The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After *Dowell*, *Rufo*, and *Freeman*

By DAVID I. LEVINE*

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* Professor of Law, University of California, Hastings College of the Law. I wish to thank Professors Margreth Barrett, David Jung, Evan Lee, and David Schoenbrod for their helpful commentary and suggestions on a previous draft, and Nicole Hardie for her diligent research assistance.

Introduction

Most of this Symposium deals with the nearly forty-year legacy and future of *Brown v. Board of Education* (*Brown I*).[1] My topic is derived from a few words in the second opinion written in that great case. In *Brown v. Board of Education (Brown II)*,[2] the Supreme Court turned its attention to the question of "the manner in which relief is to be accorded"[3] the plaintiffs in *Brown I*. Rather than ordering immediate desegregation, the *Brown II* Court controversially[4] directed the district courts handling the consolidated cases[5] "to take such proceedings and enter such orders and decrees . . . as are necessary and proper to admit [the plaintiff children] to public schools on a racially nondiscriminatory basis with all deliberate speed . . . ."[6]

1. 347 U.S. 483 (1954).
2. 349 U.S. 294 (1955).
3. *Id.* at 298.
4. *See, e.g.*, Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1041 (1984) (While "*Brown I* may be the Court's proudest demonstration of the judiciary's capacity to catalyze social progress . . . *Brown II* . . . was the progenitor of an unabating controversy concerning the proper remedies for unlawful racial segregation in the public schools."). For recent empirical scholarship questioning whether the *Brown* decisions actually were an effective catalyst for social reform, see GERALD N. ROSENBERG, THE HOLLOW HOPE (1991).
5. What we know as "*Brown*" is actually five cases that the Supreme Court handled together: Brown v. Board of Education of Topeka (Kansas), Briggs v. Elliott (South Carolina), Davis v. County School Board of Prince Edward County (Virginia) and Gebhart v. Belton (Delaware) were consolidated as one. *Brown I*, 347 U.S. 483 n.1 (1954). The fifth case, Bolling v. Sharpe (District of Columbia), was treated as a companion case because it was decided under the Fifth Amendment rather than the Fourteenth. Bolling v. Sharpe, 347 U.S. 497 (1954).
6. *Brown II*, 349 U.S. at 301. Richard Kluger described how the famous oxymoron—deliberate speed, "a phrase far too subtle to have been his own invention"—got into Chief Justice Warren's opinion. The Justice Department used the phrase in a brief during the first argument of the case in 1952. The phrase was inserted by a former law clerk to Justice Frankfurter, who had used it in two opinions. Justice Frankfurter in turn had borrowed it from an opinion written by Justice Holmes in 1918. Justice Frankfurter also used the phrase in a January 1954 memorandum which he distributed to the Court on the implementation problem. RICHARD KLUGER, SIMPLE JUSTICE 742-43 (1975).

In outlining the duties of the district courts and the defendants "to effectuate a transition to a racially non-discriminatory school system," the Court noted that "[d]uring this period of transition, the courts will retain jurisdiction of these cases."[7] The short *Brown II* opinion did not give any further guidance as to how and when the period would end and district courts would cease their supervision of the defendant school boards.[8] There is nothing in *Brown II* to suggest that the Court had any idea that the "period of transition" would span four decades and more.[9] Surely no one would have imagined that the fortieth anniversary of *Brown* would be observed with over 500 local school districts operating under court orders to desegregate.[10]

The period of transition has been prolonged because the federal judiciary has had a daunting number of tasks in each case: overseeing pretrial discovery and motions, making findings of intentional discrimination (often on the basis of complex expert testimony), extracting detailed desegregation plans from defendants or writing them internally, assessing the legitimacy of the plans, and then overseeing their implementation. Each stage has been protracted, both because of overt and subtle resistance from the defendants[11] and because of the inherent complexity of the tasks.[12]

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7. *Brown II*, 349 U.S. at 301.

8. From the opinion, it appears that the Court did not expect that this period would last long. For example, in remanding, the Court reminded the district courts to use their traditional powers of equity to "require that the defendants make a prompt and reasonable start toward full compliance" with *Brown I*. *Brown II*, 349 U.S. at 300.

Kluger has detailed the debates, from the perspectives of participants from all sides of the case, including the justices and their law clerks, on the crucial question of the necessity of setting time limits in *Brown II*. KLUGER, *supra* note 5, at 737-44. With the benefit of hindsight, not setting a time limit has seemed like a large mistake on the Court's part. *E.g.*, Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859, 905 (1991) ("*Brown II* . . . was not a proud moment in America's history"). Kluger's extensive discussion has made clear, however, that it was the Court's hope that the lack of a deadline would quicken the pace of desegregation. Any time limit could have been seen as utterly arbitrary and a minimum period for segregation to continue, not a maximum time within which it must end. KLUGER, *supra* note 5, at 742.

9. "Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13 (1971).

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

11. *See, e.g.*, Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983).

12. *See, e.g.*, Frank T. Read, *The Bloodless Revolution: The Role of the Fifth Circuit in the Integration of the Deep South*, 32 MERCER L. REV. 1149, 1155 (1981) (describing the period after *Brown II* as "epitomized by complex, snail-paced legal battles to achieve only the most token desegregation results"). It was not until 1968 that the Supreme Court put significant pressure on school boards to move faster. Green v. County Sch. Bd. of New Kent County, 391

Until recently, the Court had not provided much guidance on the latter stages[13] of the enforcement of school desegregation decrees—the process of modifying final injunctions and consent decrees, and where appropriate, ending jurisdiction over school desegregation cases.[14] In the past two terms, however, at the urging of the United States Justice Department,[15] the Court has taken up several important issues on this subject in a series of three decisions. In chronological order, they are: *Board of Education of Oklahoma City Schools v. Dowell*,[16] *Rufo v. Inmates of Suffolk County Jail*,[17] and *Freeman v. Pitts*.[18]

This Article reviews these recent Supreme Court decisions in the order in which the issues develop at the latter stages of the life cycle of a judicial decree: (1) modification of injunctions and consent decrees ordering desegregation or other institutional reform;[19] (2) partial release of defendants from the active supervision of the district court;[20] (3) complete release of defendants from the jurisdiction of the court;[21] and (4) restoration of supervision over a defendant which a court has released from its jurisdiction and which subsequently makes decisions with dis-

U.S. 430, 439 (1968) ("The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.").

13. "Latter stages" will be used to refer to the period after a court has both made a finding of the defendant's liability and has adopted a remedial plan, whether through an injunction or a consent decree.

14. In keeping with the theme of this Symposium, the analysis in this Article concentrates on school desegregation cases. Much of what will be said about the latter stages of school desegregation cases is of direct relevance to (and often is drawn from) other types of institutional reform cases.

15. The Justice Department under Presidents Reagan and Bush actively tried to modify and terminate judicial supervision of school boards in a variety of ways. *See, e.g.*, William B. Reynolds, *The Role of the Federal Government in School Desegregation, in* BROWN PLUS THIRTY: PERSPECTIVES ON DESEGREGATION 47, 49 (L. Miller ed., 1984) (President Reagan's Assistant Attorney General for Civil Rights describing policy). For a discussion on the Justice Department's new policies on desegregation, see William L. Christopher, Note, *Ignoring the Soul of* Brown: Board of Education v. Dowell, 70 N.C. L. REV. 615, 616 nn.7 & 8 (1992); Timothy S. Jost, *The Attorney General's Policy on Consent Decrees and Settlement Agreements*, 39 ADMIN. L. REV. 101 (1987); Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 790-91 (1986); Laurie Mesibov, *Busing in Unitary School Districts: A Board's Right to Modify the Plan*, SCH. L. BULL., 19, (Fall 1986). These cases arose as part of a broader conservative agenda to counter the expansive efforts to achieve institutional reform that *Brown* spawned. *See* Timothy S. Jost, *From* Swift *to* Stotts *and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1106-07 (1986) [hereinafter, Jost, *Modification of Injunctions*].

16. 111 S. Ct. 630 (1991) (*Dowell III*).

17. 112 S. Ct. 748 (1992).

18. 112 S. Ct. 1430 (1992).

19. *Rufo*, 112 S. Ct. 748.

20. *Freeman*, 112 S. Ct. 1430.

21. *Dowell*, 111 S. Ct. 630 (*Dowell III*).

criminatory effects on the plaintiffs.[22] The Article then considers the effectiveness of the tests announced by the Supreme Court in its three latest decisions in this area by examining how they have been applied by the Tenth Circuit in the most recent decision in *Brown v. Board of Education*[23] itself. Finally, the Article considers how the Court could have done a better job in the decisions in providing guidance to litigants and lower federal courts on the task of handling the latter stages of all institutional reform litigation, including school desegregation cases. The Article suggests a unified approach to all latter stage issues, based upon Rule 60(b)(5) of the Federal Rules of Civil Procedure[24] and its precursor, the classic opinion on the modification of consent decrees and injunctions written by Justice Benjamin Cardozo in 1932.[25]

In the three decisions, *Rufo*, *Dowell III*, and *Freeman*, the Court has made some distinct choices about the role of the district courts during the latter stages of school desegregation cases. Portions of these decisions are subject to criticism if, as Justice Marshall argued and others believe,[26] they amount to a significant retreat from the promise of *Brown I*. Overall, however, the decisions are far from being disastrous for the proponents of court-ordered school desegregation and other institutional reform decrees. Rather, the choices the Supreme Court has made in these cases demonstrate that in the field of school desegregation, the present Court is taking a moderately conservative, rather than an extremely conservative path.[27] As a result of these cases decided nearly forty years after *Brown I*, district court judges finally have some blueprints, however imperfect, for orderly supervision of the latter stages of all institutional reform cases, including school desegregation cases.

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22. *Dowell*, 111 S. Ct. 630 (*Dowell III*)

23. 978 F.2d 585 (10th Cir. 1992) (*Brown 1992*).

24. Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or . . . it is no longer equitable that the judgment should have prospective application . . . .

25. United States v. Swift & Co., 286 U.S. 106 (1932).

26. *See infra* text accompanying notes 257-61.

27. *See, e.g.*, Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 24 (1992) ("the Supreme Court did not unveil a full-tilt conservative revolution"); Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1300 (1992) ("the remedy cases preserve the legacy of the Burger Court").

I. Modification of Injunctions and Consent Decrees Ordering Desegregation[28]

A. The Background of Modifications

In the wake of *Brown I* and *II*, courts have faced a new species of lawsuits: institutional reform litigation.[29] In such suits, plaintiffs, usually using the class action device, seek long-term reform of the policies and conditions in government-operated institutions through the use of equitable decrees.[30] The experience of many courts with such decrees (whether issued as ordinary judicial decrees or as consent decrees)[31] has been that they are broad in scope and long-lasting in effect. As a result, parties often have desired to modify the decrees in light of subsequent developments.[32]

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28. This section is based upon David I. Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation: A Commentary on the Supreme Court's Adoption of the Second Circuit's Flexible Test*, 58 BROOK. L. REV. — (1992).

29. There is a mass of legal literature on institutional reform litigation. Rather than give the usual obligatory string citations here, I refer you to where I have done so in the past. *See* DAVID SCHOENBROD ET AL., REMEDIES: PUBLIC AND PRIVATE (1990); David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753 (1984).

30. There have been many such suits since *Brown I*. For example, there are over 500 local school districts currently operating under court orders to desegregate, and prisons in over 40 states are under judicial supervision due to overcrowding and other unconstitutional conditions. Stewart, *supra* note 9. *See also* Wayne N. Welsh, *The Dynamics of Jail Reform Litigation: A Comparative Analysis of Litigation in California Counties*, 26 LAW & SOC'Y REV. 591 (1992) (noting that almost one-third of the jails in the United States, which incarcerate more than 100 prisoners, are currently under court orders to alleviate unconstitutional conditions).

31. A consent decree is a negotiated settlement of a case brought in equity which is enforced through the court's power to enforce any equitable decree or order. Thus, courts have traditionally treated consent decrees as possessing characteristics of both long-term contracts between the parties and judicial decrees. *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (treating a consent decree as both); United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n.10 (1975) ("[c]onsent decrees and orders have attributes both of contracts and of judicial decrees"). *See generally* Symposium, *Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI. LEGAL F. 1.

32. Professor Jost has aptly described the problem:

> Because the injunction is necessarily a static . . . response to a dynamic evolving problem, over time it almost inevitably becomes less responsive to the problem it addresses. . . . The future tricks the court; the injunction, the court's now outdated prediction, plods off into irrelevancy, leaving the beneficiary bereft of protection or the obligor subject to oppression.

Jost, *Modification of Injunctions*, *supra* note 15, at 1103-04 (1986).

For numerous examples of cases where parties have sought modifications, see those collected in Thomas J. Andre Jr., *The Collateral Consequences of SEC Injunctive Relief: Mild Prophylactic or Perpetual Hazard?*, 1981 U. ILL. L. REV. 625; Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725 (1987); Jost, *Modification of Injunctions*, *supra* note 14; Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291 (1988); Maimon Schwarzschild, *Public*

Since everyone's crystal ball is inevitably cloudy, it might appear natural for courts to allow modifications. Indeed, Rule 60(b)(5) of the Federal Rules of Civil Procedure expressly provides that the court may grant relief if "it is no longer equitable that the judgment should have prospective application."[33]

In modern times, however, the rule has not always been interpreted generously.[34] Unlike the hazy history of some legal rules, the origins of the interpretation of this rule are easy to trace. Courts and commentators invariably place responsibility at the feet of Justice Benjamin Cardozo.[35]

1. Swift: *Justice Cardozo Creates the "Grievous Wrong" Test*

In 1932, Justice Cardozo established the basic modern standards for evaluating any request to modify an injunction or consent decree in his opinion for the Supreme Court in *United States v. Swift & Co.*[36] *Swift* arose from an antitrust consent decree entered in 1920 against the five

Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 DUKE L.J. 887; Steven R. Shapiro, *The Modification of Equitable Decrees: A Critical Commentary*, 50 BROOK. L. REV. 459 (1984); Marc J. Steinberg, *SEC and Other Permanent Injunctions—Standards for Their Imposition, Modification and Dissolution*, 66 CORNELL L. REV. 27 (1980); Stacey L. Murphy, Note, *Modification of Consent Decrees in Institutional Reform Litigation: A Return to the* Swift *Standard*, 8 REV. LITIG. 203 (1989); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020 (1986).

33. For background on this portion of Rule 60(b), which codified procedure of long standing duration in equity, see JAMES W. MOORE & J. DESHA LUCAS, 7 MOORE ¶ 60.26[4] (2d ed. 1992); 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2863 (1973). *See also* Mary K. Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41 (1978); James W. Moore & Elizabeth B.A. Rogers, *Federal Relief From Civil Judgments*, 55 YALE L.J. 623 (1946); Theodore R. Mann, Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 TEMP. L.Q. 77 (1951); Note, *Finality of Equity Decrees in the Light of Subsequent Events*, 59 HARV. L. REV. 957 (1946).

34. *See, e.g.*, Jost, *Modification of Injunctions*, *supra* note 15, at 1111-12 n.74 (citing cases that "have considered requests for modification much as they would view collateral attacks on judgments not involving injunctions"); 11 WRIGHT & MILLER, *supra* note 33, § 2863 at 208-10 n.10 ("[b]ecause the standard is an exacting one, many applications for relief . . . are denied;" citing cases).

35. *E.g.*, Milton Handler & Michael Ruby, *Justice Cardozo, One-Ninth of the Supreme Court*, 10 CARDOZO L. REV. 235, 245 (1988) (Cardozo's opinion in *Swift* has been "regarded as the fountainhead of all learning on the modification of consent decrees").

36. 286 U.S. 106 (1932). The vote was 4-2, with three Justices not participating in the decision because of their roles in the case prior to being appointed to the Court. Comment, *The Packer Consent Decree*, 42 YALE L.J. 81, 91 n.44 (1932). *Swift* was Justice Cardozo's second opinion for the Supreme Court; it was argued in his first week on the bench. Handler, *supra* note 35, at 245.

largest meat packers in the country.[37] The defendants had promised in the decree neither to deal in nor distribute a variety of food products, including meat, at the retail level, and over 100 other non-meat foods and groceries.[38] The defendants almost immediately began to engage in a long series of legal maneuvers in an attempt to avoid the constraints of the decree.[39] In one such attempt in 1930, two of the defendants moved to modify the decree, claiming that the food industry had changed substantially in the ten years since the decree had been agreed upon.[40] After the Supreme Court of the District of Columbia granted the requested modifications, the United States, joined by associations of wholesale grocers, appealed.[41]

Justice Cardozo's opinion clarified many issues regarding a court's power to modify an injunction or consent decree. Justice Cardozo determined that a court had the inherent power to modify its own decree,[42] whether or not the decree provided expressly for future modification.[43]

37. For fuller descriptions of the long course of the litigation, see, e.g., OWEN M. FISS, INJUNCTIONS 325-99 (1st ed. 1972); Jost, *Modification of Injunctions*, *supra* note 15, at 1107-13; Comment, *The Packer Consent Decree*, *supra* note 36.

38. *Swift*, 286 U.S. at 111.

39. *Id.* at 112-14. Besides the activity in the lower courts, the Supreme Court itself had already turned down two challenges to the decree prior to this case. United States v. California Coop. Canneries, 279 U.S. 553 (1929); Swift & Co. v. United States, 276 U.S. 311 (1928). Justice Cardozo made it clear that he took a dim view of these attempts. *Swift*, 286 U.S. at 112 ("The expectation would have been reasonable that a decree entered upon consent would be accepted by the defendants . . . as a definitive adjudication setting controversy at rest.").

Professor Douglas Laycock has noted that the defendants fought vigorously against the decree just a short time after they had agreed to it, because it turned out that they had made a poor prediction of the outcome in a crucial case then pending before the Supreme Court. In United States v. United States Steel Corp., 251 U.S. 417, 451 (1920), which was handed down just two days after the decree in *Swift* was entered, the Court settled a previously open question of antitrust law in a way that would have favored the *Swift* defendants. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1029-30 (1985).

40. *Swift*, 286 U.S. at 113. Professor Jost points out that the defendants' goal in this motion to modify, obtaining the right to enter the retail grocery market, would have been their legal right in the absence of the decree because they had not unlawfully dominated or engaged in restraint of trade in this market. Jost, *Modification of Injunctions*, *supra* note 15, at 1109.

41. *Swift*, 286 U.S. at 113-14.

42. Prior to *Swift*, the Supreme Court had not resolved whether a decree was readily modifiable or whether it should be treated as a final judgment that was subject to review only on appeal. *See* 2 MILTON HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 939-40 n.164 (1973); Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1080-81 (1965) (citing cases). The vote was 4-2, with three Justices not participating in the decision because of their roles in the case prior to being appointed to the Court. Comment, *The Packer Consent Decree*, *supra* note 36.

43. *Swift*, 286 U.S. at 114 ("If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.").

Moreover, because the entry of the decree was "a judicial act," the court could modify the decree, whether it had been entered after a trial on the merits or as part of a settlement with the consent of the parties.[44] The decree had certain aspects of a contract governing prospective behavior, but it did not bind the parties in quite the same way that a private contract would.[45]

Although the fact that Justice Cardozo's opinion confirmed that the lower court possessed the power to modify the decree, Justice Cardozo did not make it easy to use that power. In *Swift*, Justice Cardozo established an apparently stringent standard for parties seeking the court's exercise of the power to modify a decree:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. . . . We are not at liberty to reverse under the guise of readjusting. . . . The inquiry for us is whether the changes [in the grocery business] are so important that dangers, once substantial, *have become attenuated to a shadow*. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. *Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.*[46]

Under this standard, commonly referred to as the "grievous wrong" test, the Court rebuffed the meat packers' motion to modify the injunction. Moreover, under the grievous wrong test, federal courts, including the Supreme Court, kept the decree in effect against the meat packers for another fifty years.[47]

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44. *Id.* at 115.

45. *Id.* at 115. ("[The parties' consent] was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.")

46. *Id.* at 119 (emphasis added). One noteworthy feature of this section of Justice Cardozo's opinion is the absence of citation to any authority. Virtually all of the passages in the opinion that make determinations regarding the law of modification are similarly devoid of authority. Evidently, Justice Cardozo believed that he could write with a relatively free hand and the case could have gone either way. For discussion of a radically different earlier draft of Justice Cardozo's opinion, which would have had the Court finding for the meat packers and adopting a significantly more flexible standard for modifications, see Handler & Ruby, *supra* note 35, at 246-49; Jost, *Modification of Injunctions*, *supra* note 15, at 1111 n.73. Some of the arguments Justice Cardozo crafted but ultimately discarded survived in the dissent. Handler & Ruby, *supra* note 35, at 247.

47. The decree was not finally dissolved until 1981. United States v. Swift & Co., 1982-1 TRADE CASES (CCH) ¶ 64,464 (N.D. Ill. 1981).

2. *The Application of* Swift

Perhaps because a jurist of the eminence of Justice Cardozo wrote the opinion, perhaps because in the quoted paragraph he crafted some of his most memorable phrases,[48] many lower courts have interpreted *Swift* in a stringent fashion.[49] The leading case taking the strict approach is *Humble Oil & Refining Co. v. American Oil Co.*[50] In an opinion written by then-Judge Harry Blackmun, the Eighth Circuit refused to modify a thirty-year old injunction, which had allocated the use of the petroleum trademark "Esso." In Judge Blackmun's view, the party seeking modification had to "provide close to an unanswerable case. . . . [C]aution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements."[51] Other lower courts have followed this interpretation of *Swift*, even in situations where a strict approach seems terribly harsh, if not unjust.[52] Not all lower courts, however, have read *Swift* so rigidly.[53]

The Supreme Court has not taken a clear approach when it has applied *Swift* to modification issues.[54] For example, in a later opinion in the meat packers' case, *United States v. Swift & Co.*,[55] the Court summa-

48. *See* Holiday Inns, Inc. v. Holiday Inn, 645 F.2d 239, 245 (4th Cir. 1981) (Phillips, J., dissenting) ("Inevitably also—given the authorship—courts have sometimes been tempted to ascribe to its several felicities of phrase . . . a talismanic significance that, with all deference, I suggest the author of *The Nature of the Judicial Process* would never have claimed for them."), *cert. denied*, 454 U.S. 1053 (1981).

49. *See, e.g.*, Note, *Modification of Consent Decrees*, *supra* note 32, at 1023-24 (1986) (describing a 1960 opinion in *Swift*, United States v. Swift & Co., 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd mem.*, 367 U.S. 909 (1961), as "[p]erhaps the starkest example of judicial unwillingness to grant even modest modifications in the face of substantially changed circumstances").

