The Desegregated School System and the Retrogression Plan

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I. INTRODUCTION

The school desegregation cases stand as a barometer of the ability and willingness of the courts to enforce the fourteenth amendment. In *Brown v. Board of Education* (Brown I), reformulation of the non-discrimination principle became the catalyst for elimination of patterns of overt official racial discrimination in voting, employment, housing and public facilities as well as in public schools. Brown I also led to a drastic reshaping of the remedy used to correct civil rights violations. The resulting reformulated nondiscrimination principle and the revised civil rights remedy have developed and endured for over thirty years. But they have met challenges at every step.

It is easy to forget the conditions that prevailed in 1954—an official caste system relegated black children to segregated, second-rate schools and these children opened the first chapter of their public life as second-class citizens. Brown I required the states to abandon the caste system. The reaction was massive resistance. The Supreme Court persevered, however, and slowly articulated a set of remedial principles to guide the dismantling of the dual school system. Spurred on by the protests of blacks and the repressive state responses to them, the country fell in line behind the Court.

Yet, change came slowly, sometimes hardly at all. The turning point, the point at which the pace of change accelerated, was the enactment of the Civil Rights Act of 1964. Then came *Green* (1968) and *Swann* (1971) dictating structural reform of dual school systems. There has

5. In *Green v. County School Bd.*, 391 U.S. 430, 88 S. Ct. 1689 (1968) the Supreme Court ruled that the sufficiency of a school desegregation plan is to be measured by its effectiveness. The Supreme Court disapproved a "freedom of choice" plan, under which students chose the school they would attend, where the schools remained substantially segregated and other educationally sound plans promised "a system without a 'white' school and a 'Negro' school, but just schools." Id. at 442, 88 S. Ct. at 1696.
been much debate about the reasoning of these decisions and even more about whether they led to educational improvement or decline, but it is beyond dispute that these two Supreme Court decisions succeeded in altering the educational landscape of the school systems of the South and of many northern school systems as well. No longer are the public schools the front line of enforcing a racial caste system.

The authority of the school desegregation cases has withstood the initial wave of community opposition, as well as second thoughts of some scholars, legislators, and members of the Court. Now, however, an indirect challenge threatens the foundations of the structural reform that \textit{Swann} requires. Virtually all school systems subject to \textit{Swann} have now complied with it to some degree. Some school systems are now claiming that their compliance warrants release from the dictates of \textit{Swann}. This development in itself is of no great concern. What is alarming is that several of the lower federal courts, in a number of recent decisions, have articulated standards of review of these claims.
for release which are at odds with, and amount to sanctioning the dismantling of, the earlier achievements of structural reform.\(^\text{12}\)

To determine the propriety of such reform dismantling, one must first understand the underlying purposes of reform. School desegregation decrees serve several purposes, and any dismantling plan must be evaluated in light of each of the reasons supporting the structural decree. The restorative principle, requiring school authorities to eradicate the effects of past discrimination, stands as the primary obstacle that a dismantling plan must overcome. Whether that obstacle is insurmountable depends on the nature of the dismantling plan and the extent of change which the structural reform has wrought.

At the same time as the Supreme Court was formulating and applying the *Swann* restructuring principles, it was developing a body of law limiting school desegregation remedies. Professor Drew Days has demonstrated how the Court’s decisions, freeing school authorities of remedial responsibility for segregation caused by other school systems\(^\text{13}\) or by private action,\(^\text{14}\) draw lines which may well be grounded in misgivings over extending the busing remedy.\(^\text{15}\) Plaintiffs challenging dismantling plans rely on the broad restructuring principles of *Swann*. School boards defending such plans rely on the *Milliken I, Dayton I,*\(^\text{16}\)

\[^{12}\text{See infra text accompanying notes 130-68.}\]
\[^{13}\text{In Milliken v. Bradley, 418 U.S. 717, 94 S. Ct. 3112 (1974), the Supreme Court reversed a lower court decision requiring school districts surrounding Detroit to participate in a plan designed to remedy school segregation in Detroit stemming from intentionally segregative actions of the city's school authorities. The surrounding school systems had not engaged in segregative actions directed at the Detroit schools.}\]
\[^{14}\text{In Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 96 S. Ct. 2697 (1976), the court disapproved a district court order requiring a de jure segregated school system not only to desegregate but to ensure that in future years no school within the system would enroll a "majority of any minority." As the court noted, subsequent majority enrollments of minorities in particular schools "might be caused by factors for which the defendants [the school board] could not be considered responsible." Id. at 434, 96 S. Ct. at 2704. Thus, the "no majority of any minority" requirement imposed by the district court could potentially have had the effect of restraining privately-caused segregation. Such a result could not be approved, the court reasoned, because the federal courts are without authority to forbid school segregation stemming solely from private action.}\]
\[^{16}\text{Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 97 S. Ct. 2766 (1977), overturned a systemwide busing order on the ground that it was not justified by the current state of the record. The Court remanded the case with instructions directing the district court to supplement the record and then to devise a remedy to redress the "incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would}\]
and *Pasadena* line of cases. But the two lines of cases are not necessarily in conflict, and taken together they provide guidance for review of dismantling plans.

A recent case involving the Norfolk, Virginia, schools\(^\text{17}\) provides a starting point for this article's discussion of the principles to be applied in judging a dismantling plan. A detailed history of that case serves to introduce the concept of retrogression as it applies to plans that dismantle busing remedies. Arguably, *Swann* provides the primary doctrinal basis for review of retrogression plans. It is important, however, to examine the normal mechanics of school desegregation cases, which serve as a backdrop for a description of the different types of revisions of school desegregation plans that are available, the way in which retrogression plans are treated in case law, and the legal doctrines and policies that bear on review of retrogression plans. Lastly, a concluding analysis of the Supreme Court's denial of certiorari in the Norfolk case suggests that future review of retrogression plans not founded on present discriminatory intent should focus on whether the plans reinstate effects of past discrimination.

II. DESCRIPTION OF THE NORFOLK CASE

A. History of Segregation

The Norfolk case followed the familiar pattern of school desegregation litigation, beginning with a suit for prohibitory injunction and ending with systemic reformation of the schools. When *Brown I* announced that state-enforced racial separation in the public schools violates the equal protection clause of the fourteenth amendment, the schools of Norfolk were segregated by law. After *Brown I* the State of Virginia embarked on its program of massive resistance, a program predicated on the legitimacy of segregation and the illegitimacy of *Brown* Ps alleged "encroachment by the Supreme Court, through judicial legislation, upon the reserved powers of the States."\(^\text{18}\) Despite this interposition by the State of Virginia, student plaintiffs in Norfolk and

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nearby Newport News prevailed in identical class actions seeking to enjoin enforcement of laws requiring racial separation in the schools. As characterized by the court of appeals, the injunctions “merely forbade defendants from refusing to admit plaintiffs to any school solely on account of race or color.”

After further skirmishing, the district court ordered admission of seventeen school children for the 1958-59 school year, and the court of appeals affirmed. Rather than admit black children to white schools, the governor ordered Norfolk’s white high schools and junior high schools closed in September 1958. After the district court ruled the school closing was unconstitutional, the school board admitted seventeen of the 151 black students who had applied to white schools in Norfolk. Virginia then turned to pupil placement laws to exclude blacks from white schools. When these laws were challenged, the court approved the requirement that black applicants for transfer to white schools take achievement tests during the transition period, but said transfers should not “forever be confined to such Negro children who have superior intelligence.” The court held that the pupil placement law was constitutional on its face but unconstitutional as applied to some students. Exclusion of others was upheld.

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19. Adkins, 148 F. Supp. 430. See also Beckett v. School Bd. of Norfolk, 2 Race Relations Law Reporter 337 (E.D. Va. 1957). Following the intervention of additional plaintiffs, the case was renamed. See Brewer v. School Bd. of Norfolk, 349 F.2d 414 (4th Cir. 1965). Thus, the case is sometimes called Beckett and sometimes called Brewer.

20. School Bd. of Newport News v. Atkins, 246 F.2d 325, 327 (4th Cir. 1957). The school board and district court apparently assumed that desegregation would have to be achieved by means of unitary geographic zones for all students. The school authorities thought that such a plan was generally workable, because, at least in secondary schools, while “there will undoubtedly be some mixing of the races, . . . the percentage of white to colored children would probably be in excess of twenty to one in schools now occupied only by white children.” Beckett, 2 Race Relations Law Reporter at 339. Apparently it was assumed that white children would not attend black schools.


24. “Pupil placement” laws were based on the premise: “Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge.” Carson v. Warlick, 238 F.2d 724, 728 (4th Cir. 1956), cert. denied, 353 U.S. 910, 77 S. Ct. 665 (1957). Typically, students wishing to attend a school other than one to which their race had been assigned would apply to the school authorities to enroll in the desired school. The school authorities would then apply various criteria to the application. See generally Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala.), aff’d mem., 358 U.S. 101, 79 S. Ct. 221 (1958).


During this first phase of post-Brown litigation, it should be noted, the plaintiffs simply sought admission to white schools. As the court in the Norfolk case said, "the melody of massive resistance lingers on."28

B. The Pre-Swann Remedy

The next period, leading up to Swann, was characterized by growing recognition that school segregation could not be remedied piecemeal. The school authorities had established segregation as a central tenet of school administration by creating a structure that came to be known as the dual system. A dual system is characterized by two sets of schools, teachers, students, transportation routes, and student activities, one for each race. In Norfolk, as elsewhere, plaintiffs sought to change this structure. The Fourth Circuit gradually developed a body of law prohibiting initial assignments of students based either on two superimposed sets of attendance areas, one for whites and another for blacks, or on attendance areas gerrymandered to promote separation of the races.29 School systems were permitted to base student assignments on geographic zones or student choices.30

Three years later the Fourth Circuit began to struggle with the question of what should be done about racial separation in the schools caused by residential racial segregation. One district court, in approving a high school assignment plan that preserved substantial segregation,
had been presented with racial residential statistics for ninety planning
districts, of which sixty-two were "very predominantly white" and sev-
enteen were "very predominantly non-white."\(^{31}\) The district court ob-
served: "There is no panacea for racial balance in public schools. The
same is true as to housing. One follows the other as night follows
day."\(^{32}\) The court of appeals remanded, ruling that "[t]he school board
cannot build its exclusionary attendance areas upon private racial dis-

\(^{32}\) Id. at 134.
rev'd sub nom. Brewer v. School Bd. of Norfolk, 434 F.2d 408 (4th Cir.), cert. denied,
\(^{34}\) Id. at 1291.
\(^{35}\) Id. at 1277.
\(^{36}\) Id. at 1298.
laws prior to 1954 which prompted segregated housing patterns and, in
turn, brought about a neighborhood school which was segregated." 40
The district court did not, however, enter any findings concerning the
causes of the perceived residential segregation. The court approved the
"optimal" plan for the Norfolk schools based on the court's assessment
of the competing practical concerns.

The Fourth Circuit reversed, noting that, whether or not the 60% +
white schools provided the claimed educational benefits, the plan's quota
"effectively excludes many black pupils from integrated schools on ac-
count of their race, a result which is the antithesis of a racially unitary
system." 41 The court of appeals directed the district court to fashion a
"plan for unitary schools," desegregating all high schools and utilizing
"reasonable" methods of desegregating elementary and junior high
schools. 42 Thus, the court of appeals assumed that all the schools of
Norfolk should be desegregated if feasible. Indeed, concurring Judges
Sobeloff and Winter stressed their view that the record to date failed to
reflect that such relief was "infeasible." The opinions contained no
reference to the causes of the one-race composition of numerous schools.

