Oklahoma Law Review

Volume 40 | Number 4

1-1-1987

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Recommended Citation
Thomas E. Chandler, *The End of School Busing? School Desegregation and the Finding of Unitary Status*, 40 OKLA. L. REV. 519 (1987),
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OKLAHOMA
LAW REVIEW

VOLUME 40 WINTER 1987 NUMBER 4

THE END OF SCHOOL BUSING? SCHOOL DESEGREGATION AND THE FINDING OF UNITARY STATUS

THOMAS E. CHANDLER*

During its 1986-87 term, the United States Supreme Court declined to review two cases that addressed public school board efforts to end court-ordered busing.[1] As a result, the Norfolk, Virginia, public school district became the first school district in the country to end court-ordered busing.[2] At the same time, however, the Oklahoma City School Board's plan to curtail compulsory busing was blocked.[3] These cases suggest that thirty-two years after *Brown v. Board of Education*[4] and fifteen years after *Swann v. Charlotte-Mecklenburg Board of Education*,[5] school desegregation and busing are not dead issues. Moreover, these cases indicate that the issue of ending busing—not whether to bus—may begin the next phase of litigation in the long history of school desegregation cases.

The history of school desegregation is not entirely a happy one. For example, the events that occurred in Little Rock, Arkansas, in 1957 represent only

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1. Dowell v. Board of Educ., 795 F.2d 1516 (10th Cir.), *cert. denied*, 107 S. Ct. 420 (1986); Riddick v. School Bd., 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). The Supreme Court has not reviewed a busing case since 1979. *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (Dayton II); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979). See also *infra* note 76.

2. Washington Post, Nov. 4, 1986, at A1, col. 4. The Fourth Circuit's decision in *Riddick* upheld the Norfolk School Board's plan to end busing of elementary schoolchildren. This case is discussed more fully below in the sections on the findings and effects of unitary status.

3. Dowell v. Board of Educ., 795 F.2d 1516 (10th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

4. 347 U.S. 483 (1954) (*Brown I*). The Court in *Brown I* held that government-mandated racial segregation in public schools violated the equal protection clause of the fourteenth amendment.

5. 402 U.S. 1 (1971). The Court in *Swann* approved the remedial use of court-ordered busing in school desegregation cases.

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one extreme of the early efforts made to defy the *Brown I* decision.[6] Yet, despite these efforts, enormous progress has been made to eradicate publicly sanctioned racial segregation in public education,[7] and the *Brown I* decision has been properly recognized as "one of the most important events in the recent history of the United States."[8] The resulting transformation in public education is almost singularly a result of the persistence of the federal courts in pursuing the promise of *Brown I*.[9] Frequently, however, this persistence has resulted in the federal courts, and not the local school boards, running the public schools.

The long-term involvement of the federal courts in school districts resulted from the failure of the local school boards to fulfill their own "affirmative obligation" to eliminate all vestiges of state-imposed segregation.[10] The Supreme Court declared in *Brown II* that "[s]chool authorities have the primary responsibility" of ending state-sponsored segregation.[11] However, *Brown II* also instructed the lower federal courts to use their broad equitable powers to eliminate obstacles to the transition mandated by *Brown I*.[12] As a result, in many cases "the magnitude of the constitutional violation, the scope of the remedy required to redress the violation, and the possibility of recurring violations" has made it necessary for the district courts to retain active supervision over cases for considerable periods of time.[13] In fact, continuing federal court supervision of school districts spanning twenty-five to thirty years is not uncommon.[14] For example, the Norfolk school desegregation case that

6. *See* Cooper v. Aaron, 358 U.S. 1 (1958). The *Cooper* case involved actions by the Governor and legislature of Arkansas to prevent the implementation of the *Brown I* decision. The Governor went so far as to use state troops to prevent blacks from entering a previously all-white high school. These events resulted in a constitutional crisis that led the Supreme Court to convene a rare special session. *See also* Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957), *aff'd sub nom.* Faubus v. United States, 254 F.2d 797 (8th Cir.), *cert. denied*, 358 U.S. 829 (1958).

7. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, CLEARINGHOUSE PUB. No. 76, STATEMENT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS ON SCHOOL DESEGREGATION 52 (1982).

8. R. WOLTERS, THE BURDEN OF BROWN—THIRTY YEARS OF SCHOOL DESEGREGATION 3 (1984). *Brown I* has also been recognized as giving the injunction a new prominence in remedial jurisprudence, a prominence that began with the school desegregation cases and was later extended to civil rights cases in general. O. FISS, THE CIVIL RIGHTS INJUNCTION 4 (1978). The injunction necessarily underlies all court-ordered busing. Further, although *Brown I* technically applied only to public education, the case began a long series of decisions holding invalid state-imposed racial segregation in other public facilities. *See, e.g.*, Turner v. City of Memphis, 369 U.S. 350 (1962) (per curiam) (airport restaurants); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (public buses).

9. See, e.g., *supra* note 7.

10. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

11. Brown v. Board of Educ., 349 U.S. 294, 299 (1955) (*Brown II*).

12. *Id.* at 300.

13. *See* Lee v. Macon County Bd. of Educ., 584 F.2d 78, 81 (5th Cir. 1978).

14. In the late 1950s and 1960s hundreds of lawsuits were filed seeking to enforce the mandates of the *Brown* decisions. The *Riddick* and *Dowell* cases are just two examples of such cases that are still ongoing.

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spawned the *Riddick* decision began in 1956,[15] and the *Dowell* case began in 1961.[16]

At some point, however, federal court supervision of public school districts does end. The threshold point is a finding that the "dual" school district has been converted to a "unitary" system in which every facet of school operations has been desegregated.[17] A finding of unitary status significantly affects all parties to the litigation, including the role of the federal court in overseeing the school district's compliance with *Brown I.* Indeed, the Norfolk School Board's successful plan to end busing was premised on a previous judicial finding that the school system had achieved unitary status.[18] Thus, the issue of when court-ordered busing may be terminated is really part of the broader

15. See *supra* note 1 and accompanying text. *See also* Beckett v. School Bd., 148 F. Supp. 430 (E.D. Va.), *aff'd*, 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957).

16. See *supra* note 1 and accompanying text. *See also* Dowell v. School Bd., 219 F. Supp. 427 (W.D. Okla. 1963).

17. Green v. County School Bd., 391 U.S. 430, 435-38 (1968). The Supreme Court in *Green* first introduced the terminology of converting a dual system of education into a "unitary" system. A unitary system generally implies that the school district has achieved full compliance with the Court's decision in *Brown I.* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971). *See also* Alexander v. Board of Educ., 396 U.S. 19, 20 (1969) (Court stated that unitary school system is one "within which no person is to be effectively excluded from any school because of race or color."). However, the terms "dual," "unitary," and "unitary status" have not had universally accepted meanings. *See generally* Note, *The Segregative Impact of Changing Demographics Upon School Districts Subject to Court-Ordered Desegregation*, 49 GEO. WASH. L. REV. 100, 105 n.46 (1980).

A "dual" school system can be broadly defined as any school system that is unlawfully segregated, whether by state statute or as a result of policies adopted by school authorities. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 201 (1973) (local school board policies); Green v. County School Bd., 391 U.S. 430, 435 (1968) (statute). A dual school system is thus one where de jure segregation exists. See *infra* note 66.

Confusion has also resulted from use of the terms "unitary" and "unitary status." Generally, a unitary school system is one that has been desegregated. *See, e.g.*, Smedley, *Developments in the Law of School Desegregation*, 26 VAND. L. REV. 405, 405-06 (1973). However, as the Eleventh Circuit has recently noted, a "unitary" school system should be distinguished from one that has achieved "unitary status." Georgia State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985). The Eleventh Circuit defined a "unitary" school system as "one which has not operated segregated schools as proscribed by cases such as *Swann* and *Green* for a period of several years." *Id.* A school system that has achieved "unitary status," on the other hand, is "one which is not only unitary but has eliminated the vestiges of its prior discrimination and has been adjudicated as such through proper judicial procedures." *Id.* As discussed throughout this article, this distinction is central to defining the roles of the court and the school board in dismantling dual school systems.

Some courts have adopted a specific definition of a unitary school system for the purposes of a particular case. *See, e.g.*, Keyes v. School Dist. No. 1, 653 F. Supp. 1536, 1541 (D. Colo. 1987).

This article adopts the Eleventh Circuit's terminology while recognizing that this terminology has not been universally followed. *See also* Craven, *Integrating the Desegregation Vocabulary—Brown Rides North, Maybe*, 73 W. VA. L. REV. 1 (1970-71).

18. Riddick v. School Bd., 784 F.2d 521, 543 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). The finding of unitary status generally marks the time from which resegregation is constitutionally permissible. These effects are addressed *infra* in "The Effect of a Finding of Unitary Status."

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question of how a court's finding that a school system has achieved unitary status affects a school desegregation case.

This article addresses how a finding of unitary status affects the school board, the plaintiffs challenging the school board's actions, and the federal court overseeing a school district's transition from a dual to a unitary system. One of the critical issues addressed is whether plaintiffs challenging school board actions taken subsequent to a finding of unitary status that adversely affect minorities must prove discriminatory intent on the part of the school board.[19] Additionally, the *Riddick* and *Dowell* cases are examined with a view toward reconciling the apparently contradictory decisions concerning a school board's power to end busing subsequent to a finding that the school district has achieved unitary status. These cases can be reconciled only by determining how a finding of unitary status affects previously issued mandatory injunctions. Finally, a procedure is suggested that would enable a court to terminate its oversight of an offending public school system that has achieved unitary status, while avoiding the apparent confusion of the *Riddick* and *Dowell* cases.

Three preliminary matters are also addressed. First, the history of the Supreme Court school desegregation cases is briefly traced. Second, the effect of the initial implementation of desegregation measures is discussed. Third, the findings that a court must make and the procedures that it must follow to declare a school system unitary are examined. Thus, the life-span of a typical school desegregation case is put into both a historical context and the context of the significant legal determinations that must be made to terminate the case.

The Supreme Court and School Desegregation: 1954-79

The history of the major school desegregation cases has been told frequently and need not be retold in detail here.[20] A brief review of the landmark cases is necessary, however, to put into historical perspective the recent cases seeking an end to busing and an end to federal court supervision of school districts because these recent decisions draw heavily on earlier Supreme Court cases. In fact, the legal issues being raised in these cases are the inevitable result of earlier Supreme Court decisions. Moreover, recognizing why the federal courts remain vigilant in ensuring that there is no retreat from the *Brown*

19. This question was one of the two Questions Presented in the Petition for Certiorari filed in *Dowell*. The question as stated was: "Following a district court's finding that a dual school system has achieved 'unitary' status in a final order terminating jurisdiction, must a showing of discriminatory intent be made by parties challenging [the] 'unitary' school system's new neighborhood elementary school plan which curtails compulsory busing?" Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit at (i), Board of Educ. v. Dowell, 795 F.2d. 1516 (10th Cir.) (No. 86-326), *cert. denied*, 107 S. Ct. 420 (1986).

20. More recent treatment includes 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.9 (1986); Devins, *School Desegregation Law in the 1980's: The Courts' Abandonment of Brown v. Board of Education*, 26 WM. & MARY L. REV. 7, 13-25 (1984); Jones, *The Desegregation of Urban Schools Thirty Years After Brown*, 55 U. COLO. L. REV. 515 (1984).

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decisions requires some understanding of the long struggle[21] to end the pernicious system of racial segregation in public schools.[22]

Twenty-eight years after the fourteenth amendment was ratified guaranteeing that no state shall deny to "any person within its jurisdiction the equal protection of the laws,"[23] the Supreme Court held that states were free to segregate persons on the basis of race so long as the separate facilities provided to each race were "equal."[24] As a result, many public institutions in the North as well as the South "rushed headlong into the adoption of policies and practices which put into place the principle of separate-but-equal."[25] The public schools were no exception.[26] In the South state constitutions and statutes rigidly mandated racial separation in public schools.[27] In the North segregated

21. The struggle to end racial segregation in public schools often was widely and violently opposed. See, e.g., *supra* note 6.

22. The Honorable Nathaniel R. Jones, now a Circuit Judge on the United States Court of Appeals for the Sixth Circuit, more eloquently expressed the similar point. He stated:

> There is today a casualness, almost a cynicism, associated with a reference to slavery. This reaction feeds a national amnesia about the insidiousness of that institution and the vestiges of it which are evident in a variety of contemporary institutions. Consequently, the public has difficulty accepting, in this period of time, remedies for racial wrongs.

Jones, *supra* note 20, at 516.

23. U.S. CONST. amend. XIV, § 1.

24. Plessy v. Ferguson, 163 U.S. 537 (1896). The Court stated:

> The object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.

Id. at 544. The Court concluded that the Louisiana statute requiring railway companies to provide "equal but separate accommodations" for both black and white passengers was a reasonable exercise of state police power. *Id.* Only one Justice—Justice Harlan—dissented.

25. Jones, *supra* note 20, at 518.

26. In some areas separate school facilities for blacks were already required by law. For example, Congress passed a series of laws in the 1860s requiring separate schools for blacks in the District of Columbia. *See generally* Carr v. Corning, 182 F.2d 14, 18 (D.C. Cir. 1950) (court traces history of congressional legislation affecting the segregation of District of Columbia public schools). *See also* Plessy v. Ferguson, 163 U.S. 537, 544-45 (1896) (Court notes the then common establishment of separate schools for whites and blacks).