50. 405 F.2d 803 (8th Cir. 1969), *cert. denied*, 395 U.S. 905 (1969).

51. *Id.* at 813.

52. *See, e.g.*, Holiday Inns, Inc. v. Holiday Inn, 645 F.2d 239 (4th Cir. 1981) (refusing to modify injunction which prohibited defendant from indicating that its name was registered as a trademark, even though mark had been established in patent court subsequent to initial judgment), *cert. denied*, 454 U.S. 1053 (1981); Leigh Ann Galbrath, Note, *Injunction Modification Standards: Uniformity v. Flexibility*, 39 WASH. & LEE L. REV. 490, 492-501 (1982) (criticizing decision as too harsh).

53. *See, e.g.*, Jost, *Modification of Injunctions*, *supra* note 15, at 1113-21; 11 WRIGHT & MILLER, *supra* note 33, § 2863 at 208-10 (reviewing cases taking flexible approaches under *Swift*).

54. Some commentators have put this point less charitably. *E.g.*, Mengler, *supra* note 32, at 299-300:

> No one serious about defining a district court's task in interpreting a consent decree should look to the Supreme Court for guidance. Because its stated view on interpretation has shifted with the merits of each case, the Court has charted all the possibilities and fixed its sights on none of them. Consequently, the Court has said nothing useful for lower courts, unless one thinks providing a grab-bag of options is useful.

55. 367 U.S. 909 (1961).

rily affirmed a refusal to modify the *Swift* decree. The district court had based its refusal on Justice Cardozo's rigid phrases, even though another twenty-five years had passed since the original opinion and market conditions had changed dramatically.[56] Conversely, in an opinion issued just weeks before the affirmation, *System Fed'n No. 91, Employees' v. Wright*,[57] the Court relied heavily on *Swift* in holding that it was an abuse of discretion for a trial court to *refuse* to modify a consent decree after Congress had amended the operative statute in a manner which did not necessarily affect the terms of the decree.[58]

In 1968, the Court undertook its first full re-examination of *Swift* in *United States v. United Shoe Mach. Corp.*[59] *United Shoe*, like *Swift*, was an antitrust case. Unlike *Swift*, where private defendants attempted to modify a consent decree, *United Shoe* concerned an attempt by the United States as plaintiff to modify an injunction issued by the trial court after a full hearing on the merits.[60] Writing for the Court, Justice Fortas emphasized that Justice Cardozo's decision was framed in the context of defendants who sought "not to achieve the purposes of the provisions of the decree, but to escape their impact."[61] In remanding for reconsideration of the government's petition to modify, Justice Fortas made it clear that if the trial court's original order had not been effective in remedying the antitrust violations, it had the power and the obligation to modify so that the federal antitrust laws would be enforced.[62] Although the Court

56. *See* Note, *Flexibility and Finality in Antitrust Decrees*, 80 HARV. L. REV. 1303, 1310-11 (1967) (describing changed conditions).

57. 364 U.S. 642 (1961).

58. The Court found an abuse of discretion even though Congress simply amended the Railway Labor Act to permit (but not require) union shops. The consent decree had enjoined the railroad and union from requiring a union shop, which reflected then-existing law. *Id.* at 644. Thus, the injunction did not require unlawful behavior on the part of the defendants; its continuance merely would have prohibited them from doing something that Congress had decided to permit.

59. 391 U.S. 244 (1968).

60. After the district court had found in 1953 that defendant United Shoe had committed antitrust violations by monopolizing the market for manufacturing shoe machinery, it imposed certain restrictions on the company's future activities. In 1965, the United States asked the district court to modify the injunction because the restrictions had failed to enhance competition in the market for shoe machinery. The district court rejected the government's attempt to break up United Shoe on the grounds that the United States had failed to make a showing of grievous harm required under *Swift*. *United Shoe*, 391 U.S. at 245-47.

61. *Id.* at 249. *See also id.* at 248 ("*Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interest of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved.").

62. *Id.* at 251-52. *See also* HANDLER, *supra* note 42, at 944-53 (criticizing *United Shoe* because it did not hold the government to *Swift*'s requirements for modifications); Note, *Requests by the Government for Modification of Consent Decrees*, 75 YALE L.J. 657 (1966) (discussing the issue prior to *United Shoe*).

opened the way for a modification in the particular case before it, commentators have noted that *United Shoe* is ambiguous precedent.[63] Justice Fortas's opinion did not make clear which of the factual differences that distinguished the *United Shoe* situation from *Swift* really was of greatest importance.[64] Thus, after *United Shoe*, although the Court evidently did not think that the grievous wrong test was to be applied to all modification situations, it failed to make clear when the test should and should not be applied in the future.

B. Modifications in Reform Litigation

1. The Case for Flexibility

Since *United Shoe*, commentators have called for flexibility in modifying injunctions in several factual and legal contexts.[65] One of the most important examples where commentators and some courts have contended that a strict interpretation of *Swift* was inappropriate has been institutional reform litigation. Professor Owen Fiss is perhaps the best-known commentator taking this approach. He has noted that in an institutional reform case, the remedial phase "is concerned not with the en-

63. *E.g.*, Note, *Modification of Consent Decrees*, *supra* note 32, at 1024-26 (citing and assessing alternative interpretations). As a result, the "lower courts' responses . . . present a confusing mix of doctrinal analyses." *Id.* at 1028.

64. It is not clear whether the holding of *United Shoe* turns on just one or some combination of the factual distinctions between it and *Swift*, such as: that in *United Shoe*, it was the plaintiff rather than the defendant seeking relief; that it was the government seeking relief and not a private party; that it was an attempt to fulfill the purposes of the decree and not avoid them; or that *United Shoe* involved a court-imposed injunction, rather than a consent decree. *See, e.g.*, HANDLER, *supra* note 42, at 945-49; Note, *Modification of Consent Decrees*, *supra* note 32, at 1028-30 (describing attempts of courts to reconcile *Swift* and *United Shoe*).

65. Professor Jost has probably done the most thorough job of collecting and analyzing the appropriate situations:

> [W]hen necessary to accommodate a change of the law or legally material change of fact, to relieve the obligor from oppression, to effectuate the rights of the beneficiary, or, in certain cases, to protect the public interest, a court should be open to modification.

Jost, *Modification of Injunctions*, *supra* note 15, at 1162.

Professor Jost has also categorized a large number of cases taking a flexible approach to modifications. *Id.* at 1113 n.84. *See also* Brian K. Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 LA. L. REV. 789 (1988); Steinberg, *supra* note 32, at 71-73; Edward A. Tomlinson, *Modification and Dissolution of Administrative Orders and Injunctions*, 31 MD. L. REV. 312, 326-27 (1971). All three commentators advocate an ad hoc approach to modification based on large numbers of factors. *But see* Hugh J. Beard Jr., *The Role of Res Judicata in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction*, 49 LA. L. REV. 1239, 1241-42 (1989) ("Logically and necessarily flowing . . . is the preclusion of a continuing and flexible modification of the decree. . . ."); Murphy, *supra* note 32, at 220-21 (rejecting flexible approach as allowing political considerations to affect judicial decision on modification).

forcement of a remedy already given, but with the giving or shaping of the remedy itself. . . . The task is to remove the condition that threatens the constitutional values."[66] He focused in particular on effective enforcement of constitutional rights through necessarily complex, ongoing involvement of the trial court in shaping the relief.[67] This task cannot be accomplished unless the decree can be modified under a flexible standard as events warrant.

Until the Supreme Court decided *Rufo* in 1992[68], *New York State Association for Retarded Children v. Carey*[69] was the leading federal case[70] adopting the flexible approach to modifications in the institutional reform context. *Carey* began as a class action brought on behalf of mentally retarded residents of a large substandard state institution, the Willowbrook State School, located in New York City. In a consent

66. Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 27-28 (1979). Professor Fiss's view has been adopted by some judges. *See, e.g.*, Battle v. Anderson, 708 F.2d 1523, 1538 (10th Cir. 1983) (McKay, J., concurring), *cert. dismissed*, 465 U.S. 1014 (1984); Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

67. Professor Abram Chayes is another preeminent professor closely associated with the position that institutional reform litigation needs a flexible approach to modification. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). In the course of his now-classic essay on the differences between the traditional model of adjudication and the then-new public law litigation model, Professor Chayes noted:

> The form of relief does not flow ineluctably from the liability determination, but is fashioned ad hoc. In the process, moreover, right and remedy have been to some extent transmuted. The liability determination is not simply a pronouncement of the legal consequences of past events, but to some extent a prediction of what is likely to be in the future. And relief is not a terminal, compensatory transfer, but an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved. . . .
>
> The decree seeks to adjust future behavior, not to compensate for past wrong. It is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered. It provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer. Finally, it prolongs and deepens, rather than terminates, the court's involvement with the dispute.

Id. at 1293-98.

68. *See infra* section IB(3).

69. 706 F.2d 956 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983). For background on the case, see DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS (1984); Philip P. Frickey & David I. Levine, Book Review, 3 CONST. COMM. 270 (1986) (reviewing THE WILLOWBROOK WARS).

70. The *Carey* opinion met with wide acceptance in the federal courts over the past decade. *See, e.g.*, Heath v. DeCourcy, 888 F.2d 1105 (6th Cir. 1989); Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989); Plyler v. Evatt, 846 F.2d 208 (4th Cir. 1988), *cert. denied*, 488 U.S. 897 (1988); Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984); Tetra Sales (U.S.A.) v. T.F.H. Publications, Inc., 727 F. Supp. 92 (S.D.N.Y. 1989). Some courts have not found it necessary to decide whether to follow *Carey* or *Swift*. *See, e.g.*, Twelve John Does v. District of Columbia, 861 F.2d 295 (D.C. Cir. 1988); Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987). *See also Murphy, supra* note 32, at 211-16 (detailing impact of *Carey*).

judgment entered in 1975, the defendants agreed to reduce the population of Willowbrook from 5700 to 250 by relocating residents to community placements in non-institutional residence facilities with a maximum of fifteen beds.[71]

After extensive efforts to enforce the consent judgment, as of mid-1981, 1369 members of the original class still remained at Willowbrook and 999 others merely had been transferred temporarily to other large institutions.[72] When the plaintiffs moved for an order declaring the defendants out of compliance with portions of the consent judgment, defendants responded in part by seeking modification of the fifteen-bed limitation to a fifty-bed limitation. After hearing weeks of testimony regarding these motions, the district court held that the defendants were not in compliance with provisions of the consent judgment and rejected their request for modification of the bed limitation, which would have allowed the use of larger facilities.[73] Relying on a rigid reading of *Swift*, the district court concluded that the defendants had "failed to show exceptional circumstances or any grievous wrong as a basis for relief."[74]

The Second Circuit reversed the district court's refusal to modify the consent judgment's fifteen-bed limitation.[75] Writing for the panel, Judge Henry Friendly framed the inquiry under the most flexible language from *Swift*[76] and rejected the trial court's reliance on Justice Cardozo's stricter language.[77]

Judge Friendly thought that a flexible test was appropriate for three major reasons. First, he correctly pointed out that *Swift*'s language had to be read in context. Turning to the context of the case before him, Judge Friendly acknowledged that although it was the defendant seeking modification, "it [was] not, as in *Swift*, in derogation of the primary objective of the decree."[78] Judge Friendly found a closer analogy than either *Swift* or *United Shoe* in his own opinion for the majority in *King-*

71. *Carey*, 706 F.2d at 959.

72. *Id.* at 960.

73. New York State Ass'n for Retarded Children v. Carey, 551 F. Supp. 1165, 1192 (E.D.N.Y. 1982).

74. *Id.* at 1191. The district court quoted the Second Circuit as having cited *Swift* in support of a stringent test. *Id.* at 1190-91 (quoting Chance v. Board of Examiners, 561 F.2d 1079, 1086 (2d Cir. 1977)).

75. New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 972 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983).

76. *Id.* at 967 ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . ." (quoting *Swift*, 286 U.S. at 114)).

77. *Id.* at 968.

78. *Id.* at 969. In Judge Friendly's view, the primary objective was to empty "mammoth" Willowbrook; the fact that the modification that all defendants proposed would counter another objective, placing residents "in small facilities bearing some resemblance to a normal

Seeley Thermos Co. v. Aladdin Industries, Inc.,[79] where the Second Circuit had previously acknowledged that *Swift* must be read in context. Thus, "[w]hen a case involves drawing the line between legitimate interests on each side, modification will be allowed on a lesser showing."[80]

Second, Judge Friendly supported his conclusion that a more flexible standard was appropriate by quoting extensively from several sources, including Professors Chayes and Fiss, to support his general conclusion that

> in institutional reform litigation such as this, judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom.[81]

Thus, in Judge Friendly's view, "a consensus is emerging among commentators in favor of modification with a rather free hand."[82]

Third, in this case in particular, "especially great generosity [was] mandated" because of a recent Supreme Court decision, *Youngberg v. Romeo*.[83] Judge Friendly believed that under *Youngberg*, the district court was not free to choose between the testimony offered by the witnesses for the plaintiffs and the defendants. The lower court could only determine whether the defendants' request for modification to use larger

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home" was just a consequence of the modification. *Id.* ("any modification will perforce alter some aspect of the decree").

79. 418 F.2d 31 (2d Cir. 1969).

80. *Carey*, 706 F.2d at 969. Judge Friendly went on to quote from *King-Seeley*:

> While changes in fact or in law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes.

Id. at 969 (quoting *King-Seeley*, 418 F.2d at 35).

81. *Carey*, 706 F.2d at 969.

82. *Id.* at 970. *See also id.* at 971 ("Applications to modify a decree such as that in this case should thus be viewed with generosity.").

83. 457 U.S. 307 (1982). *Youngberg*, which was decided almost two months after the district court ruled in *Carey*, *see* 706 F.2d at 964, concerned a suit for damages brought by a retarded man who had been committed to a state-run institution and allegedly had received inadequate treatment. In deciding whether the defendant state officials were liable, the Supreme Court emphasized that

> courts must show deference to the judgment exercised by a qualified professional. . . . [T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Youngberg, 457 U.S. at 322-23, *quoted in Carey*, 706 F.2d at 965, 971.

facilities "constituted 'professionally acceptable choices.' "[84] In an action based on all these reasons, the Second Circuit panel remanded the case to the district court on the narrow question of whether the defendants' experts had exercised professional judgment in supporting the request for modification to allow a fifty-bed limit.[85]

2. Stotts: *The Supreme Court Rejects Flexibility?*

The Court first gave detailed attention to the standards for modification in the context of an institutional reform case in *Firefighters Local Union No. 1784 v. Stotts*.[86] As we will see, the Court seemed to reject, at least sub silentio, the position that motions for modifications of decrees in institutional reform cases should be handled under a flexible test such as the one the Second Circuit had adopted one year before, in *Carey*.

Stotts began as a suit alleging racial discrimination in the employment practices in the Memphis, Tennessee fire department.[87] In 1980, the trial court entered a consent decree in which the city committed itself to certain hiring and promotion goals with respect to African-American employees in its fire department.[88] In 1981, the city announced that it would have to lay off some city employees due to unexpected budget shortfalls, and that it would use a "last-hired, first-fired" system for the layoffs.[89] At the plaintiff's request, the district court issued a preliminary injunction which temporarily modified the consent decree to make the impact of the layoffs less severe on the plaintiffs.[90] The Sixth Circuit affirmed the issuance of the preliminary injunction,[91] but the Supreme Court reversed.

Despite the apparent similarities to the facts of *United Shoe*—both cases involved plaintiffs attempting to effectuate the general purposes of the respective decrees—Justice White's opinion for the majority took a surprisingly strict approach to modifications. Treating the consent decree first as a contract, Justice White noted that the " 'scope of a consent

84. *Carey*, 706 F.2d at 971. Judge Friendly rejected the position expressed by the United States as *amicus curiae* that the defendants had already and irrevocably exercised their professional judgment in agreeing to the terms of the consent decree because their agreement was based on the mistaken belief that small facilities could be found. *Id.*

85. *Id.* The *Carey* opinion is analyzed critically in Levine, *supra* note 28; Shapiro, *supra* note 32; Karen Keeble, Note, *Judicial Modification of Consent Judgments in Institutional Reform Litigation*, 50 BROOK. L. REV. 657 (1984); Murphy, *supra* note 32.

86. 467 U.S. 561 (1984).

87. *Id.* at 565.

88. *Id.*

89. *Id.* at 566.

90. *Id.* at 567.

91. Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982).

decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it' or by what 'might have been written had the plaintiff established his factual claims and legal theories in litigation.' "[92] Given that the decree mentioned neither layoffs, demotions, nor "an intention to depart from the existing seniority system or from the City's arrangements with the Union,"[93] the majority could not "believe that the parties to the decree thought that the City would simply disregard . . . the seniority system it was then following."[94] The majority completely ignored the argument raised by Justice Blackmun[95] that within the context of the complex and lengthy process of implementing a civil rights action, leaving the trial court discretion to handle unforeseen circumstances was not a rewriting of the parties' agreement, but was merely part of the attempt to implement it.[96]

Justice White also explained that the trial court did not have inherent power to modify the consent decree in response to the unexpected financial crisis. "Title VII necessarily acted as a limit on the District Court's authority to modify the decree over the objections of the City; the issue cannot be resolved solely by reference to the terms of the decree and notions of equity."[97] Under the interpretation of Title VII the Court had provided in *Teamsters v. United States*,[98] the district court could not alter the seniority system in this context unless it either made a finding that the seniority system was adopted with discriminatory intent or that it could not make whole a proven victim of discrimination without such

92. *Stotts*, 467 U.S. at 574, (quoting United States v. Armour & Co., 402 U.S. 673, 681-82 (1971)).

93. *Id.* Justice Stevens' concurring opinion also rested on a similar rationale. *Id.* at 590-92 (Stevens, J., concurring).

94. *Id.* Justice White also noted that it was not likely that the city would have bargained away seniority rights since neither the Union nor the non-minority employees were parties when the 1980 consent decree was entered. *Id.* at 575. Justice O'Connor emphasized this point in her concurring opinion. *Id.* at 587-88 (O'Connor, J., concurring). Subsequently, the Court has taken an even stronger approach to protecting the rights of non-parties. Martin v. Wilks, 490 U.S. 755 (1989) (non-parties cannot be bound in either a formal or practical sense by a consent decree). *But see* Civil Rights Act of 1991, Pub. L. No. 102-166, § 108 (reversing *Martin* under limited circumstances).

95. Justices Brennan and Marshall joined Justice Blackmun's dissent. *Stotts*, 467 U.S. at 607 (Blackmun, J. dissenting).

96. *Stotts*, 467 U.S. at 609. The majority also ignored the dissent's important procedural point that the case was being reviewed after the trial court had issued a preliminary injunction, not a permanent injunction. Under the standard rules of appellate review, the trial court was entitled to considerable deference in this context. *Id.* at 601. *See also* American Hosp. Supply Corp. v. Hospital Products, Ltd., 780 F.2d 589, 595 (7th Cir. 1986) (Posner, J.) (noting the substantial deference due the trial court "in the hectic atmosphere of a preliminary-injunction proceeding").

97. *Stotts*, 467 U.S. at 576 n.9.

98. 431 U.S. 324 (1977).

an alteration.[99]

Commentators generally recognize that in *Stotts*, the Supreme Court missed an opportunity to clarify the rules for modifications, especially in the institutional reform context.[100] Because the Supreme Court did not make its overall standards explicit, whatever its actual intent, *Stotts* has not been widely credited with a broad effect on the law of modification of injunctions.[101] Rather, most lower courts have read *Stotts* as a narrow decision dictated merely by the special protections that Congress provided to bona fide seniority systems when it passed Title VII.[102] If the Court meant to establish rules for modifications of decrees issued in institutional reform litigation, it failed in *Stotts*.

3. Rufo: *The Supreme Court Adopts a Flexible Test*

Despite the Supreme Court's rigid approach to modification in *Stotts*, in *Rufo v. Inmates of Suffolk County Jail*,[103] its most recent opinion on the modification of consent decrees, the Court unequivocally adopted a flexible test in institutional reform cases. Curiously, the Court did not explain its apparent 180-degree turn even though the same person, Justice White, wrote the majority opinions in both *Stotts* and *Rufo*.

a. The Facts and Opinions in *Rufo*

Rufo began in 1971 when inmates sued the sheriff of Suffolk County (Boston), Massachusetts, and other state and local officials, alleging that pre-trial detainees were being held under unconstitutional conditions. In

99. *Stotts*, 467 U.S. at 576 n.9. The dissent objected that in the context of a preliminary injunction to modify a consent decree, it was impossible for the court to know the extent and nature of any past discrimination by the city. The parties had never been to trial on these claims in either the original action leading to the consent decree or in this action seeking modification. *Id.* at 609. In a subsequent decision, the Court clarified that despite *Stotts*, a district court could enter a consent decree that benefitted individuals who were not actual victims of an employer's discriminatory practices despite Title VII's apparent restrictions. Local No. 93 v. City of Cleveland, 478 U.S. 501 (1986). The majority in *Local 93* distinguished those situations where a district court would be barred by Title VII from providing such relief, "after a trial or, as in *Stotts*, in disputed proceedings to modify a decree." *Id.* at 528.

100. *See, e.g.*, Jost, *Modification of Injunctions*, *supra* note 15, at 1123 ("*Stotts* illustrates the confusion resulting from the variety of judicial approaches to modification that have evolved since *Swift*."); Murphy, *supra* note 32, at 210 (speculating on why *Stotts* majority did not address issue); Note, *Modification of Consent Decrees*, *supra* note 32, at 1032 n.79 (reviewing differing ways commentators have evaluated *Stotts*).

101. *See, e.g.*, SCHOENBROD ET AL., *supra* note 29, at 246 n.1; *Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 267 (1984).

102. *See, e.g.*, Deveraux v. Geary, 765 F.2d 268 (1st Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); Wilmington Firefighters v. City of Wilmington, 632 F. Supp. 1177, 1185 (D. Del. 1986) (collecting cases).

103. 112 S. Ct. 748 (1992).

1973, District Judge Robert Keeton agreed that conditions in the facility, the Charles Street Jail, which had been built in 1848, were constitutionally deficient under the Due Process Clause of the Fourteenth Amendment. The district court issued a permanent injunction which prohibited pre-trial detainees from being double-celled after November 30, 1973 and prohibited their incarceration at the jail after June 30, 1976.[104] When the problems were not solved on schedule, the district court issued subsequent orders, which the First Circuit Court of Appeals affirmed. It declared that the jail would be closed on October 2, 1978, unless a plan for creating an acceptable facility was presented to the district court before that date.[105] The defendants met this deadline. After further negotiations, the district court entered a consent decree which included plans for a new jail housing 309 detainees in single occupancy rooms.

