LIMITING FEDERAL DISTRICT COURT POWER AFTER SUCCESSFUL IMPLEMENTATION OF SCHOOL DESEGREGATION ORDERS

One year after the United States Supreme Court declared segregation in public schools unconstitutional,[1] the Court delegated primary responsibility for remedying segregated conditions to local school officials.[2] Where school officials failed, the Court instructed district courts to fashion effective desegregation remedies through the use of their broad equitable powers. The Supreme Court, however, in delineating the scope of these powers, has cautioned that although equitable powers are traditionally broad, they are nevertheless subject to certain limitations.[3] In *Pasadena City Board of Education v. Spangler*,[4] the Supreme Court held that a district court had exceeded the limits of its power and authority in refusing to modify a desegregation order which after initial compliance required annual readjustment of student attendance zones in response to demographic shifts.

In 1970 the district court determined that the Pasadena Unified School District was unconstitutionally segregated[5] and ordered im-

1. Brown v. Board of Educ. (Brown I), 347 U.S. 483 (1954).

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

3. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). In *Swann*, the Supreme Court reviewed the duties of school authorities and established general guidelines for the scope of equitable powers of the courts. The Court held that Title IV of the Civil Rights Act of 1964, § 407, 42 U.S.C § 2000c-6 (1970), did not restrict or withdraw from federal courts their existing equitable powers. Such equitable powers permitted judicial intervention in assignment of teachers, staff and students and in the areas of school construction and pupil transportation. Remedies that would require "inflexible" student racial quotas, however, were held to be beyond the equitable power of courts. Remedial jurisdiction continued only until the achievement of the "unitary school system." 402 U.S. at 33.

4. 427 U.S. 424 (1976).

5. Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970), *aff'd*, 427 F.2d 1352 (9th Cir. 1970). The district court found that the school board: (1) drew attendance zone boundaries so as to increase segregation, (2) located new schools or additions to existing schools so as to increase segregation, (3) promoted a neighborhood school policy and a policy against cross-town busing tending to increase segregation, (4) allowed schools to remain racially identifiable by the composition of their faculties, (5) discriminiated in the hiring and promotion of faculty and staff, (6) assigned teachers with less experence and training to schools with predominantly black enrollments, (7) utilized busing which imposed an undue share of burdens of desegregation on black students, and (8) made a series of educational policy decisions which were based wholly or in part on considerations of the race of students or teachers which contributed to racial segregation. On the basis of these violations, the court concluded that defendants had an affirmative constitutional duty to "promote integration." *Id.* at 504. The school board did not appeal this order.

pementation of a desegregation plan.[6] The "Pasadena Plan" included, in part, a requirement that no school in the district have a "majority of any minority" students. The school district initially complied with the "no majority" requirement,[7] but in 1974, the school board sought modification of the plan's "no majority" requirement.[8] The district court denied relief[9] because the racial composition of five of the thirty-two schools in the district no longer complied with the "no majority" requirement.[10] The court refused to accept the school board's argument that noncompliance was attributable to "white flight"[11] in response to the desegregation decree, finding instead that the population shifts closely approximated the demographic trend in segregated and desegregated districts throughout the state.[12] On appe-

6. *Id.* at 506.

7. Spangler v. Pasadena City Bd. of Educ., 375 F. Supp. 1304 (C.D. Cal. 1974), *aff'd*, 519 F.2d 430 (9th Cir. 1975), *rev'd*, 427 U.S. 424 (1976).

8. The board sought to dissolve the district court's injunction, to terminate the district court's retained jurisdiction over the actions of the school board or to obtain approval of petitioner's modifications of the "Pasadena Plan." *Id.* at 1305.

9. The court found that the alternative plan proposed by the school board was a "freedom of choice" plan which would not adequately desegregate the system. *Id.* at 1307. Express opposition by the community and board to the "Pasadena Plan" was also a consideration in the district court's decision. *Id.* at 1305, 1309. In 1974, the school board was found in contempt of the mandates of the "Pasadena Plan" in its hiring of administrative personnel. Spangler v. Pasadena City Bd. of Educ., 384 F. Supp. 846 (C.D. Cal. 1974).

10. 375 F. Supp. at 1306.