27. *See, e.g.*, DEL. CONST. art X, § 2 (1897); DEL. REV. CODE § 2631 (1935) (repealed in 1968); KAN. GEN. STAT. § 72-1724 (1949) (permitting but not requiring separate school facilities) (repealed 1957); S.C. CONST. art. XI, § 7 (1895); S.C. CODE § 5377 (1942) (current version at S.C. CODE ANN. § 21-622 (Law. Co-op. Supp. 1975)); TEX. CONST. art. VII, § 7 (1876); TEX. REV. CIV. STAT. ANN. arts. 2900, 2922-13, 2922-15 (1965) (repealed 1969); VA. CONST. art. IX, § 140 (1902); VA. CODE ANN. § 22-221 (1950) (repealed 1980). *See generally* Brown v. Board of Educ., 347 U.S. 483, 486-88 n.1 (1954) (*Brown I*) (addressing the Kansas, South Carolina, Virginia, and Delaware constitutional and statutory provisions); Ross v. Houston Indep. School Dist., 699 F.2d 218, 220 n.3 (5th Cir. 1983) (discussing the Texas constitutional and statutory provisions). Thirty-three years after the Supreme Court's decision in *Brown I*, expressly rejecting government-mandated racial segregation in public schools, some state constitutions still retain provisions prohibiting blacks and whites from attending the same schools. *See, e.g.*, W. VA. CONST. art. XII, §.

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schools resulted from official action taken with impunity in light of the *Plessy* decision.[28]

In 1954 the Supreme Court expressly rejected the separate-but-equal doctrine in public education and held that government-mandated racial segregation in public schools violated the equal protection clause.[29] The Court did not, however, address the question of appropriate relief. The Court set the question of relief for reargument and invited the Attorney General of the United States and other parties to submit new briefs. In 1955 the Court decided *Brown II*[30] and held that the school authorities must dismantle segregated school systems "with all deliberate speed."[31] The Court stated that the school authorities have the primary responsibility for complying with *Brown I* and that the federal district courts, guided by equitable principles, should oversee compliance.[32] The *Brown II* decision was predicated on "faith in state and lower federal courts, which, because of their proximity to local conditions, were best suited to perform the duty of insuring good faith implementation of the decision."[33] However, the school authorities and the lower courts were given no specific guidelines for implementing the Court's edict.

Good faith did not follow. The *Brown* decisions were met with massive resistance, including the events that occurred in Little Rock in 1957.[34] These events compelled the Supreme Court to expressly reaffirm the principles set forth in *Marbury v. Madison*[35] and to state that its interpretation of the fourteenth amendment in *Brown I* was binding on all states notwithstanding state laws to the contrary.[36]

State and local dilatory practices continued into the second decade after

28. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

29. Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (*Brown I*) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place."). For a brief history of the cases attacking the separate-but-equal doctrine prior to *Brown I*, see Jones, *supra* note 20, at 520-22.

30. Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*).

31. *Id.* at 301.

32. *Id.* at 299-300.

33. R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 20, at 408. The Court was also sensitive to the needs of the people to adjust to the changes *Brown I* required.

34. See *supra* note 6 and accompanying text. Other methods of defiance included state interposition resolutions (allowing the state, as a sovereign entity, to suspend the operation of federal mandates within its borders), violence, harassment of civil rights workers, and oppressive regulation of civil rights groups. The Court struck down one attempt to cripple civil rights groups in NAACP v. Alabama, 357 U.S. 449 (1958). These methods and others are surveyed in 2 N. DORSEN, P. BENDER, B. NEUBORNE & S. LAW, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 625-33 (4th ed. 1979).

35. 5 U.S. (1 Cranch) 137 (1803).

36. Cooper v. Aaron, 358 U.S. 1, 18 (1958). The Court stated that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *Id.* The Court added that "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'." *Id.*

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the *Brown* decisions, and with each passing year the Court's patience grew thinner. In *Griffin v. County School Board*,[37] the Court stated that "[t]he time for mere 'deliberate speed' has run out."[38] Four years later, in *Green v. County School Board*,[39] the Court struck down a freedom-of-choice plan. The Court in *Green* established the lasting principle that school boards "operating state-compelled dual systems were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[40] Thus, the school board in *Green* was required not only to abandon its freedom-of-choice plan but to dismantle the dual system by coming forward "with a plan that promises realistically to work, and promises realistically to work *now*."[41] In short, the Court declared that the test of any remedy was its effectiveness.[42] The Court's discussion in *Green* of a school board's duty to desegregate is among the Court's most quoted language in school desegregation cases.[43]

In 1969 the Supreme Court manifested its growing impatience with delay by overturning its "all deliberate speed" timetable for desegregation.[44] The Court stated that the "operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible."[45] The Court added that "[u]nder 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."[46] The Court also reaffirmed that the lower federal courts must retain jurisdiction over the desegregation cases to "insure prompt and faithful compliance" with the Court's orders.[47]

37. 377 U.S. 218 (1964) (holding that closing public schools to avoid desegregation was a denial of equal protection to black students).

38. *Id.* at 234. This case involved but one effort by the state of Virginia to circumvent the *Brown I* decision, which struck down the Virginia segregation laws along with those in three other states. See also *infra* text accompanying note 39.

39. 391 U.S. 430 (1968).

40. *Id.* at 437-38.

41. *Id.* at 439 (emphasis in original).

42. Jones, *supra* note 20, at 524.

43. The *Green* decision is important both for its mandate that school systems must achieve "unitary" status, and for its discussion of the findings that must be made to achieve unitary status. These findings are discussed *infra* in "The Finding of Unitary Status."

In a companion case to *Green*, the Court also emphasized that school boards have the responsibility to promptly convert the school system to a unitary, nonracial system. Raney v. Board of Educ., 391 U.S. 443, 447 (1968).

44. Alexander v. Board of Educ., 396 U.S. 19, 20 (1969) (per curiam).

45. *Id.*

46. *Id.* (citing Green v. County School Bd., 391 U.S. 430, 438-39, 442 (1968); Griffin v. County School Bd., 377 U.S. 218, 234 (1964)).

47. *Id.* at 21. *See also* Raney v. Board of Educ., 391 U.S. 443, 449 (1968). In *Raney* the Court stated that the district courts "should retain jurisdiction in school segregation cases to insure (1) that a constitutionally acceptable plan is adopted, and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, non-racially operated school

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The next major school desegregation opinion was *Swann v. Charlotte-Mecklenburg Board of Education*.[48] In *Swann* the Court gave more precise guidelines for school boards and district courts to follow in desegregating dual school systems.[49] The Court stated that "[t]he district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation."[50] The Court approved the use of racial quotas and mandatory student assignment plans as starting points in shaping a remedy.[51] The Court stated that:

> Absent a constitutional violation there would be no basis for judicially ordering assignments of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.[52]

The Court in *Swann* next addressed the issue of busing. The lower court had found that the assignment of schoolchildren to the school nearest their home would not produce an effective dismantling of the dual system.[53] In these circumstances the Court could "find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation."[54] The Court added that "[d]esegregation plans cannot be limited to the walk-in school."[55] With little further discussion, the Court thus created one of the major social controversies of the 1970s—the busing of schoolchildren to achieve racial desegregation. More important, the Court refused to retreat from its basic holding in *Brown I*.[56]

The Court concluded its decision in *Swann* with language that proved to

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system is rapidly and finally achieved." *Id.* at 489 (quoting Kelly v. Altheimer, 378 F.2d 483, 389 (8th Cir. 1967)).

48. 402 U.S. 1 (1971).

49. *Id.* at 14. As a preliminary matter, the Court emphasized that "judicial powers may be exercised only on the basis of a constitutional violation." *Id.* at 16. The Court stated that where a constitutional violation has been found, and the school authorities have defaulted on their obligation to provide acceptable remedies, "a district court has broad power to fashion a remedy that will assure a unitary school system." *Id. See generally* R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 20, at 431-34.

50. 402 U.S. at 26.

51. *Id.* at 25, 28.

52. *Id.* at 28.

53. *Id.* at 30.

54. *Id.*

55. *Id.*

56. *See generally* Jones, *supra* note 20, at 526. The Court's decision in *Swann* was unanimous.

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be the seed of later cases seeking to undo school busing and other court-ordered desegregation remedies. The Court stated that:

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I.* The systems would then be "unitary" in the sense required by our decisions in *Green* and *Alexander.*
>
> It does not follow that the communities served by such 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 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.[57]

Public reaction to the *Swann* decision was swift and largely hostile.[58]

57. 402 U.S. at 31-32. This language has been widely read to imply that school districts had an affirmative obligation to desegregate, rather than to integrate. *See, e.g.*, Devins, *supra* note 20, at 17. In addition, as another commentator has stated, this language indicates that the Court "determined that the duty to desegregate was a passing one." Lively, *Separate But Equal: The Low Road Reconsidered*, 14 HASTINGS CONST. L.Q. 43, 65 (1986). As discussed in this article, the effect of a finding of unitary status indicates that the duty to desegregate is indeed a passing one.

However, *Swann* does contain certain language suggesting the contrary. Earlier in the opinion the Court stated that "[i]n devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district court 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." 402 U.S. at 21. *See also* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979) (*Dayton II*). It has been argued that this language should be limited to school systems that have not yet achieved unitary status. *See, e.g.*, Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 656 n.21 (1987). One commentator has suggested, however, that this language does imply "the need for some form of safeguard against the re-establishment of the dual school system after a declaration of unitariness." *Id.* at 656. "Returning Control Over School Board Decisions," *infra*, suggests one such procedural safeguard.

58. Most significantly, then President Nixon and Congress sharply attacked busing. In a 1972 nationally televised address, President Nixon attacked "massive busing" and announced the introduction of legislation to "call an immediate halt to all new busing orders by federal courts." *Address to the Nation on Equal Employment Opportunities and School Busing*, PUB. PAPERS OF PRESIDENT RICHARD NIXON 425-29 (1972). In 1974, President Ford expressed his opposition to "forced busing." PUB. PAPERS OF PRESIDENT GERALD FORD 255 (1974). Further, in 1974, Congress enacted the Esch Amendment to the Equal Educational Opportunity Act of 1974, which prohibited any federal agency (including the courts) from ordering a desegregation plan that required the transportation of students beyond the school closest or next closest to their homes. 20 U.S.C. § 1714(a) (1982). This broad language was narrowed by another provision of the amend-

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However, with few exceptions,[59] the Court did not retreat from its pronouncements in *Swann* or its earlier cases. For example, in *United States v. Scotland Neck City Board of Education*,[60] the Court held that avoiding "white flight" was not an acceptable reason for achieving "anything less than complete uprooting of the dual school system."[61] Moreover, in *Keyes v. School District No. 1*,[62] the first desegregation case to reach the Court from a metropolitan school district outside the South,[63] the Court held that school board actions alone could constitute unconstitutional racial discrimination to the extent such actions were motivated by "segregative purpose or intent."[64] The Court further held that a school board's purposeful segregation of a significant portion of a school district justified a system-wide remedy to dismantle the dual system.[65] Underlying the Court's decision in *Keyes* was its distinction between de facto and de jure segregation—a distinction requiring desegregation only where there has been "segregative purpose or intent" and governmental action to maintain segregated schools.[66]

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ment that stated that the Act was not intended to modify or diminish the authority of the federal courts to enforce the fifth and fourteenth amendments. 20 U.S.C. § 1702(b) (1982). *See generally* Jones, *supra* note 20, at 525; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 7, at 6-8; U.S. COMM'N ON CIVIL RIGHTS, DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT, 8-13 (1979). Hostile congressional action did not quickly abate. In 1979, for example, several bills were introduced in Congress that sought to limit the ability of the Office of Civil Rights of the Department of Health, Education, and Welfare to facilitate school desegregation through busing. Jones, *supra* note 20, at 430 n.55.

59. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*). The Court held in *Milliken I* that the courts could not order busing between school districts absent a finding of an interdistrict constitutional violation. *See also* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), discussed *infra* at notes 62-66.

60. 407 U.S. 484 (1972).

61. *Id.* at 491. The Court also held that desegregation could not be achieved by splitting a single school system operating dual schools into two new systems that, although nominally unitary, would preclude meaningful desegregation.

In addition, in *Scotland Neck*, and in Wright v. Council of Emporia, 407 U.S. 451 (1972), decided the same day, the Court emphasized that the school board may not take any action that has the *effect* of impeding desegregation.

62. 413 U.S. 189 (1973).

63. The Denver, Colorado, school district in *Keyes*, unlike most of the school districts in the South, had never operated under a constitutional or statutory provision that mandated racial segregation in public schools. See *supra* note 27 and accompanying text. Thus, the *Keyes* case was the Court's "first consideration of racial imbalance in a school system free from a history of officially mandated racial assignment." Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317, 318 (1976).

64. 413 U.S. at 208.

65. *Id.* at 203, 208. The Court thus created the "presumption" that system-wide segregative intent exists where it is shown that intentionally segregative school board actions took place in a meaningful portion of the school district. *Id.* at 208. A school district subject to this presumption "must either desegregate its schools or satisfy the almost impossible burden of demonstrating that the school system would have been segregated regardless of its conduct." Devins, *supra* note 20, at 20.

