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PROTECTING THE REMEDY OF UNITARY SCHOOLS

Dennis G. Terez*

Once a school system is found to be unitary, should a court withdraw its supervision of the system's desegregation efforts? The Fourth and Tenth Circuits have handled this question differently. This Article analyzes those opinions, finding deficiencies in both. Mr. Terez proposes that findings of unitariness be read to incorporate a permanent injunction prohibiting the return to vestiges of school segregation. Such an implication has procedural and substantive advantages for the protection of the hard-won remedy of unitariness.

INTRODUCTION

The 1986-87 school year marks a significant development in the litigation history of public school desegregation cases, especially as that history relates to the controversial remedy of busing.1 The post-unitary period2 is upon us, and the courts are

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Although I have worked closely on a major school desegregation case as a law clerk, the views expressed in this Article are entirely my own. Throughout the Article, I draw certain analogies to the Cleveland, Ohio desegregation case of Reed v. Rhodes. The analogies are merely for purposes of illustration, and do not in any way reflect the view of the court in the case. I deliberately avoided any discussion of the issues in the two primary cases examined in this Article with Chief Judge Battisti so that this Article would reflect only my personal and professional views. Neither Chief Judge Battisti nor any member of his staff reviewed this Article prior to publication. At the same time, I hope that my year with the Judge has broadened my views on the difficult problems associated with public school desegregation in the United States, and that the experience is not lost in this Article.

1. Following the Supreme Court's holding and clarification in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-31 (1971), the concept of "busing" as used in this Article refers to the transportation of students in a public school system as mandated by a student assignment plan either voluntarily adopted by a particular school board or imposed upon the school district by court order. The pros and cons of busing are far beyond the scope of this Article; however, the reader should keep in mind that it is the desire to return to "neighborhood schools" which led to certain school board action in both the Norfolk and Oklahoma City school districts and it was this action that was challenged by the plaintiffs in the principal cases discussed herein. This Article examines the court opinions resulting from these challenges.

2. The terminology in the area of school desegregation is far from uniform, and this problem adds to the confusion in opinions. See infra note 71 and accompanying text. "Post-
divided over both the limits of permissible conduct by defendants and the reasonable expectations of plaintiffs once a dual school system has been dismantled and unitariness declared. The two recent cases of *Riddick v. School Board of the City of Norfolk* and *Dowell v. Board of Education of the Oklahoma City Public Schools* illustrate this split. In both cases, the appellate courts were required to define the limits of permissible action and reasonable expectations. In both cases, the district courts had declared the public school system to be unitary, had withdrawn from the cases, and had ceased active supervision of the defendants' duty to desegregate the public school systems in question. The action which triggered these recent opinions involved modifications of court-approved desegregation plans to partially eliminate the busing of school children. In both *Riddick* and *Dowell*, the modifications passed by the defendant school boards resulted in an increase in predominantly one-race schools.

This Article examines the opinions in *Riddick* and *Dowell* and analyzes the different holdings and the manner in which the Fourth and Tenth Circuits reached their respective conclusions. Both opinions are inadequate guides for future courts and parties in the post-unitary period. On the one hand, *Riddick* places too severe a burden on plaintiffs and simply gives the defendant school board too much room to maneuver once a public school system has been declared unitary. If the test in *Riddick* is followed, courts may hesi-

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3. As used in this Article refers to the period after which a school system has successfully moved from a dual system, which is intentionally segregated along racial lines, to a unitary system. The implications of a finding of unitariness are in part the topic of this Article.


6. There is no precise definition for "predominantly one-race schools," but schools which are 90% or more one race (the result of the challenged school board actions examined in this Article) would likely fall into this category. The Supreme Court has also referred to such schools as being "racially identifiable." See, e.g., *Green*, 391 U.S. at 435. In the recent opinion of United States v. Lawrence County School Dist., 799 F.2d 1031 (5th Cir. 1986), the Fifth Circuit described racially identifiable schools as vestiges of a discriminatory dual system. Id. at 1043. Although the Fifth Circuit cites both *Riddick* and *Dowell* in its opinion, and seems to side with the *Riddick* approach to the issue, the court explicitly avoided dealing with the circuit conflict because it held that the district court had not yet declared the Lawrence County School District to be unitary. Id. at 1038. A district court also followed the *Riddick* approach in *Mapp v. Bd. of Educ. of the City of Chattanooga*, 630 F. Supp. 876, 884 (E.D. Tenn. 1986), but this case was decided prior to the Tenth Circuit's opinion in *Dowell*. 
tate to make findings of unitariness for fear that the school system will quickly revert to a dual system rendering the efforts of past decades futile. On the other hand, the court in Dowell reaches the correct result by analyzing the parties’ burdens of proof through the use of language normally associated with permanent injunctions. Unfortunately, the court’s reasoning is strained to the point of being disingenuous; thus, Dowell, too, is of little help to courts and parties dealing with this problem in the future. Finally, by denying writs of certiorari in both cases on November 3, 1986, the Supreme Court refrained from providing direct guidance in this area.7

To remedy the inadequacies of both opinions, this Article proposes a framework for analyzing the legality of school board action after unitariness has been found. This method of analysis is based primarily on the general history of public school desegregation in the United States, and on the key concepts underlying Supreme Court opinions addressing the issue of remedy in public school desegregation cases. Like all litigation, lawsuits challenging public school segregation must end at some point regardless of the difficulty in achieving full compliance with the ordered remedy.8 However, simple common sense as well as the holdings in Brown v. Board of Education9 and its progeny teach us that the Supreme Court could not possibly have intended to impose a remedy on the public schools which would practically vanish once a particular school system was declared unitary. Brown and subsequent cases mandate unitary schools; a finding of unitariness itself, therefore, should be interpreted to incorporate an injunction which permanently prohibits the defendants from retracting to a dual system of public schools. Even under this proposed standard, the legal bounds of unitariness must remain flexible, as the Supreme Court has continually held, but there are indeed permanent limits on de-

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7. 107 S. Ct. 420 (1986). As the Washington Post reported on November 4, 1986, “the mixed signals left both sides guessing as to the high court’s thinking on the basic issues.” Washington Post, Nov. 4, 1986, at A1, col. 3. Parties will no doubt interpret these denials of certiorari as an affirmation of the lower court rulings. This is, however, a dangerous step to take with Riddick and Dowell. Although the appellate court in Dowell makes a conscious effort to limit itself to the narrow procedural question before it, see infra text accompanying notes 45-46, it explicitly rejects the reasoning underlying the holding in Riddick. The recent denial of certiorari in both cases perpetuates the split in reasoning, analysis, and holding.

8. The court’s statement in Mapp is an example of judicial sentiment on this point: “This case has been pending in this Court too long. A school desegregation case is certainly a special kind of case. However, there is no reason why it must remain pending forever.” Mapp, 630 F. Supp. at 888 (citation omitted).

fendants' actions once a school system has been declared unitary. Defendants should bear the burden of persuasion, under the standards of modifying permanent injunctions, when they desire to move significantly beyond those limits.

It is doubtful whether the action taken by the school boards in Riddick and Dowell would be allowed when examined under this test of unitariness. In both cases, the partial termination of busing results in a rather substantial number of predominantly one-race schools. In other words, the actions being challenged move the public school systems in the direction of dual systems in violation of the permanent injunction to remain unitary. Thus, this Article concludes that the actions taken by the school boards in Riddick and Dowell should be prohibited.

I. RIDDICK v. SCHOOL BOARD OF THE CITY OF NORFOLK

A. History of Litigation

Litigation over desegregating the public school system in Norfolk, Virginia began in 1956. The Fourth Circuit upheld the district court's finding that the Norfolk school board operated a dual school system based on race, and the court ordered the defendants to institute a unitary school system in Norfolk. A remand followed to allow consideration of the Supreme Court's holding in Swann v. Charlotte-Mecklenburg Board of Education on expanded remedies in public school desegregation cases. In 1972, the Fourth Circuit finally approved a plan which included cross-town busing to accomplish the goal of unitary schools.

