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The Role of Res Judicata in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction

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1. Summary and Thesis

A critical issue in desegregation law is how a school district once found to have been de jure segregated becomes "unitary." This issue is already of considerable practical importance and will become even more so as a greater number of school districts begin to move for recognition of their unitary status. Yet the issue has never been clearly addressed by the Supreme Court, and has only recently received attention in the lower courts and law reviews.[1]

This article analyzes the procedures and decisions of the Supreme Court with respect to the unitary status of previously segregated public schools in terms of general law and the Federal Rules of Civil Procedure. There seems to be no explicit support for the proposition that desegregation litigation is exempt from the same rules of evidence, civil procedure, and substantive law as any other litigation.[2] Because the Supreme Court often does not explain its decisions in terms of those

1. E.g., United States v. Overton, 834 F.2d 1171 (5th Cir. 1987) (*Overton*), aff'g United States v. Texas Educ. Agency, 671 F. Supp. 484 (W.D. Tex. 1987); Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987) (*Nucci*), vacating in part and aff'g in part 620 F. Supp. 214 (D. Mass. 1985), 617 F. Supp. 1316 (D. Mass. 1985); Dowell v. Board of Educ. of Okla. City Pub. Sch., 795 F.2d 1516 (10th Cir. 1986) (*Dowell II*), vacating 606 F. Supp. 1548 (W.D. Okla. 1985) (*Dowell I*), on remand, 677 F. Supp. 1503 (W.D. Okla. 1987) (*Dowell III*) reversed after remand, No. 88-1067 (10th Cir. July 7, 1989) (*Dowell IV*) (opin. withdrawn Sept. 15, 1989); Riddick v. School Bd. of Norfolk, 784 F.2d 521 (4th Cir. 1986), cert. denied, 479 U.S. 938, 107 S. Ct. 420 (1986) (*Riddick*), aff'g 627 F. Supp. 814 (E.D. Va. 1984).

2. Cf. Martin v. Wilks, 109 S. Ct. 2180, 2184 (1989) ("a principle of general application in Anglo-American jurisprudence"); Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1792 (1989) ("Conventional rules of civil litigation generally apply to Title VII cases"); Patterson v. McLean Credit Union, 108 S. Ct. 1419, 1421 (1988) (per curiam); United States v. Paradise, 480 U.S. 149, 191, 107 S. Ct. 1053, 1076 (1987); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 718, 103 S. Ct. 1478, 1483 (1983); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, 91 S. Ct. 1267, 1275 (1971) (*Swann*); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n.6, 99 S. Ct. 2941, 2946 n.6 (1979) (*Columbus*); Rizzo v. Goode, 423 U.S. 362, 378, 96 S. Ct. 598, 607 (1976); Hills v. Gautreaux, 425 U.S. 284, 294 n.11, 96 S. Ct. 1538, 1545 n.11 (1976); General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 399, 102 S. Ct. 3141, 3154 (1982); *Riddick*, 784 F.2d at 531.

general rules, however, the lower courts are developing separate and special rules for civil rights litigation in general and school desegregation cases in particular. This development reverses the movement away from special procedural rules for each "cause of action" that has characterized the development of the common law during the Nineteenth and Twentieth centuries. Moreover, this tendency runs counter to the explicit and unqualified mandates of federal statutory law expressed in part at least by the Federal Rules of Civil Procedure. For this reason, analysis in terms of the common rules of law is not only logically correct, but also legally more appropriate.

The theory of desegregation advanced herein is that once a court finds liability—that is, an intentionally segregated school system—that court must issue a remedial order which it predicts will eradicate and completely correct the prior constitutional violations. All vestiges of segregation must be identified and eradicated. (§§ 2-3). The court order must be tailored to remedy the violation found, and when finally approved, constitutes res judicata with respect to the remedial sufficiency of every part of the remedy. (§§ 4-5). Such a desegregation order may only be modified as a final judgment under Rule 60(b) of the Federal Rules of Civil Procedure. (§§ 6-7). Once the order has been fully implemented and fully complied with, either in its original form or as modified, then the constitutional violations previously found must be deemed to have been corrected and the system adjudged fully unitary. Rule 60(b) then requires that the judgment be vacated as satisfied. (§ 8). Under certain circumstances, even where the desegregation order is not completely or perfectly implemented, unitary status should be recognized. (§§ 9-10). The achievement of unitary status has three results. First, the injunctions should be vacated. New violations may be proved in this and any other litigation only by showing an intent to discriminate by the defendants. Second, under ordinary circumstances, the case should be terminated. Termination should be delayed only where supplemental claims of subsequent intentional discrimination are made. (§§ 11-13). Finally, the finding of unitary status is accorded the same effect as any other necessary finding for purposes of res judicata and collateral estoppel, thus precluding anyone in privity with the parties from thereafter relitigating either liability or remedy for the prior segregated system. (§ 14).

The critical point in the above legal analysis is that res judicata applies to the desegregation decree. Logically and necessarily flowing from this conclusion[3] is the the preclusion of a continuing and flexible

3. In this respect, this analysis opposes that of Jost, From *Swift* to *Stotts* and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101 (1986) [hereinafter Jost] and Landsberg, The Desegregated School System and the Retrogression Plan, 48 La. L. Rev. 789 (1988) [hereinafter Landsberg].

modification of the decree, the operation of the "satisfaction" clause of Rule 60(b), and the holding in *Board of Education of Pasadena City Schools v. Spangler.*[4] From this conclusion, the corollary that the finding of unitary status likewise is res judicata is a logical result. If res judicata did not apply, the desegregation decree could be modified at will, and rendered incapable of satisfaction. Hence, the dicta of *Swann v. Charlotte-Mecklenburg Board of Education,*[5] and the holding of *Spangler I* would be incompatible with the fabric of the law.[6]

In this article, the desegregation decisions of the Supreme Court are accepted as an accurate and consistent articulation of the law of equal protection under the Fourteenth Amendment to the Constitution of the United States. No criticism of these various holdings will be made.[7] Theories of desegregation and constitutional analyses that are based upon a disagreement with these holdings are not addressed in this paper, except to the extent that they raise points relevant to its analysis. Not only are the doctrines articulated in these cases implicit in *Swann*, the last unanimous decision by the Court on desegregation,[8] but the decisions and the doctrines they expound also provide essential and highly persuasive support for the thesis advanced herein.

2. GOAL OF UNITARINESS

The ultimate goal of a court ordered desegregation plan is the creation of a unitary school district. Thus, the formulation of the

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4. 427 U.S. 424, 96 S. Ct. 2697 (1976) (*Spangler I*). See also 549 F.2d 733 (9th Cir. 1977) (remanding to district court); 611 F.2d 1239 (9th Cir. 1979) (on appeal after remand) (*Spangler II*); see also 552 F.2d 1326 (9th Cir. 1977).

5. 402 U.S. 1, 91 S. Ct. 1267 (1971) (*Swann*).

6. This approach was propounded by the Pre-Trial Memorandum of the United States as *amicus curiae* filed on a Motion for Declaration of Unitary Status in Keyes v. School Dist. No. 1, Denver, Colo. (Civ. A. No. C-1499, D. Colo.) on Feb. 8, 1984.

7. Accordingly, critical analyses of the holdings that a showing of intentionally segregative conduct in a significant part of the school district raises a presumption of intentional segregative conduct throughout the school system, Keyes v. School Dist. No. 1, Denver, Colo. 413 U.S. 189, 93 S. Ct. 2686 (1973) (*Keyes*), the propriety of busing and other race-conscious remedies, *Swann*, and the affirmative duty to desegregate (including an effects test in formulating the remedy), Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 99 S. Ct. 2971 (1979) (*Dayton II*), Wright v. Council of Emporia, 407 U.S. 451, 92 S. Ct. 2196 (1972) (*Council of Emporia*), are beyond the scope of this paper. Similarly, the necessity of showing discriminatory intent to prove a violation of the equal protection clause, Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040 (1976), the mandate that the remedy be tailored to the violation, Milliken v. Bradley, 418 U.S. 717, 744, 91 S. Ct. 3112, 3127 (1974) (*Milliken I*), Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 97 S. Ct. 2766 (1977) (*Dayton I*), Hills v. Gautreaux, 425 U.S. at 293-294, 96 S. Ct. at 1544, and that race-conscious conduct and racial balance are a temporary remedy, not a permanent goal, *Swann*, 402 U.S. at 16, 28, 91 S. Ct. at 1276, 1283 (1971), Raney v. Board of Educ., 391 U.S. 443, 88 S. Ct. 1697 (1968) (*Raney*), will also be accepted.

8. See Landsberg, supra note 3, at 804-805.

desegregation plan that will be adopted as a final order and judgment requires a working definition of what constitutes a unitary school district.[9] *Swann* gives a basic description of this goal: "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race."[10] The elements of a unitary school system are described consistently with the *Swann* decision in 20 U.S.C. 1707:

> When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, such school population changes so occurring shall not, *per se*, constitute a cause for civil action for a new plan of desegregation or for modification of the court approved plan.[11]

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9. The precise definition of an unitary school system has for some time curiously evaded the grasp of the Supreme Court. Northcross v. Board of Educ., 397 U.S. 232, 237, 90 S. Ct. 891, 893 (1970) (Burger, C.J., concurring). See Graglia, When Honesty Is "Simply . . . Impractical" for the Supreme Court: How The Constitution Came to Require Busing for School Racial Balance, (Book Review) 85 Mich. L. Rev. 1153, 1174-1176 (1987). See also Fiss, The Civil Rights Injunction, at 14 (1978) ("a doctrinal uncertainty (a lack of clarity as to what 'unitary nonracial school system' meant.")); Gewirtz, Choice in Transition: School Desegregation and the Corrective Ideal, 86 Colum. L. Rev. 728, 732-733 (1986) [hereinafter Gewirtz, Choice]; Terez, Protecting the Remedy of Unitary Schools, 37 Case W. Res. L. Rev. 41, 57-59 (1986); Note, Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation, 100 Harv. L. Rev. 653, 662 (1987) [hereinafter Note, Allocating the Burden]. Indeed, as two courts have stated, "[T]he [Supreme] Court has produced no formula for recognizing a unitary school system," *Overton*, 834 F.2d at 1177 (quoting *Nucci*, 831 F.2d at 318). See also Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 602-603 (1983) ("evasion may sometimes be functional") [hereinafter Gewirtz, Remedies and Resistance]. However imprecise the Court's discussion may have been, the Court in each instance regards the term as describing a condition of a school district having highly significant legal consequences. Contra *Dowell IV*, No. 88-1067, slip op. at 21; Landsberg, supra note 3, at 812-813, 815-816.

10. 402 U.S. at 23, 91 S. Ct. at 1297. Along the same lines, the Supreme Court has stated that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20, 90 S. Ct. 29, 29 (1969) (*Alexander*). The court has further equated "unitariness" with a "nonracial system of public education," Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 436, 88 S. Ct. 1689, 1693 (1968) (*Green*), "racial neutrality," *Spangler I*, 427 U.S. at 436, 96 S. Ct. at 2704; and "racially nondiscriminatory school system," *Columbus*, 443 U.S. at 458, 99 S. Ct. at 2947.

11. Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, § 208, 88 Stat. 516. This provision was originated as a floor amendment in 1972 by Rep. Fascell (D. Fla.), 118 Cong. Rec. 28886 (1972). A variant of section 1707, section 1714(c), was

The statute refers to "such a desegregated school system" as one which has been determined to meet one of four specified conditions. These statutory conditions are different ways of describing that status which the Supreme Court was to characterize two years later in *Spangler I* as a *unitary* school system.

A final desegregation order contains findings of fact, conclusions of law, and remedies. The findings and conclusions identify the intentionally discriminatory conduct causing segregation that has been found to exist by the court[12] and identify any vestiges of this prior segregation.[13] If the violation was systemic, then the remedy must be systemic.[14]

The desegregation plan should entirely dismantle the dual school system and engender (when the plan is fully implemented) a unitary school system.[15] It must prohibit future discrimination[16] as well as elim-

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also offered as a floor amendment by Rep. Fascell. Section 1714(c) states:

> When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, no educational agency because of such shifts shall be required by any court, department, or agency of the United States to formulate, or implement any new desegregation plan, or modify or implement any modification of the court approved desegregation plan, which would require transportation of students to compensate wholly or in part for such shifts in school population so occurring.

Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, § 215, 88 Stat. 517.

12. The finding of discrimination is one of fact. *Dayton II*, 443 U.S. at 534 & n.8, 99 S. Ct. 2971 & n.8; Rogers v. Lodge, 458 U.S. 613, 623, 102 S. Ct. 3272, 3278 (1982). See Branti v. Finkel, 445 U.S. 507, 512 n.6, 100 S. Ct. 1287, 1291 n.6 (1980) (first amendment constitutional violation); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 99 S. Ct. 693 (1979) (same).

13. The courts appear to distinguish between the intentional segregation and the vestiges of this segregation. For the limited purposes of this article, the terms "vestiges" of segregation and "effects" of segregation will be considered synonymous. The proper definition of vestiges of segregation, nevertheless, is beyond the scope of this article. See Landsberg, supra note 3, at 819; Schnapper, Perpetuation of Past Discrimination, 96 Harv. L. Rev. 828 (1983); Note, Retention of Jurisdiction in Desegregation Cases: A Causal and Attitudinal Analysis, 52 S. Cal. L. Rev. 195, 225 (1978); Note, Unitary School Systems and Underlying Vestiges of State-Imposed Segregation, 87 Colum. L. Rev. 794 (1987) [hereinafter Williams]; Days, School Desegregation Law in the 1980's: Why Isn't Anybody Laughing? (Book Review), 95 Yale L.J. 1737 (1986). However defined, the desegregation plan must eliminate, correct, and remedy all such vestiges.

14. *Dayton I*, 433 U.S. at 420, 97 S. Ct. at 2775; *Keyes*, 413 U.S. at 213, 93 S. Ct. at 2700.

15. For the purposes of this article, any distinction between a final desegregation order, a final desegregation decree, and a final desegregation judgment are deemed ir-

inate the vestiges of past intentional segregation. It may not hide these effects, neutralize them, or place them in a dormant condition. It must "so far as possible eliminate" them.[17] Whether the remedial plan is proposed by the defendants, by the plaintiffs, by an independent consultant, or by the court sua sponte,[18] the obligation of the court in approving such a desegregation plan is to assure that the plan "promises realistically to work, and promises realistically to work *now*."[19] It must make every effort accurately to predict the future and "attempt to bring all of the future into the present and deal with it as though it were present."[20]

When initially fashioning a desegregation remedy, in order to gauge whether the plan will be "effective" in dismantling the dual system,[21]

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relevant and the three terms will be used synonymously. See infra text accompanying notes 176-82 for the distinction between prohibitory and mandatory injunctions.

16. "In devising remedies . . . it is the responsibility of . . . district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system." *Swann*, 402 U.S. at 21, 91 S. Ct. at 1279. See also *Dayton II*, 443 U.S. at 538, 99 S. Ct. at 2979; *Columbus*, 443 U.S. at 460, 99 S. Ct. at 2948.

17. Louisiana v. United States, 380 U.S. 145, 154, 85 S. Ct. 817, 822 (1965) ("[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future"); *Dayton I*, 433 U.S. at 417, 97 S. Ct. at 2774; *Keyes*, 413 U.S. at 200 & n.11, 93 S. Ct. at 2693 & n.11; *Swann*, 402 U.S. at 15, 91 S. Ct. at 1275; *Green*, 391 U.S. at 437, 88 S. Ct. at 1693; Gewirtz, Remedies and Resistance, supra note 9, at 589. Landsberg argues that a desegregation plan may in fact only "neutralize [ ] those effects [of past discrimination] for so long as [the plan] was in place." Landsberg, supra note 3, at 818. Williams similarly suggests that "surface" vestiges are remedied, but that other vestiges "underlying," are not remedied but merely counter-acted or hidden by most plans. Williams, supra note 13, at 799-805. See also id. at 796-799; Landsberg, supra note 3, at 826. The primary example of such unremedied vestiges is residential segregation, which a busing plan arguably counteracts but does not cure with respect to the segregation in neighborhood schools. Williams, supra note 13, at 801-802. However, neither Landsberg nor Williams appear to argue that a plan that only neutralized or counteracted the vestiges of prior segregation would be constitutionally adequate, and should therefore be approved by the courts. Landsberg, supra note 3, at 824. See Louisiana v. United States, 380 U.S. at 154, 85 S. Ct. at 822; Fiss, supra note 9, at 10.

18. Landsberg, supra note 3, at 810.

19. *Green*, 391 U.S. at 439, 88 S. Ct. at 1694 (emphasis original). See *Swann*, 402 U.S. at 13, 91 S. Ct. at 1275.

20. Jost, supra note 3, at 1103 n.20. The district court must retain jurisdiction over a desegregation action until unitary status is achieved. *Raney*, 391 U.S. at 449, 88 S. Ct. at 1700 ("[T]he better course would be to retain jurisdiction until it is clear that disestablishment has been achieved."); Milliken v. Bradley, 433 U.S. 267, 280, 97 S. Ct. 2749, 2757 (1977) (*Milliken II*); *Green*, 391 U.S. at 439, 88 S. Ct. at 1695; Brown v. Board of Educ., 349 U.S. 294, 300-301, 75 S. Ct. 753, 756 (1955) (*Brown II*); see Gewirtz, Remedies and Resistance, supra note 9, at 598.

21. *Swann*, 402 U.S. at 24, 91 S. Ct. at 1280. Davis v. School Comm'rs of Mobile

courts must consider the extent to which the proposed remedial plan will leave in place predominantly one-race schools or other substantial racial imbalances caused by prior segregation. It is a rebuttable presumption that all such one-race schools are a product of intentional discrimination.[22] This is not a legal fiction,[23] but an evidentiary rule based on logic, probability, and painful experience.[24] Nevertheless, the decisions in both *Swann* and *Spangler I* provide that there is no right to a particular racial balance in any school.[25]

Rule 65(d) of the Federal Rules of Civil Procedure further requires that injunctions shall state their terms specifically and in reasonable detail. This rule must, of course, apply to desegregation orders as it would to any injunction.[26] Possibly most important, however, and consistent with the commands of both equity and Rule 65(d), the remedy must be specifically tailored to the findings of constitutional violation.[27]

County, 402 U.S. 33, 37, 91 S. Ct. 1289, 1292 (1971); *Raney*, 391 U.S. at 448, 88 S. Ct. at 1699.

22. *Swann*, 402 U.S. at 25, 91 S. Ct. at 1280; Landsberg, supra note 3, at 809.

23. Contra Landsberg, supra note 3, at 809.

24. *Keyes*, 413 U.S. at 208, 93 S. Ct. at 2697 ("[T]here is a high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system."), 209 ("This burden shifting principle . . . 'is merely a question of policy and fairness based on experience in the different situations.'") (quoting 9 J. Wigmore, Evidence § 2486, at 275 (3d ed. 1940); *Swann*, 402 U.S. at 25, 91 S. Ct. at 1280. See Days, Turning Back the Clock: The Reagan Administration and Civil Rights, 19 Harvard Civil Rights-Civil Liberties Law Review 310, 324 (1984) [hereinafter Days, Turning Back].

25. *Swann*, 402 U.S. at 24, 91 S. Ct. at 1280 (disapproving a "substantive constitutional right [to a] particular degree of racial balance or mixing"); *Spangler I*, 427 U.S. at 434, 96 S. Ct. at 2703.

26. *Spangler I*, 427 U.S. at 438, 96 S. Ct. at 2706 (quoting Fed. R. Civ. P. 65(d)). "*Every* order granting an injunction . . . shall be specific in terms, [and] shall describe in reasonable detail, . . . the act or acts sought to be restrained.") (emphasis added). See International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 75, 88 S. Ct. 201, 207 (1967). See also Fiss, supra note 9, at 13.

27. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, 279, 106 S. Ct. 1842, 1847, 1849 (1986) (plurality) (*Wygant*); id. at 284-285 (O'Connor, J., concurring); General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 399, 102 S. Ct. 3141, 3154 (1982); Fullilove v. Klutznick, 448 U.S. 448, 480, 100 S. Ct. 2758, 2776 (1980) ("[a]ny congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination [must be] tailored to the achievement of that goal") (Burger, C.J.); *Dayton I*, 433 U.S. at 420, 97 S. Ct. at 2775; Hills v. Gautreaux, 425 U.S. 284, 293-294, 96 S. Ct. 1538, 1544 (1976); Rizzo v. Goode, 423 U.S. 362, 376-381, 96 S. Ct. 598, 606 (1978); *Milliken I*, 418 U.S. at 738, 744, 746, 94 S. Ct. at 3124, 3127, 3128; id. at 757, 94 S. Ct. at 3133 (Stewart, J., concurring); *Swann*, 402 U.S. at 16, 91 S. Ct. at 1276; System Federation No. 91 v. Wright, 364 U.S. 642, 81 S. Ct. 368 (1961) (*System Federation No. 91*). See Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 576 n.9, 104 S. Ct. 2576, 2586 n.9 (1984) (*Stotts*); Fiss, The

Professor Fiss characterizes the "tailoring" concept of "the relationship between remedy and violation [as being] deductive or formal." His position is that "certain features of the tailoring principle," i.e., "the insistence that the remedy must fit the violation," suggest that "the violation [serves] as the premise and the remedy the conclusion." Thus, "the violation is viewed as the *exclusive* source of the remedy; and . . . the remedy, like the conclusion, is thought to follow from the violation" with a high degree of certainty.[28] Under the tailoring concept, a remedy sufficient to correct the violation is a matter of right, not discretion.[29]

Several legal scholars oppose the tailoring concept. Among them, Professor Fiss argues that "we must free ourselves" from the tailoring concept.[30] Professor Chayes concurs with this view, arguing that just as "there is no way to reason from the 'right' to a desegregated school system established by Brown to the content of the decree in any particular case, [i]t is equally impossible to work backward from the relief to define the contours of the right."[31] Professor Landsberg also decidedly opposes the tailoring concept:

> The Supreme Court, in *Brown II*, *Swann*, and [*Spangler I*], sketched out a general approach to the school desegregation remedy. The remedy is not fully congruent with the violation and its effects, for district courts have broad discretion to both

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Supreme Court, 1978 Term, Forward: The Forms of Justice, 93 Harv. L. Rev. 1, 46 (1979) (claims that the tailoring principle was "quietly introduced in *Swann* but first applied in *Milliken I*."); Fiss, supra note 9, at 43; Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 683 (1982); Gewirtz, Remedies and Resistance, supra note 9, at 589; Jost, supra note 3, at 1122; Landsberg, supra note 3, at 802; Note, Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law, 92 Yale L.J. 328, 337 (1982); Note, supra note 13, at 200.

28. Fiss, supra note 27, at 46. See Jost, supra note 3, at 1115; Fiss, supra note 9, at 55. See also, Chayes, Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282 (1976) [hereinafter Chayes, Role of Judge]; see generally Chayes, The Supreme Court 1981 Term, Forward: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4 (1983) [hereinafter Chayes, Public Law Litigation]. Professor Fiss, perhaps postulating an easier target, also suggests two additional inherent characteristics of a "tailored" remedy: "each specific provision of the remedy is explicable in terms of the violation; [and] it is assumed that there is a unique remedy in the same way there is a single conclusion to a syllogism." Fiss, supra note 27, at 46.

29. But see Gewirtz, Remedies and Resistance, supra note 9, at 590-608 (gap between right and remedy); Landsberg, supra note 3, at 824.

30. Fiss, supra note 27, at 46-47.

31. Chayes, Public Law Litigation, supra note 28, at 50. Professor Chayes admits that "the Burger Court['s] . . . decisions have been something less than hospitable to the procedures and elements of public law litigation." Id. at 7-8. See Fiss, supra note 27, at 4-5. See also Chayes, Role of Judge, supra note 28, at 1293-1296, 1296, 1298-1302; Taylor, *Brown*, Equal Protection and the Isolation of the Poor, 95 Yale L.J. 1700, 1717-1720 (1986). Cf. Note, supra note 13, at 231-234.

> use racial balance as a starting point and to take into account the practicalities of the situation.[32]

Professor Landsberg thus follows the "structural injunction" model propounded by Professors Fiss and Chayes.[33] This view of desegregation remedies precludes the use of the doctrine of res judicata for injunctions because it posits that no issues have yet been—or ever will be—determined.

The preceding view of the amorphous connection between violations found and remedies required contradicts almost every decision written by the Court touching on desegregation remedies. *Swann*, *Spangler I*, *Dayton I*, *Milliken I*, and *Dayton II* all require that remedies must be narrowly tailored to violations. Even Professor Chayes admits that "the Burger Court may be seen to be embarked on some such program for the restoration of the traditional forms of adjudication."[34] On the other hand, such an amorphous connection advances the power of the judiciary's discretion as the prime agent of assumedly beneficent change.[35]

3. Formulation of Remedial Orders

Once the trial court has determined what a perfectly unitary school district would be, it must fashion a remedy that will achieve that condition. In approving a desegregation plan, however, the court must conduct an equitable balancing of interests.[36]

The defendant school boards, having violated the plaintiff's rights, must redress those violations. This is the obligation articulated in *Council of Emporia* and *Dayton II*.[37] This duty of the defendants to desegregate is absolute.[38] Nevertheless, because school desegregation cases almost always seek equitable relief, school boards have some leeway and the district court has the equitable authority to balance various governmental interests, generally, the advancement of educational goals weighed against the duty to integrate.[39]

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32. Landsberg, supra note 3, at 836-837.

