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## Freeman v. Pitts: A Rethinking of Public School Desegregation

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## CASENOTE

### *FREEMAN v. PITTS*: A RETHINKING OF PUBLIC SCHOOL DESEGREGATION

#### I. INTRODUCTION

On March 31, 1992, the United States Supreme Court unanimously declared that federal district courts have the authority to relinquish supervision and control of a public school desegregation plan in incremental stages, before full compliance has been achieved in every area of school operations.<sup>1</sup> The Court also held that public school districts have no duty to remedy racial imbalance caused by demographic shifts once the vestiges of *de jure* segregation have been eliminated.<sup>2</sup> Reversing a lower court's ruling, Justice Kennedy, writing for the majority, stated that the decision was consistent with the Court's duties to both remedy constitutional violations and to restore control of a public school system to state and local authorities.<sup>3</sup> The Supreme Court's ruling in *Freeman v. Pitts*<sup>4</sup> may well have whittled away much of the high ground that has been gained in the area of public school desegregation.

Namely, once a school district has achieved a certain degree of compliance with court-ordered desegregation plans, federal courts will now be permitted to withdraw judicial supervision and control.<sup>5</sup> The *Freeman* Court responded primarily to the effect of demographic change<sup>6</sup> and rendered a holding allowing for a piecemeal unitary standard.<sup>7</sup> For the mil-

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1. *Freeman v. Pitts*, 112 S. Ct. 1430, 1436 (1992).

2. *Id.* at 1447.

3. *Id.* at 1445 (citing *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977)) ("[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.")

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

5. *Id.* at 1436.

6. *Id.* at 1448.

7. *Id.* at 1444. The term "unitary" is generally understood to describe a school system that is in total compliance with the constitutional ban on legally mandated segregation of public education. See, e.g., *Board of Educ. v. Dowell*, 111 S. Ct. 630, 636 (1991); *Green v. County Sch. Bd.*, 391 U.S. 430, 441 (1968).

lions of American racial minorities, especially African-Americans, the Court's holding in *Freeman* has the potential of emasculating years of progress in equal educational opportunity inspired by *Brown v. Board of Education*<sup>8</sup> and its progeny.

Through the enactment of the Thirteenth Amendment, Congress abolished slavery in 1865,<sup>9</sup> thus freeing thousands of African-Americans from the brutal chains which had bound them since the mid-fifteenth century. By the time the Fourteenth Amendment was passed in 1868, Congress had theoretically included African-American citizens in the American ideology "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."<sup>10</sup> As history has proved, however, the inhumanity of racial discrimination was not eliminated with the passage of the Fourteenth Amendment. When the Supreme Court held that "separate but equal" was the law of the land in *Plessy v. Ferguson*,<sup>11</sup> African-Americans were forced to live, learn, work and socialize in an America that was characteristically "separate and unequal."<sup>12</sup>

*Plessy v. Ferguson* remained intact until 1954 when the Supreme Court again tackled the issue of racial discrimination in public education. With its landmark holding in *Brown v. Board of Education*, the Court declared that "in the field of public education the doctrine of 'separate but equal' has no place."<sup>13</sup> Unfortunately, the promises of *Brown* remain largely unfulfilled today. Countless public educational systems in the United States remain segregated, despite the emphasis the Court placed on education as a means for employment opportunity and social mobility:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an op-

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8. 347 U.S. 483 (1954).

9. U.S. CONST. amend. XIII, § 1.

10. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

11. 163 U.S. 537 (1896).

12. "Our Nation, I fear, will be ill served by the Court's refusal to remedy *separate and unequal* education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Milliken I) (Marshall, J., dissenting) (emphasis added).

13. 347 U.S. 483, 495 (1954).

portunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>14</sup>

Employment opportunity and social mobility in today's expanding global economy require training and education. If African-Americans and other racial minorities are to achieve the American Dream, educational equality must remain at the forefront of national policy.<sup>15</sup> As one well-respected African-American educator has stated, African-American high school students, particularly those in America's inner cities, often have no idea that a quality education is available to them.<sup>16</sup> Once youngsters are exposed to the opportunities that a quality education can provide, their lives have been and can continue to be dramatically altered for the better.<sup>17</sup>

In an effort to provide an historical perspective into the vexing issue of public school desegregation, Part II of this Note examines the history of desegregation in American public schools under the framework of leading desegregation cases.<sup>18</sup> If the courts are empowered with the authority to allow public school districts to determine their own destiny regarding the course of desegregation, then African-Americans and other similarly situated racial minorities may face the dismal prospect of losing much of the ground that has been gained in both equal employment and educational opportunity since the mid-1960s.

Part III continues with an analysis of the *Freeman* decision and the role federal courts must now assume when supervising school desegregation programs, the effect of *Freeman* on public school districts, and the mechanics of federal court withdrawal.<sup>19</sup> Finally, Part IV provides a forecast of the future as Americans from all political camps attempt to grapple with the *Freeman* decision.<sup>20</sup>

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14. *Id.* at 493.

15. One court wrote:

It would be ironic if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the *American Dream* for so long' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

*United Steelworkers of America v. Weber*, 443 U.S. 193, 204 (1979) (emphasis added) (quoting 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey)).

16. BILL MOYERS, *A WORLD OF IDEAS* 78 (1989) (a conversation with Dr. William Julius Wilson, a prominent African-American professor of sociology at the University of Chicago).