The district court supervised compliance with its orders through annual reports. On February 14, 1975, the district court found that the public school system of Norfolk was unitary and accordingly dismissed the action.

14. The text of Judge John A. MacKenzie's order dismissing Beckett states: It appearing to the Court that all issues in this action have been disposed of, that the School Board of the City of Norfolk has satisfied its affirmative duty to desegregate, that racial discrimination through official action has been eliminated from the sys-
The recent *Riddick* case arose when the Norfolk school board decided in 1983 to abolish cross-town busing of elementary school students and to place in its stead a student assignment plan based on geographic zones. The school board moved the district court to reinstate *Beckett* and filed a separate civil action seeking approval of its proposed modification to the integration plan. The plaintiffs in *Riddick* then filed a class action suit challenging the school board’s action, which prompted the school board to withdraw its motion and to voluntarily dismiss the newly filed action.

### B. The Challenged School Board Action

Under the desegregation plan, a school in Norfolk was racially identifiable as being a “black school” if its enrollment consisted of more than 70% black students. In 1977, one elementary school was over 70% black; by 1981 seven elementary schools were over 70% black. By 1983, blacks made up 58%, and whites made up 42%, of school enrollment.

In 1981, an ad hoc committee appointed by the school board examined the “feasibility of reducing cross-town busing” in light of the “continued loss of white students from the public school system and the drastic drop in parental involvement.” An expert’s report concluded that “mandatory busing had led to significant white flight and that if busing continued, the Norfolk school system would be 75% black by 1987.”

Two plans for modifying student assignment, Plan I and Plan II, resulted from the school board’s examination of the problems facing student enrollment in Norfolk public schools. Plan I, which the school board adopted by a five to two vote, eliminates cross-town busing for students in grades kindergarten through six. All elementary schools for these grades become neighborhood schools, although the attendance zones are gerrymandered to achieve “maximum racial integration.” Under this plan, twelve of the city's

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16. *Id.* at 525-28.
17. *Id.*
18. *Id.* at 526.
19. *Id.*
20. *Id.* at 527.
thirty-six elementary schools would be 70% or more black,\textsuperscript{21} and of these twelve schools, ten would be 97% or more black.

Plan I also contains a majority-minority (M/M) transfer option whereby any student attending a school where his race constitutes 70% or more of the student body can transfer to a school where his race constitutes less than 50% of the student body. Transportation for this M/M program is provided free of charge. According to school board estimates, ten to fifteen percent of students eligible for the M/M program would take advantage of it; if 20% of eligible black students participate in the program, only one of six schools would remain more than 70% white. All ten of the predicted "black schools" would remain above 95% black.

Plan II, which was rejected by the school board, called for a redrawing of attendance zones and an increase in the number of students bused but a reduction in the length of the bus rides for elementary school students. Under Plan II, no school would have less than 25% of any one race.

C. \textit{The Holdings in Riddick}

In July 1984, the district court upheld Plan I as constitutional, basing its reasoning primarily on the 1975 order which dismissed the original desegregation action.\textsuperscript{22} In the district court's view, the 1975 finding of unitariness "had the effect of placing the burden of proof on the plaintiffs instead of the defendant school board. The burden was on the plaintiffs to show that the proposed plan was adopted by the board with an intent to discriminate on the basis of race."\textsuperscript{23} Plaintiffs failed to meet this burden. Furthermore, in the

\textsuperscript{21} This compares with four under the desegregation plan before modifications were made. \textit{Id.} This particular statistic may be inaccurate, since the court mentions in another part of its opinion that in 1981 there were seven elementary schools which were over 70% black. \textit{Id.} at 526.


\textsuperscript{23} This is also the manner in which the Fourth Circuit viewed this burden. \textit{Riddick}, 784 F.2d at 528. In \textit{Riddick}, the district court had made a finding of unitariness years before this burden of proof was placed on the plaintiffs who challenged the school board action; therefore, the district court was clearly within the post-unitary period when it acted in 1984. Another district court in Virginia recently imposed the same burden on the plaintiffs in the very same opinion in which it found the school system to be unitary. \textit{Bradley} v. Baliles, 639 F. Supp. 680, 687 (E.D. Va. 1986). A third court recently applied the standard enunciated in \textit{Riddick} to a case in which the defendants had succeeded in implementing the court-approved desegregation plan in all respects except in faculty and staff assignments, i.e., the \textit{Riddick} standard was applied in the absence of a finding of unitariness. \textit{Mapp} v. Bd. of Educ. of the City of Chattanooga, 630 F. Supp. 876, 884, 888 (E.D. Tenn. 1986). This appears to be the most extreme application of the \textit{Riddick} standard, since the court's language strongly implies
district court's view, the public school system of Norfolk remained unitary under Plan I.\textsuperscript{24}

Reviewing the district court's finding of unitariness under a "clearly erroneous" standard pursuant to Fed. R. Civ. P. 52(a), the Fourth Circuit upheld the lower court.\textsuperscript{25} Once it reached this conclusion, the appellate court grappled with the legal effect of a finding of unitariness. In short, it attempted to define the boundaries of the defendants’ permissible conduct and of plaintiffs’ reasonable expectations after a district court has found a public school system to be unitary and has dismissed a case. Relying heavily on \textit{Pasadena City Board of Education v. Spangler}\textsuperscript{26} and \textit{Swann v. Charlotte-Mecklenburg Board of Education},\textsuperscript{27} the court noted that a district court's powers to remedy racial segregation in public schools are broad but not plenary;\textsuperscript{28} they are circumscribed by the nature of the constitutional wrong involved. Once it is clear that the unlawful segregation has been completely eliminated, the role of the district court ends. The Fourth Circuit agreed with the district court "that \textit{Swann} and the cases that follow, both in the Supreme Court and in the courts of appeals, require a plaintiff to prove discriminatory intent on the part of the school board of a unitary school system."\textsuperscript{29}

\begin{itemize}
  \item that the adoption of the desegregation plan is sufficient to automatically shift the entire burden to the plaintiffs regardless of the effectiveness of such a plan. "The effect of the implementation of the Plan was, with the exception of faculty/staff assignments, to establish a unitary school system in compliance with equal protection." \textit{Id.} at 884. \textit{But see Lawrence County School Dist., 799 F.2d at 1037:} "It should go without saying that a system does not become unitary merely upon entry of a court order to transform it into a unitary system." \textit{Id.}
  \item Every piece of evidence in this case points to the fact that the Norfolk school system is unitary: the Norfolk School Board is an integrated body, the Norfolk school administration is racially balanced, the racial composition of the faculty and staff is mixed, and the overwhelming majority of school children, of both races, on the elementary, junior and senior high school levels, attend schools whose student bodies are racially mixed. In addition, there has been no contention, nor could there be one, that the extracurricular activities, transportation network and school facilities are operated in a dual fashion. Finally... there has been no challenge to any of the Board's actions in the \textit{Beckett} litigation since some time before the 1975 Order was entered.
  \item \textit{Riddick}, 627 F. Supp. at 819.
  \item The Fourth Circuit reasoned: "The district court reviewed all six factors set out in \textit{Green} and found that Norfolk's school system had remained unitary since 1975. There is substantial evidence in the record to support such a finding. We therefore affirm its holding." \textit{Riddick}, 784 F.2d at 534. The six factors to which the court makes reference are from \textit{Green}, 391 U.S. at 435.
  \item 427 U.S. 424 (1976).
  \item 420 U.S. 1 (1971).
  \item The court stated: "In situations in which a school board has defaulted on its obligations, the court can use its broad powers to fashion a remedy in order to assure a unitary system." \textit{Riddick}, 784 F.2d at 535 (citing \textit{Swann}, 402 U.S. at 16).
  \item \textit{Riddick}, 784 F.2d at 537.
\end{itemize}
The Fourth Circuit then affirmed the lower court's holding that plaintiffs had failed to establish discriminatory intent on the part of defendants in adopting Plan I, finding that the record contained sufficient facts to indicate that white students were leaving the public schools because of busing. Because this apparently was the reason the school board adopted Plan I in the first place, the court concluded that the school board's action was constitutional and did not violate the mandate to establish unitary schools in Norfolk.

