ACKNOWLEDGING THOSE STUBBORN FACTS OF HISTORY: THE VESTIGES OF SEGREGATION

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In 1955, as part of its historic drive to desegregate the nation's public schools, the Supreme Court authorized district judges to set in motion and oversee desegregation programs in hundreds of school districts throughout the country. Within a few decades of this decision, however, such desegregation programs quickly came under attack. In the 1991 decision Board of Education v. Dowell, *the Supreme Court responded to these criticisms by providing a two-part test for determining when a district had achieved unitary status and therefore could be freed from its desegregation program. The test hinged on whether a district had eliminated the vestiges of past discrimination to the extent practicable. Circuit Courts applying this test have interpreted the definition of vestiges very narrowly, failing to recognize any aspects of present day schools as legacies of segregation. As a result, nearly all challenged desegregation programs have been terminated, with courts declaring that formerly dual school districts have achieved unitary status. This Comment advocates a longer life for these programs through a more expansive reading of the* Dowell *test and a broader definition of the term vestiges, in particular.*

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* Managing Editor, UCLA Law Review, Volume 50. J.D., UCLA School of Law, 2003; B.A., Stanford University, 1997. Special thanks to Professor Stuart Biegel for steering me through this project with his encouragement and guidance. Thanks to Robin Johansen, Thomas Klitgaard, and David Levine for sharing their experiences and insights; to Tracy Casadio, Khaldoun Shobaki, Vanessa Au, Kristen Rowse, Timothy Nelson, Roshan Sonthalia, Michael Anderson, and Pei Pei Tan for their ceaseless improvements to this work; and to my fiancé, Kimiko, for her inspiration and support. Lastly, I dedicate this Comment to my parents, for the many sacrifices that have allowed me the space to read, write, and learn.

INTRODUCTION

"[T]he [Supreme] Court has never explicitly defined what constitutes a 'vestige' of state-enforced segregation," Thurgood Marshall wrote in his dissent to *Board of Education v. Dowell*.[1] The *Dowell* decision currently serves as the instruction manual for school districts seeking to free themselves from court-ordered desegregation programs. According to Justice Marshall, the "majority sa[id] very little" about the "scope or meaning" of the term "vestiges."[2] Some scholars have recognized this curious silence as a noteworthy omission,[3] given the significance of the concept in the determining the continued existence of court-ordered desegregation decrees. *Dowell* orders courts to examine "whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable."[4] With this mandate, the Court partially hinges the fate of desegregation programs on the interpretation of the term vestiges, and in doing so, makes vestiges more than a mere term of art.[5] As

1. 498 U.S. 237, 260 (1991) (Marshall, J., dissenting).
2. *Id.* at 261.
3. *See* David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 HARV. BLACKLETTER L.J. 39, 82 (2000) (observing that the Supreme Court had never explicitly defined the term "vestiges"); Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1166 (2000) (noting that how courts should define "vestiges" is "largely unanswered, and probably unanswerable on its own terms"); Raymond Wolters, *The Consent Order as Sweetheart Deal: The Case of School Desegregation in New Castle County, Delaware*, 4 TEMP. POL. & CIV. RTS. L. REV. 271, 272–73 (1995) ("The Supreme Court . . . has failed to give a precise definition of the continuing effects of unconstitutional discrimination . . . . [The] Court has been unclear when specifying how a vestige or a remnant of past discrimination is to be identified."); *see also* Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 760 (1993) ("The United States Supreme Court, instead of establishing clear standards, has granted vast discretion to federal district courts to determine the good faith of school systems, the adequacy of their compliance with desegregation orders, and any ongoing responsibilities the district may have for educational inequities . . . ."). The ambiguities of the *Dowell* decision were immediately noted by civil rights attorneys when the opinion was issued. *See* Ruth Marcus, *Court Eases Test on Busing; Schools May Cite Best Effort to Remove Bias*, WASH. POST, Jan. 16, 1991, at A1 (noting several pieces left undecided by *Dowell*: "[*Dowell*] does leave some stuff open for interpretation" (quoting ACLU civil rights attorney, William Taylor)).
4. *Dowell*, 498 U.S. at 250.
5. For a full discussion of *Dowell* see *infra* Part I.

a result of the recent dismantling of several desegregation programs[6] and the increasing number of court challenges involving more than four hundred desegregation decrees throughout the country,[7] the definition of the term vestiges is central and critical to the future existence of desegregation programs.

Customarily, the Court's interpretation of an undefined term is a standard practice that does not stir alarm. However, in interpreting vestiges, the consequences are far-reaching. A party's ability to demonstrate that a school district has eliminated the vestiges of discrimination to the extent practicable may signal the death of a desegregation decree. Alternatively, proving that vestiges of segregation continue to linger may result in a decree's affirmation, and perhaps even its extension. Viewed more broadly, the absence or existence of vestiges implicates more than a court order. Our inability to locate vestiges of segregation in present day school systems that are as segregated as ever[8] signals that the vision of an integrated United States, first endorsed in *Brown v. Board of Education*,[9] is perhaps unattainable.[10] On the other hand, recognizing vestiges around us not only acknowledges the hard-to-remove stain of hundreds of years of discrimination, but also allows for the possibility that *Brown's* aspirations still carry value.[11] The consequences are too great for the term to remain undefined or misdefined, which is precisely why I contend that it has not yet been defined. Absent a clear definition, lower courts have developed a functional meaning for vestiges. Subsequently, appellate courts in various circuits have amended these definitions, establishing

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6. *See* Parker, *supra* note 3, at 1157–58 (listing Buffalo, Denver, Savannah, Oklahoma City, and Wilmington as school districts in which desegregation programs have been ended in the last ten years, and Dallas, Kansas City, Missouri, and Little Rock as school districts in which desegregation programs soon will be ended); Davison M. Douglas, *The End of Busing?*, 95 MICH. L. REV. 1715, 1715 (1997) (book review) (observing that the public discussion on school desegregation among academics, politicians, and judges has been largely critical).

7. At the time of *Dowell*, there were over five hundred school systems operating under court orders. *See* Marcus, *supra* note 3; Ruth Marcus, *Court Cuts Federal Desegregation Role; Schools' Anti-Bias Obligations Eased*, WASH. POST, Apr. 1, 1992, at A1 (noting that after the *Freeman v. Pitts* decision, "[l]awyers . . . predicted that the ruling . . . would prompt many of the several hundred school districts now operating under federal court orders to seek removal from court control").

8. *See* GARY ORFIELD, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION (2001) (observing the continued intensification of segregation in the 1990s).

9. 347 U.S. 483 (1954).

10. *See* Jeffrey Rosen, *Bus Stop: The Lost Promise of School Integration*, N.Y. TIMES, Apr. 2, 2000, § 4, at 1 (noting that the shift in public opinion may mean that "the central premise of the Brown decision—that integrated public schools are the most important institution in a pluralistic society—will not survive the 21st century").

11. *See id.* ("Fifty years after Brown versus Board of Education, there is still no non-coercive mechanism for racial integration that has evolved in this country.") (quoting Columbia Law School Professor, Samuel Issacharoff).

an entirely new phase in desegregation jurisprudence worthy of close examination.

In this Comment, I explore the functional meanings of vestiges that various courts have developed since the *Dowell* decision, and then explain the ramifications of these applications. Part I surveys the Supreme Court's desegregation jurisprudence, which provides a backdrop for lower court desegregation decisions. Next, in Part II, I examine how various courts interpret vestiges in their respective jurisdictions when faced with challenges to school desegregation programs. In Part III, I suggest an alternative definition of vestiges that is rooted in case law and offers a viable alternative to the narrow definitions set forth by the circuit courts. Finally, in Part IV, I identify additional areas for exploration by courts grappling with the application of vestiges. In addition, I suggest alternatives that advocates of desegregation programs may consider in devising a suitable role for the courts in this area.

I. DESEGREGATION AND THE U.S. SUPREME COURT

The story of vestiges begins with *Brown v. Board of Education*.[12] In *Brown*, the Court declared that the "separate but equal" doctrine has no place in public education and paved the way for court-ordered and court-supervised desegregation decrees throughout the United States.[13] *Brown v. Board of Education II*[14] assigned these orders to district court judges, who were instructed to retain jurisdiction over the litigation and "enter such orders and decrees . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to the cases."[15] The intention of issuing the decrees was to provide a "prompt and reasonable" start toward full compliance with *Brown*.[16] However, these instructions provided little guidance to the district courts retaining jurisdiction over the daily operations necessary to implement school desegregation—and even less guidance for recognizing when the task was complete.[17]

12. 347 U.S. at 483.

13. *Id.* As noted in the Introduction, there are currently over four hundred court-supervised desegregation programs in existence.

14. 349 U.S. 294 (1955).

15. *Id.* at 301.

16. *Id.* at 300.

17. *See id.* The language of the case indicates that these vague marching orders were more by design than by accident and were intended to account for the variety in local school conditions. *Id.* "In fashioning and effectuating the decrees, the courts will be guided by equitable principles . . . [which have] been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Id.* (footnote omitted).

Some direction arrived with the Court's opinion in *Green v. County School Board*,[18] in which the plaintiffs sued the New Kent County School Board for maintaining a segregated school system through its "freedom-of-choice" desegregation program.[19] Under this plan, students retained the ability to choose any public school in the district. Evaluating the plan, the Court examined six areas, later known as the "*Green* factors," to measure the school district's level of desegregation: faculty, staff, transportation, extracurricular activities, facilities, and student assignment.[20] Given that no white student ever chose to attend New Kent County's traditionally African American school, the school district remained a dual system, segregated for two races. Therefore, the Court ruled that New Kent County's freedom-of-choice plan was not sufficient to meet *Brown II*'s mandate.[21] While the six *Green* factors easily pointed to this result based on the simple, unambiguous facts of *Green*, they would later prove less helpful in determining exactly when a dual system transitioned into a unitary one. *Green* instructed lower courts where to look for signs of desegregation, but provided less guidance on specifically what to look for once there.

Nearly a quarter of a century later, the final days of some desegregation programs arrived, putting the *Green* factors to the test. These challenges were instigated by families frustrated with student assignment plans imposing racial caps at particular schools,[22] local school districts tired of federal government supervision,[23] and parents weary of having their children bused far distances.[24] The latter describes the sentiments that pressed the Oklahoma City School Board to abolish the provisions of its 1972 desegregation decree in 1985.[25] Oklahoma City's unilateral abolition of its desegregation program, which eliminated federal oversight without approval by the district court supervising the decree, eventually required the Supreme Court's involvement. Oklahoma City's actions provided the Court with the opportunity to finally set down a standard for determining when a school district had successfully achieved unitary status. In 1991, in *Board of Education v. Dowell*, district courts were finally given a roadmap that enabled them to bring desegregation decrees to a halt.