17. *Id.*

18. See *infra* notes 21-59 and accompanying text.

19. See *infra* notes 60-101 and accompanying text.

20. See *infra* notes 102-123 and accompanying text.

## II. A HISTORY OF DESEGREGATION IN AMERICAN PUBLIC SCHOOLS

*Freeman v. Pitts* began in 1968 as a class action suit filed by African-American school children and their parents residing in DeKalb County, Georgia.<sup>21</sup> The plaintiffs alleged that the DeKalb County School System (DCSS) was unconstitutionally segregated on the basis of race.<sup>22</sup> In 1969, the United States District Court for the Northern District of Georgia entered a consent order approving a plan to eliminate *de jure* segregation from the school system.<sup>23</sup> The federal court retained jurisdiction to supervise and control implementation of the plan.<sup>24</sup>

In 1986, the DCSS filed for dismissal seeking a declaratory judgment that DCSS had achieved unitary status.<sup>25</sup> The district court found that DCSS had achieved unitary status with regard to four of the six factors identified in *Green v. New Kent County School Board*:<sup>26</sup> student assignments, faculty, staff, transportation, extracurricular activities and facilities.<sup>27</sup> The Eleventh Circuit Court of Appeals reversed, holding, *inter alia*, that a district court should retain supervisory control over a school system until the school system achieves unitary status in all *Green* categories at the same time for several years.<sup>28</sup>

The Supreme Court's decision in *Freeman v. Pitts* is likely to have far reaching effects for both civil rights activists, who favor a tightening of judicial control over school desegregation matters, and political conservatives, who advocate a return of desegregation supervision to state and local school board administrators. Thirty-nine years after the Supreme Court held in *Brown v. Board of Education (Brown I)*<sup>29</sup> that separate but equal in public education was unconstitutional under the Fourteenth Amendment's Equal Protection Clause,<sup>30</sup> many public schools in America continue to be racially segregated.<sup>31</sup>

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21. *Pitts v. Freeman*, 755 F.2d 1423 (11th Cir. 1985), *rev'd*, 887 F.2d 1438, 1440 (11th Cir. 1989), *rev'd*, 112 S. Ct. 1430 (1992).

22. *Id.*

23. *Id.* at 1442-43.

24. *Id.*

25. *Freeman*, 112 S. Ct. at 1435-36. *See also supra* note 7.

26. *Green v. New Kent County Sch. Bd.*, 391 U.S. 430, 435 (1968).

27. *Id.* at 1437.

28. *Pitts v. Freeman*, 887 F.2d 1438 (11th Cir. 1989), *rev'd*, 112 S. Ct. 1430 (1992).

29. 347 U.S. 483 (1954).

30. U.S. CONST. amend. XIV, § 1.

31. The issue of race in public education continues to generate heated debate, whether the dialogue centers on the inclusion of minority perspectives on the design of new curricula, the longstanding desegregation orders in school busing curricula cases, or the use of scholarships specifically targeted to minority group students. Arguably, the Supreme Court has shown an increasing aversion toward race-conscious remedies designed to overcome discrimination in employment, housing and public education.

As politicians, school board administrators, civil rights activists, and ordinary citizens continue to wrestle with America's ongoing war against racism and public school segregation, recent developments in education and in the federal courts have critically challenged *Brown I's* central theme.<sup>32</sup> *Brown's I's* conclusion that separate but equal has no place in public education relied heavily on sociological data which indicated that African-American children in segregated schools were inherently stigmatized with "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>33</sup>

The Court's decision in *Brown I* ushered in an era of unprecedented control and supervision by federal courts over public school districts engaging in state-imposed segregation. Since *Milliken v. Bradley*,<sup>34</sup> the Court has backed away from taking an affirmative role in eliminating the vestiges of decades of segregated public education. The Court's general reluctance to take a positive stand on school desegregation issues has most recently been reflected in *Board of Education v. Dowell*,<sup>35</sup> which centered around the issue of court-ordered busing, and the present decision, *Freeman v. Pitts*.<sup>36</sup>

The historical relevance of the *Brown I* decision, ending state-sanctioned segregation, and its impact on constitutional analysis, has been firmly established in American case law.<sup>37</sup> By removing the stamp of state approval from public school segregation, the Court may well have rea-

32. The Supreme Court held "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal" and therefore violative of "equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown*, 347 U.S. at 495. As of 1980, in spite of *Brown I*, two-thirds of all African-American children attended public schools where over half of the students were members of minority groups. COMMITTEE ON THE STATUS OF BLACK AMERICANS, NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 76 (Gerald D. Jaynes & Robin M. Williams, Jr., eds. 1989) [hereinafter COMMON DESTINY].

33. *Brown*, 347 U.S. at 494. While the Court's reliance on sociological data continues to be controversial, several recent studies have shown that while some African-American children benefit from attending previously all-white schools, others actually perform worse because of discriminatory programs and negative attitudes fostered by white administrators and teachers. See Kenneth B. Clark, *A Personal View of the Background and Developments Since the Brown Decision*, in BROWN PLUS THIRTY: PERSPECTIVE ON DESEGREGATION 18 (LaMar P. Miller ed., 1986).

34. 418 U.S. 717 (1974) (holding that a multi-district remedy for school desegregation, such as busing children across district lines, can only be ordered by a federal court when there has been a finding that all the districts involved have been responsible for the segregation to be remedied).

35. 111 S. Ct. 630 (1991) (allowing a desegregation decree concerning busing to be dissolved if racial desegregation has been achieved).