II. *Dowell v. Board of Education of the Oklahoma City Public Schools*

A. *History of Litigation*

The lawsuit which resulted in court-ordered desegregation of the Oklahoma City public schools began in 1961 and continued until 1977. During this period of time, the district court approved a comprehensive plan for transforming the dual system of education into a unitary system, but in 1972 Judge Luther L. Bohanon vacated such orders and replaced the previous plan with one entitled: "A New Plan for Unification for the Oklahoma City Public School System," otherwise known as the Finger Plan.31

The Finger Plan, which was instituted during the 1972-73 school year, required some busing, and adopted a standard of 20% black enrollment as a starting point for creating a unitary system; however, this was not to be viewed as "an inflexible requirement." Under the Finger Plan, busing affected black students in grades one through four. White fifth graders were bused to fifth grade centers. Certain neighborhood schools in integrated areas remained unchanged and qualified as "stand alone schools." The goal for elementary schools was to achieve schools of more than 10% but less than 35% black enrollment. Junior and senior high schools were desegregated through feeder patterns and busing to obtain schools with between 15 and 30% black enrollment.

In approving the Finger Plan for desegregating Oklahoma City

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32. *Dowell*, 338 F. Supp. at 1269. "It is not necessary that every school in the District always reflect the racial composition of the total system." *Id.*
public schools, the district court placed certain restraints on the defendant school board if it chose to modify the plan in the future:

The Defendant School Board shall not alter or deviate from the New Plan without the prior approval and permission of the court. If the Defendant is uncertain concerning the meaning or intent of the plan, it should apply to the court for interpretation and clarification. It is not intended that the school authorities be placed in a "strait jacket" in the administration of the plan, but it is essential that the court be informed of any proposed departure from the sanctioned program. The court is committed to the principles of the plan, but is not inflexible concerning the details.\textsuperscript{33}

The district court explicitly retained jurisdiction "for all further appropriate orders."\textsuperscript{34}

Five years later, the school board filed a motion to close the case on the grounds that the defendants had "eliminated all vestiges of state-imposed racial discrimination in its school system and [was] . . . operating a unitary school system."\textsuperscript{35} On January 18, 1977, Judge Bohanon entered an order terminating the court's jurisdiction in \textit{Dowell}.\textsuperscript{36}

Litigation in the case began once again on February 19, 1985 when plaintiffs filed a motion to reopen the case on behalf of black school children in Oklahoma City in response to a student reassignment plan proposed by the school board which eliminated busing for students in grades one through four.

\textbf{B. The Challenged School Board Action}

During the period between the initiation of the Finger Plan and the filing of the motion to reopen the case, the number of students

\textsuperscript{33} \textit{Id.} at 1273. The court further noted that the order approving the Finger Plan was binding on all defendants, their present and their future agents.

\textsuperscript{34} \textit{Id.} at 1274.


\textsuperscript{36} The order read in part:

[T]he School Board, under the oversight of the Court, has operated the [Finger] Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the Court . . . . Now sensitive to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court . . . .

\textbf{ACCORDINGLY, IT IS ORDERED:}

Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal.

\textit{Id.}
attending school in the Oklahoma City school district dropped by approximately 41%. The student population in 1971 was 23.4% black; in 1985, the student population was 38.3% black.

In 1984, three of the city's school board members began a study of the district's kindergarten through fifth grade schools. In the period since the Finger Plan was instituted, the number of "stand alone" schools, schools that had achieved "natural integration," had increased. The committee reported that as a result of this, an increasing number of black students who were previously bused into the newly established "stand alone" schools were required to be reassigned. This, in turn, increased "the busing burden in terms of time and distance on young black children in the first through fourth grades." The committee was also troubled by a decline in parental involvement in the educational process.

In response, the school board adopted a new student reassignment plan for the 1985-86 school year by a unanimous vote. Busing outside the immediate neighborhood was eliminated for grades kindergarten through four. An equity committee was established "to assist the equity officer and recommend ways to integrate students at any racially identifiable elementary schools several times each year." Also, an M/M program was established for elementary school children. Under the new student reassignment plan, twenty-two of the district's sixty-four elementary schools will be 90% or more white and non-black minorities. Eleven schools will be 90% or more black.

C. The Holdings in Dowell

The district court in Dowell sanctioned the school board's adoption of the new student assignment plan, holding that the finding of unitariness in 1977 applied to the current plaintiffs and thus barred their alleged claims under the principles of res judicata and collateral estoppel. In language very similar to that used by the district court in Riddick, the court held that the Oklahoma City school district continued to be unitary under the new plan. The existence of
racial identity, according to the court in Dowell, is not unconstitutional without a showing that such schools were created on the grounds of racial discrimination.\textsuperscript{42} Since discriminatory intent under Arlington Heights v. Metropolitan Housing Development Corp.\textsuperscript{43} and Washington v. Davis\textsuperscript{44} cannot be inferred solely from disproportionate impact, the district court held that the school board did not adopt the new student reassignment plan with the purpose of racially discriminating against students. Finally, since the plaintiffs were unable to show special circumstances which would warrant relief through reopening the case, the court denied the plaintiffs' motion.

The Tenth Circuit, however, reversed the lower court's decision. At the outset of its opinion, the appellate court was cautious to note that it was addressing "only the precise question of whether the trial court erred in denying the motion to reopen."\textsuperscript{45} The Tenth Circuit went on to hold that:

While the principles of res judicata may apply in school desegregation cases, a past finding of unitariness, by itself, does not bar renewed litigation upon a mandatory injunction. Moreover, when it is alleged that significant changes have been made in a court-ordered school attendance plan, any party for whose benefit the plan was adopted has a right to be heard on the issue of whether the changes will affect the unitariness of the system. In such circumstances, it is not necessary for the party seeking enforcement of the injunction to prove the changes were motivated by a discriminatory intent. Accordingly, we conclude that the trial court erred in not reopening the case.\textsuperscript{46}

Although the Tenth Circuit carefully limited the issue before it, the court went beyond in its reasoning and criticized the Fourth Circuit's approach to the post-unitary period in Riddick. The Tenth Circuit disagreed with the Fourth Circuit because of the latter's "bridge between a finding of unitariness and voluntary compliance with an injunction."\textsuperscript{47} According to the Tenth Circuit, "[a]
finding of unitariness may lead to many other reasonable conclusions, but it cannot divest a court of its jurisdiction, nor can it convert a mandatory injunction into voluntary compliance.48 While discussing the holding in Riddick, the appellate court in Dowell also dealt with the Government's position that once a finding of unitariness is made, "school officials are free to choose among myriad locally acceptable methods of student assignment, as long as they do not act with discriminatory intent."49 The Tenth Circuit reminded the Government that "the purpose of court-ordered school integration is not only to achieve, but also to maintain, a unitary school system."50

The key to the appellate court's reasoning in Dowell is its view that the district court's 1977 order closing the case did not vacate or modify the 1972 order requiring the school district to implement the Finger Plan.51 According to the appellate court, since the 1972 order requiring the district to bus children continues to have full force and effect, the plaintiffs were merely trying to enforce the 1972 order and to perpetuate the duties of the school district under that order by filing their motion to reopen the case.52 Under the language of mandatory injunctions, the plaintiffs thus enjoy the continuation of the obligations the order places on defendants beyond the procedural life of the specific case.53 Since the plaintiffs have a right to a full determination as to whether the mandatory injunction has been violated, the district court erred in denying their motion to reopen the case.

