THE UNITARINESS DILEMMA: THE FIRST CIRCUIT'S ATTEMPT TO DEVELOP A TEST FOR DETERMINING WHEN A SYSTEM IS UNITARY

In *Brown v. Board of Education (Brown I)*,[1] the Supreme Court proclaimed that the doctrine of "separate but equal"[2] has no place in public education. The Court found that separate educational facilities are inherently unequal[3] and deny minority children equal protection of the

1. 347 U.S. 483 (1954). In *Brown I* the Supreme Court consolidated cases from four different school systems: Topeka, Kansas (Brown v. Board of Education); Clearendon County, South Carolina (Briggs v. Elliott); Prince Edward County, Virginia (Davis v. County School Board); and New Castle County, Delaware (Gebhart v. Belton). In a separate case, Bolling v. Sharpe, the Court also held that the District of Columbia was segregated. 347 U.S. 497, 500 (1954).

For a fascinating account of the history of the *Brown* litigation, and of the struggles of blacks to achieve school desegregation, see R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

2. The Court adopted the doctrine of "separate but equal" in Plessy v. Ferguson, 163 U.S. 537 (1896). In *Plessy*, the Court affirmed the conviction of a person of mixed race who violated Louisiana law by refusing to leave his railroad seat in a car reserved for whites. The Court found such segregation compatible with the "equal protection clause" of the fourteenth amendment. Specifically, the court opined:

> The object of the 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. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their power. The most common instance of this is connected with the establishment of separate schools for whites and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

Id. at 544.

Despite the Court's approving language of "separate but equal" facilities in public education, the Court soon realized that the doctrine would not always ensure equality of education. Gradually, the Court chipped away at the doctrine, beginning in the area of graduate and professional education. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (holding Missouri had an obligation to admit a black student to the University of Missouri Law School if it could not offer him substantially equal facilities *inside* the state); Sipuel v. Oklahoma, 332 U.S. 631 (1948) (reaffirming *Gaines*); Sweatt v. Painter, 339 U.S. 629 (1950) (finding inequality between an "ersatz" law school set up exclusively for blacks and the prestigious University of Texas Law School); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (prohibiting segregation of black student from other students within the same law school).

3. *Brown I*, 347 U.S. at 495.

laws.[4] In *Brown II*[5] the Court placed the primary duty of providing remedy for school segregation on the school boards.[6] However, the Court suggested that district courts use their broad equitable powers to fashion relief if the school boards failed in their duty.[7] The Court required each board of a segregated school system to make a "prompt and reasonable start" toward full compliance with *Brown I*.[8] Moreover, once a school board begins implementation, then the Court would only allow additional implementation time consistent with the public interest and good faith compliance at the earliest practicable date.[9] During this interim period, the district court would retain jurisdiction over the case.[10]

Thus, from 1954 to 1968, the Supreme Court left primary enforcement of *Brown I* to the lower courts and the political process.[11] Only rarely did the Court step in to firmly reestablish the principles of *Brown I*, despite the massive resistance to desegregation in the South.[12] It was not

4. *Id.* The equal protection clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

5. Brown v. Board of Education, 349 U.S. 294 (1955). While the decision in *Brown I* is a general ruling as to the constitutional validity of school segregation, *Brown II* is a remedial decision limited to the facts of the five consolidated cases. *See* G. GUNTHER, CONSTITUTIONAL LAW 635, 641 (11th ed. 1985). The Court determined that the remedy for future desegregation cases would be decided on a case-by-case basis. 349 U.S. at 301.

6. 349 U.S. at 299.

7. 349 U.S. at 300. The district courts would "have to consider whether the action of school officials constituted good faith implementation of the governing constitutional principles." *Id.* at 299. If not, the courts would intervene to protect the plaintiffs' interest in admission to public school on a nondiscriminatory basis. *Id.*

8. *Id.*

9. *Id.* at 300-01. In determining whether a school board needs more implementation time, the Supreme Court stated that the supervising court:

> may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system.

Id. at 301.

10. *Id.* at 301.

11. *See* GUNTHER, *supra* note 5, at 712-13.

12. *But see* Cooper v. Aaron, 358 U.S. 1 (1958) (reprimanding the Little Rock, Arkansas school board and Governor Faubus for refusing to follow the edict of *Brown I*); Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964) (prohibiting a state from closing the public schools to avoid its duties under *Brown I*); Goss v. Board of Education, 373 U.S. 683 (1963) (striking down a transfer plan because it tended to perpetuate racial segregation).

For a general discussion of the post-*Brown* problems, see Kurland, *Brown v. Board of Education Was the Beginning: The School Desegregation Cases in the United States Supreme Court, 1954-1979*,

until *Green v. County School Board*[13] that the Supreme Court clarified a school board's duty to eliminate segregation. Specifically, the Court found that a "freedom of choice" plan,[14] in which students can decide whether to attend a white school or a black school, is inconsistent with the requirements of *Brown I* and *Brown II*.[15] The Court found that the ultimate end of desegregation is the transformation of a segregated school system into a "unitary" non-racial system.[16] To satisfy the "unitariness" requirement, a school board must initiate a plan with a realistic expectation of immediate success.[17]

Since *Green*, the Court has elaborated further the duties of the school board and the district courts in implementing the *Brown II* edit of a "prompt and reasonable start" towards unitariness.[18] However, the Court has failed to elaborate the elements of a unitary system,[19] despite the fact that defining unitariness is the "central riddle" of school desegre-

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1979 WASH. U.L.Q. 309, 324-336; Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 LAW AND CONTEMP. PROBS. 7 (1975); D. BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980).

13. 391 U.S. 430 (1968).

14. Prior to adoption of this plan, the school board operated two segregated schools: New Kent (entirely white); and George W. Watkins (entirely black). Although the Virginia consitutional and statutory provisions mandating segregation in public schools were held unconstitutional in Davis v. County School Board of Prince Edward County, decided with *Brown I*, the school board continued the segregated operation of the system after the *Brown* decisions, presumably on authority of several statutes enacted by Virginia in resistance to those decisions. 391 U.S. at 433.

15. 391 U.S. at 441-42. Fearing the loss of federal financial aid, the school board adopted the freedom of choice plan. *Id.* at 433-34, 433 n.2. During the plan's three years of operation, no white student chose to attend the all black school. As for the black students, 115 enrolled in the formerly all-white school. However, 85 % of the black students still attended all black schools. *Id.*

16. More specifically, the Supreme Court stated: "School boards such as the respondent then operating state-compelled dual systems were nevertheless 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." 391 U.S. at 438.

17. 391 U.S. at 439. The Supreme Court did not hold, however, that "freedom of choice" plans are per se unconstitutional. If the freedom of choice plan offers the promise of effective conversion into a unitary system, it might be used. However, if, as in *Green*, other means promise speedier, more effective conversion to a unitary school system, "freedom of choice" plans must be held unconstitutional. *Id.* at 441. In *Green* the Court found that zoning would have provided a more effective way to dismantle the dual system. *Id.*

18. *See infra* notes 27-32 and accompanying text. *See also* Alexander v. Holmes County Board of Education, 396 U.S. 19, 20 (1969) (every school district is obligated to terminate dual systems at once and operate only unitary schools).

19. As used throughout this Note "unitary" describes a school system, "within which no person is to be effectively excluded from any schools because of race or color." *Alexander*, 396 U.S. at 20. The Supreme Court has consistently held that a unitary system is the goal of a school desegregation remedy. *Id.*; *Green*, 391 U.S. at 436. At the opposite extreme is a "dual system," which the

gation law.[20] This Note addresses the First Circuit's attempt to enunciate the elements a district court should use in determining if a school system is unitary.[21] Part I discusses the effects of a finding of unitariness. Part II analyzes the three-prong test developed by the First Circuit in *Morgan v. Nucci* and that court's application of its test to the Boston school system. Part III examines the usefulness of the First Circuit's test by applying it to two other school systems previously declared unitary. Finally, Part IV contains observations as to the usefulness of the First Circuit test and recommendations for a modified test of unitariness.

I. EFFECTS OF A FINDING OF UNITARINESS

In a school desegregation case, once a plaintiff has made a prima facie showing of intentional segregation and maintenance of a dual system, the duty of remediation of segregation rests with the school board.[22] The school board has a "heavy burden"[23] of showing that school board actions tending to continue the dual system serve "important and legitimate ends."[24]

A second result of a finding of a dual system is that the district court obtains jurisdiction over the system and retains it until the court declares the system unitary.[25] The remedial measures that the district court may

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Supreme Court has defined as one in which the State, acting through the local school board an school officials, "enforces a system that is part white and part black." *Green*, 391 U.S. at 435.