33. See generally, Fiss, supra note 9; Chayes, Role of Judge, supra note 28; see Jost, supra note 3, at 1118 n.105, 1144-1146 & n.254.

34. Chayes, Role of Judge, supra note 28, at 1304. See also Chayes' discussion of Rizzo v. Goode, id. at 1305-1307; Note, supra note 27, at 336.

35. See Jost, supra note 3, at 1143 and cases at 1118 n.105. But see generally Hayek, Constitution of Liberty (University of Chicago Press 1960), at 133-339.

36. Chayes, Role of Judge, supra note 28, at 1292-1293. Jost, supra note 3, at 1126 n.157.

37. *Council of Emporia*, 407 U.S. at 460, 462, 92 S. Ct. 2196, 2202; *Dayton II*, 443 U.S. at 537-540, 99 S. Ct. at 2978.

38. *Columbus*, 443 U.S. at 458-459, 99 S. Ct. at 2946; *Dayton II*, 443 U.S. at 537-538, 99 S. Ct. at 2978.

39. *Brown II*, 349 U.S. at 300, 75 S. Ct. at 756 ("Traditionally, equity has been

The desegregation plan need not be the plan that is most desegregative. It may take into account other factors such as funding and transportation.[40] The preclusion or reduction of "white flight," however, is not a legitimate governmental objective,[41] although plans that are designed in part to attract non-black students into schools on a voluntary basis are appropriate so long as the plan as a whole furthers desegregation.[42]

In this balancing process, factors must be taken into account that are not properly connected to the establishment of a unitary school system.[43] As the Court stated in *Council of Emporia*, "the weighing of these factors to determine their effect upon the process of desegregation is a delicate task,"[44] citing *Brown II*:

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.[45]

There will be some elements of the unitary school system which can be achieved only at so great a cost to educational goals that the court, applying the traditional rules of equity and properly balancing interests,[46] will not attempt to achieve them. Where a remedy does more harm

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characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. . . . To that end, the courts may 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."); see also *Milliken II*, 433 U.S. at 280 n.15, 97 S. Ct. at 2757 n.15; *Council of Emporia*, 407 U.S. at 467, 92 S. Ct. at 2205; *Swann*, 402 U.S. at 30-31, 91 S. Ct. at 1283.

40. *Brown II*, 349 U.S. at 300, 75 S. Ct. at 756.

41. United States v. Scotland Neck Bd. of Educ., 407 U.S. 484, 490-491, 92 S. Ct. 2214, 2217 (1972). Generally, the courts cannot allow themselves to accommodate local prejudices. Palmore v. Sidoti, 466 U.S. 429, 104 S. Ct. 1879 (1984).

42. *Riddick*, 784 F.2d at 528-529, 540; Tasby v. Wright, 713 F.2d 90, 99 (5th Cir. 1983).

43. Gewirtz, Remedies and Resistance, supra note 9, at 598-608. See Jost, supra note 3, at 1126 n.157.

44. *Council of Emporia*, 407 U.S. at 466, 92 S. Ct. at 2205.

45. *Brown II*, 349 U.S. at 299, 75 S. Ct. at 756.

46. Id. at 300, 75 S. Ct. at 756.

than good, for instance where its cost, economic or otherwise, is greater than its benefit, equity will not command that remedy.[47] For example, busing may not be used as a remedy to the extent that it is incompatible with the health or safety of the students.[48] Even continuing judicial supervision is not cost-free. It can be expensive and time consuming. Moreover, it denies local self-government in an area particularly appropriate for local decisionmaking.[49] In this respect, Congress has enacted legislation that attempts to subordinate the use of busing as an element in a unitary school system to other educational goals.[50]

In addition to the above balancing process, the trial court must decide whether there are vestiges of segregation that judicial supervision cannot cure. Some elements of the ideal unitary school district cannot be achieved through judicial or other governmental action. A court may well be unable to correct all effects through a decree, even continuing disproportionate effects. As the Court in *Swann* noted,

> elimination of racial discrimination in the public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope.[51]

Even one race schools may be untouched because of "the practicalities of the situation."[52] This assessment regarding the ability of the courts "to accomplish their expansive goals," however, should not be confused with the "definition of 'unitar[iness].'"[53]

The unrealizable elements of a unitary school system may be closely related to the competing interests just discussed. Depending upon one's

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47. Gewirtz, Remedies and Resistance, supra note 9, 598-608.

48. *Swann*, 402 U.S. at 30-31, 91 S. Ct. at 1283; Days, supra note 24, at 320; Landsberg, supra note 3, at 803.

49. See *Milliken I*, 418 U.S. at 741-742, 94 S. Ct. at 3112, 3125 ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process"); Williams, supra note 13, at 804; Terez, supra note 9, at 54 n.60.

50. See 20 U.S.C. § 1714(b) (1982). See Days, supra note 24, at 230.

51. *Swann*, 402 U.S. at 22, 91 S. Ct. at 1279. Contrary to Landsberg, supra note 3, at 819 n.149, this limitation is not confined to the use of busing, but extends to all remedial measures in a school desegregation case.

52. Davis v. Board of Sch. Comm'rs of Mobile County, 402 U.S. 33, 37, 91 S. Ct. 1289, 1292 (1971). See *Keyes*, 413 U.S. at 203, 93 S. Ct. at 2695; Gewirtz, Remedies and Resistance, supra note 9, at 596.

53. Williams, supra note 13, at 805; Gewirtz, Remedies and Resistance, supra note 9, at 591-593, 668.

view of the efficacy of judicial and governmental action, one may determine that the court cannot stop white flight, or that the necessary judicial or governmental control of individual decisions necessary to stop white flight is outweighed by other considerations. For example, a court order enjoining people from moving their residences or from sending their children to private schools would involve a balancing of interests in which the unitariness is outweighed by another governmental goal, namely, the preservation of individual freedom.[54]

Legal damages, where not within the shelter of the Eleventh Amendment or the statute of limitations, are available to fill the gaps left by equity's limitations.[55]

4. Res Judicata

A: *General Principle*

Once the final desegregation order is formulated and approved, it has the effect of a final judgment under the doctrine of res judicata.[56] The doctrine of res judicata[57] teaches that "when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or

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54. See Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625 (1923); Valley v. Rapides Parish Sch. Bd., 646 F.2d 925, 944 (5th Cir. Unit A May 1981), cert. denied, 455 U.S. 939, 102 S. Ct. 1430 (1982). See also Williams, supra note 13, at 804; Gewirtz, Choice, supra note 9, at 734 n.17; Gewirtz, Remedies and Resistance, supra note 9, at 603 & n.43; Note, Institutional Reform Litigation: Representation in the Remedial Process, 91 Yale L.J. 1474, 1479 n.23, 1491 n.84 (1982).

55. Gewirtz, Remedies and Resistance, supra note 9, at 606 n.50; but see id. at 598 n.29.

56. The application of *res judicata* arises twice in desegregation litigation: First, it applies to the final desegregation order, discussed here. Second, it applies to the determination of unitary status, discussed at §§ 8 and 14. The elements and prerequisites for the application of *res judicata* discussed here equally govern the determination of unitary status.

57. As noted by the Supreme Court, the First Restatement of Judgments uses the term *res judicata* broadly to cover the functions and effects of merger, bar, collateral estoppel, and direct estoppel. Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 n.6, 75 S. Ct. 865, 867 n.6 (1955); Restatement (First) of Judgments, Chapter 3, Introductory Note, at 160 (1942). The Second Restatement retains this definition of *res judicata* but combines the doctrines of collateral estoppel and direct estoppel within the term of "issue preclusion." United States v. Mendoza, 464 U.S. 154, 158 n.3, 104 S. Ct. 568, 571 n.3 (1984). The operational effect here given to *res judicata* is attributed by the Second Restatement to "merger" and "bar", and are sometimes referred to as "claim preclusion." Restatement (Second) of Judgments, Chapter 3, Introductory Note, at 131 (1980).

defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'"[58] Res judicata is not a technical rule, but a fundamental rule of repose for both society and litigants. "[The] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts."[59] This language, used by the Supreme Court half a century ago, is even more compelling in view of today's crowded dockets.[60]

The doctrine of res judicata applies to injunctions.[61] This doctrine is consistent with, if not required by, the merger of law and equity accomplished by the Federal Rules of Civil Procedure.[62] The doctrine of res judicata governs litigation brought under Section 1983, the statute under which almost all desegregation suits are authorized.[63] The effect

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58. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597, 68 S. Ct. 715, 719 (1948) (quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1877)). See Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 404, 101 S. Ct. 2424, 2430 (1981) (*Moitie*) (Blackmun, J., concurring in the judgment); *Spangler I*, 427 U.S. at 432, 96 S. Ct. at 2703; 1B J. Moore, J. Lucas & J. Currier, Moore's Federal Practice ¶ 0.405[1], at 178 (2d ed. 1988). Cf. Local 28 Sheet Metal Workers v. EEOC, 478 U.S. 421, 441 n.21 (1986). Thus, claims that residential imbalances and educational deficiencies are the result and vestige of school segregation must be advanced as part of the original desegregation suit. The failure of the court to consider or (where proven) remedy these claims is error. See, e.g., *Swann*, 402 U.S. at 21, 91 S. Ct. at 278. However, for the purpose of *res judicata*, the judgment need not be free from error. *Moitie*, 452 U.S. at 398, 101 S. Ct. at 2427; United States v. Swift & Co., 286 U.S. 106, 117, 52 S. Ct. 460, 463 (1932) (*Swift*); 1B Moore's Federal Practice ¶ 0.405[4.-1], at 197 n.3. See generally, 1B Moore's Federal Practice ¶ 0.405, at 178.

59. Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299, 37 S. Ct. 506, 508 (1917).

60. *Moitie*, 452 U.S. at 401, 101 S. Ct. at 2429. This is accepted even though "[t]he defense of *res judicata* is universally respected, but actually not very well liked." Riordon v. Ferguson, 147 F.2d 983, 988 (2d Cir. 1945). The principles of *res judicata* retain their persuasive and precedential strength in recent decisions. See Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S. Ct. 1883 (1982); Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411 (1980).

61. See United States v. Munsingwear, Inc., 340 U.S. 36, 37, 71 S. Ct. 104, 105 (1950) (prior injunction suit *res judicata* as to subsequent treble damage action); Sibbald v. United States, 37 U.S. (12 Pet.) 488, 492 (1838). Cf. *System Federation No. 91*, 364 U.S. 642, 81 S. Ct. 368; *Swift*, 286 U.S. at 119, 52 S. Ct. at 464; *Dowell II*, 795 F.2d at 1522; 27 A.J.2d, Equity § 245, at 811 (1966); Restatement (Second) of Judgments § 18 comments b and c (1980); 1B Moore's Federal Practice ¶ 0.405[1] at 182 n.17. Cf. 18 U.S.C. 1509 (1982), discussed at Fiss, supra note 9, at 17. But see Restatement of Judgments § 46 comment a (1942); id. § 47 comment h.

62. Cf. 11 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 2863, at 205 (1981).

63. Allen v. McCurry, 449 U.S. 90, 96-97, 101 S. Ct. 410, 415 (1980); *Dowell II*, 795 F.2d at 1519, 1522; *Riddick*, 784 F.2d at 531; Los Angeles Branch NAACP v. Los

of res judicata extends to the findings of liability, the necessity of the remedy, the balancing of equitable interests, and the ultimate sufficiency of the decree to correct the violations. This is so because all of these issues are necessary parts of the decision whether to issue the injunction.

A consent judgment has the effect of res judicata in that civil action,[64] although its collateral estoppel effect is substantially limited.[65] Where a court actually makes findings on the merits, however, it is not a settlement but an order on the merits, even though the parties may have agreed to the form of the order.[66] Thus, where the element of "consent" is addressed to the form of remedy, and both the liability and substance of the remedy were the result of litigation, then the judgment has full res judicata operation.[67]

B. *Objections*

Professor Jost asserts that "[r]es judicata is not applied to injunctions as it is to legal judgments, because of the prospective nature of injunctions."[68] He cites only two law review articles as explicit authority.[69] One of these articles, an unsigned 1965 student survey in the Harvard Law Review, disapproved of the doctrine's admitted applicability to injunctions:

> In succeeding centuries, as equity courts became imbued with the legal doctrine of res judicata, they became more reluctant to grant modification and soon limited their re-examination to cases of plain error and "new matter." Several American courts applied the principles of res judicata even more vigorously, denying modification after the term of court in which the injunction had issued. Although some measure of finality is desirable, the legal doctrine of res judicata is inappropriate when applied to the injunction remedy. Unlike actions at law, which

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Angeles Unified Sch. Dist., 750 F.2d 731 (9th Cir. 1984), cert. denied, 474 U.S. 919, 106 S. Ct. 248 (1985) (*Los Angeles Branch*); Bronson v. Board of Educ. of City Sch. Dist., 687 F.2d 836 (6th Cir. 1982); 525 F.2d 344 (6th Cir. 1975) (*Bronson*).

64. United States v. International Bldg. Co., 345 U.S. 502, 73 S. Ct. 807 (1953); 1B Moore's Federal Practice ¶ 0.409[5] at 331-334. See *Riddick*, 784 F.2d at 530.

65. *International Bldg. Co.*, 345 U.S. at 505-506; *Riddick*, 784 F.2d at 530. See generally 1B Moore's Federal Practice ¶ 0.444[3].

66. *International Bldg. Co.*, 345 U.S. at 506, 73 S. Ct. at 809; *Riddick*, 784 F.2d at 530.

67. *Riddick*, 784 F.2d at 530.

68. Jost, supra note 3, at 1124.

69. Rendleman, Prospective Remedies in Constitutional Adjudication, 78 W. Va. L. Rev. 155, 163 (1976) ("But because injunctions guide conduct in a changing future, some observers think *res judicata* inapposite for injunctions." (footnote omitted)); Note, Developments in the Law—Injunctions, 78 Harv. L. Rev. 994 (1965).

> are decided on the law in force at a given moment, an injunction has a continuing effect and should be adjusted to reflect changes in the statutory or common law rights of the parties.[70]

The Supreme Court does not share these sentiments, holding that "[t]here is simply no 'principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata' . . . . This Court has long recognized that '[p]ublic policy dictates that there be an end to litigation.'"[71] Ironically, Professor Jost provides substantial support—based on "policy" rather than legal precedent—for treating injunctions as if res judicata did apply.[72]

The main thrust of Professor Jost's objection is that the possibility that "[t]here is no one remedial solution, but rather a range of possibilities that the court might employ to bring about institutional change,"[73] should affect the binding nature of the decree because the constitutional violation conceivably could have been corrected by other means. This objection does not question the court's finding that *some* remedy was required, that the particular remedy approved was sufficient, or that a decision based on judicial discretion is nonetheless a final decision once made. Once a school system has been found to be segregated, the remedy must systematically address all aspects of the violation.[74] Consequently, all aspects of a dual system attributable to defendants must be deemed to have been remedied by a desegregation plan finally approved by the court as constitutionally adequate.

5. Finality of Desegregation Orders

The doctrine of res judicata applies only where a final judgment adjudicating the rights of the parties has been entered.[75] A judgment is

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70. Note, supra note 69, at 1080-1081 (citations omitted). Modification of injunctions under showings of changed circumstances are authorized under Fed. R. Civ. P. 60(b)(5), and are not inconsistent with *res judicata*. See infra text accompanying notes 94-160.

71. *Moitie*, 452 U.S. at 402, 101 S. Ct. at 2429; Heiser v. Woodruff, 327 U.S. 726, 733, 66 S. Ct. 853, 856 (1946).

72. Jost, supra note 3, at 1124-1129, citing (at 1125 n.151) Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399, 444-445 (1973).

73. Jost, supra note 3, at 1119 (footnote omitted).

74. *Dayton I*, 433 U.S. at 420, 97 S. Ct. at 2775; *Keyes*, 413 U.S. at 213, 93 S. Ct. at 2699.

75. United States v. United States Smelting Refining & Mining Co., 339 U.S. 186, 198-199, 70 S. Ct. 537, 544 (1950); United States v. Wallace & Tiernan Co., 336 U.S. 793, 800-801, 69 S. Ct. 824, 828 (1949); G. & C. Merriam Co. v. Saalfield and Ogilvie, 241 U.S. 22, 28, 36 S. Ct. 477, 480 (1916); *Riddick*, 784 F.2d at 531; 18 Federal Practice and Procedure § 4432, at 298; 50 C.J.S. Judgments § 620 (1947); Restatement (First) of

final for the purposes of res judicata and its corollaries when the court order adjudicates all of the rights and liabilities of all of the parties.[76] An injunction is such a final adjudication.[77]

Nevertheless, there appears to be some contention that desegregation decrees are generally not final, even though *Spangler I* implicitly suggested that they are.[78] There are, of course, certain desegregation plans that are not in fact final.

A. *Three Species of Non-Final Desegregation Orders*

One kind of order specifically mentioned in *Spangler I* as not being final was the "step at a time" type of order that was relatively popular during the late 1960's.[79] Under these orders, a school district was desegregated gradually, addressing different aspects of the dual system at different times and at different speeds.[80] Thus, the implementation of one of these steps was not necessarily grounds for satisfaction of the judgment. This type of order generally has not been entered since *Green*.

A second kind of order specifically excluded by *Spangler I* is a plan embodying specific revisions of the attendance zones for particular schools,

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Judgments § 41 (1942); Restatement (Second) of Judgments § 13 (1980).

Where the judgment is not final, but determinations on issues of fact and law have been made, the doctrine of "law of the case" substantially inhibits the reconsideration of those subjects. EEOC v. Int'l Longshoremen's Ass'n. 623 F.2d 1054, 1058 (5th Cir. 1980), cert. denied, 451 U.S. 917, 101 S. Ct. 1997 (1981); Bromley v. Crisp. 561 F.2d 1351, 1363 (10th Cir. 1977), cert. denied, 435 U.S. 908, 98 S. Ct. 1458 (1978); White v. Murtha, 377 F.2d 428, 431-432 (5th Cir. 1967). See Morgan v. Nucci, 831 F.2d 313, 330 (1st Cir. 1987). See generally 1B Moore's Federal Practice, ¶ 0.404, at 117.

76. Fed. R. Civ. P. 54(b); 1B Moore's Federal Practice ¶ 0.409[1.-1] at 301-303.

77. Cf. *Swift*, 286 U.S. at 119, 52 S. Ct. at 464; Jost, supra note 3, at 1105, 1109 n.60, 1112; Note, supra note 69, at 1072, 1080-1081. Where both injunctive relief and money damages are sought, both claims must be adjudicated for the judgment to be final. Gresham Park Community v. Org. Howell, 652 F.2d 1227, 1242 (5th Cir. 1981); Brush Electric Co. v. Western Electric Co., 76 F. 761 (7th Cir. 1896). The desegregation order should be entered separately as a judgment under Fed. R. Civ. P. 58. But cf. Bankers Trust Co. v. Mallis, 435 U.S. 381, 98 S. Ct. 1117 (1978).

All desegregation orders are subject to appeal whether as final orders or as interlocutory orders with respect to injunctions. 28 U.S.C. §§ 1291, 1292(a)(1) (1982). Therefore, the appealability per se of an order offers no criteria for determining the order's finality for purposes of *res judicata*. United States v. United States Smelting Refining & Mining Co., 339 U.S. 186, 198-199, 70 S. Ct. 537, 544 (1950). But cf. *Riddick*, 784 F.2d at 531.

78. *Spangler I*, 427 U.S. at 435, 96 S. Ct. at 2704.

79. Id. at 435, 96 S. Ct. at 2704. Professor Gewirtz suggests that "[i]n this sense all desegregation plans are 'step at a time' plans by definition incomplete at inception." Gewirtz, Choice, supra note 9, at 795, n.216; Gewirtz, Remedies and Resistance, supra note 9, at 590-591.

80. See United States v. Montgomery Bd. of Educ., 395 U.S. 225, 229-231, 89 S. Ct. 1670, 1672 (1969). See also Monroe v. Board of Comm'rs of Jackson, 391 U.S. 450, 453, 88 S. Ct. 1700, 1702 (1968) (plan immediately effective in elementary schools and extended over a four year period to junior and senior high schools).

rather than applying in general terms to all of the district's schools, and further containing provisions for later appraisal of whether such discrete individual modifications had achieved the "unitary" system required by *Brown II*.[81] Such a plan has been rare since *Keyes* because the presumption of systematic segregation announced in that case[82] begets a systematic rather than an individual school remedy.

A third kind of order that is not final is one in which a final desegregation order is entered but, on appeal, the higher court directs the district court on remand to reassess its decision on the basis of subsequent events. Such a desegregation plan had never become final for res judicata purposes in the first place because it was appealed and the appellate court found its "promise to work" essentially unrealistic.[83] The reassessment then focuses on whether subsequent events have made the original plan's promise to create a unitary system more realistic.[84]

B. *Finality and Modifiability*

On the other hand, a court's unquestioned equitable authority to modify outstanding injunctive decrees[85] does not render the judgment less than final.[86] An explicit provision in desegregation decrees acknowledging the court's power to modify its decrees pursuant to Rule 60(b) simply reflects the Supreme Court's admonition that jurisdiction should be retained to oversee implementation of the remedial plan.[87] As noted by the Fourth Circuit in *Riddick v. School Board of Norfolk*,[88] such "language is not dissimilar to the language in Rule 60(b) which allows

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81. *Spangler I*, 427 U.S. at 435, 96 S. Ct. at 2704. *Brown II* requires a "racially non-discriminatory school system," 349 U.S. at 301, 75 S. Ct. at 756, in which "admission to the public schools" is determined "on a nonracial basis." *Id.* at 300-301.

82. *Keyes*, 413 U.S. at 205-211, 93 S. Ct. at 2695.

83. See, e.g., *Green*, 391 U.S. at 439, 88 S. Ct. at 1694 (1969). Cf. *United States Smelting*, 339 U.S. at 198, 70 S. Ct. at 544 (*Res judicata* "is not applicable here because when the case was first remanded, nothing was finally decided.")

84. *Green*, 391 U.S. at 439, 88 S. Ct. at 1694.

85. *Swift*, 286 U.S. at 114, 52 S. Ct. at 462. See *System Federation No. 91*, 364 U.S. at 646, 81 S. Ct. at 370; Fed. R. Civ. P. 60(b).

86. *System Federation No. 91*, 364 U.S. at 647-648, 81 S. Ct. at 371 ("Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided. . . . A balance must thus be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances."); *Swift*, 286 U.S. at 119, 52 S. Ct. at 464.

87. Raney v. Board of Educ., 391 U.S. 443, 449, 88 S. Ct. 1697, 1700 (1968); *Brown II*, 349 U.S. at 301, 75 S. Ct. at 756.

88. 784 F.2d 521 (4th Cir. 1986).

parties to seek relief from a judgment under certain prescribed circumstances."[89]

A district court may not preclude the effects of "finality" by declining to enter a "final" decree and labeling its order as "provisional" or "interim," or by retaining the power to modify without the showing required by Rule 60(b).[90] The "inherent limitation upon federal judicial authority" emphasized by the Court in *Swann*, *Spangler I*, *Milliken I*, and other Supreme Court decisions,[91] cannot be evaded merely by a court declaring that it retains power to modify its orders from time to time as it deems circumstances might require. Additionally, such provisions cannot thwart the mandate of *Green* that the time for deliberate speed had ended and that orders must "promise realistically to work, and . . . to work *now*."[92] An order that promises realistically to work "*now*" necessarily precludes an order that a court deems insufficient and intends to modify in the future. A plan which the court knows may require modification is not a plan that honestly and realistically promises to work—now or at any other time.

6. Modification of Judgments Generally

The conclusion that a desegregation plan is a final judgment governed by res judicata does not exempt the plan from the operation of Rule 60(b). As with all equitable decrees, and, for that matter, all judgments in law[93] or equity under the Federal Rules of Civil Procedure, a plan may be modified pursuant to Rule 60(b).[94]

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89. Id. at 531. The Fourth Circuit in *Riddick* found the 1975 declaration of unitary status to be final for *res judicata* purposes even though the district court had given the parties the option to reinstate the cause on the docket on a showing of good cause. The order "concluded a complex legal battle" of several years duration "in which all parties had ample opportunity to be heard." Id.

90. Id. at 531 (leave to reinstate does not inhibit finality). See Fed. R. Civ. P. 60(b) ("A Motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."). Cf. *System Federation No. 91*, 364 U.S. at 644, 81 S. Ct. at 369. But see, e.g., Keyes v. District No. 1, Denver, Colo., 609 F. Supp. 1491 (D. Colo. 1985).

91. *Swann*, 402 U.S. at 16, 91 S. Ct. at 1276 ("As with any equity case, the nature of the violation determines the scope of the remedy."); id. at 28, 91 S. Ct. at 1282 ("[A]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis."); *Spangler I*, 427 U.S. at 434, 96 S. Ct. at 2703; *Milliken I*, 418 U.S. at 744, 94 S. Ct. at 3127. See Chayes, Public Law Litigation, supra note 28, at 46.

92. *Green*, 391 U.S. at 439, 88 S. Ct. at 1694 (emphasis original). See Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20, 90 S. Ct. 29, 29 (1969).

93. *System Federation No. 91*, 364 U.S. at 646, 81 S. Ct. at 370. But see Jost, supra note 3, at 1109 n.60; id. at 1124 n.148.