36. 112 S. Ct. 1430 (1992).

37. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE* (1975); J. HARVIE WILKINSON, III, *FROM BROWN TO BAKKE* (1979).

soned that, with time, African-American school children would no longer be stigmatized by attending separate schools characterized by inadequate facilities and resources. Instead, African-American students would receive better educational opportunities in a racially integrated environment.

*Brown I* signaled the end of apartheid in America by granting full national citizenship status to millions of African-Americans, who were previously relegated to second-class citizen roles as a result of earlier Supreme Court cases such as *Dred Scott v. Sandford*<sup>38</sup> and *Plessy v. Ferguson*.<sup>39</sup> However, since the mid-1970s, desegregation efforts in the area of equal education opportunity have been severely limited.<sup>40</sup> Efforts to desegregate public schools have been met with widespread opposition, such as "white flight" from cities and an enormous displacement of African-American teachers and administrators.<sup>41</sup> Hundreds of public school desegregation cases continue to crowd federal court dockets, and state and national legislators have recently advocated a move to bring this litigation to a close.<sup>42</sup>

Political conservatives argue that *Brown* has given rise to the resegregation of America's public schools by promoting racial integration rather than simple desegregation — that is, racial balance as opposed to a color-blind approach to educational opportunity.<sup>43</sup> Also, advocates of public school desegregation, who once believed that the prohibition of *de jure* segregated education would eventually materialize into equal educational

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38. 60 U.S. (19 How.) 393 (1857).

39. 163 U.S. 537 (1896); see also C. TSEHLOANE KETO, *THE AFRICA-CENTERED PERSPECTIVE OF HISTORY* 25-28 (1989). *Brown I* not only provided substantial authority for the prohibition of segregation in a wide spectrum of public services, but also provided the legal foundation for the Civil Rights Act of 1964. Because of *Brown I*'s profound effect, evidenced by the enactment of significant several civil rights legislation, millions of minority-group citizens have been successfully assimilated into the mainstream of American life.

40. See, e.g., *COMMON DESTINY*, *supra* note 32, at 75-84.

41. See Robert L. Gill, *Brown II v. Board of Education of Topeka: Its Human Advances and Human Tragedies, 1955-1980*, 32 *NEGRO EDUC. REV.* 15, 39 (1981). The term "white flight" refers to the mass migration of white families from urban areas to suburban communities to avoid sending their children to newly integrated public schools. See also DERRICK A. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 109 (1987). Professor Bell explains that "[w]hen districts finally admitted more than a token number of black students to previously white schools, the action usually resulted in closing black schools, dismissing black teachers and demoting (and often degrading) black principals." *Id.*

42. Former Presidents Ronald Reagan and George Bush, and their supporters, were fervent in their efforts to end judicial supervision of public education desegregation. These administrations have argued before the courts that judicial supervision and control should end once public school districts have complied with desegregation decrees for a specified period of time. See Paul Gerwitz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 *COLUM. L. REV.* 728, 798 (1986).

43. See THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY* 65-69 (1984).

opportunity for all Americans, now acknowledge that the goal of *Brown I* has not been fully achieved.<sup>44</sup>

When the Supreme Court reached its decision in *Brown II*,<sup>45</sup> it was attempting to give America a chance to adapt to the way things would be in the future. The *Brown II* decision was met with heavy resistance as state and local legislators and school administrators continued to oppose national desegregation efforts.<sup>46</sup>

Some states adopted the "freedom of choice" plan proposed by *Briggs v. Elliott*,<sup>47</sup> which permitted students in certain grades to choose, on an annual basis, schools they would attend; those not choosing were assigned to the school previously attended. However, in *Green v. County School Board*,<sup>48</sup> the Court disapproved *Briggs*' "freedom of choice" plan. In *Green*, the Court ruled that school boards were "charged with the affirmative duty" to see that "racial discrimination . . . [is] eliminated root and branch."<sup>49</sup>

In *Keyes v. School District No. 1*,<sup>50</sup> the Court once again tackled the issue of school desegregation by holding that a school board has the burden of proving that its "racially neutral" neighborhood school policy was not motivated by an intent to segregate. *Swann v. Charlotte-Mecklenburg Board of Education*<sup>51</sup> directed public school officials to "eliminate invidious racial distinctions" in the quality of school facilities, faculty

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44. See Robert L. Carter, *Reexamining Brown Twenty-Five Years Later: Looking Backward into the Future*, 14 HARV. C.R.-C.L. L. REV. 615, 620 (1979). For example, "[b]lack children in 1980 made up about one-fifth of the nation's public elementary and secondary enrollment, but almost two-thirds of them went to schools in which more than one-half of the students were minorities." COMMON DESTINY, *supra* note 32, at 76.

45. *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*). In *Brown II*, the Court held that efforts to desegregate American public schools must be done "with all deliberate speed." *Id.* at 301. This phrase has been the subject of widespread controversy as many public school districts, especially those in the South, balked at the Court's order.

46. See, e.g., *Griffin v. Prince Edward County Sch. Bd.*, 377 U.S. 218 (1964) (holding that closing all public schools in the county and contributing to the support of the private white schools that took their place to avoid desegregation was unconstitutional); *Cooper v. Aaron*, 358 U.S. 1 (1958) (holding that the Little Rock, Arkansas, school board could not delay a desegregation plan).