Moreover, the Court has identified segregation of students, faculty, staff, transportation, extracurricular activities and facilities as indicia of a dual system. *Green*, 391 U.S. at 435.

20. Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, (1971). *See also* Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 792 ("the central termination question . . . is what it means to accomplish desegregation and achieve unitary status"). One law review article notes that the reason why

> [t]he Court has refrained from offering such a statement [is] because it has recognized that no single inflexible formula could apply to all school systems. Just as the methods for desegregating dual school systems necessarily vary with the circumstances so does the determination whether desegregation has been successful. Courts supervising the desegregation of dual school systems must define unitariness in light of the circumstances before them. Once all the vestiges of the dual system, as well as the effects of those vestiges, have been eliminated, declaring the system unitary is within the discretion of the district court judge.

Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 662-63 (1987) (footnotes omitted).

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

22. Brown v. Board of Education, 349 U.S. 249, 299 (1955).

23. Green v. County School Board, 341 U.S. 430, 439 (1968).

24. Wright v. Council of Emporia, 407 U.S. 451, 459-62, 467 (1972).

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

take are broad.[26] In *Swann v. Charlotte-Mecklenburg Board of Education*[27] the Supreme Court sanctioned the district court's use of racial quotas,[28] remedial alteration of school attendance zones,[29] and busing of school children to remedy intentional segregation.[30] However, the Court recognized that these measures were temporary in nature, designed for use only until the school system achieved unitary status.[31] The Court failed to specify the elements of unitariness. It did, however, refer in passing to the *effects* of a finding of unitariness.[32]

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26. *Brown II*, 349 U.S. at 300 ("In fashioning and effectuating the decrees, the courts will be guided by equitable principles."). *See also* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown the scope of a district court's equitable powers to remedy past wrongs is broad . . .").

In *Milliken v. Bradley*, 433 U.S. 267, 281 (1977), the Court provided three equitable principles to guide courts in drafting a remedy. First, the remedy must take into account the nature and scope of the violation. Second, the remedy should restore the students, to the greatest degree possible, to the position they would have occupied absent the violation. Finally, the courts should take into consideration the interests of state and local authorities in managing their own affairs in accordance with the Constitution. *Id.* at 280-81. The tension between effective remediation and local autonomy has caused the greatest consternation for lower courts attempting to determine whether a system is unitary and what effects such a finding should have.

27. 402 U.S. 1 (1971).

28. *Id.* at 22-25. The Court noted that desegregation does not mean every school in the community must always reflect the racial composition of the system as a whole. However, racial quotas may be used as a starting point in shaping a remedy. *Id.*

29. *Id.* at 27-29. Included in this power is the ability to pair and group noncontiguous zones to counteract past segregation.

30. *Id.* at 29-31. The Court recognized that assigning students to the school nearest their home would not effectively dismantle Charlotte-Mecklenburg's dual system. Busing could therefore be used to a limited extent. Nonetheless, a valid objection to busing could be made where the time or distance of travel is so great as to risk either the health of the children or significantly impair the educational process. One important factor in determining appropriate travel time is the age of the students. *Id.* at 31.

31. 402 U.S. at 31-32.

32. The Court observed:

> 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.

402 U.S. at 31-2.

A. Returning the System to Local School Board Control

In *Pasadena City Board of Education v. Spangler*[33] the Supreme Court first expounded on the effect of a district court finding of unitariness. Since 1970 the Pasadena school system had operated under a desegregation plan designed to eliminate schools with "a majority of any minority students."[34] After 1971, however, population shifts undermined the effectiveness of the plan.[35] Thus, in 1974 the school board sought a modification of the reassignment order.[36] The district court denied the request and continued the annual reassignment of students, despite the absence of any proof of deliberate school board efforts to undermine the desegregation efforts.[37] The Supreme Court reversed, holding that the district court abused its discretion by requiring annual reassignment of students absent proof that school officials had deliberately caused changes in the racial mix.[38] Furthermore, the Court held that once the Pasadena School Board accomplished its affirmative duty to desegregate, the district court's power to require further annual reassignments terminated.[39] Thus, once a school system achieves unitary status the school board regains its control over the decision-making process.[40]

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33. 427 U.S. 424 (1976).

34. *Id.* at 431.

35. *Id.* Following the 1970-71 school year, black enrollment at one Pasadena school exceeded 50 % of the school's total enrollment. The next year, four Pasadena schools had black enrollments exceeding 50 % of their total enrollment. By the time of the hearing on the school board's motion to modify the plan, five of Pasadena's thirty-two regular schools were in violation of the district court's "no majority of any minority" requirement.

36. The Pasadena School Board sought four changes in the original court order: (1) to have the judgment modified so as to eliminate the requirement that there be no school with a majority of any minority students, (2) to have the district court's injunction dissolved, (3) to have the district court terminate its "retained jurisdiction" over the actions of the board *and* (4) to approve the school board's modifications of the "Pasadena Plan." Spangler v. Pasadena City Board of Education, 375 F. Supp. 1304, 1309-10 (C.D. Cal. 1974).

37. Spangler v. Pasadena City Board of Education, 375 F. Supp. 1304 (C.D. Cal. 1974); *aff'd* Spangler v. Pasadena City Board of Education, 519 F.2d 430 (9th Cir. 1975). The court of appeals affirmed two to one but all three judges expressed substantial reservations about some of the district court's actions, and the implications for future operation of the Pasadena Schools. The majority was satisfied, however, that the district judge would heed its reservations. 519 F.2d at 440-41 (Chambers, J., concurring). The Supreme Court granted certiorari. 423 U.S. 945 (1975).

38. 427 U.S. at 435.

39. *Id.* at 436-37. More specifically, the Court stated that: "For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court [has] fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Id.*

40. According to one commentator, the holding in *Pasadena* was a narrow one because the trial judge had taken an "obviously inappropriate" step by "[asserting] the power to maintain a particular

Three circuit courts have considered the appropriate role of the district courts in desegregation cases after a finding of unitariness. In *Riddick v. School Board of City of Norfolk*,[41] the Fourth Circuit adopted the *Pasadena* approach, holding that once a system has achieved unitary status the district court may not order further relief to counter resegregation caused by factors other than the school board's intentional discrimination.[42] Rather, the school system is returned to the school board and the district court is divested of jurisdiction.[43]

The Tenth Circuit reached the opposite conclusion in *Dowell v. Board of Education*.[44] In *Dowell*, the court held that the closing of a school desegregation case does not diminish the district court's authority after it had enjoined the board from following segregationist policies.[45] The termination of active supervision over a school system does not prevent the district court from enforcing its orders.[46] Moreover, the mandatory injunction remains in effect until the court dissolves it.[47] The Tenth Circuit criticized the Fourth Circuit for "treat[ing] a district court order terminating supervision as an order dissolving a mandated integration plan."[48] The *Dowell* court emphasized that a finding of unitariness cannot divest a court of its jurisdiction, nor can it convert a mandatory injunction into voluntary compliance.[49]

In *United States v. Overton*[50] the Fifth Circuit rejected the *Dowell* ap-

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racial balance in the schools 'in perpetuity', without regard to whether the affirmative duty to desegregate has already been 'accomplished' and a 'unitary system' already achieved." Note, *The Unitary Finding and the Threat of School Resegregation:* Riddick v. School Board, 65 N.C.L. REV. 617, 630 n.112 (1987) (quoting Gewirtz, *supra* note 20, at 791).

Similarly, the Sixth Circuit narrowly interpreted the *Pasadena* holding in Oliver v. Kalamazoo Board of Education, 640 F.2d 782 (6th Cir. 1980). The court reasoned, "*Pasadena* did not, however, hold that a district court did not have the authority and duty to order such ancillary programs if such were found to be necessary to cure the effects on the black children of the prior unconstitutional school segregation." *Id.* at 787.

41. 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

42. *Id.* at 537-38.

43. *Id.* at 537.

44. 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).

45. *Id.* at 1520. The court stated that "the viability of a permanent injunction does not depend upon this ministerial procedure." *Id.* (citation omitted).