Construction on the new jail did not begin until more than one year after the projected completion date.[106] Because growth in the inmate population had outpaced the projections, a state court ordered the defendants to build a larger jail.[107] In response, the district court modified the decree in 1985 to allow the facility's capacity to be increased to any amount so long as, inter alia, "single-cell occupancy is maintained under the design for the facility."[108]

While the jail was under construction in 1989, the Suffolk County sheriff moved to modify the decree to allow some double-celling of detainees. The sheriff contended that the motion was supported by both a change in law and a change in fact. The change in law asserted was the Supreme Court's decade-old opinion in *Bell v. Wolfish*,[109] which had held that double-celling was not unconstitutional per se. The asserted change in fact was the increase in the population of pre-trial detainees the jail had experienced.

Judge Keeton refused to grant the request for modification on the basis that the sheriff had not met the "grievous wrong" standard from *Swift*. In the district court's view, *Bell* did not overrule any legal interpretation on which the 1979 consent decree relied. As for the increase in the jail population, it was "neither new nor unforeseen."[110] The court

104. This order was not appealed. *Rufo*, 112 S. Ct. at 754.

105. *Id.* at 755 (quoting Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98, 99-100 (1st Cir. 1978)).

106. The Court's opinion gave no reason for this delay. *Id.* at 756.

107. *Id.*

108. *Id.*

109. 441 U.S. 520 (1979). The Supreme Court handed down *Bell* just one week after Judge Keeton had approved the consent decree in 1979. *See Rufo*, 112 S. Ct. at 756.

110. *Rufo*, 112 S. Ct. at 756 (quoting Inmates of Suffolk County Jail v. Kearney, 734 F. Supp. 561, 564 (D. Mass. 1990)).

also stated that even under a flexible modification standard, such as had been adopted by the Second Circuit in *Carey*, the sheriff would not be permitted to introduce double-celling. According to Judge Keeton, who had handled the case for years, a separate cell "has always been an important element of the relief sought in this litigation—perhaps even the most important element."[111]

Although the First Circuit affirmed the district court summarily,[112] the Supreme Court reversed.[113] Writing for a majority of five,[114] Justice White began by noting that even though a consent decree "in some respects is contractual in nature," the parties "desire and expect" that the decree will be enforceable as a judicial decree.[115] As such, the decree is subject to Rule 60(b) of the Federal Rules of Civil Procedure. Although the district court had recognized these facts, its equation of Rule 60(b)(5) with the "grievous wrong" standard of *Swift* was in error.[116]

After detailing the history of the *Swift* litigation, Justice White cited *Carey* as a leading case recognizing that, read out of *Swift*'s factual context, Justice Cardozo's language might be erroneously interpreted as a "hardening" of the "traditional, flexible standard for modification of consent decrees."[117] According to Justice White, other decisions of the Supreme Court "reinforce the conclusion that the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees."[118] Justice White underscored that both *Swift* and the terms of Rule 60(b) permitted "a less

111. *Id.* at 756-57 (quoting *Inmates of Suffolk County Jail*, 734 F. Supp. at 565).

112. Inmates of Suffolk County Jail v. Kearney, 915 F.2d 1557 (1st Cir. 1990) ("We are in agreement with the well-reasoned opinion of the district court and see no reason to elaborate further.").

113. *Rufo*, 112 S. Ct. at 748.

114. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Souter joined the opinion. Justice O'Connor wrote a concurring opinion. Justice Stevens wrote a dissent, which Justice Blackmun joined. Justice Thomas took no part in the case, which was argued before he joined the bench. *Id.* at 754.

115. *Id.* at 757.

116. *Id.*

117. *Id.* at 757-58. Justice White made no effort to demonstrate what the standard was preceding *Swift*. Rather, he only cited cases decided after *Swift*, such as *Carey* and *United Shoe*.

118. *Rufo*, 112 S. Ct. at 758. Justice White cited only two cases for this point, Railway Employees v. Wright, 364 U.S. 642 (1961) and Board of Educ. v. Dowell, 111 S. Ct. 630 (1991). Although both opinions distinguish *Swift*, neither precisely applied to the situation in *Rufo*. In *Railway Employees*, the Supreme Court held that the district court had to modify a decree that tracked labor laws after Congress amended the laws in question. 364 U.S. at 651. *Dowell* dealt with a somewhat different problem, a motion to dissolve a desegregation decree after the terms of the decree had been satisfied. *See infra* notes 227-238.

stringent, more flexible standard"[119] in the appropriate case. Relying again on *Carey*, Justice White noted that "[t]he upsurge in institutional reform litigation since [*Brown I*] has made the ability of a district court to modify a decree in response to changed circumstances all the more important."[120]

Justice White then explained that even though a district court should be flexible in considering requests for modification of institutional reform decrees, "it does not follow that a modification will be warranted in all circumstances."[121] Relief, Justice White wrote, is appropriate under Rule 60(b)(5) when the existing consent decree is no longer equitable, not "when it is no longer convenient to live with the terms of a consent decree."[122] According to the majority, a party seeking modification has the burden of establishing that "a significant change in circumstances warrants revision of the decree."[123] Once this burden is met, the district court must consider whether the proposed modification is suitably tailored to the changed circumstance.[124] The Court specified that the initial burden can be met by showing either a significant change in factual conditions or in the law.[125]

According to the Court, changed factual conditions could make compliance inequitable where the decree proved to be unworkable because of unforeseen obstacles[126] or when enforcement without modification would have been detrimental to the public interest. Justice White rejected a test the plaintiffs had proposed which would have allowed modification only when a change in facts have been both "unforeseen and unforeseeable."[127] He noted that such a standard would be even more rigid than *Swift*. He acknowledged, however, that "[o]rdinarily . . . mod-

119. *Rufo*, 112 S. Ct. at 758 ("The *Swift* opinion pointedly distinguished the facts of that case from one in which genuine changes required modification of a consent decree . . . .").

120. *Id.* Justice White also rejected the contention that a flexible standard would deter negotiated settlements. *Id.* at 758-59.

121. *Id.* at 760.

122. *Id.*

123. *Rufo*, 112 S. Ct. at 760.

124. In a footnote, the Court specified that this standard applied to modification of a term of a consent decree that "arguably relates to the vindication of a constitutional right." Such a showing is not necessary to implement minor changes in extraneous details such as the paint color of a building facade. If such minor changes can't be handled by consent, the district court was directed to grant the change if the moving party had a reasonable basis for the request. *Id.* at 760 n.7. The Court did not explain how to distinguish the border between the two situations or what test to apply when the motion to modify concerned something that fell in between the two extremes.

125. *Id.* at 760.

126. The Court cited to *Carey* as an example. *Id.* at 758 n.6.

127. *Id.*

ification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree."[128] Justice White did not expressly state what a court should do when the events were subjectively unforeseen but reasonably foreseeable. The implication, however, was that flexibility is called for in that situation.[129]

Changes in the law could also be the basis for a modification. Justice White identified one situation where modification was definitely required: if an obligation imposed on the parties became impermissible under federal law.[130] He also stated that modification might be warranted "when the statutory or decisional law has changed to make legal what the decree was designed to prevent."[131] Justice White rejected the defendants' claim that *Bell v. Wolfish* was a change in the law requiring modification. Although *Bell* did not ban all double-celling, neither did it cast doubt on the legality of single-celling. Moreover, the defendants "were undoubtedly aware that *Bell* was pending when they signed the decree."[132] Justice White noted that the parties were free to enter into a settlement that committed the defendants to doing more than the Constitution required.

The Court majority recognized that there was a risk that the unceasing stream of clarifications of the law inherent in our legal system would open the door to constant relitigation, would undermine finality, and might discourage parties from settling their differences. To avoid this, Justice White stated that decisions merely clarifying the law, rather than changing it, generally could not be the basis for a modification motion. On the other hand, a clarifying decision could be the basis for a motion for modification if it turned out that the parties had based their agree-

128. *Rufo*, 112 S. Ct. at 760. "[T]hat party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." *Id.* at 761.

129. *See id.* at 761 n.10, "We note that the dissent's 'reasonably foreseeable' standard differs significantly from that adopted by the Court today." In the absence of a clear written agreement and a fully developed record, the Court was not willing to impose sole responsibility on a local governmental entity for responding to any "reasonably foreseeable" increase in the detainee population by increasing the capacity of the jail "potentially infinitely." *Id.*

130. *Id.* at 762.

131. *Id.* (citing Railway Employees v. Wright, 364 U.S. 642 (1961), and Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984)). Curiously, this is the only citation to *Stotts*, which was Justice White's most recent majority opinion on modification of a consent decree in an institutional reform case. It is somewhat strange that Justice White made no effort to distinguish the rigid approach he took in *Stotts*, which rebuffed the plaintiff's efforts to seek a modification to deal with an unforeseen (but probably foreseeable) event, a layoff of employees, with the flexible approach he took in *Rufo*, which assists the defendant in seeking a modification to deal with a foreseeable and probably foreseen event, an increased jail population.

132. *Rufo*, 112 S. Ct. at 762.

ment on a misunderstanding of the governing law. Justice White suggested that *Rufo* could be such a case if the defendants could establish that the parties had thought that single-celling was constitutionally mandated at the time they entered into the decree.[133]

Once the moving party had met its burden of establishing a change of law or fact warranting modification, the majority directed the lower court to decide whether the proposed modification was "suitably tailored" to the changed circumstance.[134] The Court stated that this inquiry should be guided by three principles: (1) the modification should not create or perpetuate a constitutional violation; (2) the modification should address the problems created by the change in circumstances and should not attempt to rewrite the decree so that it conforms to the constitutional floor; and (3) federalism requires some deference to local governmental administrators where the changed condition makes it substantially more onerous and expensive to comply with the decree.[135]

In separate opinions, three other Justices approved of the adoption of a flexible standard for modification of consent decrees in institutional reform cases. Justice O'Connor, concurring, approved of the majority's rejection of the strict language of *Swift*.[136] Justice Stevens (joined by Justice Blackmun), dissenting, specifically agreed with the majority's "endorsement" of *Carey*.[137]

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133. *Id.* at 763. Justice White noted that the decree stated that it "sets forth a program which is both constitutionally adequate and constitutionally *required*."

134. *Id.*

135. *Id.* at 764. In a footnote added to respond to Justice O'Connor's concurring opinion, Justice White clarified that no deference was involved in the first step of the inquiry—whether there had been a significant change of law or fact. In the second step, however, "principles of federalism and simple common sense" required giving significant weight to the views of the officials who had to implement the decree. *Id.* at 764 n.14. Justice White did not elaborate on exactly how principles of federalism might have an effect in this or related contexts. For attempts to do so, see Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203 (1987); Note, *Federalism and Federal Consent Decrees Against Governmental Entities*, 88 COLUM. L. REV. 1796 (1988).

136. *Rufo*, 112 S. Ct. at 766 (O'Connor, J., concurring). Justice O'Connor wrote separately because of her disagreement on other points. In her view, the Court's new standard was no clearer than the general language of Rule 60(b)(5); she would have simply reviewed the district court's exercise of the discretion permitted under the rule. Justice O'Connor believed that the majority's opinion could be understood to say that, in this case, because of *Swift*, the district court had taken too narrow a view of its permissible discretion. *Id.*

137. *Id.* at 768 (Stevens, J., dissenting). Although Justice Stevens endorsed the Court's adoption of *Carey*, he dissented because he concluded that even under that standard, the district court's refusal to modify should have been affirmed for several reasons. He noted that the district court had already applied *Carey*'s flexible test as an alternate holding. *Id.* at 768 n.1. Justice Stevens saw the basic task of the district court and the parties as fashioning the "best" remedy in a complex situation where there was no way to quantify the constitutional values at

b. Improving the *Rufo* Opinion

The two-part test that Justice White adopted in *Rufo*—the movant must show a change in law or fact and the proposed modification must be tailored to the changed circumstances—provided a basic standard for deciding modification cases in the future. As Justice White explained, it was consistent with Rule 60(b)(5) and *Swift*'s broader structure.[138] *Rufo* would have been an even better opinion, however, if it had clarified some additional points.

First, the *Rufo* Court should have done more to explain how its opinion fit within its own precedent. For example, in *United Shoe*, the Court had held that it was inappropriate to use *Swift*'s grievous wrong standard when assessing a plaintiff's request to modify. The *United Shoe* Court also held, however, that under *Swift*, a decree "may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved."[139] Yet *Rufo* applied a flexible test even though the motion to modify came from a defendant and the purposes of the decree had not been achieved at the time of the request for modification. Justice White did not attempt to reconcile *Rufo* with *United Shoe* on this score.[140]

Even more mysteriously, Justice White's *Rufo* opinion ignored *Stotts*, his own precedent concerning the modification of consent decrees in institutional reform cases. In *Stotts*, the plaintiffs moved to modify the decree to maintain its overall purposes: affirmative action in the hiring and promotion of African-American firefighters. Rather than following the flexible approach of *United Shoe*, where the plaintiff also sought modification to preserve the purpose of the decree, Justice White in *Stotts* used a strict approach to reading the consent decree.[141] Contrary to his

issue. *Id.* at 769-70. Moreover, because the decree already had been modified in 1985, the defendants had to point to conditions of law or fact that had changed since that time to justify further modification. Justice Stevens believed that none would qualify. *Id.* at 771.

138. *Rufo*, 112 S. Ct. at 764. For an argument that the Court should have abandoned *Swift* in favor of a new test, the hypothetical contract standard, see *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 294-99 (1992).

139. United States v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968).

140. Justice White simply quoted the discussion of *Swift* in *Carey* without discussing the lower court's treatment of *United Shoe*. *Rufo*, 112 S. Ct. at 758-59 n.6.

141. The majority's approach was so strict that it ignored the important point Justice Blackmun made in dissent; the majority took no account of the procedural posture of the case, which was on appeal from a preliminary injunction the district court issued to protect temporarily the terms of a consent decree. Justice Blackmun took the majority to task for basing part of its decision on what plaintiffs had failed to prove when they had not had an appropriate opportunity to submit their proof. In reviewing the propriety of the district court's decision to issue a preliminary injunction, he would have focused on what the plaintiffs might have demonstrated at a full hearing. *Stotts*, 467 U.S. at 611 (Blackmun, J., dissenting).

subsequent approach in *Rufo*, he did not suggest in *Stotts* that the parties should frame the inquiry in terms of whether layoffs were a foreseen, foreseeable, or unforeseen event. For Justice White, it was sufficient that within the "four-corners" of the agreement, the consent decree did not expressly provide for layoffs. Moreover, he concluded it was not believable that the parties thought that the consent decree would affect the city's seniority system.[142]

In contrast to the strict approach he took in *Stotts*, Justice White emphasized in *Rufo* the need for flexibility in modifying decrees in institutional reform cases. In *Stotts*, it was the dissent to Justice White's opinion that made that case. Justice White did not directly explain in *Stotts* why it was incorrect to treat institutional reform decrees differently from other types of cases. Although one should not expect a majority opinion to respond to every point made by a dissent, it is peculiar that Justice White saw no need in *Rufo* to justify his own change of heart.[143]

The lack of explanation makes it difficult to understand how *Rufo* and *Stotts* are to be applied. After *United Shoe*, an observer might have understood that there were two rules for modification. A plaintiff seeking modification to effectuate the purposes of a decree was entitled to a reasonably flexible standard. A defendant, however, had to meet *Swift*'s stringent "grievous wrong" standard before a court would grant its request for modification.[144] *Rufo* and *Stotts*, however, appear to invert these rules, requiring a *plaintiff* seeking modification to meet an onerous burden while a *defendant* is entitled to the benefits of a flexible standard. Because Justice White did not discuss *Stotts* in *Rufo*, he has left himself

142. *Id.* at 574.

143. It is especially odd that Justice White's majority opinion in *Rufo* provided no explanation, because in effect *Rufo* overruled *Stotts*. The difference in approach carries beyond the question of the need for flexibility. For example, in *Rufo*, Justice White emphasized that the parties were free to agree to do more than was constitutionally required; a modification request had to be tailored in light of what had been agreed upon, not the constitutional floor that might have been imposed after a case was fully litigated. *Rufo*, 112 S. Ct. at 764. In *Stotts*, Justice White held that in a litigated request for modification, the district court could not grant more relief than it could after full litigation. *Stotts*, 467 U.S. at 576-77 n.9. Needless to say, Justice White did not explain how his two majority opinions were to be reconciled on this point either.

144. *See, e.g.*, the description of the district court's understanding of the rules established by *Swift* and *United Shoe* in King-Seeley Thermos Co. v. Aladdin Indus. Inc., 418 F.2d 31, 34 (2d Cir. 1969) (as summarized by Judge Friendly before developing the "true holding"). *Compare King-Seeley*, 418 F.2d at 37 (Moore, J., dissenting) ("Nor did Judge Anderson acquire a 'rigidity' of mind by a misconstruction of the *Swift* and *United Shoe* cases. To the contrary, his analysis of these cases demonstrates that he was fully aware of the extent of their holdings."). *See also* King-Seeley Thermos Co. v. Aladdin Indus. Inc., 169 U.S.P.Q. 85 (D. Conn. 1970) (terms of injunction as modified after remand).

(and the Court) open to such misunderstandings.[145]

Second, *Rufo* does not give appropriate deference to the trial court's determination of the primary purposes of the decree.[146] It would be helpful for litigants and courts to know how to find a "primary purpose" of a decree. If *Rufo* is to be the guide, the district court's considered judgment about the primary purposes of a decree it has entered may be insufficient on appeal. That judgment can be second-guessed by the appellate court, which evidently will not be bound on this issue by the regular deferential standards of review usually accorded to findings of fact.[147] To attempt to avoid this result in the future, the parties should label all

145. Justice White could have distinguished the two cases in fairly persuasive ways. For example, in *Stotts*, one party was trying to effectuate a purpose that evidently was not, and—because of the rights of unrepresented third parties that would have been implicated—really could not have been contemplated by the decree. *See* Martin v. Wilks, 490 U.S. 755 (1989). In contrast, in *Rufo*, the party seeking modification was arguably attempting to effectuate an express purpose of the decree. In the alternative, Justice White might have pointed out that the district court in *Stotts* (but not in *Rufo*) was particularly limited in what it was permitted to grant in a request for modification because of the special policy preferences that Congress had expressed in Title VII. *Stotts*, 467 U.S. at 576-77 n.9. *Cf. Rufo*, 112 S. Ct. at 771 n.5 (Stevens, J., dissenting) (distinguishing the district court's authority and duty to modify in cases where Congress has and has not expressed a policy preference).

By not making these or other distinctions, Justice White's opinion leaves the *Rufo* Court open to the charge that it is being result-oriented and overly deferential to the local governmental officials. *See, e.g.*, Mengler, *supra* note 32, at 311 ("The case law, beginning with *Swift* and ending with *Stotts*, certainly provides evidence that . . . the result always has dictated the Court's articulation of the nature of consent decrees."). This would not be the first time that such charges had been aimed at this Court. *See, e.g.*, Payne v. Tennessee, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting) ("Power, not reason, is the new currency of this Court's decisionmaking.").

146. Determining the primary purpose(s) of the decree is important because that determination significantly affects how a court views a proposed modification. In *Carey*, Judge Friendly of the Second Circuit saw the primary purpose of the decree as emptying Willowbrook; the district court thought that placing the plaintiffs in small facilities resembling a home was at least as important. Thus, Judge Friendly was willing to allow the plaintiffs to be placed in larger community settings and the district court was not. *See Carey*, 706 F. 2d 956, 967-69 (2d Cir. 1983). In *Rufo*, Justice White's opinion for the majority simply asserted that the "primary purpose" of the decree was to provide a remedy for "unconstitutional conditions obtaining in the Charles Street Jail." *Rufo*, 112 S. Ct. at 762. Thus, a modification that would allow double-celling, if done in a constitutional manner, becomes a relatively small matter. Justice White did not undertake to explain why the trial court who had handled the case for years was incorrect in characterizing the decree as providing for "[a] separate cell for each detainee [which] has always been an important element of the relief sought in this litigation—perhaps even the most important element." *Id.* at 759, (quoting Rufo v. Inmates of Suffolk County Jail, 734 F. Supp. 561, 565). *See also id.* at 767 (O'Connor, J., concurring) (arguing that the Court should defer to district court's views on need to ban double-celling); *Id.* at 772 (Stevens, J., dissenting) (observing that prohibition against double-celling was a consistent central purpose in the litigation).

147. In both *Carey* and *Rufo*, the appellate court freely substituted its judgment for that of the district court in determining what was the primary purpose of the respective decrees. Neither court used a deferential standard in making their decision.

the "primary purposes" of the decree as such.[148] Until the Supreme Court provides some guidance on this issue, however, no one can be certain that even this strategy will be successful.

Third, Justice White did not clearly distinguish the Court's position from Judge Friendly's extreme deference to the professional judgment of the defendants' experts in assessing the appropriateness of a requested modification.[149] In contrast to *Carey*, it appears that the *Rufo* Court expected only modest deference towards defense experts in the district court's review of a requested modification. For example, Justice White was careful to emphasize that no deference is owed in the threshold inquiry of establishing a significant change in law or fact warranting modification.[150] An element of deference, based on "principles of federalism and common sense," arises only in the second stage, when the district court examines whether the proposed modification is tailored to addressing the changed circumstances. Deference is due the defendants because they have primary responsibility for resolving the intricate problems in implementing an institutional reform decree.[151] At the same time, the limits on this deference were underscored by Justice White's clear statements to the effect that a modification was not to be used as an excuse to rewrite the decree so it conformed to the constitutional floor or to use financial constraints as an excuse for the perpetuation of constitutional violations.[152] Although on its face the amount of deference required under *Rufo* seems more appropriate than the much larger amount required under *Carey*,[153] it would have been helpful if the *Rufo* Court had explained explicitly how its views on deference differed from those of the

148. *See, e.g.*, Stewart, *supra* note 10, at 51 (reporting that in response to *Rufo*, ACLU prison lawyers now seek "cast-in-stone" language in consent decrees).

149. Judge Friendly probably was too deferential to the defendants' professional judgment in *Carey*, which permitted the defendants to avoid obligations that it had incurred voluntarily as part of the settlement of the plaintiffs' suit. *See, e.g.*, Shapiro, *supra* note 32, at 477 (noting that the "tilt toward open-endedness is decidedly one-sided in favor of defendants"); Note, 50 BROOK. L. REV., *supra* note 32, at 680-81 (questioning application of "professional judgment" standard to *Carey*).