94. Jost, supra note 3, at 1105. Cf. *Swift*, 286 U.S. at 114, 52 S. Ct. at 462; Note, supra note 69, at 1080.

A. *Standard in* Swift

Rule 60 allows for modifications only upon certain showings. Most justifications for proposed desegregation plan modifications do not fall within the provisions of paragraphs (1) through (4) of Rule 60(b).[95] In the last clause of Rule 60(b)(5) and Rule 60(b)(6)—the "catch-all clauses"—Congress codified additional pertinent grounds for modification of an otherwise final judgment.[96] Modification is authorized when further prospective application is inequitable as well as for any other reason justifying relief from the operation of the judgment. Professor Moore cautioned, however, that Rule 60(b)(6) "is intended to be a means for accomplishing justice in *exceptional situations*; and, so confined, does not violate the principle of finality of judgments."[97]

Under the "catch-all clauses," the primary basis for allowing a court to alter or modify a decree is only seen in the unusual situation where a showing of "new and unforeseen" changes in law or fact have rendered the once-valid judgment clearly erroneous or unjust.[98] For example, modification under these provisions is justified when changes in the controlling law since the judgment was entered,[99] particularly that governing the scope and nature of remedies,[100] indicate that the prior judg-

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95. See Note, Clarifying the Desegregation Process, 39 Okla. L. Rev. 519, 523 (1986).

96. See Jost, supra note 3, at 1105 & n.31.

97. 7 Moore's Federal Practice ¶ 60.27[2], at 60-274 (emphasis added); Jost, supra note 3, at 1105; Landsberg, supra note 3, at 828. But cf. Klapprott v. United States, 335 U.S. 601, 614, 69 S. Ct. 384, 390 (1949); cf. also Note, supra note 95, at 522-523.

98. *Swift*, 286 U.S. at 119, 52 S. Ct. at 464. See *System Federation No. 91*, 364 U.S. at 647, 81 S. Ct. at 371 ("significant changes in law or facts"); Note, supra note 69, at 1080 & n.3, citing Rede v. Rede, Public Record Office Enrolled Chancery Decrees, c. 78/1, case 44 (1545). United States v. United Shoe Machinery Corp., 391 U.S. 244, 88 S. Ct. 1496 (1968) (*United Shoe*), does not suggest a different standard. There, the Supreme Court emphasized that "in framing the decree, the District Court had 'proceeded on the premise that relatively mild remedies should be tried as a first resort, and that the possibility of more drastic measures should be held in abeyance.' Brief of the United States, No. 394, 1953 Term, 155." Id. at 249, 88 S. Ct. at 1500. The decree at issue in *United Shoe* was thus analogous to "'step at a time' [desegregation] plans by definition incomplete at inception" which *Spangler I* indicated would require a different standard of analysis. *Spangler I*, 427 U.S. at 435, 96 S. Ct. at 2704. *United Shoe* simply held that plaintiffs seeking modification of such an incomplete remedy need not meet *Swift*'s inapposite "grievous wrong" standard. *United Shoe*, 391 U.S. at 248-249, 88 S. Ct. at 1499. The *United Shoe* analysis is inapplicable where a desegregation plan, like that involved in *Spangler I*, is intended to be a final and complete remedy.

99. See *System Federation No. 91*, 364 U.S. at 648-650, 81 S. Ct. at 371; see id. at 650 n.6, 81 S. Ct. at 372 n.6 ("There are many cases in which a mere change in decisional law has been held to justify modification of an outstanding injunction."); Note, supra note 69, at 1081-1082.

100. United States v. South Park Indep. Sch. Dist., 566 F.2d 1221, 1225 (5th Cir. 1978), cert. denied 439 U.S. 1007, 99 S. Ct. 622 (1978) ("[T]he parties are bound by

ments in this case were "clearly erroneous" or a "manifest injustice" to the plaintiffs. Such a change in the law justifies—though it perhaps does not require—modification because "a remedy should fit the discrete wrong to which it is addressed. . . . [T]he violation is the exclusive source of the remedy—each provision of an injunction must follow from the violation and each violation has a unique remedy. Therefore, if the legal authority grounding an injunction is altered or the factual circumstances that it addressed change in a legally material respect, the injunction must also be modified to conform to the new law or facts."[101]

Furthermore, a change in facts may so change the circumstances as to make it inequitable for the judgment to continue to have prospective effect.[102] A foreseeable change of facts, or a change that was in fact foreseen, would not authorize the modification because such facts would have been an aspect of "the circumstances . . . obtaining at the time of [the injunction's] issuance."[103]

The burden of proof is on the plaintiff to persuade the court that the motion is timely[104] and authorized under Rule 60(b), and that the judgment, as modified, is tailored to remedy the violation.[105] Further, the parties may not slumber on their rights even under the "catch-all" clauses: they must initiate proceedings within a "reasonable time"[106] and may not ordinarily wait until a motion under the "satisfaction" clause

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intervening opinions" such as *Swann*.). See Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358, 1360 (W.D.N.C. 1969) (*Green* changed law, requiring plan to be modified); Note, supra note 13, at 208.

101. Jost, supra note 3, at 1115. See id., at 1132. See also *System Federation No. 91*, 364 U.S. at 647, 81 S. Ct. at 371 ("[A] sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. . . . [T]he court cannot be required to disregard significant changes in law or facts . . ."); *Swift*, 286 U.S. at 114, 52 S. Ct. at 462. But see Fiss, supra note 27, at 49.

102. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 592, 104 S. Ct. 2576, 2595 (1984) (Stevens, J., concurring in the judgment); *System Federation No. 91*, 364 U.S. at 642, 81 S. Ct. at 368; *Swift*, 286 U.S. at 114, 119, 52 S. Ct. at 462, 464; see *Stotts*, 467 U.S. at 568, 576, 104 S. Ct. at 2586; Jost, supra note 3, at 1104; 1B Moore's Federal Practice ¶ 0.415, at 504. Cf. *Swann*, 402 U.S. at 7, 91 S. Ct. at 1271; *Dowell II*, 795 F.2d at 1522; Note, supra note 79, at 1081-1083.

103. *System Federation No. 91*, 364 U.S. at 647, 81 S. Ct. at 371 (must be "unexpected"); see *Stotts*, 467 U.S. at 574, 104 S. Ct. at 2585; id. at 592, 104 S. Ct. at 2595 (Stevens, J., concurring in the judgment); Jost, supra note 3, at 1110, 1122, 1135 n.199.

104. Rule 60(b) regulates the time for seeking the modification of a judgment. The second sentence of Fed. R. Civ. P. 60(b), means not only that the "catch-all" clauses of Fed. R. Civ. P. 60(b)(5), and 60(b)(6), do not include the reasons set forth in Fed. R. Civ. P. 60(b)(1) through (3), but also that, generally, a motion under Fed. R. Civ. P. 60(b)(5) or (6), should not be made using any argument that could have been used to set aside a judgment for mistake, new evidence, or fraud upon the court.

105. See supra note 27.

106. "The motion shall be made within a reasonable time . . ." Fed. R. Civ. P. 60(b).

of Rule 60(b)(5) (often a motion for a declaration of unitary status) to make a counter-motion to modify the judgment.[107]

This authority to modify its outstanding injunctive decrees "is not a substitute for an appeal. It does not allow relitigation of issues that have been resolved by the judgment."[108] As the Supreme Court clearly stated in *United States v. Swift & Co.*:[109] "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting."[110] Thus, an appellate court's power to modify an injunctive decree does not authorize it to question whether the decree was valid when entered. As summarized by Justice (then Judge) Blackmun for the Eighth Circuit, "caution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements."[111]

B. *Objection: Flexible Standards*

A contrary view is taken by the Second Circuit[112] which suggests that modification should be allowed "even in the absence of changed conditions" when "the decree is not properly adapted to accomplishing its purposes,"[113] as the decree's purposes and propriety are contemporaneously determined.[114] Other courts have granted modification for the purpose of "effectuat[ing] the rights of the beneficiary," or serving the "public interest" by protecting third parties or by deferring to other branches or levels of government.[115] Even less restrictive is the doctrine allowing modification "to fulfill the promise to the beneficiary of the

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107. See Jost, supra note 3, at 1128 & n.167. However, a motion to modify is not untimely because the defendant in response files a motion for unitary status. United States v. South Park Indep. Sch. Dist., 566 F.2d 1221, 1223-1225 (5th Cir. 1978).

108. 11 Federal Practice and Procedure § 2863, at 206.

109. 286 U.S. 106, 52 S. Ct. 460 (1932).

110. Id. at 119, 52 S. Ct. at 464. See *System Federation No. 91*, 364 U.S. at 647, 81 S. Ct. at 371.

111. Humble Oil & Refining Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir.), cert. denied, 395 U.S. 905, 89 S. Ct. 1745 (1969).

112. King-Seeley Thermos Co. v. Aladdin Industries, Inc. 418 F.2d 31 (2d Cir. 1969).

113. Id. at 35. See United States v. Lawrence County Sch. Dist., 799 F.2d 1031, 1044 (5th Cir. 1986); Note, The Modification of Consent Decrees in Institutional Reform Litigation, 99 Harv. L. Rev. 1020, 1037-1038 (1986).

114. See Jost, supra note 3, at 1117-1118; Note, supra note 54, at 1477-1478 & n.18. Cf. Davis v. East Baton Rouge Parish Sch. Bd., 721 F.2d 1425, 1439 (5th Cir. 1983).

115. Jost, supra note 3, at 1115, 1118-1120. See Duran v. Elrod, 760 F.2d 756, 759 (7th Cir. 1985) (Posner, J.) (public interest must be considered and re-balanced on modification); Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1020 (7th Cir. 1984) (Posner, J.); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 967-970 (2d Cir. 1983) (Friendly, J.), cert. denied, 464 U.S. 915, 104 S. Ct. 277 (1983); Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1120-1121 (3d Cir. 1979), cert. denied, 444 U.S. 1026, 100 S. Ct. 689 (1980).

initial decree," based on the "structural public adjudication model" propounded by Professors Chayes and Fiss.[116] Finally, some commentators now embrace *ad hoc* balancing explicitly and treat each motion for modification as though it were *sui generis* and addressed strictly to the discretion of the court.[117] Following these doctrines, appellate courts have allowed modification based on factors other than change in law or fact, accepting the injunction as a "pliant and instrumental tool for protecting rights and doing equity."[118] This theory, articulated by Judge McKay in his concurring opinion in *Battle v. Anderson*,[119] describes a "process" whose "task is not to declare who is right or who is wrong, not to calculate the amount of damages or to formulate a decree designed to stop some discrete act," but ". . . to remove the condition that threatens the constitutional values."[120] To achieve this goal, "the court must employ a dynamic and flexible process to refine the remedy continually."[121]

These analyses, particularly the doctrine of flexibility "in the public interest," cannot provide standards that enable courts to make modification decisions based on uniform principles rather than expediency.[122] These approaches necessarily result in inconsistencies and result-oriented modifications. Changes in law should be readily discernible,[123] and changes in fact are only somewhat less so,[124] but "oppressiveness" and "ineffectiveness," contrary to the view of Professor Jost,[125] are not readily described, let alone measured. Professor Jost recognized that "as courts have become more and more flexible in their approach to modification, the lack of principled standards to guide this flexibility has become

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116. Fiss, supra note 27, at 18-28, 44-50; Chayes, Role of Judge, supra note 28, at 1288. See also Fiss, supra note 9, at 86-95; Note, supra note 69, at 1082-1083.

117. Steinberg, SEC and Other Permanent Injunctions—Standards for Their Imposition, Modification, and Dissolution, 66 Cornell L. Rev. 27, 71-73 (1980); Tomlinson, Modification and Dissolution of Administrative Orders and Injunctions, 31 Md. L. Rev. 312, 326 (1971). But see supra note 27 for authorities cited.

118. Jost, supra note 3, at 1105.

119. 708 F.2d 1523, 1536-1540 (10th Cir. 1983), cert. dismissed, 465 U.S. 1014, 104 S. Ct. 1019 (1984) (Sup. Ct. R. 53).

120. 708 F.2d at 1538, quoting Fiss, supra note 27, at 27-28; see id. at 49 (The particular choice of remedy "must always be open to revision, even without the strong showing traditionally required for a modification of a decree . . . . A revision is justified if the remedy is not working effectively or is unnecessarily burdensome."); Jost, supra note 3, at 1118.

121. Jost, supra note 3, at 1118-1119. See id. at 1142-1148.

122. See Jost, supra note 3, at 1106, 1121.

123. *System Federation No. 91*, 364 U.S. at 643, 81 S. Ct. at 369; Jost, supra note 3, at 1121.

124. See *System Federation No. 91*, 364 U.S. at 643, 81 S. Ct. at 369.

125. Jost, supra note 3, at 1121.

increasingly and often painfully obvious."[126] Less euphemistically, this flexibility has become a convenient substitute for an appeal of the original order.[127] This substitution cannot be made without ultimately disregarding the mandate that the remedy must be tailored to the violation.[128]

This approach to modification has been rejected by the Supreme Court in *Firefighters Local Union No. 1784 v. Stotts*,[129] at least for civil rights litigation.[130] As analyzed by Professor Jost,[131] the majority and both concurring opinions adhere to the notion that modification can be allowed only to preserve the congruence between the remedy and the underlying law. Consequently, only a change in facts or a change in law justify modification. Justice White, writing for the majority, and Justice O'Connor, concurring, based their opinions strictly upon the provisions of Title VII, the law on which the original consent decree was entered.[132] White "adhered to a narrow, tailoring approach to remedies in general and to modification in particular" thereby rejecting arguments for discretion in effectuating the terms of a decree.[133] Justice Stevens, concurring, accepted as a matter of general law that the only justification for modifying a decree was that "respondents had demonstrated the presence of changed circumstances."[134] He did not rely on specific provisions of Title VII, finding as a threshold matter that changed circumstances were necessary to justify a modification and, without such a showing of changed circumstances, it was unnecessary to reach Title VII's provisions.[135] In his dissent, Justice Blackmun alone argued for a flexible approach, emphasizing the need to effectuate the beneficiary's rights, "the basic purpose of the original consent decree."[136]

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126. Jost, supra note 3, at 1106.

127. See Duran v. Elrod, 760 F.2d 756, 764 (7th Cir. 1985) (Flaum, J., dissenting).

128. See Fiss, supra note 27, at 46-50; Jost, supra note 3, at 1116-1120; Chayes, Role of Judge, supra note 28, at 1299 (In a structural injunction, "the judge will not, as in the traditional model, be able to derive his responses [the relief] directly from the liability determination, since, . . . the substantive law will point out only the general direction to be pursued and a few salient landmarks to be sought out or avoided."); Chayes, Public Law Litigation, supra note 27, at 46; cf. Landsberg, supra note 3, at 827-830, but see supra note 12.

129. 467 U.S. 561, 104 S. Ct. 2576 (1984) (*Stotts*).

130. See *Spangler I*, 427 U.S. at 437-438, 96 S. Ct. at 2697 (change in fact or law). See also Jost, supra note 3, at 1107 & n.46. But see Note, supra note 113, at 1030-1032.

131. Jost, supra note 3, at 1121-1123.

132. *Stotts*, 467 U.S. at 576-577, 104 S. Ct. at 2576; id. at 587-588, 104 S. Ct. at 2590 (O'Connor, J., concurring).

133. Jost, supra note 3, at 1122.

134. *Stotts*, 467 U.S. at 592, 104 S. Ct. at 2595.

135. *Stotts*, 467 U.S. at 590-592, 104 S. Ct. at 2594. See Jost, supra note 3, at 1122-1123.

136. *Stotts*, 467 U.S. at 611, 104 S. Ct. at 2604; see Jost, supra note 3, at 1123. But see, Humble Oil & Refining Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir.)

7. Modification of Desegregation Decrees

As with any other equitable decree, a desegregation plan may not produce the expected results. This may occur for a number of reasons. For example, a school desegregation plan may be based on mistaken information with respect to the demographics of the school district. It may be based on information that is thereafter shown—by newly discovered evidence concerning demographics, or other relevant matters, not available at the trial—to have been incorrect.[137] It may have been based on fraud, misrepresentation, or other misconduct by an adverse party. There is no question that a judgment may be modified upon such a showing.[138]

Even then, however, there are prerequisites in addition to those found in Rule 60(b) that must be met before allowing modification of desegregation plans. First, the court must determine that the plan, as modified, is equally tailored effectively to promote desegregation.[139] Once a school desegregation plan is in place, the school board is under a "heavy burden" of justifying shifts to "apparently less effective method[s]" of desegregation.[140] A proposed modification that is less effective for desegregation can be approved only when the court finds that this reduction of effectiveness is necessary to promote a legitimate and important governmental interest, generally an educational interest.[141] "A court supervising the process of desegregation [does not] exercise its remedial discretion responsibly where it approves a plan that, in hope of providing better 'quality education' to some children, has a substantial adverse effect upon the quality of education available to others."[142]

Second, the Court in *Spangler I*[143] makes it clear that a desegregation plan cannot be modified under Rule 60(b)(5) or 60(b)(6) on the basis of demographic changes not caused by official segregative conduct.[144]

(Blackmun, J.), cert. denied, 395 U.S. 905, 89 S. Ct. 1745 (1969). See Chrysler Corporation v. United States, 316 U.S. 556, 564, 62 S. Ct. 1146, 1150 (1942).

137. Jost, supra note 3, at 1104.

138. Fed. R. Civ. P. 60(b).

139. See *Milliken I*, 418 U.S. at 744, 94 S. Ct. at 3126 (1974); *Dayton I*, 433 U.S. at 420, 97 S. Ct. 2775. See also supra note 30.

140. *Council of Emporia*, 407 U.S. at 467, 92 S. Ct. at 2206; see also *Dayton II*, 443 U.S. at 538, 99 S. Ct. at 2979; *Green*, 391 U.S. at 439, 81 S. Ct. 1694; *Riddick*, 784 F.2d at 535.

141. *Council of Emporia*, 407 U.S. at 467, 92 S. Ct. at 2206; *Dayton II*, 443 U.S. at 538, 99 S. Ct. at 2979.

142. *Council of Emporia*, 407 U.S. at 463, 92 S. Ct. at 2204.

143. 427 U.S. 424, 96 S. Ct. 2697 (1976).

144. Id. at 435-436, 96 S. Ct. at 2704 ("There was also no showing . . . that those post-1971 changes in the racial mix of some Pasadena schools . . . were in any manner caused by segregative actions chargeable to the defendants. . . . But as these shifts were

The Court appears to regard demographic changes as foreseeable changes which the original desegregation plan must take into account.[145] If the original desegregation plan does not take into account demographic changes, including white flight, it is subject to reversal or modification upon appeal. If it is not appealed, however, the parties cannot complain about the effect that these demographic changes cause thereafter in the school system. This change in the facts must be deemed to have been contemplated by the original remedy[146] and its relitigation foreclosed by res judicata.

There are clearly some events that are not foreseeable.[147] These may include certain events that have demographic effects. For example, a flood may empty a portion of a school district. Similarly, a natural disaster may render a portion of the school district so isolated as to justify, under *Keyes*,[148] the elimination of busing in and out of that territory. Both such events may justify a change under the catch-all clauses of Rule 60(b). They are unforeseeable demographic effects. The demographic movements discussed in *Spangler I*,[149] *Swann*,[150] and elsewhere, however, are gradual and incremental, not immediate.

Modification may also be justified in rare instances by causal attenuation that may occur during the implementation of the final desegregation plan. So much time may elapse between the time of the formulation of the desegregation plan and the current time that a con-

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not attributed to any segregative actions on the part of [the school board] . . . [n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies . . . ."). But see United States v. Lawrence County Sch. Dist., 799 F.2d 1031, 1044-1046 (5th Cir. 1986) (*Lawrence County*); Davis v. East Baton Rouge Parish Sch. Bd., 721 F.2d at 1435; Devins, School Desegregation Law in the 1980's: The Courts' Abandonment of Brown v. Board of Education, 26 Wm. & Mary L. Rev. 7, 29-30, 35-36 (1984); Gewirtz, Remedies and Resistance, supra note 9, at 596.

145. *Spangler I*, 427 U.S. at 436, 96 S. Ct. at 2704 ("quite normal pattern of human migration"). See *Swann*, 402 U.S. at 31-32, 91 S. Ct. at 1283 ("communities . . . will [not] remain demographically stable, for in a growing, mobile, society, few will do so.").

146. See *Stotts*, 467 U.S. at 592, 104 S. Ct. at 2595 (Stevens, J., concurring in the judgment) (possibility of adverse effect on blacks caused by future seniority based layoffs was "apparent" when decree entered, and as such was not "changed circumstances"). But see *Lawrence County*, 799 F.2d at 1043.

147. See *Spangler I*, 427 U.S. at 437, 96 S. Ct. 2705; *Swift*, 286 U.S. at 119, 52 S. Ct. 464 ("unexpected," "new and unforeseen"); Jost, supra note 3, at 1104; 1B Moore's ¶ 0.415, at 504-512. See *Stotts*, 467 U.S. 561, 104 S. Ct. 2576.

148. *Keyes*, 413 U.S. at 203, 93 S. Ct. at 2695 ("This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units."); see Davis v. Board of Sch. Comm'rs of Mobile County, 402 U.S. at 37, 91 S. Ct. at 1292.

149. 427 U.S. at 431-432, 436-437, 96 S. Ct. at 2702, 2704.

150. 402 U.S. at 26-28, 31-32, 91 S. Ct. at 1281, 1283.

dition, previously, and correctly, found to be a vestige of segregation, is no longer effectively caused by that prior segregative act. This is arguably a change in circumstance under the third clause of Rule 60(b)(5). A defendant school board which had not properly implemented those portions of the plan aimed at remedying this particular vestige[151] would seek relief from this part of the judgment and would have the heavy burden required under Rule 60(b)(5) to prove that "the relationship between past segregative acts and present segregation ha[d] 'become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention.'"[152]

Additionally, a desegregation decree that contains a busing component may be modified under a provision of the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1718.[153] This provision was intended to allow modification on "other than the normal equity ground."[154] It permits the termination of the busing components not only when the provisions of that component are fully implemented and satisfied, but also when the court has made an independent and *de novo* finding that the school district has otherwise satisfied the requirements of the Fourteenth Amendment and will continue so to do.[155]

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151. If the defendant school board had properly implemented the part of the plan at issue, the obligation would be vacated as satisfied under Rule 60(b)(5) (first clause).

152. Tasby v. Wright, 713 F.2d 90, 94 (5th Cir. 1983). Cf. *System Federation No. 91*, 364 U.S. at 647-648, 81 S. Ct. at 371.

153. Section 1718 provides as follows:

> Any court order requiring, directly or indirectly, the transportation of students for the purpose of remedying a denial of the equal protection of the laws may, to the extent of such transportation, be terminated if the court finds the defendant educational agency has satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable, and will continue to be in compliance with the requirements thereof. The court of initial jurisdiction shall state in its order the basis for any decision to terminate an order pursuant to this section, and the termination of any order pursuant to this section shall be stayed pending a final appeal or, in the event no appeal is taken, until the time for any such appeal has expired. No additional order requiring such educational agency to transport students for such purpose shall be entered unless such agency is found not to have satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable.

154. Remarks of Sen. Javits, 120 Cong. Rec. 24891 (1974). But see Landsberg, supra note 3, at 829 (20 U.S.C. § 1718 (1983) "rejects the equitable standard").

155. As Landsberg notes, an additional provision in the proposed Act requiring termination of busing upon a finding of unitary status was deleted by the Conference Committee. The Conference Committee did not explain whether this provision was deemed unconstitutional (but see *Spangler I*), redundant, duplicative, inexpedient, or politically unacceptable. Landsberg, supra note 3, at 829 n.190. See Conf. Rep. No. 1026, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4206, 4220-4221. But see Landsberg, supra note 3, at 829-830.

Many final decrees are in fact modified, often upon motion of the school officials. Most are granted by consent after negotiations, and few are reported.[156] There are three primary kinds of modifications. The first is when the school board asks that they be relieved from part of the judgment because they have implemented that aspect of the plan. This is the equivalent to a partial finding of unitariness and is discussed herein.[157] A second type of modification is based on an acknowledged inability to implement the final desegregation plan. Such modifications often take place with respect to magnet schools or other programs based on voluntary enrollments, in which either the money has not been found to accomplish the goals or the students did not enroll at the schools to such a substantial degree so as to suggest that the plan was initially based on inaccurate data or predictions or both. This is essentially a confessed failure to implement and is also discussed herein.[158] The third kind, and by far the most common, arises from a motion to modify a plan because the school board has found the plan to be or to have become impractical.[159] Such modifications can be based, under Rule 60(b), on new evidence, on a finding that the evidence offered at trial was incorrect, or on changed circumstances. It seeks a re-balancing of interests on a showing that educational goals are being inappropriately subordinated in light of the proffered showing.[160]

Thus, to approve the modification, the district court must not only find that the new plan is properly tailored to continue to eliminate segregation and the vestiges of segregation from the school system (or, where not desegregative, promote other important interests), but it must also find that the modification was justified under Rule 60(b), generally by changes in law or unforeseeable changes in fact. A modification approved by a court must, therefore, as a matter of res judicata, have been determined to be consistent with the school officials' obligations under *Dayton II* and *Brown II*.

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156. Landsberg, supra note 3, at 813-814.