11. "White flight," or whites moving from a district to avoid the imposition of a desegregation decree, does not alter a school board's affirmative duty to desegregate. *See* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972)(demographic changes resulting from the implementation of a desegregation decree held insufficient to release the school board from its duty to achieve "anything less than complete uprooting of the dual public school system."). Newburg Area Council, Inc. v. Board of Educ., 489 F.2d 925 (6th Cir. 1973), *cert. denied*, 421 U.S. 931 (1975) (population shifts due to "white flight" did not affect the school board's duty to convert to a "unitary system"). *But cf.* Mapp v. Board of Educ., 525 F.2d 169 (6th Cir. 1975), *cert. denied*, 427 U.S. 911 (1976) (population shifts due to "voluntary withdrawal of white students" and other "de facto" conditions that rendered a student assignment plan ineffective *before* initial implementation held beyond control and responsibility of the school board).

12. 375 F. Supp. at 1306. In Petitioners Brief for Certiorari at 377, Pasedena City Bd. of Educ. v. Spangler, 423 U.S. 945 (1975), the Superintendant of Schools reported a loss of 1,733 (5.9%) white students in the first month of the plan's implementation. This report denied that the loss was solely the consequences of the plan, but did not deny that some "white flight" to avoid integration may have taken place. A report written by one member of the board of education reported a loss of 2,212 white students (12.4%) the first year of the plan's implementation, and an additional loss of 1,800 white students (11.5%) the second year. *Id.* at 424-25. The board attributed this drop from 58.3% in 1970 to 50% in 1971 to "white flight." Although rejecting this contention, the district court nevertheless held that the school board was required to accommodate the demographic changes in its student attendance zones.

al, the Ninth Circuit asserted that the "no majority" requirement would be unacceptable if it required perpetual annual readjustments of student attendance zones.[13] But the court affirmed denial of relief[14] noting two factors which indicated that the district court had not abused its discretion: (1) there had been literal compliance with the "no majority" requirement only for a few months after initial implementation of the plan; and (2) the school board had been generally uncooperative.[15]

The Supreme Court reversed [16] and held that the district court had abused its equitable discretion by requiring attendance zone adjustment to comply with the "no majority" requirement after initially successful implementation.[17] The Court concluded that modification of the requirement should therefore have been granted[18] and remanded the case to the court of appeals for reconsideration.

Throughout the brief history of school desegregation litigation, the permissible scope of a district court's equitable power to administer

13. 519 F.2d at 437-38. The court considered a "spontaneous" remark made by the district judge during consideration of the motion for relief from the desegregation decree that his interpretation of the order, "meant to me that at least during my lifetime there would be no majority of any minority in any school in Pasadena." The court concluded, however, that *Swann's* prohibition against annual readjustments became operative when "there has been a full and genuine implementation which has eliminated, *with some anticipated permanence,* racial discrimination from the system." *Id.* at 437. (emphasis added.)

14. *Id.* at 440.

15. *Id.* at 434-35. The court responded to the school board's contention that desegregation had been accomplished after implementation of the plan by noting that "such was a transitory and temporary achievement, enduring for a period of utmost brevity." *Id.* at 437. The court reasoned that there was "abundant evidence upon which the district judge . . . could rightly determine that the 'dangers' which induced the original determination have not diminished sufficiently." *Id.* at 434. *Cf.* United States v. Swift & Co., 286 U.S. 106, 116 (1932) (an injunctive order should be modified when it has become an "instrument of wrong" due to changed circumstances and when "the changes are so important that dangers, once substantial, have become attenuated to a shadow").

16. 427 U.S. 424 (1976). The Court rejected the contention of petitioners that the case was moot because the original plaintiffs had graduated from the Pasadena school system. The United States' intervention into the action was held sufficient to defeat mootness. *Id.* at 431. The Court also considered the significance of the failure of the board to appeal from the original decree as a potential bar to its request for modification. The Court concluded that "this observation overlooks well-established rules governing modification of even a final decree entered by a court of equity." *Id.* at 438.

17. *Id.* at 435.

18. *Id.* at 438. The Court concluded that modification should have been ordered by the court of appeals because of the ambiguity of the "no majority" requirement, evidenced by the different interpretations by the district judge and the parties, and the inconsistency of the district court's order with the Court's intervening decision in *Swann*. *See* notes 29-34 and accompanying text *infra*.

desegregation decrees has been a significant judicial concern. The Supreme Court first considered this issue in *Brown v. Board of Education (Brown* II).[19] Considering the complexities presented in determining appropriate relief for a constitutional violation, the Court stated that district courts were to be guided by the "practical flexibility" of equitable principles.[20] The Court directed district courts to consider the adequacy of any plans proposed by school boards in order to effectuate a transition to a nondiscriminatory school system and to retain jurisdiction until "a system of determining admission to the public schools on a nonracial basis" is achieved.[21]

Despite the breadth of equitable powers accorded to district courts in *Brown* II, fashioning effective remedies proved to be a difficult task. Lower courts were confronted with dilatory tactics by school boards resulting in delays in achieving the "unitary system" required by *Brown* II.[22] The Supreme Court in *Green v. County School Board*[23]

19. 349 U.S. 294 (1955).