150. *Rufo*, 112 S. Ct. at 764 n.14.

151. *See id.* at 764 (citing Brown v. Board of Educ., 349 U.S. 294, 299 (1955) (*Brown II*)); Missouri v. Jenkins, 495 U.S. 33, 51 (1990); Milliken v. Bradley, 433 U.S. 267, 281 (1977) (*Milliken II*).

152. *Id.* at 764 & n.14. *But see id.* ("To refuse modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief from one or more provisions of a decree that might not have been entered had the matter been litigated to its conclusion.").

153. *But see id.* at 767 (O'Connor, J., concurring) ("[d]eference to one of the parties to a lawsuit is usually not the surest path to equity"); *id.* at 772 (Stevens, J., dissenting) (defendants' "history of noncompliance . . . provides an added reason for insisting that they honor their most recent commitments").

Second Circuit. Otherwise, lower courts may believe that they should grant defendants an unwarranted level of deference.[154]

Fourth, Justice White did not focus expressly on the standard for reviewing a denial of a request for relief under Rule 60(b). As framed in the majority's opinion, the district court made an error of law by believing that Rule 60(b)(5) had only codified part of *Swift*—the "grievous wrong" standard.[155] Such an error is freely reviewable by the appellate court.[156] In contrast, both Justice O'Connor and Justice Stevens framed the issue under the abuse of discretion standard.[157] The majority did not expressly disagree that the abuse of discretion standard would have been appropriate if the district court's decision had been based on a proper understanding of the law. It would have been better, however, if the majority had clarified its understanding either by expressing agreement with the concurrence and dissent or by explaining why a different standard applied. Otherwise, lower courts may be confused about the appellate standard to be applied in cases decided after *Rufo*.[158]

Finally, Justice White did not explain how to determine whether there has been a "change" in the law, which might support modification, or merely a "clarification," which will not.[159] In *Rufo*, Justice White tried to establish some standards for making this determination.[160] It remains to be seen whether the standards that he set in *Rufo* will provide sufficient guidance.

Perhaps one reason that the majority in *Rufo* did not undertake to explain how to make the distinction is that it is nearly impossible to do so. To illustrate why, let us briefly consider the difficulties the Court has

154. For an example of an opinion that seems to believe that *Rufo* incorporates an extremely deferential standard, see Inmates of Allegheny County Jail v. Wecht, 797 F. Supp. 428 (W.D. Pa. 1992). In 1989, the parties in *Wecht* entered into a consent decree that inter alia committed the defendants to build a facility for the forensic mentally ill. *Id.* at 429. The district court allowed modification on the grounds that the defendants' desire to follow a popular "philosophy in the mental health field"—deinstitutionalization—constituted a sufficient change under *Rufo*. *Id.* at 435. The plaintiffs' position—that the defendants had agreed to build the facility less than three years before—was brushed aside. The defendants made no showing that deinstitutionalization of the mentally ill, a concept that was at least 20 years old, constituted a significant change of fact or law of the type that *Rufo* appeared to contemplate. The case might have been correctly decided if Justice White, writing in *Rufo*, had expressly differentiated the Court's endorsement, or a modest level of deference, from Judge Friendly's more extreme views about the need to bow deeply to professional judgment.

155. *Rufo*, 112 S. Ct. at 757.

156. *See, e.g.*, JACK FRIEDENTHAL ET AL., CIVIL PROCEDURE § 13.4, at 600 (1985).

157. *Rufo*, 112 S. Ct. at 765 (O'Connor, J., concurring) and at 773 (Stevens, J., dissenting).

158. For example, after the district court acts on remand in *Rufo*, any subsequent appeal should be judged under the abuse of discretion standard.

159. *Rufo*, 112 S. Ct. at 762.

160. *See supra* text accompanying notes 125-28.

had in making the same distinction in an unrelated area of the law: habeas corpus. In *Teague v. Lane*,[161] and its progeny[162] the Supreme Court determined that a federal "habeas [corpus] petitioner generally cannot benefit from a new rule of criminal procedure announced after his conviction has become final on direct appeal."[163] Thus, in many federal habeas corpus petitions, a court must determine whether an opinion which the prisoner is relying on, but which was released after his or her conviction became final, announced a "new rule." If the opinion did announce a new rule, it is not retroactive and of no benefit to the prisoner. If, however, it has merely clarified the law or applied it in a new factual context, it would apply retroactively. However, as one circuit court that has struggled with the issue has said: "the 'new rule' rule is easier to recite than apply in most cases. . . . Suffice it to say that discerning the domain of a given rule and marking the precise point at which its younger sibling, rather than it, applies is more than an art than a science."[164] One commentator has called for the Supreme Court's attempts to distinguish new rules from old ones a "logical house of cards."[165]

Courts faced with petitions to modify that are based on asserted changes in the law will have to deal with the same problem. Not all situations will be as obvious as the one that the *Rufo* Court faced, whether *Bell v. Wolfish*[166] qualified as a change in the law requiring modification.[167] In closer cases, it is safe to predict that the courts will have some trouble making the determination.[168] Even after deciding whether

161. 489 U.S. 288 (1989).

162. Graham v. Collins, 113 S. Ct. 892 (1993); Wright v. West, 112 S. Ct. 2482 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sawyer v. Smith, 497 U.S. 227 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989).

163. Wright v. West, 112 S. Ct. 2482, 2489 (1992). *See also* Markus Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Effects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1 n.1 (1992) (collecting commentary on *Teague*).

164. Taylor v. Gilmore, 954 F.2d 441, 445 (7th Cir.), *cert granted*, 113 S. Ct. 52 (1992).

165. Dubber, *supra* note 163, at 19. Dubber does an excellent job of demonstrating in detail how difficult, if not futile, it is to make sense of the Supreme Court's tests for a "new rule" of criminal procedure. "The logical relationship between precedent and the rule under observation, of course, is no easier to capture than the precise syllogisms of judicial opinion." *Id.*

166. 441 U.S. 520 (1979).

167. To see why *Bell* did not qualify, see text accompanying note 127.

168. In Taylor v. Gilmore, 954 F.2d 441, 448 (7th Cir.), *cert. granted*, 113 S. Ct. 52 (1992), the Seventh Circuit developed an approach to the *Teague* problem that might be helpful to courts trying to apply *Rufo*:

> [W]e adopt the following analysis when deciding whether a case announces a new rule under *Teague*. First we determine whether the case clearly falls in one category or another—if it overrules or significantly departs from precedent, or decides a ques-

there has been a change in the law, the courts will have to decide whether the change warrants modification of the decree. For example, a change might not be warranted where the defendants had voluntarily committed themselves to do more than it turned out they were obligated to do under the Constitution,[169] but they might be entitled to a change where they have committed themselves to do no more than the law requires or where the court itself has issued an injunction, which will be limited necessarily by the changing contours of the law.[170] Here again, the *Rufo* Court would have been of great assistance to the lower courts had it taken the time to explain fully how to handle the problems that might arise in applying its tests.

c. Applying *Rufo* to School Desegregation Cases and Other Institutional Reform Cases

Although the *Rufo* standard for consent decree modification arose from a case challenging conditions in a county jail, *Rufo* has direct future application to all types of institutional reform cases, including school desegregation cases.[171] Both Justice White's majority opinion and Justice Stevens's dissent cited school desegregation cases such as *Brown* to explain why flexibility is required in the entire class of institutional reform cases. None of the opinions in *Rufo* even remotely suggested that the analysis adopted there was sui generis to jail cases.[172]

The major concerns raised above—that district courts will give too much deference to the professional judgment of defendants, who may be looking for excuses to avoid obligations under consent decrees, and appellate courts will give too little deference by appellate courts to district courts in deciding the "primary purposes" of decrees and how best to implement them—obviously apply to the school desegregation context as well. It is too soon to tell whether these concerns will turn out to be

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tion previously reserved, it is a new rule, while if it applies a prior decision almost directly on point to a closely analogous set of facts, it is not. Second, when the question is a close one, we will look to (1) whether the case at issue departs from previous rulings by lower courts or state courts, and (2) the level of generality of prior precedent in light of factual context in which that precedent arose.

169. *Rufo*, 112 S. Ct. at 762.

170. *See, e.g.*, Railway Employees v. Wright, 364 U.S. 642 (1961).

171. *See, e.g.*, People Who Care v. Rockford Bd. of Educ., No. 89-C20168, 1992 WL 184303 (N.D. Ill. 1992) (school desegregation case); Wyatt v. King, 803 F. Supp. 377 (M.D. Ala. 1992) (institutions for mentally ill and retarded). In both cases, defendants' requests for modification were denied under *Rufo*.

172. *Accord* Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141, 1148-49 (6th Cir. 1992) (*Rufo* not limited to prison reform cases; applies to school desegregation cases); United States v. City of Chicago, 978 F.2d 325 (7th Cir. 1992) (applying *Rufo* to employment discrimination case).

justified.[173] Despite these concerns, properly understood,[174] the test that the Court adopted in *Rufo* on the basis of the entirety of *Swift* should succeed as a workable basic standard for deciding whether the prospective application of any institutional reform decrees—including those in school desegregation cases—are still equitable.[175]

II. Partial Release from Active Supervision of the District Court

A motion to modify a consent decree or injunction is based on the premise that the order needs to be changed because it is not equitable to require compliance with one or more of its directives. A request to be partially released from active supervision of the district court is based on a different premise: the order needs to be modified because the defendant has complied with some of its provisions. To illustrate the difference, let us assume that under an injunction or consent decree containing provisions A, B, and C, the defendant is in compliance with provision A, but not provisions B or C. A defendant desiring to modify its obligation to comply with provisions B or C would seek relief through the use of a motion for modification under Rule 60(b)(5). The applicable standards would be the ones discussed in section I above.

Now assume that the defendant does not desire relief from provisions B and C, but instead wishes to avoid the active supervision of the

173. Another problem that seems to be arising is that some defendants are using *Rufo* as an excuse to avoid or delay their obligations under the applicable consent decrees. In effect, they are contending that *Rufo* itself is a change in the law which warrants modification. *See, e.g.*, Halderman v. Pennhurst State Sch. & Hosp., 784 F. Supp. 215, 216 (E.D. Pa. 1992) (expressing dismay at defendants' attempt to use *Rufo* to avoid their obligations when there is no change of law or fact).

174. *See infra* text accompanying notes 318-335.

175. There is little apparent reason why the test announced in *Rufo* cannot apply in general to all requests for modification under Fed. R. Civ. P. 60(b)(5). *See* 11 WRIGHT & MILLER, *supra* note 33, § 2863 at 208-10 (1973) ("[O]n an adequate showing the courts will provide relief if it no longer is equitable that the judgment be enforced, whether because of subsequent legislation, a change in the decisional law, or a change in the operative facts." (citing modifications granted in cases of wide variety of subject matter)).

Some courts have already accepted *Rufo*'s general application. *E.g.*, United States v. Western Elec. Co., 969 F.2d 1231, 1235 n.7 (D.C. Cir. 1992) (antitrust consent decree); Deweerth v. Baldinger, 804 F. Supp. 539 (S.D.N.Y. 1992) (granting modification under *Rufo* due to change of law in a case involving ownership of works of art). *But see* W.L. Gore & Assoc., Inc. v. Bard, 977 F.2d 557 (9th Cir. 1992) (majority in patent case relying on *Carey* to distinguish *Rufo* as applying only to "public or service institution" cases; concurrence believing *Rufo* applied to all types of cases); Comment, *A Judicial Role for Proceedings Involving Uncontested Modifications To Existing Consent Decrees*, 41 CATH. U. L. REV. 665, 667 n.9 (1992) (stating that despite *Rufo*, *Swift* applies to requests for modification of antitrust consent decrees).

district court under provision A while it concentrates on achieving compliance with provisions B and C. Until recently, it was not clear whether a court was: (a) required to grant, (b) prohibited from granting, or (c) permitted to grant such partial relief from supervision. In recent years, courts interpreting Supreme Court precedent had given all three answers. In *Freeman v. Pitts*,[176] the Supreme Court has decided that the right answer is (c): such relief is now permitted in the district court's equitable discretion. A defendant in partial compliance with a decree may obtain partial release from active judicial supervision.

A. Is Partial Relief Required?

Before *Pitts*, the notion that partial relief was *required* rested on then-Associate Justice Rehnquist's opinion for the majority in *Pasadena City Board of Education v. Spangler*.[177] In *Spangler*, the district court determined in 1970, after a full hearing on the merits, that the defendant school board had engaged in racial discrimination. In particular, it found discrimination in the hiring and promotion of staff and faculty, and in acts and policies that fostered segregation.[178] Part of the district court's remedy was to order the defendants to develop and submit a plan with the goal of having no school where a majority of students come from any one minority group. The school board's plan achieved the "no majority of any minority" goal in the first year it was implemented, but not over the next few years.[179]

In 1974, shortly after an election in which several new members were elected to the school board on an anti-decree and anti-busing platform,[180] the school board sought changes in the court's order. The desired changes would either have led to termination of the court's continuing jurisdiction over the case or to modification of the order so that parents could choose the school their children would attend.[181] The district court rejected this request in a full opinion on the grounds that the purposes of the decree had not been achieved and the original orders were not unfairly oppressive to the defendants.[182] A panel of the Ninth

176. 112 S. Ct. 1430 (1992).

177. 427 U.S. 424 (1976).

178. Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 505-06 (C.D. Cal. 1970).

179. Spangler v. Pasadena City Bd. of Educ., 375 F. Supp. 1304, 1306 (C.D. Cal. 1974), *aff'd*, 519 F.2d 430 (9th Cir. 1975), *vacated*, 427 U.S. 424 (1976). The defendants violated other portions of the order as well. Spangler v. Pasadena City Bd. of Educ., 384 F. Supp. 846, 849 (C.D. Cal. 1974).

180. *Spangler*, 519 F.2d at 435.

181. Spangler v. Pasadena City Bd. of Educ., 375 F. Supp. 1304, 1305 (C.D. Cal. 1974).

182. *Id.* at 1305-09.

Circuit affirmed the district court on these points.[183] Two of the judges on the panel, however, noted their disapproval of a remark that the district judge had made from the bench during the hearing to the effect that "at least during my lifetime there would be no majority of any minority in any school in Pasadena."[184]

The Supreme Court reversed in an opinion by Justice Rehnquist[185] which focused heavily on the "in my lifetime" remark. The majority did not consider, under the traditional appellate standards of review, the appropriateness of the holdings in the district and circuit opinions on the defendants' continued failure to eradicate segregation. Nor did it address the findings that the freedom of choice plan the defendants had proposed was unsuitable to achieving that goal. Instead, Justice Rehnquist's opinion for the Court held that because the defendants had been in technical compliance with the "no majority of any minority" requirement for one school term, the defendants were no longer required to comply with this requirement and had to be permanently released from its strictures.[186]

The primary stated basis[187] for this holding was that the intervening decision in *Swann v. Charlotte-Mecklenburg Board of Education*[188] had created a limit on the scope of the judicially created relief available to correct violations of the Fourteenth Amendment.[189] It is true that the *Swann* Court had stated that what a court could do to achieve and maintain racial balance was limited by the goal of correcting the effects of de jure segregation.[190] The *Swann* Court, however, made these statements in the specific context of distinguishing between the broad powers a court possessed before, and the more limited powers it possessed after, all vestiges of intentional segregation had been eliminated from the defendant

183. *Spangler*, 519 F.2d at 434-38.

184. *Id.* at 437-38. One judge concurred on this point, *id.* at 440; one dissented, *id.* at 443.

185. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

186. *Id.* at 436-37.

187. The other basis was the fact that the "no majority of any minority" provision was ambiguous and that the district court had a different understanding of its meaning than that of the parties. *Id.* at 433.

188. 402 U.S. 1 (1971). The Supreme Court announced *Swann* well after the district court entered the decree in 1970.

Swann made clear that only proof of intentional de jure segregation of students by race gives rise to liability under *Brown*, but that the remedy for that violation must be designed to "eliminate from the public schools all vestiges of state-imposed segregation." *Id.* at 15. A school system that has eliminated these vestiges is often called "unitary," while a system that has engaged in intentional segregation and has not eliminated the vestiges is often labelled "dual." *E.g.*, *Dowell III*, 111 S. Ct. at 636. *See generally* G. Scott Williams, Note, *Unitary School Systems and Underlying Vestiges of State-Imposed Segregation*, 87 COLUM. L. REV. 794 (1987).

189. *Spangler*, 427 U.S. at 433-34.

190. *Swann*, 402 U.S. at 31-32.

school system. Justice Rehnquist did not explain why a limit on judicial power that, under *Swann*, applied only after the vestiges of de jure segregation had been eliminated also applied *before* that goal had been met.[191]

Although Justice Marshall saw (and strongly disagreed with) the potential import of *Spangler*, lower courts have been reluctant to accept the opinion's limitation on their power to supervise the implementation of school desegregation decrees.[192] The First Circuit, however, squarely followed *Spangler*'s lead in *Morgan v. Nucci*.[193]

Morgan challenged segregation in the Boston, Massachusetts public school system.[194] After the circuit upheld its findings that the schools were being run unconstitutionally,[195] the district court began to implement a remedial plan in 1975.[196] By 1982, the district court found that significant progress had been made towards the goal of a unitary (fully integrated) system and began to disengage from supervision of the defendant school board. Many of the original remedial orders were termi-

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191. Justice Marshall made this point in his dissent:

> According to the Court, it follows from our decision in *Swann* that as soon as the school attendance zone scheme had been successful, even for a very short period, in fulfilling its objectives, the District Court should have relaxed its supervision over that aspect of the desegregation plan. It is irrelevant to the Court that the system may not have achieved " 'unitary' status in all other respects such as the hiring and promoting of teachers and administrators."

Spangler, 427 U.S. at 442 (Marshall, J., dissenting) (quoting the majority opinion, *id.* at 438 n.5).

192. *See, e.g.*, Jost, *Modification of Injunctions*, *supra* note 15, at 1158 ("It is telling that *Spangler* has been distinguished in numerous subsequent cases and limited to its facts as Rehnquist described them.") & 1158-59 n.343 (collecting cases). Other commentators have taken *Spangler* to be a strong statement about the limits of judicial power in this context. *See, e.g.*, Beard, *supra* note 65, at 1284:

> Thus, an inquiry into whether a school district as a whole has achieved unitary status is comprised of a series of inquiries into the unitariness of the discrete components of the system. As to each such component, the district court's remedial authority expires upon the full and proper implementation of the pertinent provisions of a desegregation decree designed to achieve unitary status.

See also Paul Brest, *The Supreme Court, 1975 Term-Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 56, 223 (1976) ("having implemented a racially neutral attendance pattern once . . . even briefly").

193. 831 F.2d 313 (1st Cir. 1987).

194. The history of the litigation is detailed in Seth Ptasiewicz, Note, *The Unitariness Dilemma: The First Circuit's Attempt to Develop a Test for Determining When a System is Unitary*, 66 WASH. U. L.Q. 615, 625-627 (1988). For a journalist's account of the case, see J. ANTHONY LUKAS, COMMON GROUND (1985).

195. Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom.*, Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

196. Morgan v. Kerrigan, 401 F. Supp. 216, 256-57 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1975), *cert. denied*, 426 U.S. 935 (1976). The plan combined district-wide magnet schools and racial balancing of schools within geographic community districts.

nated permanently.[197] In a number of key areas, however, where the district court believed that further judicial control was needed, it issued "final orders."[198] The final order for student assignments, for example, required the school board to maintain a specific racial mix in the schools, as the court had required while it was actively supervising the school system.[199] These final orders effectively kept the school district under the court's permanent jurisdiction, if not its daily supervision.

The district court's "final orders" were appealed. The First Circuit recognized that the Boston school system had not achieved unitariness in all aspects.[200] In its view, however, the "threshold question" was whether the lack of unitariness in areas other than student assignments "provides justification for the district court to continue to impose its specific student assignments plan."[201] The court's response to its own question was that under *Spangler*, "we believe the answer to this question is clearly 'no.' Our primary inquiry is, therefore, whether unitariness has been reached *in the area of student assignments* itself."[202] Although the circuit court thought that the record was clear,[203] it remanded the case, allowing the district court to determine through a hearing whether the Boston schools actually had achieved unitariness in student assignments.[204] If the district court concluded that the schools had achieved unitariness in this area, it was to release the school board from supervision of any kind on this matter.[205]

197. *See* Morgan v. Nucci, 831 F.2d at 315-16.

198. Morgan v. Nucci, 620 F. Supp. 214, 215-17 (D. Mass. 1985).

199. *Morgan*, 831 F.2d at 317.

200. For example, the court noted that the system had not met its goals in hiring minority faculty. *Id.* at 318.

201. *Id.*

202. *Id.* At a later point, the court elaborated on why it believed *Spangler* required this result. *Id.* at 318-19. The Fifth and Tenth Circuits subsequently approved of *Morgan*'s reading of *Spangler*. Flax v. Potts, 915 F.2d 155, 159 (5th Cir. 1990); Keyes v. School Dist. No. 1, 895 F.2d 659, 666 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1040 (1991). *Accord*, Jansen v. City of Cincinnati, 977 F.2d 238 (6th Cir. 1992). Oddly, the Sixth Circuit's opinion does not cite Freeman v. Pitts, 112 S. Ct. 1430 (1992), which was handed down a few months before *Jansen* and contradicts *Morgan*'s reading of *Spangler*. *See infra* notes 205-211 and accompanying text.

203. *Morgan*, 831 F.2d at 318.

204. The circuit court provided guidance by creating a three-part test for making this determination: (1) the number of racially-identifiable schools remaining in the system; (2) whether the defendants had demonstrated good faith in the desegregation effort; and (3) whether maximum practicable desegregation of the student bodies at the different schools had been achieved. *Id.* at 319-24. For commentary on the First Circuit's test, see Beard, *supra* note 65 at 1280 (approving) and Ptasiewicz, *supra* note 194, at 637-42 (criticizing).