Prior to arriving at its conclusion in *Dowell*, the Court established that remedial decrees were not "intended to operate in perpetuity" and that local

18. 391 U.S. 430 (1968).
19. *Id.* at 431.
20. *See id.* at 435.
21. *Id.* at 441–42.
22. *See* Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854 (9th Cir. 1998).
23. *See* Coalition to Save Our Children v. State Bd. of Educ., 901 F. Supp. 784 (D. Del. 1995).
24. *See* Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).
25. *See id.*

control of public school systems was valued highly.[26] In this context, the Court advanced a test for identifying the achievement of unitary status. First, courts should assess whether the moving party "complied in good faith with [its] desegregation decree since it was entered."[27] Secondly, courts should evaluate "whether the vestiges of past discrimination had been eliminated to the extent practicable."[28] Affirmative responses to these two inquiries would result in a declaration of unitary status for a school district. These are the instructions the Court sent down to the district court upon remand.[29]

However, the inquiries themselves were problematic because of their vagueness and susceptibility to competing interpretations. What is "good faith" compliance? What are "practicable" measures for a school district to adopt? What constitutes a "vestige" of segregation? Elaborating on this latter question, the Court articulated additional instructions to shed light on the ambiguous "vestiges" prong: "In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable the District Court should look not only at student assignments, but 'to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.'"[30] By thus invoking the *Green* factors, the Court left the district court with the same inadequate instructions for determining the end point of a desegregation decree as it had for determining when to order one in the first place.

The *Dowell* mandate to assess whether "vestiges of discrimination had been eliminated to the extent practicable" assumed a district court knew how to clearly identify such a vestige. Although the term regularly appeared in desegregation litigation and court opinions, no uniform definition prevailed.[31] Moreover, the term was far from self-explanatory, as Justice Marshall explained in his *Dowell* dissent.[32] Identifying the absence of a definition, Marshall proposed his own:[33] "[T]he function that this concept [of vestiges]

26. *Id.* at 248.
27. *Id.* at 249–50.
28. *Id.* at 250.
29. *Id.* at 251.
30. *Id.* at 250 (quoting Green v. County Sch. Bd., 391 U.S. 430, 435 (1968)). *Brown II* anticipated that many of the *Green* factors would be crucial areas for district courts to investigate in designing desegregation plans. In *Brown II*, the Court instructed district courts to "consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis." Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 300–01 (1955).
31. *See Dowell*, 498 U.S. at 245.
32. *See supra* notes 1–2 and accompanying text.
33. *See Dowell*, 498 U.S. at 251 (Marshall, J., dissenting) ("[T]he standard for dissolution of a school desegregation decree must reflect the central aim of our school desegregation precedents.").

has performed in our jurisprudence suggests that it extends to any condition that is likely to convey the message of inferiority implicit in a policy of segregation."[34] Marshall insisted that the "*effects* of past discrimination remain chargeable to . . . school district[s] regardless of [their] lack of continued enforcement of segregation."[35] For Marshall, therefore, an obvious vestige of discrimination remained the racial identification of separate schools for whites and African Americans because these institutions still had the capacity of tainting African American students with the stigma of inferiority.[36] Justice Marshall believed that the Court should have never invited the possibility of Oklahoma City's unitary status. Such a determination paved the way for a reversion of Oklahoma City's schools back to the segregated system that had originally warranted the decree.

Despite Marshall's indignation that vestige was undefined, the majority did not reconsider its opinion. Marshall's dissent provides the *Dowell* Court's only substantial discussion on vestiges, and further, illuminates the term's meaning in a way the majority fails to accomplish. His definition provides a useful starting point for unraveling the application of the vestiges test. The *Dowell* majority makes clear that the racial identification of a school is not a vestige.[37] Hence, a majority African American school is not a vestige of segregation solely by virtue of its demographics. *Dowell* leaves a positive definition of the term an open question, which Marshall attempted to respond to through his own characterization of the majority's interpretation. According to Marshall, the majority believed a school district's present and future compliance with the Equal Protection Clause was sufficient to eliminate past vestiges.[38] Hence, if the contemporary practices and policies of the Oklahoma City School Board comported with the constitutional requirements of the Fourteenth and Fifth Amendments, any of the lingering effects of segregation-era regulations would be healed. In articulating the majority position in this fashion, Marshall recognized both the narrow frame through which the majority sought to explain the term, as well as the increasing irrelevance of the past to explain the present-day realities of school systems.

34. *Id.* at 260–61.

35. *Id.* at 262.

36. *Id.* at 251 ("[T]he inquiry [the majority] commends to the District Court fails to recognize explicitly the threatened reemergence of one-race schools as a relevant 'vestige' of *de jure* segregation.").

37. *Id.* at 249–50.

38. *Id.* at 261 ("[T]he majority presumably views elimination of vestiges as part of 'operat[ing] in compliance with the commands of the Equal Protection Clause.'").

One year later, the Supreme Court further elaborated on its definition of vestiges in *Freeman v. Pitts*,[39] the case challenging the DeKalb County, Georgia desegregation program that had governed the school district since 1969.[40] The *Freeman* Court decided that a district court could relinquish control over a school district in incremental stages—meaning it could withdraw supervision from those *Green* factors in which the school achieved compliance with the court-ordered desegregation plan. Therefore, a school district did not need to achieve unitary status in all six *Green* factors simultaneously before a district court terminated its consent decree as to one of them.[41] For my purposes, the importance of *Freeman* lies in the majority's fuller discussion of vestiges, a concept that *Green* left vague:

> In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist. But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities. The vestiges of segregation that are the concern of the law . . . 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.[42]

In stating this, the Court extended the breadth of vestiges beyond the six *Green* factors. Now, vestiges could be "subtle and intangible," in addition to being present in the various, more conspicuous facets of school operation established by *Green*. Subsequently, lower courts used the formulation offered by both *Green* and *Freeman* to determine the fates of their own desegregation programs.

II. INTERPRETING VESTIGES IN THE CIRCUIT COURTS

With an articulated standard on how to determine unitary status, parties across the United States, from Yonkers to San Francisco, sought to strip their school districts of long-binding desegregation programs and policies. Central to these challenges was the assertion that the vestiges of discrimination had been eliminated to the extent practicable. Opponents of this notion attempted to prove that vestiges still remained by suggesting that varied academic results or low teacher expectations for minority students constituted vestiges of segregation. Circuit courts, however, repeatedly found this line of

39. 503 U.S. 467 (1992).
40. *Id.* at 467.
41. *See id.* at 471.
42. *Id.* at 495–96.

argument unpersuasive and deemed the causal link of these supposed vestiges to de jure segregation tenuous at best. The vestiges of discrimination apparent in the 1960s and 1970s, were questioned and reconsidered in school district after school district in the decades following *Dowell*. The following discussion chronicles the five cases which have reached the Circuit Courts in that time, paying particular attention to what each party argued to be a vestige of segregation, and how the courts, in turn, responded to these arguments.

A. The Northern New Castle County School Districts

In 1996, the Court of Appeals for the Third Circuit became the first to seize the opportunity to consider vestiges in light of the *Dowell* ruling. The outcome of *Coalition to Save Our Children v. State Board of Education* ended a 1978 court order requiring the Boards of Education of the Brandywine, Christina, Colonial, and Red Clay School Districts (Delaware School Districts) to implement schemes for school desegregation.[43] A year prior to the Third Circuit's ruling, the District Court for the District of Delaware declared the implementation of the 1978 decree a success and concluded that the school districts satisfied the *Dowell* requirements; they had complied in good faith with their desegregation decrees and had eliminated, to the extent practicable, the vestiges of de jure segregation to achieve unitary status.[44] The Coalition to Save Our Children, an organization seeking to preserve the desegregation decree, appealed this decision on several grounds, mainly questioning whether the Delaware School Districts had truly merited unitary status. In describing the legal issue presented in the appeal, the Third Circuit, like the Supreme Court, did not outline its own definition of vestiges. To merit unitary status, the court stated, the school system must no longer discriminate on the basis of race. According to the court, a school system no longer discriminates on such a basis when it "affirmatively has eliminated all vestiges of state-imposed segregation."[45] For its definition of vestiges, the Third Circuit alluded to the *Green* factors as a "critical starting point in identifying vestiges of discrimination."[46]

Student Assignment. The Coalition first argued that student assignments within the school, in classrooms, and academic programs, manifested vestiges of segregation. It offered evidence that African American students

43. *Id.* at 823–24.
44. Coalition to Save Our Children v. State Bd. of Educ., 901 F. Supp. 784, 823–24 (D. Del. 1995).
45. Coalition to Save Our Children v. State Bd. of Educ., 90 F.3d 752, 759 (3d Cir. 1996).
46. *Id.* at 760.

were overrepresented in special education classes and underrepresented in gifted and talented programs.[47] Statistical evidence presented to the court suggested that among high school students with identical test scores, African American students were more likely to be placed in lower level classes than white students.[48] Finally, the Coalition submitted an expert report that concluded that African American students, who were disproportionately placed in lower level courses, consistently demonstrated fewer gains in achievement over time, which adversely affected their ability to attend college.[49]

However, the Third Circuit declined to recognize any of this evidence as vestiges of segregation. Instead, it adhered to expert testimony that described the racial balance at schools in these districts as "close to perfect" based on an index comparing the racial composition at the Delaware School Districts to a national sample of seventy-six similar school districts.[50] The court refused to entertain the Coalition's argument regarding within-school segregation, asserting that "the Constitution [did] not require any particular racial balance in each school, grade, or classroom."[51] As to the criticism of the racial imbalance in special education programs, the court explained that special education students had been classified based on "neutral, non-discriminatory state and federal criteria," could be removed from the program at a parent's request, and had been excepted from desegregation orders.[52] The court, therefore, was not troubled that the percentage of African American students in special education programs exceeded the percentage of African Americans in the overall population. Nor did the court find problematic the consistently lower placement of African American students with comparable test scores to those of white students, given the comparison relied only on testing results and not on academic achievement in coursework.[53] To the allegation of lower teacher expectations, the court commented that "alone it is neither definitive nor substantial enough to show clear error . . . [and] does not establish anything specific about whether that putative problem is related to disparate educational opportunity or treatment according to race."[54] It called the expert report "devoid of factual support . . . [and] merely conclusory,