47. 132 F. Supp. 776 (E.D.S.C. 1955). *Briggs* was one of the original companion cases to *Brown I* and held that the Constitution does not require integration, but rather prohibits racial discrimination. The court reasoned that Americans still had the "freedom to choose" which schools their children attended. *Id.*

48. 391 U.S. 430, 442 (1968).

49. *Id.* at 437-38.

50. 413 U.S. 189 (1973). Even where a school district was partially segregated on a *de facto* basis rather than through *de jure*, the Court remained committed to the idea of unitary school districts.

51. 402 U.S. 1, 15 (1971) (declaring that the authority of federal courts to construct equitable remedies is "broad").



compositions and extracurricular activities.<sup>52</sup> After *Swann*, federal courts began imposing more stringent desegregation plans such as mandatory busing and the use of racially-balanced student body compositions. The net effect of the Court's ruling in *Keyes*, combined with its decision in *Swann*, was to provide district courts with the authority to order busing to the degree necessary to desegregate public school districts effectively.

Progress in public school desegregation began to wane with the Court's 1974 decision in *Milliken v. Bradley*.<sup>53</sup> The Court held that a multi-district remedy for school desegregation, such as busing school children across district lines, can only be ordered by a federal court when the court has found that all the districts involved were responsible for the segregation remedied. Before the *Milliken* decision, the Court had not reversed a single school desegregation order that provided for declaratory relief since its ruling in *Brown*.<sup>54</sup>

Likewise, the Court's recent decision in *Board of Education v. Dowell*<sup>55</sup> further illustrates the Court's reluctance to address the inherent dangers of school board policies designed to resegregate public schools as a result of shifting demographics. The *Dowell* holding emphasizes that once a federal court declares a school district unitary, the school district is no longer required to be under any further court supervision.<sup>56</sup>

Before the *Dowell* decision, the question of whether a desegregation decree should be terminated was resolved by determining whether the school system had achieved "unitary" status. Determining the precise meaning of "unitary" was problematic and rarely did two courts reach the same definition.<sup>57</sup> Curiously, the *Dowell* Court declined to explain how to determine when a school system is *unitary*. The Court's new desegregation standard makes no mention of the word *unitary*.<sup>58</sup>

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52. *Id.* at 18 (citing *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968)).

53. 418 U.S. 717 (1974).

54. DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 397-99 (1980).

55. 111 S. Ct. 630 (1991); see *supra* note 31 and accompanying text.

56. *Id.* at 638. Nevertheless, the school district must continue to be subject to the constitutional prohibition against intentional racial discrimination.

57. See *Morgan v. Nacci*, 831 F.2d 313, 321 (1st Cir. 1987) ("[U]nitariness is less a quantifiable 'moment' in the history of a remedial plan than it is the general state of successful desegregation."); *Keyes v. School Dist.*, 609 F. Supp. 1491, 1516 (D. Colo. 1985), *aff'd*, 895 F.2d 659 (10th Cir. 1990) (criticizing the Supreme Court for not defining the meaning of "unitary."); see also *Georgia State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985) (comparing a unitary school system "which has not operated segregated schools . . . for a period of several years" with a school system which has achieved unitary status that "is not only unitary but has eliminated the vestiges of its prior discrimination . . .").

58. *Dowell*, 111 S. Ct. at 636. The Court held that it was a mistake "to treat words such as *dual* or *unitary* as if they were actually found in the Constitution." *Id.*

Now that *Freeman v. Pitts* has been decided, civil rights activists, as well as political conservatives, look nervously to the future. Those on both sides of the issue wonder what the effect of *Freeman* will be on an estimated eight hundred school systems presently under court-ordered desegregation.<sup>59</sup>

### III. THE IMPACT OF *FREEMAN* ON FEDERAL COURTS AND PUBLIC SCHOOLS

#### A. *The Role of the Federal Courts*

The Court's decision in *Freeman v. Pitts*<sup>60</sup> will likely result in a proliferation of cases brought by school districts seeking to end existing school desegregation orders. The *Freeman* decision may also encourage obstinate school districts to further delay achieving meaningful desegregation, while expanding the responsibility of civil rights activists to monitor educational disparities and to bring such matters to the attention of the courts.

For those federal courts presently supervising school desegregation programs, *Freeman* makes it clear that district courts will have greater discretion and flexibility in allowing incremental desegregation or partial unitariness.<sup>61</sup> In *Freeman*, Justice Kennedy emphasized that the district court's ultimate purpose should be to remedy violations and restore control of school systems to state and local authorities.<sup>62</sup> The *Freeman* Court continually emphasized that in determining unitariness, the district courts must evaluate the school district's record of compliance with regard to the six factors enunciated in *Green*,<sup>63</sup> the term "unitary," however, has no fixed meaning or content.<sup>64</sup>

This is precisely what may worry some civil rights activists. Over sixty percent of lower court federal judges have been appointed by either Ronald Reagan or George Bush.<sup>65</sup> Civil rights activists are concerned that piecemeal unitariness will ultimately whittle away the *Brown* decision.<sup>66</sup>

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59. See David G. Savage, *High Court Eases Busing Standards*, L.A. TIMES, Apr. 2, 1992, at A1.

60. 112 S. Ct. 1430 (1992).

61. *Id.* at 1445.

62. *Id.*

63. The Court implicitly outlined six major areas of public school desegregation policy which would come under the control and supervision of the district courts: student assignment, transportation, physical facilities, extracurricular activities, assignments of teachers and staff, and allocation of resources. The Court emphasized that the district courts would retain jurisdiction until state-imposed segregation had been completely removed. 391 U.S. 430, 440-41 n.5 (1968).