Of course, a court can alter mandatory injunctions when equity so requires,54 but only when such modifications are based on a

48. Id.
49. Brief of United States as Amicus Curiae at 14 (Nov. 26, 1985), Riddick v. School Bd. of the City of Norfolk, 784 F.2d 521 (4th Cir. 1986). In both Riddick and Dowell, the Government entered as amicus curiae. Its position in both cases was virtually identical to the holding in Riddick.
50. Dowell, 795 F.2d at 1520 (emphasis in original) (citing Keyes v. School District No. 1, Denver, 609 F. Supp. 1491, 1515 (D. Colo. 1985)). In a footnote, the court also cited Lee v. Macon County Bd. of Educ., 584 F.2d 78 (5th Cir. 1978), and Graves v. Walton County Bd. of Educ., 686 F.2d 1135 (11th Cir. 1982).
52. Id. at 1521.
53. Id. (citing E.E.O.C. v. Safeway Stores, Inc., 611 F.2d 795 (10th Cir. 1979), cert. denied, 446 U.S. 952 (1980), and 11 A. WRIGHT & C. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2961 (1973)).
change in law or facts so substantial "that the dangers prevented by
the injunction 'have become attenuated to a shadow,' and the
changed circumstances have produced "'hardship so extreme and
unexpected" as to make the decree oppressive.' "55 Thus, the bur-
dens of proof are substantially different than those imposed on the
parties by the Fourth Circuit in Riddick.

[T]he plaintiffs, as the beneficiaries of the original injunction,
only have the burden of showing the court's mandatory order
has been violated. The defendants, who essentially claim that the
injunction should be amended to accommodate neighborhood el-
ementary schools, must present evidence that changed conditions
require modification or that the facts or law no longer require the
enforcement of the order.56

III. PROBLEMS WITH "UNITARINESS" AND THE APPELLATE
COURT HOLDINGS

While the appellate court in Riddick and the district court in
Dowell appear anxious to be relieved of the burden of the particular
school desegregation cases on their dockets,57 the appellate court in
Dowell apparently believes that the job of desegregating public
schools is not quite finished once a finding of unitariness is made.
There is a strained reasoning in either case, and a critical analysis of
the appellate opinions quickly uncovers some serious legal and
practical flaws.

The Fourth Circuit in Riddick attaches great weight to the lan-
guage in Swann v. Charlotte-Mecklenburg Board of Education and
in Pasadena City Board of Education v. Spangler concerning the
ongoing jurisdiction of a district court in a school desegregation
case. In Swann, the Supreme Court recognized that demographics

55. Dowell, 795 F.2d at 1521 (quoting Securities and Exchange Commission v. Jan-dal
Oil & Gas, Inc., 433 F.2d 304, 305 (10th Cir. 1970)).

56. Dowell, 795 F.2d at 1523 (citing Northside Realty Associates, Inc. v. United States,
605 F.2d 1348 (5th Cir. 1979), and E.E.O.C. v. Safeway Stores, Inc., 611 F.2d 795 (10th Cir.
1979), cert. denied, 446 U.S. 952 (1980)).

57. In reading the criticisms of the appellate opinions in Riddick and Dowell, one should
not be under the misconception that the judicial sentiment to be relieved of the burden of
school desegregation cases is somehow unique to judges in the Fourth and Tenth Circuits.
The feeling is evidently shared by many others. For example, in his order dissolving all
injunctions in the case of Penick v. Columbus Board of Education, Judge Robert M. Duncan
wrote,

"[T]hroughout this entire litigation, the Court has held the view that a court has
flimsy credentials for the oversight of school affairs. Accordingly, I have made a
conscientious effort to do as little of it as necessary. In that regard there is no
quarrel with the need to discontinue Court involvement as soon as practicable."
injunctions).
and general mobility of populations may change student assignment patterns over time. Accordingly, the Court held:

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.\footnote{Swann, 402 U.S. at 31-32.}

The Supreme Court also addressed the issue of ongoing judicial supervision in \textit{Spangler}: "\textit{H}aving once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns."\footnote{Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437 (1976).} The desire to be relieved from the workload of a school desegregation case is understandable, and one does not have to ponder very long and hard before understanding why a school board would like to be free from judicial supervision, especially in light of an apparent public displeasure with busing.\footnote{The Cleveland, Ohio school desegregation case of Reed v. Rhodes, No. C-73-1300, (N.D. Ohio Dec. 9, 1985), is one example of the workload such a case can produce. Litigation has continued now for over 13 years, and the Court has issued to date over 420 orders in the case. Yet for all of this work, the Court is credited for only a single case on its docket. The goal of "coming out from under the court order" in \textit{Reed} has been touted by a number of past and present school board members and administrators as a number one priority.}

The appellate opinion in \textit{Dowell} counters this language concerning relinquishment of jurisdiction by raising an issue which is not adequately addressed in \textit{Riddick}: holding that all judicial control vanishes once a finding of unitariness is entered mocks the accomplishments of desegregation painfully achieved while the court actively supervised the case.\footnote{Dowell, 795 F.2d at 1519.} As the facts in both cases indicate, once active judicial supervision is terminated, the tendency is to return to a more segregated school system. This reality undermines the duty of public school systems to maintain a unitary system after the district court has found unitariness in a particular school district.\footnote{Id. at 1520. See also cases cited supra note 50.} Furthermore, courts interested in maintaining unitariness in
a school district may be hesitant under the holding in Riddick to make any formal finding of unitariness, even if the system is in fact unitary, for fear that once such a finding is made, the school system will quickly resegregate, intentionally or not.

There are further, practical problems with the holding in Riddick. Placing the burden on the plaintiffs to show intentional racial discrimination before they can be granted any relief after a finding of unitariness has been made renders it virtually impossible for them to preserve the remedy which was achieved through years of arduous and costly litigation. As the voluminous records and opinions in past and pending school desegregation cases show, it is extremely difficult to establish an unconstitutional intent on the part of collegial, ever-changing bodies such as school boards.\textsuperscript{63} The requirement that plaintiffs repeat the task of litigating alleged racial segregation in public schools constitutes an obstacle which is entirely disproportionate to the apparent ease with which school boards can effectively resegregate school systems even through allegedly neutral methods. It is simply unfair to require plaintiffs to expend so many of their resources to preserve a remedy which is rightfully theirs.\textsuperscript{64}

Moreover, given current delays in the federal court system, it would indeed be an unwise policy to further burden dockets with drawn-out relitigation of school matters. This is particularly true if district courts throughout the country desire to issue final orders which succeed in ending public school segregation. Additional protection for the remedies which initially grew out of the first round of school desegregation cases presents a far more sensible solution in terms of judicial economy than the filing of new lawsuits.\textsuperscript{65}

Although the Tenth Circuit may have recognized the risks of resegregation, the Dowell opinion provides little in the way of precedent, because the holding is so narrowly focused on the facts of that specific case. As noted above, the Tenth Circuit bases its entire holding on the presence and continuing validity of the 1972 order requiring the defendant school board to institute and maintain the

\textsuperscript{63} For example, in the Cleveland case, three years intervened between the filing of the case and a finding of liability on the part of defendants. The opinion is 90 pages in length in the Federal Supplement. See Reed v. Rhodes, 422 F. Supp. 708 (N.D. Ohio 1976).

\textsuperscript{64} As the court stated in Dowell, "The parties cannot be thrust back to the proverbial first square just because the court previously ceased active supervision over the operation of the Finger Plan." Dowell, 795 F.2d at 1520.

\textsuperscript{65} Admittedly, even the solution presented in this Article will demand judicial time; however, far less time will be required because of the limited scope of the showing required under alleged violations of permanent injunctions.
Finger Plan, which included busing for all grades. Indeed, the appellate court requires an explicit dissolution of the 1972 order before the defendants can be relieved of their duty "to persist in the elimination of the vestiges of segregation."\textsuperscript{66} Instead of an explicit dissolution of prior remedial court orders, Senior Judge Bohanon implicitly dissolved such orders by terminating the court's jurisdiction. The district court's own denial of plaintiffs' motion to reopen the case strongly indicates that Senior Judge Bohanon interpreted the 1977 order dismissing the case as having this effect on his prior orders.\textsuperscript{67} The end result as far as the plaintiffs are concerned appears to be a remedy which is protected by nothing more than the wording of the order terminating the case.\textsuperscript{68} It seems peculiar that such an important remedy should depend on semantics rather than on the intent of a district court, the form of an order rather than the substance of a case.