157. See infra text accompanying notes 248-255.

158. See infra text accompanying notes 258-265.

159. A difference between the impracticality of a plan and the ineffectiveness of a plan should be recognized. The former denotes that the plan will not effectively educate children; the latter that the plan will not eradicate segregation. A desegregation plan's capability and likelihood of promoting education is not a necessary issue in its formulation, while its sufficiency to eradicate segregation is not only a necessary issue, but the fundamental issue. *Green*, 391 U.S. at 437, 88 S. Ct. at 1693. See Landsberg, supra note 3, at 805 n.87.

160. See Devins, supra note 144, at 34. Devins claims that no suit has ever involved this issue. Minor modifications are also sometimes made under the guise of clarifying or interpreting the original injunction, thus avoiding the need for explicitly meeting the prerequisites of Fed. R. Civ. P. 60(b). Jost, supra note 3, at 1104 and n.29. Cf. Note, supra note 69, at 1084-1086.

8. Satisfaction and Unitary Status

A. *General Principle*

It is a matter of black letter law that a judgment can be discharged by payment or performance in full, thereby entitling the party against whom it was rendered to have it deemed satisfied.[161] Where a judgment has been implemented by paying damages or restitution, by achieving specific performance, or by implementing a mandatory injunction, the judgment is satisfied and must be vacated.[162] Under such a circumstance, "the purposes of the litigation as incorporated in the decree . . . have [ ] been fully achieved."[163] The decision whether a school system that has been operating under a final order has achieved unitary status is thus necessarily a determination of whether the defendants have implemented fully and faithfully all of the provisions (including subsequently submitted plans) of the final order theretofore approved and modified by the court.[164] If so, the judgment and orders should be vacated.

This principle is recognized and codified in the first clause of Rule 60(b)(5) of the Federal Rules of Civil Procedure. Rule 60(b)(5) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) *the judgment has been satisfied, released, or discharged*, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; . . . .[165]

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161. Restatement (First) of Judgments § 46, at 178-179 (1942) (comment a: "If the decree has been performed, and the plaintiff's claim has been satisfied thereby, such satisfaction will extinguish the plaintiff's original claim and bar him from maintaining a subsequent action on his original claim."). See 10 Cyclopedia of Federal Procedure (3d rev. ed. 1984) § 35.32, at 319; Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1855). See generally 7 Moore's Federal Practice ¶ 60.26 [2], at 60-243 to 60-245. See Landsberg, supra note 3, at 811; but see id. at 811 n.121.

162. Sierra Club v. Mason, 365 F. Supp. 47, 49 (D. Conn. 1973) ("the order *ex proprio vigore* require[s] something to be done, such that the judgment can be satisfied.").

163. *United Shoe*, 391 U.S. at 248, 88 S. Ct. at 1499; see Jost, supra note 3, at 1119, 1142 n.238 & n.239.

164. The determination of unitary status can be focused on some point other than the date of the hearing, but at a date months or years earlier. This declaration *nunc pro tunc* would then legitimize the district's subsequent non-integrative (through not intentionally discriminatory) conduct. See *Spangler I*, 427 U.S. 424, 96 S. Ct. 2697 (School district had implemented the 1970 plan and had become unitary in 1971, but was only so declared in 1979, after the Supreme Court's decision in 1976.). But see *Dowell II*, 795 F.2d at 1522.

165. (Emphasis supplied.)

The determination of unitariness is not based on the third clause, which provides for modification or dissolution when "it is no longer equitable that the judgment should have prospective effect." The logic of *Dowell v. Board of Education of Oklahoma City Public Schools*[166] and the thesis of a note published in the Fordham Law Review[167] are based on a misapprehension of the grounds on which an injunction is affected by a declaration of unitariness, contending that a declaration of unitariness operates only under the third clause of Rule 60(b)(5).[168] Therefore, the Court must weigh all interests equitably,[169] including possible equities arising from mere racial imbalances,[170] and this balancing process might lead to a decision other than vacating the injunction.[171] While a judgment that has been fully satisfied clearly should have no further prospective effect, Rule 60(b)(5) leaves no doubt that satisfaction of the judgment *per se* precludes any further balancing of equities and requires that the injunction be vacated.[172]

The defendants have the burden of persuading the court by a preponderance of the evidence that they have performed all of their duties under a final desegregation order. A finding of unitary status under this legal standard is a finding of fact[173] and is not an issue reviewable under the "abuse of discretion" standard.[174] The courts have been vir-

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166. *Dowell II*, 795 F.2d at 1516; *Dowell IV*, No. 88-1067, slip op. at 13-19 (10th Cir. July 7, 1989).

167. Note, The Unitariness Finding and Its Effects on Mandatory Desegregation Injunctions, 55 Ford. L. Rev. 551 (1987). See also Jost, supra note 3, at 1158.

168. Note, supra note 167 at 564. *Dowell II* did not disturb the district court's finding in *Dowell I* that the Oklahoma City Public Schools were unitary, but it held that this finding did not necessarily vacate the outstanding injunction mandating the desegregation plan. See also *Dowell IV*, No. 88-1067 (10th Cir. July 7, 1989) (opin. withdrawn Sept. 15, 1989).

169. Note, supra note 167, at 564-565.

170. But see *Swann*, 402 U.S. at 24, 91 S. Ct. at 1280 (no right to racial balance).

171. See, e.g., *Dowell II*, 795 F.2d at 1523.

172. The equitable considerations suggested in Note, supra note 167, should be considered on a motion to modify the desegregation plan. The party suggesting the modification would have the burden not only of showing that the Equal Protection Clause supported this modification, but also that the modification was authorized by Fed. R. Civ. P. 60(b).

173. *Spangler I*, 427 U.S. at 441, 96 S. Ct. at 2707 ("And while any determination of compliance or noncompliance must, of course, comport with our holding today, it must also depend on factual determinations which the Court of Appeals and the District Court are in a far better position than we are to make in the first instance."); *Riddick*, 784 F.2d at 533; Vaughns v. Board of Educ. of Prince George's County, 758 F.2d 983, 990 (4th Cir. 1985) (*Vaughns*). See *Columbus*, 443 U.S. at 457 n.6, 99 S. Ct. at 2946 n.6. See generally Anderson v. City of Bessemer City, 470 U.S. 564, 105 S. Ct. 1504 (1985); Fed. R. Civ. P. 52(a).

174. See *Dayton I*, 433 U.S. at 417-418, 97 S. Ct. at 2774 (describing standard of review of remedies in terms of errors of fact or law, not abuse of discretion); Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1241 (9th Cir. 1979) (*Spangler II*); *Riddick*, 784 F.2d at 533. The court in Morgan v. Nucci, 831 F.2d at 326, did not expressly

tually unanimous in maintaining that the mere adoption of a final desegregation plan does not instantly convert a dual school system into a unitary school system. Rather, consistent with Rule 60(b)(5), the judgment is satisfied only if the plan is fully and faithfully *implemented* by the school board.[175]

The satisfaction clause applies to mandatory orders and to orders prohibitory in form but essentially mandatory in nature, i.e., "prohibited from failing to do A and B" or "prohibited from doing B until you do A."[176] Nevertheless, this principle is not easily applied to truly prohibitory orders.[177] These orders fall into three categories.[178] The first category encompasses general prohibitions against discriminatory conduct. However, the formulation of desegregation plans must be in terms sufficiently specific and detailed such that implementation or failure to implement is an observable and measurable phenomenon and not a matter of guesswork.[179] Broad injunctions, therefore, are often void

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characterize the standard of review employed but appears to have viewed the district court's decision on unitariness as a finding of fact. Cf. Note, supra note 69, at 1070. But see *Dowell IV*, No. 88-1067, slip op. at 12-13 (10th Cir. July 7, 1989); Gulf Coast Fans, Inc. v. Midwest Electronics Importers, Inc., 740 F.2d 1499, 1510 (11th Cir. 1984); C. Wright & A. Miller, 11 Federal Practice and Procedure, § 2872, at 261-262 (1973). Questions of the application of a legal standard to a particular set of facts are ordinarily held to be questions of "law" subject to *de novo* review. See General Building Contractors Ass'n v. Pennsylvania, 458 U.S. at 393 n.19, 102 S. Ct. at 3151 n.19. But see Fiss, supra note 9, at 27.

175. *Riddick*, 784 F.2d at 533 ("As we have previously stated, the mere implementation of a desegregation plan does not convert a dual system into a unitary one."); United States v. Texas Educ. Agency (South Park Indep. Sch. Dist.), 647 F.2d 504 (5th Cir. 1981), cert. denied, 454 U.S. 1143, 102 S. Ct. 1002 (1982); but see *Spangler I*, 427 U.S. at 434, 96 S. Ct. at 2703 ("While the District Court found such a [constitutional] violation in 1970, and while this unappealed finding afforded a basis for its initial requirement that the defendants prepare a plan to remedy such racial segregation, its *adoption* of the Pasedena plan in 1970 established a racially neutral system of student assignment in the PUSD."). Cf. Gewirtz, Choice, supra note 9, at 793.

176. See Note, supra note 69, at 1061-1063.

177. Cf. United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S. Ct. 894, 897 (1953); *Swift*, 286 U.S. at 119, 52 S. Ct. at 464; Jost, supra note 3, at 1142, 1151; Landsberg, supra note 3, at 811 n.121.

178. Cf. Fiss, supra note 9, at 7 (not only mandatory and prohibitive, but three other types of injunctions: preventive, reparative, and structural). The application of the satisfaction clause would apply, under Professor Fiss's classification, to reparative and (if such a mandate is valid) structural injunctions.

179. Fed. R. Civ. P. 65(d). See International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 75, 88 S. Ct. 201, 207 (1967) ("Defendants . . . [must] never be left to guess what they are forbidden to do"); Jost, supra note 3, at 1155-1156. This applies not only to judgments as initially entered, but also to plans required subsequently to be submitted for approval.

because "they are too vague to be understood."[180] The second category includes orders prohibiting enforcement of particular constitutional provisions, statutes, ordinances, or resolutions. These orders may comply with Rule 65's mandate for specificity and are unquestionably valid until the enforcement of the provision at issue is no longer a real threat. This places a fairly heavy burden on a defendant seeking relief, except when the provision had been repealed or substantially amended. In such a case the "dangers, once substantial, have become attenuated to a shadow."[181] Most desegregation decrees no longer contain this injunction, inasmuch as most segregation laws have been repealed, and facially neutral attendance plans have been subsequently substantially altered to eliminate the offending provisions. The third category consists of orders perpetually prohibiting the defendant from engaging in specifically described conduct, e.g., selling meat at retail.[182] Such a provision is also valid under Rule 65(d). The latter two classes of injunctions are incapable of being satisfied. Since *Green*, however, school desegregation plans as a whole have been mandatory in nature even where they may contain discrete prohibitory provisions.

In connection with the determination of unitary status, two other questions are often discussed at the same hearing: whether the defendants have engaged in any subsequent act of intentional discrimination unrelated to the final order; and whether the defendants will likely engage in further acts of intentional discrimination whether related or not related to the desegregation plan.[183] These two factual determinations involve

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180. *International Longshoremen's Ass'n*, 389 U.S. at 74, 88 S. Ct. at 206 ("[An] abstract conclusion of law [is not] an operative command capable of enforcement."); id. at 76, 88 S. Ct. at 208 ("[A] federal court [must] frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid."); Schmidt v. Lessard, 414 U.S. 473, 94 S. Ct. 713 (1974); NLRB v. Express Publishing Co., 312 U.S. 426, 435-436, 61 S. Ct. 693, 699 (1941); Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 897-898 (5th Cir.), cert. denied, 439 U.S. 835, 99 S. Ct. 118 (1978); City of Mishawaka, Indiana v. American Elec. Power Co., 616 F.2d 976, 991 (7th Cir. 1980), cert. denied, 449 U.S. 1096, 101 S. Ct. 892 (1981); Jost, supra note 3, at 1155-1156; Fiss, supra note 9, at 13; see Fed. R. Civ. P. 65(d); Note, supra note 69, at 1063-1067.

181. *Swift*, 286 U.S. at 119, 52 S. Ct. at 464.

182. *Swift*, 286 U.S. at 111, 52 S. Ct. at 464.

183. In the July 16, 1984 brief in *Keyes*, the United States as *amicus curiae* posited a two part test:

> We have discussed in our February 8 memorandum the two-part test for determining whether a previously segregated system has become unitary. . . . In short, the Court must ascertain:
>
> (1) whether the defendant school authorities have fully and faithfully implemented a constitutionally-acceptable desegregation plan designed by the Court and/or parties to eliminate all vestiges of the prior dual system; and

supplemental claims that preclude the closing of the case and the termination of jurisdiction,[184] but are not directly involved in the determination of unitary status.

B. *Objections*

A number of commentators[185] and courts[186] argue that in order for a school district to be declared unitary the school officials must demonstrate, at the time of the determination, that the system has achieved and maintained an acceptable level of "desegregation." This also entails

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(2) whether the school officials have subsequently engaged in no intentional segregative acts.

Memorandum at 2. The second part of this test is discussed as a supplemental claim, infra text accompanying notes 395-405. Since unitary status means that the *previous* constitutional violations have been remedied, the first decision is necessarily the only element. See *Spangler II*, 611 F.2d at 1245 ("I have doubts whether there is always a logical nexus between the objective of eliminating the effects of past violation and a finding that a future violation might occur.) (Kennedy, J., concurring). But see *Dowell II*, 795 F.2d at 1522 ("[T]he consequence of the disobedience [may] have destroyed the unitariness previously achieved by the district.").

184. See infra text accompanying notes 395-405.

185. See generally Williams, supra note 13, at 810; Chandler, The End of School Busing? School Desegregation and the Finding of Unitary Status, 40 Okla. L. Rev. 519 (1987); Note, Unitariness and Busing: Placing the Burden of Proof for Obtaining Judicial Review When a School Board Stops Busing, 92 Dick. L. Rev. 437, 451 (1988). Cf. Gewirtz, Choice, supra note 9, at 794-796; Gewirtz, Remedies and Resistance, supra note 9, at 657. Landsberg assumes that there will be a *de novo* examination to determine whether vestiges have been eradicated. Landsberg, supra note 3, at 817-824. The Fordham note suggests that the unitariness finding should have no operational effect unless it also contains this sort of *de novo* review. Note, supra note 167, at 565. Cf. Jost, supra note 3, at 1151.

Some disagreement is based on "policy" rather than precedent. E.g., Note, supra at 454. This is the quintessential legislative question that is beyond the scope of this article.

186. Tasby v. Wright, 713 F.2d 90, 96 (5th Cir. 1983); but see id. at 95; Clark v. Board of Educ. of Little Rock Sch. Dist., 705 F.2d 265, 270 (8th Cir. 1983); Pate v. Dade County Sch. Bd., 588 F.2d 501, 504 (5th Cir. 1979), cert. denied, 444 U.S. 855, 100 S. Ct. 67 (1979); United States v. Texas Educ. Agency (South Park Independent Sch. Dist.), 647 F.2d 504, 507 (5th Cir. 1981).

In *Riddick*, both the trial and appellate address *de novo* whether the Norfolk School Dist. remained unitary several years after it had been declared unitary. 627 F. Supp. 814 (E.D. Va. 1984). Landsberg, however, construes this analyses to "refer [ ] only to Norfolk's good faith implementation of the busing plan." Landsberg, supra note 3, at 835. In any event, this *de novo* examination added nothing to the courts' analysis. Both courts had found that the district had been unitary in 1975, 784 F.2d at 529, and the Fourth Circuit recognized that the doctrine of collateral estoppel precluded relitigation of that question, 784 F.2d at 531. Both courts further held that there had been no intervening intentionally segregatory conduct that would have disturbed this unitary status. Thus, the inquiry as to unitary status in 1984 merely prudently covered all bases and the findings were redundant and the purest dicta. See also *Dowell III*.

a showing that all vestiges of past intentional segregation (often including residential segregation) have been eliminated and no longer even contribute to prevailing racial imbalances in schools.[187]

This theory discounts the logic of the general law of judgments by contending that the Supreme Court in *Green* and *Swann* implicitly created a special rule of law for desegregation litigation, and established not only the criteria for the formulation of a "transitional" desegregation plan, but also the criteria for the determination of the "end-state" status of a unitary school system.[188] However, the Supreme Court's decisions in *Swann* and *Green* only addressed the formulation of an adequate desegregation plan and do not conflict with res judicata. In *Swann*, the original plan was modified because of the change in law announced by *Green*.[189] The defendants' proposed plan in *Green*, a freedom of choice arrangement, had been approved by the district court in 1966 and affirmed in relevant part by the Court of Appeals.[190] This approval was the subject of the Supreme Court's original review of *Green* on certiorari.[191] Thus, the district court's original approval had neither become "final" nor attained "res judicata" effect.[192] While *Green* strongly mandates that the court ensure during the formulation of a plan that the plan will be effective and promise realistically to work, once the plan has been formulated and has received final court approval that plan has all the attributes of a final judgment. The language in *Green* is in each instance prospective—what the proposed plan must "promise" to do—never retrospective.[193] The language in *Swann* is equally prospective.

Res judicata requires that the two decision points in the desegregation process be evaluated by different criteria. The first decision point is the formulation of the final order dismantling the dual system. The second decision point is the determination of whether the school system has achieved a unitary status.

Final desegregation decrees and orders are *designed* to correct all discriminatory effects.[194] Prior constitutional violations are identified at trial and addressed in the remedial orders. Trial courts must determine that the remedial orders entered are fully adequate and tailored to

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187. See Note, supra note 185, at 451.

188. Landsberg, supra note 3, at 830-831; Note, supra note 185, at 451; Note, supra note 54, at 1477-1478 n.18.

189. Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358, 1360 (W.D.N.C. 1969).

190. *Green*, 382 F.2d 338 (4th Cir. 1967).

191. Certiorari granted, 389 U.S. 1003 (1967).

192. See supra text accompanying notes 57-92.

193. *Green*, 391 U.S. at 439, 88 S. Ct. at 1695 ("The burden on the school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.") (emphasis in original).

194. *Spangler I*, 427 U.S. at 436, 96 S. Ct. at 2705.

eradicate forever all vestiges of prior segregation.[195] Once that inquiry has been made, however, the plan adopted by the court is judicially determined to be an "effective" desegregation remedy. This is the critical operational result of applying the doctrine of res judicata. The analysis necessary and appropriate for the formulation and approval of a desegregation plan cannot be repeated, and the same issues thus relitigated, in the determination of unitary status.[196] Prior segregative pupil assignments (and other violations) are remedied when the requirements of a plan have been fully and nondiscriminatorily implemented by school authorities, regardless of whether implementation of the plan successfully achieved for all schools in the system the particular racial balance projected by the plan. The validity of that original "effectiveness" determination is in no way undermined by evidence that racial balance and other remedial elements of a desegregation plan have not been permanently achieved. Thus, like the unappealed desegregation plan involved in *Spangler I*,[197] the merits of remedial measures previously ordered by a court are not open to further judicial scrutiny except under Rule 60(b).[198]

If compliance with a comprehensive, constitutionally valid court order is *not* dispositive, then courts examining the "vestiges" question will have little else to look to other than the raw numbers of student enrollment and analogous factors.[199] At a minimum, this review would be based on the six factors set forth in *Green* and on other concepts of what is needed to attain "unitary" status.[200] If racial imbalances *per*

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195. See *Spangler II*, 611 F.2d at 1242 (Kennedy, J., concurring) (While "original findings of intentional discrimination, . . . are not phrased in terms of the incremental segregative effect," the school system was found unitary). Contra, Landsberg, supra note 3, at 810.

196. *Swift*, 286 U.S. at 119, 52 S. Ct. at 464 ("We are not framing a decree . . . . The injunction, whether right or wrong, is not subject to impeachment to the conditions that existed at its making.").

197. 427 U.S. at 428, 96 S. Ct. at 2701 (1976).

198. Id. at 432, 96 S. Ct. at 2703 ("We do not have before us any issue as to the validity of the District Court's original judgment, since [the previous school board] did not appeal from it."); id. at 436-437, 96 S. Ct. at 2705 ("For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violation on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.").

199. See, e.g., *Vaughns*, 758 F.2d at 991. Cf. Gewirtz, Choice, supra note 9, at 796-798; Chandler, supra note 185, at 534-538.

200. See Note, supra note 185, at 451. Cf. School Bd. of Richmond v. Baliles, 829 F.2d 1308, 1314 (4th Cir. 1987); Keyes v. School Dist. No. 1, Denver, Co., 609 F. Supp. at 1498; *Dowell III*, 677 F. Supp. at 1506-1513. Such an inquiry would resemble in process and effect a proceeding under 20 U.S.C. § 1718 (1982), see supra text accompanying notes 153-155.

se support an inference that a school district has not achieved unitary status without any prerequisite finding of intentional discrimination or bad faith implementation, then racial balance must be an essential element of a unitary school district. In effect, this equates "racial balance" with "effective desegregation."[201] But the Constitution does not require, either as a matter of right or as a matter of remedy, a particular racial balance in public schools.[202] "The clear import . . . from *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.' "[203]

The Supreme Court has firmly established that valid desegregation plans may *not* be judicially altered periodically in order to maintain racial balance, and that even absent discrimination, neither school attendance nor residential patterns are likely to be in racial balance. A desegregation plan may not be declared a failure because it falls short of achieving a "particular degree of racial balance or mixing" in some schools.[204] The achievement of certain racial percentages cannot be imposed as an "inflexible requirement" on school boards.[205] While the current degree of racial balance in school systems has an obvious relevance to any discrimination inquiry,[206] that consideration is not dis-

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201. *Spangler I*, 427 U.S. at 434, 96 S. Ct. at 2703; *Swann*, 402 U.S. at 24, 91 S. Ct. at 1280; but see id. at 26-27; cf. Landsberg, supra note 3, at 806.

202. *Spangler I*, 427 U.S. at 434, 438, 96 S. Ct. at 2703, 2705; *Swann*, 402 U.S. at 24-25, 91 S. Ct. at 1280 (mathematical ratios not an inflexible requirement in formulating remedial orders); *Council of Emporia*, 407 U.S. at 464, 92 S. Ct. at 2204.

203. *Milliken I*, 418 U.S. at 740-741, 94 S. Ct. at 3125 (footnote omitted); see id. at 763-764, 94 S. Ct. at 3136 (White, J., joined by Douglas, Brennan, and Marshall, JJ., dissenting). As noted in South Park Indep. Sch. Dist. v. United States, 439 U.S. 1007, 1011, 99 S. Ct. 622, 624 (1978) (Rehnquist, J., joined by Powell, J., dissenting from denial of certiorari):

> The thrust of *Swann* and [*Spangler I*], when taken together, is that a district court must heed the *Swann* mandate to closely scrutinize predominantly one-race schools when approving an initial desegregation plan in a school district with a history of *de jure* segregation, but that the District Court has no obligation, indeed, has no authority, to monitor the plan indefinitely to make sure that the initial *Swann* requirements are maintained year after year in spite of demographic changes which are in no way attributable to the school board. A unanimous Court in *Swann* made clear that the Constitution requires the dismantling of dual school systems, but does not mandate racial balance in schools.

204. *Spangler I*, 427 U.S. at 434, 96 S. Ct. at 2703.

205. Id.

206. The racial percentages actually achieved under the plan and similar statistical measures and indices are relevant insofar as they are probative of bad faith implementation of the desegregation plan by the school board or of post-judgment intentional segregative conduct. If the absence of racial balance stems from the board's failure to carry out the

positive of whether the school board has indeed taken all steps necessary to render the system "unitary."

C. *Application*

The doctrine of res judicata and the satisfaction of judgments clause of Rule 60(b)(5) have been applied in areas outside of desegregation law in a number of proceedings, but primarily in the area of environmental law.[207] These principles were applied by the Supreme Court to the question of unitary status in desegregation litigation in *Pasadena Board of Education v. Spangler*,[208] and have thereafter been explicitly applied in the First and Ninth Circuits, and possibly in the Fifth and Eleventh Circuits.

In *Spangler I*, the district court approved a system-wide student assignment plan in 1970 designed to implement its order that no school in the Pasadena school district have "a majority of any minority students."[209] The school district achieved the racial percentages mandated by this order in the first year of the plan's implementation, but gradually "'slipped out of compliance'"[210] with the "no majority" requirement

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plan's requirements, then full and faithful implementation has not occurred and unitariness has therefore not been achieved: The judgment has not been satisfied. If the imbalance results from subsequent intentionally segregative acts by the board, then a new constitutional violation has occurred, necessitating further corrective action by the Court. See Fed. R. Civ. P. 15(d), and infra text accompanying notes 394-405. If, on the other hand, the imbalance is due to events not attributable to the school board, such as demographic changes and/or student population changes, then the imbalance provides no basis for finding either that the board has not carried out its affirmative duty to desegregate or that it has engaged in post-judgment unconstitutional conduct requiring further remedial action. The critical inquiry, therefore, is whether the school board is responsible for racial percentage "shortfalls." If not, then the court cannot view such "shortfalls" as a condition that evidences continuing segregation or requires corrective action. Since racial imbalance not resulting from official discrimination is not a "condition that offends the Constitution" (*Milliken I*, 418 U.S. at 738, 94 S. Ct. at 3124; id. at 757, 94 S.Ct. at 3133) (Stewart, J., concurring), there is simply nothing "to correct." This is the teaching of *Spangler I*, 427 U.S. at 435-437, 96 S. Ct. at 2704.