47. *See id.* at 762.
48. *See id.* at 763–64.
49. *See id.* at 765. The expert witness was Jeannie Oakes, who issued a report titled "Ability Grouping, Tracking and Within-School Segregation in New Castle County Schools." *Id.* at 765 n.16.
50. *Id.* at 762.
51. *Id.* (citing Miliken v. Bradley, 418 U.S. 717, 740–41 (1974)).
52. *Id.* at 763.
53. *Id.* at 764.
54. *Id.* at 765.

presuming that the placement of a given student in a lower track on the basis of ability is *per se* discrimination."[55]

Faculty and Staff Assignment. Concerning the *Green* factors of faculty and staff, the Coalition argued that vestiges remained and pointed to the two to three percent decline since 1982 in the overall percentage of minority teachers within the districts. Contrary to the Coalition's evidence, the court found the racial balance that the Delaware School Districts achieved "virtually unprecedented among those school districts in this country that operate under court orders,"[56] and recognized this fact as more indicative of desegregation than a minute dip in percentages. It characterized the decline in minority teachers not as a vestige, but rather, as an unfortunate, contemporary, national trend caused by the critical shortage of African American teachers in public schools.[57] The Coalition further contested the absence of racial balance in the various school district staffs that had not been diversified to reflect any racial balance. The court, however, dismissed these arguments, claiming that it would not be feasible to require these staff members to move or commute to distant workplaces, given the modest salary they received.[58]

Extracurricular Activities. Nor did the court acknowledge that vestiges existed in extracurricular activities, the last *Green* factor the Coalition contested. Pointing to the racial identifiability within student activities, the Coalition argued that vestiges still remained.[59] The court limited its sphere of influence, asserting that a school district could not compel or deny student participation in noncompulsory extracurricular activities merely to achieve a racial balance. Because the extracurricular activities were open to students of all races, all eligibility requirements were race-neutral, and all students, regardless of race, were encouraged to participate. Therefore, the court found the accusations of discrimination in extracurricular activities unmerited.[60]

In its review of the above *Green* factors, as well as other ancillary factors that had been designed for these particular districts,[61] the Third Circuit declared the Delaware School Districts unitary. Despite the Coalition's mission

55. *Id.* at 765 n.16.
56. *Id.* at 766.
57. *Id.* at 767.
58. *Id.* at 768.
59. *Id.*
60. *Id.*
61. The ancillary factors derived from a 1978 court order for the Northern New Castle School Districts that required the districts to engage in a number of plans—from creating an in-service training program for teachers and personnel training them to cope with the desegregation process, to establishing and enforcing nondiscriminatory guidelines for new construction. *See id.* at 769–76.

to preserve Delaware's desegregation programs and its attempt to locate vestiges in various aspects of the school system, such as in the lower course placement of African American students, the dip in minority teachers, and the continued racial identifiability of nonacademic pursuits, the Third Circuit elected to find causation of these trends not in segregation, but rather, in socioeconomic conditions. It criticized the Coalition for its failure to "acknowledge the importance of pervasive socioeconomic conditions that account for [these educational] discrepancies" and for "avoid[ing] the responsibility of carefully examining the roots of the continuing black/white achievement gap."[62] In framing the disparities of Delaware's current school system as vestiges of segregation, however, the Coalition believed it had taken on precisely that responsibility.

B. San Francisco Unified School District

San Francisco's desegregation program began in 1978 when the San Francisco National Association for the Advancement of Colored People (SFNAACP) brought suit in the District Court of the Northern District of California on behalf of a group of African American families against the San Francisco Unified School District (SFUSD) for its practices of discrimination and segregation.[63] It was a complaint which, by 1983, had paved the way for the court's approval of a desegregation consent decree that still operates in SFUSD today.[64] The decree mandated increased efforts to promote academic excellence for all students in the district and required the desegregation of all schools, programs, and classrooms. Set forth in *San Francisco NAACP v. San Francisco Unified School District*, the decree's most controversial provision, paragraph 13, limited the population of any one race or ethnicity at most SFUSD schools to 45 percent.[65] It was this provision that sparked the litigation challenging the San Francisco desegregation consent decree.

In 1994, a group of Chinese American families filed suit against SFUSD, seeking to end the desegregation program that allegedly barred many qualified Chinese American applicants from several of the city's most prestigious

62. *Id.* at 778.

63. San Francisco NAACP v. San Francisco Unified Sch. Dist., 484 F. Supp. 657 (N.D. Cal. 1979).

64. San Francisco NAACP v. San Francisco Unified Sch. Dist., 576 F. Supp. 34 (N.D. Cal. 1983).

65. *Id.* at 63. Pursuant to paragraph 13 of the Consent Decree, no San Francisco Unified School District (SFUSD) school may have fewer than four racial/ethnic groups represented in its student body, and no racial/ethnic group may constitute more than 45 percent of the student body at any regular school, or more than 40 percent at specified alternative schools. *Id.*; *see also* Ho v. San Francisco Unified Sch. Dist., 965 F. Supp. 1316, 1318 (N.D. Cal. 1997).

schools.[66] In *Ho v. San Francisco Unified School District*,[67] the families sought a declaratory judgment that the system of racial classification embodied in paragraph 13 was invalid under the Fourteenth Amendment.[68] Their motion for summary judgment on this claim was denied and later appealed to the Court of Appeals for the Ninth Circuit, which placed the issue of vestiges at the forefront of the litigation. "[T]wo issues remain for trial," Judge Noonan wrote, "do vestiges remain of the racism that justified paragraph 13 of the consent decree in 1983? Is paragraph 13 necessary to remove the vestiges if they do remain?"[69] Describing the unidentified and unspecified evidence of vestiges the SFUSD submitted in its affidavits as being too conclusory, the court insisted that the evidence of vestiges be more concrete and more closely tied to the discriminatory practices and policies that justified the consent decree in 1983.[70]

The Ninth Circuit's opinion centralized the issue of vestiges in the *Ho* litigation and hinged the San Francisco consent decree on whether vestiges remained or not. The SFUSD's ability to prove vestiges of segregation still lingered promised to result in the continuation of the decree, while proving the elimination of such vestiges would mark the end of the consent decree. Absent a clear definition from the Supreme Court, the legal standard for vestiges in San Francisco remained an open question for the court to resolve. Unlike the Third Circuit, this court actively sought to establish a definition. Accordingly, the court required the parties to submit briefs arguing the appropriate standard for the term. Three different briefs were submitted to the court, representing the range of definitions accommodated by the Supreme Court's desegregation cases. The narrowest definition of vestiges was expectedly presented by the Ho plaintiffs:

> [T]o prove that a present condition within the SFUSD is a "vestige" of prior segregation which might justify the Consent Decree, the Defendants must show (1) that the condition relates back to original acts of *de jure* segregation; (2) that those original acts of *de jure* segregation were committed by the SFUSD; and (3) that the present condition continues to be caused by those original acts of *de jure* segregation and not by present-day external factors beyond the SFUSD's control.[71]

66. *Ho*, 965 F. Supp. at 1318.
67. Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854 (9th Cir. 1998).
68. *Ho*, 965 F. Supp. at 1318–19.
69. *Ho*, 147 F.3d at 865.
70. *Id.*
71. Plaintiffs' Brief on Defining Vestiges of Discrimination at 4, Ho v. San Francisco Unified Sch. Dist. (N.D. Cal. Dec. 2, 1998) (No. C-94-2418-WHO).

The SFUSD submitted the broadest definition of vestiges, relying heavily on "authoritative dictionary definitions of the word 'vestige.'"[72] Ultimately, the SFUSD urged the court to "apply a legal standard which seeks the disclosure of all traces of conditions which existed in the SFUSD at the time the Consent Decree was developed and approved by the Court, remained in 1994, and have not yet been eliminated."[73] After considering these briefs, Judge William Orrick, the presiding district judge, announced the definition of vestiges for the purpose of trial, adopting a third definition of vestiges recommended by the state superintendent:[74]

> [A] vestige of segregation or discrimination . . . exists when (1) there exists a current condition in the school system that is likely to convey the message of racial inferiority that is implicit in a policy of segregation; and (2) that current condition is caused, at least in part, by the intentional racially discriminatory policies and practices by government officials that justified the Consent Decree at its inception.[75]

The *Ho* litigation ultimately settled. As a result, the above standard Judge Orrick set forth was never truly tested in the courtroom at either the district level or the appellate level. Despite this, the arguments that followed Judge Orrick's announcement and that led up to the anticipated trial, provide a useful illustration of how one jurisdiction approached the interpretation of vestiges when afforded a slightly broader definition than permitted in any of the circuit courts reviewed in this Comment.[76] Under the definition adopted by Judge Orrick, the state superintendent filed an expert report by Professor Stuart Biegel, the State Monitor for the SFUSD's Consent Decree. Biegel posited that vestiges of segregation manifested themselves in the different expectations of students depending on their race and socioeconomic status.[77] At schools that were racially identifiable as African American, he contended, students were consistently "presented with a 'dumbed-down' curriculum based

72. Local School District Defendants' Memorandum Re: The Legal Standard to Be Applied by the District Court in Determining "Vestiges" at 2, Ho v. San Francisco Unified Sch. Dist. (N.D. Cal. Dec. 1, 1998) (No. C-94-2418-WHO).

73. *Id.* at 4.

74. *See supra* note 71 and accompanying text; *see also infra* note 75.

75. Levine, *supra* note 3, at 82 (citation omitted); *see also* State Superintendent's Trial Brief, Ho v. San Francisco Unified Sch. Dist. (N.D. Cal. Feb. 16, 1999) (No. C-94-2418).

76. *See* Levine, *supra* note 3, at 82. According to Professor David Levine, counsel in *Ho*, the adopted definition of vestiges "seemed to tip unduly in favor of the defendants." *Id.* Such a formulation, Levine believes, reeked of judicial activism. He suggests that the court "would do its best to preserve the essence of the decree it had approved and presided over for so long." *Id.* at 83. Levine further argues that the court's legal standard was plainly incorrect since Judge Orrick relied on Marshall's failed legal standard in his *Dowell* dissent. *Id.* at 82.