64. *Freeman*, 112 S. Ct. 1444.

65. Nat Hentoff, *Back to Separate But Equal*, WASH. POST, Apr. 11, 1992, at A25.

66. The Reagan administration pointed to public resentment of busing as justification for turning back the clock on public school desegregation. However, recent studies have shown

This view corresponds to the position taken by Justice Marshall in his dissenting opinion in *Dowell*.<sup>67</sup>

Justice Marshall sharply criticized the majority for not requiring school districts to exhaust all viable remedies to achieve desegregation before a court determines that unitary status has been achieved.<sup>68</sup> Moreover, Justice Marshall questioned the majority's determination that a school board had no responsibility to remedy the segregative effects of student assignments caused by shifting demographics.<sup>69</sup>

In keeping with the majority opinion in *Dowell*, the *Freeman* Court minimized the importance of demographic shifting with regard to racial balancing.<sup>70</sup> The *Freeman* Court cited statistics indicating that millions of Americans move every year and that as the *de jure* violation becomes "more remote in time," and as "demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system."<sup>71</sup> Justice Scalia's concurring opinion suggests that, in a future case, the Court may rewrite the basic standards that were left intact in *Freeman*.<sup>72</sup> Such a move would make it much easier for school districts to escape the watchful eye of continued judicial scrutiny.

Justice Scalia also noted that because of the relationship between school segregation and residential segregation, the "allocation of the burden of proof foreordains the result in almost all of the 'vestiges of the past discrimination' cases."<sup>73</sup> Moreover, Scalia asserted that if the courts were to require the plaintiffs to prove that current racial imbalance was

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that the majority of the public supports integration. Eighty per cent of those surveyed support the theory of school integration. Fewer would actually send their children to school on buses to achieve it, but a majority of those surveyed indicated that they would if it was the only viable alternative. See *American Schools Are Unequal -- Still*, BOSTON GLOBE, Jan. 10, 1991, at B2.

67. *Dowell*, 111 S. Ct. at 639 (Marshall, J., dissenting).

68. *Id.* at 645 (Marshall, J., dissenting).

69. *Id.* at 645-46. Justice Marshall argued that residential segregation must be considered a vestige of discrimination if previous school board decisions contributed in some way to segregation. *Id.*

70. 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.

*Freeman*, 112 S. Ct. 1430, 1447 (1992) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971)).

71. *Id.* at 1448. The Court emphatically stated that a federal court, in a desegregation case, has the discretion to order an incremental or partial withdrawal of supervision and control. See *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976).

72. 112 S. Ct. at 1450-51 (Scalia, J., concurring).

73. *Id.* at 1452.

caused in part by a *de jure* system, plaintiffs would rarely prevail.<sup>74</sup> Conversely, if school boards were required to establish that racial imbalance is *not* attributable to past discrimination, plaintiffs would almost always prevail.<sup>75</sup> Although he avoided defining a new legal principle, Justice Scalia hinted that in the near future, courts would require that the burden of proof be shifted back to the plaintiffs.<sup>76</sup>

Interestingly, Justice Souter's concurring opinion expressed an uneasiness with the speedy removal of district court supervision from once-segregated school districts. Justice Souter recognized that while demographic changes influencing a school's racial composition may have no causal link to prior *de jure* segregation, judicial supervision over student assignment "may still be necessary" to redress underlying vestiges of the unconstitutional dual school system.<sup>77</sup>

Justice Souter's opinion also clarified one of the qualifications in Justice Kennedy's majority opinion by adding that when gradually releasing school districts from supervision, federal court judges must be careful that the remaining vestiges of discrimination do not "act as an incubator for resegregation in others."<sup>78</sup> Because Souter's was a crucial fifth vote, the majority opinion may have had to adopt a more qualified tone than it would have otherwise.

Justice Blackmun, joined by Justices Stevens and O'Connor, concurred in the *Freeman* holding. They did not join Kennedy's opinion on the grounds that the Court should have required the lower courts to assume a more thorough reexamination of the reasons most African-American students in DeKalb County still attend predominantly black schools.<sup>79</sup> Justice Blackmun stated that the district court's supervision over a school board should continue until the school district has demonstrated full compliance with constitutionally-mandated desegregation efforts.<sup>80</sup> In essence, Justice Blackmun encouraged district courts to remain skeptical of school board attempts to achieve unitary status and to review school board actions carefully to insure that the board's actions serve to promote, rather than impede, racial desegregation.<sup>81</sup> Justice Thomas did not participate in the decision, which was argued a month before he joined the Court.

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74. *Id.*

75. *Id.*

76. *Id.* at 1453.

77. *Id.* at 1454. (Souter, J., concurring). Justice Souter's opinion is particularly noteworthy because his views on desegregation were essentially unknown when the Court agreed two years ago to hear the case.

78. *Id.* at 1455.

79. *Id.* (Blackmun, J., concurring).

80. *Id.* at 1456.

81. *Id.*

What standard, then, must federal district court judges apply when determining whether a school district has achieved a unitary status, albeit a partial one? Arguably, there is no clearly defined standard that the courts can follow in determining full compliance since eight justices wrote four separate opinions with no agreement on a single standard. Consequently, federal courts, at least for the time being, must continue to consider *Green's* six factors<sup>82</sup> when determining whether a school district has achieved unitary status.