205. On remand, however, the district court determined that even under the First Circuit's test, the school system had not achieved unitariness. In affirming this ruling, the circuit drew back a bit from the most extreme implications of its prior opinion. It refused to subdivide

B. Is Partial Relief Prohibited?

Until it was overruled in 1992, the leading case taking the position that partial relief was prohibited was the Eleventh Circuit's opinion in *Pitts v. Freeman*.[206] After supervising the DeKalb County, Georgia (suburban Atlanta) school system since 1969, the district court ruled in 1986 that the defendants had not achieved unitary status in toto, but had done so in four categories, including student assignments.[207] Taking its lead from the First Circuit's opinion in *Morgan*, the district court held in *Pitts* that it would order no further relief in the areas in which it found that the defendants were in unitary status. It did order further relief in the areas in which the defendants had not achieved unitary status.[208]

The Eleventh Circuit upheld the district court's finding that the defendant school district was not completely unitary. Nevertheless, it reversed the ruling that the defendants had no further duties in those areas (particularly student assignments) which the district court had found to be unitary. The circuit expressly rejected the approach taken in *Morgan*[209] and held that a school system is unitary only after it has simultaneously satisfied all of the *Green* factors[210] for several years.[211] Until it has done so, the circuit ruled, the defendants were responsible for any racial imbalances that occurred, even in areas that were unitary. The defendants had to undertake actions that "may be administratively awk-

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areas such as student and faculty assignments into even smaller pieces. "To do so would open the door to substantial regression [in desegregation]." Morgan v. Burke, 926 F.2d 86, 92 (1st Cir. 1991), *cert. denied sub nom.* Boston Teachers' Union v. Morgan, 112 S. Ct. 1664 (1992).

206. 887 F.2d 1438 (11th Cir. 1989), *rev'd*, 112 S. Ct. 1430 (1992) (*Pitts*).

207. The district court considered whether the defendant had achieved unitary status with respect to the factors identified in Green v. New Kent County Sch. Bd., 391 U.S. 430, 441 (1968). *See Freeman*, 112 S. Ct. at 1437. The "*Green* factors" are: student assignments, faculty assignments, staff assignments, transportation, physical facilities, and extracurricular activities. *Green*, 391 U.S. at 435.

208. *Freeman*, 112 S. Ct. at 1442.

209. The circuit panel believed that the *Morgan* court was wrong to hold that *Spangler* supported (let alone compelled) the incremental approach. The *Pitts* court thought that in *Spangler*, the Supreme Court had "simply refused to approve the Pasadena School Board's rigid requirement that no minority comprise a majority of any school population." *Pitts*, 887 F.2d at 1447. Aside from the *Spangler* decision itself, the court's sole supporting authority for this conclusion was a footnote in a student's law journal note. *Id.*, *quoting* Tracy E. Sivitz, Note, *Eliminating the Continuing Effects of the Violation: Compensatory Education as a Remedy for Unlawful School Segregation*, 97 YALE L.J. 1173, 1191 n.104 (1988).

210. *See supra* note 207 (defining *Green* factors).

211. *Pitts*, 887 F.2d at 1446. The circuit court noted that the *Green* factors operated in part as an indicator of the intangible vestiges of discrimination. *Id.* at 1449. In other words, it saw the *Green* factors as a means to an end (the complete elimination of illegal segregation) rather than ends in themselves.

ward, inconvenient, and even bizarre in some situations."[212]

Whatever its merits in the abstract,[213] no other court followed *Pitts* in its brief life.[214] The Supreme Court granted certiorari in 1991[215] and reversed.[216]

C. Is Partial Relief Permitted?

In *Freeman v. Pitts*,[217] the Supreme Court steered a middle course between requiring and prohibiting partial withdrawal of supervision. Writing for the majority, Justice Kennedy framed the issue as "whether a district court *may* relinquish its supervision and control over those aspects of a school system in which there has been compliance with a desegregation decree if other aspects of the system remain in noncompliance."[218]

Justice Kennedy began to answer by first affirming that a school district once segregated by law had to eliminate the vestiges of the de jure system in order "to insure that the principal wrong, . . . the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present."[219] He described the *Green* factors as "a measure of the racial identifiability of schools in a system that is not in compliance with *Brown*."[220] He also affirmed that "[t]he term 'unitary' does not confine the discretion and authority of the District Court in a way that departs from traditional equitable principles."[221] Moreover, the "equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision."[222]

Justice Kennedy then turned his attention to "[o]ur application of

212. *Pitts*, 887 F.2d at 1450 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971)).

213. In *Pitts*, the Eleventh Circuit noted that the *Green* factors were merely a way to achieve the goal of eliminating all vestiges of past illegal discrimination. Simply meeting one or more of the factors did not absolve the district court of its responsibility to look for other lingering effects of state-sponsored segregation. *Pitts*, 887 F.2d at 1446. For commentary generally supportive of the Eleventh Circuit's approach in *Pitts*, see Christopher, *supra* note 15, at 634-39 (1992).

214. *See* Flax v. Potts, 915 F.2d 155, 159 (5th Cir. 1990); Keyes v. School Dist. No. 1, 895 F.2d 659, 666 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1040 (1991) (both rejecting *Pitts* and following *Morgan*).

215. Freeman v. Pitts, 111 S. Ct. 949 (1991).

216. Freeman v. Pitts, 112 S. Ct. 1430 (1992).

217. *Id.*

218. *Id.* at 1443 (emphasis added).

219. *Freeman*, 112 S. Ct. at 1443. He stated that this was the "rationale and the objective of *Brown I* and *Brown II*." *Id.*

220. *Id.*

221. *Id.* at 1444.

222. *Freeman*, 112 S. Ct. at 1444.

these guiding principles" in *Spangler*.[223] After supplying two lengthy quotations from Justice Rehnquist's opinion,[224] Justice Kennedy purported to make "explicit the rationale that was central in *Spangler*."[225] According to the *Freeman* Court, that rationale was that "[a] federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control."[226] Justice Kennedy pointed out that incremental withdrawal was consistent with the duty to return the control of school matters to the local authorities as soon as practicable.[227] Surprisingly, however, Justice Kennedy never addressed the question of whether the *Morgan* Court had been correct to conclude that the very language he had quoted from *Spangler actually required* incremental withdrawal.[228] In the *Freeman* Court's view, it is simply up to the trial court to decide whether to use incremental withdrawal. Justice Kennedy either did not see, or chose not to point out, the difference between a rule that required incremental withdrawal and one that permitted it.[229]

223. *Id.* Although he did not mention it here, as a Ninth Circuit judge, Justice Kennedy ruled on a phase of the *Spangler* case. 611 F.2d 1239, 1242-48 (9th Cir. 1979) (holding that the entire decree should be dissolved after nine years of compliance).

224. *Freeman*, 112 S. Ct. at 1444. The quotations contain, inter alia, Justice Rehnquist's admonition that "having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function . . . ." *Id.* (quoting *Spangler*, 427 U.S. at 436).

225. *Id.*

226. *Id.* at 1444-45. At a later point in the opinion where he expressly announced the holding, Justice Kennedy reiterated that "federal courts have the authority to relinquish supervision and control" and that a court "may determine that it will not order further remedies in areas where the school district is in compliance with the decree." *Id.* at 1445. The next two sentences in the paragraph also describe the district court's authority in permissive terms. *Id.* at 1445-46.

227. *Id.* The opinion discusses and quotes from *Milliken v. Bradley*, 433 U.S. 267 (1977); *Board of Educ. v. Dowell*, 111 S. Ct. 630 (1991); and *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977).

228. The opinion merely noted that in *Pitts*, the Eleventh Circuit had rejected *Morgan's* incremental approach. *Freeman*, 112 S. Ct. at 1442. There is no hint from Justice Kennedy that *Morgan* had read *Spangler* as requiring the incremental approach.

229. It is this author's belief that Justice Kennedy's approach to writing this portion of the opinion may have been extremely important to the result. Using long quotations from *Spangler* (consisting of a full column in the Supreme Court Reporter), rather than analyzing the case's holding, helped to obscure the discrepancy between what most courts and commentators have thought *Spangler* said (incremental withdrawal *required*) and what Justice Kennedy said it said (incremental withdrawal *permitted*). This approach may have had the effect of lulling Justice Rehnquist into not writing a separate opinion in *Freeman*. If he had written, he might have clarified that his majority opinion in *Spangler* had imposed a mandatory duty on district courts.

The holding in the case also might have turned out differently if the Court had reviewed *Morgan* instead of (or in tandem with) *Freeman*. Certiorari was denied in *Morgan* just three weeks after *Freeman* was decided. Boston Teachers' Union v. Morgan, 112 S. Ct. 1664 (1992).

The Supreme Court did not leave district courts with unfettered discretion. The Court noted that discretion to order incremental withdrawal "must be exercised in a manner consistent with the purposes and objectives of its equitable power."[230] The factors the Court suggested to inform the sound discretion of the district court were: (1) whether there has been full and satisfactory compliance with the decree in those aspects where supervision is to be withdrawn; (2) whether retention of judicial control is necessary or practicable to achieve compliance with other portions of the decree; and (3) whether the defendant school district has demonstrated its good faith commitment to the whole of the decree and the law that was the original predicate for judicial intervention.[231]

The Court then proceeded to demonstrate why the court of appeals was wrong to prohibit the district court from relinquishing partial control.[232] First, under its test, the Court looked to see whether the defendants had achieved full and satisfactory compliance with those aspects of the decree where the district court contemplated a withdrawal of supervision. As part of this aspect of its review, the Court approved of the district court's examination of the *Green* factors as demonstrating that the factors need not be a rigid framework.[233] The Court then rejected the

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If the Court had reviewed *Morgan*, it would have had no choice but to face the question of whether *Spangler* had created a mandatory or permissive rule. If the issue had been presented sharply, it is quite possible that at least Chief Justice Rehnquist (author of *Spangler*), Justice White (a member of the majority in *Spangler*) and perhaps Justice Scalia would have joined a separate opinion taking a rigid view of *Spangler*'s holding. This might have affected the outcome in *Freeman*, which was a split vote. (Only Chief Justice Rehnquist, Justice White, and Justice Souter joined Justice Kennedy's opinion in full. Justices Blackmun, Stevens, and O'Connor concurred in the judgment; Justice Souter, who joined in the majority opinion, wrote a separate concurrence; Scalia wrote a separate concurring opinion; Justice Thomas did not participate.) For discussion of the "art of weakening precedent," see Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 98-109 (1991).

230. *Freeman*, 112 S. Ct. at 1446. None of the opinions written in *Freeman* considered the application of standards codified in rules such as FED. R. CIV. P. 60(b)(5), as the Court had done in *Rufo*. There is no obvious reason why the Court did not use the terms of the rule as its starting point. The decree was a final judgment; ordinarily relief from its prospective application would be governed by the terms of Rule 60(b)(5). *See* 7 MOORE *supra* note 33, ¶ 60.26[4] at 60-251.

231. *Freeman*, 112 S. Ct. at 1446. It is noteworthy that these factors go much more towards ensuring the effective implementation of the decree rather than the federalism or separation of power concerns that have been a hallmark of so many other recent opinions of the Court in this area. *Compare, e.g., Rufo*, 112 S. Ct. at 764 (noting that federalism requires some deference to governmental defendants in tailoring modifications of a decree).

232. Although the Court remanded for further proceedings on specific issues, it did not explain why it did not simply remand to the court of appeals to determine in the first instance whether the district court had abused its discretion under the newly announced test.

233. The Court described the district court's approach as addressing the *Green* factors, inquiring whether further elements ought to be identified, and determining whether minority

circuit court's view that *Swann* required "awkward," "inconvenient," and "even bizarre" measures.[234] Most importantly, the Court stated that the school board did not have to take such extreme measures in the late phases of implementing a decree if certain conditions were true. The school board did not have to act when the imbalance in student assignments was attributable to independent demographic forces rather than either the prior de jure system or to a later violation by the school district.[235] Because the student reassignment plan accomplished its objectives in the first year of operation, before "dramatic demographic changes altered residential patterns"[236] and the defendant school board was found not to be responsible for those changes,[237] the first criterion in Justice Kennedy's test was established.

The Court did not rule on the effect of the second criterion, whether the retention of judicial control over an area found to have achieved unitary status was necessary or practicable to achieve compliance with other portions of the decree. Although the Court noted that it had previously recognized that student and faculty segregation could be related problems, it remanded to the district court to make specific findings on this aspect of the case in light of the opinion. In contrast to the first criterion, where the burden of persuasion was clearly placed on the defendant, Justice Kennedy suggested that the burden of persuasion for the second criterion lay elsewhere.[238] He did not explain why the Court had not placed the burden of persuasion for this part of the test upon the defendants, as it did for the other two parts.

The Court also ordered more specific findings on Justice Kennedy's third criterion, the school district's demonstration of good faith commitment to the entire desegregation plan.[239] There was no finding that the

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students were being disadvantaged in ways that required new and further remedies to insure full compliance with the decree. *Freeman*, 112 S. Ct. at 1446-47.

234. *Id.* at 1447.

235. *Id.* The Court made clear that the school district had the burden of showing that any current imbalance in student attendance was not traceable "in a proximate way" to the prior violation. The Court then demonstrated why the district court was correct to find that in this case the resegregation was the product of private choices and not state action. *Id.* at 1446-48.

236. *Id.* at 1447.

237. "It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation. And the law need not proceed on that premise." *Id.* at 1448.

238. "There was no showing that racial balancing was an appropriate mechanism to cure other deficiencies in this case. . . . [T]he record does not show that student reassignments would be a feasible or practicable way to remedy [non-compliance with respect to faculty reassignments]." *Freeman*, 112 S. Ct. at 1449.

239. Justice Kennedy did not specify whether the district court was to look for good faith under a subjective or an objective test. His opinion suggests, however, that it is a mixture of

school board had either acted in bad faith or committed acts of discrimination since the plan went into effect. The Supreme Court remanded, however, because it believed that the lack of a finding of bad faith was not necessarily the equivalent of an express finding that the school district had made an affirmative commitment to act in good faith with the entire plan.[240]

Freeman inspired three concurring opinions. Justice Scalia approved of the result, but noted that its narrow ground, a finding that no portion of the racial imbalance was a remnant of prior de jure segregation, was an "extraordinarily rare circumstance."[241] In a lengthy essay joined by no other Justice, he called for the Court to face what is to be done in the other school districts where "democratic processes remain suspended, with no prospect of restoration, 38 years after [*Brown I*]."[242] Justice

both. "A history of good faith compliance [i.e., an objective test] is evidence that any current racial imbalance is not the product of a new de jure violation, 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 [i.e., a subjective test]." *Id.* at 1449-50. *Compare* Ptasiewicz, *supra* note 194, at 637-38 (criticizing the *Morgan* court for not specifying whether the test of the school board's good faith should be objective or subjective).

Justice Kennedy did not specify in *Freeman* how long the period of good faith compliance must last. (The Court avoided a similar opportunity the year before in *Board of Educ. of Oklahoma City v. Dowell*, 111 S. Ct. 630, 637 (1991)). The Eleventh Circuit has long required a school system to maintain racial equality in all the *Green* factors for three years before it could achieve unitary status and be released from jurisdiction. *See* Lee v. Etowah County Bd. of Educ., 963 F.2d 1416, 1421-22 (11th Cir. 1992); Pitts v. Freeman, 887 F.2d 1438, 1450 (11th Cir. 1989), *rev'd on other grounds*, *Freeman*, 112 S. Ct. 1430 (1992); Youngblood v. Board of Pub. Instruction, 448 F.2d 770, 771 (5th Cir. 1971) (Eleventh Circuit carved from former Fifth Circuit in 1981). Others have suggested that a much longer period must elapse. *E.g.*, Gewirtz,, *supra* note 15, at 793 ("A period of sustained compliance, perhaps an entire generation, is needed for public perceptions about the racial character of the schools to be transformed"). *Accord* Ptasiewicz, *supra* note 194, at 641. In its amicus brief in *Freeman*, the Justice Department suggested that three years should be the minimum period, with 13 years (a generation of students) being adequate in all but the most unusual cases. Brief for the United States as Amicus Curiae Supporting Petitioners at 10-11 (No. 89-1290). *See also* Michael Greve, *Terminating School Desegregation Lawsuits*, 7 HARV. J.L. & PUB. POL'Y. 303, 312 (1984) (calling for Congress to enact a sunset law, which would automatically terminate desegregation lawsuits after a school district has operated under a court-ordered plan for a specified period of time). All of these authorities are considering what an appropriate time period should be before a district is completely released from the court's jurisdiction. A shorter period might be appropriate in certain instances of partial withdrawal, where the court is continuing to maintain jurisdiction over the entire case and can easily reactivate its supervision if necessary.

240. *Freeman*, 112 S. Ct. at 1450.

241. *Id.* (Scalia, J., concurring).

242. *Id.* "At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools." *Id.* at 1453.

Scalia called for a return to what he thought were the ordinary principles of law and our democratic heritage—that plaintiffs must prove intent and causation and not merely the existence of racial disparity, that public schools, even in the South, should be controlled by local officials and parents, and that pupils should be able to attend schools nearest their homes.[243]

Justice Souter joined Justice Kennedy's opinion, but wrote separately to explain his understanding of what the Court was requiring of the district courts.[244] He pointed out that the district court might need to continue to supervise areas found to have achieved unitary status in more situations than Justice Kennedy identified. First, rather than being unrelated phenomena, as the majority affirmed was true in DeKalb County, in other situations the dual school system could be the cause of the demographic shifts. Second, an unremedied "*Green*-type factor" might serve as an incubator for resegregation in another factor. In Justice Souter's view, the district court should make a specific finding that there was no immediate threat of resegregation occurring in this way before relinquishing partial supervision. Moreover, Justice Souter clarified that if resegregation should occur, the district court would be free to reassert control without requiring the plaintiffs to prove that the defendants intended to discriminate, because the court would still have jurisdiction over the case.[245]

Justice Blackmun, joined by Justices Stevens and O'Connor, concurred in the judgment only.[246] Although agreeing with the holdings of the Court, he wrote separately for two reasons. First, Justice Blackmun wanted to be precise about what it means for the district court to retain jurisdiction while relinquishing supervision and control of a sub-part of the school system. In Justice Blackmun's view, until the desegregation decree is dissolved entirely: (a) the defendants have the duty to convert to a unitary system; (b) the duty is enforceable without new proof of a constitutional violation; and (c) the school board has the burden of proving that its actions are eliminating the effects of *de jure* segregation.[247] Justice Blackmun also wanted to elaborate on the factors the district court should consider in determining whether racial imbalance was traceable

243. *Id.* at 1454.

244. *Id.* (Souter, J., concurring).

245. *Id.* at 1454-55. These were the first remarks Justice Souter had made about a desegregation matter since joining the Court.

246. *Id.* at 1455 (Blackmun, J., concurring in the judgment).

247. *Freeman*, 112 S. Ct. at 1456.

to board actions.[248] Like Justice Souter, Justice Blackmun signaled lower courts that they should not be too quick to release school districts, even partially, from their active supervision.

Thus, eight Justices[249] agreed that partial withdrawal of supervision is an appropriate step for the district court to take in the latter stages of the implementation of a desegregation decree. District courts are permitted to take this step now, but contrary to the principle that might well have been inferred from *Spangler*, they are distinctly not required to do so in all instances.[250] If the district courts faithfully require defendants to meet the burdens of persuasion announced in *Freeman*, partial withdrawal will not often be granted. Moreover, if the district courts can (and do) simply reactivate their supervision as easily as Justices Souter and Blackmun suggest—and as Justice Kennedy's opinion for the majority does not deny[251]—partial withdrawals need not become significant impediments to the achievement of effective school desegregation. If the district courts take their cue from Justice Scalia, however, whose urgent desire to get the federal judiciary out of the school desegregation business is unmistakable, the courts will prematurely withdraw their supervision in part. They also may unnecessarily hesitate to restore supervision should it become appropriate or improperly put the onus on the plaintiffs to prove that the defendants intended for segregation to return.[252]

III. Complete Release of School Boards from the Jurisdiction of the Court

To illustrate the difference between a partial release from the supervision of the court and a complete release from its jurisdiction,[253] let us

248. Justice Blackmun particularly emphasized the obligation of the school board to prove that its own policies did not contribute to demographic changes, including residential segregation, which led to racially identifiable schools. *Id.* at 1457-60.

249. Justice Thomas did not participate in the decision.

250. *See, e.g.*, Stone v. Prince George's County Bd. of Educ., 977 F.2d 574 (table), No. 91-2127, 1992 WL 238254 (4th Cir. 1992) (unreported decision); Board of Pub. Educ. for Savannah v. Georgia, No. CV 490-101, 1992 WL 322299, *7 (N.D. Ga. 1992) (unreported decision) (citing *Freeman* as giving district courts discretion to use partial withdrawal).

251. *Compare* Beard, *supra* note 65, at 1284 ("As to each . . . component, the district court's remedial authority expires upon the full and proper implementation of the pertinent provisions of a desegregation decree.").

252. *See The Supreme Court, 1991 Term—Leading Cases*, *supra* note 138, at 259 (1992) ("*Freeman* appears to be part of an emerging trend in which the Court, unsympathetic to certain types of litigation but unwilling to impose doctrinal hurdles, merely defers to lower court judges who increasingly share the Court's outlook.").

253. Commonly, the words "supervision" and "jurisdiction" might be used interchangeably. For purposes of clarity, however, in this Article I have used the words in distinct contexts. "Supervision" is used to refer to a situation like *Freeman*, a case of incremental

return to the hypothetical desegregation decree containing provisions A, B, and C. Under *Freeman*, a defendant in compliance with provision A, but not provisions B and C, may be released from the active supervision of the district court under provision A while it concentrates on achieving compliance with provisions B and C. Now assume that the defendant school board is finally in compliance with all three provisions (in other words, the system is unitary). The defendant seeks complete release from the jurisdiction of the district court. What result?[254] After the circuit courts developed contradictory answers,[255] the Supreme Court decided recently that the district court must release the defendant school board from its jurisdiction within a "reasonable" (albeit undefined) period of

withdrawal (e.g., "partial release from the active supervision of the court"). "Jurisdiction" refers to a situation like *Dowell III*, where the court is asked to terminate its power over any aspect of the case (e.g., "complete release from the jurisdiction of the court").

254. The related matter, what happens when a school district that has been declared unitary takes action that has the effect of resegregating the school system, will be discussed in section IV *infra*.

255. *Compare* Dowell v. Board of Educ., 795 F.2d 1516, 1518-19 (10th Cir. 1986) (*Dowell I*) (no release from jurisdiction), *cert. denied*, 479 U.S. 938 (1986) and 890 F.2d 1483 (10th Cir. 1989) (*Dowell II*) (no release), *rev'd*, 111 S. Ct. 630 (1991) (*Dowell III*); *with* Pitts v. Freeman, 887 F.2d 1438, 1445 (11th Cir. 1989), *rev'd on other grounds*, 112 S. Ct. 1430 (1992) (requiring release from jurisdiction); Morgan v. Nucci, 831 F.2d 313, 318 (1st Cir. 1987); United States v. Overton, 834 F.2d 1171 (5th Cir. 1987) (requiring release); Riddick v. School Bd. of Norfolk, 784 F.2d 521, 535 (4th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986); Pitts v. Freeman, 755 F.2d 1423, 1427 (11th Cir. 1985) (requiring release); and Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239 (9th Cir. 1979) (requiring release).