The Tenth Circuit also employs an illogical standard for protecting reasonable plaintiff expectations after basing its holding on the continuing validity of the 1972 order. The court upholds the inviolability of permanent injunctions, yet grants the plaintiffs a right to be heard only on alleged "significant changes"\textsuperscript{69} of the 1972 injunction. This standard raises the question of why the court limited this right only to "significant changes." If a mandatory injunction is as unchangeable as the Tenth Circuit finds, then plaintiffs should be able to protest all changes to the 1972 order. In its use of

\textsuperscript{66} Dowell, 795 F.2d at 1520.

\textsuperscript{67} A judge's interpretation of his or her own orders should, of course, be given a certain amount of deference, especially in such protracted lawsuits as school desegregation cases. Vaughns v. Bd. of Educ. of Prince George's County, 758 F.2d 983, 989 (4th Cir. 1985) (citing United States v. Bd. of Educ. of Chicago, 717 F.2d 378, 382 (7th Cir. 1983); Brown v. Neeb, 644 F.2d 551, 558 n.12 (6th Cir. 1981). Comments Senior Judge Bohanon made during the hearing on plaintiffs' motion also indicate as much. When asked whether the 1977 order changed the 1972 injunction requiring busing, the senior judge responded that "things change and you can't hold a School Board to something that becomes outmoded, useless, or harmful. You can't expect the Court to do a thing like that." Brief of United States as Amicus Curiae at 24-25 (Nov. 26, 1985), Riddick v. School Bd. of the City of Norfolk, 784 F.2d 521 (4th Cir. 1986).

\textsuperscript{68} If, for example, the district court in Dowell chose to use the language found in the order closing the desegregation case of Penick v. Columbus Board of Education, the appellate court in Dowell would have lost the basis for its holding, and plaintiffs would have likely been deprived of all relief. The court in Penick held that, "After a careful review of the efforts made by the Columbus Board of Education, the Superintendent of the Columbus Public Schools, the State Board of Education, and the State Superintendent of Public Instruction to remedy the effects of the violations of the United States Constitution, this Court concludes that it now must dissolve all injunctions in this case." Penick v. Columbus Bd. of Educ., No. C-2-73-248, slip op. at 1 (S.D. Ohio Apr. 11, 1985) (emphasis added).

\textsuperscript{69} Dowell, 795 F.2d at 1519.
this limitation, the court apparently intended to permit plaintiffs to challenge only those amendments to the 1972 order which will revert the schools at least partially to a dual system. Possible modifications to the desegregation plan undoubtedly exist which would not affect the extent of integration in the Oklahoma City schools. Nevertheless, the reasoning behind preserving the mandate in one clause of an injunction is equally applicable to preserving the mandate in another clause of the same injunction. Moreover, the appellate opinion never attempts to define "significant change," though it presumably includes dismantling busing for elementary students in grades kindergarten through four.

The underlying cause of the various problems found in these opinions lies in part in a clash of competing goals. On the one hand, there exists a desire to ensure that the remedy of unitary schools does not become an evanescent one once a school district is found to be unitary; on the other hand, there is the need to provide for a fair and reasonable termination of these protracted lawsuits so school districts can continue to govern themselves. If unitary schools can virtually disappear overnight through so-called neutral actions by school boards, then the decades of litigation have been for nothing and equal protection guarantees for the vast majority of public school students of this Nation remain illusory. In that case, the justice system has produced a useless though costly remedy. Nevertheless, active litigation must end sometime; school desegregation cases cannot continue forever, for that would be a remedy far beyond the scope of the constitutional violation. Some type of accommodation of these two goals is necessary.

One can also attribute the confusion and differing holdings in these recent opinions to a lack of a clear definition of "unitariness." As important as the concept is, courts have failed to adopt a universal definition for the term. Many courts have developed and employed their own definitions, and some have even used terminology entirely absent from Supreme Court opinions.\footnote{70. The court in Georgia State Conference Branch of the NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985), sought clarification of some of the terminology in this area by drawing a distinction between a "unitary school system" ("one which has not operated segregated schools as proscribed by cases such as Swann and Green for a period of several years"), \textit{id}. at 1413 n.12, and "a school system which has achieved unitary status" ("one which is not only unitary but has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures"). \textit{Id}. The court admitted, however, that even these two terms were often confused by other courts. \textit{Id}. The Fifth Circuit recently proposed a slightly different though very complete definition of a "unitary school district": "a district in which schools are not identifiable by race and students and faculty are assigned in a man-}
The Supreme Court’s opinions in this area do not entirely clarify the meaning of “unitariness.” The opinions do make clear the ultimate goal of this immense litigation effort—the dismantlement of dual school systems based on race and the transition to “racially nondiscriminatory school system[s].”71 But even this definitional goal can be understood only when examined in the broader historical context of school desegregation and in light of the important legal principles enunciated by the Supreme Court since Brown.

In Brown II the Supreme Court implies that the right to be admitted to public schools on a nondiscriminatory basis is the appropriate remedy in these cases,72 but other language in Brown II itself indicates that more is at stake. The Court bases its opinion in the earlier Brown I case on a finding that there is a benefit received by children who attend integrated schools.73 Integrated student bodies, then, are part and parcel of “unitariness,” and this broader remedy justifies the measures which the Supreme Court later describes and permits in Swann.

Green v. County School Board of New Kent County further explains the remedy of unitary schools. In that opinion, the Supreme Court defines dual school systems for the lower courts by comparing them to racially identifiable schools, i.e., schools which can be identified as “black schools” and “white schools” because of the predominant race of the student body. Racial identification, however, does not result solely from a predominately one-race student body, although that may be sufficient in certain cases. Rather, racial identification is reflected in “every facet of school operations—faculty, staff, transportation, extracurricular activities and facili-

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71. Brown II, 349 U.S. at 301. “The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . . .” Green, 391 U.S. at 436. Despite the clarity of this statement, some confusion even on this point exists. See supra note 2 and accompanying text. For example, in a recent opinion in Bradley v. Baliles, 639 F. Supp. 680 (E.D. Va. 1986), Judge R. Merhige, Jr. described a unitary system as one in which the dichotomy between black and white schools does not exist. The court continues, “The elimination of the vestiges of segregation, in areas such as student achievement, is ancillary to and separate from the primary goal of eliminating the segregation itself.” Id. at 688 (emphasis in original). As history has shown, merely eliminating racial segregation in a school system does not necessarily transform that system into a unitary one. Affirmative steps must be taken beyond the elimination of segregation itself to achieve a unitary system. Judge Merhige’s interpretation of the “primary goal” does not necessarily imply these affirmative steps.


In defining the dual school system more clearly, the Supreme Court also explains the remedy of unitary schools: defendants are to convert their dual school system "to a system without a 'white' school and a 'Negro' school but just schools."74

In addition to this substantive background, there is an important and well-established procedural history to school desegregation litigation which sheds considerable light on the meaning of unitariness. Most obvious in this regard is the timetable which the Supreme Court set in 1955 under which defendants in school desegregation cases were obligated to complete the transition to a unitary system. In Brown II, the Court held that the transition was to take place "with all deliberate speed."76 By adopting this standard, the Court recognized the need for flexible remedies which would not diminish the importance of the constitutional principles involved, but which would address the varied local school problems.77 After years of difficult litigation and social upheaval, the Court's patience ran out,78 however, and by the end of the 1960's all school districts were ordered "to terminate dual school systems at once and to operate now and hereafter only unitary schools."79 In addition, school boards once operating state-compelled dual school systems were charged with the affirmative duty of converting to a unitary system "in which racial discrimination would be eliminated root and branch."80

The Supreme Court also made clear that as a procedural matter, the district courts were not to avoid the difficult problems involved in ensuring full compliance with the Court's mandate. In Raney v. Board of Education of the Gould School District,81 the Court struck a balance between the practical difficulties of achieving full compliance (and perhaps the courts' desire to be relieved of the workload) and the retention of district court jurisdiction.82 The Court concluded that a district court handling a public school desegregation case should retain jurisdiction to guarantee (1) that a constitution-