46. *Id.*

47. *Id.* at 1520-21. Thus, the court rejected the Fourth Circuit's attempt to treat a district court order terminating supervision as an order dissolving a mandatory desegregation order, absent a specific mandate to that effect.

48. *Id.* at 1520 n.3.

49. *Id.*

50. 834 F.2d 1171 (5th Cir. 1987).

proach and adopted the *Riddick* approach.[51] The *Overton* court gave three reasons for its decision. First, the *Dowell* approach denies meaning to the concept of unitariness as used by the Supreme Court in *Pasadena* and *Swann* by failing to end judicial superintendence of the school system.[52] Second, the *Dowell* approach continues to hold school districts responsible for resegregation even though the district court declared the system unitary.[53] And finally, the *Dowell* approach violates the equitable principle that judicial power "should extend no further than required by the nature and extent of [the] violation."[54]

B. Shifting the Burden of Proof

The second effect of a judicial finding of unitariness is that the burden of proof[55] shifts from the school board to the plaintiff. In order to secure further judicial intervention, the plaintiff must prove that the school board acted with the intent to reestablish a dual system.[56] Even if the plaintiff proves a segregative purpose, the school board will prevail if it demonstrates its actions were based on legitimate, nonsegregative purposes.[57]

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51. 834 F.2d at 1174-75.

52. *Id.* at 1175. More specifically the court stated, "Attaining unitary status . . . means that a school board is free to act without federal supervision so long as the board does not purposefully discriminate . . . ."

53. *Id.* at 1175-76. The court believed a school district is released from the consequences of its past misdeeds when it eliminates the vestiges of a segregated system and achieves a true unitary status.

54. *Id.* at 1176 (citing General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 399 (1982)).

55. As used in this Note, "burden of proof" refers to the burden of persuasion, i.e., the burden of persuading the fact finder "that the disputed fact, in light of all the evidence, is more likely true than not." Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653 n.1 (1987).

56. *See* Columbus Board of Education v. Penick, 443 U.S. 449, 464 (1979) (plaintiffs in a desegregation action must "prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." (quoting Keyes v. School District, No. 1, 413 U.S. 189, 198 (1973)).

57. *See* Riddick v. School Board of City of Norfolk, 784 F.2d 521, 524, 529 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986) (upholding a school board plan to limit decreases in white student population and increase parental involvement). The test of discriminatory purpose derives from two Supreme Court precedents: Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (approving a zoning ordinance against the challenge that the law had a racially disproportionate impact), and Washington v. Davis, 426 U.S. 229 (1976) (upholding a written objective test that had a greater degree of impact on blacks than whites). This test is known as the "*Arlington Heights/Davis* test". The test is used when a party challenges that a facially neutral law has a disproportionate impact. The problem in applying this test is proving a discriminatory pur-

In *Overton v. Austin Independent School District*,[58] the Fifth Circuit rejected plaintiff's argument that the burden of proof should remain on the school board because it had a prior history of discrimination and superior knowledge of the facts necessary to prove or disprove a discriminatory intent.[59] The court found these arguments unpersuasive because they were based on a view that the school board could never be trusted and should be kept under federal judicial control indefinitely.[60] The court recognized the risks involved in giving the school board control over student assignments and shifting the burden of proof back to the plaintiff.[61] The court, however, believed that school board policy is a local decision and board members should be relieved of constant court supervision.[62]

In *Dowell v. Board of Education*,[63] on the other hand, the Tenth Circuit refused to shift the burden of proof.[64] Consistent with its finding that being a unitary system does not mean removal of a mandatory injunction,[65] the court held that the plaintiff is only required to show that the school board violated the injunction.[66] The burden then shifts to the

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pose. Courts are confronted by decision-making entities to whom the judiciary feels it owes some deference. Courts are therefore reluctant to look into the motives behind such laws. The Court has held that the mere impact of the law is not enough to find an equal protection violation. *See* Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) (approving a state law giving preference to veterans in civil service examinations despite the law's disproportionate impact on women). The Court refused to base its findings solely on subjective legislative motive. A strict subjective analysis would overturn many acts approved in a non-discriminatory democratic process simply because some legislators were prejudiced. J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 547 (3rd ed. 1986).

58. 834 F.2d 1171 (5th Cir. 1987).

59. *Id.* at 1174-75.

60. *Id.* at 1176.

61. *Id.* As the court noted, "The carrot of unitariness can be a meaningful incentive for school districts to desegregate only if we abide by our promise to release federal control when the job is done."

62. *Id.* at 1176-77. The court recognized that enforcing the decree once the system is declared unitary would violate the equitable principle that judicial power should, "extend no further than required by the nature and extent of [the] violation." *Id.* at 1176 (quoting, General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 399 (1982)). The constitutional wrong, as the court states, is the purposeful separation of races in public education. The remedy is to achieve the approximate mix that would have occurred but for the discrimination. Once that is done the system is unitary. Once the remedy is complete, refusing to let the school system vary from the desegregation model unless it proves its nonsegregative purpose confuses the wrong with the remedy. *Id.* at 1177.

63. 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).

64. *Id.* at 1523.

65. *See supra* note 47 and accompanying text.

66. 795 F.2d at 1523.

school board to prove that conditions have changed sufficiently to require modification or removal of the injunction.[67]

II. DEFINING THE ELEMENTS OF A UNITARY SYSTEM

Though the Supreme Court has refrained from formally defining the elements of a unitary school system,[68] it identified the indicia of a *dual* system: Segregation among students, faculty and staff; segregation of transportation; and segregation of extracurricular activities.[69] Yet, the Court never stated that implementation of a desegregation plan, alone, makes the school system unitary.[70] The Court has declined to offer a single, comprehensive statement defining unitariness because it recognizes that no single, inflexible formula could apply to all systems.[71] Just as the methods for desegregating dual systems necessarily vary with the circumstances,[72] so does the determination of unitariness.[73] The Court

67. *Id.*

For an alternative approach to burden allocation after a finding of unitariness, see Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 668-70 (1987), wherein the author proposes that a plaintiff challenging a school board action as promoting the reestablishment of the dual system after a finding of unitariness must make a prima facie showing that the action will cause a substantial resegregation of the school system. Upon this showing, the burden shifts to the school board to prove the action did not result from an intent to discriminate. If the school authorities are unable to meet this burden, then the challenged action should be enjoined. *See also* Note, *The Unitariness Finding and Its Effect on Mandatory Desegregation Injunctions*, 55 FORDHAM L. REV. 551, 573-77 (1987).

The Supreme Court has yet to address the issue of burden shifting after a finding of unitariness. The Court denied certiorari in the *Riddick* and *Dowell* cases dealing with burden shifting. 479 U.S. 398 (1986). For criticism of the Court's refusal to hear *Riddick* and *Dowell*, see Terez, *Protecting the Remedy of Unitary Schools*, 37 CASE W. RES. 41, 41-43 n.7 (1987).

68. *See supra* note 19 and accompanying text.

69. Green v. County School Board, 391 U.S. 430, 435 (1968).

70. Rather, the Court consistently maintains that any plan adopted must work effectively. *See* Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971) ("The measure of any desegregation plan is its effectiveness."); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 31 (1971) ("desegregation plans must be reasonable, feasible and workable."); *Green* 391 U.S. at 438-39 (any desegregation plan must "realistically . . . work now").

71. *See* Keyes v. School District No. 1, 413 U.S. 189, 224 n.10 (1973) (Powell, J., concurring in part and dissenting in part) (recognizing that circumstances and demographics vary from district to district and thus no hard and fast rules should be formulated).

72. *See* Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 663 n.65 (1987) (noting that the Supreme Court recognized that solutions to segregated schools may vary according to local school problems).

73. *See* Ross v. Houston Indep. School District, 699 F.2d 218, 227 (5th Cir. 1983) (decision on whether a system is unitary must be based on the conditions in the district). For this reason, the determination of unitariness is left to the district courts' discretion. *See* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Alexander v. Board of Education, 396 U.S. 19

held that the district court supervising desegregation must define unitariness in light of the circumstances before it.[74] But the Court's failure to provide guidance for the lower courts in determining unitariness has led to inconsistent results.[75] Only the First Circuit, in *Morgan v. Nucci*,[76] provides a test for the district courts to apply.