C. The Post-Swann Desegregation Order.

Litigation in Norfolk was still proceeding in 1971 when the Supreme
Court held in Swann that one race schools in formerly dual school
systems were presumptively unlawful and that the proper remedy was
structural reform. 43 The court of appeals returned the Norfolk case to
the district court for entry of a new plan, to "be based on a revision
of the Stolee C plan [a busing plan proposed by the government's
expert] with necessary modifications and refinements, or the board may
adopt some other plan of its choice that will meet the requirements of
Swann and Davis." 44 The district court's opinion on remand is unre-
ported, but we know from later district court and court of appeals
opinions that the district court approved a plan of desegregation proposed

40. Id. at 1303.
41. Brewer v. School Bd. of Norfolk, 434 F.2d 408, 411 (4th Cir.), cert. denied, 399
42. Id. at 412. This reasonableness standard was derived from the Fourth Circuit's
43. See infra text accompanying notes 73-90.
The court refers to Davis v. Board of School Comm'rs, 402 U.S. 33, 91 S. Ct. 1289
(1971), a companion case to Swann ruling that further affirmative steps must be taken
to desegregate the Mobile, Alabama schools.
by the school board, with some revisions. The plan "utilized several different methods of pupil assignment," including "cross-town busing as a technique to overcome the remaining vestiges of Norfolk's dual school system." The plan "used a 70%-30% ratio in assigning students"; that is, schools were to be between 70% and 30% black. At the time, overall enrollment in Norfolk schools was 48.1% black.

On appeal a group of intervenors objected that the busing plan went too far, but apparently neither they nor the other parties claimed that Swann's presumption against one-race schools in formerly de jure school systems had been misapplied. Rather, the intervenors argued that the plan sought racial balance, that it was unacceptable to a large segment of the patrons of the school system, and that the busing subjected pupils to unreasonable risks to their health and safety. The court of appeals rejected each argument, noting that racial percentages were simply used as a starting point, that opposition to desegregation was not a valid objection to busing, and that "bus trips required of pupils under the plan generally fall within a range of thirty minutes each way," a range that the court did not consider excessive.

D. The Finding of Unitariness

By 1975, the black enrollment in Norfolk schools had risen to 51%, and the school system had been following the plan for three years. The district court entered the following order with the consent of counsel for the parties:

It appearing to the Court that all issues in this action have been disposed of, that the School Board of the City of Norfolk has satisfied its affirmative duty to desegregate, that racial discrimination through official action has been eliminated from the system, and that the Norfolk School System is now "unitary," the Court doth accordingly ORDER AND DECREE that this ac-

48. The lack of findings regarding the effects of past discrimination creates difficulties in reviewing the validity of retrogression plans. See infra text accompanying notes 105-11.
49. Brewer, 456 F.2d at 945.
50. Riddick, 784 F.2d at 540.
tion is hereby dismissed, with leave to any party to reinstate this action for good cause shown. 51

E. Post-Unitariness Events

When the order finding unitariness was issued in 1975, total enrollment in Norfolk's schools was over 47,000, down 2,000 students from the total enrollment in 1971 when the busing order was entered. 52 By 1983 enrollment had decreased to 34,802. 53 Because of this decline in enrollment, the number of elementary schools had decreased from fifty-four in 1970 to thirty-six in 1983. 54 Between 1972 and 1983, these school closings led to numerous revisions of the original busing plan, but contemporary court opinions do not disclose the nature of those revisions except to say that twenty-two elementary schools served bused students and the remainder served single attendance zones. 55 During this same period, the white proportion of the public school enrollment decreased from 52% when busing began in 1971 to 42% twelve years later. 56 By 1986, four of the elementary schools had become over 70% black. 57

In 1983, the school authorities, concerned especially about declining white enrollment, adopted a new plan of student assignment at the elementary level, replacing several "paired" attendance areas with single attendance zones for each school (except one city-wide school). While the busing plan was retained at the secondary level and the elementary school attendance zones were gerrymandered to promote integration, the new plan projected that ten of thirty-six elementary schools would become virtually all black. 59 All predominantly white schools would enroll substantial numbers of black students, although six schools would become over 70% white for the first time since implementation of the busing plan. 60

A class of black students filed suit in federal district court challenging the new plan. The district court concluded that the 1975 finding of

52. Riddick, 784 F.2d at 540 n.17.
53. Id. at 541 n.18.
55. Riddick, 784 F.2d at 527 n.5.
56. Id. at 541 n.18.
57. Id. at 527.
58. Pairing typically combined the attendance areas of two schools which might be across town from each other, so that one of the schools served all the students in the two areas in lower grades and the other served upper grades.
59. Riddick, 784 F.2d at 527.
60. Id.
unitariness had released the school authorities from their affirmative obligation to dismantle the dual school system. The court found that the purposes of the plan were to stabilize enrollment in the district and to increase parental involvement in the schools, and that the school board had not acted with discriminatory intent in adopting the plan. Moreover, the court found that the plan provided more promise of long-term racial integration than did the busing plan: "If the Proposed Plan is successful and the racial composition of the school population stabilizes, the school administration will have considerably more white students for the purpose of integrating the system than it would have if the present plan continues in operation, according to various forecasts." This perception rested largely on findings that the busing plan had caused, and would continue to cause, "white flight," thus decreasing the pool of white students available for desegregation purposes.

The court of appeals affirmed. It held that the 1975 finding of unitariness was properly entered and bound the plaintiffs; the district court's finding that the district had remained unitary after 1975 was not clearly erroneous; the district court properly placed on the plaintiffs the burden of proving "discriminatory intent on the part of the school board of a unitary school system"; and the plaintiffs had failed to sustain that burden. Although the plaintiffs had claimed "that the burden of proof remains on the school board to prove that implementation of the new assignment plan will not perpetuate the vestiges of the past de jure dual system," neither the district court nor the court of appeals addressed what effects of past discrimination had been remedied by the busing plan or whether the dismantling plan reinstated those effects.

III. RETROGRESSION

The plan approved in Riddick is a retrogression plan. That term was applied in Beer v. United States to voting changes that, although arguably not infected with discriminatory intent, "would lead to a retrogression in the position of racial minorities with respect to their

62. Id. at 821-22.
63. Riddick, 784 F.2d at 521.
64. Id. at 537.
65. Id. at 534.
66. The plaintiffs' brief in the court of appeals argued at length that the record affirmatively showed that the dismantling plan reinstated various claimed effects of past discrimination. Appellants' Brief, at 22-34, Riddick, 784 F.2d 521 (No. 84-7412). The court of appeals opinion does not address the argument.
effective exercise of the electoral franchise." As applied herein, the term refers to a plan of student assignment which, while arguably not adopted with discriminatory intent, significantly increases the number of minority students attending one-race schools. The Supreme Court has made it plain that such plans do not per se offend the equal protection clause which bars only segregation that stems from an intent to segregate. The Court, however, has yet to address directly the standards to be applied to retrogression plans adopted by school systems which at one time operated officially segregated schools.

The history of the Norfolk case lends itself to conflicting interpretations. One view stresses the good faith efforts of the local school authorities to conduct a nondiscriminatory educational program. The other view sees the liquidation of elementary school busing as the culmination of decades of resistance to Brown; the school authorities lost many battles but won the war. Judges Sobeloff and Winter, concurring in Brewer, said, "This litigation has been frustratingly interminable, not because of insuperable difficulties of implementation but because of the unpardonable recalcitrance of the defendants. The new, and spurious, 'principles' devised . . . and endorsed . . . as justification for the failure to desegregate fly in the face of Brown . . . and are simply new rationalizations for perpetuating illegal segregation."

Like the history of the Norfolk case, a retrogression plan may be portrayed in two seemingly contradictory yet accurate ways. It may be portrayed as returning almost all formerly black elementary schools to their racial composition under the dual system, while returning most formerly white elementary schools to the majority white status contem-
plated by the now discredited "optimal" plan. Such portrayal stresses presumed effects of past discrimination and also implies continuing intent to cloister white students in majority white schools by deliberately relegating a large group of black students to black schools. The court of appeals erroneously calls this the "original sin" doctrine. Carrying the theological image further, the other view of the circumstances might be called the "redemption" doctrine, which portrays the retrogression plan as providing the educational advantages of neighborhood schools while maintaining a higher degree of actual integration in Norfolk over the long run. This portrayal stresses the importance of freeing successfully desegregated school systems from remedial obligations so that they can pursue their educational mission in the same manner as other urban school systems that serve racially concentrated neighborhoods.

Each portrayal accurately paints a one-dimensional image of the true picture. Resolution of the retrogression issue should begin with a complete picture. The key to the case is found in Swann, unless Swann itself is to be reconsidered, and the issue under Swann is neither the good faith of school administrators nor distributive justice in light of practical considerations. Rather, as demonstrated below, the issue is whether or not the retrogression plan reinstates the effects of past discrimination.

IV. Swann

The Swann doctrine is shorthand for a series of school desegregation decisions, beginning in 1968 with Green v. County School Board.72 The cases73 establish a set of dichotomies regarding the appropriate school desegregation remedy. First, their central theme is the "tailoring doctrine": school desegregation remedies must be tailored to the scope of the past violation. Where the violation was systemic, the remedy must be systemic.74 Where the violation was limited to specific schools, the remedy must be confined to what is necessary to desegregate those schools. Thus, Swann's first dichotomy is implicit in the tailoring doc-

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74. "[T]he only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration." United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 869 (5th Cir. 1966).
trine, which either requires or forbids systemwide relief, depending on the circumstances.  

Second, Swann not only insists that the relief for systemic unlawful segregation be systemic, the case also requires that affirmative steps be taken to eliminate unexplained racial isolation in such school systems. On the other hand, Swann emphasizes that racial balance is not required and allows school authorities to justify the continued existence of some one-race schools. Indeed, some school boards have succeeded in winning judicial approval of plans under which some schools remain one-race. Thus, Swann's second dichotomy arises where the court tells courts they must take race-conscious action in some instances and may not do so in others.

Third, Swann contemplates a "hands-off" attitude by the courts as long as the schools comply on their own. In the first instance, it is up to school authorities to devise the desegregation remedy, but, in case of default by the school authorities, the courts must fashion the remedy and may exercise considerable leeway in doing so. Swann also requires use of busing (assignment of students beyond the nearest school) where necessary, but forbids busing when it is incompatible with health or safety of the children. Finally, Swann requires continuing judicial supervision of the desegregation process, but contemplates that once a school system has become "unitary," further judicial intervention should ordinarily not be necessary.

Much has been written about the reasoning of Swann, but only a few points need be emphasized here. The central issue in deciding when a school board may adopt a retrogression plan is determination of the

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76. School authorities in a formerly dual system have the burden of showing that the racial composition of one-race schools "is not the result of present or past discriminatory action on their part." Swann, 402 U.S. at 26, 91 S. Ct. at 1281.

77. This limiting aspect of tailoring has been much criticized. See, e.g., P. Dimond, Beyond Busing: Inside the Challenge to Urban Segregation 395-96 (1985) (criticizing opinions that used "such techniques to avoid consideration of the two basic violation issues: Is the almost complete separation of blacks from whites across metropolitan America a legacy and continuing engine of caste? If so, should we as a people, through our state and federal governments, be held responsible for refusing to confront any such wrong?").

78. Swann allows formerly dual systems to maintain one-race schools on a showing that one of two circumstances exists. First, the school board may show that the one-race schools result from "the practicalities of the situation." Davis, 402 U.S. at 37, 91 S. Ct. at 1292. Second, the school authorities may show that the schools' "racial composition is not the result of present or past discriminatory action on their part." Swann, 402 U.S. at 26, 91 S. Ct. at 1282.
purposes served by the existing busing plan. If the retrogression plan is consistent with those purposes, and if the objectives of the busing plan have been completely met, there would be no reason to disapprove the retrogression plan. If the converse is true, it would be necessary to ask whether and to what extent the original objectives of the busing plan may be abandoned.