As discussed supra at text accompanying notes 93-160, this evidence may also be relevant to modification under Fed. R. Civ. P. 60(b). The imbalance may have resulted from mistake, fraud, or events—not including ordinary demographic change—that the court could not have foreseen.

207. Environmental Defense Fund, Inc. v. Hoffman, 566 F.2d 1060 (8th Cir. 1977); Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, 342 F. Supp. 1211, 1218 (E.D. Ariz.), aff'd, 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931, 93 S. Ct. 2749 (1973); Sierra Club v. Mason, 365 F. Supp. 47 (D. Conn. 1973); and Sierra Club v. U.S. Army Corps of Engineers, 609 F. Supp. 1052 (S.D.N.Y. 1985). Cf. Ferrell v. Trailmobile, Inc., 223 F.2d 697 (5th Cir. 1955).

208. 427 U.S. 424, 96 S. Ct. 2697 (1976).

209. Id. at 427-428, 96 S. Ct. at 2700.

210. Id. at 433, 96 S. Ct. at 2703.

in ensuing years. In 1974, the school district unsuccessfully moved the district court to dissolve the "no majority" order.[211] On appeal, the district court's denial was affirmed because the school district's "failure to maintain literal compliance with the ['no majority' requirement of the] 1970 injunction indicated that the district court had not abused its discretion in refusing to grant so much of petitioner's motion for modification as pertained to this aspect of the order."[212]

The Supreme Court vacated the Ninth Circuit's judgment and held that the district court had exceeded its remedial authority in seeking to mandate racial percentages among students in Pasadena schools after 1971.[213] The Court emphasized that the desegregation plan ordered by the district court was "designed" to achieve a unitary school system[214] and that "[t]here was . . . no showing . . . that those post-1971 changes in the racial mix of some Pasadena schools . . . were in any manner caused by segregative actions chargeable to the defendants."[215] The Court concluded:

> In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished *that* objective. That being the case, the District Court was not entitled to require the [school board] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.[216]

Thus, the Court held that the resolution of whether a dual system of student assignment has been remedied turns on whether the district court's "adoption of [a pupil assignment plan] established a racially

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211. Id. at 431, 96 S. Ct. at 2702.

212. Id. at 431-432 (footnote omitted).

213. Id. at 433-435, 96 S. Ct. at 2703. The Court noted that "Judge Chambers thought that as soon as the PUSD was brought into compliance with [the 1970] order, the mandatory injunction should be terminated [519 F.2d 430] at 440 [(1975)]." Id. at 432 n.1.

214. Id. at 436, 96 S. Ct. at 2705 ("[T]he District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools.").

215. Id. at 435, 96 S. Ct. at 2704.

216. Id. at 436-437, 96 S. Ct. at 2704 (emphasis in original). The dissent also appears to recognize "that a fully desegregated school system may not be compelled to adjust attendance zones to conform to changing demographic patterns." Id. at 443, 444 n.1, 96 S. Ct. at 2703 n.1 (Marshall, J., dissenting).

neutral system of student assignment in the [school district]."[217] The decision by the district court in approving the desegregation plan that the conduct required in the plan was both necessary and sufficient to remedy prior constitutional violations then became res judicata as to this school district.[218] Hence, full implementation of the student assignment components of a desegregation decree ordered by a court to achieve a unitary school system pursuant to this holding satisfies the judgment and establishes "'a system of determining admission to the public schools on a nonracial basis.'"[219] Therefore, the court's remedial function is "fully performed" by "once implement[ing] a racially neutral attendance pattern."[220]

An unfriendly but accurate commentator, Professor Jost, described the meaning of *Spangler*:

> However, *Swann* barred a "no majority of any minority" requirement only in a situation in which *de jure* segregation had been eliminated and a unified district achieved. [402 U.S. at 31-32]. If a unified school district had not yet been achieved by the time modification was requested, and if the effects of past *de jure* discrimination had not yet been eliminated, the "no majority of any minority" requirement would continue to be appropriate until such time as those goals were reached, even under *Swann*. Justice Rehnquist's opinion [in *Spangler I*] would advise the district court only that is [sic] must modify its order at that time. For the Court to determine that the obligors were immediately entitled to relief from the "no majority of any minority" requirement, . . . [the Supreme Court] had to determine not only that the requirement might someday cease to be appropriate but also that [the "no majority of any minority" . . . requirement] was currently not necessary and that a unified district had in fact been achieved.[221]

Thus, the majority in *Spangler I*, much to the chagrin of Professor Jost, found that the full implementation of the Pasadena plan for only one year resulted in the achievement of a fully unitary district. Professor Jost further complained: "Rehnquist unconvincingly rejected the district

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217. Id. at 434, 96 S. Ct. at 2703.

218. See id. at 432, 96 S. Ct. at 2703.

219. Id. at 435, 96 S. Ct. at 2704. Professor Fiss implicitly suggests that this result follows from the litigation "model" that "the remedy is designed to correct or prevent a discrete event, and the judicial function usually exhausts itself when the judgment is announced and the amount of damages calculated or the decree aimed at some discrete event is issued." Fiss, supra note 27, at 27.

220. *Spangler I*, 427 U.S. at 437, 96 S. Ct. at 2705.

221. Jost, supra note 3, at 1157. Cf. *Vaughns*, 758 F.2d at 988.

court's determination on this matter. . . . [H]e determined that the defendants were, for one school term, technically in compliance with this requirement and interpreted this to mean that any further required compliance was unnecessary to protect the beneficiary and was unduly oppressive to the . . . [school board]."[222] The court acknowledged that racial imbalance existed among the Pasadena school system that would have been unacceptable in a non-unitary system, but no further examination of the current racial balance in the system was either undertaken or requested. Justice Rehnquist, according to Jost, held that if compliance had been achieved, the decree had to be partially vacated,[223] for the continued existence of the decree provided no benefit to which the beneficiary was legally entitled.

A district court, therefore, must make a declaration of unitary status once it has determined that the defendants have fully and faithfully implemented the desegregation plan approved by the court.[224] Consistent with Rule 60(b)(5) (satisfaction) and the doctrine of res judicata, the *Spangler I* analysis applies not merely to student assignments. Whatever remedial tools are employed by a court to cure a dual school system, once they are fully implemented throughout the system, the formerly dual system must be regarded in this respect as "unitary."[225]

In *Spangler I*, the Supreme Court explicitly applied to the Pasadena system the implicit logic of *Swann*, as shown by Chief Justice Burger's reflection:

> It does not follow that the communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from

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222. Jost, supra note 3, at 1158.

223. Id.

224. Even the (Ford) Department of Justice so stated:

> At oral argument the Solicitor General discussed the Government's belief that if, as petitioners have represented, *they have complied with the District Court's order during the intervening two years, [from 1974 to 1976] they will probably be entitled to a lifting of the District Court's order in its entirety.* Tr. of Oral Arg. 28.

Spangler I, 427 U.S. at 441, 96 S. Ct. at 2707 (emphasis added). Professor Landsberg was on the Brief for the United States in both *Spangler I* and *Spangler II*, 427 U.S. at 426; 611 F.2d at 1239. See also Note, The Supreme Court 1975 Term, 90 Harv. L. Rev. 56, 221, 223 ("Having implemented a racially neutral attendance pattern *once . . . even briefly*.") (emphasis added); Note, supra note 23, at 199.

225. Cf. *Spangler II*, 611 F.2d at 1243 & n.3 (Kennedy, J., concurring).

> the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.[226]

Reexamination of the findings as to the remedy and reformulation of the desegregation plan are precisely the "further intervention" that the Court unanimously held not to be "necessary."

Two appellate court decisions governing the declaration of unitary status in a desegregation case, *Spangler II* and *Morgan v. Nucci*, have applied the foregoing principles.[227] In *Spangler II*,[228] after the Supreme Court's decision, the Ninth Circuit Court of Appeals held that the district court on remand had subsequently erred by refusing to lift its remedial order in its entirety.[229] The opinion by Judge Goodwin, emphasizing that "[t]he displacement of local government by a federal court is presumed to be temporary," held that the district court had "ignored . . . the Board's present compliance," and that "vague charges about lack of aggressiveness, or differences of opinion about who can best manage the future course of desegregation in a troubled school district, are insufficient grounds for the permanent interposition of judicial control over an activity of local government that by law is consigned to an elected school board."[230]

Judge (now Justice) Kennedy's opinion more precisely set forth the standard for requiring a district court to terminate its remedial orders.[231] Relying on the Supreme Court's above-quoted directions on remand, Judge Kennedy noted that Pasadena was "in substantial compliance with the [desegregation] plan for the period 1970-1974 . . . [and] total compliance [since that time]."[232] Accordingly, he concluded that "compliance with the Pasadena Plan for nine years is sufficient in this case, given the nature and degree of the initial violation, to cure the effects of

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226. *Swann*, 402 U.S. at 31-32, 91 S. Ct. at 1283.

227. Landsberg believes that *Riddick* also followed this doctrine. Landsberg, supra note 3, at 798, 835. See also Note, supra note 185, at 439. The district court order by which the Norfolk public schools were declared unitary does state "that the School Board of the City of Norfolk has *satisfied* its affirmative duty to desegregate." *Riddick*, 784 F.2d at 525 (emphasis added).

228. *Spangler II*, 611 F.2d at 1239.

229. Id. at 1242.

230. Id. at 1241.

231. Judge Kennedy's opinion received the concurrence of Judge Anderson, the third judge on the panel, giving his opinion, together with Judge Goodwin's opinion, the full authority of the Ninth Circuit. See *Riddick*, 784 F.2d at 537 n.16.

232. *Spangler II*, 611 F.2d at 1243.

previous improper assignment policies. Further delay in returning full responsibility for administration to the school board is unjustified."[233] Neither judge examined the contemporaneous racial configuration of the Pasadena schools. Compliance with the final desegregation plan was deemed to be critical.[234]

In the Boston school case, *Morgan v. O'Bryant*,[235] the First Circuit noted that, under *Spangler I*, "absent any showing that school population changes were the result of segregative actions by the defendants or the result of some other constitutional violation, the district court's power to decree a remedy had ended when it implemented its earlier plan."[236] The Court subsequently, in *Morgan v. Nucci*, postulated three "general inquiries" as to whether the Boston schools have achieved unitariness in student assignments: first, what is the number of one-race or racially identifiable schools; second, have the school defendants demonstrated good faith in the desegregation effort and the running of the schools; and third, has maximum practicable desegregation of student bodies at the various schools been attained.[237] Thereafter, the Court measured all three of its tests of unitariness in every instance against the previously approved desegregation plan.[238] While the Court examined the number of one-race or racially identifiable schools, it excused each instance of identifiability by reference to the district court's order.[239] Good faith was measured by the defendants' implementation of the plan.[240] Lastly, the Court gave no consideration to whether any greater degree of desegregation than that contemplated by the original plan was feasible.[241]

The Eleventh Circuit followed this doctrine, perhaps inadvertently and clearly without substantial analysis, in *United States v. Board of*

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233. Id. at 1244.

234. See id. at 1243 & n.2 (Kennedy, J., concurring). Cf. Haycraft v. Board of Educ., 560 F.2d 755, 756 (6th Cir. 1977); United States v. Seminole County Sch. Dist., 553 F.2d 992, 994 & n.7 (5th Cir. 1977).

235. 687 F.2d 510 (1st Cir. 1982).

236. Id. at 517. The Boston school system was found unitary in Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987) (*Nucci*).

237. *Nucci*, 831 F.2d at 319.

238. See also id. at 329 n.25 ("[W]e have no doubt that if the BTU or any defendant demonstrated complete compliance with all outstanding faculty and staff orders, the court would withdraw entirely from the school's staffing decisions" citing *Spangler I*, 427 U.S. at 436).

239. *Nucci*, 831 F.2d at 319-321.

240. Id. at 321-322. But see Note, The Unitariness Dilemma: The First Circuit's Attempt to Develop a Test for Determining When a System is Unitary, 66 Wash. U.L.Q. 615, 637-638 (1988).

241. *Nucci*, 831 F.2d at 317-326. The district court had found by approving the original plan that it had mandated the maximum feasible desegregation. *Swann*, 402 U.S. at 26, 91 S. Ct. at 1282.

Education of Jackson County.[242] There the Court of Appeals affirmed the dismissal of a desegregation case and vacation of injunctions "because the 1970 order [had], in effect, been complied with."[243] The Fifth Circuit recently has acknowledged without criticism and perhaps with greater advertence the specific application of this doctrine: "the district court announced that it would grant Oxford's motion to dismiss the [desegregation] order unless appellants showed either that Oxford had failed to comply with the court's order or that supplemental relief was in order."[244]

The Tenth Circuit has recently had before different panels of the court three cases involving the unitary status of school districts.[245] An opinion was issued on July 7, 1989, in *Dowell IV*, but then withdrawn. As discussed below, this majority opinion did not focus on the recognition of unitary status, but rather denies any decisive legal significance to such a finding. An opinion in *Brown III* (with an unreleased dissenting opinion by Judge Baldock) was issued June 2, 1989, but was subsequently, withdrawn on July 19, 1989. This opinion contained language substantially supporting the analysis here advanced, stating that "[w]here the school district has complied with the desegregation plan to the best of its ability, and has done what can be done in spite of the obstacles in its way, it is reasonable to conclude that no further desegregation is feasible," and that "[t]he present case is one of those rare ones in which the unitariness determination is not directly tied to the execution of a particular desegregation plan."[246] As of this writing, no opinion has been issued in *Keyes II*.

D. *Summary*

Thus, when a court scrutinizes a public school district for possible violations of constitutional rights, it does not focus on the current circumstances. It must focus on the *cause* of those circumstances. A slight racial imbalance—or no imbalance at all—that is caused by intentional discrimination violates the Constitution. A gross disparity that

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242. 794 F.2d 1541 (11th Cir. 1986).

243. Id. at 1543. Similar language is found in *Georgia State Conference*, 775 F.2d at 1413-1414, that a "school system which was previously segregated can become fully unitary after implementing a constitutionally acceptable plan and operating in a manner in which 'the State does not discriminate between public school children on the basis of race.' " See *Lawrence County*, 799 F.2d at 1055-1058 (Higginbotham, J., dissenting).

244. Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 753 (5th Cir. 1989).

245. Brown v. Board of Educ. of Topeka, No. 87-1668 (*Brown III*); Dowell v. Board of Educ. of Okla. City Pub. Sch., No. 88-1067 (*Dowell IV*) (opin. withdrawn Sept. 15, 1989); and Keyes v. School Dist. No. 1, Denver, Co., Nos. 85-2814, 87-2634 (*Keyes II*).

246. *Brown III*, No. 87-1668, slip op. at 26-27 (10th Cir. June 2, 1989) (withdrawn, July 19, 1989).

is not caused by intentional official discrimination does not. All inquiries as to cause are historical, for causality is a historical event. It is not the present, but the past, that is the touchstone.

When a school district has been involved in desegregation litigation in the past, the previous proceedings are part of this historical inquiry. Assume that in that past litigation, the court determined that there was official, intentional discrimination. No one appears to want *that* decision re-examined or relitigated. Subject to Rule 60(b), it is res judicata, and the determination is binding on the subsequent inquiry. Where the courts made that previous determination, the court will have determined, secondly, what injuries the plaintiffs sustained as a result of the identified intentional discrimination. Those injuries may include current injuries and also conditions that continue to cause injuries in the future ("vestiges of segregation"). This second determination is also res judicata, though many appear to want *this* determination re-examined and to add more injuries and more existing conditions to its list.

Thirdly, the court will have determined what conduct was necessary to "remedy" the situation, to put the plaintiff in the place where the plaintiff would have been had the intentional discrimination not occurred ("remedy"). This may involve a payment of money ("damages"), or it may involve an order not to do certain specific and described acts or to do certain equally specific and described acts ("injunction" or "desegregation plan"). This is again res judicata, but whether this determination may be re-examined and relitigated is very much the question at bar.

The court may or may not have made a fourth determination: whether the conduct required by the third determination ("remedy") has been implemented. Where this determination has already been made, it is also res judicata. Whether this determination may be relitigated has not been widely debated because its significance depends almost exclusively on the binding nature of the third determination.

If the court's second determination ("vestiges") is res judicata, then injuries that the court had not previously found to have resulted from the intentional official discrimination cannot be subsequently examined (except under Rule 60(b)) as having been possibly caused by that discriminatory conduct. A succeeding court should not then find these conditions to be constitutionally offensive unless it independently finds them to have been caused by intentional official discrimination.

If the court's third determination ("remedy") is res judicata, then only the conduct required by that determination—the payment of money or the doing or avoiding of certain acts—was necessary to correct the identified injuries, again, except as modified under Rule 60(b). And, as a logically necessary corollary, the performance of that conduct did in fact correct the previously identified injuries and satisfy the previously imposed obligation.

If the injuries found to have resulted from the previously identified intentional discrimination have been subsequently corrected, then the current state of affairs cannot result from the intentional discrimination previously identified, and the examining court is back to square one.[247]

A *de novo* review of the unitary status of a school district logically denies the operation of res judicata in the second and third determinations. Such a review always re-examines the third determination ("remedy"), and often re-examines the second determination ("vestiges").

9. Partial Implementation

The Supreme Court has also stated that the decree may be satisfied in whole or in part, answering, as well, the question "whether," as the district court put it in a subsequent opinion in *Keyes*, "it is appropriate to parse the criteria in *Green* . . . to separate out pupil assignments from the other elements."[248]

The fact that a school district has remedied its formerly dual system of student assignment does not, in and of itself, render the district "unitary" as a whole. The Supreme Court in *Green* recognized at least six discrete components of a school system, including student assignment, which must be cleansed of the vestiges of past unconstitutional segregation before the system as a whole can be declared unitary.[249] Indeed, in *Spangler I*, the Court expressly observed that, notwithstanding the Pasadena School Board's fulfillment of its remedial obligation regarding student assignments, the Pasadena school district was not entitled to a declaration of unitariness until it had fulfilled its remedial obligations regarding all elements of the system.[250] Conversely, however, the Court made it clear that a school district need not be unitary in every respect before it is entitled to be released from the requirements of a desegregation decree pertaining to a component of the old dual system, such as student assignments, that have been fully fulfilled. Despite the fact that in other components of the Pasadena school system the remedy had not been implemented, and vestiges of Pasadena's dual system therefore apparently survived, the *Spangler* Court ruled that the district court's remedial authority over student assignment had expired when

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247. Almost. Anyone who participated in the previous litigation cannot now claim that the present state of affairs is the result of intentional discrimination that was involved or should have been involved in the previous litigation. The court must determine whether there was intentional discrimination after the entry of the judgment in the previous litigation.

248. Keyes v. School Dist. No. 1, Denver, Co., 609 F. Supp. at 1516.

249. In addition to student assignments, the components of a school system identified by the *Green* court were faculty, staff, transportation, extracurricular activities, and facilities. *Green*, 391 U.S. at 435, 88 S. Ct. at 1693.

250. *Spangler I*, 427 U.S. at 436, 96 S. Ct. at 1204.

the requirements of the desegregation decree pertaining to assignment had been fully and properly implemented.[251] Indeed, the Supreme Court expressly found "little substance" in the argument that the district court should retain authority to impose the "no majority of any minority" requirement "at least until the school system achieved 'unitary' status in all other respects such as the hiring and promoting of teachers and administrators."[252]

In dissent, Justice Marshall advanced precisely the "all or nothing" reasoning which he recognized had been rejected by the *Spangler I* majority:

> I see no reason to require the District Court in a case such as this to modify its order prior to the time that it is clear that the entire violation has been remedied and a unitary system has been achieved.[253]

Thus, an inquiry into whether a school district as a whole has achieved unitary status is comprised of a series of inquiries into the unitariness of the discrete components of the system.[254] As to each such component, the district court's remedial authority expires upon the full and proper implementation of the pertinent provisions of a desegregation decree designed to achieve unitary status. Not until all requirements of a school desegregation decree have been fully implemented—that is, not until the dual system has been dismantled with respect to all discrete components of the system—can the system as a whole be declared unitary and jurisdiction over the case be terminated.[255]

10. Imperfect Implementation

Final orders are not always implemented to the last detail. Implementation of the mandatory aspects of the final order is not always perfectly accomplished.

One common example of alleged "imperfect implementation" occurs where the court specifically mandates school boundaries and the schools

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251. Id. Professor Jost disapprovingly noted that Justice Rehnquist "[f]irst . . . isolated the initial decree's 'no majority of any minority' pupil assignment requirement from its hiring, promotion, and other requirements." Jost, supra note 3, at 1158 (footnote omitted). See Chandler, supra note 185, at 530; Note, supra note 224, at 221, 223.

252. Id. at 438, n.5. See id. at 442. See also, Davis v. Board of Sch. Comm'rs of Mobile County, 430 F.2d 883, 888 (5th Cir. 1970); *Nucci*, 831 F.2d at 318.

253. *Spangler I*, 427 U.S. at 444, 96 S. Ct. at 2708 (footnote omitted); see also 427 U.S. at 442, 96 S. Ct. at 2707.

254. Note, supra note 224, at 223; Chandler, supra note 185, at 530. See *Spangler I*, 427 U.S. at 436, 438 n.5, 96 S. Ct. at 2704, 2705 n.5; *Nucci*, 831 F.2d at 318-319.

255. Where partial unitary status has been found, the court should not only clearly state what part of previous orders remain in force, but it should set a date for a new hearing on the remaining parts of the decree. See Chandler, supra note 185, at 554.

nevertheless fail to enroll the appropriate racial percentages. This has often been denounced as an allegedly "ineffective plan." As noted in the Boston case,[256] even where racially identifiable schools exist, so long as those schools are in compliance with the court's own student assignment order, the plan has been—in this respect, at least—perfectly implemented. The defendants have done every act contemplated by the decree and the existence of these schools will not preclude a finding of unitariness. In a situation where the court initially sets a percentage, but then specifically approves assignment criteria (including district lines) proposed by the defendants, the analysis is the same as in *Nucci*.

A distinction should be made between a plan in which the court approves attendance district lines, and then predicts that these districts will have certain racial percentages (the Boston plan), and a plan in which the court requires that a certain racial percentage (often with a specified margin of flexibility) must be met but allows the school district without further court approval to draw the lines.[257]

Of course, if the court finds that it was misled by inaccurate information provided by the defendants, and it used this information either in formulating the remedy or in approving student assignment criteria, then the judgment must be vacated under the general criteria of Rule 60(b). An analogous analysis can be used for other aspects of a plan.

Nevertheless, there are, in fact, instances of imperfect implementation of a judgment. While perfect implementation of the final desegregation plan entitles the school district to be released from the judgment, imperfect implementation does not necessarily preclude the court from determining that the school district is unitary and that the judgment has been satisfied.[258]

The critical inquiry is whether the imperfections in implementation, either "shortfalls" in the racial composition of schools or other failures, were substantial,[259] were substantive rather than technical,[260] and were

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256. *Nucci*, 831 F.2d at 320-321.

257. Thus, school officials can control the assignments of students but cannot control enrollments of students. Id. at 322-323. The defendants in this instance must bear the additional burden of persuasion that the assignment criteria which they formulated and used were in fact suitable to achieve the required racial percentages, but failed to do so for reasons entirely beyond the control of the defendants.

258. See Ross v. Houston Ind. Sch. Dist., 699 F.2d 218, 225 (5th Cir. 1983) ("[i]mmutable geographic factors and post-desegregation demographic changes that prevent the homogenation of all student bodies do not bar judicial recognition that the school system is unitary"). Cf. United States v. Seminole County Sch. Dist., 553 F.2d 992, 995, 996 (5th Cir. 1977).

259. See *Nucci*, 831 F.2d at 322 ("substantial compliance"), 325 ("noncompliance . . . relatively slight").

260. Id. at 322-324; Morgan v. O'Bryant, 687 F.2d 510, 517 (1st Cir. 1982) (Under

caused by the deliberate conduct—action or inaction—of school officials.

There will, of course, be instances in which a district court will find that the school district has not in fact substantially implemented a final desegregation judgment. In some cases this failure of implementation will be beyond the control of the defendants.[261] One of these instances occurs where the defendant lacked funds to implement all or significant portions of the decree.[262] Where the defendants have been precluded from implementing the plan by matters beyond their control, the court should simply extend the time during which the plan should be implemented, or otherwise modify the plan no more than necessary to take into consideration those changed circumstances beyond the defendant's control. Where persons other than the defendants interfere with the judgment, but the judgment can be fully implemented by enjoining those persons as well, those persons should be enjoined from interfering with the judgment of the court.[263]

In other instances, however, the failure to implement will be caused by the defendants. The school board may, either because of intentional segregatory purposes or for other reasons, fail to put the plan into place. These other reasons may well include legal disagreements as to the propriety of the plan, disagreements as to the educational benefit of the plan, or the like. In any event, whether discriminatory or nondiscriminatory, these reasons constitute bad faith and intentional disobedience by the defendants. Nevertheless, the desegregation order remains valid as a judgment, its determinations as to the necessity and sufficiency of remedial measures remain a binding adjudication, and failure to

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Spangler I, "absent any showing that school population changes were the result of segregative actions by the defendants or the result of some other constitutional violation, the district court's power to decree a remedy had ended when it implemented its earlier plan."). Technical provisions would ordinarily include reporting and notification requirements.

261. Such a failure to implement must be distinguished from instances where the defendants in fact do every act contemplated by the decree, but this implementation fails to produce the expected results.