A. History of Boston School Desegregation Litigation

The First Circuit developed its test in *Morgan v. Nucci* in the context of the Boston school desegregation litigation. This case ended fifteen years of continuous litigation centered on desegregation of the Boston school system.[77] Litigation began in 1972 when Morgan brought suit challenging the segregation in the Boston school system.[78] The district court found that the public schools were suffering from widespread racial segregation.[79] The court attributed this segregation to the purposeful misconduct of the school board in: (a) assigning students to schools, (b) discriminating when hiring and placing minority teachers and (c) locating and upkeeping school buildings.[80] In 1975 the district court began issuing orders to rectify the situation. The most important part of the desegregation plan dealt with student assignments.[81] The district court fashioned a broad remedy designed to transform the Boston schools into

(1969); Green v. School Board, 391 U.S. 430 (1968); Brown v. Board of Education, 349 U.S. 193 (1955) (*Brown II*).

74. *See supra* note 72.

75. *Compare* Riddick v. School Board of City of Norfolk, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 *with* Dowell v. Board of Education, 795 F.2d 1516 (10th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). Without guidance from the Supreme Court, these two circuits reached opposite conclusions on the issues of burden of proof and continued control of the system after a declaration of unitariness by the district court.

76. 831 F.2d 313 (1st Cir. 1987).

77. For the history of the Boston litigation, see Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982); Morgan v. Kerrigan, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

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

79. 379 F. Supp. at 425.

80. *Id.* at 449.

81. Morgan v. Kerrigan, 401 F. Supp. 216, 256-57 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935. Under this plan the court divided the city into eight geographical community districts and one city-wide "magnet" district. The court required assignments to schools within any one of the community districts to ensure that the percentage of black, white and "other minority" students approximated the corresponding percentage of each group in that district's total student population. *Id.* at 261. Assignments to the magnet schools had to approximate the racial composition of the student population in the entire city. *Id.* at 262.

"a unitary system in which racial discrimination would be eliminated root and branch."[82]

In 1982, the district court found that the Boston school board had made significant progress toward the goal of unitariness.[83] The court therefore commenced a transitional program of judicial disengagement.[84] After 1982, for example, the district court permanently terminated half of its original remedial orders.[85] However, the court also issued a series of instructive "final orders" in certain areas, including student assignments, which it deemed to warrant further judicial control.[86]

The final order for student assignments required that the school board indefinitely maintain specific racial mixes in the city's schools approximating the balances mandated by the district court during the "active" supervision years.[87] The school board appealed from this order, claiming that an injunction indefinitely perpetuating a particular, judicially-drawn

82. Morgan v. Nucci, 831 F.2d at 316 (quoting Green v. County School Board, 391 U.S. at 438). The district court also issued orders relating to faculty and staff, Morgan v. Kerrigan, 388 F. Supp. 581 (D. Mass. 1975), *aff'd*, 530 F.2d 431 (1st Cir. 1976); facilities, Morgan v. McDonough, 689 F.2d 265 (1st cir. 1982); special education, school safety and security, student discipline, bilingual education, vocational education, and student transportation, Morgan v. Nucci, 620 F. Supp. 214 (D. Mass. 1985).

83. Morgan v.McDonough, 554 F. Supp. 169 (D. Mass. 1982).

84. *Id.* at 171. While initially keeping the outstanding desegregation orders in effect, the court established a new administrative mechanism that reduced the need for direct judicial supervision. The court transferred to the Massachusetts Board of Education ("State Board") the primary responsibility for monitoring defendants' compliance with the court's desegregation orders and for mediating disputes between the parties. The district court required the State Board to submit semi-annual reports on defendants' efforts toward fulfilling their duty of remedying segregation. Morgan v. Nucci, 831 F.2d 313, 316 (1st Cir. 1987).

85. *See* Morgan v. Nucci, No. 72-911-G (D. Mass. Aug. 8, 1985) (student transportation order); Morgan v. Nucci, No. 72-911-G (D. Mass. May 17, 1985) (bilingual education, school safety and security, and student discipline orders); Morgan v. Walsh-Tomasini, No. 72-911-G (D. Mass. Oct. 31, 1984) (special education and institutional pairing orders). For an injunctive order not eliminated, see Morgan v. Nucci, 620 F. Supp. 214 (D. Mass. 1985).

86. Morgan v. Nucci, 831 F.2d at 316. Besides student assignments, other areas in which the district court retained control included vocational and occupational education, school facilities, staff desegregation, and parent and student organizations. *Id.*

The district court noted that "while significant progress has been made in these areas, the State Board reports show that each entails some unfinished planning, implementation or monitoring." Morgan v. Nucci, 620 F. Supp. at 218. The court signalled its lessened involvement, however, by formally removing the Boston case from its active docket. *Id.* at 219.

87. Morgan v. Nucci, 831 F.2d at 317. The final order required that the schools:

> (a) shall compose enrollments at each school so that its racial/ethnic proportions shall be consistent with current guidelines which shall be derived, with respect to city-wide magnet schools and programs, from the citywide public school population and, with respect to district schools, from the public school population of their current districts or consolidations thereof; . . .

formula was inappropriate.[88] The board asserted that, by 1985, it had substantially complied with all the court's remedial assignment orders.[89] As for student assignments, the school board contended that compliance was at the highest practicable level.[90]

Addressing the school board's contention of maximum practicable compliance, the First Circuit noted that the board had not achieved unitariness in all aspects of the Boston school system.[91] The First Circuit held, however, that a failure to achieve unitariness in other areas did not justify the district court's continued imposition of a specific student assignment plan.[92] The First Circuit opined that the "primary inquiry is . . . whether unitariness has been reached *in the area of student assignments* itself."[93] The record suggested to the appeals court that the student assignment process was unitary.[94] However, the First Circuit declined to make a final determination until the district court had a second opportunity to consider this specific unitariness issue.[95]

B. The Test for Unitariness

Even though the First Circuit left the ultimate determination of unitariness to the district court, it developed a tripartite test for deter-

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(b) alternatively, may beginning with the 1986-87 school year or thereafter use a single, city-wide guideline for assigning students . . . .

Morgan v. Nucci, 620 F. Supp. 214, 215-16 (D. Mass 1985). The circuit court further elaborated the order:

> Under either (a) or (b) assignment totals at a particular school may diverge from the target percentages within a range determined by adding and subtracting 25 percent of the total percentage. Thus, if the target percentage for a particular group is 48 percent, any assignment between 36 and 60 percent (48 plus or minus 12) is acceptable.

Morgan v Nucci, 831 F.2d at 317 n.3 (citation deleted).

88. Morgan v. Nucci, 831 F.2d at 317. The school defendants also appeal from an unpublished order of May 24, 1985, requiring schools in districts 4 and 5 to meet the district's racial mix within a variance of ten percent. *Id.* at 317, n.3.

89. *Id.* at 317.

90. *Id.*

91. *Id.* at 318 (citing faculty and staff assignments as an example).

92. *Id.*

93. *Id.* (emphasis original).

94. *Id.*

95. *Id.* Conversely, in part III of the opinion, the court rejected the Boston Teachers Union's appeal from a final order requiring the school board to follow hiring practices that would secure a faculty and staff of not less than twenty-five percent black and ten percent other minority members. This order represented a continuation of goals set in the mid-1970's. The First Circuit held that the district court could continue this desegregation program because the goals of a unitary staff and faculty had yet to be realized. *Id* at 328-29. The court also dismissed as moot the City of Boston's appeal from the district court order relating to unified facilities. *Id.* at 332.

mining whether Boston's student assignments had achieved unitary status and instructed the district court to apply it.[96]

1. *One-Race or Racially Identifiable Schools*

The First Circuit stated that an abundance of one-race or racially identifiable schools in a particular district may preclude a finding of unitariness.[97] To determine if Boston had an impermissible number of one-race schools, the court first had to consider the percentage at which a school becomes one-race.[98] The court declined to specifically adopt either an 80 or 90 percent standard because under either figure, Boston had a permissible number of one-race schools.[99] The court suggested that further desegregation of Boston's one-race schools would be impracticable due to "intractable demographic obstacles."[100] Therefore, the number of one-race schools appeared to the court to be consistent with a finding of unitariness.[101]

2. *Good Faith*

The First Circuit also observed that a history of good faith operation of the school system, in general, and implementation of assignment orders, in particular, would support a finding of unitariness.[102] The court included a good faith element because such a test would provide continued jurisdiction over school boards that have implemented neutral proce-

96. *Id.* at 318-23.

97. *Id.* at 319. The First Circuit also recognized, however, that "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." *Id.* (quoting Swann v. Board of Education, 402 U.S. 1, 26 (1971)).