The opinions in the *Swann* cases recognize that the school desegregation plan in that case serves several distinct purposes. The plan converts the school system from one with two sets of schools, designated by race, to a system with one set of schools. It thus extirpates the overt racial identity of schools. Second, through the presumption against one-race schools and the requirement that race-conscious assignments be made to ensure desegregation, the plan provides remedial rules of sufficient clarity to ensure against further dilatory tactics. This presumption and the race consciousness requirement play a prophylactic role: they serve "to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation." 79

Each of these reasons for requiring "busing" is transitory. Once there are no longer two sets of schools, future racially neutral assignments seem unlikely to renew formal dualism. Once the plan has been in place for a period of time, the political need for preventive relief should diminish. Time should bring about changes in school sizes, sites, and identifiability, as well as in the racial makeup of neighborhoods.

*Swann* has stood essentially unscathed for over fifteen years. Although some justices have questioned the extent of busing required by some lower courts under *Swann*, 80 no justice has questioned *Swann* itself. The Court extended the *Swann* analysis north, to states without segregation laws, in *Keyes*. 81 Arguably, a subsequent northern case known as *Dayton I* limited *Swann*, confining relief to specifically identified effects of discrimination. The Court, however, soon 83 showed that *Dayton I*'s impact was peripheral. True, the Court placed limits on *Swann*'s logic in *Milliken I*, 84 which denied interdistrict busing relief for a violation

80. See infra notes 92 and 167.
confined within Detroit's borders. Nevertheless, those limits were arguably implicit in Swann all along. Thus, the core of Swann remains.

Swann has withstood attack for several reasons. First, it is rooted in experience. As the Court explained in Swann, prior lower court decisions "embraced a process of 'trial and error,' and our effort to formulate guidelines must take into account their experience."\(^{85}\) Second, it is rooted in equity and constitutional doctrine. The tailoring principle, preventive relief, eradication of the effects of past discrimination, and careful use of race-consciousness are independently supportable and collectively compatible.\(^{86}\) Third, a convincing case against busing has not been made. Admittedly, it can be argued that in some communities busing has not "worked";\(^{87}\) but in most it has.\(^{88}\) Finally, the busing remedy benefits from "the mitigating circumstance of [its] transitory

85. *Swann*, 402 U.S. at 6, 91 S. Ct. at 1271. See Michelman, The Supreme Court 1985 Term—Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 31 (1986): "Pragmatism looks to shared experience to produce intermediate premises, which although local, provisional, and relative to situation, may be normatively sufficient for the occasion."

86. See infra text accompanying notes 133-68.

87. See, e.g., J. Wilkinson, *From Brown to Bakke* 151 (1979) (Richmond busing plan "proved a failure"). Judge Wilkinson's book examines both the case law and the sociological evidence regarding busing. He concludes that "[o]n busing the evidence is not all in, nor is it all on one side. But what there is suggests that only in the most select circumstances can busing be expected to succeed." Id. at 308. Of course, whether a plan is considered a failure or a success depends on what one conceives as its objective. Courts do not order busing to achieve educational objectives but to overcome racial isolation flowing from past unlawful discrimination. Educators could conclude that busing had not improved education, while at the same time jurists might conclude that it had successfully eradicated some effects of past discrimination.

88. Professor Gary Orfield surveyed patterns of public school desegregation in the United States from 1968 to 1980. He found that "[t]he most substantial decreases in segregation of black students came in the South and the border states," where Swann applies. G. Orfield, *Public School Desegregation in the United States, 1968-1980,* at 3, 5 (1983). *Swann* has its greatest impact in city school systems with racially impacted housing patterns. Orfield found that "[i]n general, the greatest increases in integration of black students were" in large metropolitan school districts "that have sweeping busing orders." Id. at 32. "The desegregation plans limited to central cities faced the same patterns of demographic change that affected cities across the nation, [increased percentage of students]." Id. at 35. David J. Armor, the expert witness for the Norfolk school system, attributes much of the decrease in white enrollment to the existence of court-ordered busing plans. However, the statistics on which he relies reveal that most southern school systems which he cites retain substantial white populations. Moreover, in most systems the difference between projected percentage white without court orders and actual percentage white with court orders is ten or fewer percentage points. Armor, *White Flight and the Future of School Desegregation,* in *School Desegregation* 208, Table II (Stephen & Feagin, eds. 1980). See also B. Schwartz, supra note 75, at 191-93 (success of busing in Charlotte).
If court mandated busing were considered permanent, the objections to it might be considerable, for busing would then become what Gewirtz calls a "distributive" requirement rather than a remedial tool. The Court, however, has repeatedly disavowed any end-state requirement of racial balance in the schools.

Although Swann has withstood the test of time, its dichotomies have often been ignored by the lower courts. In many instances courts and advocates have simply relied on one prong of a particular dichotomy without reference to the other. Soon after Swann, its author, Chief Justice Burger, complained in Winston-Salem/Forsyth County Board of Education v. Scott that the lower court had imposed a racial balance plan despite Swann's disapproval of requiring racial balance. Other cases, Riddick included, have focused on this disapproval of racial balance without considering why Swann creates the presumption against one-race schools in formerly dual school systems. Some cases have emphasized the limiting aspect of tailoring, while others have emphasized the empowering aspect. Application of Swann has thus illustrated the

89. "This mitigating circumstance prevents us from coming to a verdict. For how can we condemn something that is ephemeral, in transit?" Kundera, The Unbearable Lightness of Being 4 (Heim trans., 1984). See also Gewirtz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 Colum. L. Rev. 728 (1986).

90. Under the distributive conception, "racial justice under the Constitution is understood as a specific racial distribution—for example, a representation of the races in various institutions in proportion to their representation in the population." Gewirtz, supra note 89, at 731.

91. The prime example is Lino Graglia, who argues that: "Swann . . . [is] a decision that historians may someday rank with Dred Scott in terms of gratuitous infliction of injury on the country by the court in matters of race." Graglia, From Prohibiting Segregation to Requiring Integration, in School Desegregation 79 (Stephan & Feagin, eds. 1980). Professor Graglia portrays Swann as requiring racial balance. Id. at 83. He does not discuss the Court's dichotomies, but assumes that Swann's permissible flexible starting point represents an end-state requirement.


general tendency of the lower courts to ignore nuance in the Supreme Court's non-discrimination rulings. The "all deliberate speed" doctrine of Brown I\(^\text{96}\) did not mean that desegregation was to be indefinitely postponed, but many lower courts treated it as a license for delay until, fourteen years later, the Court held in Alexander v. Holmes County Board of Education\(^\text{97}\) that desegregation of dual systems must occur "at once."\(^\text{98}\) Correct application of Swann proceeds from recognition that "the requirement of integration is a transitional rule, justified by the courts under a corrective theory rather than a distributive or prohibitory theory."\(^\text{99}\)

V. MECHANICS OF SCHOOL DESEGREGATION CASES

The mechanics of school desegregation cases may profoundly affect analysis of the retrogression plan. Party structure, the fact finding process and the method of formulating busing plans all bear on the school board's remedial duty. These aspects of the case, together with procedures for deactivating school desegregation cases, also bear upon the issue of whether either claim preclusion or issue preclusion apply during consideration of the retrogression plan.

A. Entry of the Busing Order

Three characteristics of the procedure for entry of the busing order may affect analysis of the standards for validity of a retrogression plan. Party structure, the fictional quality of the facts, and the formulation of the busing plan are peculiarities of school desegregation litigation.

1. Party Structure

Party structure refers to the identities and peculiarities of the plaintiffs. Some school desegregation suits were commenced by individuals,
while others were commenced as class actions. If individual plaintiffs were first graders when they commenced an individual action for school desegregation, the suit could have a life of no more than twelve years. If the case was a class action commenced prior to the 1966 amendments to Federal Rule of Civil Procedure 23, it is not clear whether it would be considered a "true" or a "spurious" class action. In some suits that failed as class actions after 1966, the plaintiffs failed to obtain class certification, so the suits became in essence individual actions. The failure to obtain class certification may also have transformed pre-1966 class actions to post-1966 individual actions.

The parties in desegregation suits involving over 350 school districts include the United States, typically as an intervenor under 42 U.S.C. § 2000h-2 or as a plaintiff under 42 U.S.C. § 2000c-6. It should be noted as well, however, that the United States does not necessarily side with the private plaintiffs on all issues in school desegregation cases. In several recent cases, including Riddick, the United States has supported school board retrogression plans.

100. Initially the Fourth Circuit disallowed class actions in school desegregation cases. The court explained that black school children were to be "admitted . . . as individuals, not as a class or group." Carson v. Warlick, 238 F.2d 724, 729 (4th Cir. 1956), cert. denied, 353 U.S. 90, 77 S. Ct. 685 (1957). The court later allowed class actions, based on the understanding that the challenged discriminatory practices were based on class characteristics. See, e.g., Jeffers v. Whiteley, 309 F.2d 621, 628-29 (4th Cir. 1962) (where plaintiffs challenge "a general disregard by the School Board of the constitutional rights of Negro pupils" injunctive "relief is available in a spurious class action such as this").


102. In a true class suit "all members of the class were bound; . . . if it was 'spurious,' the members were not bound by a judgment adverse to the class but could come in as intervenors, even after judgment, and thereby take advantage of a favorable judgment." F. James & G. Hazard, Civil Procedure § 10.22, at 569 (3d ed. 1985).

103. Pasadena, 427 U.S. 424, 96 S. Ct. 2697. But see Graves v. Walton County Bd. of Educ., 686 F.2d 1135, 1139-40 (5th Cir. Unit B 1982) ("despite the lack of a formal order certifying this case as a class suit, this case was in fact a class action and was specifically described and treated as such by the parties and the trial court").

104. See Jones v. Caddo Parish Bd., 735 F.2d 923, 925 (5th Cir. 1984) (en banc) (and see cases cited at n.1, to the effect that "[t]he amended rule applied to actions pending on its effective date"); see also Judge Rubin's dissent. Id. at 943.


2. Fictional Quality of the Facts

A retrogression plan revives some of the racial imbalance which existed prior to imposition of the busing plan. If that imbalance was illegal, then, arguably, it remains illegal. Review of the prior imbalance, however, proceeds under the Swann presumption, which creates a legal fiction. Unless the school authorities refute the fiction, the remedy will be based on the supposition that all one-race schools in the school system are the results of past discrimination. Analysis of a retrogression plan requires understanding how the original violation decision was reached.

In the typical suit to desegregate an urban school system previously segregated by law, the parties do not litigate the general issue of past discrimination. Because state law required segregation, the unlawfulness of such de jure segregation is beyond dispute. In some cases, however, liability for court ordered desegregation may have turned on whether the school board's desegregative actions prior to suit were sufficient. In either case, the nub of the litigation becomes the sufficiency of a desegregation plan. Some school boards have attempted to litigate the question of whether racial imbalance in particular schools was the result of school board action, and some have succeeded in establishing that the particular racial imbalance was not the result of their action. More typically the court, relying on the transitory prophylactic justification for the Swann doctrine, has simply evaluated plans in terms of desegregative effect and practicality. The courts hardly ever find that particular segregative conditions are the result of particular segregative activities on the part of school authorities. Indeed, the difficulty of demonstrating causation or the lack of it is one of the reasons for the Swann presumption that systemwide discrimination had systemwide effects. Therefore, if the court is to determine the cause of one-race schools, the burden of proof is normally determinative.