77. Stuart Biegel, Revised Expert's Report at 5, Ho v. San Francisco Unified Sch. Dist. (N.D. Cal. Feb. 3, 1999).

on continued low expectations on the part of too many teachers, counselors, and administrators."[78] According to Biegel, a "watered-down curriculum based on low expectations" regularly resulted in classes that were disproportionately populated by low-income minority students.[79]

The SFNAACP filed expert reports as well, declaring that vestiges of racial discrimination still remained unremedied and therefore the system of classification in paragraph 13 was still necessary.[80] The school district's experts stipulated that the consent decree responded to areas of educational inequality and that the classification system embodied in paragraph 13 was imperative to effectively implement the school desegregation plan. Vestiges of segregation, the SFNAACP asserted, were apparent in the disproportionate number of African American and Latino students receiving failing grades or incompletes in classes and failing to show up for class at all.[81] The *Ho* plaintiffs, despite their dissatisfaction with the legal standard set before them, challenged the vestiges the SFNAACP advanced, stating that no causal link existed between the alleged vestiges and the system of state-enforced segregation prior to 1983. The *Ho* counsel highlighted what to them was the faulty reasoning of the SFNAACP expert reports stating, "[a]t most, the reports asserted that since certain facts existed in 1983 and still existed at the present time, they must be vestiges of segregation."[82] Whether the district court or the Ninth Circuit would have concluded similarly remains an open question, but subsequent opinions provide hints.

In Judge Orrick's approval of the 1999 settlement, he referenced the uphill battle the SFUSD defendants embarked upon that seemed to cast doubt on the existence of provable vestiges within the SFUSD.[83] However, the revised settlement agreement of 2001 contained greater possibilities for the plaintiffs' cause.[84] While Judge Orrick once again echoed his 1999 sentiments

78. *Id.* at 9. Professor Biegel's expert testimony was also prepared to discuss the placement of African American students in "leftover" classrooms and the separation of Chinese American and Latino students in lower quality language classes for their entire elementary school career. *Id.*

79. *Id.*

80. *See* Levine, *supra* note 3, at 90.

81. *See id.*

82. *Id.* at 90–91.

83. *See* San Francisco NAACP v. San Francisco Unified Sch. Dist., 59 F. Supp. 2d 1021, 1030 (N.D. Cal. 1999).

> It is thus clear to the Court that defendants had very little chance of prevailing at trial. There was little likelihood that defendants would be able to prove that the race-based student assignment plan was still constitutional today in light of the very strict burdens of proof imposed by the Supreme Court and the Ninth Circuit.

Id.

84. A revised settlement agreement emerged in July 2001 when it became apparent to all the parties involved that the December 2002 consent decree termination date would not afford the District sufficient time to implement programs related to the consent decree goals of

that anticipated difficulty for the defendants to prove vestiges, he described the battle as uphill, but not impossible.[85] Moreover, Judge Orrick made implicit in the 2001 settlement agreement proposal that vestiges still remained in the district. He declined to terminate the consent decree, instead extending its life until December 2005. Moreover, he provided that the SFUSD must "take all practicable actions to eliminate any vestiges of past *de jure* racial or ethnic discrimination, to the extent practicable" by the termination date of San Francisco's Consent Decree.[86] Unfortunately, for future plaintiffs in school districts such as Boston, the vestiges that remained in San Francisco remained unnamed and unidentified.

C. Boston School District

In 1975, in *Morgan v. Hennigan*[87] Judge W. Arthur Garrity of the District Court of Massachusetts determined that Boston had promoted and maintained dual public school systems in violation of the constitutional rights of African American students.[88] The ensuing remedy obligated Boston's premier examination schools[89] to ensure that African American and Latino students composed 35 percent of each entering class.[90] By 1995, the Boston School Committee (BSC) had discontinued the 35 percent set-aside and adopted a new plan,[91] under which each examination school admitted half of its class on the basis of a composite score ranking, consisting of a combination of a student's grade point average and entrance examination score. The remaining half of the class was admitted on the basis of the composite

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educational equity and excellence. According to several reports, the continued operation of the consent decree was necessary to effectuate its goals, and the *Ho* plaintiffs agreed not to oppose extensions of the program under specific conditions. Amended Stipulation and [Proposed] Order Re: Modification and Termination of Consent Decree, Ho v. San Francisco Unified Sch. Dist (N.D. Cal. Jul. 11, 2001) (No. C-84-2418-WHO) (on file with author).

85. *See* Memorandum Decision and Order, Ho v. San Francisco Unified Sch. Dist. No. C-94-2418-WHO, 2001 WL 1922333, at *5 (N.D. Cal. Oct. 24, 2001) ("The District unquestionably faced an uphill battle, although not an impossible one, in attempting to show that the use of race it now proposed was within the boundaries of the United States Constitution.").

86. *Id.* at 5–6 ("The District has agreed to take all practicable actions to eliminate any vestiges of past *de jure* racial or ethnic discrimination, to the extent practicable, by that time.").

87. 379 F. Supp. 410 (D. Mass. 1974).

88. *See id.* at 481–82.

89. The examination schools are Boston's three most renowned public schools, of which Boston Latin School is the most prestigious. The other two schools are Boston Latin Academy and O'Bryant School. *See* Wessmann v. Gittens, 160 F.3d 790, 791–92 (1st Cir. 1998).

90. Morgan v. Kerrigan, 401 F. Supp. 216, 258 (D. Mass. 1975).

91. Judge Garrity no longer had control of the student assignment process at this point. In 1987, the First Circuit directed Judge Garrity to return control of student assignment process to the Boston School Committee in the spirit of local control of schools. *See* Wessmann v. Boston Sch. Comm., 996 F. Supp. 120, 122 (D. Mass. 1998).

score ranking, as well as "flexible racial/ethnic guidelines."[92] These guidelines provided each of the three schools with a student body that reflected the diversity of the school's applicant pool.[93] But these plans excluded Sarah Wessmann, a white student who would have been awarded entrance to Boston Latin School had the admission process accepted students solely on the basis of composite score rankings. Due to the racial and ethnic guidelines, Wessmann argued, she was denied admission despite having stronger composite scores than admitted minority students. She brought suit and sought an injunction against the admission plan.

Judge Joseph Tauro, a U.S. District Court Judge for the District of Massachusetts, justified the admission program based on two compelling state interests: diversity and the removal of vestiges of discrimination. "Despite more than a quarter century of federal court involvement," Judge Tauro wrote, "vestiges of past discrimination remain within the Boston Public School system."[94] For his main evidentiary source, Judge Tauro pointed to a 1994 Order in which Judge Garrity, a fellow district court judge, enjoined the BSC from doing anything that promoted racial segregation in the schools.[95] "This order alone provided a compelling basis for the [BSC's] adopting a policy designed to effectively avoid re-segregation of its examination schools," wrote Judge Tauro.[96] In passing, Judge Tauro pointed to "gross disparities in achievement and admissions statistics between black and Hispanic students on the one hand, and white and Asian students on the other."[97] He also observed that no set uniform curriculum standards existed for students and that teachers harbored lower performance expectations of African American and Hispanic students.[98] After having observed nearly eighty schools in two years, a deputy superintendent testified to several instances which manifested the lower expectations directed at minority students in Boston: occasions of unjustified disciplinary action, regular occurrences

92. The plan combined "strict composite score ranking with flexible racial/ethnic guidelines." *Id.* at 124. By this plan, the first half of seats available at each examination school would be awarded to the top test takers in the "Qualified Applicant Pool." Those not admitted on this basis would be considered the "Remaining Qualified Applicant Pool." The remaining spots at the school would be awarded according to the composite score ranking as well as flexible racial and ethnic guidelines. *See id.* at 125–26.

93. *Id.* at 126.

94. *Id.* at 131.

95. In July 1994, Judge Garrity issued an Order which enjoined the defendant Boston School Committee in four areas. Most notable was the fourth prong of this order, in which "Judge Garrity 'permanently enjoined' the defendants 'from discriminating on the basis of race in the operation of the public schools of the City of Boston and from creating, promoting or maintaining racial segregation in any school or other facility in the Boston public school system.'" *Id.* at 123.

96. *Id.* at 131.

97. *Id.*

98. *Id.*

where praise was withheld, and a continuous failure by teachers to call on minority students during class discussions and treating them with "condescending laxity" when they did.[99]

While the District Court easily recognized lingering vestiges, the First Circuit, upon appeal, saw none which could be supported by a "strong basis in evidence."[100] In framing its discussion, the First Circuit, like the Third and Ninth Circuits before it, insisted that there be such a foundation linking a current school inadequacy to discriminatory conduct during the time of de jure segregation. Judge Tauro's primary evidence, namely Judge Garrity's 1994 Order that prohibited the school district from discriminating or fostering segregation, simply lacked force for the First Circuit.[101] According to the court, the District Court could not "hinge [its decision] on the mere existence of a past judicial finding," proclaiming that its "unrelievedly conclusory observations" were dissatisfying.[102]

With the evidence provided in Judge Garrity's 1994 Order finding no support in the First Circuit, the BSC looked to other manifestations of vestiges. First, the Committee pointed to the aforementioned achievement gap and traced its roots to the de jure segregation of the 1970s. The First Circuit was equally skeptical here and commented, "[I]t is unclear exactly what causative factors [the achievement gap statistics] measure."[103] Secondly, the BSC alluded to lower teacher expectations for African American and Latino students as the cause of the achievement gap and claimed it was the requisite link to de jure segregation practices. The First Circuit was unpersuaded, and criticized the expert testimony for its failure to be Boston-specific and for its strong reliance on anecdotal evidence that the court believed failed to demonstrate the pervasiveness of the problem.[104] The court found fault with any evidence the plaintiffs advanced as vestiges of segregation.

D. Yonkers School District

The U.S. District Court for the Southern District of New York issued remedial orders for the Yonkers School District to desegregate in the 1986 case, *United States v. Yonkers Board of Education*.[105] Challenges to the orders in 1987 and 1992 prompted the district court to order a trial to establish whether vestiges of segregation existed in Yonkers schools and whether there was a

99. Wessmann v. Gittens, 160 F.3d 790, 821–22 (1st Cir. 1998).
100. *Id.* at 800.
101. *Id.*
102. *Id.* at 802.
103. *Id.* at 803.
104. *Id.* at 805–07.
105. United States v. Yonkers Bd. of Educ., 635 F. Supp. 1538 (S.D.N.Y. 1986).

causal relationship between any unconstitutional actions by the state defendants and those vestiges. In the 1993 trial, the district court held that vestiges of desegregation indeed persisted.[106] Whereas in prior cases, proponents of desegregation programs used the *Green* factors of student enrollment, faculty, staff, transportation, extracurricular activities, and facilities to demonstrate vestiges, here the evidence of vestiges came in the form of insufficient multicultural curricula and teaching techniques, and low teacher expectations.[107] As to low teacher expectations, the School Board provided several examples: the testimony of a teacher who had repeatedly overheard other teachers stating their belief that not all children can learn, referring to children of color in particular; a former superintendent who observed a teacher discourage the participation of minority students under the assumption they did not know the correct answers to his questions; a school social worker who testified that some teachers saw minority students as deficient because they were bilingual immigrants, urban, and poor.[108]

Then, in 1997, the defendant State of New York, which sought to free itself of its desegregation program, contested the district court's findings that vestiges of segregation remained in the school system. The Second Circuit agreed with the State of New York that the vestiges of segregation had been eliminated. It found the evidence submitted by the program's advocates to be "almost entirely anecdotal, and failed to forge an adequate causal link between the regime of *de jure* segregation and any ongoing remediable deficiency."[109] Thus, the problems which plagued BSC's defense in Boston hindered the defenders of desegregation in Yonkers as well.