98. Morgan v. Nucci, 831 F.2d at 319-20. The court noted that other courts had applied percentages ranging from 70-90 percent. *Id.* at 320. The court refused to use 70 or 75 percent as a figure appropriate for Boston schools. The court demonstrated that a figure in this range would label many Boston schools one-race *even if* their racial mix matched that of the court-established district in which they operate. *Id.* at 320 n.7.

99. *Id.* at 320. Using a 90 percent figure, only one school, Cheverus Middle School, had a racial majority of more than ninety percent. The school (91 percent white) is located in East Boston, an area excluded from much of the district court's remedial plan due to its geographic isolation. *Id.* Using an 80 percent figure, the number of one-race schools rose to thirteen. Eight of these schools (80 percent or more black) are in the most heavily black sections of Boston. Four of these schools (80 percent or more white) are located in East Boston. *Id.* All the schools, however, were in compliance with the district court's desegregation orders. *Id.*

100. 831 F.2d at 320-21.

101. *Id.* at 320.

102. *Id.* at 321.

dures but continue to exhibit "discriminatory animus" in decisionmaking.[103] The presence of good faith reduces the possibility that board compliance is but a "temporary constitutional ritual."[104]

In the Boston case, the First Circuit pointed to two factors demonstrating the school board's good faith. First, the court stressed that the last State Board report concluded that the school board had fully complied with the student assignment orders.[105] Second, the court noted that minorities had gained several positions of responsibility in the school system, countering the possibility of intentional resegregation after termination of court supervision.[106]

3. *Maximum Practicable Desegregation*

Finally, the First Circuit emphasized that the ultimate goal of a desegregation program is "maximum practicable desegregation,"[107] a practical, not a theoretical standard.[108] According to the court, the district court should not continue supervision merely because some further degree of compliance with assignment orders is possible.[109] As long as the school board substantially complies with assignment orders, the court should forego retaining jurisdiction over assignment practices.[110]

The First Circuit went on to consider actual enrollment in the Boston school system.[111] If actual enrollment figures are skewed so that there is

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* The court also commented that:

> [b]y 1982, personnel changes and improved attitudes led both the district court and this court to comment on the responsible approach the school defendants were exhibiting towards the running of the school system and the implementation of the district court's orders . . . This was true on the date of the orders under review.

Id.

107. *Id.* at 322. "[Whether] 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.*" *Id.* (quoting Ross v. Houston Independent School District, 699 F.2d 218, 227 (5th Cir. 1983) (emphasis supplied)).

108. Morgan v. Nucci, 831 F.2d at 324.

109. *Id.*

110. *Id.* at 322.

111. *Id.* at 323. The court noted that actual enrollment may serve as a further check on the effectiveness of the assignment reform. *Id.* Based on the February 1985 monitoring report, the State Board found that only three of the fourteen high schools exhibited non-compliance, and none by more than two percentage points. All of the high schools out of compliance had too few whites, consistent with the State Board's explanation that enrollments may fail to fully reflect assignments because of the shrinking white population. Only one high school, the isolated East Boston High, had

a significant number of one-race schools, then the district court has a right to question the effectiveness of the plan itself.[112] Any divergence, however, between assignments and actual enrollment caused solely by "white flight"[113] should not be attributed to the school board.[114] The First Circuit found "that the once segregated Boston schools achieved a substantial degree of racial integration."[115]

III. APPLICATION OF THE FIRST CIRCUIT TEST

This Note examines the effectiveness of the First Circuit's test for

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more than 34 percent white enrollment, while the remaining two had more than 25 percent white enrollment. *Id.*

The State Board found that of the twenty-six middle schools, eleven had actual enrollments out of compliance, three as to black, seven as to whites, and one as to other minorities. None of these schools had too many whites. The State Board found that due to the special admission exams for entry to the seventh grade at Boston Latin School and Latin Academy, compliance cannot be achieved as to black enrollment. *Id.*

Finally, as for the elementary schools, the State Board found that 11 of 78 schools were out of compliance. However, the degree of noncompliance was greater, ranging from a minimum of five percent to a maximum of eighteen percent. *Id.* at 324. The First Circuit found that even though the schools were not in literal compliance with the assignment orders, there was no evidence that this non-compliance was caused by an "attempt to maintain enclaves of segregation." *Id.*

112. *Id.*

113. The problem of "white flight," whites leaving the city to avoid desegregation, is the greatest threat to complete desegregation. A major problem in designing an effective desegregation remedy is the extent to which the court can take into account the possibility of white flight in response to the desegregation order. *See generally* Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 625-65 (1983) (discussing the white flight phenomenon and possible legal responses).

114. Morgan v. Nucci, 831 F.2d 313, 322-23 (1st Cir. 1987). As the court pointed out, "[w]hile those charged with desegregation must not shrink from the threat of white flight, school officials who have taken effective action have no affirmative fourteenth-amendment duty to respond to those who vote with their feet." *Id.* at 323 (*quoting* Ross v. Houston Independent Schools, 699 F.2d 218, 225 (5th Cir. 1983)).

115. 831 F.2d at 323. *See also supra* note 111. Based on the State Board monitoring reports and actual enrollment figures, the court vacated the final orders as to student assignments. *Id.* at 326. The court also rejected three additional reasons the district court gave for maintaining jurisdiction. First, the district court found that school defendants were responsible for the racial identifiability in districts 4 and 5 by their failure to adopt "special desegregation measures." *Id.* at 325. The First Circuit noted these plans were not fixed plans but recommendations intended to attract more white students to these schools on a voluntary basis. Failure to implement these plans, the First Circuit held, does not show bad faith. *Id.* Second, the First Circuit found that a failure to create a unified facilities plan does not prohibit a finding of unitariness in student assignments. While poor upkeep of schools may impede desegregation, the answer to that is better maintenance. The school defendants were developing a plan for better maintenance. *Id.* at 325-26. Finally, the court rejected the desirability of further monitoring as a basis for continued supervision over student assignments. Either schools are unitary or not. This rationale does not demonstrate the need for a continued injunction as to student assignments. *Id.* at 326.

unitariness by applying it to two school systems with long histories of desegregation litigation culminating with a reaffirmation of a previous finding of unitary status. These are the Norfolk, Virginia and Oklahoma City, Oklahoma systems.[116]

A. Norfolk, Virginia[117]

Litigation to desegregate the Norfolk public school system began in 1956.[118] In 1970, the Fourth Circuit upheld the district court's finding of deliberate segregation in the Norfolk public schools and ordered the district court to make the system unitary.[119] The plan called for mandatory busing.[120] The ultimate goal of the plan was to achieve a 70/30 ration of black to white students in the public schools.[121] In 1975, the district court found the system unitary and dismissed the case.[122]

During the period from 1975 to 1980, the 70/30 ratio fell apart and the Norfolk school system moved toward resegregation.[123] The resegrega-

116. This Note chose these school systems for two reasons. First, within the last two years the courts of appeals in these two jurisdictions reached diametrically opposed views on the effects of a finding of unitariness. *See supra* notes 33-67 and accompanying text. Second, the history of desegregation efforts in both cities has been extensive and is well documented. *See generally* Note, *The Unitariness Finding and its Effect on Mandatory Desegregation Injunctions*, 55 FORDHAM L. REV. 551, 567-73 (1987); Terez, *Protecting the Remedy of Unitary Schools*, 37 CASE. W. RES. 41, 44-53 (1987).

117. For an excellent account of the history of school desegregation in Norfolk, Virginia, *see* Note, *The Unitary Finding and the Threat of School Resegregation: Riddick v. School Board*, 65 N.C.L. REV. 618 (1987).

118. Adkins v. School Board of the City of Newport News, 148 F. Supp. 430 (E.D. Va.), *aff'd*, 246 F.2d 324 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957). Following intervention by other plaintiffs, the case was renamed Brewer v. School Board of the City of Norfolk, 349 F.2d 414 (4th Cir. 1965).

119. Brewer v. School Board of the City of Norfolk, 434 F.2d 408, 410 (4th Cir.), *cert. denied*, 399 U.S. 929 (1970). Following the Supreme Court's *Swann* decision, the Fourth Circuit again remanded *Brewer* to the district court for implementation of a desegregation plan conforming with *Swann*'s expanded scope of remedies. Riddick v. School Board of City of Norfolk, 784 F.2d 521, 524 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

120. Brewer v. School Board of the City of Norfolk, 456 F.2d 943, 945 (4th Cir.), *cert. denied*, 407 U.S. 933 (1972). In addition to mandatory busing, the district court utilized pairing and clustering of schools in Norfolk. Finally, the plan called for free busing for students. *Riddick*, 784 F.2d at 525.