107. "The mix that would have occurred but for the racism is a judicially created hypothetical." United States v. Overton, 834 F.2d 1171, 1176 (5th Cir. 1987).
108. Horton v. Lawrence County Bd. of Educ., 578 F.2d 147 (5th Cir. 1978); Castaneda v. Pickard, 781 F.2d 456 (5th Cir. 1986).
111. "[T]here is no way to reason from the 'right' to a desegregated school system
3. Formulation of the Busing Plan

Seldom is there only one way to effect desegregation. A variety of grade restructuring, zone configuration, and school capacity options confront the school planner. Seldom is it obvious which option is best, either for education purposes or to fulfill the requirements of *Swann*. *Swann* places on the school board the initial responsibility to formulate the school desegregation plan. If the board defaults, the court must develop a "default plan" by drafting its own, relying on a plan drafted by another party, or appointing a court expert to draft the plan. In neither instance do the parties typically litigate the question of whether particular aspects of the plan are tailored to the violation. Thus, in most cases the effects of the past unlawful practices are not addressed at either the violation or the remedy stage of litigation. In many cases the plans provide for racial balance whether or not *Swann* or *Davis* would require that degree of desegregation.

B. Deactivating the Case

The Supreme Court has provided little guidance for what should happen to the case after the busing order has been entered. *Brown II* required compliance with "all deliberate speed" and said that "[d]uring this period of transition, the courts will retain jurisdiction of these cases to the content of the decree in any particular case. It is equally impossible to work backward from the relief to define the contours of the right." *Chayes, The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 50 (1982).

112. After *Swann*, many boards, including Norfolk, submitted plans which, in effect, provided racial balance. In many other systems, the court ordered implementation of a default plan.

113. [T]he effects of the violation and proper duration of the remedy are difficult to measure. . . . Especially is this so where the original findings of intentional discrimination, often made years ago, are not phrased in terms of the incremental segregative effect that board violations had on the racial distribution of a school population.

Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1242 (9th Cir. 1979) (Kennedy, J., concurring) (footnote omitted). Justice Kennedy, then a Ninth Circuit judge, concluded that innocently motivated retrogression would be permissible in Pasadena. However, he also recognized that the issue was whether the retrogression plan reinstated effects of past discrimination. Pasadena's discrimination had been less pervasive than that found in a system where law required separation of the races. So, "compliance with the Pasadena Plan for nine years is sufficient in this case, given the nature and degree of the initial violation, to cure the effects of previous improper assignment policies." Id. at 1244.

114. Indeed, it has been noted that the *Swann* opinion itself "contains absolutely no analysis of the purported relationship between the constitutional violations—the 'loaded game board'—found by the district court, and the systemwide remedies devised to eradicate vestiges of this discrimination." *Note, Retention of Jurisdiction in Desegregation Cases: A Causal and Attitudinal Analysis*, 52 S. Cal. L. Rev. 195, 210 (1978).
cases." Green said 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." This statement suggests that a court should relinquish jurisdiction at some point, an inference supported by later language in Swann which noted: "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." The Court added that "once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system ... 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." Building on Swann, Pasadena held that once the busing plan has been successfully implemented the courts would lack authority to require further adjustments to the plan in order to correct racial imbalances arising from residential movement not caused by the school authorities. However, in Pasadena the Supreme Court did not reach the school board's contention that the injunction there should be lifted and federal court jurisdiction over the board terminated.

The lower courts have inferred from these Supreme Court decisions that, in contrast to ordinary injunctive suits, cases resulting in successful compliance with the busing injunction should lead to some form of absolution at some point. After a period of compliance, the court typically declares the school system unitary. The court may also remove the case from the active docket, relinquish jurisdiction over the case, or dissolve the injunction. Some courts replace the detailed regulatory

117. Swann, 402 U.S. at 31, 91 S. Ct. at 1283.
118. Id. at 32, 91 S. Ct. at 1284.
120. Id. at 440-41, 96 S. Ct. at 2706-07.
122. E.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 67 F.R.D. 648, 650 (W.D.N.C. 1975), ordered "1. That this cause be removed from the active docket. 2. That the file be closed." The court stressed, however, that "[t]he duty to comply with existing court orders respecting pupil assignment of course remains." Id. at 649. Morgan v. Nucci, 831
injunction with a general injunction, while others simply withdraw all injunctive relief. The Fifth Circuit also allows plaintiffs "an opportunity to show cause why continued judicial supervision is necessary . . . ." before allowing dismissal of the case. Often, the disposition is ambiguous. In Norfolk, for example, the court declared the system unitary in 1975 and ordered "that this action is hereby dismissed, with leave to any party to reinstate this action for good cause shown." The factual predicate for the Norfolk order was typical: "the School Board . . . has satisfied its affirmative duty to desegregate, [and] racial discrimination through official action has been eliminated from the system . . . ." The court thus neither stated whether it was dissolving the injunction nor included any findings of fact regarding lingering effects of the past discrimination.

The finding of unitariness is simply a label. As originally employed, the term simply denoted a school system with only one set of schools, in contradistinction to a dual system, which have separate sets of schools for each race. As employed at the deactivation stage, unitariness adds the connotation of a formerly dual system which has successfully and in good faith implemented a constitutionally sufficient desegregation plan. The finding of unitariness says nothing, however, about a third possible connotation: that all effects of past discrimination have permanently been extirpated. The significance of the unitariness finding thus depends on what underlies the label. The unitariness finding is 

F.2d 313, 326 (1st Cir. 1987) (if "the schools have reached unitariness in student assignments," the "injunctive orders addressing the student assignment process" should be dissolved). The Morgan court seems to assume that the Boston school system would remain under a duty to act in good faith to "preserve the gains the schools have made over the past 15 years." Id. at 326 n.19.


127. Id. In affirming a finding that the Houston, Texas schools were unitary the Fifth Circuit recently said:

When state officials have not only made good-faith efforts to eliminate the vestiges of segregation, but have actually achieved a school system clean of every residue of past official discrimination, immutable geographic factors and post-desegregation demographic changes that prevent the homogenation of all student bodies do not bar judicial recognition that the school system is unitary. Ross v. Houston Indep. School Dist., 699 F.2d 218, 225 (5th Cir. 1983).

128. The attempted use of the label is reminiscent of the Fourth Circuit's use of the term "desegregate" as a term of limitation. A district court said in Briggs v. Elliott, 132
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not necessarily the last word in the case. To paraphrase Professor Bruce Ackerman, a finding of unitariness does not suggest "that everything worth saying has been said, but rather that it is best, all things considered, to say no more at a particular time."2 The unitariness finding is tantamount to a declaratory judgment that the school system is now free from general judicial supervision. It does not follow that the school system is free to revive or build on effects of past discrimination.

VI. REVISION OF BUSING PLANS

Revisions of busing plans may promote racial diversity in the schools; they may be neutral in their impact on racial diversity; or they may promote racial separation. Analysis of retrogression plans has tended to emphasize the presence or absence of a finding of unitariness as determinative of the school board's substantive obligations. However, this mode of analysis ignores the nature of the original violation and the resulting remedial obligation, misapplies the doctrine of preclusion, and fails to grapple with existing rules of injunction modification. Considerations of policy as well as law suggest that the core inquiry should be whether the retrogression plan revives the effects of past discrimination.

A. Types of Revisions

School administration is a dynamic process. Enrollments fluctuate, educational philosophies change, and facilities are built or abandoned. No plan can freeze the status quo as of some particular time. For example, in Norfolk the initial 1971 busing plan desegregated fifty-four elementary schools, but by the time the retrogression plan was adopted in 1984, the system maintained only thirty-six elementary schools for its diminished student body. Between adoption of the busing plan in 1971 and adoption of the retrogression plan in 1984, the school board effected numerous changes in student assignments as eighteen schools closed their doors. None of these changes appears to have been the subject of school desegregation litigation. The Norfolk school board's actions during those years present a paradigm case of the type of

F. Supp. 776 (E.D.S.C. 1955), that "[t]he Constitution . . . does not require integration. It merely forbids [segregation]." Id. at 777. The Fourth Circuit appeared to adhere to that dictum as late as 1966. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 369 F.2d 29 (4th Cir. 1966). Judge Wisdom persuasively showed in the panel opinion in United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 846 n.5 (5th Cir. 1966), adopted as clarified, 380 F.2d 385 (5th Cir. 1967) (en banc) that the terms "desegregation" and "integration" were not used by the Supreme Court as terms of art meant to avoid any affirmative duty to promote desegregation.

circumstances under which revision of busing plans is clearly permissible: where the new plan will not significantly resegregate the schools.

Other revisions in busing plans might also raise no significant legal issue. Changes in school locations and capacities or changes in residential patterns might enable a neighborhood school assignment system to enroll significant numbers of children of each race in most schools. A school system might adopt a magnet school plan[130] which results in a continuation of integration. If such a plan worked it would demonstrate that the schools had truly lost their prior identities as schools intended for children of a particular race. If, on the other hand, the school system had experienced such white flight that busing no longer could yield integrated schools, adoption of a neighborhood school plan also might not be retrogressive.

The Norfolk retrogression plan differed from the plans described above in that it created a significant number of one-race schools. As proposed, the plan established that ten formerly integrated schools would revert to their pre-Swann status, enrolling virtually all-black student bodies. The school system would retain, however, much more racial mixing than before Swann.[131] Thus, the Norfolk retrogression plan plainly posed the question of whether, and to what extent, the school board could reinstitute one-race schools once the school system had successfully implemented a court-ordered busing plan. Or, as one commentator put the question, "'[d]oes this mean that all desegregation decrees promptly self-destruct?'"[132]

B. Case Treatment of Retrogression Plans

Initially, the question of whether desegregation decrees self-destruct might be resolved by asking whether the school authorities remain subject to injunctive orders concerning the nature of the desegregation plan after the case has been deactivated. If an injunction remains in force, school authorities must follow it, under pain of contempt, unless and until they seek and obtain modification.[133] Neither the district court nor the court of appeals asked that question in Norfolk. They must have

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130. A magnet school is a "school with a special educational program designed to attract voluntary transfers from outside the area, thus producing integration without compulsion." G. Orfield, Must We Bus, 133 n.52 (1978).
131. 61% of black elementary students and all secondary school students would attend integrated schools, compared with 23% of black elementary students, 43% of black junior high school students and 100% of black senior high school students under the plan the district court approved in 1969. See supra text accompanying notes 50-60.
proceeded on the assumption that the 1975 order dismissing the case also dissolved all outstanding injunctions. This approach stands in contrast to that of the recent analysis by the Tenth Circuit in Dowell v. Board of Education of Oklahoma City, which held that a similar district court order terminating jurisdiction of a school desegregation case did not dissolve the injunction requiring the board to follow a busing plan.

The conflict between the circuits poses interesting issues as to the nature of permanent injunctions and continuing jurisdiction, but does not address the core issue of the substantive obligations of formerly de jure school systems which have successfully desegregated. Presumably if the successful implementation of the busing plan entitles the school board to relief from further busing obligations, the board could obtain a modification of the busing injunction. Indeed, the court of appeals in Dowell remanded the case to the district court "for further proceedings to determine whether the original mandatory order will be enforced or whether and to what extent it should be modified."

Having assumed that the busing order was no longer in effect, the court of appeals in Riddick applied the following syllogism to determine the board's substantive obligation: the court reasoned that unitary school systems have no affirmative obligation to desegregate; Norfolk had been declared unitary; therefore Norfolk's only continuing obligation was to desist from intentional discrimination. This syllogism relies on a play


135. Surely the Tenth Circuit is correct and the Fourth Circuit is wrong on this point. The Supreme Court has noted the "well-established insistence that those who are subject to the commands of an injunctive order must obey those commands, notwithstanding eminently reasonable and proper objections to the order, until it is modified or reversed." Pasadena, 427 U.S. at 439-40, 96 S. Ct. at 2706. The remedy for an objectionable order is a "motion to modify in the issuing court." Id. at 440, 96 S. Ct. at 2706. A motion for a declaration of unitariness is not, without more, a motion to modify. But see Note, The Unitariness Finding and Its Effect on Mandatory Desegregation Injunctions, 55 Fordham L. Rev. 551, 574-75 (1987) (if the unitariness order did not expressly dissolve or modify the original injunction a "fact-specific analysis" should be employed to determine whether the order nonetheless "should be treated as effectively dissolving the original injunction (or modifying the specific term sought to be enforced)"). See also United States v. Texas Educ. Agency, 671 F. Supp. 484, 487 (W.D. Tex. 1987), aff'd sub nom. United States v. Overton, 834 F.2d 1171 (5th Cir. 1987) (court "is no longer empowered to enforce" a consent decree "when the consent decree by its own terms states that court involvement in the case will cease at a specific date," even though the movants "may will be entitled to relief in another cause of action").

on the word "unitary," without which the syllogism would collapse. School systems which maintained only one set of schools and did not discriminate may be called unitary in contradistinction to traditional dual systems. A traditional dual system may attain unitary status by implementing a plan of desegregation that eliminates the effects of past discrimination. The Fourth Circuit shortsightedly failed to address a crucial factor in its syllogism: should the label "unitary" survive the resurrection of the effects of past discrimination? If not, have those effects been resurrected by school board action?