66. 413 U.S. at 208. If a school district has become unintentionally segregated, e.g., because of housing and migration patterns unconnected to any purposeful governmental action to racially segregate schools, there is de facto segregation. De facto segregation is not unconstitutional and

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The next significant Supreme Court decision was *Pasadena City Board of Education v. Spangler.*[67] In *Spangler* the Court expanded on its cautionary language in *Swann* that courts are not constitutionally required to make year-by-year adjustments to the racial composition of schools.[68] The district court had required the school district to annually readjust its attendance zones in order to conform with an earlier court order mandating that no school have a "majority of any minority students."[69] The Court held that the district court was impermissibly requiring a "particular degree of racial balance or mixing" which *Swann* expressly disapproved.[70] The Court rejected the district court's authority to impose such a requirement absent a showing that the school board was responsible for intervening changes in the racial composition of the schools.[71] The Court emphasized that "there are limits beyond which a court may not go in seeking to dismantle a dual school system,"[72] and that "absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis."[73]

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courts will not intervene. R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 20, at 413. However, if a school district is segregated as a result of some purposeful governmental activity—whether by state constitution or statute or by intentional school board action—there is de jure segregation. De jure segregation is a constitutional violation and it is the sole basis for judicial intervention to remedy dual school systems. The Court's decision in *Keyes* expressly maintained the constitutional distinction between de facto and de jure segregation and announced "segregative purpose and intent" as the dividing line between the two. 413 U.S. at 214-17. Justices Douglas and Powell dissented from the decision to maintain the distinction. *Id.* at 219-36.

Three years later the Court reaffirmed the *Keyes* requirement that a court must find some intentional segregative conduct before ordering desegregation. Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976) (mem.). The *Austin* decision relied on Washington v. Davis, 426 U.S. 229 (1976), which held that absent a finding of intentional discrimination there could not be a violation of the fourteenth amendment's equal protection clause.

Professor Lively has stated that *Keyes, Milliken I,* and certain language in *Swann* represent three limiting principles announced by the Court to confine the reach of court-ordered desegregation. Lively, *supra* note 57, at 58-66. These principles—"the de jure/de facto distinction, restrictions upon interdistrict remedies, and the transitory nature of the duty to desegregate"—have "guided the desegregation mandate's devolution." *Id.* at 58 & n.99. These decisions—especially *Keyes* and *Milliken I*—unquestionably represent a retreat from the Court's earlier insistence that desegregation remedies must be effective. *See, e.g., id.* at 63-64.

67. 427 U.S. 424 (1976).

68. See *supra* note 57 and accompanying text. The *Swann* and *Spangler* decisions represent all that the Supreme Court has said about the termination of federal court oversight of school desegregation. *See generally* Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal,* 86 COLUM. L. REV. 728, 791-93 (1986).

69. 427 U.S. at 428 (quoting Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 505 (D. Cal. 1970)).

70. *Id.* at 434 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971)).

71. *Id.*

72. *Id.*

73. *Id.* (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971)). The district court had the original authority to order the reassignment of students on the basis of race because of its 1970 finding of constitutional violations. The court's plan resulted in a racially neutral system. It was not a "step-by-step plan" or one expressly subject to periodic revision. Accordingly, because the school board was not responsible for the demographic shifts that caused the schools to slip out of compliance, the court had no authority to order it to readjust the school attendance figures.

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The *Spangler* decision is important for reasons other than its expansion of the limiting language in *Swann*. The Court also appeared to have divided the concept of a unitary school system into component parts that can be treated separately. The Court stated that "[i]t may well be that petitioners have not yet totally achieved a unitary system,"[74] implying that when "one component of 'unitariness' has been achieved, even briefly, a district court may be deprived of power to continue policing that sphere of school policy."[75]

At the end of the Supreme Court's 1978-79 term, the Court issued its final major school desegregation decisions.[76] The Court emphasized that if a school system was dual in 1954 there is a continuing duty to eradicate the effects of the prior intentional discrimination.[77] The Court stated that a school board had a duty to do more than simply abandon its prior discriminatory purpose.[78] If a dual system once existed and no effort is made to establish a unitary system, the school board remains under a duty to undo the segregative effects, even if the initial segregative decisions occurred more than twenty years ago. As one commentator noted, the Court "extended the *Keyes* presumption from focusing solely on the location of segregation . . . to inquiring about the time of segregation."[79] After 1979 the lower federal courts were left on their own to further untangle the hundreds of school desegregation cases that remained within their jurisdiction.

74. *Id.* at 436. The Court recognized a factual dispute as to whether the school board had complied with the plan to end discrimination in hiring and promotions.

75. *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 223 (1976). The concept of "partial unitary status," suggested in *Spangler*, is addressed *infra* in "The Effect of a Finding of Unitary Status on Plaintiffs." See *infra* notes 174-175 and accompanying text.

76. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

In 1982 the Court addressed the issue of whether a state could amend its constitution to prohibit its state courts from ordering busing to remedy de facto segregation. Crawford v. Board of Educ., 458 U.S. 527 (1982). The Court held that the amendment did not violate the fourteenth amendment. *See also* Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) (striking down state initiative prohibiting school boards from requiring busing in certain circumstances). Neither *Crawford* nor *Washington* involved busing orders by federal courts or other federal court remedies.

77. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979) (*Dayton II*). The Court stated that

> [g]iven intentionally segregated schools in 1954 . . . the Board was thereafter under a continuous duty to eradicate the effects of that system, and . . . the systemwide nature of the violation furnished prima facie proof that current segregation in the Dayton schools was caused at least in part by prior intentionally segregative official acts.

Id. (citations omitted). In other words, pre-1954 de jure segregation presented a prima facie case that current segregation was also de jure.

The Court in *Dayton II* also emphasized that the measure of the school board's conduct was its effectiveness—not its purpose—and that the school board had a "heavy burden" of "showing that actions that increased or continued the effects of the dual system serve important and legitimate ends." *Id.* at 538. See *infra* notes 90 & 93 and accompanying text.

78. 443 U.S. at 538.

79. Devins, *supra* note 20, at 22.

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The Effect of the Initial Implementation of School Desegregation Remedies

In the early Supreme Court school desegregation cases, the Court repeatedly stated that school boards have the affirmative duty to take whatever steps are necessary to convert to a unitary system.[80] When the school boards failed to achieve unitary school systems, the lower federal courts used their broad equitable powers to order that specific desegregation plans be implemented. The courts recognized from the beginning, however, "that a school system is not automatically desegregated when a constitutionally acceptable plan is adopted and implemented."[81] Rather, "public school officials have a continuing duty to eliminate the system-wide effects of earlier discrimination and to create a unitary school system untainted by the past."[82] Further, the Supreme Court has made it clear that the district courts should retain jurisdiction until the state-imposed segregation has been completely removed.[83]

Thus, the implementation of a school desegregation plan does not, by itself, terminate a school desegregation case. It is only a means to the constitutionally required end of having a unitary school system. Accordingly, after a finding of unlawful de jure segregation, the first step toward the eventual relinquish-

80. See, e.g., *supra* notes 40 & 77 and accompanying text.

81. United States v. Texas Educ. Agency, 647 F.2d 504, 508 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). *Accord* Ross v. Houston Indep. School Dist., 699 F.2d 218, 225 (5th Cir. 1983). In *United States v. Texas Education Agency* the district court held that the school district was a unitary system from the moment the court entered its original desegregation order. The Fifth Circuit reversed, stating that the school system is not unitary until the effects of the prior discriminatory dual system are eliminated. 647 F.2d at 508.

Professor Gewirtz has similarly recognized that

> desegregation is not "accomplished" as soon as a desegregation plan is adopted. A "plan" is just that: a proposal that anticipates success but neither guarantees success nor brings it about immediately. Thus, "accomplishment" of desegregation requires that a plan be fully implemented and kept in place for a period of time.

Gewirtz, *supra* note 68, at 792-93 (footnote omitted).

82. Ross v. Houston Indep. School Dist., 699 F.2d at 225 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)). See *supra* note 77 and accompanying text.

83. *See, e.g.*, Green v. County School Bd., 391 U.S. 430, 439 (1968); Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (*Brown II*). See also *supra* note 47 and accompanying text.

As one commentator has noted:

> District courts commonly retain jurisdiction over school desegregation suits to assure that court orders are applied correctly, and to monitor actions taken after "the rendition of judgment that may increase segregation in the school system." The retention of jurisdiction is especially important in school desegregation cases because resistance and evasion are common, and meaningful relief may be delayed for years after a court's finding of a constitutional violation.

Note, 49 GEO. WASH. L. REV., *supra* note 17, at 101-02 n.13 (citations omitted). *See also* United States v. South Park Indep. School Dist., 566 F.2d 1221, 1225 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978) (The court noted that under the original desegregation plan the district court retained jurisdiction over the school system and that the retention of jurisdiction "was a normal and necessary procedure taken to insure the implementation of the plan and the achievement of the goal—a 'unitary' school system." During this time, "the case remained 'active' under the district court's jurisdiction.").

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ment of federal court supervision over the school system is the implementation of a desegregation plan. The case will be concluded and federal court jurisdiction will end only after the court specifically finds that the school system has in fact achieved unitary status.[84]

In most school desegregation cases, a substantial period of time passes between the implementation of a desegregation plan and the achievement of unitary status.[85] During this period of time, the remedial power of a federal court that adopts a desegregation plan is not limited to the enforcement of the details of the original plan.[86] Instead, the court can modify the desegregation plan to eliminate "vestiges of segregation that remain or become apparent only after the plan has been put into place."[87]

The school board, however, may not unilaterally modify the desegregation plan.[88] A court-approved remedial plan may not be amended without the court's approval, and the approval must be based on a showing by the school board that its proposal is consistent with its affirmative duty to eliminate discrimination.[89] The school board has a "heavy burden" of showing that its modification plan does not "serve to perpetuate or re-establish the dual school system."[90] The school board may not, for example, justify continued racial imbalance in the schools, or a racial imbalance that would result from

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Although the district court normally retains jurisdiction over the case at least until the school system has been declared unitary, the degree of the court's actual control over the school board during the period prior to a finding of unitary status may vary. For example, the court may exercise near complete control, or may reduce its control to give the school board sufficient freedom to make adaptations to accommodate changed circumstances. *See, e.g.*, Keyes v. School Dist. No. 1, 653 F. Supp. 1536, 1539-40 (D. Colo. 1987) (The degree of court control "depends upon the extent of compliance" with the duty "to meet the requirements of federal law."). This flexibility in the degree of court control prior to a finding of unitary status follows from the Supreme Court's admonition in *Swann* that "breadth and flexibility are inherent in equitable remedies." 402 U.S. 1, 15 (1971).

84. *See, e.g.*, Pitts v. Freeman, 755 F.2d 1423, 1426 (11th Cir. 1985).

85. See generally *supra* note 17.

86. United States v. Lawrence County School Dist., 799 F.2d 1031, 1043 (5th Cir. 1986).

87. *Id.*

88. *See, e.g.*, Mims v. Duval County School Bd., 784 F.2d 1107, 1108 (11th Cir. 1986) (per curiam). In addition, an injunctive order mandating school desegregation is binding upon both the current and future school boards. *See, e.g.*, Keyes v. School Dist. No. 1, 653 F. Supp. 1536, 1539-40 (D. Colo. 1987).

89. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979) (*Dayton II*); Wright v. Council of Emporia, 407 U.S. 451 (1972); Mims v. Duval County School Bd., 784 F.2d 1107, 1108-09 (11th Cir. 1986) (per curiam).

90. Clark v. Board of Educ., 705 F.2d 265, 271 (8th Cir. 1983). *See also* Adams v. Board of Pub. Educ., 770 F.2d 1562 (11th Cir. 1985). The burden is not "heavy" in theory and fatal in fact. The Supreme Court has stated that school board actions that increase or continue the effects of the dual system must be shown to serve "important and legitimate ends." Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979) (*Dayton II*). *See generally* Note, 100 HARV. L. REV., *supra* note 57, at 657, 660. In *Adams*, for example, the court held that the school board had met its burden of proving that its closing of certain predominantly black elementary schools was consistent with its duties under an earlier court-approved consent decree.

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its proposal, on demographic changes or "white flight."[91] Accordingly, until unitary status has been achieved the school board has the burden of showing that any board proposal modifying the court's desegregation plan is consistent with the goal of desegregation.

Thus, prior to a finding of unitary status, plaintiffs may successfully challenge school board action affecting the desegregation of the schools without a further showing of discriminatory intent.[92] Instead, plaintiffs must only show that the challenged school board action has a discriminatory effect. Official action that has the effect of perpetuating or reestablishing a dual school system violates the school board's continuing duty to eliminate the consequences of its prior unconstitutional conduct. Therefore, such official action may be enjoined even if it is not motivated by a discriminatory purpose because it is *presumed* that such segregative effects result from past discriminatory acts.[93] It is the achievement of unitary status, not the initial implementation of a school desegregation plan, that shifts the burden of proving discriminatory intent back to the plaintiffs.[94]

In sum, the implementation of a school desegregation plan is the beginning, not the end, of federal court oversight of the school board's constitutional duty to eliminate the dual school system. The mere adoption of a desegregation plan does not satisfy this duty. The school board is not barred from changing the desegregation plan, but to do so it must convince the court

91. Valley v. Rapides Parish School Bd., 646 F.2d 925, 937 (5th Cir. 1981). Until a school system has achieved unitary status, desegregation may not be thwarted by "extra-legal action." *Id. See also* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); *supra* notes 60-61.

92. *See, e.g.*, Georgia State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403, 1414 (11th Cir. 1985). Normally, proof of discriminatory intent is required to establish a violation of the equal protection clause of the fourteenth amendment, e.g., plaintiffs bear this burden in originally bringing suit challenging a segregated school system. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976). *See also* Note, 100 HARV. L. REV., *supra* note 57, at 653. Plaintiff's burden in challenging school board action taken subsequent to a finding of unitary status is addressed *infra* in "The Effect of a Finding of Unitary Status on Plaintiffs."