For commentary on the lower court cases, see Lloyd C. Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees in Structural Reform Litigation*, 42 U. MIAMI L. REV. 401 (1987); Beard, *supra* note 65, at 1300-07; 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 (1990); Thomas E. Chandler, *The End of School Busing? School Desegregation and the Finding of Unitary Status*, 40 OKLA. L. REV. 519 (1987); Gewirtz, *supra* note 15, at 789-98; Brian K. Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 LA. L. REV. 789 (1988); Dennis G. Terez, *Protecting the Remedy of Unitary Schools*, 37 CASE W. RES. L. REV. 41 (1987); John E. Canady, Jr., Note, *Overcoming Original Sin: The Redemption of the Desegregated School System*, 27 HOUS. L. REV. 557 (1990); Christopher, *supra* note 15; Mitchell F. Ducey, Note, *The Unitary Finding and the Threat of School Resegregation:* Riddick v. School Board, 65 N.C. L. REV. 617 (1987); L. Kevin Sheridan, Jr., Note, *The Unitariness Finding and Its Effects on Mandatory Desegregation Injunctions*, 55 FORDHAM L. REV. 551 (1987); G. Scott Williams, Note, *Unitary School Systems and Underlying Vestiges of State-Imposed Segregation*, 87 COLUM. L. REV. 794 (1987); Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653 (1987); Annotation, Deborah Sprenger, *Circumstances Warranting Judicial Determination or Declaration of Unitary Status with Regard to Schools Operating Under Court-Ordered or -Supervised Desegregation Plans and the Effects of Such Declarations*, 94 A.L.R. FED. 667 (1987). For an earlier examination of the problem, see Richard B. Kendall, Note, *Retention of Jurisdiction in Desegregation Cases: A Causal and Attitudinal Analysis*, 52 S. CAL. L. REV. 195 (1978).

time after the system is unitary.[256]

Until the Supreme Court resolved the matter, the leading cases taking the contradictory positions were from the Fourth and Tenth Circuits.[257] In *Riddick v. School Board of Norfolk*,[258] the Fourth Circuit held that once a school district completely achieved unitary status, judicial oversight of the defendant education authorities must cease.[259] In *Dowell I*,[260] the Tenth Circuit disagreed with the position the Fourth Circuit adopted in *Riddick*. Although the Tenth Circuit agreed with the general proposition that school district affairs should be returned to the local elected authorities as soon as possible, it disagreed with the idea

256. Board of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 111 S. Ct. 630 (1991) (*Dowell III*).

257. For a listing of earlier cases, see Gewirtz, *supra* note 15, at 792 n.202.

258. 784 F.2d 521 (4th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986).

259. *Id.* at 535. As a result, under *Riddick*, the school board may take action after that date (such as ending mandatory busing in favor of neighborhood school assignments) which has the *effect* of creating racially identifiable schools unless the plaintiffs can demonstrate that the board's decision was made with the *intent* of resegregating the schools. *See* section IV *infra*.

260. 795 F.2d 1516 (10th Cir. 1986) (*Dowell I*), *cert. denied*, 479 U.S. 938 (1986). To understand *Dowell* properly, a brief chronology may be helpful:

1961: Plaintiffs (African-American students and parents) sue to end de jure segregation in public schools of Oklahoma City.

1963: District court finds that city had intentionally segregated public schools and housing in past and was still operating intentionally segregated schools.

1965: District court finds that neighborhood zoning plan for schools did not remedy past segregation because of residential segregation.

1972: District court orders adoption of "Finger Plan," a mandatory student assignment plan.

1977: After five years of compliance with Finger Plan, district court finds schools unitary and states that "jurisdiction . . . is terminated ipso facto." Order is not appealed.

1984: School Board adopts student reassignment plan (SRP), which allows more use of neighborhood schools.

1985: Plaintiffs move to reopen case, contending that schools are not unitary and SRP is a return to segregation. Motion denied by district court because the schools were unitary in 1977 as well as in 1985.

1986: *Dowell I* reverses district court. 795 F.2d 1516 (10th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986).

1987: District court finds that its orders should be vacated and schools returned to local control because the schools are unitary, the SRP was not adopted with discriminatory intent, and the defendants were not responsible for then-existing residential segregation.

1989: *Dowell II* reverses district court. 890 F.2d 1483 (10th Cir. 1989).

1991: *Dowell III* reverses *Dowell II* and remands. 111 S. Ct. 630, 633-35 (1991).

1991: Applying *Dowell III*, district court reaffirms 1987 findings and dismisses defendants from jurisdiction. 778 F. Supp. 1144 (W.D. Okla. 1991) (*Dowell IV*).

1992: District court denies plaintiffs' motion for leave to file motion to modify 1991 order of dismissal under Rules 60(b)(5) and (6). Events post-1987 must be challenged in entirely new action. 782 F. Supp. 574 (W.D. Okla. 1992) (*Dowell V*).

The history of the *Dowell* litigation is reviewed in Comment, *Replacing Confusion with Compromise: The Supreme Court's New Standard for Dissolving Desegregation Decrees in* Board of Education v. Dowell, 2 SETON HALL CONST. L.J. 337 (1991).

that the viability of permanent injunctions was affected by the termination of active judicial supervision of the case. Emphasizing the duty to achieve and maintain a unitary school system, the circuit court analogized to "any other case in which the beneficiary of a mandatory injunction seeks enforcement of the relief previously accorded by the court."[261] For the Tenth Circuit, a permanent injunction, once entered, was enforceable virtually in perpetuity.

In reviewing the case on appeal after remand to the district court, the Tenth Circuit reiterated its views. As the circuit panel explained in *Dowell II*, " 'an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate.' "[262] As a result, "compliance alone cannot become the basis for modifying or dissolving an injunction."[263] Thus, a desegregation decree remains in effect until a defendant school board can meet *Swift*'s grievous wrong test.[264]

The Supreme Court accepted *Dowell II* for review[265] and reversed[266] in a majority opinion written by Chief Justice Rehnquist.[267] The majority rejected the Tenth Circuit's reliance on *Swift*. Chief Justice Rehnquist noted that *United Shoe* had emphasized the context in *Swift* of the continuing danger of illegal restraints of trade that still existed when Justice Cardozo refused to permit the modification. In contrast, findings that the defendant school district was operating in compliance with the Constitution and that the school board was unlikely to return to its former ways would mean "that the purposes of the desegregation litigation

261. *Dowell I*, 795 F.2d at 1520.

262. *Dowell II*, 890 F.2d at 1513 (quoting Jost, *Modification of Injunctions*, *supra* note 15, at 1105). *Compare* 7 MOORE, *supra* note 33, ¶ 60.26[4] at 60-252-53:

> An injunction decree does not create a right; it is a remedy protective of a right. A party obtaining the injunction does not obtain a vested right; and accordingly its *prospective* features are subject to vacation or modification when warranted by equitable principles, whether the decree was entered in a contested case, as the result of a default, or by consent of the parties.

263. *Dowell II*, 890 F.2d at 1491 (citing United States v. W.T. Grant Co., 345 U.S. 629 (1953)). As a result, under *Dowell I* and *II*, a school board under a permanent injunction to desegregate could never take any action (such as ending busing in favor of neighborhood school assignments) which had the effect of creating racially identifiable schools. Under the Tenth Circuit's approach, the plaintiffs would have had no obligation to demonstrate that the board's decision was made with the intent of resegregating schools that had become unitary.

264. *Dowell II*, 890 F.2d at 1490. *See supra* text accompanying notes 45-47.

265. 110 S. Ct. 1521 (1990). In 1986, it had denied writs of certiorari in *Dowell I* and *Riddick* on the same day, leaving the lower courts to reflect further on the issue. 479 U.S. 938 (1986).

266. *Dowell III*, 111 S. Ct. 630, 632 (1991).

267. Justice Souter, having just replaced Justice Brennan, did not participate. *Id.* at 638. Justices Blackmun and Stevens joined a dissent written by Justice Marshall. *Id.* at 639 (Marshall, J., dissenting).

had been fully achieved. No additional showing of 'grievous wrong evoked by new and unforeseen conditions' is required of the school board."[268]

As an additional reason for supporting this result, Chief Justice Rehnquist stated that federal supervision of local school systems was always intended to be a temporary measure.[269] He noted that due to federalism concerns, it was not appropriate to have school desegregation decrees operate in perpetuity.[270] The Tenth Circuit's test, warned the Chief Justice, "would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future."[271]

Chief Justice Rehnquist did not demand that a district court release a school district from jurisdiction immediately. Rather, this should happen only after the defendant school board has operated the system in compliance with the decree "for a reasonable period of time"[272]—a period that he did not define. In deciding whether to modify or dissolve a desegregation decree, compliance over time was relevant to the district court's assessment of the school board's promise not to engage again in intentional discrimination.[273]

The Court remanded the case directly to the district court[274] so that it could decide whether the defendant board had made a sufficient showing of compliance as of 1985 to allow the injunction to have been dissolved as of that date. The Supreme Court did not provide much clear guidance on the standards to be applied on remand. Chief Justice Rehnquist laconically ordered the district court to consider the board's good faith compliance with the decree and "whether the vestiges of past discrimination had been eliminated to the extent practicable."[275]

Justice Marshall, dissenting, did not take issue with the idea that judicial supervision of a local school system should one day come to an

268. *Id.* at 637 (quoting *Swift*).

269. *Id.* (quoting *Brown II*, 349 U.S. at 299-301); *Green*, 391 U.S. at 436. Both cases described the "transition" to unitary systems.

270. *Dowell III*, 111 S. Ct. at 637.

271. *Id.* at 638. In the next sentence, Chief Justice Rehnquist referred to the Tenth Circuit's test as a "Draconian result." *Id.*

272. *Id.* at 637.

273. *Id.*

274. The Supreme Court did not explain why it remanded to the district court, rather than taking the customary step of remanding to the circuit court for proceedings not inconsistent with its opinion.

275. *Id.* at 638. The next paragraph of the opinion directed the district court to consider all of the *Green* factors, and not just student assignments. In a footnote, the majority directed the lower court to consider, *res nova*, the question of whether the present residential segregation in the city was a vestige of school segregation or of private decisionmaking and economics.

end.[276] His dissent focused instead on when a decree's purposes have been achieved.[277] He directed the bulk of his dissent at the majority's instruction that the district court decide whether the vestiges of de jure segregation had been eliminated "as far as practicable." Justice Marshall

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Id. n.2. With this one exception, there was no indication that the Supreme Court wanted the district court to consider anything beyond the *Green* factors.

On remand, the district court re-examined the evidence in the record of the 1987 hearings in light of *Dowell III*. *Dowell IV*, 778 F. Supp. 1144 (W.D. Okla. 1991). The district court refused to allow the plaintiffs additional discovery, to reopen the record, or to have a new hearing before issuing its decision. According to the district court, nothing past 1987 was relevant to the inquiry the Supreme Court ordered in *Dowell III* and the plaintiffs had an adequate opportunity in 1987 to present evidence regarding the events transpiring from 1972 to 1987. *Dowell IV*, 778 F. Supp. at 1151-52.

In a detailed opinion, the district court found that the board of education had made the required showings. The board had complied in good faith with the 1972 decree through the adoption of the SRP in 1985. *Id.* at 1156-60. There was no indication that the board would return to a system of de jure segregation in the future. *Id.* at 1159-60. Finally, the vestiges of discrimination had been eliminated to the extent practicable as of 1985, including all of the *Green* factors. Residential segregation was not chargeable to the defendant board as a vestige of discrimination. *Id.* at 1160-79. In examining individually each of the *Green* factors and the question of the board's responsibility for any remaining residential segregation, the district court did not consider whether there was any remaining stigmatic injury, as Justice Marshall had urged. *Dowell III*, 111 S. Ct. at 642 (Marshall, J., dissenting). Accordingly, as of 1985, the board was entitled to complete dissolution of the 1972 decree. *Dowell IV*, 778 F. Supp. at 1179.

As will be discussed in section IV *infra*, the district court also found that the school board adopted the SRP in 1985 for legitimate, nondiscriminatory reasons and without intent to discriminate. *Id.* at 1179-96. Because of the finding that the board had been entitled to complete dissolution of the 1972 decree before it had adopted the SRP, discriminatory intent could not be inferred from any disproportionate impact the board's decision may have had on the plaintiffs. *Id.* at 1192.

276. "I agree with the majority that the proper standard for determining whether a school desegregation decree should be dissolved is whether the purposes of the desegregation litigation, as incorporated in the decree, have been fully achieved." *Dowell III*, 111 S. Ct. at 641 (Marshall, J., dissenting.).

277. "In my view, a standard for dissolution of a desegregation decree must take into account the unique harm associated with a system of racially identifiable schools and must expressly demand the elimination of such schools." *Id.* at 642. Justice Marshall, the very person who successfully had brought and argued *Brown* before the Supreme Court forty years before, then reviewed in detail the importance of that opinion's focus on "the stigmatic injury caused by segregated schools." That focus both "explains our unflagging insistence that formerly *de jure* segregated school districts extinguish all vestiges of school segregation" and provides "guidance as to what conditions must be eliminated before a decree can be deemed to have served its purpose." *Id.*

For academic articulation of the intangible harms resulting from segregated schools, see Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1 (1992); Shane, *supra* note 4. For consideration of the argument that the cure for the stigmatic injury caused by segregated schools is not integration but curricular reform, see Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1992); Helaine Greenfield, Note, *Some Constitutional Problems with the Resegregation of Public Schools*, 80 GEO. L.J. 363 (1991).

feared that the majority's vague standard was too mild.[278] In his view, by focusing largely on the defendant's present and likely future compliance with the commands of the Equal Protection Clause, the majority ignored the concomitant duty to protect the plaintiffs by eradicating the stigmatic harm identified in *Brown I* and preventing its recurrence.[279] Although Justice Marshall probably was right to be concerned that the majority may have been establishing too mild a dissolution standard, it might prove impossible for any school system to demonstrate that it had completely eradicated the stigmatic harm resulting from its past wrongs.[280]

Dowell III has provided a clear answer to one question: once a school board has demonstrated that it has complied with the district court's mandates to eliminate the effects of intentional segregation, the court must release the board from its jurisdiction. In hindsight, despite the doubts the Tenth Circuit expressed twice to the contrary in *Dowell I* and *Dowell II*, the Supreme Court's answer is not only clear but is clearly correct under the logic of corrective justice[281]—the theory the entire

278. *Dowell III*, 111 S. Ct. at 642. *Accord*, Christopher, *supra* note 15, at 635:

> The majority opinion in *Dowell* [*III*] eschewed an in-depth, thoughtful review of what unitary status should entail in favor of an emphasis on the interests in reinstating local control over schools . . . . The clear mandate of Supreme Court precedent before *Dowell* [*III*] required school districts to remove all vestiges of past discriminatory practices. In *Dowell* [*III*] the Court slipped subtly, and perhaps pragmatically, to requiring the removal of discriminatory vestiges to the extent practicable. (citations omitted).

See also Maria A. Perugini, Note, Board of Education of Oklahoma City v. Dowell: *Protection of Local Authority or Disregard for the Purpose of* Brown v. Board of Education?, 41 CATH. U. L. REV. 779, 816 (1992) (criticizing *Dowell III*).

279. *Dowell III*, 111 S. Ct. at 644. Thus, Justice Marshall would have affirmed *Dowell II*, in which the Tenth Circuit ordered the district court to restore the desegregation decree. Otherwise, the SRP would lead to the creation of several racially identifiable schools that could be eliminated under the Finger Plan. *Id.*

280. Thus, at least one student commentator feared that Justice Marshall's approach "enshrines permanent judicial custody of public school districts." *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 273 (1991).

281. "[C]orrective justice promises . . . full correction of the constitutional harms that the state has caused to its citizens. Full correction means restoration of a notional *status quo ante*, by which the victims of illegal conduct are returned to the position they occupied before the wrong, and those responsible for the wrong are made to bear the burden of restoration." Roach, *supra* note 8, at 859.

Professor Gerwitz has contrasted the corrective approach to radical justice with two other types of justice: prohibitory and distributive justice. "The prohibitory approach . . . views the goal of antidiscrimination law as simply stopping new violations." Gerwitz, *supra* note 15, at 731. Under a distributive conception, "radical justice under the Constitution is understood as a specific radical distribution—for example, a representation of the races in population." *Id.* Under a corrective approach, a court does not just prohibit harm; it seeks to undo the harm done due to past violations. However, the goal of a corrective approach is to eliminate the effects of the past harm; it does not mandate a specific permanent distribution. *Id. See also*

Court embraced in *Dowell III*.[282] (Even Justice Marshall accepted that desegregation decrees were not to operate perpetually.)[283] As Professor Paul Gewirtz put it a few years ago in one of his perceptive essays on school desegregation, "[c]orrective intervention is supposed to be temporary, merely transitional; it is supposed to eliminate effects of the violation and then terminate."[284] *Dowell III* accomplished this goal by directing district courts to determine whether the defendants had remedied their violation of the plaintiffs' rights, and if the answer was "yes," to restore control of the schools to the rightful local authorities by terminating supervision over the defendants' actions.

Having determined that school boards had to be ultimately released from the jurisdiction of the district court, the Supreme Court necessarily had to face "the central termination question, . . . what it *means* to 'accomplish' desegregation and achieve 'unitary' status."[285] *Dowell III*'s answer to this second question—eliminate the vestiges of past discrimination "to the extent practicable"[286]—was clear, but it was not clearly correct.[287] *Dowell III*'s approach, which placed so much emphasis on the

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Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 Iowa L. Rev. 515 (1992).

282. The Court has applied corrective justice principles at least as far back as Green v. County School Board, 391 U.S. 430 (1986) (rejecting a freedom of choice plan as an adequate means to meet the requirements of *Brown*). *See* Gerwitz, *supra* note 15, at 739-40 ("*Green* cemented the Court's commitment to a corrective conception of an antidiscrimination remedy").

283. *Supra* note 267.

284. Gewirtz, *supra* note 15, at 789. Professor Gewirtz also observed that: "the assumption that corrective steps will be bounded in duration is at the core of what justifies the liberties of the corrective period, such as the courts' displacement of the usual institutions of policy making and administration in a locality . . . ." *Id.* Of course, not all commentators agree that the Supreme Court should have adopted corrective justice as its model. *See, e.g.*, Roach, *supra* note 8 (arguing that the remedial tradition of equity is theoretically and practically superior to the corrective justice model); Gewirtz, *supra* note 15, at 736-38 (discussing Professor Owen Fiss as an adherent of the distributive justice model, which holds that "integration is a permanent constitutional requirement").

285. Gewirtz, *supra* note 15, at 792.

286. Especially as operationalized as requiring a school board to meet the *Green* factors only.

287. No doubt the Court's decision on this point will be controversial. Some may praise the majority. *See, e.g.*, Beard, *supra* note 65, at 1284 ("[A]n inquiry into whether a school district as a whole has achieved unitary status is comprised of a series of inquiries into the unitariness of the discrete components of the system."). Others will criticize the majority for not taking into account the concerns that Justice Marshall raised. *See, e.g.*, Christopher, *supra* note 15, at 639 (*Dowell III* "ignored the spirit of the *Brown* mandate"). As indicated infra, the Supreme Court itself may be having some second thoughts about its choice in *Dowell III*. *Freeman*, 112 S. Ct. at 1448 ("[V]estiges of past segregation by state decree do remain in our society and in our schools. . . . The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied."); United States v. Fordice, 112 S. Ct. 2727,

need to restore local autonomy, may or may not actually deliver "a full remedy to the Afro-American children in the school system."[288]

At this point, one can only hope that when the courts apply *Dowell III* and say, "it is finished,"[289] they will be able to do so triumphantly.[290] The fact that *Dowell III* leaves us with merely a hope, however, suggests that Justice Marshall's fears will prove to be correct—that the end will be in despair, or exhaustion, rather than triumph. In addition, what if the court is wrong, and desegregation has not really been achieved, or segregation returns? It is to this problem that we now turn.

IV. Restoration of Supervision After Jurisdiction Is Ended

The problem addressed in the previous section of this Article, release of school boards from judicial supervision once the purposes of the decree have been fulfilled, is closely linked to the problem addressed in this section. Suppose that a school board has completely fulfilled provisions A, B, and C of the court's order for a reasonable period of time, that is, the schools are unitary. Under *Dowell III*, the district court must release the defendants from its supervision. Now assume that the school board subsequently establishes a policy which has a discriminatory effect on the plaintiffs and would resegregate in violation of provision A of the court's previous order if it were in effect. What standard is the court to apply in reviewing the plaintiffs' challenge to board decisions made in the

2736 (1992) (stating that mere adoption of race-neutral policies does not suffice to demonstrate abandonment of dual system of higher education).

288. *See Dowell III*, 111 S. Ct. at 648 (Marshall, J., dissenting) (arguing that this goal will not be accomplished under the majority's ruling). Professor Gewirtz predicted the adoption of some formula like *Dowell III*'s several years ago and along with the formula, a tilt for or against the plaintiffs:

> [S]ome simplifying proof rule or mechanism of approximation seems unavoidable given the empirical difficulties of knowing when to terminate. The particular proof mechanism used may well reflect not only the probabilities about whether desegregation really has been fully accomplished, but also a further value judgment about where the risks of mistakes should fall.

Gewirtz, *supra* note 15, at 797.

289. "[A]t some point—perhaps in words that could connote either triumph or despair—the court will come to say: it is finished." Gewirtz, *supra* note 15, at 798. *Compare* Roach, *supra* note 8, at 903-04 (contending that termination of a case driven by corrective justice principles may contain an unwarranted moral declaration that justice actually has been done; in contrast, a case driven by equitable principles more realistically ends with a modest declaration that a defendant institution no longer needs or can benefit from further "treatment").

290. It would be easy to tell if the end is in triumph: the plaintiffs, the defendants, and the court will celebrate the dissolution of the decree together. For one example of such a triumph, see Murray Levine, *The Role of Special Master in Institutional Reform Litigation: A Case Study*, 8 LAW & POL'Y 275, 291 (1986) (describing such a celebration at the end of a case significantly improving the standard of care for the mentally retarded in the state of Maine).

post-unitary phase? The opinions in *Riddick*, *Dowell I*, *Dowell II*, and *Dowell III* dealt with this problem—restoration of supervision—as well as the problem addressed in the previous section of the Article—release from supervision.