The Supreme Court has articulated only two forms of functional significance in a finding that a formerly dual system has attained "unitary" status. First, the school authorities are not "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." Second, flowing from this first point, "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." Thus, the Court has placed a limit on the remedial responsibility of school systems that have successfully desegregated, and has indicated that the prophylactic role of the federal court must end after a period of compliance. In saying that year-by-year adjustments to maintain racial balance are not required, however, the Supreme Court has not suggested that adjustments which destroy racial balance are to escape judicial scrutiny. Indeed, one might infer a negative pregnant, that at least some forms of retrogression are not allowed.

C. Legal Doctrines Which Bear on Review of Retrogression Plans

The retrogression plan should be analyzed to determine whether the plan constitutes a violation of an independent substantive prohibition in the Constitution and to determine whether it is consistent with the school board's remedial obligations. Those inquiries tend to merge, because the remedial obligation is defined by the nature of the substantive violation. Once a standard of review has been determined, one must decide whether the procedural posture of the busing suit affects analysis.

137. Compare Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3148 (1987) (rejecting an argument which "essentially turns on a play on the word 'access'"). Here, as in Nollan, the courts should enquire whether "[r]ewriting the argument to eliminate the play on words makes clear that there is nothing to it." Id. at 3149.
139. Pasadena, 427 U.S. at 436-37, 96 S. Ct. at 2705.
If the busing order has been dissolved and the case dismissed, any attack on the retrogression plan is likely to take place in a new lawsuit. The procedural question will be whether decisions in the first suit have preclusive effect in the second. If the busing order has not been dissolved, a school system seeking to implement a retrogression plan will need to file a motion to modify the existing injunction.

1. The Nature of the Violation and the Remedial Obligation to Eradicate the Effects of Past Discrimination

Both substantive and remedial principles governing school desegregation litigation stress that the school board must not only act with a present non-discriminatory intent but must also take care not to build on the effects of past discriminatory intent. It thus becomes crucial to understand what those effects might be. To be sure, the court could decide that the effects have become so attenuated through the passage of time that they may now be ignored. But the closer the retrogression plan approaches the state of affairs previously held unlawful, the more questionable the attenuation argument becomes.

Two substantive issues are presented by retrogression plans. First, is the plan an expression of present discriminatory intent? If so, it violates the equal protection clause.140 Second, does the plan reinstate the effects of past discriminatory intent? The case law to date has forbidden a school board from taking steps which, while neutral on their face, perpetuate the board's past discrimination. Swann itself created a presumption against one-race schools whose racial character may stem from a "loaded game board." More recently, the Supreme Court held that school boards which operated intentionally segregated schools in 1954 were thereafter under a continuing duty to eradicate the effects of that system,141 and "that the systemwide nature of [a] violation furnishe[s] prima facie proof that current segregation in the . . . schools was caused at least in part by prior intentionally segregative official acts."142

The courts in Norfolk did not consider whether the retrogression plan perpetuated past discrimination. The court of appeals simply said "[w]e reject plaintiffs' argument that the Norfolk school board must

continue to justify all of its actions because of the history of segregation.\textsuperscript{143} The court relied on the plurality opinion in \textit{City of Mobile v. Bolden:}\textsuperscript{144} "While that history of discrimination cannot and should not be ignored, it 'cannot in the manner of original sin, condemn governmental action that is not itself unlawful.'\textsuperscript{145} Not only does the Fourth Circuit misuse \textit{City of Mobile,}\textsuperscript{146} it also misapplies the analogy based on the concept of original sin, a concept which refers not to individual sinners but to humanity's nature after the fall of Adam and Eve. The Court has rejected the doctrine of original sin in the racial discrimination context. While we bear no legal blame for the sins of society, we are liable, however, for our own delicts and must remedy their effects. So are school boards. This is the reason the Court distinguishes between racial separation that stems from societal discrimination, which school boards need not remedy, and racial separation that stems from school board action, which they must remedy. Action that perpetuates such \textit{de jure} segregation is itself unlawful.

It is clear that the busing plan must be designed to eliminate the effects of past discrimination. The significance of this principle in the evaluation of a subsequent regression plan is, however, somewhat less clear. The principle may suggest that, once the busing plan was implemented the discriminatory effects vanished, or merely that the plan neutralized those effects for so long as it was in place. If the former alternative is correct, then it would follow, as the Fourth Circuit reasoned in \textit{Riddick,} that once the system has been declared unitary the school board is free to adopt a retrogression plan so long as its plan is not tainted with present discriminatory intent.\textsuperscript{147} If the latter alternative is

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\item \textsuperscript{143} Riddick v. School Bd. of Norfolk, 784 F.2d 521, 539 (4th Cir. 1986), cert. denied, 107 S. Ct. 420 (1986).
\item \textsuperscript{144} 446 U.S. 55, 74, 100 S. Ct. 1490, 1503 (1980).
\item \textsuperscript{145} \textit{Riddick}, 784 F.2d at 539.
\item \textsuperscript{146} See infra text accompanying note 156.
\item \textsuperscript{147} The court of appeals opinion in \textit{Riddick} is confusing on this point. The court refers twice to the effects of past discrimination. First, the court says the issue regarding the impact of the finding of unitariness is: "What procedure governs a challenge to a student assignment plan for a school district that historically practiced \textit{de jure} segregation but had obtained a valid judicial order that it has ridded itself of all vestiges of that racial discrimination?" \textit{Riddick,} 784 F.2d at 534. However, recall that the district court never said that Norfolk had ridded itself of the vestiges of racial discrimination. Second, the court says that plaintiffs' "claim that the burden of proof remains on the school board to prove that implementation of the new assignment plan will not perpetuate the vestiges of the past \textit{de jure} dual system." Id. The court then adds that it agrees with the district court's "allocation of the burden of proof" on the plaintiffs, seemingly treating the issue as one of burden of proof rather than standard of behavior. However, the court then does not ask whether plaintiffs proved that vestiges of discrimination have been perpetuated, but asks only whether they have proved that the school board acted with
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correct, further analysis would be required to determine whether once
dormant effects of past discrimination will be revived.

To determine whether the retrogression plan has revived effects
forbidden by Swann, it is necessary to know what those effects are. The Supreme Court has made it plain that the busing plan is not designed
to remedy generalized societal or state discrimination. The remedy can
bear only "a limited amount of baggage." Beyond this cryptic negative,
however, the Court has provided little explicit indication of what types
of discriminatory effects are pertinent to busing relief. Nevertheless, it
is safe to infer from the Court's rulings in desegregation cases that three
types of lingering effects are especially relevant: (a) racial identifiability
of schools; (b) effects of school placement and capacity; and (c) effects
of school segregation on housing patterns. These three types of effects
are presumed to operate systemwide.

Racial identifiability occurs because particular physical plants were
built to serve one race or another and are associated in the minds of
the public, including school children, with that race. Importing teachers
and students of the other race into such schools eliminates at least some
indicia of racial identifiability. If the school operates on a desegregated

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n.7 (1979). The Supreme Court has recognized other effects of past discrimination which
are remedied by means other than busing. Milliken v. Bradley, 433 U.S. 267, 97 S. Ct.
2749 (1977), upheld a remedy requiring the State of Michigan to help finance remedial
programs to "restore the victims of discriminatory conduct to the position they would
have enjoyed in terms of education had these [educational] components been provided in
a nondiscriminatory manner in a school system free from pervasive de jure racial seg-
regation." Id. at 282, 97 S. Ct. at 2758. These effects are personal to students who have
been educated in a discriminatory system. Such effects should be short-lived, because after
twelve years almost all students in the system will have begun first grade under a busing
plan.
basis sufficiently long, public memory that the state designed the school to serve a particular race may fade. A return to neighborhood schools, under these circumstances, does not necessarily entail a return to the former racial identity of the school. Although the former racial composition of the student enrollment may return, that occurrence need not carry with it the stigma of the state’s original designation. Such a school would be no different from a de facto segregated northern school.

School placement and capacity effects arose because segregated school systems normally constructed schools and determined their capacities in accordance with the projected needs to serve one race. When a black subdivision was built, the dual system required a black school to serve the students projected to live there. In a unitary system, school locations and capacities would instead have been determined by the needs of the total student population. A city with 2000 high school students would most likely have one high school under a unitary system; in a dual system it would have two. Under a dual system, if the population were 25% black, the white high school would have a capacity of 1500 and the black high school a capacity of 500.

The location and capacity of these schools is unlikely to have changed with the advent of desegregation. Some cities would not have needed to implement a busing plan to desegregate these schools because residential patterns would have allowed neighborhood school zones to succeed in the desegregative task. In such a system, the locations and capacities of the two schools would stand as continuing effects of the past discrimination, but the school zoning would have permanently racially neutralized those effects. If neighborhoods had been racially segregated, however, Swann would have required implementation of a busing plan. Typically, such a plan would have altered the grade structure of the two buildings, so that all students in the system would attend each school in turn. As long as the grade structures have been changed in this fashion, the effects of the original discriminatory decisions would again have been neutralized. Return to former grade structures might, however, restore those discriminatory effects if residential patterns and school capacities and locations have not changed.151

150. For example, the United States asserted that the Norfolk school board and the Norfolk housing authority cooperated in designing segregated schools for contemplated segregated housing projects. The United States cites as examples Bowling Park and Roberts Park schools. Brief of United States at 19-20, Brewer v. School Bd. of Norfolk, 434 F.2d 408 (4th Cir.) (Nos. 14,544 & 14,545), cert. denied, 399 U.S. 929, 90 S. Ct. 2247 (1970). Those schools are among the schools which became integrated under the post-Swann plan and resegregated under the retrogression plan.

Congress recognized this fact in one of its anti-busing statutes. While expressing a strong preference for neighborhood schools, the Equal Educational Opportunities Act of 1974 recognizes that school systems must "remove the vestiges of a dual school system," and that neighborhood school assignment may be inconsistent with that duty if "the school . . . was located on its site for the purpose of segregating students on" the basis of race.

Finally, the original decision to locate a school with a particular capacity may have had long-term effects on the racial composition of neighborhoods. The reciprocal relation between schools and housing is commonly recognized. It may take generations for segregated housing patterns to change. Since racial imbalance in housing may be caused in some unknown degree by private choice, freely exercised, some segregated housing patterns may never change. In Norfolk, the retrogression plan statistics suggest that most formerly white residential areas are now somewhat integrated, but that the core black area, with its concentrations of public housing projects, remains heavily black. This experience may suggest that many whites are reluctant to send their children to formerly all-black schools in black neighborhoods or to reside in those neighborhoods, but are willing to accept black movement into their schools and neighborhoods. If so, the effects of past discrimination will dissipate especially slowly in the formerly black schools.