93. *See, e.g.*, Wright v. Council of Emporia, 407 U.S. 451, 462 (1972) ("The existence of a permissible purpose cannot sustain an action that has an impermissible effect."). *See also* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*); Vaughns v. Board of Educ., 758 F.2d 983, 991 (4th Cir. 1985); Pitts v. Freeman, 755 F.2d 1423, 1427 (11th Cir. 1985). "If the defendants fail to show that the challenged action serves 'important and legitimate ends,' . . . that action can be enjoined solely on the basis of its effect—that is, the absence of wrongful intent on the part of the school authorities is irrelevant." Note, 100 HARV. L. REV., *supra* note 57, at 660 (citing *Dayton II*).

For example, in *Vaughns* the court stated that "[b]ecause the County's school system had not attained unitary status, it is settled law that plaintiffs were entitled to a presumption that current . . . [racial] disparities were causally related to prior segregation." 758 F.2d at 991. Thus, plaintiffs were not required to prove discriminatory intent with regard to the school board's special education proposal. But see *infra* note 163. "This presumption reflects the Court's determination to err on the side of overprotecting the rights of the victims of state-sanctioned school segregation; in cases of uncertainty, the presumption calls for judgment against the school board." Note, *supra*, at 657.

94. See *infra* "The Effect of a Finding of Unitary Status on Plaintiffs."

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that the proposed changes are consistent with its continuing affirmative duty to eliminate racial discrimination. The ultimate goal is the achievement of unitary status. Mere adoption of a desegregation plan is not enough to satisfy the school board's duty to desegregate; the plan must also be shown to have worked.

The Beginning of the End of Federal Court Oversight: The Finding of Unitary Status

The beginning of the end of federal court oversight of a school system subject to a desegregation plan is a judicial finding that the school system has achieved "unitary status." As the Supreme Court recognized in *Green*,[95] the goal of school desegregation is the transition of a dual school system into a unitary one. The Court contemplated in *Swann* that at some point formerly dual school systems would be in compliance with their constitutional duties and further intervention by the federal courts would not be necessary.[96]

The implementation of a school desegregation plan does not automatically render a school system unitary.[97] The district court must hold a hearing to determine whether the school board has in fact achieved unitary status.[98] At the hearing the school board has the burden of proving that the vestiges of past unlawful segregation have been eliminated, i.e., that the desegregation plan worked.[99] In *Green* the Supreme Court identified six components of a school system that must be desegregated before the school system can achieve unitary status. These components are faculty, staff, transportation, extracurricular activities, facilities, and composition of the student body.[100] Thus, to

95. 391 U.S. 430 (1968). See generally *supra* notes 39-43 and accompanying text.

96. 402 U.S. 1 (1971). See *supra* note 57 and accompanying text.

97. See *supra* note 81 and accompanying text.

98. *See, e.g.*, Pitts v. Freeman, 755 F.2d 1423, 1426 (11th Cir. 1985); Tasby v. Wright, 713 F.2d 90, 96 (5th Cir. 1983). In *Pitts* the court held that the district court erred in characterizing a previously dual school system as unitary where no hearing was held to determine whether the school system had achieved unitary status.

In addition, the district court's holding that a school system has achieved unitary status must detail sufficient findings of fact to allow a reviewing court to determine whether the school system meets the requirements of *Swann* and other Supreme Court cases. *See, e.g.*, United States v. South Park Indep. School Dist., 566 F.2d 1221, 1225 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978) (case remanded for supplemental findings of fact to determine whether the school system had in fact achieved unitary status).

99. *See, e.g.*, Tasby v. Wright, 713 F.2d 90, 96 (5th Cir. 1983).

100. Green v. County School Bd., 391 U.S. 430, 435 (1968).

Several commentators have recognized the difficulty in determining when a dual school district has been sufficiently dismantled to be declared unitary. As Professor Gewirtz has noted, "in a general sense, 'unitary status' is reached when the defendant shows that continuing effects of its past discrimination have been eliminated and the prospects of future discrimination have dissipated." Gewirtz, *supra* note 68, at 792. He adds that the "Court has not given practical guidance on how to identify that moment." *Id.* Other commentators have expressed more frustration. *See, e.g.*, Smedley, *supra* note 17, at 405-06 ("After some thousand decisions handed down by a hundred or more judges over a period of nearly two decades, the applicable standard [to determine what constitutes a unitary system] is unclear."); Note, *School Desegregation After Swann: A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421, 436 (1972) ("At what

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achieve unitary status, all aspects of the public education system must be freed of the effects of state-sponsored racial segregation.[101] Ending de jure segregation and its effects is not solely a matter of whether white children and black children go to school together.

The *Riddick* and *Dowell* cases provide examples of how a finding of unitary status is made and when such a finding is made in the typical school desegregation case.[102] In *Riddick* the underlying litigation to desegregate the Norfolk public schools began in 1956. In 1970 the Fourth Circuit upheld a finding that the Norfolk School Board continued to operate a dual school system based on race.[103] As a result, in 1971 a new desegregation plan was adopted. This plan utilized several methods of pupil assignment, including pairing and clustering of schools and cross-town busing.[104] In 1975, four years after the most recent desegregation plan was adopted and nineteen years after the underlying desegregation action was commenced, the district court determined that racial discrimination had been eliminated from the school system and that the system had become unitary.[105]

In a 1984 decision chiefly addressing the Norfolk School Board's plan to curtail busing, the district court reaffirmed its 1975 finding of unitary status and stated that the school district had retained its unitary character.[106] The court stated that the Norfolk School Board was an integrated body, the school administration was racially balanced, the racial composition of the faculty

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point a dual system is sufficiently dismantled to become 'unitary' remains a great mystery."). *See generally* Craven, *supra* note 17, at 1-2; Note, 49 GEO. WASH. L. REV., *supra* note 17, at 105-06 n.46.

One commentator, also recognizing that the Court has not "produced a single, comprehensive statement defining unitariness," stated that the Court "refrained from offering such a statement because it has recognized that no single, inflexible formula could apply to all school systems." Note, 100 HARV. L. REV., *supra* note 57, at 662-63. This view properly recognizes that no two desegregation cases are alike and that each must be resolved in light of its particular facts.

Despite these perceived difficulties, courts do recognize that the goal of desegregation is to achieve unitary status, and they examine the components noted in *Green* to determine whether the school system is sufficiently desegregated. *Dowell* and *Riddick*, discussed herein, are but two examples. *See also* Bradley v. Baliles, 639 F. Supp. 680, 687-88 (E.D. Va. 1986) (court stated that the "traditional test for determining whether a school district has achieved unitary status is that which was enunciated" in *Green*, and that *only* the factors mentioned in *Green* need be considered in determining whether a particular school system had achieved unitary status). *Cf.* Keyes v. School Dist. No. 1, 653 F. Supp. 1536, 1541 (D. Colo. 1987) (court adopted specific definition of a unitary school system for the particular case).

101. See *infra* note 116 and accompanying text for a discussion of partial unitary status. See also *supra* note 75 and accompanying text.

102. See *supra* note 1 and accompanying text.

103. Brewer v. School Bd., 434 F.2d 408 (4th Cir.), *cert. denied*, 399 U.S. 929 (1970).

104. Riddick v. School Bd., 784 F.2d 521, 525 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

105. *Id.* The court's 1975 order and its underlying findings are unpublished. A later decision in the same case, however, reprinted the order, which states in part that "racial discrimination through official action has been eliminated from the system, and that the Norfolk School System is now 'unitary'." Riddick v. School Bd., 627 F. Supp. 814, 818 (E.D. Va. 1984), *aff'd*, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

106. Riddick v. School Bd., 627 F. Supp. at 819.

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and staff was mixed, and the overwhelming majority of schoolchildren at all levels attended schools with racially mixed student bodies.[107] The court also noted that extracurricular activities, the transportation network, and the school facilities were not operated in a dual fashion.[108] In short, the court reviewed all of the factors set forth in *Green* in determining that the school system was free of racial discrimination and was in fact unitary.[109]

In *Dowell* the original desegregation action against the Oklahoma City school system was filed in 1961. In 1972 the district court implemented a new desegregation plan that provided for the restructuring of certain attendance zones and busing. Then, in 1975 the school board moved the court for a finding that the school system had become unitary. The district court held a hearing to receive evidence from the parties on the state of desegregation efforts in the schools. Finally, in 1977 the court issued an order finding that the Oklahoma City school system had achieved unitary status.[110] The court "specifically found that the School Board had complied with the requisite constitutional requirements and recognized that a 'unitary system' had been 'accomplished' over the previous sixteen years."[111]

Although *Green* made it clear that unitary status is not solely a matter of whether black children and white children go to school together, the most common reason why a court finds that a school system is not unitary is the continued existence of a disproportionately large number of one-race schools.[112] This is not surprising because the plaintiffs in *Brown I* and later cases sought chiefly to end the pernicious system of relegating blacks to separate all-black schools. In *United States v. Texas Education Agency*,[113] for example, the Fifth Circuit held that a desegregation plan failed to convert a school system to unitary status where ten out of eleven one-race schools remained predominantly

107. *Id.*

108. *Id.*

109. On appeal, the Fourth Circuit affirmed the district court's finding that the school system had achieved, and continued to maintain, unitary status. Riddick v. School Bd., 784 F.2d at 533. In Bradley v. Baliles, 639 F. Supp. 680, 688 (E.D. Va. 1986), the court stated that because the Fourth Circuit in *Riddick* limited its inquiry to the factors mentioned in *Green*, the court need not consider additional factors in determining whether a school system is unitary.

The court of appeals' standard of review of district court findings of unitary status is governed by Federal Rule of Civil Procedure Rule 52(a). Riddick v. School Bd., 784 F.2d at 533. Rule 52(a) states that findings of fact may be set aside only if clearly erroneous. Thus, "[f]actual findings by a district court in school desegregation cases . . . are entitled to great deference on review." *Id.*

110. The court's findings and order are unpublished. The order is quoted in part in Dowell v. Board of Educ., 606 F. Supp. 1548, 1551 (W.D. Okla. 1985), *rev'd*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

111. Dowell v. Board of Educ., 606 F. Supp. at 1554. In a later decision in the same case, the district court referred to the six factors set forth in *Green* in stating that the court's 1977 finding of unitary status was fully justified. *Id.* at 1555.

112. This is true even though in Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1, 26 (1971), the Court stated that "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law."

113. 647 F.2d 504 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

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one race nine years after the plan was adopted. Similarly, in *United States v. Board of Education*,[114] the Fifth Circuit held that the fact that three out of seven elementary schools remained more than 90 percent black five years after a desegregation plan was adopted precluded a finding that the school system had achieved unitary status. These cases suggest that desegregation of the student body is the central focus of school desegregation efforts and that a judicial finding of unitary status is not casually made.[115]

Some courts have found, however, that the existence of a large number of racially identifiable schools, or other remaining racially identifiable components of the school system, do not preclude a finding of unitary status.[116] For example, in *Ross v. Houston Independent School District*,[117] the court considered whether the school system had become unitary despite a failure to achieve integrated student attendance. A desegregation plan had been in operation for twelve years that resulted in a unitary school system in every respect except for the large number of one-race schools.[118] The court held that the school system was properly declared unitary.[119] The court stated that the "constitutional mandate against racial discrimination is categoric, but the determination of remedies for its past violation turns on the conditions in a particular district."[120]

The court added that "the decision that public officials have satisfied their responsibility to eradicate segregation and its vestiges must be based on conditions in the district, the accomplishments to date, and the feasibility of further measures."[121] The court recognized that *Swann* did not require "a racial balance in all of the schools."[122] Thus, the court concluded that because the school board had made "intense efforts" to remedy school attendance pat-

114. 576 F.2d 37 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978).

115. *See also* Tasby v. Wright, 713 F.2d 90 (5th Cir. 1983) (school district not unitary given number of one-race schools); Valley v. Rapides Parish School Bd., 646 F.2d 925 (5th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982) (despite fifteen years of desegregation efforts, continued existence of one-race schools precluded finding of unitary status). In most cases, given the central purpose of school desegregation actions, it is unlikely that a court would recognize the achievement of unitary status where the school system was unitary in all respects but student body, and student assignments continued to result in a substantial number of one-race schools. Compare Ross v. Houston Indep. School Dist., 699 F.2d 218 (5th Cir. 1983), discussed *infra* at notes 117-124.

The converse is also true, but for a different reason. By listing the six components of the school system that must be desegregated to achieve unitary status, the Supreme Court in *Green* strongly implied that a school system should not ordinarily be declared unitary where the student body has been desegregated but the other components have not. See *supra* note 100 and accompanying text.

116. *See, e.g.*, Ross v. Houston Indep. School Dist., 699 F.2d 218 (5th Cir. 1983); Mapp v. Board of Educ., 630 F. Supp. 876 (E.D. Tenn. 1986).

117. 699 F.2d 218 (5th Cir. 1983).

118. *Id.* at 226. The court specifically found that faculty assignments, transportation, extracurricular activities, and facilities had been desegregated.

119. *Id.* at 228.

120. *Id.* at 227.

121. *Id.*

122. *Id.* at 227-28. See also *supra* note 112.

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terns and because demographic changes precluded further student body integration without disrupting naturally integrated schools,[123] the school system had been properly declared unitary.[124]

The *Ross* case suggests that the factual complexity and uniqueness of each school desegregation case may account for a failure to strictly adhere to the Supreme Court's mandate in *Green* and that a blanket test for unitariness cannot be applied to every case. The case may also suggest the recognition of the Court's implication in *Spangler* that a school system may achieve partial unitary status.[125] In either event, courts do not examine the six *Green* factors in a vacuum; where further desegregation measures may be "impractical and detrimental to education," a finding of unitary status may be made despite a failure to desegregate every facet of the school system.[126] In practice, a finding of unitary status is guided by, but not constrained by, an analysis of the six *Green* factors—a victory of substance over form.