20. *Id.* at 300. For an indication of the flexibility of equitable powers, see System Fed'n No. 91 v. Wright, 364 U.S. 642 (1961) (a court of equity may modify the terms of an injunctive decree if changing circumstances require such modification); United States v. Swift & Co., 286 U.S. 106 (1932) (a continuing injunction directed to future events is subject to adaptation since events may shape needs).

21. 349 U.S. at 300-01. Determination of admission on a nonracial basis was later termed the "unitary school system." Two Supreme Court decisions expanded this definition. In Green v. County School Bd., 391 U.S. 430, 438 (1968), the Court described a "unitary system" as one "in which racial discrimination would be eliminated root and branch." One year later in Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969), the Court added to the *Green* definition that a "unitary system" was one "within which no person is to be effectively excluded from any school because of race or color." *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971) ("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.*").

22. An example of a remedy initially accepted by district courts, but later rejected, was the "freedom of choice" plan. This plan allowed students and their parents to decide which school the student was to attend, thus placing the burden of desegregation on students and their parents and thereby relieving the school board of its affirmative duty to desegregate. Theoretically, such a plan would seem to provide "a system for determining admission to the public schools on a nonracial basis." In practice, however, such plans were later held to be inadequate to discharge the affirmative duty to desegregate once a constitutional violation has been established because they rarely produce adequate changes. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13 (1971)(the Court discusses the inadequacy of such a plan in light of the minimal progress of desegregation in the post-*Brown* years); Green v. County School Bd., 391 U.S. 430 (1968); Note, *Remedies for School Segregation: A Limit on the Equity Power of the Federal Courts?*, 2 HASTINGS CONST. L.Q. 113, 116-18 (1975) [hereinafter cited as *Remedies for School Segregation*] (the author discusses the uncertainties which district courts faced during this period as to what type of remedy should be used, i.e., gradual versus immediate decrees). *Cf.* Fiss, *The Fate of an Idea Whose Time Has Come:*

responded to this problem by charging school boards 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."[24] The Court instructed that "whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed."[25] The effectiveness of any plan was to be measured against the ultimate constitutional goal: "a unitary, nonracial system of public education."[26]

Although the pace of desegregation efforts accelerated after *Green*, the extent of a district court's remedial powers and duties remained uncertain because the concept of a "unitary system" had not been precisely defined.[27] The Supreme Court has yet to provide such a definition,[28] but the Court in *Swan v. Charlotte-Mecklenburg Board of*

Antidiscrimination Law in the Second Decade After Brown v. Board of Education, 41 U. CHI. L. REV. 742, 768 (1974)[hereinafter cited as Fiss] (describes a shift in the purpose of desegregation from one of giving minorities access to all schools to the more recent goal of "dispersing" concentrations of minorities).

23. 391 U.S. 430 (1968).

24. *Id.* at 437-38. The Court considered a "freedom of choice" plan which failed to desegregate the dual school system formerly required by Virginia state law. The Court declared the necessity for immediate relief to be of primary importance in desegregation efforts: "[A] plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is . . . intolerable . . . . The burden on a school board today is to come forward with a plan which promises to work . . . *now*." *Id.* at 438-39.

25. *Id.* at 439. The Court stated that the implementation of the plan, "merely begins, not ends, our inquiry whether the Board has taken adequate steps to abolish its dual, segregated system." *Id.* at 437.

26. *Id.* at 436. Courts were to evaluate the adequacy of school board actions under deseregation plans with "an awareness that complex and muti-faceted problems would arise which would require time and flexibility for a successful resolution." *Id.* at 437. Time and flexibility were necessary to assure the eradication of the compounded harm resulting from well-entrenched and deliberately perpetuated dual systems. *Id. See* Raney v. Board of Educ., 391 U.S. 443 (1968) (rejecting "freedom of choice" and requiring retained jurisdiction); Monroe v. Board of Comm'rs, 391 U.S. 450 (1968)(rejecting "freedom of choice").

27. *See Remedies for School Segregation, supra* note 22, at 120. The author discusses the substantial uncertainty of the district courts in formulating desegregation plans after *Green* due to the Court's failure to define such terms as "dual system," "unitary system," "segregation," "integration," and "racially identifiable."