To the specific finding that lower teacher expectations were vestiges of de jure segregation, the court found that the evidence lacked support and was simply "not enough."[110] It stated, "[T]he evidence that teachers have low expectations of minority students is entirely based on scattered anecdotes, and the evidence supporting a causal link between these low expectations

106. United States v. City of Yonkers, 833 F. Supp. 214, 225 (S.D.N.Y. 1993).

107. *Id.* at 222–23. Additionally, there were other areas that the Board presented as putative vestiges of discrimination, such as "within school segregation," "the relationships between majority and minority students," "community perceptions concerning the Yonkers schools," and "the self-esteem and attitudes of the students." The Second Circuit did not review any of these because the district court made no findings on these subjects. *See* United States v. City of Yonkers, 181 F.3d 301, 312–13 (2d Cir. 1999). Here, by disallowing the *Green* factors as measures of the vestiges of segregation, the court was able to shift the burden of persuasion to the School Board. "Where the residual effects of segregation are not grounded in any of the *Green* factors, the return of school control to local authorities militates more strongly in favor of placing the burden of persuasion on those who argue that racial differences in achievement are caused by segregation." *Id.* at 311.

108. *City of Yonkers*, 181 F.3d at 315.

109. *Id.* at 306.

110. *Id.* at 316.

and prior *de jure* segregation was a set of subjective, intuitive impressions."[111] The court declared that only in the most exceptional of circumstances could anecdotal evidence be used to establish institutional discrimination.[112] Otherwise, quantitative proof of lower teacher expectations would be necessary to substantiate such a finding.

Similarly, the court refused to recognize any merit in the allegation that curricula and teacher training were outdated. Testimonies from various school administrators who spoke of outdated teaching methods and training in a segregated school system fell on deaf ears.[113] These, according to the court, did not "furnish an evidentiary basis for a finding of a vestige of prior discrimination."[114] Skeptical of the argument that deficiencies in training of the younger teachers were traceable to the era of de jure segregation, the court rescinded expectations that every school district be entirely successful at continuously retraining its teachers.[115] Simply because a teacher resisted or refuted updated pedagogical strategies such as cooperative learning did not make that teacher a "constitutional violator," according to the court.[116] Moreover, the court was wary of implying that children of different ethnicities and races needed separate curricula or exposure to distinct teaching techniques, by imposing one type of curriculum for African American students and another for white students.[117] Hence, the court declined to recognize that a school's failure to implement multicultural curricula or multicultural teaching techniques was a vestige of segregation. To conclude otherwise would have suggested that African American students were incapable of learning in the mainstream system and that they learned differently from white students. Such thinking was unacceptable.

In concluding, the court admonished the school board for its insistence that minority students be taught under different curricula, which the court said reinforced the idea of lower teacher expectations.[118] The school board believing minority students needed a different—supposedly a less rigorous—curriculum was itself indicative of lower expectations. According to the court, the school board desired to retain this "taint," because it ensured a flow of state money

111. *Id.* at 315–16.

112. *Id.* at 316 (citing Wessmann v. Gittens, 160 F.3d 790, 806 (1st Cir. 1998)).

113. *Id.* at 313–14. Some comments included those of Dr. Donald Batista, who was the superintendent of the Yonkers public schools. He testified that most teachers "were trained in a segregated system," and as a result, "[t]hey are accustomed to ability grouping and dealing with homogeneous classes, and in many respects, they have not been trained to work with more heterogeneous classes, trained in understanding cultural diversity and multi-cultural education." *Id.* at 313.

114. *Id.* at 314.

115. *See id.*

116. *Id.*

117. *See id.*

118. *See id.*

for the school district.[119] In effect, the court presumed that the board advanced lower teacher expectations and outdated curricula as vestiges, not because they recognized these to be the actual lingering effects of segregation, but rather, because the board desired the funds that accompanied desegregation programs.[120]

This presupposition is emblematic of the skepticism that several courts possessed about any proposed vestiges, and further, it echoes the hurdles faced by plaintiffs seeking to advance a broader meaning of the term.

E. Charlotte-Mecklenburg School District

The most recent desegregation program to be challenged in a circuit court revolves around the Charlotte-Mecklenberg School District (CMSD). The CMSD began operating under federal court supervision in 1971, which required a desegregation plan that included a limited use of racial ratios, the pairing and grouping of school zones, and extensive busing.[121] In 1999, the District Court for North Carolina concluded that the CMSD reached unitary status by eliminating the vestiges of past discrimination to the extent practicable.[122] In September 2001, in *Belk v. Charlotte-Menklenberg Board of Education*,[123] the Fourth Circuit concurred with that conclusion in a case prompted by Cristina Capacchione. Capacchione, a white student, argued that her rejection by CMSD's magnet school program was because of her race.[124] In challenging the magnet school admission procedures, Capacchione essentially questioned the desegregation plan that had instituted CMSD's magnet admission process.[125] Both the Capacchione litigation and the earlier declaration of unitary status struck a blow to the case's original Swann plaintiffs who sought to preserve the desegregation plan, including the magnet admission programs. In defending the desegregation plan, the Swann plaintiffs contended

119. *Id.* at 316.

120. *Id.* at 310 ("[T]he Board has a compelling financial incentive to depict its school system in the most dismal light.").

121. *See* Capacchione v. Charlotte-Mecklenburg Schs., 57 F. Supp. 2d 228, 235–36 (W.D.N.C. 1999).

122. *Id.* at 293–94.

123. 269 F.3d 305 (4th Cir. 2001).

124. *Capacchione*, 57 F. Supp. 2d at 239. The *Capacchione* litigation was consolidated with the Swann's appeal challenging the finding of unitary status.

125. *See Belk*, 269 F.3d at 305. For a description of the magnet program, see *id.* at 316–17. The magnet school program was an additional component of the Charlotte-Mecklenberg School District (CMSD) desegregation program instituted in 1992. To achieve racial balance in the magnet schools, the CMSD instituted a lottery system for African Americans and non–African Americans in order to sustain a racial balance. If there were not enough African American students or white students to fill the spots allotted to African Americans or whites, respectively, the CMSD attempted to recruit students of the needed race. *Id.*

that the vestiges of the dual system had not yet been eliminated, and therefore, the use of race was necessary to comply with the court's earlier desegregation orders.[126] To determine the validity of this allegation, the Fourth Circuit, as the Third Circuit had done for the Delaware School Districts, systematically reviewed the specific *Green* factors being contested.

Student Assignment. To determine whether a school was racially balanced, the district court adopted a "plus/minus fifteen percent variance" from the district-wide ratio of African American to white students.[127] Based on this index, twenty of the 126 schools in the district had African American student bodies higher than 15 percent above the district-wide ratio, and seventeen had African American student bodies under 15 percent below the district-wide ratio. The district court found that the CMSD had not operated as a single race school since 1970. In two alternative desegregation indices, the dissimilarity index and the index of interracial exposure,[128] the court found that the CMSD not only desegregated in the 1970s, but also maintained a substantially desegregated system and had a better racial balance than many comparable districts. In the court's assessment, CMSD had made "great leaps of progress."[129]

To dispute the court's findings, the Swann plaintiffs referred to recent data indicating that the racial imbalance had increased in some schools, demonstrating a continuing vestige of segregation. While the court acknowledged this trend, it attributed this increasing racial imbalance to demography rather than de jure segregation. Furthermore, the court refuted the Swann plaintiffs' contention by determining that the demographic changes were significant enough to result in this new racial imbalance. Consequently, the school district bore no duty to correct the imbalance.[130] For the court, the extended periods of compliance with the court's racial balance, despite a modest imbalance due to demographic shifts, supported the notion that "the present levels of imbalance [were] in no way connected with the *de jure* segregation once practiced" in the CMSD.[131]

126. *Id.* at 317.

127. *Id.* at 319. Other school districts had used much higher variances to define desegregation. *See e.g.*, Manning v. Sch. Bd., 244 F.3d 927, 935 (11th Cir. 2001) (adopting a 20 percent variance as its standard).

128. The dissimilarity index compares the racial composition of each school to the district-wide composition to measure the degree of racial imbalance. The index of interracial exposure measures the percentage of white students in schools attended by African American students.

129. *Belk*, 269 F.3d at 320.

130. *See id.* at 321 ("Once the original racial imbalance caused by a constitutional violation has been rectified, 'the school district is under no duty to remedy imbalance that is caused by demographic factors.'" (quoting Freeman v. Pitts, 503 U.S. 467, 494 (1992))).

131. *Id.* at 322.

The Swann plaintiffs also identified vestiges in school sitings and transportation burdens as areas where state choices, rather than demographic trends, resulted in a racial imbalance. They claimed that the CMSD had not attempted all that was possible in locating new schools and were dismayed that approximately 15,000 African American students were bused versus 11,000 non–African American students.[132] Like the data regarding an increased racial imbalance, these claims were also refuted by the court. It recognized that the CMSD had made efforts to establish schools in locations accessible to both African Americans and whites, and also took into consideration that new population booms necessitated new schools.[133] The court insisted that siting schools based on practicality was more reasonable than building schools based on "possibility."[134] Regarding the unequal transportation burdens, the court offered a similar counterargument grounded in practicality: It was easier to bus central city students to the suburbs given traffic conditions.[135] Therefore, neither school sitings nor transportation burdens were sufficient to prove vestiges in student assignments.