Despite the holding in *Ross*, the case is indicative of the efforts school boards and courts must make to have a school system declared unitary. The finding of unitary status in *Ross* was made twenty-five years after the initial lawsuit was filed to desegregate the Houston schools and twelve years after a suitable court-ordered desegregation plan was adopted. This indicates that the adoption of a desegregation plan is not the end of federal court oversight of the school system and that the court will not lightly infer that the desegregation plan actually worked. Moreover, the mere passage of time cannot itself be evidence of desegregation. The finding of unitary status, guided by the factors set forth in *Green*, must be based on specific findings that the school system's operations are free of past racial taint. The burden is on the school board to establish that it has fulfilled its constitutional duty. When a finding of unitary status is finally made, the next phase of the school desegregation case begins.

The Effect of a Finding of Unitary Status

A judicial finding of unitary status, by definition, indicates that the desegregation plan worked and the school board has fulfilled its affirmative duty to eliminate the effects of its prior unconstitutional conduct. As a result, the rights and responsibilities of the parties to the desegregation case, as well as the court's role in overseeing the school system, are significantly affected. First, the court's role is substantially diminished because the court's use of

123. As to a school board's consideration of demographic changes in remedying school segregation prior to a finding of unitary status, compare Valley v. Rapides Parish School Board, 646 F.2d 925, 937 (5th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982) ("White flight," residential patterns, and "extra-legal" action cannot justify the continued existence of one-race schools.). See also *supra* note 91 and accompanying text.

124. *See* Mapp v. Board of Educ., 630 F. Supp. 876 (E.D. Tenn. 1986). In *Mapp* the court held that a school system was unitary despite unremedied racially identifiable faculty and staff.

125. See *supra* note 75 and accompanying text and *infra* notes 174-175 and accompanying text.

126. Ross v. Houston Indep. School Dist., 699 F.2d 218, 228 (5th Cir. 1983). These cases, however, are the exception.

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its remedial powers necessarily depends on the existence of unremedied constitutional violations. Second, the control of the school system is returned to the school board, and the board is free to take administrative action without prior court approval and without the presumption that any segregative effects are vestiges of its past unlawful discrimination. One such action may be to cut back on previously court-ordered busing.[127] Finally, as a general matter, plaintiffs challenging a school board action that appears resegregative must prove a new discriminatory intent on the part of the school board. In addition, such plaintiffs are collaterally estopped from relitigating the issue of the unitary character of the school system.

These effects are interrelated and represent a return to the state of the world that exists for any school system free of a racially discriminatory past. These effects also underlie the seemingly contradictory decisions in *Riddick* and *Dowell* concerning a school board's power to end busing after a finding of unitary status. The court's holding in *Riddick* that a school board can end busing indicates that the plaintiffs, the school board, and the court operate under a different set of assumptions after the school system has been declared unitary.[128]

The Effect of a Finding of Unitary Status on the Role of the Court

Once a school system has achieved unitary status, a court may not further interfere with the affairs of the school board and may not make further remedial orders.[129] The court's judicial power may be exercised only on the basis of a constitutional violation and in the absence of such a violation, the school board's powers are plenary.[130] The responsibility for educational decisions thus returns to the public school officials. This does not mean, however, that the court's jurisdiction ends and the case is dismissed, unless the court specifically so provides.[131]

The Supreme Court recognized in several cases that the court's role in super-

127. See *supra* notes 1-2 and accompanying text.

128. See *supra* note 2 and accompanying text.

129. *See, e.g.*, Vaughns v. Board of Educ., 758 F.2d 983 (4th Cir. 1985). "A district court's jurisdiction to grant further relief in school desegregation cases is not perpetual. . . . 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." *Id.* at 988. *See also* Oliver v. Kalamazoo Bd. of Educ., 640 F.2d 782, 808 (6th Cir. 1980). *See generally* Lively, *supra* note 57, at 55 n.78 ("Once a school system achieves unitary status, a court may not order further relief in response to subsequent changes in neighborhood ethnicity, so-called immutable geographic factors, or demographic shifts for which the system is not held accountable."); Note, 100 HARV. L. REV., *supra* note 57, at 661 ("Direct court supervision lasts only as long as vestiges of the dual system persist.").

130. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

131. *See, e.g.*, Dowell v. Board of Educ., 606 F. Supp. 1548, 1551 (W.D. Okla. 1985), *rev'd*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 107 S. Ct. 420 (1986) (court order finding unitary status also relinquished court's jurisdiction and terminated the case); Mapp v. Board of Educ., 648 F. Supp. 992 (E.D. Tenn. 1986) (court dismissed case after finding that last component of school system, faculty and staff, had become desegregated; court had previously recognized partial unitary status with the exception of faculty and staff). Thus, the court may close the docket on the

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vising a school system is substantially diminished when the system becomes unitary. In *Swann* the Court stated that after a school system is unitary district courts are not "constitutionally required to make year-by-year adjustments of the racial composition of student bodies."[132] The Court implied that the court's power to redress future problems must be based on new constitutional violations by the school board. In *Spangler* the Court similarly recognized that a federal court's remedial powers end when the objective sought has been achieved.[133] Thus, the Fourth Circuit, citing *Swann* and *Spangler*, stated that "[a] district court's jurisdiction to grant further relief is not . . . perpetual. Once a school system has achieved unitary status, a court may not order further relief to counter-act [sic] resegregation that does not result from the school system's intentionally discriminatory acts."[134]

Although a finding of unitary status greatly diminishes the role of the federal court, the court may retain jurisdiction to "assure the maintenance of a unitary system."[135] This is frequently done by requiring the filing of statistical reports on an established schedule.[136] The court may also retain jurisdiction to enforce its outstanding orders.[137] For example, in *Dowell* the court blocked the

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case after the finding of unitary status. Lee v. Macon County Bd. of Educ., 584 F.2d 78, 81 (5th Cir. 1978).

However, the courts should, and often do, retain jurisdiction for a short period of time to assure that new discrimination does not occur. See generally *infra* notes 135-142 and accompanying text. *See also* Gewirtz, *supra* note 68, at 793-94 n.209. This procedure underlies the proposal set forth *infra*.

If the court does expressly terminate its jurisdiction, it retains the discretion to reopen the case under Federal Rule of Civil Procedure 60(b)(6). *See, e.g.*, Dowell v. Board of Educ., 606 F. Supp. at 1557. Under this rule, a court, on a motion, may relieve a party from a final judgment or order for any reason that appears just.

132. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971).

133. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). See *supra* note 67 and accompanying text.

134. Vaughns v. Board of Educ., 758 F.2d 983, 988 (4th Cir. 1985). *See also* United States v. South Park Indep. School Dist., 566 F.2d 1221, 1224 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978) (The finding of unitary status is crucial "because once it 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.").

The result of *Swann* and *Spangler* is that after a finding of unitary status, "resegregation is constitutionally permissible unless found to be the product of intentional official action." Lively, *supra* note 57, at 72.

135. *See, e.g.*, Pate v. Dade County School Bd., 588 F.2d 501 (5th Cir.), *cert. denied*, 444 U.S. 835 (1979). This broad language should not be construed to permit the court to redress resegregative effects that were not caused by intentional school board action. See, e.g., *supra* note 134 and accompanying text. *But see* Mapp v. Board of Educ., 648 F. Supp. 992, 993 (E.D. Tenn. 1986) ("[T]his court is satisfied that unlawful segregation . . . no longer exists. Based upon their conduct for many years, there is no indication that the defendants will take any steps to reinstitute vestiges of segregation. There is thus no demonstrated need to further monitor compliance with orders of this Court.").

136. *See, e.g.*, Lee v. Macon County Bd. of Educ., 584 F.2d 78 (5th Cir. 1978).

137. Dowell v. Board of Educ., 795 F.2d 1516, 1520 (10th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). In such a case, full control over the school system returns to the school board only

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school board's plan to end busing on the basis that the finding of unitary status did not automatically dissolve its prior decrees.[138] Thus, while a finding of unitary status ends the court's active supervision of the case, it does not end its power to ensure compliance with its injunctions that have not been dissolved.

The Fifth Circuit established a procedure for the district courts to follow to finally dismiss a school desegregation case. In *Youngblood v. Board of Public Instruction*,[139] the court vacated a district court order dismissing a school desegregation case after making a finding that the school system had achieved unitary status. The court held that when a school system is declared unitary the district court must retain jurisdiction over the case for at least three additional school years. During these years the school district is required to file semiannual reports with the court setting forth statistical information on the racial balance of various components of the school system's operations.[140] At the conclusion of three years, the court may consider whether the case should be dismissed. The court may not, however, dismiss the action without notice to the plaintiffs and a hearing providing the plaintiffs the opportunity to show cause why dismissal of the case should be further delayed.[141] Subsequent Fifth and Eleventh Circuit cases have embraced the *Youngblood* procedures in determining whether a court should terminate its jurisdiction over the case.[142]

In sum, the courts uniformly hold that while the finding of unitary status does not necessarily terminate the court's jurisdiction, it does greatly reduce the court's remedial powers. There is, by definition, nothing left to be remedied by the court. The court may retain jurisdiction to ensure maintenance of the unitary system by school board compliance with outstanding orders, but it may not make new remedial orders absent proof of new constitutional violations. In a unitary system, the school board, not the federal court, runs the schools.

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after the court has declared the school system unitary *and* has terminated any outstanding injunctions. *See, e.g.*, Note, 100 HARV. L. REV., *supra* note 57, at 661. *See also infra* "Decision to End Busing."

138. The *Dowell* case is discussed in detail *infra*.

139. 448 F.2d 770 (5th Cir. 1971) (per curiam).

140. *Id.* at 771. The reports are to be similar to those required in United States v. Hinds County School Bd., 433 F.2d 611, 618-19 (5th Cir. 1970).

141. 448 F.2d at 771.

142. *See, e.g.*, Ross v. Houston Indep. School Dist., 699 F.2d 218 (5th Cir. 1983); United States v. Texas Educ. Agency, 647 F.2d 504 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). Some of these cases, however, have applied the *Youngblood* procedures to a finding of unitary status, not to a decision to dismiss the case after a finding of unitary status. *See, e.g.*, Pitts v. Freeman, 755 F.2d 1423, 1426 (11th Cir. 1985). In either case, the courts have consistently required a hearing to determine whether the case should be finally dismissed. The final section of this article suggests the universal application of a similar procedure to the decision to dismiss the case after the finding of unitary status.

It should be noted that decisions of the Fifth Circuit prior to the creation of the Eleventh Circuit are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

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The Effect of a Finding of Unitary Status on the School Board

The most fundamental result of a finding of unitary status is that supervision and control of the schools is returned to the school board. The return of administrative power to the school board has two interrelated effects. First, the school board may consider such factors as housing patterns, demographic changes, and "white flight" in making decisions as to how to best run the schools.[143] Second, the school board may take action with resegregative effects without the presumption that such effects are the result of prior unconstitutional school board action.[144] The school board is limited only by prior court orders that have not been vacated despite a finding of unitary status[145] and by its duty not to take any action that would reinstitute a dual school system or discriminate against any child on the basis of race. In short, after a finding of unitary status, the school board generally operates as if there had never been unconstitutional racial discrimination in the school system.

Prior to a finding of unitary status, the school board is under a continual duty to eliminate all vestiges of racial discrimination from the schools. During such time, the school board may not justify its failure to establish a unitary system by demographic changes or "white flight."[146] Racial disparities that exist prior to a finding of unitary status are presumed to be causally related to the school board's prior unconstitutional discrimination.[147] If demographic changes render a desegregation plan unworkable, the court must adopt another solution. The school board's duty is to dismantle the dual system, and this duty "includes the responsibility to adjust for demographic patterns and changes that predate the advent of a unitary system."[148]

Once the school system is unitary, however, the school board may consider demographic changes in running its schools. As the Fifth Circuit has recognized, "[c]hanges in neighborhood ethnicity taking place after school officials have transformed the system into a unitary one need not be remedied, . . . for school officials are under no duty to adjust for the purely private acts of those who choose to vote with their feet."[149] Thus, for example, ethnic residential preferences and demographic changes for which school officials bear no responsibility may be considered in determining whether further

143. See generally *supra* notes 60 & 91 and accompanying text.

144. See generally *supra* note 93 and accompanying text.

145. Dowell v. Board of Educ., 795 F.2d 1516 (10th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). See *supra* note 138 and accompanying text. The *Dowell* case is discussed in detail *infra*.

146. *See, e.g.*, Valley v. Rapides Parish School Bd., 646 F.2d 925, 937 (5th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982) (rejecting school board's argument, where school system not yet unitary, that continued existence of one-race schools was justified by demographic changes). See also *supra* notes 61 & 91 and accompanying text.

147. *See, e.g.*, Vaughns v. Board of Educ., 758 F.2d 983, 991 (4th Cir. 1985) (where the school system has not achieved unitary status, "it is settled law that plaintiffs were entitled to a presumption that current placement disparities were causally related to prior segregation and that the burden of proving otherwise rested on the defendants."). See also *supra* note 93 and accompanying text.

148. Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425, 1435 (5th Cir. 1983).

149. *Id.* (citing Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 435-37 (1976)).