74. Green, 391 U.S. at 435.
75. Id. at 442.
76. Brown II, 349 U.S. at 301.
77. Id. at 299.
80. See also Green, 391 U.S. at 438-39, 442.
81. Green, 391 U.S. at 438.
82. 391 U.S. 443 (1968).
82. "In light of the complexities inhering in the disestablishment of state-established segregated school systems, Brown II contemplated that the better course would be to retain jurisdiction until it is clear that disestablishment has been achieved." Id. at 449.
ally acceptable plan is adopted, and (2) that the school system is operated in a constitutionally permissible fashion, so that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved.\footnote{Id. The Court's holding is in accord with Kelley v. Altheimer, 378 F.2d 483 (8th Cir. 1967) and Kemp v. Beasley, 389 F.2d 178 (8th Cir. 1968).}

Three years later in its opinion in \textit{Swann}, the Supreme Court returned to the value of local control of public school systems.\footnote{See supra text accompanying note 58.} Although retention of jurisdiction for remedial purposes remains an important principle, the Court's concern has focused throughout the late 1970's and 1980's on the task of restoring local control.\footnote{"No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the education process." Miliken v. Bradley, 418 U.S. 717, 741-42 (1974).} Thus another balance is struck, this time between the advantages of local school board control and the constitutional mandate to achieve unitary schools.

\section*{IV. Toward a More Complete Definition of \textit{“Unitariness”}}

In light of the above, the following is suggested as a more complete definition of "unitariness": "Unitariness," as a remedy to racially segregated public schools, entails the unavoidably difficult transition from racially identifiable schools to fully integrated schools where no distinctions are made on the basis of race in such key areas as faculty, staff, transportation, extracurricular activities, facilities, and student bodies. Furthermore, "unitariness" calls for the elimination of all vestiges of racial discrimination in public schools and the maintenance of public schools which cannot be identified on the basis of race in any of the key areas.

This definition includes the traditional remedial language of all school desegregation lawsuits, namely, the transition to unitary schools which are not racially identifiable. This simply translates into integration.\footnote{See \textit{Lawrence County School Dist.}, 799 F.2d at 1038.} However, the proposed definition does not limit integration to the student body, which was the primary focus of \textit{Brown}, but rather extends the remedy to the major areas noted by the Supreme Court in \textit{Green}.\footnote{Although factors such as student achievement and discipline might be relevant to the consideration of a school system's unitariness, the courts appear unwilling to move beyond the six key areas mentioned in \textit{Green}. See, e.g., \textit{Bradley}, 639 F. Supp. at 687-88.} Moreover, the proposed definition
goes beyond the substantive elements of unitary schools to recognize the procedural aspects of achieving an appropriate remedy to racially segregated schools.

The transition to unitary schools was never viewed as an easy remedy. One reason for this is that the remedy is counter-majoritarian. It is, after all, a protection of minority rights, and one that is particularly difficult to achieve because an institutional remedy is at issue. One student’s rights are at stake as well as the entire social restructuring of the school district. The Supreme Court recognized the institutional nature of this remedy by mandating that racial segregation in public schools be eliminated “root and branch.” In other words, school districts must move beyond the surface and change the institution to ensure that racially segregated schools never have a chance to thrive again in the United States.

The proposed definition cannot require school districts to permanently relinquish total control of their schools to the district courts. Indeed Raney and Swann hold that a court may terminate active supervision of a case once unitariness is found. Local control, rather than judicial control, of school districts is the more desirable outcome. But balanced against this desire for local control is the duty to maintain unitary schools. As the Supreme Court has pointed out, constitutional principles cannot yield to public demands.88

To balance these two values, the proposed definition, which takes into consideration both the substantive and procedural aspects of public school desegregation, incorporates in any finding of unitariness a permanent injunction which requires the defendants to establish and maintain unitary schools. In other words, inherent in a finding of unitariness should be an injunction requiring permanent maintenance of that unitary school system which the court and parties have labored so hard to achieve. If such an injunction is not read into a finding of unitariness, the finding would give license to school districts to take action which could revert public schools back to dual, racially identifiable systems. This would be unreasonable and inequitable in light of plaintiffs’ right to unitary, integrated schools; thus, the permanent injunction serves as a remedy protective of the plaintiff’s right.89

88. "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." Brown II, 349 U.S. at 300.
89. "An injunction decree does not create a right; it is a remedy protective of a right. A party obtaining [sic] the injunction does not obtain a vested right; and accordingly its prospec-
There are a number of significant advantages to this definition of unitariness. First, it preserves the remedy of unitary schools which has been so difficult to obtain throughout the Nation. Under the standard of injunctive orders, defendants would bear the burden of proving a "substantial change in law or facts" in order to take action contrary to unitary schools. This is where the burden belongs. Requiring the plaintiffs to reestablish discriminatory intent, as the Fourth Circuit has done in Riddick, is a task that is practically impossible to meet. Moreover, it makes no sense to place such a difficult burden on the plaintiffs, since post-unitary litigation involves only the request to adhere to the Supreme Court mandate of unitary schools—a remedy which the plaintiffs in these lawsuits have already won.

Second, this broader definition of unitariness, particularly the requirement of maintaining unitary schools, reinforces the notion that it is not "business as usual" once a finding of unitariness has been made. Full local control can be restored, providing the school boards do not take action which will dismantle unitary school systems. Permanent institutional changes may have to be made, but if that is what dismantling dual school systems "root and branch" requires, then so be it.

Third, implying a permanent injunction to maintain unitary schools once a finding of unitariness has been made puts new meaning into such a finding. Finding unitariness becomes a serious step that should not be taken lightly; it is a step which enables district courts to undertake future action if necessary without having to stretch the reasoning and language of court orders as the Tenth Circuit did in Dowell. In other words, the protection afforded plaintiffs in these cases need no longer rest solely on the semantics of selected court orders. Moreover, if further action needs to be taken to en-
sure unitary schools, a full-blown lawsuit does not have to be initiated to correct a problem.\textsuperscript{91}

Finally, implying a permanent injunction to maintain unitary schools within a finding of unitariness sets a sorely needed national standard of equal protection. "Unitariness" in one school district should not mean something different in another school district. Once a court finds a school system to be unitary, the defendants should be required to maintain the status. Only in this way can the equal protection guarantee be fully realized.\textsuperscript{92}

Opponents to this standard of unitariness may argue that it affords plaintiffs an opportunity to protest every minor change made by the school boards of court-approved desegregation plans at the district court level. Such a protest, however, is unjustified for a number of reasons. The permanent injunction which would attach to a finding of unitariness is not a prohibition against any and all

\textsuperscript{91} The importance of fine-tuning a desegregation remedy, short of active supervision of the case, is highlighted in a report filed on June 8, 1984 by the Office on School Monitoring & Community Relations (OSMCR) in the Cleveland desegregation case of Reed v. Rhodes, No. C-73-1300. In a memorandum to Chief Judge Frank J. Battisti, OSMCR reported:

[The desegregation of schools is not a one-act play in which a one-time set of student reassignments instantly and permanently transforms segregated schools into desegregated schools. Rather, school desegregation—like any program—requires constant tending, supporting and repairing. If left unattended by the School District, desegregation will disintegrate. It is imperative that the Board of Education and its administration perceive desegregated schools as a continuing goal and not as a completed and closed-out task. The Board should also understand that it is the District's role to preserve and nurture the desegregated state of the schools created by the Remedy; no one else can do it.]

Memorandum, Office on School Monitoring & Community Relations 2 (June 8, 1984) (emphasis in original). Although a finding of unitariness has not yet been made in Reed, there is no reason to believe that OSMCR's statements are not equally applicable in the post-unitary period; they are arguably more applicable since the case then loses the active and watchful eye of the court.