262. See, e.g., United States v. Louisiana, 692 F. Supp. 642 (E.D. La. 1988) [hereinafter *La. Higher Education*].

263. Cooper v. Aaron, 358 U.S. 1, 11-12, 78 S. Ct. 1401 (1958); see *Council of Emporia*, 407 U.S. at 458, 92 S. Ct. at 2201 (new defendants added and enjoined from interfering with implementation of desegregation plan); Swann v. Charlotte-Mecklenburg Bd. of Educ., 501 F.2d 383 (4th Cir. 1974). Cf. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45, 91 S. Ct. 1284, 1285; United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 92 S. Ct. 2214 (1972); *Hills*, 425 U.S. at 289 n.8, 96 S. Ct. at 1542 n.8; United States v. New York Telephone Co., 434 U.S. 159, 171-176, 98 S.Ct. 364, 372-374 (1977); Note, supra note 54, at 1479 & n.24; Note, supra note 69, at 1028-1031. See 28 U.S.C. § 1651(a) (1966) ("All Writs Act"). Cf. 18 U.S.C. 1509 (1984), discussed at Fiss, supra note 9, at 16-18.

implement, alone, does not constitute grounds for the reconsideration of its provisions.[264] Contempt penalties should be considered where individuals are identified as inhibiting or interfering with the implementation of the decree.[265]

11. Effect of Unitary Status

Where a school district has been declared "unitary", all injunctions should be dissolved, and, where no supplemental claims have been filed, jurisdiction should be terminated and the case closed.[266] The school district is thereafter held only to an intent standard for determining a constitutional violation under the Equal Protection Clause, and the parties are precluded from relitigating the remedy for the previous segregation.[267]

12. The Dissolution of Injunctions and the Intent Standard

The decision to dissolve the injunction, as the Tenth Circuit in *Dowell II* pointed out, does not occur *ipso facto* when a district is

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264. See Fed. R. Civ. P. 60(b). Cf. *Sheet Metal Workers*, 478 U.S. at 441 n.21, 106 S. Ct. at 3032 n.21 ("In any event 'contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.' "); Walker v. City of Birmingham, 388 U.S. 307, 313, 87 S. Ct. 1824, 1828 (1967); United States v. Rylander, 460 U.S. 752, 756, 103 S. Ct. 1548, 1551 (1983); 11 Federal Practice and Procedure § 2960, at 597. But see United States v. Louisiana, 692 F. Supp. 642, 649 (E.D. La. 1988); *Nucci*, 831 F.2d at 331. Cf. *Vaughns*, 758 F.2d at 993. When failure to implement also involves new acts of intentional discrimination, such discrimination and its effects must also be remedied. *Lawrence County*, 799 F.2d at 1035, 1042. Consent decrees, of course, are not adjudications and the parties cannot be held to an agreement for which there was neither timely nor substantial provision of the consideration for which they bargained.

265. But see *Paradise*, 480 U.S. at 175 n.25, 107 S. Ct. at 1069 n.25; Fiss, supra note 9, at 36. Contempt may be used to compensate the plaintiff for injury arising from the want of compliance. Id. at 54.

266. There may be a metaphysical or ontological difference between closing a case and terminating the court's jurisdiction but, for the purpose of this paper, these two terms shall be treated as synonymous. On the other hand, there appears to be a difference between dismissing a case and closing the case or terminating jurisdiction. Dismissal implies that the claim for relief was not successful for substantive or procedural reasons. See Fed. R. Civ. P. 41. Obviously this is not the case where a final desegregation order has been fully implemented. There is also a significant difference between closing a case and terminating jurisdiction, and placing a case in "inactive" status and continuing to enforce all injunctions.

267. An effect of unitary status not inherently required by the doctrine of *res judicata* is that attorney fees under 42 U.S.C. § 1988 (1981) are no longer paid to the plaintiffs because there is no longer a party which has prevailed on liability. Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 758 (5th Cir. 1989). Another effect is that local defendants are no longer able to obtain contribution from state officials as actual or potential defendants to finance local programs plausibly correcting previous constitutional violations. School Bd. of Richmond v. Baliles, 829 F.2d 1308 (4th Cir. 1987); Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 223 (5th Cir. 1983).

declared unitary.[268] In *Riddick*, the Fourth Circuit accepted the district court's finding that the district court's 1975 order declaring the school district unitary had also in fact dissolved the same court's earlier injunction.[269] In *United States v. Overton*, where the decree "by its own terms" ceased on a specific event, the decree did, in fact, end automatically.[270] The better procedure is to enter an explicit and formal judgment dissolving the injunction.[271]

A. *Absence of Special Obligation*

The real question is not whether the unitariness declaration *ipso facto* dissolves the outstanding injunctions, but whether the declaration recognizes that the defendant no longer has any special obligation—and the plaintiff any special right—that is enforceable by an injunction.[272] The general duty of the defendants—and all state officials—under the Equal Protection Clause of the Fourteenth Amendment is not enforceable by an injunction.[273] If there is no such special obligation, this dissolution should follow the declaration as an important but ministerial formality.

And there is no such special obligation. A school desegregation decree is designed to be a temporary remedial measure.[274] It effects "a

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268. *Dowell II*, 795 F.2d at 1519-1520; Chandler, supra note 185, at 540-541; Landsberg, supra note 3, at 827. Cf. Fed. R. Civ. P. 58 (separate document). Until the injunction is formally dissolved, the parties are obliged to follow it under pain of contempt. *Spangler I*, 429 U.S. at 438-540, 96 S. Ct. at 2705. Disobedience to an order by a school district that has in fact become unitary, however, when not motivated by racial discrimination, does not preclude a finding of unitariness though it may invoke other appropriate punishment. Id.

269. *Riddick*, 784 F.2d at 538; Landsberg, supra note 3, at 799-800. See *Vaughns*, 758 F.2d at 990; Note, supra note 167, at 574-575.

270. *Overton*, 834 F.2d at 1173; Landsberg, supra note 3, at 815, n.135. Landsberg notes that an injunction also terminates in individual desegregation litigation when the plaintiffs cease to be students. Id. at 828. See *Spangler I*, 427 U.S. at 429-431, 96 S. Ct. at 2701.

271. Fed. R. Civ. P. 58.

272. Landsberg, supra note 3, at 815.

273. *International Longshoremen's Ass'n*, 389 U.S. at 74, 88 S. Ct. at 206 ("[An] abstract conclusion of law [is not] an operative command capable of 'enforcement.' "); NLRB v. Express Publishing Co., 312 U.S. 426, 435, 61 S. Ct. 693, 699 (1941); Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 897-898 (5th Cir.), cert. denied, 439 U.S. 835, 99 S. Ct. 118 (1978); City of Mishawaka, Indiana v. American Elec. Power Co., 616 F.2d 976, 991 (7th Cir. 1980), cert. denied, 449 U.S. 1096, 101 S. Ct. 892 (1981); Fiss, supra note 9, at 13; Jost, supra note 3, at 1155-1556; see Fed. R. Civ. P. 65(d); Note, supra note 69, at 1063-1067. Nevertheless, a number of courts have declared school systems unitary and have then imposed injunctions essentially forbidding a violation of the equal protection clause of the Fourteenth Amendment.

274. Note, supra note 240, at 619.

transition to a racially nondiscriminatory school system."[275] The declaration of unitariness means that the court has held that the constitutional violation has been remedied: that the desegregation plan has created a school district in which there is no present discrimination nor any of the effects or vestiges of past discrimination. In this situation, accordingly, there is no continuing predicate for federal courts to supplant local control over school affairs; there has been a "substantial change in law or facts" from the time of the original violation;[276] and the existing school desegregation injunctions should be dissolved. Since the violation has been remedied, the authority for the court's outstanding orders evaporates.[277] Even the consent of the parties cannot extend this authority.[278]

The law contemplates that, under appropriate circumstances, permanent injunctions will be dissolved since, as a general principle, "an equitable remedy should be enforced only as long as the equities require . . . ."[279] This follows the general legal principle that, once an injunction has achieved its purposes, just as with any other judgment, it should not be prolonged, for a court's remedial power reaches no further—and no longer—than the correction of the wrong. As the Supreme Court

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275. *Brown II*, 349 U.S. at 301, 75 S. Ct. at 756; Accord: *Raney*, 391 U.S. at 449, 88 S. Ct. at 1700; *Green*, 391 U.S. at 439, 88 S. Ct. at 1694; *Council of Emporia*, 407 U.S. at 470, 92 S. Ct. at 2207. Cf. City of Richmond v. J. A. Croson Co., 109 S. Ct. 706, 735 (1989) (Kennedy, J., concurring); *Wygant*, 476 U.S. at 276, 106 S. Ct. at 1847. See Gewirtz, Choice, supra note 9, at 730-731, 750, 753, 783, 789. But see Terez, supra note 9; Landsberg, supra note 3, at 839; Lively, The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society, 48 Ohio St. L.J. 117, 126 (1987).

276. See *Swift*, 286 U.S. at 119. See also Fed. R. Civ. P. 60(b)(5).

277. Cf. *United Shoe*, 391 U.S. at 248, 51 S. Ct. at 464.

278. *Overton*, 834 F.2d at 1174 ("[T]he consent decree cannot lie alongside a final declaration that the school district is unitary."). Further, "[s]ince parties may not confer jurisdiction upon [the Supreme] Court or the District Court by stipulation, the request of both parties in this case that the court below adjudicate the merits of the constitutional claim does not foreclose our inquiry into the existence of an 'actual controversy' within the meaning of 28 U.S.C. § 2201 (1982) and Art. III, § 2, cl. 1, of the Constitution."). California v. LaRue, 409 U.S. 109, 112 n.3, 93 S. Ct. 390, 394 n.3 (1972). See Local Number 93 v. City of Cleveland, 478 U.S. 501, 525, 106 S. Ct. 3063, 3077 (1986).

279. Note, supra note 69, at 1080. See also Milk Wagon Drivers Union v. Meadow-Moor Dairies, Inc., 312 U.S. 287, 298, 61 S. Ct. 552, 557 (1941) ("The injunction which we sustain is 'permanent' only for the temporary period for which it may last. . . . Familiar equity procedure assures opportunity for modification or vacating an injunction when its continuance is no longer warranted."); De Bow, Judicial Regulation of Industry: An Analysis of Antitrust Consent Decrees, 1987 University of Chicago Legal Forum 353, 357-364. Cf. *Dowell III*, 677 F.2d at 1504 ("[I]t is irrational to assume that a school desegregation plan will be able to serve the needs of the community indefinitely.").

stated in *General Building Contractors Ass'n v. Pennsylvania*, judicial power may "extend no farther than required by the nature and the extent of [the] violation."[280]

Once unitariness has been declared, school authorities are again governed by the general equal protection obligation which prohibits *intentional* acts of discrimination.[281] The school authorities are no longer subject to the special obligation applied to desegregating districts, which requires that conduct must be measured by its *effect* on integration.[282] The prohibition on such conduct is an accepted aspect of a school district's remedial obligation before unitariness is achieved. This obligation ends when unitary status is achieved. As the Court in *Council of Emporia* stated, "[o]nce the unitary system has been established and accepted," a different standard applies.[283]

B. *Arguments for Special Obligation*

The existence of some sort of special obligation has been defended by a number of commentators and courts. The ingenuity of these arguments is limited only by the resourcefulness of their proponents: not

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280. 458 U.S. at 399, 102 S. Ct. at 3154. See also *Milliken I*, 418 U.S. at 744, 94 S. Ct. at 3126; *Spangler I*, 427 U.S. at 434, 96 S. Ct. at 2703; *Columbus*, 443 U.S. at 465, 99 S. Ct. at 2950; *Dayton I*, 433 U.S. at 420, 97 S. Ct. at 2775; *Overton*, 834 F.2d at 1176; Landsberg, supra note 3, at 824; but see Fiss, supra note 27, at 27 ("The remedial phase in structural litigation is far from episodic. It has a beginning, maybe a middle, but no end—well, almost no end."); Landsberg, supra note 3, at 839. Cf. Note, supra note 13, at 224-225.

281. Keyes v. School Dist. No. 1, Denver, Co., 413 U.S. 189, 93 S. Ct. 2686 (1973); Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040 (1976); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 97 S. Ct. 555 (1977) (*Arlington Heights*); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 99 S. Ct. 2282 (1979) (*Feeney*).

282. See *Columbus*, 443 U.S. at 458-459, 99 S. Ct. at 2946; *Dayton II*, 443 U.S. at 537-538, 99 S. Ct. at 2979; *Council of Emporia*, 407 U.S. at 462, 92 S. Ct. at 2203; *Swann*, 402 U.S. at 25, 91 S. Ct. at 1280; but see Landsberg, supra note 3, at 812-813, 817; Lively, supra note 275, at 119.

283. 407 U.S. at 470, 92 S. Ct. at 2207. See generally Gewirtz, Choice, supra note 9. Landsberg, supra note 3, at 816-817, contends that *Swann* and *Spangler I* leave open whether changing the assignment plan approved in the desegregation order is prohibited by the affirmative duty to desegregate. Cf. *Spangler I*, 427 U.S. at 443, 444 n.1, 96 S. Ct. at 2708 n.1 (Marshall, J., dissenting). However, there is little benefit to anyone from forbidding any change in an attendance plan that, as in *Riddick*, 784 F.2d at 526, and *Dowell I*, 606 F. Supp. at 1552, no longer dissolves the racial identification of schools and absurdly requires black students to be bussed from one predominantly black school to another. See also Clark v. Board of Educ. of Little Rock Sch. Dist., 705 F.2d 265, 271 (8th Cir. 1983). Further, even assuming *arguendo* that Landsberg is correct about *Swann* and *Spangler I*, nevertheless *Council of Emporia* is not the least bit ambiguous that the affirmative duty to desegregate itself ends on a finding of unitary status. 407 U.S. at 470, 92 S. Ct. at 2207.

a substantial restraining force. Many, however, such as that presented by Mr. Terez, present only a policy agreement, rather than an argument even plausibly based on an appeal to the principles and precedents of general law. Terez, for example, urges a permanent and perpetual injunction to maintain a "unitary system."[284] Terez justifies this proposal on grounds that to do otherwise would unfairly deprive a plaintiff of his hard won injunctive relief.[285] The extent to which this duty of a school district after it is declared unitary is different from the obligation of a school district before it is declared unitary is unclear. However, Mr. Terez argues that somehow there is a difference and that this difference is "fertile grounds for discussion and debate".[286]

Four arguments perhaps illustrate representative themes among those proponents of a special obligation who do base their contentions on plausible appeals to general law, precedent, and logic, rather than to policy.

i. *Neighborhood Schools or Retrogression*

Professor Landsberg suggests that the school board continues to have a special obligation (after the finding of unitariness) not to cause a condition, e.g., racially imbalanced schools, that resembles conditions that had been previously found to have been caused by intentional discrimination. These similar conditions, which he labels "retrogression," need not themselves result from intentional discrimination. Landsberg creatively argues that the purpose of the desegregation decree is not only to remedy identified constitutional violations but also to "extirpate[] the overt racial identity of schools" and "to ensure against further dilatory tactics."[287] Retrogression, Landsberg argues, restores this overt racial identity.[288] Under this reasoning retrogressive conditions have the constitutional consequence of "vestiges" or "effects" of segregation and the dual system.[289] Thus, Landsberg does not deny that discriminatory intent is necessary; not quite— he ingeniously allows discriminatory intent responsible for post-unitary imbalances to be shown to have transpired before the finding of unitary status.[290]

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284. Terez, supra note 9, at 60-64.

285. Terez, supra note 9, at 64.

286. Terez, supra note 9, at 64.

287. Landsberg, supra note 3, at 804.

288. See id. at 802.

289. Landsberg notes that this argument was presented to the Fourth Circuit in *Riddick*, but was not addressed *in haec verba* by the court. Landsberg, supra note 3, at 793, 800 n.66. See *Dowell II*, 795 F.2d at 1522; *Dowell IV*, No. 88-1067, slip op. at 35-37 (10th Cir. July 7, 1989). But see *Riddick*, 784 F.2d at 538-539.

290. Landsberg, supra note 3, at 826. Landsberg posits that, because the "school

Landsberg bases his argument on *Beer v. United States*.[291] However, *Beer* is based on Section 5 of the Voting Rights Act of 1975,[292] which is a statutory obligation that does not require proof of intentional discrimination.[293] Further, the "post-unitary" conditions cannot be the "vestiges" or "effects" of segregation unless they were caused by "post-unitary" intentional discrimination.[294] The "pre-unitary" conditions had been found by the court to be the result of such intentional discrimination, but these had been corrected. The Supreme Court, in *City of Mobile v. Bolden*,[295] rejected the contention that a substantial history of intentional official discriminatory conduct by other than those taking the action at issue (the defendants or their predecessors in office) has any bearing on subsequent conduct.[296] Discriminatory intent has to be "proved in a given case."[297] Further, the Supreme Court has stated that racial identity of schools alone does not violate the Constitution[298] and that the sole purpose of a desegregation decree is to remedy constitutional violations.[299]

Eric Schnapper, Assistant Counsel of the NAACP Legal Defense and Education Fund, has concluded that "such recurrent perpetuation

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board is a continuing entity . . . the discriminatory intent may have proceeded the school system's unitary status." This argues implicitly that intent may be separated from conduct not only by years but by different composition of the official body. This theory labels as the "perpetuation of past discrimination" a circumstance that involves no present intent to perpetuate and no causal connection with any earlier discrimination, but that resembles an earlier state of affairs that was the result of discrimination. This entirely disregards the Supreme Court's pronouncements on the need for proof of discriminatory intent. See *Keyes*; Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040 (1976); Wright v. Rockefeller, 376 U.S. 52, 56-57, 84 S. Ct. 603, 605-606 (1964) (election districting); Akin v. Texas, 325 U.S. 398, 403-404 (1945) (jury selection). Cf. Note, Selection of Sites for Public Housing, 40 N.C.L. Rev. 155 (1970).

291. 425 U.S. 130 (1976). Landsberg, supra note 3, at 800-801.

292. 42 U.S.C. § 1973c (1982).

293. Id. ("and will not have the effect"); McDaniel v. Sanchez, 452 U.S. 130, 137, 101 S. Ct. 2224, 2230 (1981); *Beer*, 425 U.S. at 139-140, 96 S. Ct. at 1362.

294. See *Spangler I*, 427 U.S. at 435-436, 96 S. Ct. at 2704; Schnapper, supra note 13, at 830. Cf. *Arlington Heights*, 429 U.S. at 264-265, 97 S. Ct. at 562.

295. 446 U.S. 55, 100 S. Ct. 1490 (1980).

296. 446 U.S. at 74, 100 S. Ct. at 1503; *Riddick*, 784 F.2d at 539 (History of segregation "cannot in the manner of original sin, condemn governmental action that is not in itself unlawful.").

297. *Bolden*, 446 U.S. at 74, 100 S. Ct. at 1503.

298. *Swann*, 402 U.S. at 24, 91 S. Ct. at 1280 (There is no "substantive constitutional right [to a] particular degree of racial balance or mixing."); *Spangler I*, 427 U.S. at 434, 96 S. Ct. at 2703.

299. *Swann*, 402 U.S. at 16, 91 S. Ct. at 1276; *Milliken I*, 418 U.S. at 738, 94 S. Ct. at 3124; *Rizzo*, 423 U.S. at 377-378, 96 S. Ct. at 607; *Dayton I*, 433 U.S. at 419-420, 97 S. Ct. at 2775; *General Building Contractors*, 458 U.S. at 399, 102 S. Ct. at 3154.

does not violate the Constitution. As long as the present situation is not the result of any prior intentional discrimination or of any present discriminatory purpose, the mere resemblance of current harms to some previous unconstitutionally motivated wrongs is not by itself of more than historical interest."[300] Further, injury must be "ultimately . . . traced to a racially discriminatory purpose"[301] and to conduct contemporaneously motivated by that purpose.[302]

ii. Dayton II: *Obligation or Presumption*

The author of a note in the Harvard Law Review[303] grounds his legal argument—as distinguished from his policy argument—by extrapolating from *Keyes* and *Dayton II*. He contends that the shifts of the burdens of proof announced in *Keyes*, and purportedly in *Dayton II*, are justified as matters of evidentiary law because of the probability that a school board that has discriminated with respect to a substantial part of the system, discriminated throughout the system and continues to discriminate thereafter even after a finding of unitary status. Since the board better knows its own motivations, it is fairer to require board members to explain the board's actions (past and present). Policies with segregative or disproportionate effects must be strictly scrutinized under any circumstance.[304] This contention accurately reflects *Keyes*, but is not supported by *Dayton II* or *Council of Emporia*.[305]

The Court in *Keyes* reasoned that if during a specified period of time the members of a school board have discriminated with respect to a substantial part of the district, there is no reason to believe that those same members have not been discriminating with respect to the whole district during that period of time.[306] The *Keyes* presumption has the effect of shifting the burden of proof (which is assumed to be a burden

300. Schnapper, supra note 13, at 830, citing *Spangler I*, 427 U.S. at 434-437. The two conditions also sometimes referred to as "perpetrations of past discrimination" which Schnapper considers Fourteenth Amendment violations involve either current discrimination or unremedied "vestiges" of past discrimination, both clearly remediable. Schnapper, supra note 13, at 829-831.

301. *Washington*, 426 U.S. at 240, 96 S. Ct. at 2047.

302. Schnapper, supra note 13, at 834.

303. Note, supra note 9.

304. Note, supra note 9, at 665-670. But see *Dayton II*, 443 U.S. at 472-473, 99 S. Ct. at 2984 (Stewart, J., dissenting).

305. There is a somewhat similar presumption that past intentional discrimination is the cause of current racial imbalances. *Dayton II*, 443 U.S. at 537, 99 S. Ct. at 2978; *Vaughns*, 758 F.2d at 991.

306. *Keyes*, 413 U.S. at 207-208, 93 S. Ct. at 2696.

of persuasion[307]) to the school board to show that it did not act on the grounds of race with respect to those other racially unbalanced parts of the school district.[308]

The Harvard Note seeks to extrapolate this reasoning, attribute it to *Dayton II*, and conclude that if the members of a school board have discriminated in the past, there is no reason to believe that the school board will not be discriminating in the indefinite future.[309] However, that is not an accurate description of *Dayton II*'s holding.

The *Dayton II* burden is based on the finding "that at the time of *Brown I*,[310] the defendant was operating a dual school system, that it was constitutionally required to disestablish that system and its effects, and that it had failed to discharge this duty . . . ."[311] The defendant, having violated the plaintiff's rights, must redress those violations.[312] This absolute duty of the defendants to desegregate[313] is qualified only because a Chancellor can allow these defendant school boards to promote other important and legitimate governmental goals.[314] Therefore the school district has the burden of persuading the court that any action, either past or proposed, which does not have a desegregative effect is necessary

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307. Note, supra note 9, at 653 n.1, 657 n.27; Williams, supra note 13, at 811-813. But see Rule 301, Federal Rules of Evidence. These rules were adopted effective July 1, 1975, after *Keyes* was decided. The clear language of the rule governs presumptions such as those set forth in *Keyes*. Moreover, as the history of the formulation of Rule 301 suggests, 46 F.R.D. 161, 212-219 (1969); 51 F.R.D. 315, 336 (1971); 56 F.R.D. 183, 208 (1972), the Court had accepted previously a "burden of persuasion" view of presumptions consistent with the language in *Keyes*. Rule 301, however, now prevails because the federal evidence rules, an Act of Congress, govern constitutional cases, Lavine v. Milne, 424 U.S. 577, 585, 96 S. Ct. 1010, 1015 (1976). See *Dayton II*, 443 U.S. at 535, 99 S. Ct. at 2977; *Columbus*, 443 U.S. at 501, 99 S. Ct. at 2958 (Rehnquist, J., dissenting).

308. *Keyes*, 413 U.S. at 205-213, 93 S. Ct. at 2695. Note, supra note 9, at 658-660. See also Williams, supra note 13, at 812-813.

309. Note, supra note 9, at 660-661; Williams, supra note 13, at 814-815. Cf. *Overton*, 834 F.2d at 1175.

310. Brown v. Board of Educ. of Topeka, 347 U.S. 483, 74 S. Ct. 686 (1954).

311. *Dayton II*, 443 U.S. at 534, 99 S. Ct. at 2977.

312. *Wygant*, 476 U.S. at 289, 106 S. Ct. at 1854 (O'Connor, J., concurring) ("A violation of federal statutory or constitutional requirements does not arise with the making of a finding; it arises when the wrong is committed."). Cf. McDaniel v. Barresi, 402 U.S. 39, 91 S. Ct. 1287 (1971).

313. *Columbus*, 443 U.S. at 458-459, 99 S. Ct. at 2946 (a school district has a "duty to dismantle its dual system," and "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment."); *Dayton II*, 443 U.S. at 537, 99 S. Ct. at 2978; id. at 542-543, 99 S. Ct. at 2981 (Rehnquist, J., dissenting) ("[T]he affirmative duty renders any discussion of segregative intent after 1954 gratuitous.").

314. *Council of Emporia*, 407 U.S. at 466-469, 92 S. Ct. at 2205; *Dayton II*, 443 U.S. at 537-538, 99 S. Ct. at 2979.

to achieve those other objectives.[315] This is not accurately described as a presumption or shift in the burden of proof or persuasion, because it imposes a substantive duty rather than an evidentiary burden.[316] It thus cannot survive the satisfaction of the affirmative duty prescribed in *Dayton II*.