Faculty Assignment. The Swann plaintiffs also attempted to identify vestiges in the sixteen schools with racially imbalanced faculties in the 1998–1999 academic year based on the plus/minus 15 percent variance, as described above. They noted the six school increase from the preceding school year, when ten schools had been found imbalanced.[136] The court then simply dismissed the statistical rise to sixteen racially imbalanced schools as insignificant. It was a small amount relative to the 126 total schools in the district and quite an accomplishment given that not so long ago, the district's 24,000 African American students had no white teachers whatsoever in the blatantly dual school system. Furthermore, the court found no evidence that the CMSD had assigned black teachers to black schools and white teachers to white schools.[137]

Facilities and Resources. With the burden of proving vestiges of discrimination in facilities, the Swann plaintiffs attempted to point to differing qualities of schools as vestiges. An expert for the CMSD measured seventy-three schools in the 126 school district—a mixture of identifiably white schools, identifiably African American schools, and balanced schools—and considered factors such as adequacy, safety, healthfulness, accessibility, flexibility, efficiency,

132. *See id.*
133. *See id.* at 324–25.
134. *See id.*
135. *See id.* at 325–26.
136. *See id.*
137. *See id.* at 326.

expansibility, and appearance.[138] Based on this survey, the expert found no disparities according to the racial composition of the school. Of the four schools that required major renovation, two were racially identifiable as white schools and the remaining two were racially identifiable as African American schools. Of those needing significant improvements, sixteen were identifiable as African American and eighteen as white. The survey found that the age of the buildings, not the race of its inhabitants, dictated the quality of the facilities and that deteriorating facilities were dispersed throughout the district without any correlation to the racial makeup of the schools.[139] Hence, the court refused to recognize deteriorating facilities at racially identifiable African American schools as vestiges.[140]

Transportation. In the area of transportation, the court likewise found no vestiges of segregation remaining. Five of every six district students rode the bus, freely provided by the CMSD to all students who lived within a mile and a half of their schools. Given that the CMSD provided transportation to all students within the outlined area regardless of race, the court saw nothing more the district could do.[141]

Extracurricular Activities. Nor did the court find vestiges of discrimination in extracurricular activities, for it found that the ratio of African American to white students participating in extracurricular activities was roughly equal.[142] The court noted that disparities did exist in that African American students outnumbered whites in student government positions while whites outnumbered African American students in honors programs, but the Swann plaintiffs did not successfully show these to be linked to the system of de jure segregation. The court also found no evidence suggesting that the CMSD pushed African Americans towards student government and away from honors programs.[143]

In addition to scrutinizing whether the CMSD had reached unitary status in the individual *Green* factors, the Swann plaintiffs presented other evidence that vestiges remained in the areas of teacher experiences, student achievement, and student discipline. They argued that schools that were identifiably African American had a greater likelihood of having less experienced teachers and fewer teachers with advanced degrees. In these schools, teachers had 0.7 to 1.3 fewer years' experience than the district average and 1.6 to 2.9 fewer years' experience than that found in identifiably white schools.[144]

138. *Id.* at 327.
139. *Id.* at 327–28.
140. *Id.*
141. *See id.* at 329.
142. *Id.*
143. *Id.*
144. *Id.* at 330.

Thirty-one percent of the teachers in the African American schools in the district held advanced degrees versus 46 percent of teachers in the white schools.[145] The court determined the differences in years of experience to be slight. Ironically, the court found these statistics to be more indicative of equity in teacher quality than indicative of disparity. Furthermore, the court placed no weight on the differences in degrees, asserting that the number of degrees a teacher has does not speak to the teacher's competence or quality.[146]

In response, the Swann plaintiffs attempted to establish vestiges in the differing achievement levels between African American and white students.[147] The Fourth Circuit relied on the practice of most courts, including those described above, which refused to consider an achievement gap as a vestige of discrimination. Rather than situating the achievement gap in discriminatory practices, it opted to link them to other factors, such as socioeconomic conditions.[148] Expert testimony described the vastly different socioeconomic conditions between African American and white students in the CMSD in the areas of family income, college graduation rates of parents, and free lunch programs. The court used these discrepancies to explain the achievement gap between students.[149]

Lastly, the Swann plaintiffs posited that vestiges existed in school discipline practices by arguing that African American students were targeted for disciplinary matters and were treated differently from white students. They pointed to discipline statistics for the 1996–1998 academic years that showed 66 percent of all students disciplined were African American.[150] The court responded that such evidence of disparities was not sufficient to establish a vestige of discrimination. It commented that any notion that African American students were targeted was absurd and was not substantiated by any evidence presented.[151]

In declining to recognize vestiges in any evidence that the Swann plaintiffs advanced, the circuit court affirmed CMSD's unitary status determination. "After more than three decades of federal court supervision," the Fourth Circuit wrote, "[t]he dual system has been dismantled and the vestiges of prior discrimination have been eliminated to the extent practicable."[152] While the court remarked that the CMSD was not a perfect school system given its growing student population, aging buildings, and lack of funds, it also provided

145. *See id.*
146. *See id.* at 330.
147. *See id.*
148. *See id.*
149. *Id.* at 331–32.
150. *See id.*
151. *See id.*
152. *Id.* at 335.

that "[t]hese difficulties . . . are not vestiges of the former *de jure* system and therefore do not have constitutional implications."[153]

III. ADVOCATING A BROADER DEFINITION

Although the circuit courts above never explicitly defined vestiges for themselves, they consistently refused to recognize vestiges proposed by plaintiffs seeking to preserve school district desegregation programs. Courts simply followed the *Dowell* Court and approached these cases with the confidence that they would be able to identify what a vestige was, or was not, when presented with suggestions. What a vestige was, based on the circuit court opinions discussed, was never established systematically. Moreover, no circuit court acknowledged even one vestige in any of the proposals argued before them. However, the courts were able to compile an extensive list of what did not constitute a vestige: racially imbalanced schools, lower course placement of African American students, lower academic achievement levels of African American students, different expectations of minority students based on their race, targeting of African Americans in student discipline practices, declining numbers of minority teachers, racially imbalanced school staff, outdated curricula and teacher training, less experienced teachers in minority schools, differing quality in school facilities, racially identifiable extracurricular activities, previous court orders that had implicitly recognized racial segregation, busing burdens that fell predominantly on African American students, and new school sitings in mostly non–African American areas. Apparently, the school districts had been completely cured of segregation's consequences.

The circuit courts approached any suggestion that vestiges still lingered in the various school districts with great caution and skepticism. Any vestige, they believed, needed to be clearly and causally linked to the former system of de jure segregation that the offending school district had perpetrated. No party presented any evidence of vestiges that met this standard. By mandating this causation requirement, the circuit courts required smoking guns that directly connected the school system's present ills to the segregation of the past. In doing so, the circuit courts advanced a rather narrow definition of vestiges that parties seeking to preserve desegregation decrees could not meet. This narrow interpretation facilitated the easy removal of desegregation programs and the achievement of unitary status in school districts. However, these were not the inevitable outcomes for courts to reach, for another reading of the Supreme Court's desegregation jurisprudence could

153. *Id.*

encompass an alternative view of vestiges applicable to the various school districts.

This Comment suggests an alternative and viable definition of vestiges that is discernable from Supreme Court desegregation jurisprudence and acknowledges the sentiment pointedly expressed in *Freeman* that vestiges are "stubborn facts of history" which "linger and persist" in our society.[154] The definition offered here comes in three parts: First, a vestige of de jure segregation is a condition that adversely affects a minority group that has experienced a history of discrimination in the past. Second, vestiges are traceable to the former system of segregation, or are a lingering condition or occurrence that existed in a school district at the time of the desegregation plan's formulation. Third, a vestige of de jure segregation is a phenomenon whose "cultural meaning" provides evidence of unconscious discrimination that may not be observed directly, but that is regarded with racial significance by society generally. While the first two prongs are somewhat self-evident, the latter one merits some explanation. This third definitional point borrows from Professor Charles Lawrence's formulation of a test to trigger judicial recognition of race-based behavior when confronted with equally skeptical courts in equal protection cases. Professor Lawrence's rethinking of racial discrimination can be equally implicated in the area of vestiges.[155] As a backdrop for his test, Lawrence explained:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.[156]

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154. Freeman v. Pitts, 503 U.S. 467, 495 (1992).

155. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Professor Lawrence wrote this article in response to *Washington v. Davis*, 426 U.S. 229 (1976), which required plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose. *See* Lawrence, *supra*, at 318. His article largely argues that racial discrimination should be contemplated in "a way that more accurately describes both its origins and the nature of the injury it inflicts." *Id.* at 321.

156. *Id.* at 322 (footnotes omitted). Professor Lawrence goes on to explain that our racially discriminatory beliefs operate on an unconscious level. Therefore, requiring proof of conscious or intentional motivation to find a constitutional violation "ignores much of what we understand about how the human mind works." *Id.* at 323.

For Lawrence, cultural symbols or trends that are racially charged can be emblematic of unconscious racism. According to Lawrence, the "cultural meaning" of a discriminatory act serves as "the best available analogue for, and evidence of, a collective unconscious that we cannot observe directly."[157] In other words, "[a] finding that the culture thinks of an allegedly discriminatory . . . action in racial terms" would equate to "a finding regarding the beliefs . . . of the government actors."[158] Because government actors are part of the culture, their behavior is inevitably influenced by racial considerations even if they are not cognizant of them. Drawing this connection is Lawrence's proposed manner of "com[ing] to grips with unconscious racism" and provides the definition of vestiges suggested here as a route towards a positive meaning.[159]

Proponents of the current direction of desegregation jurisprudence will find fault with the above definition, alleging it defies the judicial attitudes present in current desegregation cases. Certainly the rulings in the Supreme Court's two recent desegregation cases outlined in Part I resulted in the scaling back of desegregation-motivated programs and policies. *Dowell* was grounded on the premise that desegregation decrees were not intended to operate in perpetuity. *Freeman* permitted district courts to relinquish supervision and control over school districts in incremental stages. While these rulings ultimately restricted the scope of these decrees, it is important to note that they did not end them outright. In no opinion did the Supreme Court offer a definitive explanation of vestiges that would preclude the existence of any desegregation program faced with a challenge for unitary status. As Justice Marshall stated, the "Court ha[d] never explicitly defined what constitute[d] a 'vestige' of state-enforced segregation . . . . [A]s to the scope or meaning of 'vestiges,' the majority sa[id] very little."[160]

Both *Dowell* and *Freeman* provide opportunities that can accommodate a more expansive definition of vestiges. *Freeman* broadened vestiges beyond the enumerated *Green* factors by adding that the overall quality of the school could be a factor. Additionally, *Freeman* remains noteworthy for its clear acknowledgement that "vestiges of past segregation by state decree do remain in our society and in our schools . . . . [They are] stubborn facts of history [that] linger and persist."[161] Other courts have recognized this sentiment but the outcomes of the cases examined earlier fails to reflect this belief. In its introduction to the Delaware School Districts cases, the Third Circuit similarly

157. *Id.* at 324.
158. *Id.*
159. *Id.* at 323.
160. Bd. of Educ. v. Dowell, 498 U.S. 237, 260–61 (1991) (Marshall, J., dissenting).
161. Freeman v. Pitts, 503 U.S. 467, 495 (1992).

wrote, "It is beyond dispute that racism and bigotry continue to tear at the fragile social fabric of our national and local communities, and that our best efforts as citizens are needed to address this problem at many levels."[162] Yet in its final conclusion, the Third Circuit refused to recognize any vestiges of segregation in student assignment, faculty and staff placement, or extracurricular activities.