Various reasons may be invoked to ignore these effects when evaluating a retrogression plan. However, the Supreme Court has not endorsed any exceptions to the doctrine that governmental decisions which perpetuate the effects of past discrimination are themselves discriminatory. A plurality of the Court did inveigh against the "original sin" doctrine in City of Mobile v. Bolden, but the plurality obviously did not speak for a majority. In any event, the plurality opinion was only rejecting plaintiffs' argument that "the substantial history of official racial discrimination in Alabama" bore on "whether a discriminatory intent has been proved in a given case." Moreover, Rogers v.

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155. The School Board's expert conducted a poll of Norfolk parents from which he concluded that "while black parents do not object to being a minority, from forty to fifty-six percent of white parents do object to a school where most of the students are black." Petition for Certiorari at 24, Riddick v. School Bd. of Norfolk, 107 S. Ct. 420 (1986) (No. 85-1962).
156. 446 U.S. 55, 100 S. Ct. 1490 (1980).
157. Id. at 74, 100 S. Ct. at 1503. Shortly after the case was decided Justice Stewart
Lodge rejects the notion that City of Mobile disapproves reliance on the effects of past discrimination.

Perhaps a more powerful argument against continued reliance on the presence of these effects is that Swann simply presumes their existence without asking the question. This presumption rests in part on the need for “remedial criteria of sufficient specificity,” and such need arguably attenuates with time, as does the strength of the factual foundation for the presumption. Moreover, implementation of the busing plan is an intervening event that further weakens the proximate nature of the original intentional discrimination.

The Supreme Court has placed some limits on the presumption. For example, it does not apply to claims that other school districts should share in the desegregation process. Nor does it apply where the proof shows only isolated instances of intentional discrimination. However, even if the case for applying the presumption diminishes over time, that does not mean that in a particular case the effects of past discrimination have been eradicated. At most, therefore, the weakened support for the presumption might suggest the burden of proof be returned to the plaintiff, not that the court ignore proven effects of past discrimination in analyzing the validity of a retrogression plan.

Some have questioned whether busing plans serve the articulated purpose of remedying the effects of past discrimination or instead some unarticulated purpose. Professor Peter Shane argues that the doctrine explained to a group of law students that “reconstruction is over.” Note, Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law, 92 Yale L.J. 328, 350 (1982).


160. One observer, criticizing current Justice Department support for the abandonment of busing, notes that “[h]istory, perhaps with the help of political forces, has tended to dim recognition of the effects of de jure segregation.” Norman, The Strange Career of the Civil Rights Division’s Commitment to Brown, 93 Yale L.J. 983, 989 (1984). Judge Norman concluded with this wry comment: “One might ask whether there is a growing subscription to an unwritten amendment to a familiar principle: ‘The amount of affirmative action, such as busing, required to overcome the effects of past discrimination is inversely related to the length of time which has elapsed since Brown.”’ Id.


163. See Fiss, supra note 159, at 700.

164. Note, Retention of Jurisdiction, supra note 114, at 233. See also Shane, supra note 7, at 1041.
employed to justify the busing remedy is belied by the results in several Supreme Court cases. He concludes, from an analysis of the northern school desegregation decisions, that the relief in school cases protects other interests in addition to that of assuring "an attendance pattern untainted by intentional segregation and its consequences." He argues that "it is possible to understand the Supreme Court's remedial results as compatible with a narrow demographic conception of the harm that school desegregation remedies should relieve only if one ignores the absence of factual support for treating the degree of racial balance ordered in these cases as having an historical demographic basis."

Whether or not that argument is sound with respect to the northern cases, much of its force is lost in the Swann context for two reasons. First, the demographic conception of the harm caused by the dual system need not be so "narrow." The Swann remedy is firmly rooted in "the core of equal protection jurisprudence . . . invidious purpose." Second, Swann's limitation based on "the practicalities of the situation" is not just a pragmatic statement. It also "implicitly" limits the demographic conception of the effects of past discrimination. In effect, practicalities become a proxy for proof that particular schools would have been racially isolated even in a non-discriminatory system. In some sense, to say that busing is required in order to remedy the effects of past discrimination is not a final answer to the question of why busing is required. One could go to succeeding levels of inquiry and ask why the courts should remedy the effects of past discrimination or whether indeed that really is what they are doing. But it may also prove valuable to take the Court at its word. Given the Court's steadfast adherence to the formula of Swann, one may question whether it is prepared to abandon Swann at the retrogression stage.

Another line of attack on continued reliance on effects-based analysis is grounded in hostility toward the busing remedy. However, the justices who have repeatedly questioned the extent of busing plans also accept the premise that the duty of a school board is to remedy the effects of past discrimination. Thus, those justices would appear to support

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165. Shane, supra note 7, at 1075.
166. Id. at 1077.
closer inquiry as to effects, but would not support ignoring them altogether.

The remedial duty of the district courts is closely tied to the school authorities' substantive obligations. The courts must tailor the remedy to the violation and its effects. As the Supreme Court recognized in Louisiana v. United States,169 "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." The tailoring doctrine both restrains and empowers the courts. The restraint against relief that exceeds the scope of the violation and its effects rests on an inference from Article III of the Constitution that federal courts should do no more than is necessary to resolve controversies before them. Conversely, the empowering aspect of the doctrine is derived from the fourteenth amendment, which implies that the courts must do what is necessary to remedy denials of equal protection, past, present, and threatened. Indeed, the empowering aspect of the tailoring doctrine may be traced to the dictum in Marbury v. Madison170 that in "a government of laws, and not of men . . . the laws furnish . . . [a] remedy for the violation of a vested legal right."171 Remedying such violations is not purely a matter of discretion in the remedial process. Failure to accord complete relief from unlawful school segregation is error, according to Davis v. Board of School Commissioners of Mobile County:172 "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."173 This holding assumes that purposeful systemwide segregative actions have corresponding systemwide segregative effects which the Constitution requires to be remedied.

The school board's obligation is closely related to the district court's remedial authority. Obligation and remedy, however, are not necessarily congruent. The tailoring doctrine does not inevitably lead to only one remedy. The remedy is but a tool useful in fulfilling the board's obligation. That obligation is no more extensive than the remedy, but may be less extensive in some cases, because a court's exercise of its judicial discretion may result in an expansive remedy. Discretion, however, theoretically plays no role in defining the violation.

170. 5 U.S. (1 Cranch) 137 (1803).
171. Id. at 163.
173. Id. at 37, 91 S. Ct. at 1291.
In sum, school authorities bear an affirmative obligation to eradicate the effects of their past discrimination. Courts, in tailoring the remedy to fit the violation, also bear the duty to eradicate those effects. Implementation of a busing plan may discharge those duties but does not thereby necessarily extinguish them. The duties are extinguished when the effects are extinguished. The difficulty in assessing a retrogression plan arises in determining whether the retrogression is, in whole or in part, an effect of the board's prior discrimination.

2. Preclusive Effect of Prior Judgments

In a suit attacking a retrogression plan adopted by a formerly dual school system that has been declared unitary, several questions of preclusion may arise. Does the busing order preclude members of the plaintiff class from asserting further claims based on the defendants' past segregative actions? Does that order bar the defendants from denying that they engaged in unlawful segregation in the past? Does the order also preclude the parties from further litigation over the effects of past discrimination or the remedy? Does the order declaring the system unitary carry preclusive effect? If so, to what claims or issues might it be preclusive?

The traditional doctrine of issue preclusion may be stated as follows: "A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action." Suppose that a formerly dual school system had converted to a pure neighborhood school system by 1970. Suppose further that a court in 1971 ordered implementation of a busing plan because the neighborhood school plan had left most children in segregated schools. Later, the system was declared unitary and the remedial busing order was dissolved. Then, in 1987, the board adopted a plan identical to the neighborhood school plan that existed in 1970. Suppose, too, that the new plan led to the same degree of racial imbalance as the old neighborhood plan, while the busing plan completely integrated the schools. Under standard issue preclusion doctrine, it cannot be said that the current claim of black school children, that the 1987 plan unconstitutionally resurrects the effects of past discrimination, has been merged with the claim that the 1971 busing order satisfied. Although the claims rely on identical effects, they challenge different actions: the first claim challenges actions the school board took in 1970, while the second claim challenges actions the board took in 1987. Similarly, the unitariness order dissolving the remedial busing order could not prospectively extinguish a claim based on actions taken in 1987. Therefore, claim pre-

174. Restatement (Second) of Judgments, § 27, comment e (1982).
clusion principles do not determine the disposition of an action to enjoin implementation of a retrogression plan.

The Fourth Circuit characterized the issue of the retrogression plan as one of whether the plaintiff has proved "discriminatory intent on the part of the school board of a unitary school system." The school board is a continuing entity, however, and the discriminatory intent may have preceded the school system's unitary status. The declaration of unitariness is not based on a finding that the game board is no longer loaded, but on a finding that the school board has successfully neutralized a skewed game board. The unitariness order means only that, so long as the busing plan remains in effect, the effects of past discrimination are dormant. So the unitariness order, while binding the parties as to the issues necessarily litigated, does not bind them on the distinct issue of whether a subsequently adopted retrogression plan unconstitutionally reinstates the effects of past discriminatory intent.

Even if the court were to determine that the prior unitariness order should now be read to have determined that all vestiges of past discrimination have vanished, it is doubtful whether a finding entered in 1975, long before the school board was even considering adoption of a retrogression plan, should be accorded preclusive effect. "Relitigation of the issue in a subsequent action . . . is not precluded [if] . . . it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action." It is inconceivable that plaintiffs would have acquiesced in the granting of numerous declarations of unitariness had they believed that the declaration freed the school systems to return to their prior patterns of segregated student assignment.

The decision to enter a busing order may create preclusion as to issues necessarily decided. For example, the order definitively determines the fact of the inadequacy of the student assignment system which the busing order replaces. Thus a strong argument may be made that a subsequent return to the pre-busing system of student assignment would have to overcome the binding ruling that, as of 1970, that system was unlawful. On the other hand it will seldom, if ever, be true that adoption

175. Riddick, 784 F.2d at 537.
176. Restatement (Second) of Judgments, § 28(5)b (1982).
177. The United States is a party to suits in which 117 school systems have been declared unitary, including 47 whose desegregation orders have been dismissed by the courts. Yet few such orders have been appealed. Mesibov, Busing in Unitary School Districts: A Board's Right to Modify the Plan, 35 W. Educ. L. Rep. 607, 608 (citing Education Week, Feb. 26, 1986, at 9). See also Brief for the United States, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 96 S. Ct. 2697 (1976) (No. 75-164) (over seventy school systems where such orders had been entered and not appealed, as of 1976).
of the busing plan necessarily decides that that particular plan is constitutionally required. As noted above, seldom does the court, in ordering busing, enter findings as to specific effects of past discrimination. Both a default plan and a school board plan may advance other goals in addition to eradication of the effects of past discrimination. Educational considerations, workability, and even-handed treatment of constituents all may lead to imposition of a racial balance plan, whether or not it is constitutionally required. Therefore, the busing order will ordinarily not preclude either party from litigating the issue of whether or not segregation under the retrogression plan stems from lingering effects of past discrimination. Moreover, in support of the retrogression plan, the school system will often be arguing that changed circumstances justify its adoption. Issue preclusion will not apply to facts arising after the entry of the prior judgment.

Any reliance on preclusion doctrine also assumes identity of the parties. That assumption is warranted insofar as it applies to the defendant school board, which will be bound by the original violation findings as well as any findings that bear upon the extent of its remedial obligation. The assumption may, however, be incorrect insofar as it concerns the plaintiffs. As noted earlier, the original desegregation suit probably was brought as a “class action” prior to the 1966 amendment to Rule 23; more likely than not, however, no class was ever certified. It is far from clear whether, in these circumstances, “class” members could be bound by an adjudication in the first suit.  