\textsuperscript{92} Different courts will, of course, continue to produce different results, because not all district judges approach school desegregation cases in the same manner. For example, in Penick, Judge Duncan noted that "the State defendants have not taken any special action in connection with the remedy in this case. However, I view the inaction as a result of the positive nature of the Columbus defendants' compliance with the Court's orders. There was no need for their intervention." Penick v. Columbus Bd. of Educ., No. C-2-73-248, slip. op. at 11-12 (S.D. Ohio Apr. 11, 1985). In the northern part of the same state, however, state defendants' inaction in the Cleveland school desegregation case gave presiding Chief Judge Battisti special cause for concern. "It is difficult not to metaphorically refer to the State Board of Education as the proverbial ostrich with its head in the sand." Reed v. Rhodes, 422 F. Supp. 708, 796 (N.D. Ohio 1976). Ten years later, the court in Reed concluded that "the standard and mandate of Brown v. Board of Education . . . and its progeny, that racial discrimination be 'eliminated root and branch,' has fallen on deaf ears." Reed v. Rhodes, No. C-73-1300, slip. op. at 2 (N.D. Ohio Feb. 6, 1986). The court in Reed eventually compelled state defendants to take action. See Reed v. Rhodes, No. C-73-1300 (N.D. Ohio May 13, 1986).
change of a particular court-ordered desegregation plan. It is a requirement to maintain unitary schools, and, as the Supreme Court has recognized, it is a requirement that the remedy of unitary schools remain flexible. The broad definition given to "racial identification" by the Court in Green suggests that the concept of unitary, integrated schools also be given a broad definition to provide school boards with wide latitude for action. Every change of a particular court-ordered desegregation plan will not inhibit the maintenance of unitary schools as the permanent injunction would require.

Critics of this approach should also keep in mind the fact that all plaintiffs still bear some burden of proof under the standard of a permanent injunction, albeit much less of a burden than that imposed on the plaintiffs by the Fourth Circuit in Riddick. The implied permanent injunction may protect plaintiffs' right to unitary schools, but it does not reopen the door to active and ongoing district court supervision in cases in which a finding of unitariness has been made. To stop a particular school board action, plaintiffs would still have to make a showing that the permanent injunction to maintain unitary schools is somehow being violated; in other words, the challenged action must be shown to violate the admittedly broad concept of unitary schools. This burden alone should discourage many frivolous attempts to harass school boards. Finally, even permanent injunctions are subject to change under equitable principles.  

It seems unthinkable that the Supreme Court would relieve school districts of the duty to establish and maintain unitary schools at this early date; therefore, the heart of the permanent injunction—the maintenance of unitary schools—would likely remain unchanged even with the best of arguments. What exactly furthers unitary schools, however, is fertile ground for discussion and debate and surely an area in which defendants could convince the courts of the correctness of their position.

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93. There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen . . . . A balance must thus be struck between the policies of res judicata and the right of the court to apply modified measures to changed circumstances. Sys. Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright, 364 U.S. 642, 647-48 (1961). See also United States v. Swift & Co., 286 U.S. 106, 119 (1932).

94. A good example of the debate over what does and does not promote unitary schools is found in Mapp v. Bd. of Educ. of the City of Chattanooga, 630 F. Supp. 876 (E.D. Tenn. 1986), where the issue was the alleged discriminatory impact of certain school closings. There, the district court permitted the school board's actions, which involved combining and
V. APPLYING THE MODIFIED DEFINITION OF UNITARINESS

A. Following the Approach in Riddick and Dowell

In Riddick, the proposed definition of unitariness would place the initial burden of proof on the plaintiffs to show that the injunction to maintain unitary schools had indeed been violated by the school board's adoption and implementation of Plan I. The fact that the number of one-race schools increases with the implementation of Plan I would provide strong support for the plaintiffs' position that the school board is in fact taking action contrary to its duty to maintain unitary schools. The Supreme Court has never looked favorably on one-race schools, and has gone so far as to place a presumption against the constitutionality of school board action that results in such schools while the school board is under an affirmative duty to desegregate. Because of this presumption, it is likely that any dramatic increase in one-race schools, as under Plan I, would constitute a sufficient showing to bring the alleged violation of the injunction to the court's attention.

At this point, the defendants would bear the burden of showing either that the challenged action does not disturb a unitary system or resurrect a dual system, thus violating the injunction, or that a change in law and/or facts warrants a modification of the injunction. One of the experts for the Norfolk school board argued that the seventy to thirty ratio for defining integrated schools in Norfolk no longer made sense, because the district's population was quickly approaching 75% black. This fact could perhaps convince a district court that the original ratio for integrated schools needs to be changed. A unitary school, in other words, would have to be redefined for this particular district, but not be altogether

95. The reader is reminded that Norfolk used a 70/30 ratio for defining a desegregated school. Riddick, 784 F.2d at 526. Plan I produced 12 schools of 70% or more black students, compared to four schools before implementation. Six of the other elementary schools were 70% or more white. Id. at 527. Thus, Plan I resulted in approximately one-half of the elementary schools being racially identifiable.

96. [I]n a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory.


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abandoned as a constitutional requirement. Defendants could also raise the point that although desegregation is not furthered in the area of student assignment, integration is increased under Plan I in the other five areas mentioned in Green.98

The same approach could be used in Dowell. Instead of creating a legal fiction which prolongs the validity and effect of a particular court order despite the dismissal of the case, a court could interpret the order terminating the case as creating an injunction to protect the "unitary system so slowly and painfully accomplished over the 16 years"99 while the case was pending. To block the challenged modification of the Finger Plan, the plaintiffs would have to show that the injunction to maintain unitary schools in Oklahoma City would be violated by the proposed modification. As in Riddick, the plaintiffs would be able to point to the dramatic increase in predominantly one-race schools as a result of the proposed busing modifications.100 Defendants would then bear the primary burden of showing that the injunction either would not be violated or that it should be modified to allow the proposed school board action.

B. The Speculative Results

It is simply unclear whether a court would permit the school board actions at issue in Riddick and Dowell if it were to follow the approach outlined in this Article. It is always a dangerous game to speculate in the law, especially in areas as controversial as public school desegregation. With these cautions in mind, it is my belief that a court would likely find the challenged actions to be contrary to the maintenance of a unitary school system and, thus, constitutionally prohibited.

The facts in Norfolk and Oklahoma City would be examined under the standards of an injunction where the presumption is in favor of upholding that permanent order without modification. With the weight of an injunction behind it, a court evaluating the statistics in either case might redefine the ratios used for identifying an integrated school in those districts. But it is difficult to imagine approval of school board action that results in a system in which slightly more than one-quarter of the elementary schools are 97%
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or more black as in Norfolk. This is particularly so when the defendants have the burden to show that its actions at least do not inhibit, if they do not promote, unitary schools. The district court in \textit{Riddick} in fact admitted that proposed modifications to the desegregation plan "would have the effect of increasing the number of black racially identifiable elementary schools from seven to twelve."\textsuperscript{101}

Assuming the defendants have the burden of persuasion, they would have a greater obstacle to overcome if an alternative plan to correct perceived student assignment problems was available in Norfolk. The alternative plan would not increase the number of racially identifiable schools yet would apparently remedy some of the district's demographic changes. It is not at all clear whether the reasons which the district court gave for refusing to examine seriously the alternative plan would be adequate if that same court were enforcing an injunction to maintain unitary schools.\textsuperscript{102}

There are also factual problems with \textit{Dowell} when examined under the proposed approach. Although the school board did not have before it alternative plans, it would likely be difficult for a court on the one hand to say that defendants are maintaining unitary schools, and on the other hand to find that under the proposed plan, approximately one-half of the district's elementary schools would be 90\% or more of one race.