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desegregation can be achieved.[150] Similarly, a school board may consider "white flight" in stabilizing school integration even if the school board's plan has resegregative effects.[151]

A finding of unitary status not only expands the factors a school board may consider in running the school system, it also affects the changes a school board may make in the school system and the consequences of those changes. Prior to a finding of unitary status, "official action that has the *effect* of perpetuating or reestablishing a dual school system violates the defendant's duty to desegregate."[152] As a result, school board action that has resegregative effects may be enjoined without a showing that the school board intended to discriminate. After a finding of unitary status, however, there is no presumption that official action that has a discriminatory or resegregative effect violates the Constitution. The finding of unitary status severs the causal relationship that otherwise may have existed between the resegregative effects and the school board's prior unlawful conduct. Thus, the school board is in the same position as any state actor where proof of an equal protection violation requires proof of an intent to discriminate.[153]

The combined effects of the finding of unitary status have permitted school officials to make many administrative decisions they could not have made in the interim between the implementation of a desegregation plan and the finding of unitary status.[154] These decisions include opening and closing schools,[155] constructing new schools in particular locations,[156] ability grouping,[157] and curtailing busing.[158] As long as the school board's plans are impartially maintained and administered, the school board is free to implement them even if they disproportionately impact on one race. A finding of unitary

150. *Id. See also* Ross v. Houston Indep. School Dist., 699 F.2d 218, 225 (5th Cir. 1983). "Once a system becomes unitary, school officials need not make adjustments to changing residential or attendance patterns even if they result in resegregation." Lively, *supra* note 57, at 65.

151. Riddick v. School Bd., 784 F.2d 521, 540 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

152. Pitts v. Freeman, 755 F.2d 1423, 1427 (11th Cir. 1985) (emphasis in original). See also *supra* note 93 and accompanying text.

153. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976). Similarly,

> After a declaration of unitariness, since all vestiges of the violation have by definition been eradicated, the school board may adopt a neighborhood assignment system or choice system even if it produces more segregation than under the court's remedial plan, provided that the board's action is not intentionally discriminatory and therefore is not a new constitutional violation.

Gewirtz, *supra* note 68, at 793-94 n.209. The issue of intent is addressed *infra*.

154. A finding of unitary status returns to school board officials the responsibility for educational decisions that can then be made even if they result in resegregative effects, assuming, of course, the decisions were made without purposeful discriminatory intent.

155. Mapp v. Board of Educ., 630 F. Supp. 876 (E.D. Tenn. 1986). In *Mapp* the court held that the school board could establish a magnet school for academics at one high school and close another high school despite apparent resegregative effects.

156. Lee v. Anniston City School Sys., 737 F.2d 952 (11th Cir. 1984).

157. Castaneda v. Pickard, 781 F.2d 456 (5th Cir. 1986).

158. Riddick v. School Bd., 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). *But see* Dowell v. Board of Educ., 795 F.2d 1516 (10th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). These cases are discussed *infra*.

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status returns to the school board the plenary power to run the schools free from any stigma from its earlier unconstitutional conduct.

The Effect of a Finding of Unitary Status on Plaintiffs Seeking to Challenge Subsequent School Board Action

The effect of a finding of unitary status on plaintiffs seeking to challenge school board action mirrors the effect on the school board. As noted above, after a finding of unitary status there is no longer a presumption that school board actions that have resegregative effects are the result of constitutional violations embodied in the formerly dual school system. Accordingly, the school board is free to take administrative action that may result in discriminatory or resegregative effects subject only to the constraint common to all state actors not to intentionally discriminate on the basis of race.

The Supreme Court held in *Washington v. Davis* that to establish a prima facie case of discrimination under the fourteenth amendment the plaintiff must produce evidence that the defendant's actions resulted from discriminatory purposes.[159] Thus, plaintiffs seeking to enjoin a school board action after a finding of unitary status cannot rely solely on segregative effects to establish a cause of action; they must prove that the school board acted with discriminatory intent.[160] Further, the presence of discriminatory intent may not be inferred solely from the disproportionate impact of a particular school board action on one race.[161] In short, it is the intent to discriminate that marks the difference between permissible de facto segregation and unconstitutional de jure segregation.[162]

The lower courts are in agreement that the burden shifts to the plaintiffs to establish discriminatory intent once a de jure segregated school system has been found to be unitary. For example, in *Riddick* the school board adopted a new student assignment plan eight years after the Norfolk school system had been declared unitary. The plaintiffs challenged the plan, arguing that it had resegregative effects and that the school board had the burden of showing that the resegregative effects were not related to earlier constitutional violations. The Fourth Circuit disagreed, stating that after a finding of unitary

159. 426 U.S. 229 (1976).

160. *See, e.g.*, Riddick v. School Bd., 784 F.2d at 538. See also *infra* note 163. In other words, prior to a finding of unitary status the school board bears the burden of proving that any of its actions that reintroduce segregation are consistent with its duty to dismantle the dual school system. See *supra* notes 90-94 and accompanying text. After the finding of unitary status, however, the burden shifts to the plaintiffs challenging the school board action to prove that the school board acted with discriminatory intent. See generally Note, 100 HARV. L. REV., *supra* note 57, discussing allocation of the burden of proof after a finding of unitary status. The Supreme Court has not specifically addressed the issue of the shifting burden of proof after a finding of unitary status. *See generally id.*

161. Washington v. Davis, 426 U.S. 229, 242 (1976). The Court stated that standing alone, disproportionate impact "does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Id.* (citation omitted).

162. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). See *supra* note 66 and accompanying text.

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status "a plaintiff must prove that the school board acted with an intent to discriminate in adopting a new student assignment plan."[163] The court added that it rejected "plaintiffs' argument that the Norfolk school board must continue to justify all of its actions because of the history of segregation."[164] The only factor that may relieve the plaintiff of this burden is the existence of outstanding court orders constraining school board actions.[165]

The effect of a finding of unitary status on plaintiffs' burden in challenging school board action is not insignificant. Allocation of the burden of proof is often dispositive of the merits of a claim. Since discriminatory impact alone is not sufficient to establish discriminatory intent,[166] the plaintiffs must present other evidence to establish that the school board had a discriminatory purpose in adopting a particular plan. This is not always easy. Statistics alone will rarely suffice,[167] and expert testimony must be balanced against the testimony of the school board's experts. Further, despite the burden on the plaintiffs, the school board may proffer reasons as to why it adopted the plan; if the court finds that the reasons have a factual basis and are reasonable, it may be nearly impossible for the plaintiffs to prevail. In *Riddick*,

163. Riddick v. School Bd., 784 F.2d 521, 538 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986) ("We hold that the burden of proving discriminatory intent attaches to a plaintiff once a de jure segregated school system has been found to be unitary."). *Accord* Pitts v. Freeman, 755 F.2d 1423 (11th Cir. 1985) (because school system not yet unitary, district court erred in holding that planned expansion of high school could be enjoined only if it was motivated by discriminatory intent). *But see* Vaughns v. Board of Educ., 758 F.2d 983, 992-93 (4th Cir. 1985) (requiring plaintiff to prove intentional discrimination with regard to changes in busing even though system not unitary). See also *infra* note 171.

164. Riddick v. School Bd., 784 F.2d at 539.

165. Dowell v. Board of Educ., 795 F.2d 1516 (10th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). This issue is discussed *infra*.

One commentator has recently argued that plaintiffs challenging school board actions taken after a finding of unitary status should not automatically have to prove discriminatory intent by the school board. Note, 100 HARV. L. REV., *supra* note 57, at 667-69. The commentator maintains that "[u]nitariness does not demonstrate that the intent that created the dual system is gone, that attitudes have altered," and that "[h]inging the allocation of the burden of proof exclusively on unitariness . . . may attribute more substance to a finding of unitariness than it warrants." *Id.* at 667. The commentator proposes a rule that would first require the plaintiffs "to make a prima facie showing that the action will cause a substantial resegregation of the school system," and that after this showing, "the burden should shift to school authorities to prove that the action did not result from an intent to discriminate." *Id.* at 669. Such a rule, it is suggested, is consistent with the goal of preventing the reestablishment of a dual school system.

This proposal has merit. However, the same end could be accomplished by having courts recognize unitary status more cautiously, and by maintaining selected court orders in effect for a short period after the finding of unitary status. See *infra* "Returning Control Over School Board Decisions to the School Board." In any case, at some point the school board should be deemed to be free from any stigma from its prior unconstitutional conduct. There should not be a lingering presumption of wrongdoing ad infinitum.

166. A discriminatory impact is, however, relevant to the determination of intent. *See, e.g.*, Riddick v. School Bd., 784 F.2d 521, 543 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986) (citing Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979) and Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979) (*Dayton II*)).

167. *See, e.g.*, R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 20, at 413-14.

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for example, the court found that the plaintiffs failed to sustain the burden of proving discriminatory intent in part because the school board was able to justify its reassignment plan by its overall benefits to the school system, notwithstanding certain resegregative effects.[168]

There is some question whether a finding of partial unitary status[169] is sufficient to shift the burden of proving discriminatory intent to plaintiffs challenging school board action taken in one of the unitary components. In *Oliver v. Kalamazoo Board of Education*,[170] the court placed the burden of proving discriminatory intent on plaintiffs challenging a student assignment plan where the school system had achieved unitary status in student assignments but not in other respects.[171] Similarly, in *Mapp v. Board of Education* the court held that plaintiffs had the burden of proving discriminatory intent with regard to school board action opening and closing schools where the school system was found unitary in all respects but faculty assignments.[172] These cases appear to be the exception, although they are consistent with cases such as *Ross v. Houston Independent School District*.[173] In *Ross* the court held that the school system achieved unitary status despite a failure to achieve an integrated student body. If the concept of partial unitary status is a viable one, as *Ross*

168. 784 F.2d at 543. In *Riddick* the court stated that:

> [T]he evidence reveals that Norfolk's neighborhood school assignment plan is a reasonable attempt by the school board to keep as many white students in public education as possible and so achieve a stably integrated school system. It also represents an attempt to improve the quality of the school system by seeking a program to gain greater parental involvement. While the effect of the plan in creating several black schools is disquieting, that fact alone is not sufficient to prove discriminatory intent.

Id.

While policies that attempt to stem "white flight," like the plan upheld in *Riddick*, may be "vulnerable to criticism that they bend to racist sentiments," such policies "may represent one of the few options for providing to the largest possible number of students in our urban setting some semblance of a desegregated education." Lively, *supra* note 57, at 71.

169. That is, a finding of unitary status in only certain components of the school system's operations. See *supra* note 75 and accompanying text.

170. 640 F.2d 782, 810-11 (6th Cir. 1980).

171. *See also* Vaughns v. Board of Educ., 758 F.2d 983, 991 (4th Cir. 1985); Bradley v. Baliles, 639 F. Supp. 680, 686-87 (E.D. Va. 1986). In *Bradley*, the court briefly discussed *Oliver, Vaughns*, and the burden of proof where the school system is not unitary in all respects. 639 F. Supp. at 686-87. The court noted that the Fourth Circuit in *Vaughns* interpreted *Oliver* to place the burden of proof on plaintiffs "only because the school system had achieved unitary status with regard to student assignments." *Id.* The court added that the

> Fourth Circuit therefore appears to have ruled in *Vaughns* that, so long as a school district has achieved unitary status in the area of student assignment, the burden of proving a causal connection between prior segregation and deficiencies that are alleged to currently exist in a school system lies with those who claim that vestiges of the prior discrimination remain in the system.

Id.

172. 630 F. Supp. 876, 884 (E.D. Tenn. 1986).

173. 699 F.2d 218 (5th Cir. 1983). This case is discussed *supra* notes 117-125 and accompanying text.

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indicates and as the Supreme Court suggested in *Spangler*,[174] it follows that courts recognizing partial unitary status may also shift the burden of proving discriminatory intent to plaintiffs challenging school board action in areas declared unitary.

The *Oliver* and *Mapp* decisions recognize that a finding of unitary status must precede placing the burden of proving discriminatory intent on the plaintiffs. Thus, these decisions are consistent with the general proposition that after a finding of unitary status the burden of proving discriminatory intent falls on those claiming that discrimination exists—the real issue is how narrow the finding of unitary status may be.[175] Courts must be cautious, however, in recognizing partial unitary status because of its potential effect on the court's remedial powers, the school board's powers, and the plaintiffs' burden of proving discriminatory intent.

Finally, after a finding of unitary status, plaintiffs challenging school board action are usually collaterally estopped from relitigating the unitary character of the school system. 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."[176] Further, if the plaintiffs or their privies had a full and fair opportunity to contest an issue, they cannot relitigate that issue.[177] In *Riddick*, for example, the court held that the plaintiffs—a class of black schoolchildren—were in sufficient privity with the plaintiff schoolchildren who previously litigated the finding of unitary status to bar the current plaintiffs from relitigating that same issue.[178] That the class members may have changed because of the passage of time was not dispositive.[179] Thus, if a court finds that plaintiffs challenging school board action are the same as, or are in privity with, the plaintiffs who earlier litigated the finding of unitary status, the finding of unitary status may not be challenged in the later lawsuit. This further underscores the significance of a finding of unitary status on plaintiffs seeking to challenge school board action.

174. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). See *supra* notes 74-75 and accompanying text.

175. In Bradley v Baliles, 639 F. Supp. 680 (E.D. Va. 1986), the court acknowledged that there are differing views as to whether a school district must be unitary in all respects, or only in the area where new discrimination is alleged, to have the burden of proving discriminatory intent fall on the plaintiffs. The court did not resolve the issue because it found that the school system was unitary in all respects. This suggests that this issue will arise only in the rare case where the court is willing to find partial unitary status and the plaintiffs challenge school board action taken in the area declared unitary. See *supra* note 171.