121. 784 F.2d at 526. A school was considered segregated if its enrollment consisted of more than seventy percent black students. *Id.*

122. 784 F.2d at 525. No appeal was taken from this order. However, from 1975 to 1983, the board continued crosstown busing. *Id.*

123. In 1970, the population of Norfolk was 70 percent white and 28 percent black. During the 1969-70 school year, 57 percent of the public school students were white, while 43 percent were black. *Id.*

By 1980, the general population in Norfolk had declined more than 11 percent to 61 percent white

tion was caused by declines in student population, "white flight," and less parental involvement in the schools.[124] In 1983, the school board proposed a plan to stabilize the system.[125] The plan eliminated crosstown busing of elementary school children.[126] In its place the plan called for single attendance zone schools.[127] Students then were fed into eight junior high schools each with maximum black/white ratios of 72/28 percent and a minimum ratio of 56/44 percent.[128]

In *Riddick v. School Board of City of Norfolk*,[129] plaintiffs asserted that the 1983 plan was a deliberate attempt to resegregate the schools.[130] The district court[131] and the Fourth Circuit[132] disagreed with the plaintiffs, finding no discriminatory intent by the school board to reestablish a dual system.

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and 35 percent black. By the 1980-81 school year, enrollment had shrunk 37 percent. White enrollment dropped 42 percent while black enrollment rose to 57 percent. *Id.* at 525. Due to the decline in student enrollment, seventeen elementary schools were closed primarily in black neighborhoods. *Id.* at 526.

124. 784 F.2d at 526. Gradually, the elementary schools were becoming resegregated. In 1977, one school was over 70 percent black. By 1981, seven elementary schools were over 70 percent black. In addition, parental involvement measured by PTA membership dropped from 15,000 parents to 3,500. *Id.* at 526. The school board reasoned that increased parental involvement "was essential to the well-being of the school system." *Id.* at 529.

125. *Riddick*, 784 F.2d at 526. In 1981, the school board appointed a committee to examine the feasibility of reducing crosstown busing. The committee members visited other school systems to study their desegregation programs. The committee appointed a task force to produce data for the committee and hired expert consultants in their field. *Id.* One of these experts, Dr. Armor prepared a report on the problems of continued integration of the schools. Armor found that mandatory busing led to significant white flight and that if busing continued the Norfolk system would become 75 percent black. He urged the committee to eliminate busing. *Id.*

126. 784 F.2d at 526-27. Single attendance zone schools are more commonly known as neighborhood schools.

127. *Id.* at 527. The single attendance zones were gerrymandered so as to achieve maximum racial integration. Under the plan, twelve of Norfolk's thirty-six elementary schools would be 70 percent or more black compared to four under the busing plan. Of those twelve, ten would be 95 percent or more black. Six schools would become 70 percent or more white. *Id.*

128. 784 F.2d at 527. In addition, the plan contained a majority minority transfer option. Under the option a student assigned to a school at which his race constitutes 70 percent or more of the pupils can transfer to a school where his race is less than 50 percent of the pupils. The plan also provided for free transportation of students exercising this option. The school board estimated that 10-15 percent of eligible students would take advantage of the transfer program. Five year projection showed that as many as 40 percent of the students might opt for the transfer. *Id.* The plan also provided for multi-cultural programs to "expose students in racially isolated elementary schools to students of other races." *Id.* Finally, the plan contained a parental involvement policy. *Id.*

129. 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

130. 784 F.2d at 525.

131. Riddick v. School Board of City of Norfolk, 627 F. Supp. 814 (E.D. Va. 1984).

132. 784 F.2d at 544.

Had the district court applied the First Circuit's test of unitariness to the Norfolk district in 1983, the date of the complaint, it would have found that the indicia of unitariness were present.

1. One Race Schools

Under the original Norfolk plan the goal was a maximum of 70/30 percent black/white ratio.[133] The school board achieved this goal by 1975.[134] However, had the school board failed to adopt the new plan in 1983, estimates show that, given white flight and demographic changes, by 1987 75 percent of the students in Norfolk schools would have been black.[135] This would render the 70/30 ratio an impossibility. Under the new plan, one-third of Norfolk elementary schools would be 70 percent or more black.[136] To counterbalance this relatively high figure, all the junior high schools would be fully integrated near the original goal of a 70/30 ratio.[137] As the *Morgan* court recognized, the percentage of students making a school "one-race" varies according to demographic conditions.[138] Furthermore, the fact that there are a few one-race schools does not mean the system is dual.[139] However, because the First Circuit failed to specify the threshold percentage making a school one-race or the number of schools in a system making it dual, a reasonable application of the first prong of *Morgan* is difficult.

2. Good Faith

While the evidence supporting prong one is mixed, the evidence supporting prong two of the First Circuit test is strong. Adoption and implementation of the plan in four years supports a finding of good faith by the school board. Additionally, the 1983 plan furthered unitariness by maintaining the junior high schools at or near the 70 percent goal.[140] Furthermore, as in Boston, several black board members were elected to the Norfolk board, lessening the chance of intentional resegregation.[141] Finally, unlike Boston, the Norfolk school system had made great strides

133. *See supra* note 121 and accompanying text.
134. *See supra* note 122 and accompanying text.
135. *See supra* note 123 and accompanying text.
136. *See supra* note 127.
137. *See supra* note 128 and accompanying text.
138. *See supra* note 98.
139. *See supra* notes 99-102 and accompanying text.
140. *See supra* note 128 and accompanying text.
141. Three of the seven Norfolk board members were black. In addition, one of the black mem-

in the integration of faculty and staff.[142] This combination of factors makes the showing of good faith in Norfolk stronger than in Boston.

3. *Maximum Practicable Desegregation*

Similarly, the Norfolk school board appears to have attained the maximum practicable desegregation of its schools. Based on the large amount of white flight and a drop in school-age population,[143] the 70/30 ratio would probably no longer serve as an effective device for attaining unitary status. Under the 1983 plan, the board intended to maintain and perhaps improve that racial balance.[144]

B. Oklahoma City, Oklahoma[145]

Desegregation of the Oklahoma City schools began in 1961.[146] From 1961 to 1972, the parties to the litigation struggled though the task of desegregating the public schools, each proffering different plans to accomplish that goal.[147] The district court finally ordered implementation of the "Finger Plan" after finding that the school board thwarted earlier desegregation efforts.[148] In 1975 the school board moved to close the

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bers voted for the 1983 plan. Riddick v. School Board of City of Norfolk, 784 F.2d 521, 526 n.4 (4th Cir.), 479 U.S. 938 (1986).

142. 784 F.2d at 533. The district court previously found the school administration balanced and the racial composition of the faculty mixed. *Id.*

143. *See supra* note 124 and accompanying text.

144. 784 F.2d at 525-28.

145. For a history of the Oklahoma City litigation from 1961 to 1972, see Dowell v. School Board of Oklahoma City Public Schools, 219 F. Supp. 427 (W.D. Okla. 1963); Dowell v. School Board of Oklahoma City Public Schools, 430 F.2d 865 (10th Cir. 1970); Dowell v. School Board of Education of the Oklahoma City Public Schools, 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1051 (1972).

146. Dowell v. Board of Education of Oklahoma, 795 F.2d 1516, 1517 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).

147. 795 F.2d at 1517-18.

148. 338 F. Supp. at 1263. The Tenth Circuit described the Finger Plan as follows:

> The plan restructured attendance zones for high schools and middle schools so that each level enrolled black and white students. At the elementary level, all schools with a majority of black pupils become fifth grade centers which provided enhanced curricula. All elementary schools with a majority of white students were converted to serve grades one to four. Generally, the white students continued to attend neighborhood schools while black students in grade one through four were bused to classes. When white students reached the fifth grade, they were bused to the fifth grade center, while black fifth graders attended the centers in their neighborhoods. Schools which were located in integrated areas qualified as "stand alone schools," and the students in grades one through five remained in their own neighborhood.