28. *But see* Northcross v. Board of Educ., 397 U.S. 232 (1970). Chief Justice Burger, in a concurring opinion, responded to those who contended that the Court had not defined the "unitary system":

> The suggestion that the Court has not defined a unitary school system is not supportable. In *Alexander v. Holms County Board of Education*, 396 U.S. 19 (1969) we stated, albeit perhaps too cryptically, that a unitary system was one "within

Education,[29] did respond to these uncertainties and attempted to clarify the permissible power. In *Swann*, the Court reaffirmed the broad equitable power of district courts to "assure a unitary system"[30] in which all "vestiges of state-imposed segregation"[31] have been eliminated. The Court cautioned, however, that this power was subject to limitation. Although racial ratios were approved as "a starting point in the process of shaping a remedy," the Court declared the use of "inflexible" quotas unacceptable.[32] The Court also disapproved remedial orders that required "year by year adjustments of the racial composition of student bodies" extending beyond the point at which "the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."[33] Finally, the Court stated that after a "unitary system" has been

which no person is to be effectively excluded from any school because of race or color.

Id. at 236-37.

29. 402 U.S. 1 (1971). *See* note 3 *supra*.

30. *Id.* at 16. In a companion case to *Swann,* Davis v. Board of School Comm'rs, 402 U.S. 33 (1971), the Court reiterated the necessity for effectuating adequate plans to achieve this goal: "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation . . . . The measure of any desegregation plan is its effectiveness." *Id.* at 37.

31. 402 U.S. at 16. The interpretation of "vestiges" in a formerly dual system has varied in lower courts. *See, e.g.*, Mapp v. Board of Educ., 525 F.2d 169 (6th Cir. 1975), *cert. denied*, 427 U.S. 911 (1976) ("de facto" demographic changes which negated desegregation efforts before the plan's implementation were not "vestiges" requiring remedial relief); Newburg Area Council, Inc. v. Board of Educ., 489 F.2d 925, 930 (6th Cir. 1973), *cert. denied*, 421 U.S. 931 (1975) (a large number of racially identifiable schools gives rise to a presumption "that all vestiges of state imposed segregation have not been eliminated"); Arvizu v. Waco Independent School Disrt., 373 F. Supp. 1264, 1267 (W.D. Tex. 1973)("vestiges" in the nonunitary system were described as (1) most blacks continued to attend racially identifiable schools, (2) school faculties and staff continued to be racially identifiable, and (3) minority schools were underutilized whereas white schools were frequently overcrowded). *Cf.* J. HOGAN, THE SCHOOLS, THE COURTS AND THE PUBLIC INTEREST 27 (1974) (the tendency of California courts is to view "racial imbalance as a vestige of state-imposed segregation").

32. 402 U.S. at 25. The Court indicated that it would be "obliged to reverse" a district court order if interpreted "to require as a matter of substantive constitutional right, any particular degree of racial balance or mixing." *Id.* at 24. Strict ratio requirements, however, were not per se unacceptable. Citing United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 235-36 (1969), the Court explained that specific initial requirements may be desirable to expedite the unitary status of a school system. 402 U.S. at 19-20.

33. 402 U.S. at 31-32. The Court's decision in *Swann* was partially codified in the Equal Educational Opportunity Act, 20 U.S.C. § 1707 (Supp. IV 1974), which limits the exercise of judicial power where de facto segregation occurs subsequent to judicial determination that the system is "unitary."

achieved, only a showing of deliberate attempts by state officials "to fix or alter demographic patterns to affect the racial composition of the schools" would warrant further judicial intervention.[34]

After *Swann* lower courts dealt with racial quotas and readjustments in various ways.[35] The proper use of these remedies is problematic since the definition of "unitary system" remains imprecise.[36] The Ninth Circuit in *Spangler* recognized the racial quota and readjustment limitations imposed by *Swann*, but concluded that these limitations became operative only upon the achievement of the "unitary system"

34. 402 U.S. at 32. Two years after its decision in *Swann*, the Court decided Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). The Court held that in a northern school system "where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." *Id.* at 198. Once segregative intent was shown in one school, it would be possible to impute segregative intent to an entire school system: "[C]ommon sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Id.* at 203. The Court also recognized the "connection between past segregative acts and present segregation" and instructed that "close examination is required before concluding that the connection does not exist." *Id.* at 211. For a general discussion of the revitalization of the de jure/de facto distinction in Keyes, see Note, *Segregative Intent and the Single Governmental Entity in School Desegregation*, 1973 DUKE L.J. 1111, 1114-16. One year after *Keyes* the Court decided Miliken v. Bradley, 418 U.S. 717 (1974), in which opportunities for desegregation were further restricted by the Court's holding that district lines could not be crossed in designing a remedy unless an interdistrict violation was shown.