176. Montana v. United States, 440 U.S. 147, 153-54 (1979).

177. *See, e.g.*, Riddick v. School Bd., 784 F.2d 521, 532 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

178. *Id.*

179. *Id. See also* Bell v. Board of Educ., 683 F.2d 963, 966 (6th Cir. 1982) (prior decision concerning school board's boundary line changes precluded relitigation of issue fourteen years later even though class members had changed).

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The Decision to End Busing After a Finding of Unitary Status: Riddick v. School Board and Dowell v. Board of Education

The combined effects of a finding of unitary status on the court, the school board, and the plaintiffs challenging school board action converge on the issue of a school board's power to end busing after a finding of unitary status. This issue also magnifies the significance of these effects because of the polarizing and political nature of the school busing issue.[180] But the issue of ending busing is not analytically different from the issue of the school board's power to take other administrative action after a finding of unitary status. The court, the school board, and the plaintiffs challenging school board action are subject to the same constraints whether the school board seeks to open and close schools, alter attendance zones, or end busing.

The *Riddick* and *Dowell* courts addressed for the first time whether the school board has the power to end busing after a finding of unitary status. In both cases the school board had adopted a student reassignment plan that in part curtailed busing. The Fourth Circuit upheld the plan in *Riddick*, and the Norfolk school system became the first school system in the country to end court-ordered busing.[181] In *Dowell*, on the other hand, the Tenth Circuit struck down the plan. Not surprisingly, these cases have been perceived as being inconsistent because of the opposite effects the cases had on busing in each of the school systems.[182] This perception, however, is largely misplaced.

The point on which the cases disagree is whether a finding of unitary status automatically dissolves previous court orders mandating desegregation. *Dowell* expressly held that it does not; *Riddick* implied that it does, though *Riddick* did not expressly address the issue. *Dowell* implied, however, that had the order finding unitary status also expressly dissolved earlier court orders, the school board's plan to curtail busing might have been permissible absent a showing of discriminatory intent. Thus, these cases are as important for their similarities as for their differences.

In *Riddick* the school board adopted a student reassignment plan curtailing busing twelve years after a court order implemented mandatory cross-town busing and eight years after the school system had been declared unitary.[183] The plan was challenged by black schoolchildren who alleged that the plan violated the equal protection clause of the fourteenth amendment. The district court upheld the plan. On appeal to the Fourth Circuit, four issues were raised:

180. See, e.g., *supra* note 58 and accompanying text.

181. See *supra* note 2 and accompanying text.

182. *See, e.g.*, Washington Post, Nov. 4, 1986, at A1, col. 4. *See also* United States v. Lawrence County School Dist., 799 F.2d 1031, 1038 (5th Cir. 1986) (court stated that it "need not address the conflict in the views of the Fourth and Tenth Circuits concerning the burden of proof that must be borne by plaintiffs who seek changes in the administration of a school system after the system has been declared unitary in the sense of being fully integrated"). See *infra* note 195.

183. 784 F.2d at 524-25. The litigation to end segregated schools in Norfolk began in 1956. In 1971 the court adopted a desegregation plan that included mandatory busing. In 1975 the school system was declared unitary, and in 1983 the school board adopted the reassignment plan curtailing busing. See *supra* notes 102-109 and accompanying text.

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(1) whether the 1975 court order declaring the Norfolk school system unitary was applicable to this lawsuit; (2) whether the school system had remained unitary; (3) whether, because of the finding of unitary status, the plaintiffs had the burden of proving that the school board acted with discriminatory intent in adopting the reassignment plan; and (4) whether the school board was motivated by discriminatory intent in adopting the reassignment plan.[184]

With regard to the first two issues, the court held that the doctrine of collateral estoppel precluded relitigation of the 1975 finding of unitary status[185] and that the school system had remained unitary.[186] As to the third and fourth issues, the court held that the finding of unitary status required the plaintiffs to prove discriminatory intent on the part of the school board,[187] which the plaintiffs failed to do.[188] The court limited its holding, however, by stating that its decision was "a limited one, applicable only to those school systems which have succeeded in eradicating all vestiges of de jure segregation. In those systems, the school boards and not the federal courts will run the schools, absent a showing of an intent to discriminate."[189]

There is little remarkable about the court's analysis in *Riddick*. The school board succeeded in ending school busing simply because the court found that the school board had eliminated all effects of its prior unlawful discrimination. As a result the school board could run the school system as it saw fit. Because the school board believed that further busing would exacerbate "white flight" and destabilize the school integration that had been achieved, the school board was within its powers to curtail busing, provided its real purpose was not to discriminate on the basis of race. In short, the court recognized that the court, the school board, and the plaintiffs all operated under a new set of assumptions after the finding of unitary status.

In *Dowell*, as in *Riddick*, the school board adopted an attendance plan that included curtailing compulsory busing of certain students. The plan was adopted thirteen years after the court ordered mandatory busing and eight years after the school system had been declared unitary.[190] The district court held that the plan was constitutional even though it increased the number

184. 784 F.2d at 529.

185. *Id.* at 529-34. See *supra* notes 178-179 and accompanying text.

186. It is not clear why the court addressed the second issue, as it appears to add nothing to the analysis. The court found that the school system achieved unitary status in 1975. Thus, whether the student assignment plan discriminated against the plaintiffs is really the same issue as whether the school system remained unitary. In either case, the court recognized that the finding of unitary status shifts the burden of proving discriminatory intent to the plaintiffs if school board action is challenged as having resegregative effects.

187. 784 F.2d at 534-39. See *supra* note 163 and accompanying text.

188. 784 F.2d at 539-43.

189. *Id.* at 543.

190. Dowell v. Board of Educ., 795 F.2d 1516, 1517-18 (10th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). The *Dowell* case began in 1961. In 1972 the court ordered the implementation of a busing plan. In 1977 the school system was declared unitary, and the school board plan that curtailed busing was adopted in 1985. See *supra* notes 110-111 and accompanying text.

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of racially identifiable schools.[191] On appeal, the Tenth Circuit reversed. The court did not, however, follow the Fourth Circuit's analysis in *Riddick*. Instead, the court only addressed whether the 1972 desegregation order mandating busing was still binding on the school board despite the subsequent finding of unitary status.

The Tenth Circuit stated that the 1972 order implementing busing was a mandatory injunction that had a life, like any injunction may have, beyond the procedural life of the litigation.[192] The court concluded that the injunction was binding on the parties until it was either modified or dissolved. The court specifically found that the 1977 order finding unitary status did not dissolve the injunction.[193] According to the Tenth Circuit, "without specifically dissolving its decree, the court neither abrogated its power to enforce the mandatory order nor forgave the defendants their duty to persist in the elimination of the vestiges of discrimination."[194]

Thus, in order for the plaintiffs to enjoin the new attendance plan they were required only to prove that the mandatory injunction had been violated, not that the school board's action violated the Constitution.[195] The "historical finding" of unitary status did not "preclude the plaintiffs from asserting that a continuing mandatory order" was not being obeyed.[196] Therefore, the court reversed the district court and remanded the case for a determination as to whether the 1972 order should be enforced or modified.

The Tenth Circuit expressly recognized that the Fourth Circuit had "taken a different view" in *Riddick*.[197] However, the court reasoned that even though the finding of unitary status restored unsupervised governance to the school board, "the board must, like any other litigant, return to the court if it wants to alter the duties imposed upon it by a mandatory decree."[198] The court

191. Dowell v. Board of Educ., 606 F. Supp. 1548 (W.D. Okla. 1985), *rev'd*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). The district court's analysis was almost identical to the Fourth Circuit's analysis in *Riddick*.

192. Dowell v. Board of Educ., 795 F.2d at 1521.

193. *Id.* at 1519 ("Nothing in the 1977 order tempered the 1972 mandatory injunction."). The *Dowell* decision should not be read to imply that had plaintiffs attempted to dissolve the court orders at the time of the 1977 order, the court would have had to dissolve the orders. In other words, it is not necessarily inconsistent for certain court orders to continue in effect after the finding of unitary status. See *infra* note 203 and accompanying text.

194. 795 F.2d at 1520.

195. *Id.* at 1523 In a recent Fifth Circuit case the court stated that the *Riddick* and *Dowell* decisions indicated a conflict over the burden of proof that must be borne by plaintiffs who seek changes in the operation of a school system after the system has been declared unitary. United States v. Lawrence County School Dist., 799 F.2d 1031, 1038 (5th Cir. 1986). See *supra* note 182. This is misleading. The conflict is over the effect of the finding of unitary status on previous court orders. The difference in the burden of proof is simply the logical result of the difference in the treatment of this effect of a finding of unitary status.

The *Riddick* and *Dowell* cases are also briefly discussed in Note, 100 HARV. L. REV., *supra* note 57, at 653-43 n.5. This commentator recognized that the courts differed over whether the finding of unitary status automatically terminates previous court orders.

196. 795 F.2d at 1522.

197. *Id.* at 1520 n.3.

198. *Id.* at 1520. See *supra* note 193 and accompanying text.

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added that termination of active supervision of a case does not prevent the court from enforcing its orders; it "is only where the order terminating active supervision also dissolves the mandatory injunction that the governing board regains total independence from the previous injunction."[199] The court noted that in *Riddick* the Fourth Circuit seemed "to treat a district court order terminating supervision as an order dissolving a mandated integration plan, despite the absence of a specific order to that effect."[200] The *Dowell* court refused to adopt that view, however, declaring that in *Riddick* the "court makes a bridge between a finding of unitariness and voluntary compliance with an injunction. . . . A finding of unitariness may lead to many other reasonable conclusions, but it cannot . . . convert a mandatory injunction into voluntary compliance."[201]

The Tenth Circuit's characterization of the *Riddick* decision appears correct, although the court in *Riddick* never addressed the merits of the issue addressed in *Dowell*. The court in *Riddick* simply stated that after the 1975 finding of unitary status the school system was "no longer under court order" to continue busing.[202] The court implicitly concluded, for whatever reason, that the 1971 order mandating busing did not survive the 1975 order finding unitary status, despite the absence of a clear signal from either order that an order finding unitary status supersedes earlier desegregation orders. It may be that the court believed that the 1971 order was originally intended to last only until the finding of unitary status. It may also be, as the court in *Dowell* suggested, that the court believed the 1975 order automatically terminated the busing order. In any event, the *Riddick* court did not necessarily imply that a school board did not have to obey previous court orders after a finding of unitary status; it only implied that in the case before it there were no longer any court orders for the school board to obey.

Regardless of how the *Riddick* court reached its conclusion that the school board was not bound by prior desegregation orders, it is clear that the *Riddick* and *Dowell* courts do disagree over whether a finding of unitary status may *impliedly affect* earlier desegregation orders. In other words, the real conflict is over how clear the signal must be that a later court order supersedes an earlier one. The Tenth Circuit's view is that absent a clear statement in a later order dissolving or modifying an earlier order, the earlier order remains in full force and effect.[203] The Fourth Circuit takes the opposite view—

199. 795 F.2d at 1520-21. *See generally* Keyes v. School Dist. No. 1, 653 F. Supp. 1536, 1541-42 (D. Colo. 1987) (citing *Dowell*).

200. 795 F.2d at 1520 n.3.

201. *Id.*

202. Riddick v. School Bd., 784 F.2d 521, 525 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

203. In fact, in *Dowell* the court order finding unitary status strongly implied that the school board remained bound by the earlier desegregation orders. *Dowell*, 795 F.2d at 1519. Thus, *Dowell* is not a case where the court order finding unitary status is simply silent as to its effect on earlier court orders, as is true in *Riddick*. Moreover, *Dowell* does not suggest that had the plaintiffs attempted to dissolve the court orders at the time of the finding of unitary status, the court would have had to dissolve the orders. In other words, the court does not seem to attribute to plaintiffs solely a procedural error. The court orders were designed to maintain a unitary

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that if the order finding unitary status is silent as to its effect on earlier orders, the earlier orders are superseded. The Fourth Circuit's position may simply be that it is inconsistent to recognize the unitary status of a school system and at the same time restrict the school board's operation of its schools. This position is appealing, but it is not without problems.[204] One might argue that the court's duty to vigilantly ensure that desegregation is finally achieved requires the court to expressly dissolve its earlier orders before allowing the school board to take action that might otherwise violate them, even if the school system has achieved unitary status.[205]

The disagreement over whether a finding of unitary status automatically dissolves previous court orders does not set the Fourth and Tenth Circuits completely at odds. *Dowell* implicitly recognized that an order finding that unitary status had dissolved earlier desegregation orders would allow the school board to curtail busing absent proof of a discriminatory intent. Thus, as in *Riddick*, the court in *Dowell* recognized that the finding of unitary status does affect the court's role in overseeing the school system, the powers of the school board, and the plaintiff's burden of proof. *Dowell* merely tempered the full realization of these changes by its view that the school board was still bound by earlier court orders that had not been expressly dissolved. In short, the full implications of *Dowell* are not necessarily inconsistent with *Riddick*. *Dowell* and *Riddick* both recognize that at some point full control of school operations must be returned to the school board; absent a showing of discriminatory intent, the school board is free to run the schools as it sees fit.

In sum, the *Riddick* and *Dowell* decisions, despite their differences, indicate that school busing need not go on forever, and that at some point it will be within the school board's power to curtail busing. At such time, *Riddick* holds and *Dowell* implies, the school board may curtail busing absent a showing of discriminatory intent, just as it may take other administrative action. This result is clearly consistent with the Supreme Court's admonition in *Swann*

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school system, as well as to achieve one. *Id.* at 1520. Thus, the finding of unitary status does not automatically preclude the continued effect of mandatory court orders. The school board must prove an independent need to have the injunction modified or dissolved. *Id.* at 1523. *See also* Note, 100 HARV. L. REV., *supra* note 57, at 653-54 n.5.