795 F.2d at 1518.

case, claiming that it had "eliminated all vestiges of state-imposed racial discrimination in its school system."[149] In 1977 the district court granted the motion to terminate active supervision.[150] In 1985, plaintiffs sought to reopen the case, claiming the school board abandoned the Finger Plan and instituted a new "Student Reassignment Plan" that would resegregate the schools.[151] The district court denied this request and found the new plan constitutional.[152] The Circuit Court of Appeals reversed and remanded.[153]

The First Circuit's unitariness test leads to mixed results when applied to the Oklahoma City School system as it would be modified by its new Student Reassignment Plan.

1. One-Race Schools

The one-race aspect of the First Circuit's tripartite test lends the least support to a finding of unitariness under the new assignment plan. Under the plan the percentage of one-race elementary schools would be approximately 51 percent.[154]

2. Good Faith

Although the number of one-race schools would increase under the plan, evidence of good faith in the implementation of the Finger Plan and the newly devised plan is strong. The evidence shows that the school

149. *Id.* at 1518.

150. Dowell v. School Board of Oklahoma City Public Schools, No. CIV-9452, slip. op. (W.D. Okla. Jan. 18, 1977).

151. 606 F. Supp. at 1548. The new Student Reassignment Plan ended compulsory busing of black students in grades one through four. In its place, the plan reinstated neighborhood elementary schools for those grades. Free transportation was provided for children in the racial majority who choose to transfer to a school in which they were a minority. Racial balance in the fifth grade centers, middle schools, and high schools would be maintained by mandatory busing. *Id.* at 1551-53. Under this plan thirty-three of the system's sixty-four elementary schools would have one-race enrollments of 90 percent or more. 795 F.2d at 1518.

152. 606 F. Supp. at 1557. The district court noted that the purposes of the new plan were to increase parental involvement, provide students with a greater opportunity to participate in extracurricular activities, and minimize the busing of small children. *Id.* at 1553. In addition, the plan assured that the curriculum, student/teacher ratios, facilities, equipment, supplies, and textbooks would be the same in all schools. *Id.* Furthermore, the plan called for the appointment of an equity officer to monitor all schools and ensure equality of facilities, equipment, supplies, books, and teachers. An equity committee would assist the equity officer and recommend ways to integrate students at any racially identifiable schools. *Id.*

153. Dowell v. Board of Education, 795 F.2d 1516, 1523 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986). *See also supra* notes 44-47, 63-66 and accompanying text.

154. *See supra* note 151.

board implemented and properly operated the Finger Plan which led to a finding of unitariness on January 18, 1977.[155] In addition, the school board adopted the new plan to improve parental involvement in the schools and minimize elementary school busing.[156] Furthermore, the school board held public hearings at which any person could express his views.[157] The plan called for an equity officer to monitor all schools and insure the equality of facilities, equipment, supplies, books, and instructors. An equity committee would assist the equity officer and recommend ways to integrate schools that became racially identifiable.[158] And finally, similar to the Norfolk experience, there was great improvement in black participation in the administration, faculty, and staff of the school system.[159]

3. *Maximum Practicable Desegregation*

Two factors support a finding of maximum practicable desegregation in the Oklahoma City schools. First, population changes dramatically reduced the number of white students in the school system since implementation of the Finger Plan. Conversely, the percentage of blacks in the school population rose dramatically, making further desegregation impracticable.[160] Second, under the Finger Plan elementary schools achieved what the district court called "stand alone" status.[161] The court confers this status when the school's neighborhood has achieved a racial balance through natural integration.[162] Once achieved, students previously bused to the school must be redirected to schools that have

155. *See supra* note 150.

156. *See supra* note 152.

157. Dowell v. School Board of Oklahoma City, 606 F. Supp. 1548, 1552 (W.D. Okla. 1985).

158. *See supra* note 152.

159. 606 F. Supp. at 1553. The racial composition of the faculty and staff as of 1985 was as follows:

Teachers	30.4% black
Principles	28.4% black
Other Administrators	35.5% black
Coaches	45.6% black
Counselors	41.3% black
Special Ed. Teachers	30.2% black
Support Personnel	45.9% black

Id. In addition, the school board had implemented an affirmative action plan. *Id.*

160. In 1971, the student population was 23 percent black and 77 percent white. By 1985, however, the student population was 38 percent black but only 50 percent white (the balance consisting of non-black minorities). 606 F. Supp. at 1553.

161. *Id.* at 1552.

162. *Id.* at 1551.

not yet achieved a racial balance. Thus, under the Finger Plan, the district court would have to bus young black children further north, west, or south to all-white schools.[163] According to the district court, this increased burden on young children is highly impracticable.[164] Under the new Student Reassignment Plan, the burden of busing would be lessened and the board could achieve both unitariness and increased parental involvement.[165]

IV. CRITIQUE OF THE FIRST CIRCUIT'S TEST

Part III of this Note demonstrated the application of the First Circuit's test. Part IV, A identifies the parts of the First Circuit's test that hamper its effectiveness. Section B proposes modifications of the First Circuit's test creating a method of analysis that ensures a system is unitary.

A. Criticisms

There are several flaws in the First Circuit's test. The first and perhaps greatest flaw is the amount of weight given to the school board's good faith.[166] The First Circuit did not specify whether the test of good faith should be objective or subjective.[167] Assuming the inquiry is subjective, the question remains whether a court can believe that a school board with a history of segregationist practices has suddenly become enlight-

163. *Id.* at 1552.

164. *Id.*

165. *Id.* at 1554. A useful critique of the Fourth and Tenth Circuit opinions is contained in Terez, *Protecting the Remedy of Unitary Schools*, 37 CASE W. RES. 41 (1987). The author states in pertinent part:

> 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 hesitate 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.

Id. at 43.

166. *See supra* notes 101-05 and accompanying text.

167. An objective good faith test looks at the school board's efforts through the reasonable person's eyes. A subjective test, on the other hand, determines good faith from the perspective of the school board (i.e., their motivations for a particular action).

ened and intends to maintain a unitary system.[168] The decision to adopt a desegregation plan comes from a district court, not the school board. Prompt implementation of a plan and cooperation with the district court could be explained as a ploy by the school board to return the school system to its control.[169] It would seem mere cooperation cannot prove a change of heart in people who operated a segregated system.[170]

If, on the other hand, the First Circuit intended an objective test for good faith, other problems arise. Even if there has been improvement in the area of minority faculty, staff and administrative personnel, the school board might be using these improvements to hide true animus toward establishing a unitary system.[171] Conversely, the Boston school board could not have acted in good faith when it failed to make improvements in areas other than student assignments.[172]

Similarly, the bare fact that there were black decision-makers in Boston, Norfolk, and Oklahoma City fails to prove that the respective school boards acted in good faith. In all three cases the black members constituted a minority of the school board.[173] Even assuming the black members could muster enough support to pass a proposal, there is no assurance that black members would act in the best interest of black students. Perhaps feeling the pressure from those opposed to busing and other desegregation policies, black members would agree to curb desegre-

168. For example, the district court in the Oklahoma City case found that, prior to the "Finger Plan," the school board thwarted desegregation orders. Dowell v. Board of Education, 795 F.2d 1516, 1518 (10th Cir.), 479 U.S. 938 (1986).

169. It could reasonably be assumed that a school board realizes the sooner it implements the court order, the sooner the school board regains control over the system. *See* United States v. Overton, 834 F.2d 1171, 1175 (1987).

170. In addition, it seems strange that a school board that for years operated a dual system and fought the court ordered desegregation can cure those years of consitutional violations with adherence to a court-ordered plan. This ignores the fact that years of segregation have produced certain vestiges such as segregated housing and poor maintenance of black schools. Removal of these vestiges will take longer than full implementation of a school desegregation order. Until those vestiges are removed, however, the court should maintain control over the school system. *See* Note, *Unitary Schools and Underlying Vestiges of State-Imposed Segregation*, 87 COLUM. L. REV. 794, 799-805 (1987).

171. Morgan v. Nucci, 831 F.2d 313, 321 (1st Cir. 1987).

172. In Green v. County School Board, the Supreme Court identified segregation of students, faculty, staff, transportation, extracurricular activities, and facilities as indicia of a dual system. 391 U.S. 430, 435 (1968). If this is true, then the Boston school system failed to fully exhibit what the Court has called "among the most important indicia of a segregated system." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18 (1971).

173. For example, on the Norfolk board only three of the seven board members were black. *See supra* note 141.

gation plans, preserving their jobs.[174]

More importantly, terminating court supervision after a school board's first "successful" attempt at remedying purposeful discrimination is wrong. The measure of success must be the achievement of results,[175] not simply good faith.