35. *See, e.g.*, Brinkman v. Gilligan, 518 F.2d 853 (6th Cir.), *cert. denied*, 423 U.S. 1000 (1975)(the school board's duty was not adequately discharged because after implementation of a plan, a pattern of one-race schools remained); Monroe v. County Bd. of Educ., 505 F.2d 109 (6th Cir. 1974)(school system was not unitary because three schools remained over 85% black); Boyd v. Pointe Coupee Parish School Bd., 505 F.2d 632 (5th Cir. 1974) (the school system was not unitary because eight of ten schools did not meet racial balance requirements); Newburg Area Council, Inc., v. Board of Educ., 489 F.2d 925 (6th Cir. 1973), *cert. denied*, 421 U.S. 931 (1975) (a large number of racially identifiable schools was evidence that the school board's duty was not adequately discharged); Quality Educ. for All Children, Inc. v. School Bd., 385 F. Supp. 803 (N.D. Ill. 1974) (predominantly one-race schools are not unconstitutional if the system is genuinely integrated); Arvizu v. Waco Independent School Dist., 373 F. Supp. 1264 (W.D. Tex. 1973) (system was nonunitary because most blacks still attended "racially identifiable" schools); Moss v. Stamford Bd. of Educ., 356 F. Supp. 675 (D. Conn. 1973) (a racially neutral integration plan cannot be expected to produce an equal percentage; the disparity does not create a prima facie case of discrimination).

36. *See* note 21 *supra*; Calhoun v. Cook, 525 F.2d 1203 (5th Cir. 1975) (the system was "unitary" despite the fact that further integration was theoretically possible); United States v. Corinth Mun. Separate School Dist., 414 F. Supp. 1336 (N.D. Miss. 1976) (unitary status was achieved after seven years "of good faith compliance . . . without serious incident of racial discrimination in educational policies" and where no "vestiges of the former dual system" appeared). See also *Remedies for School Segregation, supra* note 22, at 117, 120. Comment, *School Desegregation after Swann: A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421, 436 (1972) (the point at which "a dual system is sufficiently dismantled to become 'unitary' remains "a great mystery").

which the court determined had not been accomplished in the Pasadena School District.[37]

The Supreme Court in *Spangler* rejected this application of *Swann* and held that the initially successful implementation of a "racially neutral attendance pattern" discharged the affirmative duty of the school board with regard to student attendance zones.[38] The Court reasoned that limitations announced in *Swann* prohibited any court action concerning student attendance zones until there had been a showing of a violation subsequent to implementation.[39] The district court had not found such a violation, but instead attributed the failure of the student assignment plan to a de facto demographic trend.[40] In these circumstances, the Court stated that the "no majority" requirement was unacceptably "inflexible" because it apparently contemplated a " 'substantive constitutional right [to a] particular degree of racial balance or mixing' which the Court in *Swann* expressly disapproved."[41] Finally, the Court held that doubts concerning the school board's compliance with nondiscriminatory hiring and promotion of teachers and administrators were irrelevant to the issue of whether the school board had discharged its duty to desegregate student attendance patterns.[42]

Two premises derived from the *Spangler* majority's interpretation of the *Swann* decision appear to underlie the Court's reasoning. First, the majority will allow division of a desegregation plan into functional segments.[43] Once the affirmative duty of the school board is discharged with regard to student attendance, judicial intervention must cease as to that particular function of the plan. This result may be characterized as "piecemeal unitariness."[44] Second, "unitariness"

37. 519 F.2d at 437. *See* note 13 *supra*.

38. 427 U.S. at 436-37.

39. *Id.* at 436.

40. *See* note 12 *supra*.

41. 427 U.S. at 434-35.

42. *Id.* at 436.

43. The Court has indicated six functions or indicia of a segregated school system which must be scrutinized: placement of students, faculties, and staff, and policies concerning transportation, extracurricular activities and facilities. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971); Green v. County School Bd., 391 U.S. 430, 435 (1968).