#### B. *The Effect of Freeman on Public School Districts*

*Freeman* underscores a movement toward returning control of public education to local authorities.<sup>83</sup> While the district court maintains the responsibility of insuring that a school board's actions further accomplish unitary objectives, the school district must demonstrate a "good-faith"<sup>84</sup> commitment to reaching constitutionally sound policies. In *Freeman*, the Court found that the Dekalb County School System had designed and implemented a good-faith desegregation plan and that the plan had essentially accomplished its objectives during its first year of operation.<sup>85</sup>

There are still hundreds of public school districts presently under federal court-ordered desegregation. *Freeman* indicates that as these schools gradually meet their goals, in incremental stages, they can be released from court supervision. Despite "good-faith" efforts, if schools continue to remain racially unbalanced because of demographics, school districts will be "under no duty" to remedy the imbalance.<sup>86</sup> Like the Court in *Dowell*, the *Freeman* Court expressed an intent to require the removal of discriminating vestiges to the extent practicable.<sup>87</sup> Such a mechanical approach reduces a court's assessment of the *Green* indicia to quantifying unitary status and fails to consider the true intent of *Brown I*.

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82. See *supra* note 63.

83. The trend back to local autonomy may be partly due to local concerns about racial destabilization resulting from white families removing their children from school districts under court-ordered busing plans. See *Riddick v. School Bd.*, 784 F.2d 521, 525-26 (4th Cir.) 1986, *cert. denied*, 479 U.S. 938 (1986).

84. *Freeman*, 112 S. Ct. at 1449. The current judicial focus on ameliorating public school desegregation has shifted from how to remedy a segregated system as a whole to an assessment of what incremental measures have proven to be successful.

85. *Id.* at 1447.

86. *Id.*

87. *Board of Education v. Dowell*, 111 S. Ct. 630, 638 (1991). The Reagan administration began the short-term view that unitariness is a condition achieved by eliminating the visible indicia of a segregated system, presumably after a brief period of judicial supervision. A school system became unitary, with the courts being relieved of their supervisory duties, once a judicially adequate plan was fully implemented in good-faith. See Brief for the United States as Amicus Curiae at 21-22, *Riddick v. School Bd.*, 784 F.2d 521 (4th Cir. 1986) (No. 84-1815).

A mechanical approach, as Justice Marshall argued in his dissenting opinion in *Dowell*, cannot accurately reflect the intangible stigmata of segregation.<sup>88</sup> Ratios and percentages cannot sufficiently express minority students' feelings of inferiority or racial prejudice. Unfortunately, the *Freeman* Court largely ignored a review of these intangible factors before granting unitary status to the DCSS.

Significantly, the attorneys who argued this case agree with Scalia's analysis that the assignment of the burden of proof in desegregation cases ultimately determines the outcome.<sup>89</sup> According to Christopher Hansen, an attorney from the American Civil Liberties Union who represented the plaintiffs, as a result of *Freeman*, public school officials will continue to shoulder the burden of proof in demonstrating that racial imbalance is not the result of prior *de jure* segregation.<sup>90</sup> However, Hansen disputes Scalia's proposal that the passage of time will shift the burden back onto plaintiffs.<sup>91</sup> Mr. Hansen contends that if the burden were to shift back to the plaintiffs, this would, in fact, give school districts incentive to delay compliance and cause to be obstinate.<sup>92</sup>

Rex Lee, counsel for the defendants, also agrees with Scalia's analysis. A former U.S. Solicitor General and currently President of Brigham Young University, Lee feels that any shifting of the burden of proof must also be accompanied by good-faith efforts on the school board's part.<sup>93</sup>

### C. *The Mechanics of Federal Court Withdrawal*

Arguably, Justice Kennedy's majority opinion represents a compromise. As a result of *Freeman*, courts now have greater latitude in determining when to relinquish their supervisory role over a school district under a court-ordered desegregation plan.<sup>94</sup> Nevertheless, "[t]he school district bears the burden of showing that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation."<sup>95</sup> In order to meet its heavy burden, the school district must not only demonstrate its good-faith commitment to establishing a unitary system, but must also provide a record of consistent lawful conduct.<sup>96</sup>

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88. *Dowell*, 111 S. Ct. at 639 (Marshall, J., dissenting).

89. See David O. Stewart, *No Exit. Supreme Court Finds No Easy Path to Terminate Structural Injunctions*, 78 A.B.A.J. 49, 51 (1992).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Reiterating its earlier position in *Dowell*, the *Freeman* Court emphasized federal court supervision over a public school system was originally intended as a "temporary measure." *Freeman v. Pitts*, 112 S. Ct. 1430, 1445 (1992) (quoting *Dowell*, 111 S. Ct. at 636).

95. *Id.* at 1447.

96. *Id.* at 1446.

Even while giving school officials the opportunity to take back control of their school system from the supervision of the federal courts, the Supreme Court issued a warning. Justice Kennedy wrote that it must be acknowledged that the potential for racial discrimination and hostility still exists and that its "manifestations may emerge in new and subtle forms" after "the effects of *de jure* segregation have been eliminated."<sup>97</sup> The states and their operating agencies must "ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility."<sup>98</sup>

Justice Kennedy properly recognized that the *Green* factors are often related or interdependent.<sup>99</sup> Because of the potential for the *Green* factors to act synergistically with one another, a constitutional violation in one area may not be adequately eliminated unless the court addresses other areas as well.<sup>100</sup> Justice Kennedy added that when a school district has not demonstrated good-faith under a comprehensive plan, the school district would remain under tight judicial supervision.<sup>101</sup>

At the same time, the district courts will have to address several issues that the *Freeman* Court left unanswered. For example, courts must determine the relationship of housing patterns to school desegregation. More importantly, the courts will have to define when a school system has acted in "good-faith" to achieve unitary status.