Another problem which might be a significant issue if a court scrutinized the task of maintaining unitary schools more closely (which would likely be the case under the proposed approach) is the primary reason given for the proposed busing changes in both Norfolk and Oklahoma City: the problem of so-called "white flight." The district court in \textit{Dowell} and both the district and appellate courts in \textit{Riddick} do not question the reasonableness of defendants' actions based on the white flight argument. Yet one discovers, upon closer examination, that white flight is not necessarily a sound justification for taking action which would convert half of a district's

\textsuperscript{101} \textit{Riddick}, 627 F. Supp. at 817-18. The court went on to state that it "considers a school to be 'racially identifiable' if the school population contains more than 70\% of a particular race." \textit{Id.}

\textsuperscript{102} However, the evidence produced in this case clearly established that absolutely no interest was expressed at the public hearings in the alternative plan. Therefore, the alternative plan was appropriately shelved. In short, this Court finds that the alternative plan was never a viable program and plaintiffs' arguments to the contrary, as well as their attempts to question the consideration which the alternative plan received, are completely unavailing.

\textit{Id.} at 825. \textit{But see supra} note 89 and accompanying text.
elementary schools into racially identifiable institutions, at least as far as student enrollment per school is concerned.

Although a detailed examination of the white flight phenomenon is beyond the scope of this Article, a few points should be noted. The argument that mandatory or voluntary desegregation of public schools causes the white population to flee to the suburbs is often accepted as conventional wisdom, yet this argument has been challenged in many courts as well as academic circles. The district judge in Dowell and the district and appellate judges in Riddick obviously accepted the white flight argument, but a number of district courts have, with good cause, rejected this argument as a primary cause for resegregation. Both national and regional studies conclude that the process of desegregating public schools does not result in the migration of white populations away from a city undergoing desegregation. Indeed the findings suggest that the

It is true, of course, that part of the increase in the ratio of blacks to whites in RPS [the Richmond Public School District] between 1954 and 1972 is the result of a decrease in the number of white students in RPS. In 1954, approximately 20,000 white students attended school in RPS; by 1972, this number had declined to approximately 13,000. This decline, however, was consistent with the general trend throughout the country during that time period of whites moving out of the cities and into the suburbs. There was no indication that this nationwide suburbanization was attributable to a desire to avoid desegregated schools. Id. Note that the district court in Riddick, which accepted the “white flight” argument, also lies in the Eastern District of Virginia. See also Reed v. Rhodes, No. C-73-1300 (N.D. Ohio Dec. 9, 1985) (order approving Cleveland Board of Education’s utilization plan):
The reasons for the declining number of students attending Cleveland Public Schools are difficult to isolate. It appears, however, that this occurrence is not caused primarily by a flight from a desegregated school system, but rather by other more significant factors such as the general decline in the overall school-age population and a smaller birth rate in the area. Id. at 2. The report which the court cited was produced by OSMCR, supra note 91, in September 1982. Among the report’s findings: (1) enrollment in the Cleveland public schools has declined steadily since 1967 (liability was found in Reed in 1976, and the original remedy opinion was issued in 1978); (2) school desegregation has not caused the enrollment to decline in the Cleveland public schools; and (3) the major cause of the enrollment decline in the Cleveland public schools is the erosion of the school-age population caused by population loss and a smaller number of annual births. Office on School Monitoring & Community Relations, Enrollment Decline and School Desegregation in Cleveland: An Analysis of Trends and Causes iii (Sept. 1982).

104. See, e.g., Willie & Fultz, Do Mandatory School Desegregation Plans Foster White Flight?, in SCHOOL DESEGREGATION PLANS THAT WORK 170 (C. Willie ed. 1984) (analyzing Boston and Milwaukee and concluding “transfer plans are unrelated to geographic changes of the white population in central cities”). See also Orfield, Must We Bus? in SEGREGATED SCHOOLS AND NATIONAL POLICY 95, 100 (1978) (“Desegregation, in any case, neither creates flight where there was none nor has a long-term impact on the rate of declining white enrollment.”); Sly & Pol, White Flight, Schools Segregation and Demographic Change, in THREE MYTHS: AN EXPOSURE OF POPULAR MISCONCEPTIONS ABOUT SCHOOL DESSEGREGATION 57-66 (1976).
population shifts usually have started before the implementation of court-ordered desegregation. These shifts are national in scope, and have been found to exist even in areas where there is no court-ordered desegregation through busing.

Notwithstanding the statistics which significantly weaken the theory of white flight, assumptions such as this typically die hard. One can safely predict, therefore, that individuals and governments will continue to entertain this assumption. But even if this should be the case, white flight does not necessarily imply that a court must abandon all aspirations of desegregated schools by completely relinquishing jurisdiction or by approving steps which would return a public school system to a racially identifiable one. On the contrary, one might employ the white flight argument to support stepped up court intervention to provide additional aid to the black students who remain behind in the cities.105 It is, after all, the beneficial mix of black and white students in the same classroom that prompted the Supreme Court to rule in the plaintiff’s favor in Brown v. Board of Education in the first place.

By balancing the six key areas noted in Green to decide whether curtailing busing actually inhibits or promotes unitary schools, a district court might well conclude that the school board action in both Norfolk and Oklahoma City does not violate an injunction to establish and maintain unitary schools. As noted above, any definition of unitariness must be flexible, and in any flexible standard lies the difficulty of predicting a particular outcome. Regardless of the outcome in these two cases, however, plaintiffs would justifiably fare better, and more uniform holdings in the post-unitary period would result if courts adopted the proposed approach. Finally, the remedy of unitary schools would be achieved and protected, and the courts would not be burdened by repetitious litigation in reaching that point.

VI. CONCLUSION

In 1954, the Supreme Court concluded that the doctrine of "separate but equal" has no place in the field of public education.106 Since then, the Supreme Court as well as many other courts throughout the United States have undertaken the task of remedy-

105. In Bradley, the plaintiffs argued, though unsuccessfully because the court rejected the white flight assumption, that racial isolation in the inner city imposes upon the state a duty to increase funding to such schools so as to attract more white students. Bradley, 639 F. Supp. at 694.

ing the constitutional wrong inflicted upon minority groups because of their race.

The remedial period has been a difficult one, and in many courts and school districts it continues to be a difficult one. The difficulty has been in part due to the broad scope of the necessary remedies and the differing views over what constitutes a full remedy of separate but equal public schools. In 1955, the Supreme Court concluded that the appropriate remedy was to be unitary schools.

The rest, as the saying goes, is (recent) history. Laws segregating public schools were removed from the books, and school students and staff were reassigned and rearranged. The separateness of schools was eradicated. After many years of designing and implementing a remedy which many still reject and scorn, the courts are starting to find that the transition to unitary schools is complete. The racially identifiable schools of a dual system have been largely eliminated, so we now have neither “black” schools nor “white” schools but just schools.

A tragic and unfortunate story of injustice would have to be told if nine years from now one is forced to conclude, on the one-hundredth anniversary of *Plessy v. Ferguson*,¹⁰⁷ that the public school systems of this country have reverted back to a dual nature. This Article argues for a broader definition of unitariness which encompasses both the substantive and procedural aspects of desegregation history. A finding of unitariness in a particular school district should be interpreted to incorporate a mandatory order to establish and maintain a unitary system of public education. The injunctive remedy is protective of the right that has been recognized through years of costly and difficult litigation. The injunction should not be inflexible in design, for there are many ways to achieve unitary schools. But there are permanent limits on school board action insofar as that action destroys unitary schools and recreates a dual, racially identifiable system. Through the injunction, the defendants have the primary burden to show either that their proposed action does not violate the concept of unitary schools, or that a modification of the injunction is required.

Unlike the approaches taken in *Riddick* and *Dowell*, the approach proposed in this Article would protect the remedy of unitary schools through a court order incorporated within a finding of unitariness. Equal protection would not be based on textual distinctions in closing and terminating orders. Moreover, plaintiffs would

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¹⁰⁷ 163 U.S. 537 (1896).
not be faced with a practically insurmountable burden of initiating litigation to reestablish discriminatory intent every time the remedy of unitary schools comes under attack. Under the proposed approach, the fine-tuning required of any unitary school system would be possible without unduly burdening court dockets. Business in school districts found to have discriminated in the past would not be "as usual" once unitariness is found, nor should it be if the institutional remedy of unitary schools is to be effective and lasting. But the injunction is not a straitjacket; in all cases, the mandate to operate unitary schools will provide a framework for administering an efficient system of public education in accord with constitutional mandates.