44. Discrimination may exist in regard to other functions of the school system, but this will not affect a finding that the school board has adequately discharged its duty to desegregate student assignments. In *Keyes*, however, the Court indicated that it would be "common sense" to conclude that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." 413 U.S. at

may be found upon initial compliance with a desegregation decree. The net effect of this reasoning permits an individual function of a school system to be found "instantly unitary" upon a plan's implementation.[45] Only a showing of further discriminatory actions on the part of the school board or "white flight" attributable to the decree itself will warrant further judicial intervention as to that function.[46]

The dissent rejected both premises as an unwarranted extension of the *Swann* decision.[47] According to the dissent, Swann's prohibition of annual readjustments should become operative only upon achievement of a "fully desegregated school system."[48] The dissent argued that the majority's interpretation of *Swann*, allowing compliance "even for a very short period" to satisfy the school board's affirmative duty, might well frustrate the achievement of a wholly "unitary system" in the Pasadena School District.[49] The dissent concluded that the majority's interpretation limited the range of "discretion normally accorded the District Court in fashioning equitable remedies,"[50] and in doing so

203. From this conclusion, discrimination in one school system function would seem to raise a presumption that discriminatory practices have an impact beyond the particular function which is subject to those actions. The possibility of separate compliance as to separate functions of a school system has not been generally recognized by lower courts. *See* United States v. Texas Educ. Agency, 532 F.2d 380, 393 (5th Cir. 1976), *vacated and remanded sub. nom.* Austin Independent School Dist. v. United States, 97 S. Ct. 517 (1977) ("The constitutional duty of the school authorities is to establish a unitary *system* not a unitary grade." (emphasis in original)); Spangler v. Pasadena City Bd. of Educ., 415 F.2d 1242, 1245 (9th Cir. 1969) ("Practically all of the Supreme Court decisions have required desegregation of school systems and have not talked in terms of desegregating only the method of student assignments or only the high schools.").

45. This result was dubbed by respondents in the action as a concept of "instant unitariness." Brief for Respondents at 52, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). Respondents contended that "the very idea of 'instant unitariness' is inconsistent with this Court's cases which hold that the district court must retain jurisdiction to supervise the sometimes difficult transition to a unitary system." *Id.*

46. 427 U.S. at 435-36. *See* note 11 *supra*.

47. *Id.* at 442-43 (Marshall and Brennan, J.J. dissenting).

48. *Id.* at 443. According to the dissent, *Swann* recognized:

> [O]n the one hand that a fully desegregated system may not be compelled to adjust its attendance zones to conform to changing demographic patterns. But on the other hand, it also appears to recognize that *until* such a unitary system is established, a district court may act with broad discretion—which includes the adjustment of attendance zones—so that the goal of a wholly unitary system might sooner be achieved.

Id. (emphasis in original). The dissent concluded that in light of the school board's spirit of noncompliance with the "Pasadena Plan," the district court had not abused its discretion in refusing to modify its order. *Id.*

49. *Id.* at 442-43.

50. *Id.* at 444.

would be likely to forestall the elimination of all the "vestiges" of state-imposed segregation.[51]

The majority's holding in *Spangler* to allow brief, though immediate relief to cure a constitutional violation departs from the reasoning of prior desegregation cases.[52] In the past, the Court has instructed that remedial relief should encompass the elimination of all the "vestiges"[53] of a formerly dual system.[54] The Court has ordered district courts to retain jurisdiction until the achievement of a school system free of all racial discrimination[55] and has indicated that "vestiges" exist if the remaining segregation in a school system is directly connected to past discriminatory policies and practices of the school board.[56] For example, the Court has recognized that school board decisions concerning the size and location of new schools may have a long-range effect on the racial composition of schools.[57] Arguably the racial composition of a school's faculty and administration might also influence residential location decisions which in turn will affect a school's racial composition. Therefore, doubts concerning the acceptability of Pasadena School Board policies in the hiring and promotion of teachers and administrators should justify continued judicial supervision of all school board policies and practices.[58] By limiting the

51. *Id.*

52. *See* notes 25-26 *supra*.

53. *Cf.* Equal Education Opportunities Act, 20 U.S.C § 1701(b)(Supp. IV 1974)(stating the policy of the United States to promote "the orderly removal of the vestiges of the dual school system").

54. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

55. *See, e.g.*, Green v. County School Bd., 391 U.S. 430, 437 (1968); Raney v. Board of Educ., 391 U.S. 443, 449 (1968); note 44 *supra*.

56. Keyes v. School Dist. No. 1, 413 U.S. 189, 211 (1973). *See* Fiss, *supra* note 22, at 769-77; Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 700 (1971) (both articles suggest that the causal relationship between past discriminatory practices and present segregation tends to fill the "ethical" void in the "result-oriented" approach of desegregation efforts). *See generally* note 65 *infra*.

57. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971). The Court recognized that school board decisions concerning school construction may be used as a "potent weapon" in the creation or maintenance of a segregated system, intimating that such decisions may in turn influence patterns of residential segregation.