3. Modification of Injunctions

The busing order is an injunction predicated on past events and on predictions about future events. It seeks to correct the effects of the school board’s past conduct and governs the board’s future conduct; it is at once retrospective and prospective. The retrospective foundation for the injunction does not change, because past events do not change. However, the prospective foundation for an injunction may change, if predictions prove wrong.

If the unitariness holding does not explicitly dissolve the busing order, the order continues until modified or dissolved.  

178. See Jones v. Caddo Parish School Bd., 735 F.2d 923 (5th Cir. 1984). See also, United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 865 n.62 (5th Cir. 1966). The Fourth Circuit found the Riddick class in privity with the Beckett class, but the plaintiffs did not raise and the court did not address the question whether a class had been certified in Beckett. Riddick, 784 F.2d at 532. Since Fourth Circuit doctrine at the time Beckett was filed precluded class action challenges to school segregation (see supra note 100), it seems doubtful that Beckett was a certified class action.

suggest that the substantive predicate for the busing order no longer exists, this does not excuse the school board from compliance with the order. Federal courts operate under the collateral bar regime of *Walker v. City of Birmingham*, and defendants normally may not test the validity of federal injunctions by disobedience. The proper procedure instead is a motion to dissolve or modify the injunction. Generally, that motion would be filed in the suit in which the injunction was entered, rather than by commencing a new suit. The major exception would be a case that has become moot. For example, if the United States had not been a party to the *Pasadena* case, the plaintiff’s graduation would have mooted the case. Since Article III of the Constitution precludes federal court jurisdiction of moot cases, presumably the injunction would automatically lapse. However, in class actions the class of black student plaintiffs will always exist, so the mootness exception will not apply.

Under the traditional articulation of the standard for modification of injunctions, modification of a civil rights injunction would seldom occur: “Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation.” This articulation has been criticized as having “language perhaps too strongly adverse to the possibility of modification.” In any event, that standard probably does not apply to school desegregation decrees, which contemplate that the district court will exercise continuing review. The dynamic nature of school desegregation, the fact that the workability of decrees depends to some extent on factors beyond the control of the parties, and the resultant “perils of prediction” all suggest that modification should be freely granted when either party shows that “events have occurred subsequent to the judgment that warrant modification.”

Justice Kennedy, when he was a judge on the Ninth Circuit, suggested yet another reason for refusing to apply the traditional standard to desegregation orders: the “necessary concern for the important values of local control of public school systems.”

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182. Restatement (Second) of Judgments, Reporter’s Note on § 73, at 201 (1982), and cases cited there.
183. See O. Fiss & D. Rendleman, Injunctions ch. 3 (2d ed. 1984). See also Jost, supra note 121, at 1103.
Rejection of the equitable standard finds support in federal legislation. The Equal Educational Opportunities Act of 1974 [the E.E.O.A.], adopted in the heyday of anti-busing legislation, allows courts to terminate busing orders upon finding that the school board "has satisfied the requirements of the fifth or fourteenth amendments to the Constitution . . . and will continue to be in compliance with the requirements thereof." The law forbids entry of a new busing order against such a school system unless such agency is found not to have "satisfied the requirements of the fifth or fourteenth amendments to the Constitution." Senator Javits, a member of the House-Senate conference committee that fashioned the final version of the E.E.O.A., noted in debate that this language empowers "the court to terminate for reasons other than the normal equity ground." Busing opponents complained that the provision was not strong enough, because it is discretionary and requires the court to predict future compliance with the Constitution.

The anti-busing provisions were enacted only after being substantially modified to avoid conflict with the Supreme Court's interpretation of the Constitution. In particular, the conference committee added to the bill a proviso "that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States."

Curiously, no reported court opinion relies on the anti-busing provisions of the E.E.O.A., despite their seeming relevance to the termination and retrogression issues. The Act both frees the courts from the traditional equitable doctrine regarding modification of injunctions and also displays Congressional reluctance to trespass on the Swann doctrine, despite Congressional unhappiness with busing. The deletion of section 220 of the House bill also implies that Congress has reservations re-

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187. Id.
188. 120 Cong. Rec. 24,891 (1974).
189. See remarks of Sen. Dominick (id. at 24,892); Representative Waggoner (id. at 26,112); Representative Bauman (id. at 26,124).
190. Congress also considered whether a finding of unitariness alone should require dissolution of the busing requirement. The House Bill would have required a district court to dissolve a busing order "if the court finds the schools of the defendant educational agency are a unitary school system, one within which no person is to be effectively excluded from any school because of race." See 120 Cong. Rec. 25,329 (1974), reproducing Sec. 220 of the House bill. That provision was deleted from the bill by the conference committee. See S. Conf. Rep. No. 93-1026, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4206, at 4221.
regarding the authority of a court to base dissolution of a busing order solely on a finding of unitariness.

The reasoning demonstrated in the above discussion of the Swann standard, the types of effects which busing plans are meant to remedy, and the standards for judging retrogression plans provide the foundation for reviewing particular retrogression plan cases. What showing would justify granting a school board's motion seeking judicial approval of a retrogression plan? The board could perhaps show that the plan is not really a retrogression plan, because, in the long run, it will lead to more integration than the busing plan. This type of argument has generally been based on predictions that the busing plan will result in "white flight," the retrogression plan will staunch the white flight, and therefore there will be more white students available to mix with the black students. Such a syllogism should be viewed with skepticism for several reasons. First, the predictions may prove faulty, either because white flight may not materialize or because loss in white enrollment may be unrelated to the busing plan. Second, such an argument sacrifices the present right of students to an education free of the effects of past discrimination. Although Brown contemplates a balancing of public and private interests, the retrogression plan may fail to accord adequate recognition to the present interests of students. Third, the threat of white flight may be too readily manipulable. As the court of appeals acknowledged in Riddick, "[w]hite flight cannot be used as an excuse to resist or evade a present duty to desegregate." It should be noted, too, that if busing causes white flight, that flight is itself arguably the effect of past discrimination, for, absent past discrimination, there would be no busing order. Employing some effects of past discrimination (white flight) to legitimate others (retrogressive assignments) calls into question the original busing order remedy. Yet, despite these difficulties with invoking white flight to justify retrogression, courts have taken white flight into account in fashioning initial remedies.

192. The retrogression plan in Norfolk was based in part on predictions that it would stem a feared tide of white flight. However, early reports indicate that the tide of white flight has not materialized. The American Lawyer 86 (Dec. 1986): ("Statistics unavailable to the trial court—and therefore not in the record the Fourth Circuit considered—show that white flight has come to a halt since 1981.") As Professor Fiss has noted, the perils of prediction exist when denying an injunction as well as when granting one. O. Fiss, The Civil Rights Injunction 81 (1978). Of course, the perils of prediction are greater at the point of initial decision whether to order a busing plan than after the busing plan has been implemented and a track record of actual experience has been compiled. But if the American Lawyer is correct, white flight early in the desegregation process does not necessarily provide an accurate prediction of later behavior patterns.

193. Riddick, 784 F.2d at 539.


195. Id. at 637-38. Gewirtz concludes: "At least at some point, attitudes of objection
The school board may also show that any racial imbalance created by the retrogression plan is not an effect of past or present discrimination. The imbalance might, for example, be attributable to post-desegregation demographic changes for which the school board was not responsible.\textsuperscript{196} The imbalance might also be characterized as "natural" in the sense that it would have arisen even if there had never been a dual school system. If the retrogression plan would have been an adequate remedy under Swann, the fact that a more far-reaching remedy was entered earlier should not preclude subsequent modification.\textsuperscript{197}

D. Policies Relating to Retrogression Plans

School desegregation orders enforce the nondiscrimination principle of the equal protection clause. That principle presents the primary obstacle which retrogression plans must overcome. The retrogression plan may pose both an immediate and a symbolic threat to the nondiscrimination principle. It poses an immediate threat if resegregation flows from either present or past discriminatory intent of the school board. It poses a symbolic threat because of fear that history will repeat itself.\textsuperscript{198} The compromise of 1877\textsuperscript{199} and the subsequent actions of so-called redemptionist legislatures\textsuperscript{200} validated retrogression from the nondiscrimination ideal.\textsuperscript{201} It took almost a century for that ideal to flourish again.

\textsuperscript{196} This may be the basis for the dissolution of the Oklahoma City school desegregation decree. However, the district court's findings regarding post-desegregation demographic movement are clouded by the court's view that, as a matter of law, its 1977 unitairiness finding had wiped the slate clean, so that the retrogression plan would have to be approved unless it was motivated by discriminatory intent. Dowell v. Board of Educ. of Oklahoma City, No. CIV-61-9452-B (W.D. Ok. Dec. 9, 1987).

\textsuperscript{197} See supra text accompanying notes 169-72.

\textsuperscript{198} See Note, Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law, 92 Yale L.J. 328, 350 (1982) (commentators term "the current retrenchment on civil rights remedies Redemption II").

\textsuperscript{199} In exchange for southern votes to break the electoral deadlock in the Hayes-Tilden presidential election, Republican candidate Rutherford Hayes promised to withdraw federal troops which had been enforcing Reconstruction in the south. See R. Kluger, Simple Justice, 61-62 (1977). "'[B]y 1877, America had wearied of the Negro and his problems. The Nation predicted bluntly the effect of the new Compromise: 'The Negro will disappear from the field of national politics. Henceforth, the nation, as a nation, will have nothing more to do with him.'" J. Wilkinson, supra note 87, at 20-21.

\textsuperscript{200} In the 1890s the southern states began to rewrite their constitutions, in order to disenfranchise black voters and impose a regime of white supremacy. See R. Kluger, Simple Justice 66-69 (1977).

\textsuperscript{201} See generally, C. Vann Woodward, The Strange Career of Jim Crow 49-95 (Galaxy Book ed. 1957).
This history of betrayal of the promise of the equal protection clause does not mandate automatic rejection of every step back from racial integration, for the equal protection clause itself does not promise racial integration. This history does, however, counsel the exercise of great care in reviewing such retrogression, especially if the retrogression plan bears a close resemblance to assignment systems previously rejected as inconsistent with the school board’s affirmative duty under Swann. The symbolic nature of the modern retrogression history is enhanced by the setting of the retrogression issue.

[C]ontroversies over “neighborhood schools,” “bussing,” and “de facto” segregation represent only a late phase of what has been perhaps the most important aspect of the black struggle for equality: important both because a quality education is essential to personal success, and because, since Brown v. Board of Education the right to an integrated education is the foundation upon which all legal claims to full citizenship for blacks have been built.\textsuperscript{202}

The problem of retrogression as a symbol of our discriminatory past would intensify if the Supreme Court were to approve a Riddick-like analysis. For just as the lower courts tended to construe Swann as a message to require racial balance,\textsuperscript{203} one may expect them to read Riddick as a broad-brush approval of retrogression.\textsuperscript{204}

Retrogression may also undermine Swann in a curious way. Swann caused great upheaval in Southern urban school systems. Approval of retrogression leads inevitably to the question, why did the courts require this upheaval for a fleeting moment? As one veteran civil rights lawyer asked, “If courts approve such actions, what are the consequences for the desegregation process? Is it not stripped of all lasting significance?”\textsuperscript{205}

Swann did recognize that countervailing values exist on the other side of the balance. The primary countervailing values are judicial restraint and educational autonomy. Judicial restraint and educational autonomy are advanced, initially, by the rule that once the schools have

\textsuperscript{202} D. Bell, Race, Racism and American Law 431 (1973). See also, J. Wilkinson, supra note 87, at 45: “[B]ecause Brown spoke to public education, schools would henceforth be the yardstick by which racial progress would be judged.”

\textsuperscript{203} See supra text accompanying notes 80-81.