The argument also fails to persuade when evaluated on the basis of its own logic. It assumes that the intentions—racially discriminatory or otherwise—of a governmental body do not change over time. While past conduct may be a guide to future intent of an individual,[317] it is no guide to the intent of a governmental body, whose membership is composed of different individuals over time. Further, the argument that an individual or group of individuals would be just as likely to violate the law after a finding of such a violation as before such a finding, contradicts common experience. Most individuals attempt to obey the law, particularly when they know they are being watched.[318]

This argument is similar to the two claims examined by Judge Higginbotham that had been advanced in support of such a perpetual obligation: "First, because a district that has been guilty of purposeful discrimination is sufficiently likely to return to its bigoted ways, it is fair to require [that] school district to prove that it is not motivated by intentional discrimination. Second, the party with superior knowledge of the facts is better able to prove its intent, and superior access to proof is a common justification for allocating the burden of proof."[319] As Judge Higginbotham notes,

> The elements of a violation and who must bear the burden of their proof are not conceptually distinct from unitary status but are its components; . . . In the real world of trial and uncertain proofs, a perpetual placement upon a school board of the burden of persuading its innocence of conduct with segregative impact differs little in effect from the superintendence that attends an extant decree and pending suit . . . . In short, continuing limits

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315. *Council of Emporia*, 407 U.S. at 467, 92 S. Ct. at 2205; Green v. County Sch. Bd. of New Kent County, Va., 391 U.S. 430, 439, 88 S. Ct. 1689, 1694 (1968).

316. If this were merely a presumption, rather than an affirmative duty, it could be overcome by evidence that the non-integrative effects were the result of conduct demonstrably not motivated by discriminatory intent but by other lawful purposes. See Fed. R. Evid. 301. *Dayton II*'s mandate is not so easily rebutted. See also Days, supra note 13, at 1750. But see Chandler, supra note 185, at 533; cf. Devins, supra note 144, at 22, 24.

317. *Keyes*, 413 U.S. at 207, 93 S. Ct. at 2696; Note, supra note 9, at 670 n.94; 2 Wigmore § 302, at 200 (3d ed. 1940).

318. But see Williams, supra note 13, at 812-813.

319. *Overton*, 834 F.2d at 1175. See also Note, supra note 185, at 441, where the shift in the burden of proof is characterized as "unreasonable."

> imposed as a remedy after the wrong is righted effectively changes the constitutional measure of the wrong itself; it transposes the dictates of the remedy for the dictates of the constitution and, of course, they are not interchangeable. Stated another way, the constitutional violation is purposeful separation of the races in public education. The mix that would have occurred but for the racism is a judicially created hypothetical. We have insisted upon matching that model of a unitary or desegregated status as a remedy for the wrong. Refusing, after the match, to allow a school district to vary from that model unless it proves its "non-segregative" purpose confuses wrong and remedy.[320]

iii. *One or Two Stages of Unitariness*

The Eleventh Circuit in *Georgia State Conference Branches of NAACP v. Georgia*,[321] suggests that the determination of unitary status must take place twice, and that the school district retains some sort of special desegregation obligation until a successful second determination of unitariness. The court stated:

> [A] unitary school system is one which has not operated segregated schools as proscribed by cases such as *Swann* and *Green* for a period of several years. A school system which has achieved unitary status is one which is not only unitary but has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures. . . .[322]

These dicta[323] suggest a tripartite progression of school districts from "segregated" to "unitary" to "unitary status". The court continues: "[i]t is uncontroverted in this case that the local defendants ceased operating dual school systems in 1970-71 and, therefore, are unitary in the sense which permits the use of ability grouping under certain circumstances."[324] This intermediate stage apparently allows conduct having disparate impact to be used even though such conduct was not permissible in the first stage. However, until a finding of unitary status has been made, a school district is under the obligation articulated in *Dayton II* not to take any activity which does not further desegregation except

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320. *Overton*, 834 F.2d at 1176-1177 (footnote omitted).

321. 775 F.2d 1403 (11th Cir. 1985) [*Georgia State Conference*].

322. 775 F.2d at 1413 n.12.

323. The language here discussed was not necessary to the resolution of the issue before the court, which ultimately allowed the challenged practice, ability grouping. This reasoning had not been theretofore considered by the district court, nor was it reviewed thereafter *en banc* or on *certiorari*.

324. 775 F.2d at 1413 (footnote omitted).

where, after careful consideration of the more desegregative alternatives, the conduct was necessary to promote legitimate and important governmental objectives.[325] Once unitary status has been achieved and recognized, the school board may engage in any activity which is not intended to cause the separation or the different treatment of the races. An intermediate stage is not only without foundation in any of the decisions by the Supreme Court,[326] but also provides no guidance as to which types of conduct forbidden before a declaration of a "unitary" system are permissible after such a declaration, but before the achievement of "unitary status".

Further, *Swann* and *Green* proscribe not only the operation of segregated schools, but also the failure to eliminate the vestiges of prior discrimination.[327] A school district cannot operate schools as required by *Swann* and *Green* unless it has eliminated the vestiges of its prior discrimination. *Spangler I* accepted that the Pasadena City School system met the requirements of *Swann* and *Green* (at least with respect to attendance patterns) and had eliminated the vestiges of prior discrimination.[328] To state that a school district could be a "unitary school district" under *Green* and *Swann* without having eliminated all vestiges of de jure segregation disregards *Green*, *Swann*, and *Spangler I*.[329]

In *United States v. Lawrence County School District*,[330] the Fifth Circuit also suggested a two-stage process, or at least two distinct meanings of the term "unitary":

> The phrase, the system "is being maintained as a unitary school district," in our 1974 order . . . was following the procedure required by the Supreme Court in *Alexander v. Holmes County Board of Education* . . . . The use of the word "unitary" in the *Alexander* opinion, like its repetition in the 1974 [Fifth

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325. See, e.g., *Dayton II*, 443 U.S. at 538, 99 S. Ct. at 2979.

326. See generally *Brown II*, 349 U.S. 294, 75 S. Ct. 753; *Council of Emporia*, 407 U.S. at 470, 92 S. Ct. at 2207; *Spangler I*, 427 U.S. 424, 96 S. Ct. 2697; *Dayton I*, 433 U.S. 406, 97 S. Ct. 2766; *Dayton II*, 443 U.S. 526, 99 S. Ct. 2971.

327. *Green*, 391 U.S. at 438 n.4, 88 S. Ct. at 1689 n.4 ("[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate *the discriminatory effects of the past* as well as bar like discrimination in the future.") (emphasis added); *Swann*, 402 U.S. at 26, 91 S. Ct. at 1281.

328. *Spangler I*, 427 U.S. at 435, 96 S. Ct. at 2705 ("[N]o one contests that [the desegregation plan's] implementation did 'achieve a system of determining admission to the public schools on a nonracial basis' "); id. at 436, 96 S. Ct. at 2705 ("In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished *that* objective.").

329. See supra text accompanying notes 12-25. See also Gewirtz, Choice, supra note 9, at 793 n.209.

330. 799 F.2d 1031, 1037 (5th Cir. 1986) (footnotes omitted).

> Circuit] order, did not imply a judicial determination that the school system had finally and fully eliminated all vestiges of *de jure* segregation. As used in the Supreme Court opinion, the term referred to the operation of the school system in accordance with the 1969 order under the aegis of this court. As used in this court's 1974 order, the word meant no more than that the system appeared to have been complying with the outstanding order. It should go without saying that a system does not become unitary merely upon entry of a court order intended to transform it into a unitary system.

This passage may suggest that the concept of "unitariness" as used by the Supreme Court in *Alexander* was different from that subsequently used by the Court in *Swann* and thereafter.[331]

The courts in *Georgia State Conference* and *Lawrence County* sought by this three stage theory to correct a misuse of the term "unitary" perpetrated by many courts (and possibly the Supreme Court). During the late 1960's (before *Swann*), these courts used the term to describe school districts that had just begun the desegregation process by adopting constitutionally adequate plans—plans that arguably had not yet been fully implemented.[332] These districts were still in the process of desegregating and had not reached the condition of the Pasadena district discussed in *Spangler*, foretold in *Swann*, and required in *Green*. The term was used in orders entered sua sponte, by consent, and sometimes even after hearings.[333] The courts had used this term without anyone—

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331. "Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. *Griffin* . . . [at] 234 . . . *Green* . . . [at] 438-439, 442 . . ." *Alexander*, 396 U.S. at 20, 90 S. Ct. at 29. But see *Swann*, 402 U.S. at 31, 91 S. Ct. at 1283; Terez, supra note 9, at 62 n.90.

Landsberg notes that there are three possible meanings of the label "unitariness." The first "denotes a school system with only one set of schools, in contradistinction to a dual system." A second connotes also the "successful[] and . . . good faith implement[ation of] a constitutionally sufficient desegregation plan." The third meaning includes additionally "that all effects of past discrimination [had] permanently been extirpated." This article suggests that unitariness requires all these conditions. Landsberg suggests that the term has no legally correct meaning, and then suggests that the use of the term "unitary" is "reminiscent" of attempts "to avoid any affirmative duty to promote desegregation." Landsberg, supra note 3, at 812-813 & n.128.

332. See, e.g., *Alexander*, 396 U.S. at 21, 90 S. Ct. at 30 ("While each of these school systems is being operated as a unitary system" the courts may amend the plans "as may be deemed necessary or desirable for the operation of a unitary system.").

333. The old Fifth Circuit required hearings in Youngblood v. Board of Public Instruction of Bay County, 448 F.2d 770, 771 (5th Cir. 1971), but this procedure was apparently not universally followed, nor its omission always appealed.

bench or bar—realizing that the term recognized a condition with critical legal consequences.[334] Obviously, entry of a proper final desegregation order does not make a district unitary: The order must be fully put into effect and implemented in order to satisfy the judgment. Mere approval and preliminary implementation of the plan would not have been sufficient under either Rule 60(b)(5) or the doctrine of res judicata to accomplish satisfaction of the judgment. Nevertheless, by the early 1970's (when the decrees involved in *Georgia State Conference* and *Lawrence County* were entered[335]), this term meant that the school district had successfully eradicated the dual system and all its vestiges as required by *Green* and *Swann*. Rather than merely admit that some courts had made an unappealed or uncorrected mistake—and either modify that judgment because of an arguable change in law under Rule 60(b)(5) or live with it—the two courts tried to distinguish a determination of "unitary" from a determination of "unitary status." This led to the two decisions and their respective progeny and to the resulting disregard for Supreme Court precedent.

iv. *Satisfaction or Substantial Change in Circumstance*

An argument set out in the Note *Unitariness Finding*[336] and by the Tenth Circuit in *Dowell v. Board of Education of Oklahoma City Public Schools*[337] is based on the position that the dissolution of injunctions is not necessarily affected by the determination of unitary status and is granted only on the basis of the third clause of Rule 60(b)(5).[338] The Tenth Circuit stated that the district court may dismiss the litigation only if it holds that the achievement of unitary status is a " 'substantial change in law or facts' " from those existing at the time of the initial violation.[339] Subsequently, it clarified its disagreement with the Fourth and Fifth Circuits, that, "a finding of unitariness [does not] mandate

334. Landsberg, supra note 3, at 826 and n.177. See *Spangler I*.

335. *Georgia State Conference*, 775 F.2d at 1413 n.11 (entered 1973 and 1974); *Lawrence County*, 799 F.2d at 1035 (entered 1974).

336. See supra note 167.

337. 795 F.2d 1516, 1521-1522 (10th Cir. 1986), cert. denied, 479 U.S. 938 (1986) (*Dowell II*); *Dowell IV*, No. 88-1067, slip op. at 13-19 (10th Cir. July 9, 1989) (opin. withdrawn Sept. 15, 1989). Cf. Landsberg, supra note 3, at 815; Terez, supra note 9, at 55-56.

338. See supra note 164.

339. 795 F.2d at 1521-1522. The district court found that the desegregation plan "had achieved its objective." Id. at 1518. *Dowell II* remanded the case to require the district court to explain fully whether its prior finding of unitariness envisioned changed circumstances sufficient to allow termination of the desegregation plan and dismissal of the case, *Dowell II*, 795 F.2d at 1523. The district court found such a change, *Dowell III*, 677 F. Supp. 1503 (W.D. Okla. 1987), which was appealed again. Landsberg, supra note 3, at 815 n.136. The Tenth Circuit again reversed. *Dowell IV*, No. 88-1067 (10th Cir. July 7, 1989).

the later dissolution of the decree without [additional] proof of a substantial change in the circumstances which led to issuance of that decree."[340]

This argument inherently disregards the effect of compliance with a mandatory injunction under the satisfaction clause of Rule 60(b)(5). Additionally, even if the satisfaction clause is not applicable, a finding of unitariness necessarily means that discrimination has ceased and the unconstitutional dual school system has been dismantled. Circumstances therefore are critically different from those existing at the time of the original violation. A finding of unitariness is a finding that "the dangers prevented by the injunction 'have become attenuated to a shadow.'"[341] To the extent that *Dowell* in 1986 holds that the finding of unitary status is not sufficient to support the dissolution of the injunction, it is difficult to determine what event or what finding will in fact "end judicial superintendence of the schools."[342] Under such an interpretation, *Dowell IV* conflicts ultimately with *Spangler I* as well as the long line of Supreme Court dicta characterizing the desegregation court's supervision as transitional. A transition inherently must have an end, and *Dowell IV* fails to provide any realistic standard or hope for such an eventuality.[343]

C. *Application*

In any event, the cases are rather clear. The mandate to dissolve all injunctions is based on two holdings by the Supreme Court.[344] In *Spangler I*, the Supreme Court concluded:

> For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had *fully*

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340. *Dowell IV*, No. 88-1067, slip op. at 18 (10th Cir. July 7, 1989); id. at 21, 34-35.

341. *Dowell II*, 795 F.2d at 1521. The Tenth Circuit also stated that one factor in determining whether an injunction should be dissolved is whether continuing the injunction would be "oppressive." Id. at 1521; *Dowell IV*, No. 88-1067, slip op. at 14, (10th Cir. July 7, 1989). This factor is not discussed in *Spangler I*.

342. *Overton*, 834 F.2d at 1175.

343. *Dowell II*, 795 F.2d at 1520-1521 ("[T]he purpose of the court-ordered school integration is not to achieve, but also to *maintain*, a unitary school system.") (emphasis added); *Dowell IV*, No. 88-1067, slip op. at 15 (10th Cir. July 7, 1989); Battle v. Anderson, 708 F.2d 1523, 1538 (10th Cir. 1983) (McKay, J., concurring); Jost, supra note 4, at 1106. See *Overton*, 834 F.2d at 1176.

344. This mandate is also consistent with "[p]ublic policy dictates that there be an end to litigation." Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401, 101 S. Ct. 2424, 2429 (1982).

> *performed* its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.[345]

In *Swann*, the Supreme Court similarly stated that, once a final judgment has been implemented and a fully unitary school system has been attained, the role of the Federal courts should end. "[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary."[346]

The holdings in *Swann* and *Spangler* are consistent with the holdings of the Supreme Court that stress the temporary nature of a desegregation decree.[347] In *Brown II*, the Court noted that the courts would retain jurisdiction "[d]uring this period of transition" to a "racially nondiscriminatory school system."[348] In *Green*, the Court stated that "the court should retain jurisdiction [over school desegregation cases] until it is clear that state-imposed segregation has been completely removed."[349] Additionally, the "goal of a desegregated, non-racially operated school system" was not to be achieved in an ultimate but distant millennium; rather, it was to be "rapidly and finally achieved."[350] Finally, the Court stated in *Council of Emporia* that "once the unitary system has been established and accepted" the injunction is lifted.[351] These holdings are fully consistent with and, indeed, mandated by, the principle that a remedial plan may extend only as far as necessary to correct the proven violation.[352] In *Milliken v. Bradley*, the Court stated that a desegregation "decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' "[353]

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345. 427 U.S. at 436-437, 96 S. Ct. at 2705 (emphasis added).

346. *Swann*, 402 U.S. at 31-32, 91 S. Ct. at 1283. See *Overton*, 834 F.2d at 1175; Landsberg, supra note 3, at 803; cf. Fiss, supra note 9, at 14 ("The Supreme Court was anxious to emphasize, however, that these specifics were to be viewed as mere expedients—perhaps only of a temporary nature.").

347. But cf. *Alexander*, 396 U.S. at 21, 90 S. Ct. at 30.

348. *Brown II*, 349 U.S. at 301, 75 S. Ct. at 756.

349. *Green*, 391 U.S. at 439, 88 S. Ct. at 1694. See Landsberg, supra note 3, at 811.

350. Raney v. Board of Educ. of Gould Sch. Dist., 391 U.S. 443, 449, 88 S. Ct. 1697, 1700 (1968).

351. *Council of Emporia*, 407 U.S. at 470, 92 S. Ct. at 2207.

352. General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 399, 102 S. Ct. 3141, 3154 (1982).

353. *Milliken II*, 433 U.S. at 280, 97 S. Ct. at 2757, quoting in part *Milliken I*, 418 U.S. at 746, 94 S. Ct. at 3128. See also Hills v. Gautreaux, 425 U.S. 284, 293-294, 96 S. Ct. 1538, 1544 (1976); *Milliken I*, 418 U.S. at 744, 94 S. Ct. at 3126.

A number of lower court decisions governing the effect of a declaration of unitary status in a desegregation case have applied the foregoing holdings.[354]

The clearest decision was, again, *Spangler v. Pasadena City Board of Education*,[355] decided after remand from the Supreme Court's decision in *Spangler I*. The Ninth Circuit Court of Appeals held that the district court on remand had subsequently abused its discretion by refusing to lift its remedial order in its entirety.[356] The opinion by Judge Goodwin, held that "[t]he displacement of local government by a federal court is presumed to be temporary."[357] Judge (now Justice) Kennedy's opinion explicitly required a district court to terminate its remedial orders. Relying on the Supreme Court's above-quoted directions on remand, Judge Kennedy concluded that "when a court ordered remedy has accomplished its purpose, jurisdiction should terminate."[358] According to Kennedy, "[f]urther delay in returning full responsibility for administration to the school board is unjustified."[359]

Similarly, the Fourth Circuit's decision in *Riddick* supports this conclusion.[360] The district court concluded that the dismissal of the case had effectively dissolved the injunction and refused to revive or enforce the desegregation plan. Plaintiffs in *Riddick* appealed this decision to the United States Court of Appeals for the Fourth Circuit, which affirmed:

> The 1975 order of the district court in Norfolk returned control of the city's schools to the school board by its finding that the school system was unitary. . . .
>
> Once a constitutional violation has been remedied, any further judicial action regarding student assignments without a new showing of discriminatory intent would amount to the setting

354. See also Penick v. Columbus Bd. of Educ., No. C-2-73-248 (S.D. Ohio April 11, 1985), slip op. at 1, cited by Landsberg, supra note 3, at 812 n.124.

355. 611 F.2d 1239 (9th Cir. 1979) (*Spangler II*).

356. Id.

357. Id. at 1241.

358. Id. at 1242.

359. Id. at 1244.

360. The public schools of Norfolk, Virginia, had been desegregated in the early seventies pursuant to court order and, in February 1975, the district court entered an order dismissing the case upon a finding that the district was unitary. Riddick v. School Bd. of City of Norfolk, 627 F. Supp. 814, 818-819 (E.D. Va. 1984). In 1983, the Board decided to return to neighborhood schools for elementary students. Black school children alleged that the Board's decision segregated a substantial percentage of Norfolk's black elementary school students in violation of the Fourteenth Amendment, and sought an injunction to prevent implementation of the Board's plan. After a hearing, the district court held that its 1975 order finding the Norfolk school system unitary was "fully justified," id. at 820, and "should be given full force and effect." Id. at 827.

> of racial quotas, which have been consistently condemned by the Court in the context of school integration absent a need to remedy an unlawful condition. Racial quotas are to be used as a starting point in remedying de jure segregation but not as an ultimate goal to be continued in perpetuity. Indeed, since almost every action of a school board with respect to pupil assignments in a mixed school system necessarily affects racial balance, if we were to require the Norfolk school board to justify every action it takes that affects the racial balance of its schools, we would make a finding that the school system is unitary virtually meaningless in that context.
>
> The 1975 unitary finding marks the end of de jure segregation in the system. Following such a finding, control of the system must be allowed to return to local officials.[361]

Riddick followed dicta in *Vaughns v. Board of Education of Prince George's County*,[362] where the court recognized that a "district court's jurisdiction to grant further relief in school desegregation cases is not perpetual."[363] The court further stated, "Once a school system has achieved unitary status, a court may not order further relief to counteract resegregation that does not result from the school system's intentionally discriminatory acts."[364]

The First Circuit was equally explicit in *Morgan v. Nucci*, involving the Boston, Massachusetts, school system. It noted:

> Although the [Supreme] Court has produced no formula for recognizing a unitary school system, the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities. Thus, when a court finds that discrimination has been eliminated root and branch from school operations, it must abdicate its supervisory role, in recognition that the local autonomy of school districts is a vital national tradition. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 . . . (1977).[365]

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361. *Riddick*, 784 F.2d at 538-539 (citations omitted). See also id. at 535 ("But once the goal of a unitary school system is achieved, the district court's role ends."); School Bd. of Richmond v. Baliles, 829 F.2d 1308 (4th Cir. 1987).

362. 758 F.2d 983 (4th Cir. 1985) (*Vaughns*).

363. Id. at 988.

364. Id. (citations omitted). See also Riddick v. School Bd. of City of Norfolk, 627 F. Supp. at 820. Landsberg suggests that *Riddick* is flawed because the district court's order finding unitary status, quoted at *Riddick*, 784 F.2d 525, and 627 F. Supp. at 818-819, never held *in haec verba* that all vestiges of discrimination had been eradicated. Landsberg, supra note 3, at 818 n.147. Further, he contends that conduct which perpetuates the vestiges of segregation need not be shown to have been motivated by intentional discrimination. Id. This, of course, assumes a *de novo* review of unitariness.

365. Morgan v. Nucci, 831 F.2d 313, 318 (1st Cir. 1987).

The First Circuit had earlier held that, under *Spangler I*, "absent any showing that school population changes were the result of segregative actions by the defendants or the result of some other constitutional violation, the district court's power to decree a remedy had ended when it implemented its earlier plan."[366]

As previously recognized, this critical effect of a finding of unitary status was ably and persuasively defended by the new Fifth Circuit in *Overton*. The court discussed the issue in substantial detail. The court stated "that [a finding of unitary status] must also be accompanied by a release of a unitary district from the burden of proving that its decisions are free of segregative purpose."[367] Judge Higginbotham held that "[a]ttaining unitary status . . . means that a school board is free to act without federal supervision so long as the board does not purposefully discriminate; only intentional discrimination violates the Constitution."[368] Speaking for the court, he concluded that the injunction in the Austin, Texas, school district was properly dissolved and the case closed, for three equally persuasive reasons, two of which reflect the application of principles generally governing school systems throughout the nation.[369] Relying on the equitable principle that the remedy cannot extend beyond the nature of the violation,[370] the court found that the particular nature and function of a declaration of unitary status requires termination.[371] It additionally rejected the suggestion in *Dowell II*[372] that the old Fifth Circuit in *Lee v. Macon County Board of Education*[373] had required the court to continue jurisdiction in order to "maintain" desegregation.[374]

Overton followed a long line of dicta in cases involving desegregation in the deep South. In *United States v. Texas (San Felipe Del-Rio Consol. Indep. School Dist.)*,[375] the old Fifth Circuit noted that: "It has never been our purpose to keep these cases interminably in the federal courts." Where a district "has achieved unitary status," then a dismissal is not out of order. The court elsewhere explicitly contemplated that cause

366. Morgan v. O'Bryant, 687 F.2d 510, 517 (1st Cir. 1982).

367. *Overton*, 834 F.2d at 1175.

368. *Overton*, 834 F.2d at 1175 (footnote citing Personnel Administrator v. Feeney and Washington v. Davis omitted).

369. One of those reasons was that the specific injunction issued in *Overton* expired by its own explicit terms. 834 F.2d at 1174.

370. *Overton*, 834 F.2d at 1176-1177.

371. *Overton*, 834 F.2d at 1174-1176.

372. *Dowell II*, 795 F.2d at 1520 n.3.

373. 584 F.2d 78, 81 (5th Cir. 1978).

374. *Overton*, 834 F.2d at 1174-1176. Cf. Ross v. Houston Ind. Sch. Dist., 699 F.2d 218, 225 (5th Cir. 1983); Graves v. Walton County Bd. of Educ., 686 F.2d 1135 (5th Cir. 1982); Augustus v. School Bd. of Escambia County, 507 F.2d 152, 158 (5th Cir. 1975).