#### IV. THE FUTURE OF PUBLIC SCHOOLS IN AMERICA: A RETHINKING OF EDUCATIONAL EQUALITY

##### A. *The New Face of Public Education*

Advocates for a loosening of judicial control over public schools may well declare the Dekalb County School System the winner in the Supreme Court's resolution of *Freeman*. Whether the Court's ruling is a victory for Dekalb schools — and the children they educate — largely depends on what school officials do with the freer hand they are now likely to be given. Measuring the impact of *Freeman v. Pitts* on the hundreds of school desegregation cases that remain alive across the country will take time. By ruling that compliance with desegregation orders can be achieved incrementally,<sup>102</sup> the Court has given school systems an easier path to remove themselves from court-ordered supervision. Understandably, this concerns civil rights activists who see a federal judiciary domi-

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97. *Id.* at 1445.

98. *Id.*

99. *Id.* at 1449.

100. *Id.*

101. *Id.* at 1450.

102. *Id.* at 1446.

nated by conservatives appointed by Ronald Reagan and George Bush.<sup>103</sup> These judges are likely to be more sympathetic to school officials arguing for a return of local control than to minority parents and students seeking to remedy the lingering effects of segregation.

But even if they are no longer supervised by the federal courts, public school systems across America must deal with the issue of race.<sup>104</sup> Sociologists denounce the negative effects of one-race schools on integration.<sup>105</sup> Even though state and local laws mandating segregation have been eliminated, the goal of racial integration has not been achieved.<sup>106</sup> A study conducted by the National School Boards Association reveals that 63.3 percent of all African-American school children still attend segregated schools.<sup>107</sup> A second study suggests that in order for integration to be effective, court-ordered reassignment of white students is required.<sup>108</sup> Other studies illustrate that the means selected for school integration may not directly affect student achievement.<sup>109</sup>

If a given school district cannot have an all-white school system, white parents and school administrators may attempt to achieve segregation within the school building's walls.<sup>110</sup> "Tracking" is the most common method used and is defended by school administrators and parents as an

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103. See *supra* note 42.

104. According to Dr. Gary Orfield of Harvard University, a leading expert on school desegregation, approximately 63 percent of African American school children attend primarily non-white schools. Thirty-two percent of black students are enrolled in public schools that are 90-100 percent non-white. Orfield adds that 68 percent of Hispanic children, largely ignored by the courts, are in non-white schools. See, e.g., *School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) (statement of Gary Orfield).

105. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (a mere showing of unequal spending between districts does not violate the Equal Protection Clause).

106. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE UNEQUAL* 162 (1992).

107. *Id.* Mr. Hacker contends that America's failure to resolve racial segregation stems not only from a lack of political leadership, but is also the result of white families' willingness to accept integration only on a minimal level. *Id.*

108. Christine H. Rossell, *Applied Social Science Research: What Does It Say About the Effectiveness of School Desegregation Plans?*, 12 J. LEGAL STUD. 69, 71 (1983). Prior to 1970, few school districts attempted to implement realistic desegregation plans. *Id.*

109. Meyer Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 LAW & CONTEMP. PROBS. 241, 269 (1975).

110. HACKER, *supra* note 106, at 164.



effective scholastic management tool.<sup>111</sup> Not surprisingly, a student's race is rarely mentioned under the context of tracking programs.<sup>112</sup>

Segregation originally derived its legitimacy from the premise that as a race, African-Americans were inferior to whites.<sup>113</sup> In the public school setting, segregation was previously used to classify and separate students according to their race. Admittedly, there is nothing inherently wrong with classification and separation of school children according to their scholastic ability.<sup>114</sup> The arguments for scholastic segregation are well-known. How can intellectually gifted high school students expect to gain admission to prestigious colleges and universities if they are expected to share classroom time with students that are not as talented? In the pedagogical profession, the notion of mixing students of varied educational preparation is losing ground.<sup>115</sup> Many educators believe that integrating students of differing educational abilities will ultimately cause talented students to assist their less talented peers, thereby increasing the learning capacity of the brighter student. However, it is unlikely that parents would be willing to take such risks.<sup>116</sup>

#### B. *A Reemergence of De Facto Segregation?*

The existence of racially identifiable schools makes it probable that race will continue to determine the quality of education children receive. In *Freeman*, changes in a school district's demographic makeup moti-

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111. *Id.* Tracking has been heavily criticized from an educational standpoint. See J. OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY 75, 90, 189 (1985) (stating that tracking programs perpetuate racial inequalities in society, thereby leading to unequal educational experiences, particularly in minority children). See also Robin Farmer, *U.S. Will Investigate School Clustering*, RICHMOND TIMES-DISPATCH, Jan. 21, 1993, at A1. Two City of Richmond elementary schools were investigated by the Office for Civil Rights of the U.S. Department of Education. The city's "clustering" problem involved 74 students — an equal number of blacks and whites — where all white students in the same grade were put in the same classes. This practice left many classes all black. The principal of one of the affected schools contended that white students were clustered for "social and emotional reasons," as allowed by the school board. *Id.* at A6. Although tracking mechanisms vary among school districts, one track is usually reserved for academically gifted children while a second track is used to place scholastically marginal children.