The second flaw in the First Circuit's approach is found in the one-race school element. By failing to specify the percentage of minority students in a school that would make the school "one-race," the First Circuit gives district courts carte blanche to decide the appropriate percentage. A judge who favors returning the school system to the board might fix the percentage at an unusually high level. Inflating the percentage would lead to an exaggerated number of unitary schools in a system, depriving the plaintiffs of an effective remedy.

A third flaw in the First Circuit's analysis involves the element of maximum practicable desegregation. How should a district court determine the point at which further desegregation efforts are impracticable? Reliance on demographics gives the school board an excuse to abandon desegregation orders because of white flight.[176] Furthermore, can a court really believe a school board that says it has achieved maximum practicable desegregation? From whose standpoint does the court determine practicability? The school board's? The court's? The plaintiff's? The First Circuit's opinion leaves these questions unanswered.

The final flaw of the First Circuit's approach to unitariness is that the court ignores the issue of how a finding of unitariness will affect the plaintiff's remedial rights.[177] The court failed to consider the effect of unitary status on the district court's jurisdiction, or the future plaintiff's burden of proof.

B. Modification of the First Circuit's Test

Despite the flaws in the First Circuit's analysis, the test could be modified to produce a test that considers both the plaintiff's remedial rights and the school board's desire to regain local autonomy.[178]

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174. For example, in Norfolk two of the board members voting in favor of the new plan were black. *See supra* note 141.

175. *Green*, 391 U.S. 430, 439 (any desegregation plan must "realistically . . . work *now*") (emphasis in original).

176. *See supra* note 114 and accompanying text.

177. *See supra* notes 33-67 and accompanying text.

178. *See* Milliken v. Bradley, 433 U.S. 267, 280-81 (1977) (when drafting a desegregation rem-

First, this modified test would require that the desegregation plan worked effectively.[179] To make this determination the court could properly take into account the number of one-race schools remaining after completion of the plan.[180] Until the number of one-race schools reached an acceptable level, the court would retain jurisdiction to modify the plan as necessary.[181]

Second, in determining the acceptable number of one-race schools, the district court should specify what percentage of students makes a school one-race.[182] Absent special circumstances,[183] the court should continue to use that percentage until the system is declared unitary.

Third, the district court should set a target number for determining the acceptable level of one-race schools in a unitary system.[184] For a system to be declared unitary the school board must come within 5 percent of that goal.[185] Failure to do so would require continued district court supervision.

Fourth, good faith, both subjective and objective,[186] would play a mi-

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edy, the district court should consider not only the restorative effect of the remedy, but also the local officials' interest in autonomy over local affairs); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971) (the trial court's "task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution").

179. *See supra* text accompanying note 17.

180. Morgan v. Nucci, 831 F.2d 313, 319 (10th Cir. 1987).

181. Most courts define one-race schools as having 70 percent or more students of one race. *See, e.g.*, Riddick v. School Board of City of Norfolk, 784 F.2d 521, 526 (4th Cir.), 479 U.S. 938 (1986). This figure should be the benchmark in any desegregation order unless a determination is made at the time of implementation that a 70 percent goal would be impossible. The burden would fall on the school board to prove that the 70 percent goal is impossible. *Cf.* Brown v. Board of Education (*Brown II*), 349 U.S. 294, 300-01 (1955) (placing on the school board the burden of justifying additional implementation time).

182. The court's determination would be based on all available demographic information.

183. For example, unexpected "white flight" might require reassessment of the threshold percentage. *See supra* note 98.

184. In this regard, the First Circuit correctly found that the goal of a desegregation order is maximum practicable desegregation. *See supra* note 107 and accompanying text. The court must set a realistic target and recognize the limits of possible desegregation.

185. Five percent provides a reasonable amount of leeway for the possibility of white flight. Anything above five percent shows that the plan has failed to "realistically work now." *See* Green v. County School Board, 391 U.S. 430, 439 (1968). Absent compliance the board could seek modification of the order to take into account white flight. However, the board would have the burden of proving that the impermissible number of one-race schools was caused by white flight. Moreover, the court cannot abolish any remedial measures simply because of white flight. To do so would give private biases constitutional protection. The Supreme Court has refused to grant such protection to private biases in a different context. *See* Palmer v. Sidoti, 466 U.S. 432, 433 (1984) (invalidating child custody awarded to a father merely because his ex-wife lived with a black man).

186. *See supra* notes 102-06 and accompanying text.

nor role in determining unitariness. Good faith should never be the deciding factor in determining that a system is unitary.[187] On the other hand, the presence of bad faith, subjective or objective, would be a reason for denying unitary status.[188]

Finally, even if the school board has met all of the above factors, the court, as Professor Gewirtz suggested, should delay granting unitary status for at least one generation.[189] This assures that the remedy is not merely temporary.[190] In addition, requiring the court to wait a generation until handing the system back to the school board will assure that likely none of the original board members who perpetuated segregation is still in power. Perhaps new board members will adopt a more enlightened policy than their predecessors and will not need judicial supervision. Most likely, these new members will have far more healthy and productive views on the issue of a unitary school system.[191]

Under the proposed test, none of the three school systems would sat-

187. *See supra* notes 166-75 and accompanying text.

188. *See* Morgan v. Nucci, 831 F.2d 313, 321 (1st Cir. 1987) ("where a court has reason to believe that a discrimination animus still taints local decisionmaking, it may be appropriate for the court to retain jurisdiction for some period after neutral procedures have been implemented"). A finding of bad faith is more consistent with the historical orientation of court-desegregated school boards. Thus it is entitled to greater weight than a finding of good faith. *See supra* notes 166-72 and accompanying text.

189. Gewirtz, *supra* note 20 at 789-98. As Professor Gewirtz has noted:

> The effects of a violation are not erased the moment integration is achieved. One goal of a desegregation remedy, for example, is to eliminate the racial identifiability of schools. That goal, if taken seriously, cannot be achieved by producing an integrated student body in the schools for a day, or even a year. A period of sustained compliance, perhaps an entire generation, is needed for public perceptions about the racial character of the schools to be transformed. Or to take another example: as the courts have repeatedly recognized, long-standing de jure segregation has affected school site locations and residential patterns. Desegregation, presumably, is not accomplished until these effects of the violation are reversed or no longer have any segregative effect on schools in the district. But this cannot happen overnight. The remedy must be in place for a significant period of time—until, for example, school locations and residential patterns have evolved so that a school board decision to return to a neighborhood assignment system, or to eliminate the magnet schools from a choice system, would not perpetuate effects of prior segregative actions.

Id. at 792-95. A generation is usually taken to be thirty-three years. WEBSTER'S NEW INTERNATIONAL DICTIONARY (unabridged) 1044 (2d. ed. 1959).

190. Gewirtz, *supra* note 20, at 795.

191. A more drastic proposal can be found in Terez, *Protecting the Remedy of Unitary Schools*, 37 CASE. W. RES. 41, 60-65 (1986). The author suggests that once a system is declared unitary the district court enter a permanent injunction preventing any change in the court-made remedy. This proposal is faulty because it fails to take into account the school board's interest in regaining control over its system. *See supra* note 52. Under the test provided by this Note, the school board will one day regain its control. The delay, however, is justified because it assures an effective remedy.

isfy the final requirement.[192] This would give both the courts and the school boards more time to insure that the plans actually work and are not merely token gestures to appease the courts and minorities.

V. CONCLUSION

The issue of whether a school system is unitary will continue to be a troubling issue for district courts. Their task is not made easier by the lack of guidance from the Supreme Court. This Note provides a possible test that district courts could use in their determination. Ultimately, the Supreme Court must stop avoiding the issue and hand down guidelines. Too much is at stake for the school board, minorities, and parents for the Supreme Court to stand on the sideline and let the lower courts decide on an ad hoc basis[193] if a system is unitary. The Supreme Court created this problem in *Swann*[194] and *Pasadena*[195] with its promise to return the school system to the board once it was unitary. Now the Court must create a solution.

Seth Ptasiewicz

192. Under Professor Gewirtz's test the school board regains control thirty-three years after it is declared unitary. *See supra* note 185.

193. *See supra* notes 33-67 and accompanying text.

194. *See supra* notes 27-32 and accompanying text.

195. *See supra* notes 33-40 and accompanying text.