58. Justice Rehnquist's opinion for the majority rejected this position. The majority's view may be explained by Justice Rehnquist's dissent in *Keyes* which held that once segregative intent is shown in a substantial number of schools, intent may be imputed to the entire school district: "Yet, unless the Equal Protection Clause of the Fourteenth Amendment now be held to embody a principle of 'taint,' found in some primitive legal systems but discarded centuries ago in ours, such a result can only be described as the product of a judicial fiat." 413 U.S. at 257.

district court's power in *Spangler* to influence student assignments, the Court may be inhibiting "meaningful progress"[59] toward the achievement of a wholly "unitary system" in the Pasadena School District.[60]

The decision in *Spangler* adds to the growing number of limitations which the Supreme Court has placed on the remedial powers of district courts in school desegregation cases.[61] The legal goal for which these powers are utilized, the achievement of the "unitary system," remains conceptually elusive.[62] The "unitary system" has been interpreted to require the elimination of a school system's discriminatory policies—a "process-oriented" approach.[63] It has also been interpreted to require the achievement of a particular result which is intended to counteract the consequences of past discriminatory policies—a "result-oriented" approach.[64] The holding in *Spangler* is "process-oriented" in its emphasis on the achievement of a "racially neutral system of student assignment."[65] The holding is "result-oriented" to the extent that initial compliance, albeit brief, is remedially sufficient. Proponents of integration have favored the "result-oriented" approach because its recognition of the potentially far-reaching consequences of past discrimination gives courts greater latitude in designing desegregation

59. Monroe v. Board of Comm'rs, 391 U.S. 450, 458 (1968). *See* note 26 *supra*.

60. 427 U.S. at 444 (Marshall, J., dissenting). The Ninth Circuit in *Spangler* suggested that the effectiveness of the student assignment plan should be judged by its "anticipated permanance" in remedying the violation. 519 F.2d at 437. *See* note 13 *supra*.

61. *See, e.g.*, Austin Independent School Dist. v. United States, 97 S. Ct. 517 (1977), *vacating and remanding* United States v. Texas Educ. Agency, 532 F.2d 380 (5th Cir. 1976) (for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976), because the extent of busing required by the plan was disproportionate to the constitutional violation); Milliken v. Bradley, 418 U.S. 717 (1974) (in designing a desegregation remedy, district lines could be crossed only if an interdistrict violation was shown). *See also Remedies for School Segregation, supra* note 22, at 137 (increasing remedial limitations are evidence of a retreat by the Court from its "prior course of broad, expansive treatment of school desegregation remedies").

62. *See* notes 21, 27, 28 & 36 *supra*.

63. *See*, Fiss, *supra* note 22, at 764. The author defines the "process-oriented" approach as a prohibition against basing decisions on certain forbidden criteria. Once school board decisions are purged of these forbidden, discriminatory criteria, the goal is achieved.

64. The "result-oriented" approach aims toward the achievement of a particular result, for example, improvement of the economic and social position of the protected group. *See* Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation,* 38 U. CHI. L. REV. 697, 698 (1971)(the "result-oriented" or "de facto" approach focusses on the segregated patterns themselves).

65. 427 U.S. at 437.

remedies.[66] The Court in *Spangler*, however, diluted the "result-oriented" approach by combining it with the "process-oriented" approach.

The precedential value of the *Spangler* decision may be limited by the narrowness of the Court's holding.[67] The majority expressly distinguished the "Pasadena Plan's" application of "general terms" from plans that are "by definition incomplete at inception."[68] Under the latter plan, courts issue minimum requirements which are part of the total plan and gradually add to the requirements until a "unitary system" has been achieved.[69] The plan in *Spangler*, on the other hand, appeared to contemplate a final goal within its initial requirements.[70]

Thus, it is probable that after *Spangler*, proponents of desegregation will seek relief in the form of plans "incomplete at inception." But principles applied in *Spangler* may implicitly limit court powers even under these plans. Although the concept of "instant unitariness" does not seem to be a possible bar to judicial intervention under such plans, the concept of "piecemeal unitariness" does present a potential limitation.[71] If the Supreme Court's trend in limiting the equitable powers of

66. *See* Fiss, *supra* note 22, at 765 (in its recognition of the relationship between past discriminatory acts and present segregation, the decision in *Swann* was a "giant step" toward the "result-oriented" approach).

67. 427 U.S. at 444 n.2 (Marshall, J., dissenting).