112. HACKER, *supra* note 106, at 164. Mr. Hacker believes that African-American school children are more likely to be placed in the lower — and slower — academic tracks. *Id.*

113. Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1124 (1990).

114. The classification and separation of school children is not per se unconstitutional. Courts have approved this scholastic management practice in some instances. See, e.g., *Montgomery v. Starkville Mun. Separate Sch. Dist.*, 854 F.2d 127, 129 (5th Cir. 1988) (indicating that the separation of students according to academic potential in English and mathematics was permissible even though segregated classrooms resulted).

115. HACKER, *supra* note 106, at 164.

116. *Id.*

vated the Supreme Court to establish a piecemeal unitary standard.<sup>117</sup> However, any changes in a given school district's demography necessarily includes influences of *de facto* segregation. Studies based on tracing census tracts have indicated that white families begin moving out of neighborhoods once the African-American population reaches a level between 10 and 20 percent.<sup>118</sup> This phenomenon occurs even if the African-American families have similar socioeconomic status as the white families.<sup>119</sup>

What factors, then, are responsible for motivating white families into moving from these neighborhoods once an African-American family moves next door? For many Americans, African-Americans, in general, are associated with drug abuse, criminal activity, residential deterioration and low educational attainment.<sup>120</sup> Regardless of one's achievements or professional work ethic, African-Americans may be seen by some whites as lowering the social status of a white neighborhood, simply on the basis of skin color.

One commentator has proposed that an appropriate judicial test for determining a school district's unitary status would combine the six *Green* factors with an in-depth analysis of community attitudes towards racially identifiable schools.<sup>121</sup> This proposal is fundamentally sound. In evaluating whether a school system has achieved unitary status in one, two, or all of the *Green* areas,<sup>122</sup> a district court should hear subjective testimony from minority group teachers, administrators, students and parents — the community at large.

Given the persistence of non-white public schools and general doubts about *Brown's* sociological theories, many educators have been actively searching for viable solutions to America's public school dilemma. Indeed, a rethinking of educational equality must first take place before substantial reform can follow. In light of *Freeman*, individual school districts will have to design and implement programs that can adequately accommodate the dynamics of a constantly changing population.<sup>123</sup>

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117. *Freeman v. Pitts*, 112 S. Ct. 1430, 1143-38. (1992).

118. See HACKER, *supra* note 106, at 37-38.

119. *Id.*

120. *Id.* at 38.

121. William L. Christopher, Note, *Ignoring the Soul of Brown*: Board of Education v. Dowell, 70 N.C. L. Rev. 615, 636 (1992).

122. See *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

123. A full discussion of the issues underlying America's effort to revitalize its public school educational programs, and the effects that racial integration will likely have on these programs, exceeds the scope of this paper. Several innovative programs have been proposed to accommodate the change in racial composition in America's major urban areas. Programs such as magnet schools, which offer special curricula to attract racially mixed student bodies, have shown great promise. Another innovative program proposes the development of Afrocentric curricula for children attending predominantly African-Black schools. See Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1992).

## V. CONCLUSION

For public school systems across the country, *Freeman* will provide local officials with the opportunity to take control of their schools back from the federal courts. In loosening the grip of judicial control over school desegregation matters, the Court essentially disregarded *Brown's* promise. The Court cannot hope for equal educational opportunity for all Americans if it continues to ignore the destructiveness of racism.

Now that this nation has a new President in Bill Clinton, a Democrat, civil rights activists are hopeful that a compromise can be forged between the holding in cases like *Freeman* and the reasoning of *Brown I*. In many cases, the federal courts should defer to school district decisions, but only if equal educational opportunity and integration are not jeopardized. A court's determination of unitariness does not give school districts unrestricted license to vitiate prior desegregation efforts, just short of violating the Equal Protection Clause.<sup>124</sup>

For most Americans, the road to increased employment opportunity and social mobility is clearly defined by a quality education, one that cannot be hampered by substandard learning facilities or resources. Government policy-makers, school officials and concerned citizens must realize that to make America work, equal education opportunity for all must never again take a back seat. In this regard, school board decisions should remain unimpaired with two notable exceptions. First, the federal courts should impose mandatory hearings whenever a school board proposes a new reassignment plan.<sup>125</sup> The school district's pre-unitary, court-ordered directives must be scrutinized and evaluated against all categories to insure furtherance of integration and equal opportunity.<sup>126</sup> Second, a mandatory public hearing should be conducted after each official U.S. Census to evaluate the cumulative effect of school board decisions in relation to demographic change.<sup>127</sup>

Although these measures would require the courts to assume a quasi-regulatory function, the end result would substantially reduce the amount of litigation and would further enhance the public's trust in desegregation measures. Recurrent evaluation of school board decisions would also address the concerns of racial minorities, while simultaneously strengthening the credibility of school board decisions.

The federal government and the courts must realize that effective desegregative efforts require vigilance and patience. Those with the re-

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124. U.S. CONST. amend XIV, § 1.

125. Theodore E. Karatinos, *Price v. Austin Independent School District: Segregation's Unitary Tar Baby*, 77 WEST'S EDUC. L. REP. 15 (1992).

126. *Id.*

127. *Id.*

sponsibility for determining the course our public schools will take must now be willing to make the difficult decisions necessary to achieve an integrated school system.

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