The broader definition of vestiges offered here acknowledges the reality encapsulated by these statements and attempts to address the constitutional violation that arises as a result. Moreover, while vestiges need to be real enough to be causally linked to systems of de jure segregation, *Freeman* allowed them to be "subtle and intangible" as well.[163] These words allow significant leniency for courts evaluating evidence of vestiges.[164] However, no court has attempted to grapple with what could be a subtle, intangible, or real vestige of segregation. Repeatedly, desegregation supporters have presented subtle and intangible evidence in the form of lower teacher expectations or antiquated teacher-training methods, but the circuit courts have systematically refused to identify these as vestiges. The requirement that a direct causal link exist between the system of de jure segregation and the offered evidence has continually precluded such a finding. Yet the words of Supreme Court opinions indicate that real vestiges exist in the minds of the Justices. Besides the language in desegregation jurisprudence, the general notions behind the *Dowell* test also pave the way for the continued existence of vestiges.

The *Dowell* majority directed courts to search for vestiges in the *Green* factors. The Marshall dissent established that racially identifiable schools would not be considered a vestige of segregation.[165] However, nothing in the *Dowell* opinion states that a court's inquiry into vestiges should be a test easily surpassed by desegregation detractors, as the circuit courts' reviews may suggest. Had the Supreme Court sought the easy disposal of desegregation programs, the test to determine unitary status need not have included any suggestion of vestiges.[166] According to Professor Wendy Parker, who has written extensively on desegregation jurisprudence, the Court could have limited its

162. Coalition to Save Our Children v. State Bd. of Educ., 90 F.3d 752, 756 (3d Cir. 1996).

163. *Freeman*, 503 U.S. at 496.

164. The San Francisco *Ho* litigation acknowledged this in the state superintendent's trial brief, commenting that a subtle and intangible but real condition "could include anything from measurable disparities in student achievement to evidence that teachers have lower expectations for students of a particular race or ethnicity." State Superintendent's Trial Brief, Ho v. San Francisco Unified School District (N.D. Cal. Feb. 16, 1999) (No. C-94-2418).

165. *See Dowell*, 498 U.S. at 251 (Marshall, J., dissenting) ("[T]he inquiry [the Court] commends to the District Court fails to recognize explicitly the threatened reemergence of one-race schools as a relevant 'vestige' of *de jure* segregation.")

166. *See* Parker, *supra* note 3, at 1167 (noting that the *Dowell* test "is not an easy ticket to termination").

determination of unitary status to one factor, such as a district's good faith compliance with its desegregation program, rather than basing a declaration of unitary status on the eradication of segregation's vestiges to the extent practicable. "[T]he *Dowell* test," Parker writes, "imposes a high burden on defendants: proof of the elimination of vestiges to the extent practicable. This goal-oriented requirement . . . can also be a powerful weapon in requiring actual results from school desegregation litigation with a comprehensive definition of 'vestiges.'"[167] None of the Courts of Appeals, however, have been willing to adopt such a comprehensive definition and have made the *Dowell* test a relatively low burden to overcome. Given that unitary status has been conferred upon the many school districts that have sought it, the *Dowell* directives fail to operate as a true test, susceptible to both passing and failing, but instead has become a hurdle that plaintiffs clear far too easily. Had the Court intended *Dowell* to function as a mere formality, fathoming that no vestiges of segregation existed, the one-factor test of good faith compliance would have been a sufficient obstacle for parties moving for unitary status. The Court demanded more, however, and insisted on proof that the vestiges of discrimination had been eliminated as well.

The definition suggested above coupled with the majority opinions reviewed earlier, which often identify the deficiencies of the alleged vestiges set before them, provide desegregation program sympathizers with insights as to what evidence could be permissible as a vestige of segregation should courts and plaintiffs choose to adapt lessons from these opinions. The alternate readings of *Dowell* and *Freeman*, as well as the experiences from the five jurisdictions documented, may be helpful in framing a successful litigation strategy that demonstrates vestiges of de jure segregation remain and specifically identifies such evidence. While *Dowell* makes clear that the racial identifiability of a school will not warrant a finding of vestiges, not all features of the present day school system have been precluded from consideration. Presented differently, many claimed vestiges that courts declined to recognize previously may now be considered anew.

The area of lower teacher expectations is perhaps the most likely area where a vestige may be found under the definition provided in this Comment. Given the subtlety of the phenomenon as well as the useful critiques provided by the courts as to why earlier presentations of such evidence were unacceptable, lower teacher expectations would likely qualify as a viable vestige of segregation. Mostly all school districts proposed that lower teacher expectations infected their classrooms and were an "attitudinal remnant of

167. *Id.*

the segregation era."[168] In Boston, the BSC relied heavily on an expert's report that included a "climate survey" of teacher attitudes and a multiple regression analysis designed to determine whether the low expectations reflected in teachers' survey responses could explain the achievement gap. The expert sociologist concluded that lower teacher expectations of African American and Latino students did indeed contribute to the achievement gap.[169] Additionally, BSC offered anecdotal evidence that documented the differential treatment minority and nonminority students receive.[170] Likewise, the Second Circuit was presented with evidence of lower teacher expectations in Yonkers.[171] Rather than a report from an expert sociologist, the Second Circuit heard testimony from a Yonkers school social worker, teacher, and former deputy superintendent, each of whom described examples of lower teacher expectations for minority students: teachers who view minority students as "deficient" because they are poor, bilingual, or urban; teachers who state their belief that all children do not have the capacity to learn, referencing children of color; and teachers who discourage students of color from participating in class.[172]

Both circuit courts rejected these examples as evidence of vestiges. The First Circuit critiqued BSC's expert testimony for its failure to look specifically at Boston schools because no such climate survey had been prepared for the Boston school system. Rather, the expert's conclusions on Boston were based solely on a review of general statistical data documenting the achievement gap, teacher seniority, and anecdotal evidence about teacher attitudes offered by school officials.[173] Moreover, the expert admitted to the court that the data utilized for his study was not scientifically collected, and thus not of the requisite quality to satisfy the court or his own discipline's standards.[174] The First Circuit was equally skeptical regarding the anecdotal evidence presented to it, citing in particular its failure to show the pervasiveness of the problem. According to this court, one person's recollections of isolated incidents of lower teacher expectations did not constitute a widespread problem or necessarily relate to past segregation. Furthermore, evidence of socialization—that teachers who had worked in the dual school systems had been socialized and shaped by that experience—was faulted for its lack of empirical evidence.[175] In Yonkers, the Second Circuit offered similar critiques. Because

168. Wessmann v. Gittens, 160 F.3d 790, 804 (1st Cir. 1998).
169. *Id.*
170. *Id.*
171. *See* United States v. City of Yonkers, 181 F.3d 301, 315 (2d Cir. 1999).
172. *Id.*
173. *Wessmann*, 160 F.3d at 804.
174. *Id.* at 805
175. *Id.* at 806.

the evidence was based entirely on scattered anecdotes and the causal links were subjectively based on intuitive impressions, the court declared the evidence deficient.[176]

These criticisms can be viewed as useful instructions for a party seeking to present lower teacher expectations as a vestige of discrimination. Any evidence of low teacher expectations must be first based on studies conducted in the particular school district in which the desegregation plan is being challenged. A climate survey for Kansas City will be inadequate to prove lingering vestiges in Boston. Additionally, expert evidence must adhere to the acceptable scientific methodology for collecting data in the expert's particular field. "When scientists (including social scientists) testify in court," the First Circuit wrote, "they must bring the same intellectual rigor to the task that is required of them in other professional settings."[177] Furthermore, expert testimony must be based on systematically gathered data which is both reliable and valid. Admittedly, anecdotal evidence poses a more significant barrier to acceptance than expert testimony, given such evidence can rarely show a "systematic pattern of discrimination necessary for the adoption of an affirmative action plan."[178] Nevertheless, there are exceptional circumstances in which anecdotal evidence can establish institutional discrimination.[179] Determining what these circumstances are and attempting to locate school desegregation programs in this framework may be the first step. Attempting to translate anecdotal evidence into quantitative proof that speaks to the pervasiveness of the problem may prove sufficient.

When subjected to the revised definition, lower teacher expectations may also be proven to be real, legal vestiges of segregation, and thus, could establish the burden of causation imposed by existing case law. First, the record in school districts such as Boston and Yonkers is rife with illustrations of lower teacher expectations adversely affecting minority groups. Second, establishing that such expectations are remnants of the former system of segregation would require evidence that similar attitudes prevailed at the time of state-imposed segregation, which is an evidentiary burden not too difficult to meet because racial attitudes were less concealed and more blatant during the era of de jure segregation. The third part of the definition proposed here reconceptualizes the causation burden that has proven impossible to overcome in recent desegregation opinions.[180] In arguing that the teachers

176. *City of Yonkers*, 181 F.3d at 315–16.
177. *Wessmann*, 160 F.3d at 805.
178. *Id.* at 806 (quoting Coral Const. Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991)).
179. *See* Eng'g Contractors Ass'n v. Metro. Dade County, 122 F.3d 895, 925–26 (11th Cir. 1997).
180. *See infra* note 183.

trained in dual systems of schooling were socialized and shaped by that period and retained the mindset of segregation that dominated that time, the BSC in the *Wessmann* case offered one possible example of how to reframe causation. However, because these claims were not accompanied by empirical evidence, the court refused to accept this evidence.[181] Supplying such empirical evidence, if available, may establish causation. Alternatively, recognizing that the cultural meaning of teachers' diminished expectations of minority students is a discriminatory condition can establish causation as well. That lower expectations readily translate into lower class placement and limited opportunities for college and nonvocational school tracks reeks of cultural meaning evidencing racial overtones. The third part of the definition both recognizes this as a product of unconscious racism and as a vestige of segregation worthy of redress by court-ordered desegregation plans.