The proposal set forth *infra*, involving two levels of hearings to determine whether the school system has achieved unitary status and whether the case should be dismissed, also entails that court orders may remain in effect after the finding of unitary status. The continued life of certain court orders after the finding of unitary status is not necessarily inconsistent with the concept of unitary status. The court may determine that the school system is unitary but that, given the history of the case, continued judicial supervision is warranted to ensure that unitary status has the best chance of being maintained after the court finally relinquishes its jurisdiction. Thus, the final termination of the court's jurisdiction, not the finding of unitary status, may be the point at which *all* court orders will be terminated and the school board will be entirely free to run the school system as it deems best. See *infra* notes 211 & 213 and accompanying text.

204. See *supra* note 203 and *infra* notes 211 & 213 and accompanying text.

205. See *supra* note 203 and *infra* notes 211 & 213 and accompanying text. Under the proposal set forth below, existing court orders, if not terminated when the court finds that the school system has achieved unitary status, will terminate when the court relinquishes its jurisdiction and dismisses the case.

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that there are limits beyond which a court may not go in seeking to dismantle a dual school system.[206] The limits are largely demarcated by the finding of unitary status.

Returning Control Over School Board Decisions to the School Board: A Proposal

The disagreement between the Fourth and Tenth circuits in *Riddick* and *Dowell* in regard to how a finding of unitary status affects earlier desegregation orders suggests the need for a common procedure for courts to follow in relinquishing control over school board decisions. Such a procedure should conclusively determine the nature and duration of a school board's obligations after a finding of unitary status. Courts should not have to guess whether the order finding unitary status was intended to supersede, sub silentio, previous court orders or whether it was merely a declaration of a historical fact. Further, if previous court orders do remain in effect, both the school board and the court should clearly understand what actions the school board must take to be free of federal court control. Finally, such a procedure should ensure that the school board would eventually fulfill its duty to eradicate all vestiges of past discrimination and that federal court supervision of public schools would not needlessly go on forever.

The procedure to end federal court oversight of public school systems should involve two levels of hearings to determine whether the school system achieved full unitary status and whether the case should be dismissed. The first-level hearing should be held upon motion by the school board after a desegregation plan has been implemented and in operation for a period of years. The hearing should be preceded by notice to the plaintiffs, who will have the opportunity at the hearing to show that the school system still retains vestiges of its past dual character. The court should closely scrutinize the school board's progress in desegregating its schools, and the burden of proof should be on the school board to establish that it has in fact eliminated all effects of its prior unlawful conduct.

At the first-level hearing the court should specifically address several points and make specific findings of fact as to each. First, if the court finds that the school system has not achieved unitary status the court should: (1) specifically describe those components of the school system that remain dual; (2) set forth the steps the school board must take to remedy those areas; (3) set forth whether previous court orders remain in effect; and (4) set a date for another first-level hearing to determine whether the school board has succeeded in achieving unitary status. Second, if the court finds that the school system has achieved unitary status, the court must: (1) state whether the school system achieved unitary status in all respects;[207] (2) state whether previous court orders in the same case are modified, dissolved, or remain in full force

206. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 34 (1971).

207. Courts should be reluctant to recognize partial unitary status, so as to avoid piecemeal adjudication of the status of various components of the school system. In addition, the Supreme

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and effect; and (3) if the court found that the school system achieved only partial unitary status or that previous court orders are to remain in effect, state the school board's future obligations in those areas that remain dual or under previous court orders. This way there cannot be any confusion over the school board's powers and the continued scope of the court's remedial authority.

If the court finds that the school system has achieved only partial unitary status, the court should set a date for another first-level hearing to determine whether the school system has achieved full unitary status. At this subsequent hearing, if the court finds that this condition has still not been met, the court should restate the school board's obligations and set a date for another first-level hearing. This procedure should be repeated until the court finds that the school system has become fully unitary.[208]

Once the court finds that the school system has achieved *full* unitary status, the court should follow procedures similar to those adopted by the Fifth Circuit in *Youngblood*.[209] That is, the court should state that it is retaining jurisdiction over the case for a given period of time before finally dismissing the action.[210] While jurisdiction is retained, periodic reports should be filed with the court indicating the continued racial balance in all components of the school system. Further, during this period the court may enforce any previous court orders that remain in force to ensure the maintenance of the unitary system.[211] At the end of this period, the second-level hearing will be held.

Court has made it clear that *all* vestiges of the segregated school system must be eradicated. See *infra* note 208 and accompanying text. See generally *supra* note 175 and accompanying text.

208. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971). But see *supra* note 125 and accompanying text.

209. Youngblood v. Board of Pub. Instr., 448 F.2d 770 (5th Cir. 1971) (per curiam). See *supra* notes 139-141 and accompanying text.

210. In *Youngblood* the time period was three years. The length of this period should depend upon a number of factors, including the severity of the initial constitutional violation(s), the degree of initial and continuing school board recalcitrance to implement desegregation remedies, the overall level of good faith exhibited by the school board, and the complexity of the case. The court should be flexible in adopting this time period and should adopt a period based on the particular facts of the case. See also *infra* note 216.

211. Thus, as in *Dowell*, the finding of unitary status does not necessarily preclude the continued existence of court orders affecting school board operations. The court may determine that certain court orders should continue beyond the finding of unitary status to ensure that unitary status is maintained by the remedial procedures that have proven effective. This does not imply, however, that the court orders should last forever and the school board, despite the finding of unitary status, may never regain full control over the school system. The court orders that continue in effect beyond the finding of unitary status will terminate when the court decides to terminate its jurisdiction and close the case. See *supra* note 203 and accompanying text.

In some cases, it will be the termination of the court's jurisdiction and the dismissal of the case, *along with* the finding of unitary status, that fully restores control to the school board and, for example, marks the point at which resegregation may lawfully begin. See *supra* notes 57 & 134. Although this two-step procedure may diminish the full effect of the finding of unitary status in those cases where the school system will remain subject to certain court orders, this effect will be short term and is justified by the need to ensure that the court was not too hasty in recognizing unitary status. See *infra* note 216 and accompanying text. In these cases the second-level hearing is, in effect, a check on the earlier finding of unitary status.

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This hearing gives the court a final opportunity to determine whether the school system has remained fully unitary and provides the plaintiffs a final opportunity to show why court oversight should continue.[212] Again, the powers and obligations of the school board and the scope of the court's remedial powers during this period should be clearly set out in the order finding unitary status.

If, at the second-level hearing, the court concludes that the school system has remained fully unitary and judicial oversight is no longer necessary, the court should dismiss the case, terminate all outstanding court orders,[213] and close the docket. If the court finds, however, that the school system should remain under the court's oversight for an additional period of time, even though it is fully unitary, the court should not dismiss the case but should reschedule another second-level hearing at a later date. The court should also restate the continuing obligations of the school board, including reporting requirements. Eventually, the court will find that the school system has remained fully unitary and that federal court oversight is no longer necessary. The court should then dismiss the case and state that the school board is no longer bound by any court orders previously issued in the case, i.e., all previous court orders should be expressly dissolved.

The order dismissing the case will mark the point where federal court involvement in the school system is finally and completely over. After the final order, the school board will run the schools free from all court supervision. Plaintiffs seeking to challenge subsequent school board action will have to file a new lawsuit.[214]

This procedure is similar to the procedure some courts already appear to be following. In the Fifth Circuit, for example, where the *Youngblood* procedure was adopted, the courts are required to have two separate hearings—

212. Of course, resegregative changes taken subsequent to the finding of unitary status cannot be remedied absent either proof of a new constitutional violation or proof that an existing court order has been violated. See, e.g., *supra* note 160 and accompanying text. Thus, during the time period between the finding of unitary status and the final dismissal of the case, the court should be primarily concerned with monitoring compliance with existing court orders with a view toward their ultimate termination.

213. If the court order finding unitary status also terminates all existing court orders, the finding of unitary status will mark the time at which full control of the school system returns to the school board. If, however, the finding of unitary status does not also terminate all existing court orders, the court orders that continue to constrain the school board must be terminated at some point before the court relinquishes jurisdiction and terminates the case. If the school system indeed achieved unitary status, the school board must eventually be permitted to freely run the school system subject only to its obligation not to discriminate anew.

The continued existence of court orders that survive the finding of unitary status is not inconsistent with the finding of unitary status if the court orders ensure the maintenance of the unitary system for a limited period of time and, in effect, operate as a check on the initial decision to recognize unitary status. It would, however, be inconsistent with the school board's fulfillment of its constitutional obligations to have the court control school board decisions ad infinitum. See *supra* note 211 and accompanying text.

214. After the case has been dismissed in the second-level hearing, plaintiffs should not be permitted to reopen the case under Federal Rule of Civil Procedure 60(b), absent extraordinary circumstances. This would help ensure that federal court involvement in the school system would in fact finally conclude when the case was dismissed. Compare *supra* note 131.

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one to determine if the school system is unitary and one to determine if the case should be dismissed. However, there does not appear to have been a universal adoption of this procedure even within the Fifth Circuit.[215] Further, this procedure does not require the courts to specifically apprise the parties of their continuing obligations. Because the confusion between *Riddick* and *Dowell* results from a failure of communication, it is crucial that the courts adopt a procedure to relinquish control over school systems that keeps all parties to the litigation, and the court, fully informed of the school board's continuing responsibilities.

The finding of unitary status remains the focus of the desegregation efforts. It is the beginning of the end of federal court oversight of the school system. It cannot be the end itself, however, because the court must have additional time to ensure that it was not too hasty in finding that the school board has completely fulfilled its constitutional duties. Further, those who struggled to achieve unitary status deserve as much assurance as reasonably possible that their efforts will not have been wasted. Thus, the two-step proposal strikes the proper balance between the primary goal of ensuring that the school system has in fact become unitary and the secondary goal of ensuring that federal court oversight of the school system does not needlessly go on forever.[216]

Conclusion

Until the last half of this century, the opportunity for millions of minority schoolchildren to obtain a meaningful education was precluded by law. After 1954 the federal courts vigorously pursued the promise of *Brown I* to ensure that race would no longer be a barrier to equal educational opportunities. But racial prejudices die slowly, if at all. As a result of the widespread opposition to *Brown I*, the federal courts were often forced to take over the school boards' role in running school systems. When the school boards failed in their constitutional duties to convert the dual school systems to unitary ones, the federal courts stepped in to enforce *Brown I's* constitutional mandate.

In many cases, federal court supervision of school systems has lasted more than twenty-five years. In cases such as *Riddick* and *Dowell*, the courts have

215. See *supra* note 142 and accompanying text.

216. After decades of litigation, it is not difficult to understand that a district court might not want to monitor a school system any longer than is absolutely necessary. *See, e.g.*, Mapp v. Board of Educ., 648 F. Supp. 992 (E.D. Tenn. 1986) (court declined to retain jurisdiction and monitor school system after finding the last aspect of the school system to be unitary), discussed *supra* at notes 131 & 135.

The length of the period between the finding of unitary status and dismissal should be based on the particular facts of the case. See *supra* note 210. The court should not lightly determine that no further monitoring is necessary because too much is at stake. The decision in *Mapp* to dismiss the case may have rested largely on the fact that the court had earlier found unitary status in all aspects but one, which in effect gave the court time to monitor the school system's ongoing compliance until the last component of the system was found to be unitary. Mapp v. Board of Educ., 630 F. Supp. 876 (E.D. Tenn. 1986).

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implemented desegregation plans with the goal that at some point the school system will achieve unitary status and all vestiges of the school board's prior unconstitutional conduct will be eliminated. As part of such desegregation plans, the courts often ordered that schoolchildren be bused to previously racially segregated schools. The end of court-ordered busing was a political battle cry of the 1970s. It became a reality in Norfolk in 1986.

The end to mandatory busing is part of the broader issue of ending federal court supervision of school systems. The threshold point in ending federal court oversight is the finding that the school system has acheived unitary status. Once the school system achieves unitary status, the school board regains supervision of the school system and the federal courts' remedial powers are correspondingly reduced. One action the school board may then take is to end busing. Whether the school board will be successful will depend in part on whether previous court orders mandating busing were expressly dissolved or, if not, whether the finding of unitary status automatically dissolved them. The next phase of litigation in the school desegregation cases will address these issues as more and more school systems achieve unitary status and attempt to end busing. The *Dowell* and *Riddick* cases represent the beginning of this phase.

As an increasing number of courts address the effects of the finding of unitary status and the propriety of school board decisions ending busing, the courts must be cautious to ensure that the promise of *Brown I* is not thwarted in the final hour. A procedure, such as the one proposed in this article, should be adopted to ensure that the school boards fulfill their duty to eradicate all vestiges of past discrimination. The courts' primary concern should not be whether federal court oversight, or even busing, will go on forever but whether desegregation has been once and for all achieved. Federal court oversight of school systems and busing should eventually end; but it is the goal of equality, not of administrative convenience, that fulfills the promise of *Brown I*.[217]

217. In April of 1987, the promise of *Brown I* was finally fulfilled in the Topeka, Kansas, public school system. The Topeka school system was one of five parties to Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*). Thirty-three years after the landmark decision in *Brown I*, United States District Judge Richard D. Rogers declared that the Topeka school system has achieved unitary status. *See* Knudsen, *Judge Rules Kan. Schools are "Unitary,"* NAT'L L.J., Apr. 27, 1987, at 7, col. 1.

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