In *Riddick*, the Fourth Circuit held that once a school system is unitary in all facets of its operation, not only must the district court release the defendant school board from its jurisdiction, it has no residual power to automatically order further relief to counter any resegregation that may subsequently occur. The district court can restore its supervision over the schools only if the plaintiffs prove that the school board intended to resegregate.[291] In *Dowell I* and *II*, the Tenth Circuit took the contrary position. It held that termination of the district court's active supervision over a school system does not prevent it from taking measures designed to counter subsequent resegregation. Under the Tenth Circuit's approach, the district court never really releases the defendants from its jurisdiction, just from its active supervision. As a result, under *Dowell I* and *II*, a district court could reassert active supervision upon a mere showing that the defendants had violated its order.[292]

The Supreme Court unequivocally sided with the Fourth Circuit when it reversed the Tenth Circuit in *Dowell III*. In his opinion for the majority, Chief Justice Rehnquist observed:

> A school district which has been released from an injunction imposing a desegregation plan no longer requires court authorization for the promulgation of policies and rules . . . but it of course remains subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment.[293]

The logic of this conclusion, based on ideas of corrective justice,[294] evidently was so obvious to the Court that no further explanation, or even citation, was necessary. Even Justice Marshall, although he dissented on the question of when the school board could be released from jurisdic-

291. Riddick v. Sch. Bd. of Norfolk, 784 F.2d 521, 537-38 (1986). The Fifth Circuit later agreed. United States v. Overton, 834 F.2d 1171, 1174-75 (5th Cir. 1987).

292. *Dowell I*, 795 F.2d at 1520-23. For discussion of the problem prior to the decision in *Dowell III*, see sources cited in note 239 supra.

293. *Dowell III*, 111 S. Ct. 630, 638 (1991).

294. *See, e.g.*, Gewirtz, *supra* note 15, at 793 n.209 (under the logic of corrective justice principles, after release from court's jurisdiction, school board may adopt a choice system that produces more segregation than under the remedial plan, "provided that the board's action is not intentionally discriminatory and therefore is not a new constitutional violation"). Although Professor Gewirtz's article would support the result in *Dowell III*, it was not cited by the Court.

tion, agreed with the preclusive consequences of release.[295]

On remand, the district court had little trouble applying the directives the Court issued in *Dowell III*. In *Dowell IV*, the district court first determined that the school board had been entitled to be released from jurisdiction before it had adopted the SRP.[296] As a result, to challenge an action of the school board in the post-unitary phase, the plaintiffs had to demonstrate[297] that the board had acted with a segregative purpose in adopting the SRP.[298] It was not enough to demonstrate either that segregative consequences had resulted from the board's decision or even that the defendants knew that their action would have such consequences.[299] In *Dowell V*, the district court used the identical standard—requiring proof of the defendants' segregative purpose—in flatly rejecting the plaintiffs' attempt to use Rule 60(b) to obtain relief from its prior decision in *Dowell IV*.[300] Although the district court rejected the plaintiffs' attempt to use the rule on relief from judgments to reexamine the school board's decisions subsequent to the hearing held in 1987, it invited the plaintiffs to bring a new suit challenging the board's post-1987 actions.[301]

295. "[T]he dissolution of such a decree will mean that plaintiffs will have to mount a new constitutional challenge if they wish to contest the segregative effects of the school board's subsequent actions." *Dowell III*, 111 S. Ct. at 641 n.3 (Marshall, J., dissenting).

296. *Dowell IV*, 778 F. Supp. 1144, 1179 (W.D. Okla. 1991).

297. In effect, to challenge post-unitary actions under *Dowell III*, the plaintiffs must bring a whole new action. *See* Price v. Austin Indep. Sch. Dist., 945 F.2d 1307, 1315 (5th Cir. 1991) (issue preclusion applies where plaintiffs complain of school board actions taken after court declares system unitary); Beard, *supra* note 65, at 1309-13 (same). Under *Dowell III*, the plaintiffs are not entitled to any special procedural consideration in the post-unitary phase, as several commentators had urged previously. *E.g.*, Landsberg, *supra* note 65, at 826-27; Note, 100 HARV. L. REV., *supra* note 255, at 668-70. Both authors based their arguments on *Dowell I* and *II*.

298. *Dowell IV*, 778 F. Supp. at 1179. The district court noted that the plaintiffs had an extraordinary burden in order to prove discriminatory intent because a black school board member had the principal role in developing the SRP and several members of the black community testified in support of the plan. *Id.* at 1183. *But see* Ptasiewicz, *supra* note 194, at 638-39 (no assurance that black members of school board would act in best interest of black students).

299. *Dowell IV*, 778 F. Supp. at 1179-80. The district court relied principally on Personnel Admr. v. Feeney, 442 U.S. 256, 279 (1979), for its ruling that an awareness of consequences is not proof of discriminatory purpose. Although the district court's ruling is probably correct in terms of adherence to precedent in discrimination cases, in other contexts, proof of knowledge that a consequence is substantially certain to occur is treated as proof of intent. RESTATEMENT (SECOND) OF TORTS § 8A (1965). *See* David J. Jung & David I. Levine, *Whence Knowledge Intent? Whither Knowledge Intent?*, 20 U.C. DAVIS L. REV. 551 (1987).

300. *Dowell V*, 782 F. Supp. 574 (W.D. Okla. 1992).

301. *Dowell V*, 782 F. Supp. 574, 577. The district court reasoned that Rule 60(b)(5) was not applicable to an order of unconditional dismissal; there was no longer an order in force with any prospective application. *Id.* at 577-79. Rule 60(b)(6) did not apply because the plaintiffs could not show the requisite extraordinary circumstances. *Id.* at 579-81. *See* 7 MOORE,

The district court, in *Dowell IV* and *V*, understood the import of *Dowell III*. Once a district court has released a defendant school board from its supervision and jurisdiction, it may not automatically order further relief to counter any resegregation that may occur later.[302] The district court can restore its supervision over the schools only if the plaintiffs file a new action and prove that the school board intended to resegregate.

V. Application to *Brown v. Board of Education*

It is most fitting for a contribution to this Symposium observing the anniversary of *Brown I* to be able to consider the application of the Supreme Court's opinions on the latter stages of school desegregation cases to the very latest opinion in *Brown* itself.[303] *Brown 1992* illustrates the difficulties that lower courts are likely to encounter in applying the latter-stage trilogy to other school desegregation cases.

The reader may be surprised to learn that *Brown* is still a live controversy. In *Brown II*, the Supreme Court praised the substantial progress that had already been made in Topeka.[304] On remand from *Brown II*, the district court found that the school board had made a good faith effort to comply fully with the Supreme Court's mandate.[305] Although the district court retained jurisdiction, the legal action lay dormant until 1974, when the Office of Civil Rights of the U.S. Department of Health, Education and Welfare (HEW) notified the school district that it was not in compliance with federal law. HEW ultimately did not take administrative action.[306] The case, however, was revived again by group of African-American parents and children who were permitted to intervene in

supra note 33, ¶ 60.18[8]; 11 WRIGHT & MILLER, *supra* note 33, § 2851 at 142 (rule 60 is not a substitute for an appeal).

If the plaintiffs could have shown that the defendants lied to the district court about their commitment to avoiding intentional discrimination in the future, they could have proceeded under Rule 60(b)(3), which permits relief from a final judgment for fraud, misrepresentation, or other misconduct of an adverse party. There is no reason to believe that such evidence existed here. Bringing their motion fewer than 30 days after losing in *Dowell IV*, see *Dowell V*, 782 F. Supp. at 576, it appears that the plaintiffs were simply trying to misuse Rule 60(b) as a vehicle to get the district court to reconsider its previous rulings.

302. *Accord* Lee v. Talladega County Bd. of Educ., 963 F.2d 1426 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1257 (1993).

303. Brown v. Board of Educ., 978 F.2d 585 (10th Cir. 1992) (*Brown 1992*). The Tenth Circuit announced its opinion just a few weeks shy of the fortieth anniversary of the first oral argument before the Supreme Court in *Brown I*.

304. *Brown II*, 349 U.S. 294, 299 (1955).

305. Brown v. Board of Educ., 139 F. Supp. 468, 470 (D. Kan. 1955).

306. Brown v. Board of Educ., 892 F.2d 851, 854 (10th Cir. 1989); Brown v. Board of Educ., 84 F.R.D. 383, 390-91 (D. Kan. 1979).

Brown in 1979. The intervenors included children of Linda Brown, who as a child, had been a named plaintiff in the original suit.[307]

In 1986, the district court heard evidence on the question of whether the vestiges of de jure segregation had been eliminated in the Topeka school system. It found that Topeka had a unitary school system and was not then in violation of federal law or responsible for racial conditions in the district.[308] In reaching this conclusion, however, the district court was a bit equivocal in its allocation of the burden of proof. Its primary statement on the burden began by declaring that plaintiffs had the burden of proving that illegal segregation existed in the school system and ended by declaring that the defendants had proven by a preponderance of evidence that the schools were unitary.[309]

On appeal, the Tenth Circuit reversed on a 2-1 vote.[310] It held in *Brown 1989* that the district court had erroneously placed the burden of proof on the plaintiffs to prove intentional discriminatory conduct; further, the circuit panel majority was convinced that the defendants had failed to demonstrate that the effects of past intentional discrimination had been eliminated and that the school system was unitary. In the majority's view, where a court had already found that the school system had once been operating with de jure segregation, the plaintiffs simply had to demonstrate the continued existence of segregation. The defendants then had the burden of demonstrating more than lack of intent to cause current segregation; they had to demonstrate "that no causal connection exists between past and present segregation."[311]

The panel majority reversed because it believed that the district court had placed an improper burden on the plaintiffs and had placed too much reliance on the school board's present lack of intent to segregate.[312] In addition, the "key to [the panel's] reversal" was the district court's failure to require the school board to show the absence of a link between the de jure segregation established in *Brown I* and the current condition of segregation shown at trial.[313] The panel majority concluded that while the school board had not actively promoted segregation, "[w]hat Topeka

307. *Brown*, 84 F.R.D. 383 (D. Kan. 1979).

308. Brown v. Board of Educ., 671 F. Supp. 1290, 1311 (D. Kan. 1987).

309. *Id.* at 1295.

310. Brown v. Board of Educ., 892 F.2d 851, 862-63, 886 (10th Cir. 1989) (*Brown 1989*).

311. *Brown 1989*, 892 F.2d at 861.

312. *Id.* at 867. The panel majority did not dispute that the present school board was acting without any discriminatory intent. *Id.* at 868.

313. *Id.* at 874.

did not do is actively strive to dismantle the system that existed."[314] The dissent parted company with the majority on two major issues: the dissent charged the majority with making its own findings of fact[315] and misconstruing the burden of proof issue. The dissent's position was that the plaintiffs had failed to meet part of the burden that the majority itself had imposed, which was to demonstrate the existence of a current condition of segregation.[316]

The school board sought review in the Supreme Court. Shortly after *Freeman* was decided, the Supreme Court summarily vacated *Brown 1989* and remanded for reconsideration in light of *Dowell III* and *Freeman*.[317] This was hardly a surprising result; both *Brown* and *Dowell* arose in the Tenth Circuit. In *Dowell III*, the Court had rejected the circuit's approach in *Dowell I* and *II*. Presumably, the Court expected that the Tenth Circuit would simply remand the case to the district court for proceedings not inconsistent with *Dowell III* and *Freeman*. In *Brown 1992*, however, the same Tenth Circuit panel (by the same 2-1 vote) reinstated *Brown 1989* in full.[318]

Despite the rebuke that another panel of the Tenth Circuit had received in *Dowell III*, the *Brown 1992* panel majority did not believe that the Supreme Court had "altered the landscape of desegregation law."[319] It saw *Freeman* as reaffirming one of the central principles of *Brown 1989*.[320] Likewise, the view of the panel majority was that *Dowell III* required the district court to determine whether the school board had complied with the desegregation decree in good faith and whether the vestiges of past discrimination had been eliminated to the extent practicable.[321] According to *Brown 1992*, neither *Freeman* nor *Dowell III* required the plaintiff to make a new showing of intent in order to obtain

314. *Id.* at 886. At another point, the majority described Topeka's general attitude towards desegregation after the implementation of its initial plan in the 1950s as "benign neglect." *Id.* at 889.

315. *Id.* at 890.

316. *Brown 1989*, 892 F.2d at 891-93. The dissent explained the district court's statement about the burden of proof as showing that not only had the plaintiffs failed to meet their initial burden, in the alternative, the defendants had demonstrated that the school system was unitary. *Id.* at 892.

317. Brown v. Board of Educ., 112 S. Ct. 1657 (1992).

318. *Brown 1992*, 978 F. 2d 585, 587-88 (10th Cir. 1992).

319. *Id.* at 588.

320. "The school district bears the burden of showing that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation." *Id.* at 588 (quoting *Freeman*, 112 S. Ct. at 1447).

321. *Id.* at 589 (quoting *Dowell III*, 111 S. Ct. at 638). The circuit equated its command to eliminate "past intentional segregation to the maximum feasible extent" with *Dowell III*'s use of the term practicable. *Id.* at 589 n.4.

relief from a current condition of segregation.[322] "The absence of a moment at which Topeka achieved compliance with the Constitution is vital because it is only '[o]nce the racial imbalance due to the de jure violation has been remedied [that] the school district is under no duty to remedy imbalance that is caused by demographic factors.' "[323]

While defending continued judicial supervision overall, the panel did direct the district court to consider whether to exercise the discretion granted under *Freeman* to relinquish partial supervision of the areas of the school system that the plaintiffs conceded were unitary. The panel stated that *Freeman* required the district court to make two findings before withdrawing supervision incrementally: the court must find that relinquishing partial control would not make it impossible to craft a remedy for other facets of the system and the court must find that the school system has demonstrated good faith in its efforts to desegregate the entire system, over time.[324]

According to the *Brown 1992* panel, under *Freeman*, good faith was to be measured objectively; "mere protestations" would not suffice.[325] Further, a school board could not be acting in good faith if it viewed compliance as nothing more than a means to return to racially identifiable schools immediately after being released from judicial supervision.[326] Finally, the panel majority made clear that under *Freeman*, relinquishing partial supervision was not identical to terminating jurisdiction over the defendants. If, as a result of past intentional discrimination, segregation were to reemerge in a facet which had been released from supervision, the district court could address the problem without making a new finding of defendant's intent to segregate.[327] Based on the "clarifications" Justices Blackmun and Souter offered in *Freeman*, the *Brown 1992* majority appears to have decided this issue correctly.[328]

In dissent, Judge Baldock charged the majority with simply "parsing [*Freeman* and *Dowell III*] for the minimal support they provide its prior resolution" in *Brown 1989*.[329] According to the dissent:

> [A] federal court may withdraw from supervision of a school district in increments as the district achieves unitary status over each facet of its operations. [*Freeman*.] Once a school district has

322. *Brown 1992*, 978 F.2d at 589.

323. *Id.* at 590 n.6 (quoting *Freeman*, 112 S. Ct. at 1447).

324. *Id.* at 591-92. *Compare Freeman*, *infra* notes 212-222 (three-part test).

325. *Brown 1992*, 978 F.2d at 592.

326. *Id.*

327. *Id.* at 592-93 (citing *Freeman*, 112 S. Ct. at 1455 (Souter, J., concurring)).

328. *E.g.*, *id.* at 589, 593 (quoting *Freeman*, 112 S. Ct. at 1456 (Blackmun, J. concurring); *id.* at 1455 (Souter, J., concurring)).

329. *Brown 1992*, 978 F.2d, at 593 (Baldock, J., dissenting).

> achieved unitary status, actions concerning student assignment, even if they result in racial imbalance, must be evaluated under traditional equal protection principles which require a showing of intentional discrimination. [*Dowell.*][330]

Rather than reinstating its previous opinion, Judge Baldock would have remanded to the district court for complete reconsideration in light of *Freeman* and *Dowell III*. He would have left the district court to do its own fact-finding, subject to the clearly erroneous standard on appeal.[331] He also expressed concern that the majority's formulation of the good faith inquiry was "from the same bolt of cloth" as the Tenth Circuit's discredited views in *Dowell II* and would lead to inappropriately prolonged supervision of the school board.[332]

It appears that the majority and the dissent are both right, at least in part, and wrong in part. The dissent was on firm ground in calling for a complete remand after the circuit panel had indicated exactly how the district court should apply the shifting burden of proof the Supreme Court established in *Dowell III*. The differing interpretations the Tenth Circuit judges in *Brown 1989* and *1992* placed upon the district court's ambiguous discussion of the burden of proof were central to their views of whether the district court acted properly. A remand, with proper instructions, would have been the procedurally more appropriate course. The dissent was also correct to focus on the need to respect the district court's role in the fact-finding process.

The dissent, however, was wrong to suggest that a school district can easily achieve "unitary status" over one facet of its operations; *Freeman* effectively rejects that reading of *Spangler*. A school system cannot be released from jurisdiction until and unless it has both achieved unitary status by, at a minimum eliminating all of the vestiges of de jure segregation "as far as practicable,"[333] and has complied in good faith with the decree for a reasonable period of time.[334] Judge Baldock was wrong to assert that once a school district has achieved unitary status over a facet of its operations, school board actions concerning that facet that result in

330. Id. at 594. Judge Baldock also cited *United States v. Overton*, 834 F.2d 1171, 1175-76 (5th Cir. 1987) and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22-23 (1971). Both *Swann* and *Overton*, however, dealt with school systems that had eliminated all vestiges of a segregated system and had achieved a true unitary system. On this point at least, Judge Baldock seems to have fallen into the trap that the Supreme Court warned against in both *Freeman* and *Dowell III*—making too much of the term "unitary." *Freeman*, 112 S. Ct. at 1443-44; *Dowell III*, 111 S. Ct. at 636.

331. *Brown 1992*, 978 F.2d at 594-95, 595 n.4. As in *Brown 1989*, Judge Baldock accused the majority of substituting its own fact-finding for that of the district court. *Id.* at 596.

332. *Id.* at 595 n.4.

333. *Dowell III*, 111 S. Ct. at 638.

334. *Id.*; *Freeman*, 112 S. Ct. at 1449.

racial imbalance can only be challenged by a showing of intentional discrimination. The majority was correct to follow the clarifications of the majority opinion that Justices Blackmun and Souter presented on this point.[335]

For present purposes, however, it is not terribly important to decide whether the majority or dissent correctly applied *Freeman* and *Dowell III* to *Brown 1992*. What is important is that the judges on the *Brown 1992* panel could not agree on the meaning of the two cases. This is powerful evidence that the Supreme Court has failed again to provide sufficiently clear guidance to the lower courts. It is time to do so.

VI. A Unified Approach to the End Stages of School Desegregation Cases: Follow the Federal Rules

Rule 60(b)(5) allows relief "upon such terms as are just" when "the judgment has been satisfied . . . or it is no longer equitable that the judgment should have prospective application."[336] In essence, all of the situations considered in this Article are ones where a party is making one of these two claims. The district courts need guidance in applying their equitable discretion to the various situations. The circuit courts need guidance in understanding their reviewing role. Individually, *Rufo*, *Dowell III,* and *Freeman* provide some guidance; what they lack collectively is a unified approach so that lower court judges will know when to apply which test.

The key to a unified approach to the latter stages of school desegregation cases, and indeed of all institutional reform cases, is to "follow the federal rules,"[337] specifically Rule 60(b)(5). And where does the rule lead us? Right back to Justice Cardozo.[338] Properly understood and properly applied to the school desegregation context, indeed to the later

335. The majority noted:

> Therefore, if it were later to appear that a vestige of segregation in a facet still under the court's control has led to a reemergence of segregation in a facet over which the court had relinquished control, the court would not be powerless to react. "[B]ecause the court retains jurisdiction over the case, it should of course reassert control over [the relinquished area] if it finds that this does happen."

Brown 1992, 978 F.2d at 593 (quoting *Freeman*, 112 S. Ct. at 1455 (Souter, J., concurring)).

336. FED. R. CIV. P. 60(b)(5).

337. Several years ago, a group of first-year students at Hastings did a wonderful parody of their civil procedure course based on the plot of the movie version of *The Wizard of Oz*. The key to salvation for Dorothy (qua-first-year-law-student) was to "Follow the Federal Rules," as sung to the tune of "Follow the Yellow Brick Road."

338. Or, to keep the homage going for a moment longer, Justice Card-OZ-o. Finally, is it merely coincidence that *Brown* arises in Kansas? Res ipsa loquitur.

stages of all institutional reform cases, Justice Cardozo's opinion in *Swift* has all the answers.

A. Modifications of Injunctions and Consent Decrees

When is prospective application of a decree "no longer equitable"?[339] *Rufo* correctly focuses on this question.[340] Although its reliance on Judge Friendly's opinion in *Carey* is, as we have seen, somewhat misplaced,[341] the *Rufo* Court has provided a reasonably workable test. *Rufo* places the burden on the party requesting modification to demonstrate both a significant change in circumstances and that the proposed modification is suitably tailored to the changed circumstance.

This test under Rule 60(b)(5) is also consistent with *Swift*.[342] As one commentator has noted, the functional characteristics of a consent decree should guide the court in ruling on a petition to modify it.[343] The parties have chosen to avoid the uncertainties of litigation,[344] no party has admitted liability, and both parties have compromised.[345] The decree is designed primarily to serve the purposes of the parties, as articulated in the decree; in general, the parties do not intend merely to implement the purposes of the underlying substantive law.[346] Justice Cardozo anticipated this situation perfectly: "We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree."[347] Or, in modern remedial parlance, we might say that in the consent decree, the parties have estab-

339. FED. R. CIV. P. 60(b)(5).

340. Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 760 (noting that modification was permitted when it was no longer *equitable* to comply with consent decree, and not "when it [was] no longer convenient").

341. *See supra* text accompanying notes 149-54; Levine, *supra* note 28.

342. That is, it is consistent with the entire structure that Justice Cardozo established in United States v. Swift & Co., 286 U.S. 106 (1932), which was more elaborate than just the "grievous wrong" test that he applied to the facts of the *Swift* case itself. In this section of the Article, "*Swift*" refers to the whole structure. *See also* Jost, *Modification of Injunctions*, *supra* note 15, at 1105 ("The leading precedent codified by Rule 60(b)(5) is [*Swift*].").

343. Mengler, *supra* note 32, at 343-44.

344. *See* 2 HANDLER, *supra* note 36, at 951.