375. 509 F.2d 192, 194 (5th Cir. 1975).

must be shown "why *dismissal* of the case should be further delayed."[376] The court in *Lawrence County*,[377] noted that "[i]f the court had decided that the vestiges of segregation had been completely erased, the retention of jurisdiction would have been anomalous."[378] The old Fifth Circuit made it clear that "[o]nce a district achieves unitary status, the methods, means and procedures employed to reach that status are not frozen and unchangeable, immunized from the consequences of subsequent racially neutral attempts to alter or divide the district."[379] The court noted that once a finding of unitary status is made "a federal court loses its power to remedy the lingering vestiges of past discrimination absent a showing that either the school authorities or the state had deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools."[380]

In *Pitts v. Freeman*,[381] the Eleventh Circuit stated that "after a finding of full unitary status" plaintiffs would be required to prove discriminatory intent[382] and that "[u]ntil the DeKalb County School System achieves unitary status, official action that has the *effect* of perpetuating or reestablishing a dual school system violates the defendants' duty to desegregate."[383] The decision recognized that a finding of "unitary status . . . requires dismissal of the action."[384] *Georgia State Conference* likewise contemplated that the school district's "affirmative duty to eliminate the consequences of . . . [its] prior unconstitutional conduct" necessarily expires after the hearing needed "[t]o declare a school district as fully unitary and thus terminate a school desegregation case."[385]

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376. Youngblood v. Board of Public Instruction of Bay County, 448 F.2d 770 (5th Cir. 1971) (emphasis added). Accord: Pickens v. Okolona Mun. Sep. Sch. Dist., 594 F.2d 433, 436 (5th Cir. 1979); Pate v. Dade County Sch. Bd., 588 F.2d 501, 504 (5th Cir.), cert. denied, 444 U.S. 835, 100 S. Ct. 67 (1979); Lee v. Macon County Bd. of Educ. (Baldwin County), 584 F.2d 78, 81 (5th Cir. 1978); *Augustus*, 507 F.2d at 158.

377. 799 F.2d 1031 (5th Cir. 1986).

378. Id. at 1037.

379. Fort Bend Indep. Sch. Dist. v. City of Stafford, 594 F.2d 73, 75 (5th Cir. 1979).

380. United States v. South Park Indep. Sch. Dist., 566 F.2d 1221, 1224 (5th Cir.), cert. denied, 439 U.S. 1007, 99 S. Ct. 622 (1978).

381. 755 F.2d 1423 (11th Cir. 1985).

382. Id. at 1426.

383. Id. at 1427 (emphasis in original). Accord: Georgia State Conference of Branches of NAACP v. State of Georgia, 775 F.2d 1403, 1413-1414 (11th Cir. 1985).

384. Id. at 1426. Cf. 755 F.2d at 1427.

385. 775 F.2d 1403, 1414 (11th Cir. 1985). The decision of the Eleventh Circuit in United States v. Board of Educ. of Jackson County, 794 F.2d 1541, 1543 (11th Cir. 1986), is not to the contrary. While granting dissolution, the court opined that unitary status "does not inevitably require the courts to vacate the orders upon which the parties have relied in reaching that . . . [status]." However, in discussing "premature" terminations of jurisdiction, "*Jackson*, on its facts, cannot be construed to invite or command indefinite

The necessity of requiring proof of subsequent intentional discrimination is supported by Sections 1704 and 1705 of Title 20, adopted by Congress pursuant to Section 5 of the Fourteenth Amendment.[386] Sections 1707 and 1714(c)[387] further provide that school population changes caused by demographic shifts do not per se constitute a cause of action for a new plan of segregation or for modification of a court approved plan. This means not only that an approved plan cannot be violated by these demographic shifts, but also that these demographic shifts are not grounds for new litigation. These provisions would be meaningless if a finding of prior discrimination in a school district thereafter forever prohibited neighborhood schools as being a denial of equal protection.[388]

Under the intent standard, a court may not prohibit a unitary district's change to a neighborhood system merely because that change may result in racially imbalanced schools. As the Supreme Court found in *Crawford v. Los Angeles Board of Education*, adoption of a neighborhood plan may not be enjoined solely because the school district has some residential segregation,[389] and *Swann* establishes that, absent deliberate discrimination, a federal court may not force upon local school authorities its view of a preferable degree of racial integration.[390] Many school districts in this country follow a neighborhood school policy[391] and Congress has declared "it to be the policy of the United States

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and continued district court involvement to monitor and enforce earlier court orders since the declaration of unitary status has led to dismissal of the action. . . ." Lee v. Macon County Bd. of Educ. (Nunnelley State Technical College), 681 F. Supp. 730, 738 (N.D. Ala. 1988).

386. Sections 1704 and 1705 of Title 20 of the United States Code provide as follows:

> *Section 1704.* The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal education opportunity, or equal protection of the laws.
>
> *Section 1705.* Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin, or the school to which such student is assigned was located on its site for the purpose of segregating students on such basis.

Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, §§ 205 and 206, 88 Stat. 515.

387. See supra text accompanying and quoted in note 11.

388. See *Riddick*, 784 F.2d at 539.

389. Crawford v. Board of Educ., 458 U.S. 527, 533 n.8, 537 n.15, 544, 102 S. Ct. 3211, 3216 n.8, 3217 n.15, 3221 (1982) (*Crawford*).

390. *Swann*, 402 U.S. at 16, 28, 91 S. Ct. at 1276, 1282.

391. See *Keyes*, 413 U.S. at 245-248, 93 S. Ct. at 2715 (Powell, J., concurring).

that . . . the neighborhood is the appropriate basis for determining public school assignments."[392] Thus, an intent to promote neighborhood schools is not an intent to discriminate.[393]

13. Termination of Jurisdiction and Supplemental Claims

Once the court is persuaded that the school system has attained unitary status, the court must vacate the judgment, dissolve existing injunctions, and (where all aspects of the system have achieved unitary status) ordinarily dismiss the action. Nothing else remains to be done in this civil action that the court properly may do. Indeed, this is precisely the analysis contemplated by the *Spangler* court's directions on remand, although it did not expressly resolve the question of when all remedial supervision should be terminated.[394] The court cannot dismiss the civil action or terminate jurisdiction if there are supplemental allegations of either discrimination or a threat of discrimination.[395] The plaintiff may file supplemental claims or act as if he had filed supplemental claims.[396] However, whether the school district is unitary or not, the burden of proof with respect to supplemental claims is always on the plaintiff.[397] Once the supplemental claim is initiated (formally or

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392. 20 U.S.C. § 1701(a)(2) (1982).

393. See *Swann*, 402 U.S. at 28, 91 S. Ct. at 1282. See also *Spangler II*, 611 F.2d at 1245; *Riddick*, 784 F.2d at 540; *Overton*, 834 F.2d at 1177-1178; Gewirtz, Choice, supra note 9, at 793 n.209. But see Note, supra note 185, at 454-455.

394. Note, supra note 13, at 199. Cf. City of Richmond v. J. A. Croson Co., 109 S. Ct. 706, 738 (1989) (Scalia, J., concurring in judgment).

395. Obviously, also, where aspects of the system continue to be non-unitary, jurisdiction must be retained. But see United States v. Corinth Municipal Separate Sch. Dist., 414 F. Supp. 1336 (N.D. Miss 1976). Professor Gewirtz suggests that after the dissolution of injunctions, the "court might retain *jurisdiction* for a modest period after declaring unitariness . . . to assure that new discrimination does not occur." Gewirtz, Choice, supra note 9, at 793 n.209. This would be consistent with the *Youngblood* procedures of the old Fifth Circuit, Youngblood v. Board of Public Instruction of Bay County, 448 F.2d 770, 771 (5th Cir. 1971), and with the analysis discussed here.

396. Fed. R. Civ. P. 15(b). See Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 750 F.2d 731, 739 n.9 (9th Cir. 1984), cert. denied, 474 U.S. 919, 106 S. Ct. 247 (1985). The court has jurisdiction over these claims even if it subsequently determines that the allegations fail to state a claim of relief. Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 249, 71 S. Ct. 692, 694 (1951); Bell v. Hood, 327 U.S. 678, 66 S. Ct. 773 (1946). See Fed. R. Civ. P. 12(b)(6).

397. There are two burdens on the supplemental determinations. The first one is very much a formality: as described infra, these determinations are claims for supplemental relief, and leave to file such claims under Fed. R. Civ. P. 15(d) must be obtained from the court. This permission must be granted by the court when justice so requires, and justice always so requires in desegregation matters. Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 226-227, 84 S. Ct. 1226, 1230 (1964). Technically, a formal motion under Rule 15(d) to file a supplemental pleading should be made. However, failure

informally), the court must inquire into the merits of such allegations before dismissing the case.[398]

The first supplemental determination is whether there has been intentional discrimination within the school system that is unrelated to (or subsequent to) the implementation of the final desegregation plan.[399] The Supreme Court noted in *Griffin v. County School Board of Prince Edward County*[400] that subsequent discriminatory conduct by the defendants may properly be considered in the pending desegregation suit.[401] This inquiry is also allowed, if not required, under Rule 15(d) of the Federal Rules of Civil Procedure. Such discrimination would independently violate the Fourteenth Amendment and merit judicial intervention.[402] The court must also determine whether there have been additional vestiges, resulting from these subsequent intentional discriminatory acts, that must be eliminated.[403]

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to do so does not impair the ability of the court to grant relief. Fed. R. Civ. P. 15(b). Thereafter, a substantially greater burden is on the plaintiff to show the existence of deliberate racial discrimination or the imminent threat of the same. See Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040 (1976). This burden of persuasion on the supplemental claims is equivalent to that in an independent civil action.

398. Lee v. Washington County Bd. of Educ., 682 F.2d 894, 897 (11th Cir. 1982).

399. *Swann*, 402 U.S. at 32, 91 S. Ct. at 1284 ("[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter the demographic patterns to affect the racial composition of the schools"). Obviously, discriminatory conduct related to the desegregation plan affects the district's progress toward unitary status. Conceivably, isolated occurrences of discriminatory conduct—e.g., in faculty employment—may not necessarily constitute a failure to implement the plan nor thus affect the district's unitariness. See *Dayton II*, 443 U.S. at 536 n.9, 99 S. Ct. at 2978 n. 9; *Spangler I*, 427 U.S. at 436, 96 S. Ct. at 2704. However, the *Keyes* presumption may assist in proving such a failure to implement the plan.

400. 377 U.S. 218, 84 S. Ct. 1226 (1964).

401. The Court in *Griffin* said:

> The original complaint had challenged racial segregation in [public] schools. . . . The new complaint charged that . . . [the] County was still using its funds, along with state funds, to assist private schools while at the same time closing down the county's public schools, all to avoid the desegregation ordered in the *Brown* cases. The [supplemental] complaint thus was not a new cause of action but merely part of the same old cause of action arising out of the continued desire of colored students . . . to have the same opportunity for state-supported education afforded to white people . . . . Rule 15(d) of the Federal Rules . . . plainly permits supplemental amendments to cover events happening after suit, and it follows, of course, that persons participating in these new events may be added if necessary. Such amendments are well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice.

Id. at 226-227 (footnote omitted).

402. See, e.g., Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040 (1976).

403. *Swann*, 402 U.S. at 32, 91 S. Ct. at 1284.

The second supplemental determination is whether there is an imminent and immediate threat of future intentional discriminatory conduct. This determination is consistent with the mandate that the district court assure that desegregation not recur.[404] This future discriminatory conduct may be related to the desegregation plan, but the threat must be one of intentional discrimination.[405]

14. PRECLUSION

Where a court holds a school district to be unitary, the findings necessarily supporting this final judgment, like all other findings in the litigation, become res judicata as to the case.[406] A finding of unitary status constitutes a finding that the constitutional violations alleged and proved as the predicate for the remedial plan have been corrected. The issues of liability, remedy, and the satisfaction of the remedy may not be further litigated on the same claim for relief.[407] Additionally, under the doctrine of collateral estoppel, this finding also precludes the relitigation of these issues in subsequent actions between the same parties and their privies.[408]

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404. Id. at 21, 91 S. Ct. at 1278.

405. *Dayton I*, 433 U.S. at 413, 417, 97 S. Ct. at 2772, 2774; *Feeney*, 442 U.S. 256, 99 S. Ct. 2282; *Arlington Heights*, 429 U.S. at 266, 97 S. Ct. at 563; Washington v. Davis, 426 U.S. 229, 240, 96 S. Ct. 2040, 2047 (1976); *Keyes*, 413 U.S. at 198, 93 S. Ct. at 2692. An expressed preference for neighborhood schools is insufficient evidence upon which to base a finding of such a threat. *Crawford*, 458 U.S. at 543, 102 S. Ct. at 3220; *Spangler II*, 611 F.2d at 1244-1247.

406. *Riddick*, 784 F.2d at 529-532. *Dowell II*, 795 F.2d at 1522 ("When, five years later, the court determined that the implementation of the Finger plan had resulted in unitariness within the district, that finding became final, and it, too, is binding on the parties with equal force. . . . Thus . . . the trial court properly refused to permit the plaintiffs to relitigate conditions extant [at the time of the declaration of unitariness].").

407. 1B Moore's Federal Practice, ¶ 0.405 to 0.415, at 178-512.

408. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 873, 104 S. Ct. 2794, 2798 (1984); Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411 (1980); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649 n.5 (1979); Lawlor v. National Screen Service Corp., 349 U.S. 322, 326, 75 S. Ct. 865, 867 (1955); 1B Moore's, ¶ 0.405[1], at 178-181, 190-196. This preclusion is often also referred to as *res judicata*, but Moore's distinguishes it and calls it collateral estoppel. Brown v. Felsen, 442 U.S. 127, 138 n.10, 99 S. Ct. 2205, 2212 n.10 (1979). See generally, 1B Moore's Federal Practice ¶ 0.444[3]. See also United States v. International Bldg. Co., 345 U.S. 502, 73 S. Ct. 807 (1953).

Consent orders in compromise and settlement of a suit have no effect on subsequent litigation but do have preclusive effect within the litigation. However, if the decree was entered "after the court made findings on the merits of the plaintiffs' claims for relief, the order is not a consent order in settlement of the suit but is an order on the merits of the same. The fact that the parties agreed to the order does not alter that conclusion." *Riddick*, 784 F.2d at 530; *International Building Co.*, 345 U.S. at 506, 73 S. Ct. at 809.

The doctrine of res judicata itself is the foundation for the principles of collateral estoppel and issue preclusion. This doctrine is summarized with respect to the general principles of issue preclusion in *Montana v. United States*:[409]

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ." *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined . . . that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.

A. *Identity of Issues*

In ascertaining whether subsequent school desegregation litigation[410] is precluded by a prior judgment, the claim must first be examined. The scope of the issues governed by res judicata is far broader than the issues governed by collateral estoppel. Under res judicata, all issues that were *or could have been* litigated are governed by the first adjudication.[411] Those issues must arise in litigation brought under the same "cause of action." Under the Restatement of Judgments, this includes claims arising from the same "transaction."[412] The establishment and continuation of a dual system of schools would appear to meet this standard.

But see Jost, supra note 3, at 1103 ("Relatively few complex injunctions wholly lack an element of consent."); id. at 1146 ("If a desegregation decree turns out to be totally ineffective in eliminating segregation, the fact that the decree was entered by consent should not preclude the beneficiary from claiming a continued, enforceable right to attend schools free from illegal segregation." This is an "inalienable entitlement [] that ultimately cannot be contracted away.") (footnote omitted).

409. 440 U.S. 147, 153-154, 99 S. Ct. 970, 973 (1979) (citations omitted).

410. Collateral estoppel applies to school desegregation litigation. *Riddick*, 784 F.2d at 531; *Los Angeles Branch*, 750 F.2d 731; *Bronson*, 687 F.2d 836.

411. Cromwell v. County of Sac, 94 U.S. 351 (1877); United States v. Nevada, 463 U.S. 110, 129-130, 103 S. Ct. 2906, 2917 (1983).

412. Restatement (Second) of Judgments § 24 comment b (1982). United States v. Nevada, 463 U.S. at 130 n.12, 103 S. Ct. at 2918 n.12. But see Lawlor v. National Screen Service, 349 U.S. 322, 327-328, 75 S. Ct. 865, 868 (1955).

However, under collateral estoppel "[a] judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action."[413] Where the current action relies on the discriminatory conduct addressed by the prior suit the issues are necessarily the same. A suit seeking a remedy for the same discriminatory conduct is thus an action on the same claim for relief.[414] On the other hand, new segregatory conduct, motivated by contemporaneous discriminatory intent, is not affected by the previous finding of unitary status.[415]

Landsberg objects to the application of collateral estoppel to desegregation remedies on grounds that "the parties do not typically litigate the question of whether particular aspects of the plan are tailored to the violation" and that the "effects of the past unlawful practices are not addressed."[416] Landsberg further suggests that a busing order will not necessarily be based on findings that it was necessary.[417] This objection assumes not only that the courts have customarily disregarded their desegregation duties as prescribed by numerous Supreme Court directives, but also that the doctrine of collateral estoppel requires that all issues must be explicitly discussed, that a claim based on discriminatory school assignment can properly be broken into a multitude of discrete "issues" and "injuries," each of which may be separately litigated and remedied, and that no issues can be included as decided by necessary implication or as part of the whole.[418] Once a system has been found segregated as a whole, whether by operation of the *Keyes* presumption or not, the remedy must address all aspects of the dual system and all "injuries" caused by that segregation. Where there was

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413. Restatement (Second) of Judgments § 27 comment e (1982); Landsberg, supra note 3, at 825. See *Cooper*, 467 U.S. at 874, 104 S. Ct. at 2798; *Lawlor*, 349 U.S. at 326, 75 S. Ct. at 867; *Allen*, 449 U.S. at 94-95, 101 S. Ct. at 414.

414. *Los Angeles Branch*, 750 F.2d 731. See Miller v. Board of Educ., 667 F.2d 946, 948 (10th Cir. 1982); Note, supra note 104, at 525-527. Cf. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 84-85, 104 S. Ct. 892, 897 (1984). See generally, *Allen*, 449 U.S. 90, 101 S. Ct. 411.

415. *Los Angeles Branch*, 750 F.2d at 739-741. See Landsberg, supra note 3, at 826.

416. See Landsberg, supra note 3, at 810. See id. at 826-827. See also Jost, supra note 3, at 1103, 1131. See Fiss, supra note 27, at 47-49.

417. Landsberg, supra note 3, at 826-27. Landsberg suggests that the failure of the court to specify that a condition is a vestige of segregation, and is being remedied by the desegregation plan, *Dayton I*, 433 U.S. at 417-418, 420, 97 S. Ct. at 2774, 2775, permits a subsequent plaintiff to use this vestige as a predicate for further remedies. Landsberg, supra note 3, at 818-821.

418. Cf. *Spangler II*, 611 F.2d at 1242; EEOC v. International Longshoremens Ass'n, 623 F.2d 1054, 1058 (5th Cir. 1980). For the purposes of preclusion, the Restatement (Second) Judgments includes within such a claim all rights arising out of the same transaction or series of transactions, Restatement (Second) of Judgments § 24(a) (1982). See Fed. R. Civ. P. 13(a).

a systematic remedy for systematic segregation, all forms of discrimination and segregatory conduct within the school system attributable to the school authorities or other state officials, and all vestiges and effects of that conduct, must be deemed remedied by a desegregation plan finally approved as constitutionally adequate.[419]

B. *Privity of Parties*

A second aspect of the application of collateral estoppel is the determination of parties in privity to the original litigants.[420] Where the complaining parties are different, the resolution of the question becomes in many respects dispositive.[421] The concept of the privity of the parties appears to be the same for the application of both res judicata and collateral estoppel. A party bound under res judicata is bound under collateral estoppel.[422] Where the named plaintiffs are identical—a rare occurrence in protracted school desegregation litigation[423]—the issue resolves itself. Where the previous action was a duly certified class action, this takes on a complexity of some magnitude.[424] It must be determined whether the classes represented in the two suits may be "in sufficient privity for the principles of collateral estoppel . . . to apply."[425]

Under the definition of the class made pursuant to Rule 23(e), the current plaintiffs—or a large part of them and the class they represent—may be part of the previous class, particularly if the class had been defined to include future students.[426] However, as noted by Landsberg, no class definition may ever have been made in the previous litigation.[427] However, the previous action may have been treated as a class action, even if no explicit determination and no class allegations were made.[428]

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419. See *Dayton I*, 433 U.S. at 420, 97 S. Ct. at 2775; *Keyes*, 413 U.S. at 213, 93 S. Ct. at 2699; United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 869 (5th Cir. 1966).

420. *Los Angeles Branch*, 750 F.2d at 741-742. See Ashley v. City of Jackson, 464 U.S. 900, 902, 104 S. Ct. 255, 256 (1983) (Rehnquist, J., and Brennan, J., dissenting from denial of certiorari).

421. Martin v. Wilks, 109 S. Ct. 2180, 2184 & n.2 (1989).

422. See *Dowell I*, 606 F. Supp. at 1555. Cf. Moore's Federal Practice ¶ 0.441[3.-1], at 731.

423. *Riddick*, 784 F.2d at 532.

424. Landsberg, supra note 3, at 807-808. But cf. id. at 828.

425. Bell v. Bd. of Educ. of Akron Public Sch., 683 F.2d 963 (6th Cir. 1982); *Bronson*, 525 F.2d at 349; *Los Angeles Branch*, 750 F.2d 731.

426. *Dowell I*, 606 F. Supp. at 1555.

427. Landsberg, supra note 3, at 808.

428. Graves v. Walton County Bd. of Educ., 686 F.2d 1135, 1139-1140 (5th Cir. 1982) ("despite the lack of a formal order certifying this case as a class suit, this case was in fact a class action and was specifically described and treated as such by the parties and the trial court."); *Los Angeles Branch*, 750 F.2d at 741 n.11; but see Jackson v. Hayakawa, 605 F.2d 1121, 1125-1126 & n.7 (9th Cir. 1979).

On the other hand, failure to obtain certification may also transform a pre-1966 class action into a post-1966 individual action.[429]

Privity may include a party—including the United States Government—who "had . . . totally financed and controlled" the efforts of a named party to the previous litigation.[430] Some circuit courts have suggested an additional form of privity. Where the current plaintiffs were "virtually represented" by a previous class action, they are bound by the previous judgment.[431] "The application of this doctrine [of virtual representation] to desegregation cases is particularly appropriate. It has been recognized that unless subsequent generations of school children are bound by preclusion rules from relitigating identical claims of unlawful segregation, those claims would assume immortality."[432]

However, if the current plaintiffs are not in privity with the previous plaintiffs, they are not precluded from relitigating the issue of the sufficiency of desegregation remedy. Nevertheless, the doctrine of stare decisis would apply in its strongest sense.

The decisions in *Riddick* support this principle.[433] The court noted:

> Once a court decides an issue of law or fact necessary to its judgment, that decision can be binding upon a party to it if the party was given a "full and fair opportunity to litigate [the] issue in the earlier case."
>
> * * *
>
> While the actual make-up of class members may be different because of the passage of time (as it is bound to have been at the beginning and ending of *Beckett*), we believe that the two classes are in sufficient privity for the principles of collateral estoppel or issue preclusion to apply.[434]

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429. Landsberg, supra note 3, at 808; see Jones v. Caddo Parish Sch. Bd., 735 F.2d 923, 925, 936 n.16 (5th Cir. 1984). See also dissent, id. at 943. But see United States v. Jefferson County Bd. of Educ., 371 F.2d 836, 865 n.62 (5th Cir. 1966); *Dowell I*, 606 F. Supp. at 1555; Brown v. Bd. of Educ. of Topeka, 84 F.R.D. 383 (D. Kan. 1979); Note, supra note 95, at 525-527.

430. Martin v. Wilks, 109 S. Ct. at 2184 n.2; *Mendoza*, 464 U.S. at 159 n.5, 104 S. Ct. at 572 n.5; Montana v. United States, 440 U.S. at 155, 99 S. Ct. at 974. See Nevada v. United States, 463 U.S. at 134-144, 103 S. Ct. at 2920. But see Kania v. Fordham, 702 F.2d 475, 476 n.2 (4th Cir. 1982).

431. *Los Angeles Branch*, 750 F.2d at 741 (applying and approving California law).

432. Bell v. Board of Educ., 683 F.2d 963, 966 (6th Cir. 1982); but see *Spangler I*, 427 U.S. at 429-430, 92 S. Ct. at 2701.

433. Adams v. School Dist. No. 5, Orangeburg Co., S.C., 444 F.2d 99 (4th Cir.), cert. denied, 404 U.S. 912, 92 S. Ct. 230 (1971), later app., School Bd. of the City of Norfolk v. Brewer, 456 F.2d 943 (4th Cir.), cert. denied, 406 U.S. 933, 92 S. Ct. 1778 (1972). See Riddick v. School Bd. of the City of Norfolk, 784 F.2d 521 (4th Cir.), cert. denied, 479 U.S. 938, 107 S. Ct. 420 (1986).

434. *Riddick*, 784 F.2d at 531, 532.

15. CONCLUSION

The dismantling of dual, segregated, school systems is what desegregation is all about. Bright lines and deadlines help focus the mind on achieving that end with more than deliberate speed. Unitary status, not indefinite judicial supervision, is the end for which all parties should be striving. A prolonged denial of local control will, in the long run, serve no one.[435] Local accountability is essential if a school system is to succeed in its mission of educating children of all races; prolonged judicial control destroys that accountability. The Court in *Brown v. Board of Education*[436] was wary that requiring too much too soon might cause states and local school boards to balk, and so the Court settled for desegregation with "all deliberate speed."[437] But times have changed. Now the failure to demand that unitariness be achieved quickly not only disserves minority students but also diminishes local control. The two goals of any desegregation process should be thus succinctly stated: dismantle dual school systems as quickly as possible, and—when this is done—end federal intervention.

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435. The benefit suggested by some that school boards still in the process of desegregation might claim financial assistance for that process from state governments, appears to be a weak attempt to delay the goal of the desegregation process.

436. *Brown II*, 349 U.S. 294, 75 S. Ct. 753.

437. Id. at 301, 75 S. Ct. at 756.