IV. EXTENDING *BROWN*'S VISION THROUGH OTHER MEANS

The redress for such constitutional harms may come in a number of other ways, as well. While the adoption of a broader definition of vestiges provides one outlet to solidify the court's role in racially balancing and improving the quality of schools, other mechanisms utilizing litigation and the courts for school reform purposes and extending the valuable work already completed by existing desegregation decrees may prove equally worthwhile. Three of these alternatives are the following: modification of the causation requirement, reinvigorating existing decrees, and using new litigation strategies.

A. Modification of the Causation Requirement

In recent desegregation opinions, meeting the causation requirement has been extremely difficult because of the changing nature of desegregation jurisprudence. In desegregation cases litigated in the 1970s, the Supreme Court developed causation presumptions that favored school desegregation plaintiffs. Under these presumptions, mere proof of segregation would be sufficient to establish liability. Hence courts saw any racial imbalance, from student assignment to student achievement, as rooted in the system of de jure segregation for which defendants were held responsible. In this regime, causation played a trivial role, as the burden for proving causation was low.[182] The evidence at various stages of the *Dowell* case provides a helpful illustration. In Dowell's 1972 trial, the district court relied upon a map that showed the

181. *Wessmann*, 160 F.3d at 807.
182. *See* Parker, *supra* note 3, at 1170.

racial composition of the Oklahoma City school system. The court found this map and the demographics it reflected to be persuasive evidence that Oklahoma City was unconstitutionally segregated. In 1986, during a subsequent phase of litigation, a virtually identical map was presented to the same district court judge who subsequently found the map to be evidence that school segregation no longer existed.[183] Over time, the presumed causal connection between the system of de jure segregation and current conditions was broken, and as a result, plaintiffs have been confronted with insurmountable causation requirements, as illustrated in the Delaware, San Francisco, Boston, Yonkers, and Charlotte-Mecklenberg school districts. What may have previously been deemed a vestige of segregation became suddenly acceptable.

Proponents of desegregation plans must press for a modification of the causation requirement to make it less burdensome. Such a movement is necessary to account for the reality that suspect motives are easy to conceal and that, like vestiges, the links between both current conditions and the previous system of segregation can be subtle and intangible.

B. Reinvigorating Existing Decrees

As stated at the outset of this Comment, there are currently over four hundred desegregation programs in effect across the country.[184] While several school districts have recently moved for unitary status, hundreds of desegregation programs remain intact. The causation principles that initiated these programs have not been revisited nor have the vestiges of segregation identified decades ago been refuted. According to one empirical study, most court-ordered remedies suffer from extreme neglect and inattention, though the remedy remains in place.[185] Therefore, more effective judicial involvement is necessary to halt the widespread trend of judges adopting minor, passive roles in overseeing desegregation plans in their districts.[186] To revitalize dormant desegregation programs, judges may institute a number of requirements. They may subject existing desegregation plans to occasional hearings

183. *See* Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 EMORY L.J. 863, 867–68 (1993). Hansen portrays this relatively new causation requirement as a front for judicial exhaustion, asserting that "the judicial focus on causation is hiding more powerful factors." *Id.* at 866. Courts are accustomed to success, Hansen writes, and desegregation cases have frustrated this by lasting several decades without finalization. *Id.* at 869.

184. *See supra* note 7 and accompanying text.

185. *See* Parker, *supra* note 3, at 1160. To arrive at this conclusion, Parker conducted two empirical studies that covered the court-ordered desegregation of 192 school districts. *See id.* at 1159.

186. *See id.* at 1213. Parker observes that most judicial action involves responding to a defendant's motion for the modification of a desegregation plan. Otherwise, judges do not actively participate in the litigation. *Id.*

in order to retain continual judicial oversight, or they may supervise their cases actively while maintaining an end goal of encouraging settlement.[187]

C. New Litigation Strategies

Given that courts have construed vestiges very narrowly, leading to the termination of many desegregation programs, future court involvement with schools may be based on a new understanding of vestiges that frames them not as the lingering effects of de jure segregation, but rather as current constitutional violations under state educational adequacy claims. Thus far, courts have managed to explain teacher inexperience, diluted curricula, and deteriorating facilities for racially identifiable minority schools as products of something other than segregation. As a result, parties sympathetic to desegregation plans recognizing a role for the courts in school reform must discover alternative litigation strategies that relieve the heavy burden of establishing a causal link between de jure segregation and its vestiges.[188] What had been previously advanced as evidence of the lingering vestiges of segregation may instead be resubmitted in court as new evidence to allege that states are failing to meet their constitutional responsibility to adequately educate students.

California is one state where such a strategy is being pursued.[189] In May 2000, on the forty-sixth anniversary of *Brown*, a coalition of civil rights groups filed a class action lawsuit in San Francisco Superior Court, now known as *Williams v. State of California*. The complaint, which stands as "the most comprehensive lawsuit to date concerning the bare minimum required [of states],"[190] alleges that California has failed to provide its students with the essentials necessary for a free and common school education.[191] Additionally, the complaint asserts that officials have violated state and federal requirements that stipulate equal access to public education be provided

187. *Id.* at 1214–15.

188. *But see* Wolters, *supra* note 3, at 296. Wolters contends that recent desegregation jurisprudence rightfully curtailed the role of courts in desegregation programs. In his opinion, the Delaware court-ordered desegregation program was being used as the means to compel the Delaware State Legislature to enact expensive new legislation. *Id.*

189. Similar strategies are also being pursued in Florida. A similar suit was filed in 1999 and is currently pending in state court. The suit accuses the state of violating the constitutional rights of tens of thousands of schoolchildren in failing to provide them with an adequate education, enabling them to pass standardized tests, learn basic skills, and compete in the workplace. Suits challenging educational adequacy have also been filed in Alabama, North Carolina, Ohio, and Connecticut. *See* Lisa Shafer, *7 County Students Sue State*, CONTRA COSTA TIMES, May 18, 2000 at A1.

190. Press Release, American Civil Liberties Union, Landmark Lawsuit on Behalf of Public School Students Demands Basic Education Rights Promised in State Constitution (May 17, 2000), *at* http://archive.aclu.org/news/2000/n051700a.html(last visited July 19, 2003).

191. First Amended Complaint for Injunctive and Declaratory Relief at 10, Williams v. State (Cal. Sup. Ct. Aug. 14, 2000) (No. 312236).

without regard to race, color, or national origin.[192] In framing the claims in this light, the *Williams* plaintiffs continue the efforts made by their predecessors, from the Coalition to Save our Children in Delaware to the Swann plaintiffs in Charlotte-Mecklenberg. Specifically, they point to the ills of the school system and locate them within a discriminatory educational system.

The *Williams* plaintiffs argue that vestiges exist, but not in the same sense that the Coalition, BSC, or Swann plaintiffs argued the point. Instead of connecting them to the previous system of de jure segregation, the *Williams* plaintiffs present them as present day constitutional violations. The violations in *Williams* are more real than subtle, and resemble many of the vestiges that had been proposed in the desegregation cases chronicled in Part II. These conditions include deplorable facilities, evidenced in broken toilets, falling ceiling tiles, leaking roofs, broken air conditioning and heating systems; the lack of textbooks or other educationally necessary curricular material; and overcrowded, cramped classrooms without enough seats and desks.[193] While only about 10 percent of California's teachers do not have full, nonemergency teaching credentials, the schools represented in *Williams* have two to five times as many uncredentialed teachers as this statewide norm. One school's percentage of uncredentialed teachers is as high as 87 percent.[194]

Moreover, the *Williams* litigation has not lost sight of the discriminatory impacts of these violations, and explicitly acknowledges that these school inadequacies burden minority students more than other students, with a pronounced impact in neighborhoods with poor and minority students. Nearly all the plaintiffs in this action are African American, Latino, or Asian Pacific American.[195] In the schools these plaintiffs attend, 96 percent of their classmates are students of color. "The failures this lawsuit addresses are not randomly distributed," said Julie Su, the Litigation Director of the Asian Pacific American Legal Center, an organization involved in the *Williams* lawsuit. "They are concentrated in communities of color, in economically struggling communities, and in immigrant communities. The state's neglect has a clearly discriminatory impact."[196] Ramona Ripston, Executive Director of the ACLU of Southern California added, "Forty-six years ago today, the Supreme Court in *Brown v. Board of Education* rejected a system of inequality that had come to be accepted by many in this country as a natural state of affairs."[197]

192. *See* David Cragin, *Order to Study Books Sought Texts in Schools: Educational Rights Violated, Civil Rights Lawyers Say*, SAN JOSE MERCURY NEWS, Sept. 13, 2000, at 1B; Shafer, *supra* note 189.

193. Press Release, *supra* note 190.

194. The school referenced is Frances Willard Elementary School in Compton Unified School District. *See* First Amended Complaint, *supra* note 191, at 58.

195. *Id.* at 7.

196. Press Release, *supra* note 193.

197. *Id.*

In requesting relief, the *Williams* plaintiffs, like their predecessors, do not seek monetary damages, but rather a court order that would require the state to provide basic educational necessities to all California public school students. Such an injunction would require the state to establish baseline standards for the constitutional conditions and tools necessary for education, and also would require a system of accountability that would continuously monitor the maintenance of these basic tools.[198] If successful, the *Williams* litigation may return relevance and vitality to court-ordered decrees that had once promised school improvement. A successful lawsuit may also broaden the scope of such decrees and extend them from one school district to the rest of the state, and from remedying the specific consequences of segregation to remedying the evident failing of the present-day school system.

CONCLUSION

Because the Supreme Court's decision in *Dowell* placed discussions regarding vestiges of segregation at center stage in determining the longevity of a desegregation program, how these vestiges are defined plays a pivotal role in desegregation jurisprudence. Recently, circuit court opinions have shaped the application of vestiges as narrowly as possible, refusing to identify them in any school condition that could reasonably be considered to manifest vestiges. The continuation of this trend forebodes a limited role for courts in school desegregation matters. However, another reading of school desegregation jurisprudence can accommodate a broader notion of what constitutes a vestige. Desegregation jurisprudence has also made a viable, positive definition for vestiges possible. This definition recognizes vestiges in conditions that linger from the system of de jure segregation and disproportionately impact minorities historically discriminated against. This definition also acknowledges vestiges in those conditions which contain cultural meanings that result from racist or discriminatory attitudes, albeit unconscious ones. When such a definition is adopted, a renewed role for the courts can be inaugurated. Taking this semantic step preserves the vision of equal schools embodied by *Brown* for those who consider school desegregation programs a worthwhile endeavor.

198. *See* First Amended Complaint, *supra* note 191, at 74–75.

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