68. *Id.* at 435. The Court cited United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969), as an example of a plan "incomplete at inception." In *Montgomery*, the Alabama District Court began desegregating the Montgomery School District in 1964 by establishing minimal requirements. Carr v. Montgomery County Bd. of Educ., 232 F. Supp. 705 (M.D. Ala. 1964). In order to allow this southern school system to gradually adjust to integration, requirements were built up in a "step at a time" plan. Such plans allow student quota provisions, because the district court is in a position to modify such requirements by maintaining a close supervisory relationship with the school system through periodic reports, hearings and court orders.

69. Since the decision in Youngblood v. Board of Pub. Instruction, 448 F.2d 770 (5th Cir. 1971), the Fifth Circuit has required district courts to retain jurisdiction for a period of not less than three years, during which time semi-annual reports by the school system are filed. In this way the district courts retain supervisory authority to review school board actions until the court is satisfied that the school system has achieved unitary status. *See, e.g.*, Lee v. Autauga County Bd. of Educ., 514 F.2d 646 (5th Cir. 1975); Hereford v. Huntsville Bd. of Educ., 504 F.2d 857 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1976); United States v. Hendry County School Dist., 504 F.2d 550 (5th Cir. 1974).

70. 427 U.S. at 435. *See* Brief for Petitioners at 4, Pasadena City Bd. of Educ., v. Spangler, 427 U.S. 424 (1976). Petitioners contended that "unlike most desegregation plans, the Pasadena Plan called for immediate and total desegregation. It was not a plan that used a step-by-step process. It extirpated all remnants of school segregation immediately." *Id.*

71. The possibility that one function of a school system will reach the final desegrega-

district courts continues, [72] questions concerning the scope of judicial power under such plans, the acceptable length of time for courts to continue "stepping" toward a "unitary system,"[73] and the acceptability of minimum requirements[74] will be raised. Because such plans are subject to a broad exercise of judicial supervision, judicial authority and discretion under these plans appears vulnerable to attack under the *Spangler* rationale.

More than twenty years after *Brown v. Board of Education*, segregated conditions still exist throughout the nation.[75] Limitations on the equitable powers of district courts further diminish the opportunity for adequate judicial relief.[76] The Court's recognition in *Spangler* of the

tion goal before another function suggests this conclusion. The recognized functions of a school system (assignment of students, faculty and staff, and allocation of transportation, extracurricular activities and facilities) may eventually be expanded. For example in Carr v. Montgomery County Bd. of Educ., 232 F. Supp. 705 (M.D. Ala. 1964), the court's initial order required the desegregation of certain grades within the schools. Under the rationale of *Spangler*, it would appear that once compliance is complete in these grades, judicial intervention must cease as to that function of the school system thus separating the function of student assignment into separate part by grades. *See also* note 44 *supra*.

72. Several suggested reasons may explain this trend. *See generally* Fiss, *supra* note 22, at 772 (judicial primacy and activism in desegregation should be reconciled with the democratic tradition of our nation); *Remedies for School Segregation, supra* note 22, at 149-51 (trend is partially the result of a balancing between constitutional goals and state and local interests). *But cf.* Milliken v. Bradley, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting) (Justice Marshall, disagreeing with the majority's limitation of the district court's equitable power in granting interdistrict relief, contended: "Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law.").

73. For an indication of the length of time courts have retained jurisdiction of a school system, see Carr v. Montgomery County Bd. of Educ., 511 F.2d 1374 (5th Cir. 1975) (jurisdiction continued for eleven years); United States v. Corinth Mun. Separate School Dist., 414 F. Supp. 1336 (N.D. Miss. 1976) (the court found the school system "unitary" after it had operated for seven years "without vestiges of the former dual system"); Arvizu v. Waco Independent School Dist., 373 F. Supp. 1264 (W.D. Tex. 1973) (jurisdiction continued for eight years).

74. According to *Spangler*, a court may theoretically retain jurisdiction until a final desegregation goal is reached. 427 U.S. at 436. As long as courts issue minimum requirements, it seems that they will retain authority to readjust requirements that are not effective upon implementation.

75. This condition is most predominant in the North and West where in 1972 only 28.3% of minority students attended schools with 50 to 99.9% white enrollment. UNITED STATES COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL EDUCATION OPPORTUNITY 49 (1975). "There appear to be legitimate fears that the South is . . . moving toward a duplication of Northern residential segregation as desegregated schools are undercut by increasingly segregated neighborhoods and cities." *Id.* at 61.

76. *See Remedies for School Segregation, supra* note 22, at 149-51.

adequacy of brief, though immediate, relief for a constitutional violation represents a retreat from the achievement of the constitutional ideal advanced by *Brown*.

Annette B. Kolis