345. *See, e.g.*, Suter v. Artist M., 112 S. Ct. 1360, 1366 (1992); Wyatt v. King, 803 F. Supp. 377, 385-86 (M.D. Ala. 1992) (parties may agree to terms in a consent decree which exceed requirements of federal law).

346. In the less likely case that the injunction was entered by the court and is not a consent decree, then a motion to modify should be tested against the purposes of the substantive law. "A litigated decree works if the relief effectively remedies the wrong and fails to work if the relief does not remedy the wrong. But a consent decree works if the parties comply with its terms, and does not work if one or both parties do not comply." Mengler, *supra* note 32, at 344-45.

347. *Swift*, 286 U.S. at 119.

lished their rightful positions for themselves;[348] is there any reason to change that agreement now?

Rufo properly noted that Justice Cardozo distinguished between two types of decrees that parties might enter into with one another:

> The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. . . . The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.[349]

Thus, Justice Cardozo recognized that in some situations, the parties could establish their respective rightful positions and expect those relationships to be reasonably permanent, while in other situations, the parties would have understood that their rightful positions were not so clearly established in the consent decree.

In *Swift*, Justice Cardozo found that the parties had framed a decree on "facts . . . substantially impervious to change."[350] In that specific context, Justice Cardozo's use of the "grievous wrong" standard was utterly appropriate. By agreement, the parties had established their respective rightful positions. This voluntary agreement should not have been disturbed unless the defendants could prove that its continued application would impose a grievous wrong on them.[351]

Institutional reform decrees, such as those arising from prison reform as in *Rufo*, or school desegregation, are paradigmatic examples of the other type of decree Justice Cardozo identified, involving changing conduct or conditions. "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."[352] When a party has demonstrated that legal or factual events have "shaped the need" to modify an institutional reform decree, the district court should respond appropriately.

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348. *See* LAYCOCK, *supra* note 39, at 15 (defining plaintiff's and defendant's rightful positions).

349. *Rufo*, 112 S. Ct. at 758 (quoting *Swift*, 286 U.S. at 114-15).

350. *Swift*, 286 U.S. at 114, 119.

351. When a court issues an injunction in the first instance, it occasionally uses an equivalent concept that goes by a variety of names, such as balancing the equities or undue hardship, to justify granting the plaintiff less than her rightful position. *See* SCHOENBROD ET AL, *supra* note 29, at 108; David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 636-37 (1988).

352. *Swift*, 286 U.S. at 114.

The court might need to respond for a variety of reasons. One reason might be that the plaintiff needs assistance in achieving her rightful position, as established in the consent decree. For example, *United Shoe* correctly utilized the flexibility inherent in *Swift*; because it was equitable to help the plaintiff implement the purposes of the decree, the plaintiff's request for modification was granted. Another possibility might be if unforeseen factual circumstances made implementation of a portion of the decree unfair, akin to a grievous wrong. Thus, in *Rufo*, if it was true that the increase in the prisoner population was unforeseen, the court might consider a modification, so long as the plaintiff's rightful position was left as undisturbed as possible.

In applying *Swift*'s entire approach to a motion to modify a consent decree under rule 60(b)(5), the courts need to remember that their task is to implement the parties' purposes. In doing so, the courts need to apply the "principles inherent in the jurisdiction of the chancery."[353] To wit, if there is doubt about the parties' purposes, the district court needs to interpret the agreement,[354] and that decision should be reviewed under the appropriate deferential standard: the clearly erroneous test or the abuse of discretion formula.[355] The court of appeals and the Supreme Court should not lightly presume that they know better than the district court what the primary purposes of the agreement are.[356] Otherwise the appellate court might unfairly disturb the parties' determination of their respective rightful positions.

Rufo is a prime example of appellate meddling with the parties' determination of rightful position. The district court concluded that the

353. *Id.*

354. "To interpret [a consent decree] is to explain and elucidate, not to add to or subtract from the text." 2 HANDLER, *supra* note 33, at 952.

355. Justices O'Connor and Stevens properly focused on the need to review the district court's work under these traditional standards. Professor Mengler suggested that the district courts could avoid some of the interpretation problems by holding a "clarification hearing" at the time the decree is approved. The record of that hearing would provide a type of legislative history of the decree that would guide judicial interpretation in the future. Mengler, *supra* note 32, at 336-37. For a case that appears to have done something like what Professor Mengler recommended, see Wyatt v. King, 803 F. Supp. 377, 387-88 (M.D. Ala. 1992) (looking at history and terms of consent decree to determine whether modification warranted). Another preventive measure is to incorporate a statement of purposes into the decree. 2 HANDLER, *supra* note 33, at 950.

356. *Compare Rufo*, 112 S. Ct. at 762; New York State Assoc. for Retarded Children v. Carey, 706 F.2d 956, 969 (2d Cir. 1983) (no appellate deference). One exception is where the decree, as interpreted, would ostensively permit the parties to do something that the law prohibits or prohibit something that the law requires. *E.g.*, *Rufo*, 112 S. Ct. at 762-63; Kasper v. Board of Election Comm'rs, 814 F.2d 332, 341-42 (7th Cir. 1987) (stating that consent decree may not permit parties to engage in illegal conduct). Such an interpretation would be impermissible.

parties had agreed that single-celling was to be the plaintiffs' rightful position. The Supreme Court decided that the parties had agreed to another, lower, standard for rightful position: ending unconstitutional conditions. Unless it was clearly erroneous, the district court's determination should have prevailed.

Under *Swift*, in deciding a motion to modify, the district court's task is to determine which type of consent decree is before it, and then to apply the correct principles from that case. The appellate court's task is to make sure that the district court has made the correct choice and, viewed through the appropriate lens of review,[357] has properly applied the relevant principles.

B. Partial Release From Active Supervision of the District Court

Freeman confirmed that district courts may use the tool of incremental withdrawal from a decree in a school desegregation case "in a manner consistent with the purposes and objectives of its equitable power."[358] The Court sidestepped *Spangler*'s contrary implications that incremental withdrawal was required, without acknowledging that it had done so.

The weakest aspect of the *Freeman* decision was that the majority, indeed all the Justices who wrote, did not simply apply Rule 60(b)(5).[359] There was no need to invent wholly new tests,[360] which must be interpreted and applied by the lower courts.[361] Rather, the Supreme Court should have asked whether, under Rule 60(b)(5), the district court had abused its discretion[362] in concluding that the decree should be modified because prospective application of a portion of the decree would "no longer be equitable."

If the Supreme Court had thought to apply rule 60(b)(5) in *Free-*

357. The standard of review will shift depending on whether the appellate court is examining a factual finding, a conclusion of law, or an application of discretion. *See supra* text accompanying notes 155-58.

358. Freeman v. Pitts, 112 S. Ct. 1430, 1446 (1992).

359. The case came to the district court as a motion for final dismissal because the schools were unitary, a motion which the defendants would have brought under the rule. *Freeman*, 112 S. Ct. at 1437.

360. Especially confusing new tests with an unexplained shifting burden of proof. *See supra* text accompanying notes 230-31.

361. The confusion encountered in the majority and dissenting opinions in *Brown 1992* is some evidence that the Supreme Court failed in its role of giving guidance to the lower courts in *Freeman*. *See Brown*, 978 F.2d at 585.

362. The *Freeman* court did recognize that the appellate issue was whether the district court had abused its discretion, but not with respect to Rule 60(b)(5). *Freeman*, 112 S. Ct. at 1446.

man,[363] it probably would have followed *Rufo*, in which, just a few months before, the Court had found *Swift* applicable to the institutional reform context. *Rufo* placed the burden on the party requesting modification to demonstrate both a significant change in circumstances and that the proposed modification is suitably tailored to the changed circumstance. In *Freeman*, the change in circumstances would be that the defendants had met their obligations with respect to student assignments; the proposed modification—release of the defendants from active judicial supervision of that facet of the operation of the school system—would be suitably tailored to that changed circumstance. It also would be suitably tailored to what is necessarily a purpose of such decrees, respecting federalism by minimizing intrusion into the affairs of local governmental authorities.

The potential interactions between a facet of the decree which has been satisfied, such as student assignments, and other facets that still need to be implemented also can be handled under this formula. If a district court were concerned that ceasing to supervise provision A of the decree would make it too difficult to implement provisions B and C, the motion to modify should be denied. As Justice Cardozo wrote, "[t]he question is whether [the modification] can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect."[364] And if, before the defendants are released from jurisdiction entirely, there is a need to restore supervision of provision A in a situation like one that was identified in the several opinions in *Freeman*, this too can be handled as a change in circumstances under *Swift*. In short, there was no necessity to cloud already difficult issues by developing new tests in *Freeman*.

C. Complete Release From Jurisdiction of the Court

The Supreme Court has declared in *Dowell III* that, once a school board has demonstrated compliance over a reasonable period of time with the dictates of an injunction designed to eliminate the effects of intentional segregation, the district court must release the defendant school board from its jurisdiction. The *Dowell III* Court appropriately invoked *Swift* to demonstrate that school desegregation decrees are one type of

363. There is no obvious reason why it failed to consider the application of the rule. The pertinent portion of the case's history began with the defendants' motion for final dismissal of the litigation on the grounds that the school system was completely unitary, i.e., a motion under Rule 60(b)(5). *Freeman*, 112 S. Ct. at 1437.

364. United States v. Swift, 286 U.S. 106, 117-18 (1932).

order that is not contemplated to operate in perpetuity.[365] The *Dowell III* Court properly placed the burden of persuasion on the defendants who wanted to be released from the jurisdiction of the district court.[366]

The *Dowell III* opinion would have been a more useful guide to lower courts, however, had it shaped the inquiry in terms of *Swift* and Rule 60(b)(5). Such an inquiry would put the parties and the district court in the proper frame of mind: focused on whether it would be inequitable for the order to continue to have prospective application.[367] It would clarify that the defendants must demonstrate the existence of a significant change in conditions, i.e., that the corrective purposes of the order have been met, before the district court would contemplate a release from jurisdiction.[368] Finally, there would be no doubt that these decisions are to be made by the district court in the first instance, subject to appellate review under the abuse of discretion standard.[369]

Relying on *Swift* would help the district court properly consider other points as well. First, *Swift* would help the courts to keep straight the obligations of defendants under an injunction, as in *Dowell III*, and their somewhat different obligations under a consent decree. When the defendants seek to obtain permanent and complete release from the con-

365. Board of Educ. of Oklahoma City Sch. v. Dowell, 111 S. Ct. 630, 637 (1991). In other words, the parties' rightful position in an injunction issued in a school desegregation case cannot contain a provision for perpetual judicial supervision of the school board.

366. The more controversial question in *Dowell III* was whether the Supreme Court was changing the standard against which the defendants' conduct would be measured. If eliminating de jure segregation "as far as practicable" (*id.* at 638) is a retreat from *Brown I*, then it was wrong for the reasons advanced by Justice Marshall. *See supra* text accompanying notes 257-61.

367. Another way of thinking about the problem, which achieves the same end, is to ask whether the judgment has been "satisfied" within the meaning of Rule 60(b)(5). *See* 7 MOORE, *supra* note 33, ¶ 60.26[2] ; 11 WRIGHT & MILLER, *supra* note 33, § 2863 at 202 (1973) (noting that this provision has rarely been relied upon).

School desegregation is not the only area of the law where this problem has vexed the courts. *See, e.g.*, the following works discussing conflicting cases on whether courts should perpetually enjoin violators of trade secrets from manufacture or sale of products using such secrets, even after public disclosure: MELVIN F. JAGER, TRADE SECRETS LAW § 7.02[3][b] (1988); 2 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 7.08[1] (1991); Michael Barclay, Note, *Trade Secrets: How Long Should an Injunction Last?*, 26 U.C.L.A. L. REV. 203 (1978); Ferdinand S. Tinio, Annotation, *Propriety of Permanently Enjoining One Guilty of Unauthorized Use of Trade Secret from Engaging in Sale or Manufacture of Device in Question*, 38 A.L.R. 3d 572 (1971).

368. This clarification would eliminate the possibility of a court taking the position that the district court in 1987 and the dissent in *Brown 1992* may have had: that the plaintiff bears the burden of proof at this stage. *See Brown*, 671 F. Supp. 1290; *Brown 1992*, 978 F.2d at 593.

369. *See, e.g.*, Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 765 (1992) (O'Connor, J., concurring) (proper task of appellate court is to review the district court's exercise of its discretion). *See also* Roach, *supra* note 8, at 894 ("equity forces judges to confront their discretion not to award remedies").

straints of an injunction, the district court must determine if the wrongs (intentional segregation and its vestiges) have been eliminated; the court must determine if the plaintiffs have obtained their rightful position, which is to enjoy the minimum rights guaranteed by the Constitution. The federalism concerns expressed in *Dowell III* are strong in this context. These concerns necessarily operate as a limitation on the type of order a district court is permitted to impose on its own authority in a school desegregation case after a hearing on the merits.

On the other hand, when the defendants seek to obtain release from a consent decree, the district court must determine whether the purposes of the decree have been met. The defendants may have agreed to do more than a judicially imposed injunction could have mandated; unless they can meet the requirements of *Swift*, the defendants should be held to their bargain. They may not try to rewrite the agreement to the constitutional floor.[370]

Second, under *Swift*, it is clear that *all* purposes of the decree must be fulfilled before the district court is obligated to cede jurisdiction. To the extent that *Dowell III* suggests to the contrary, it is not correct. For example, *Dowell III* appears to focus only on making sure that the school district has mechanically complied with the *Green* factors. This narrow focus does not give sufficient weight to the question of whether other corrective purposes of desegregation decrees, for example eliminating the intangible harms of segregation such as stigmatization, have been achieved.[371]

The decree or injunction may have other purposes that also must be achieved before the defendants are released.[372] For example, an injunction or decree could legitimately include as one of its aims a reparative[373]

370. *Rufo*, 112 S. Ct. at 764. As Justice Cardozo said:

> We do not turn aside to inquire whether some of these restraints . . . could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court.

United States v. Swift, 286 U.S. 106, 116-17 (1932).

371. There is a difference on this matter between injunctions and decrees. The Supreme Court is obviously free to determine what a school district must do to meet the constitutional floor imposed by the Equal Protection Clause of the Fourteenth Amendment. It has probably done so in *Dowell III*, by requiring desegregation "to the extent practicable." *Dowell III*, 111 S. Ct. at 638 (footnote omitted). Unless the Court determines that a certain choice is illegal, however, the Court should not disturb the parties' decisions regarding the rightful position that they have enshrined in a consent decree.

372. *See United Shoe*, 391 U.S. at 248, *quoted in Dowell III*, 111 S. Ct. at 636 ("*Swift* . . . holds that it may not be changed . . . if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved.").

373. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 10-11 (1978) (distinguishing between the preventative and reparative elements of an order).

or compensatory component as well as the goal of eliminating the vestiges of intentional segregation.[374] Probably the best-known case with such a decree at issue is *Milliken v. Bradley*,[375] where the Supreme Court affirmed the district court's desegregation plan for the Detroit public schools, which included compensatory and remedial educational programs. The Court recognized that in addition to making changes to comply with *Green*, "independent measures" were needed to "remedy the impact of previous, unlawful educational isolation."[376] If a consent decree or injunction includes a compensatory component, it would not be appropriate to release the defendants completely from jurisdiction until the compensatory component has been fulfilled, even if the defendants were operating the schools in a completely unitary fashion and in utter good faith.[377]

Third, although *Dowell III* and *Freeman* emphasized the relevance of the defendants' good faith commitment to continuing to operate unitary schools, neither opinion established an appropriate test for measuring the defendants' good faith: *Swift* did. Justice Cardozo asked "whether the changes are so important that dangers, once substantial, have become attenuated to a shadow."[378] Only when the defendants' commitment to unitary education meets this high standard is it appropriate to impose the risk of future harm upon plaintiffs in order to confer upon the defendants the benefits of permanently releasing them from continuing judicial supervision.[379] A lesser standard (or as in the *Dowell III* and *Freeman* opinions, no articulated standard) will lead lower courts to choose a stopping point that unduly diminishes or overrides the goal

374. *See* Sivitz, *supra* note 209. *See also* Shane, *supra* note 4, at 1127:

> School desegregation remedies should attack what was the systematic and continuous vulnerability of minority children in those districts to a variety of harms inflicted upon them by hostile public school authorities. That vulnerability, which deprives minority students and their parents of objectively reasonable confidence in the nondiscriminatory educational administration to which they are entitled, is the crux of unfair governance.

375. 433 U.S. 267 (1977) (*Milliken II*). *See generally* John Leubsdorf, *Completing the Desegregation Remedy*, 57 B.U. L. REV. 39 (1977) (discussing implications of *Milliken I*).

376. *Milliken II*, 433 U.S. at 287-88.

377. *Cf.*, Gewirtz, *supra* note 15, at 793 n.205 (raising question of when *Milliken II*-type compensatory education remedies should terminate). *But see* Roach, *supra* note 8, at 877-79 (questioning whether under notions of corrective justice, restoration is ever possible to achieve or whether the myth of restoration creates a "false sense of complacency" that courts cure all harms).

378. United States v. Swift, 286 U.S. 106, 119 (1932).

379. *See* Gewirtz, *supra* note 15, at 797 (observing that different proof rules about when to terminate jurisdiction reflect value judgments about the probabilities of whether desegregation has been fully accomplished as well as where the risks of mistakes should fall).

of full corrective justice.[380] Therefore, a district court should not release a defendant from its jurisdiction until it is convinced that the dangers "have become attenuated to a shadow."

D. Restoration of Supervision After Jurisdiction Is Ended

Dowell III makes it absolutely clear that, having been released from an injunction, a school board is free to make choices about the operation of its schools so long as it meets the general mandates of the law. Plaintiffs who wish to challenge a decision made after the release from jurisdiction must demonstrate that the school board acted with a segregative purpose.[381] In this one instance, *Swift* has little to add; there is nothing in Justice Cardozo's opinion, however, that is contrary to the *Dowell III* Court's conclusion on this issue.

Dowell III is plainly correct in its own specific context, where the defendants had been released from jurisdiction after completely satisfying the terms of an order for a period of several years—an order issued originally by the court after full litigation on the merits. In the consent decree context, there is no reason why the parties can not negotiate a provision that allows the plaintiffs to return to court in the future on a lesser showing than proof of the defendants' desire to segregate.[382] Without such a specific provision, however, *Dowell III* would apply; the plaintiffs would have to make out a case de novo without relying on the determinations made in the previous case.[383]

Conclusion

A few years ago, Professor Paul Gewirtz noted that, especially in the school desegregation area, the termination issue had been neglected

380. *Id.* at 797.

381. *E.g., Dowell IV*, 778 F. Supp. 1144, 1179 (W.D. Okla. 1991). As indicated *supra*, at note 301, a possible exception would be a motion to reopen a final judgment of release due to "fraud . . . , misrepresentation, or other misconduct of an adverse party." FED. R. CIV. P. 60(b)(3). For example, such a motion would be appropriate if the district court had released the defendant school board from jurisdiction on the basis of false representations about the board's intentions. *See* 7 MOORE, *supra* note 33, ¶ 60.24[5]; 11 WRIGHT & MILLER, *supra* note 33, § 2860 at 187-89 (1973).

382. *See* Mengler, *supra* note 32, at 345 ("Nor does adopting *Swift's* test preclude the parties themselves from proposing a more flexible standard . . . as one of the terms in their original consent decree"). *Cf.* 42 U.S.C. § 9622(f)(6) (West Supp. 1991) (covenant not to sue pursuant to consent decree must contain provision permitting United States to reopen litigation if pollution worse than anticipated); United States v. Overton, 834 F.2d 1171 (5th Cir. 1987) (enforcing parties' bargain in consent decree settling school desegregation suit; suggests a different bargain would also be enforced).

383. *See, e.g., Dowell V*, 782 F. Supp. 574, 577; United States v. Overton, 834 F.2d 1171 (5th Cir. 1987); Beard, *supra* note 65, at 1287.

both by the Supreme Court and by scholars supportive of policies of corrective justice.[384] Prodded by the Justice Department under the Reagan and Bush Administrations, in *Rufo*, *Freeman*, and *Dowell III*, the Supreme Court has provided answers to many of the questions surrounding the latter stages of all institutional reform cases, including school desegregation cases. Not all of the details in the answers the Court has provided will be to everyone's liking: some responses will be distressing to those supportive of the plaintiffs' civil rights bar[385] and others will be denounced by certain former Justice Department policymakers and their academic supporters.[386] Taken as a whole, the Court's answers are generally consistent with the corrective purposes behind institutional reform litigation: to correct the harm done in the past, to make reasonable efforts to ensure that the harm will not recur and then to terminate judicial supervision so "that the future will be free of both the defendant's wrongs and the court's corrective requirements."[387]

As is particularly well demonstrated by the conflicting views represented in the Tenth Circuit's recent opinion, *Brown 1992*, however, the Supreme Court could have done a much better job in providing guidance to the lower courts facing modification and termination issues.[388] Luckily, there is no reason that lower courts cannot improve on the Supreme Court's performance. As the great case from Kansas that we celebrate in this Symposium enters its fifth decade, let us hope that the lower federal courts realize what the Supreme Court did not. The federal circuit and district courts can be faithful to their obligations to follow Supreme Court precedent and, simultaneously, they can follow a unified approach to these problems in the latter stages of all institutional reform cases, including school desegregation cases. Doing both will ensure that the courts help the parties achieve their rightful position in these cases, without causing grievous wrongs to either side. The federal courts have the

384. Gewirtz, *supra* note 15, at 790.

385. *E.g.*, Christopher, *supra* note 15, at 615.

386. Beard's article is a good example of what at least some policymakers in the Justice Department under the Republican Presidents had hoped to accomplish through cases like these. *See* Beard, *supra* note 65. Although Beard, a former Special Counsel to the Assistant Attorney General for Civil Rights, provided the customary disclaimer that the views expressed in the article were his own, he thanked several Reagan Justice Department stalwarts "particularly Wm. Bradford Reynolds" for "invaluable suggestions and assistance." *Id.* at 1239. *See also*, Landsberg, *supra* note 27, at 1329-32 (reviewing widely varying reactions to Rehnquist Court decisions in race discrimination cases).

387. Gewirtz, *supra* note 15, at 754.

388. *See also* Brown, *supra* note 277, at 82 (calling for Supreme Court to "establish an ideological framework that would directly focus the need for educational reform on the socializing process of public schools" as part of its desegregation termination opinions).

power to do these tasks, and they don't need the ruby slippers. They need only follow the federal rules and Justice Cardozo.