\textsuperscript{204} Approval of retrogression on a large scale would tend to confirm Professor Bell’s thesis that Brown and its strong enforcement until the mid-1970s rested on a convergence of white and black interests and that as those interests began to diverge in the late 1970s there has been a “slow but steady erosion of the Court’s commitment.” D. Bell, Race, Racism and American Law 436 (2d ed. 1980).

been desegregated there is no duty to make yearly adjustments in enrollments to retain racial balance. Those values may also be advanced by removing unitary school systems from continuing judicial supervision. This does not, however, require abandonment of the school board's duty not to reinstate effects of past discrimination. Individual autonomy is not implicated in a major way, because "[c]ourt-ordered busing does not deprive students of any race of an equal opportunity for an education."206 Since the busing plan will have been entered pursuant to Swann, which directs the lower courts not to order busing which endangers health or education, those considerations will not weigh strongly in the balance when considering the retrogression plan. Of course, changed circumstances may cause the busing plan to endanger health or education, although it did not do so when implemented. If so, those considerations will likely support the retrogression plan.

A judicial hands off policy toward retrogression plans would result in all the disruption that attends a change from the status quo, while continuance of busing orders will promote stability.207 The busing issue, once in the forefront of public consciousness, appears to have receded somewhat. This dimming of public attention to the subject could influence the Supreme Court to avoid adoption of any standard which promises to reopen the busing controversy. However, judicially imposed continuance of busing may also be viewed as a veiled attack on the democratic process. The Court should interrupt that process only where necessary to enforce the Constitution.

Finally, should the Court seek uniformity of treatment of students and school boards? Both the Congress and Justice Powell have urged this value in the consideration of school desegregation requirements.208 Southern school systems all practiced the kind of systemwide segregation that leads to a presumption of systemwide segregative effects. Very few northern school systems have been found liable for systemwide segre-
Uniformity could be obtained by wiping the southern slate clean, so that the southern school system's obligations are lowered to correspond with those of northern systems. Alternatively, the obligations of northern systems could be raised. Justice Powell suggested a mixed approach in his Keyes dissent, but the Court has shown no disposition to either impose an obligation to desegregate on "de facto" segregated systems or to remove the affirmative duty of "de jure" segregated systems.

VII. THE SUPREME COURT'S DENIAL OF CERTIORARI IN THE NORFOLK CASE

At first glance the denial of certiorari in Riddick is puzzling. A clear conflict with Dowell on the significance of a finding of unitariness seems to be presented. If Riddick was wrongly decided, denial of certiorari would seem to countenance deprivations of the equal protection rights of thousands of Norfolk elementary school children. The Court, on this view, would be misusing its discretionary jurisdiction in a manner similar to an earlier Norfolk case, Naim v. Naim. In that much-criticized case the Court declined to review a marriage annulment based on Virginia's anti-miscegenation law. That law was held unconstitutional eleven years later. The Court also has been criticized for declining to interfere with lower court decisions in school desegregation cases in the decade after Brown, approving "tokenism" remedies such as pupil placement and grade-a-year desegregation plans.

Several possible explanations exist for the Court's refusal to grant review. The Court may have thought that the conflict with Dowell was limited to the mechanical question whether the unitariness finding dissolved the busing plan, and that no substantive conflict existed. The Court may simply have thought that the issue should percolate further in the lower courts, just as remedy issues were allowed to do until Green was decided. Or, the Court may have viewed the issue as generally quiescent and not worth stirring up by granting review. The members of the Court may have been fragmented on this issue, with no faction strong enough to muster four votes for certiorari. Two more

214. J. Wilkinson, supra note 87, at 85.
215. Green was based almost entirely on the reasoning of a series of Fifth Circuit cases authored by Judge Wisdom. See id. at 111-18.
fundamental reasons, partaking of all the above elements, may have militated against review.

First, the ambiguity of the 1975 unitariness finding is troublesome. The district court found that the school board "has satisfied its affirmative duty to desegregate [and] that racial discrimination through official action has been eliminated from the system." While that finding, unchallenged by the Beckett plaintiffs, probably refers only to Norfolk’s good faith implementation of the busing plan, the board would argue that the court found that all effects of past discrimination had been permanently extirpated. Any Supreme Court review of the case would proceed under the shadow of this finding. Either the court would have to decide as a matter of law whether the finding is dispositive as to the issue of revival of effects of past discrimination, or it would have to remand to clarify the meaning of the finding. These side issues might have led the Court to conclude that the core issue of the standards governing retrogression plans was not plainly presented.

Second, the record in Riddick might support the decision of the lower courts even if their reasoning was erroneous. The record, as gleaned from the reported decisions in the various Norfolk cases, might support an argument that the racial imbalance under the retrogression plan did not stem from the school board’s past discrimination. The plan would have been permissible under Swann and therefore remains permissible. The plan affects only elementary schools; it leaves most of them desegregated. Most students will attend integrated elementary schools, and all will attend integrated secondary schools. The schools which remain virtually all-black are located in the heart of a large black residential area. The retrogression plan here could be viewed as similar to the retrogression plan approved by the Eighth Circuit in Clark v. Board of Education of Little Rock, under which 19% of the nonwhite students would be assigned to schools with over a 95% nonwhite enrollment. It is similar to plans approved by the lower courts as the initial post-Swann remedy. Whether one agrees or disagrees with the premise that

217. 705 F.2d 265 (8th Cir. 1983).
218. Id. at 272-73.
219. See, e.g., Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425 (5th Cir. 1983) (upholding default plan which leaves eleven one-race schools attended by 17.5% of the elementary school students); Jones v. Caddo Parish School Bd., 735 F.2d 923, 939 (5th Cir. 1984) (Rubin, J., joined by Clark, Goldberg, Randall, Tate and Johnson, J.J., dissenting from affirmance of denial of intervention to challenge plan which allegedly left 47% of black students in one-race schools); Carr v. Montgomery County Bd. of Educ., 377 F. Supp. 1123 (M.D. Ala. 1974), aff’d, 511 F.2d 1374 (5th Cir. 1975), cert. denied,
the retrogression plan here satisfies the requirements of Swann, such a reading militates against the existence of any precedential significance to the more disturbing error by the Fourth Circuit, that of ignoring entirely the continuing duty of a formerly dual school system to remedy the effects of past discrimination.

Although the Court denied certiorari in Riddick, the retrogression issue is bound to recur. Hundreds of school districts operate under court ordered desegregation plans. Hundreds more operate under voluntary desegregation plans, but are subject to the same analysis and the same obligation because they operated dual school systems when Brown was decided. Many school districts have been declared unitary. The Court has tended since Swann to treat the case as definitive regarding remedies for dual school systems and has generally denied review of remedial decisions. However, it has granted review in cases raising issues not clearly resolved by Swann. Therefore, Supreme Court resolution of the retrogression issue seems inevitable.

VIII. Conclusion

The Supreme Court, in Brown II, Swann, and Pasadena, sketched out a general approach to the school desegregation remedy. The remedy is not fully congruent with the violation and its effects, for district courts have broad discretion to both use racial balance as a starting point.

423 U.S. 986, 96 S. Ct. 394 (1975); Stout v. Jefferson County Bd. of Educ., 537 F.2d 800 (5th Cir. 1976); Ross v. Houston Indep. School Dist., 699 F.2d 218 (5th Cir. 1983) (upholding finding of unitariness in 26% white system with fifty-five black schools, including twenty-two which were black under the dual school system); Calhoun v. Cook, 522 F.2d 717 (5th Cir. 1975).


222. See supra note 93.


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point and take into account the practicalities of the situation. Nevertheless, the constitutionally required objective is to remedy the effects of past discrimination and to prevent future discrimination. Elaborate mechanics have evolved, including continuing jurisdiction and district court supervision of desegregation, a presumption against one-race schools, and tentative rules for terminating federal court supervision. Those mechanics, though important, should not be confused with the constitutional requirement, which is non-discrimination. That requirement applies both during and after the remedial process. It forbids segregation resulting from intentional school board discrimination, whether occurring prior to suit, during the remedial period, or after the relinquishment of jurisdiction by the courts. The finding of unitariness, the dissolution of the injunction, and the dismissal of the case do not alter the constitutional requirement. The procedure for challenging retrogression plans may change, but not the substantive duty.

The treatment of a retrogression plan not motivated by present discriminatory intent depends on the court's view of the purpose of the busing plan to be replaced. The extreme opposite views treat the busing plan as either an end-state requirement or as a redemptive act. If something approaching racial balance is required, retrogression plans may never replace busing plans.\footnote{225} If the busing plan redeems the school board and the finding of unitariness wipes the slate clean, then a retrogression plan adopted with benign motives must always be approved. These two views are but caricatures of Swann, which requires a balancing of the public and private interests—the need to remedy the effects of past discrimination contrasted with the educational practicalities.

A proper approach to retrogression plans will accord due deference to both prongs of Swann's several dichotomies. While assuming that, unless shown otherwise, some effects of discrimination persist, society must also recognize that time eventually will have a curative effect. In addition, not all racial isolation in big cities can fairly be attributed to the school board's prior segregative actions. The solution most nearly consonant with the remedial structure established by Swann simply allows the school authorities to show that they have complied with the busing plan and that the retrogression plan they now wish to implement does

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225. This seems to be the proposal espoused by one author. Terez, supra note 124, at 70, concludes that "[a] finding of unitariness in a particular school district should be interpreted to incorporate a mandatory order to establish and maintain a unitary system of public education." "[T]here are permanent limits on school board action insofar as that action destroys unitary schools and recreates a dual, racially identifiable system." Id. The key, in Terez' view, is "[t]he broad definition given to 'racial identification' by the Court in Green." Id. at 64. Thus, Terez would apparently read Green as providing end state rules as well as remedial rules.
not revive the effects of past school board discrimination. Perhaps, as with the freed slaves of ancient Egypt, forty years will elapse before those effects have sufficiently atrophied. Fidelity to the fourteenth amendment commands the school boards and the courts to display patience.

Retrogression plans may range along a spectrum. On one extreme are plans which reimpose the very system of assignment previously held unlawful. On the other extreme are plans which arguably promise a degree of desegregation equal to or even greater than the busing plan. Incantation of labels such as “unitary” or “formerly dual system” does not aid analysis of this range of plans. Review of retrogression plans should not be limited to asking whether the school board adopted them with discriminatory intent. Nor should it turn solely on whether the plans have a substantial segregative effect. If the courts may ignore the effects of past discrimination in reviewing retrogression plans, there will be no principled basis for requiring them to combat those effects in fashioning remedies for the dual system. There will be no basis for imposing on dual school systems an affirmative duty to desegregate. Finally, there will be no basis for imposing the busing plan, whose sole legal justification is that it eradicates the effects of past discrimination. In short, it is hard to see how Swann could coexist either with Riddick or with a rigid rule against retrogression.

226. One commentator suggests that the burden of proof should be allocated as follows:

[P]laintiffs challenging a school board action as promoting the reestablishment of the dual system after a finding of unitariness should be required to make a prima facie showing that the action will cause a substantial resegregation of the school system. Upon this showing, the burden should shift to the school authorities to prove that the action did not result from an intent to discriminate. If the school authorities are unable to meet this burden, then the resegregatory action should not go forward.

Note, Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation, 100 Harv. L. Rev. 653, 669 (1987). See also, Morgan v. Nucci, 831 F.2d 313, 326 n.19 (1st Cir. 1987); Note, The Unitary Finding and the Threat of School Resegregation: Riddick v. School Board, 65 N.C.L. Rev. 617 (1987). The Fourth Circuit, however, placed the burden on plaintiffs in Riddick, even though their proof clearly established retrogression. It has been suggested that the Sixth Circuit adheres to the Riddick standard. Terez, supra note 124, at 46 n.23 (citing Mapp v. Board of Educ. of Chattanooga, 630 F. Supp. 876, 884, 888 (E.D. Tenn. 1986)). However, the plaintiffs in Mapp failed to establish that the challenged school board actions there were retrogressive. So the court’s citation of Riddick seems superfluous.

227. See Fiss, Against Settlement, 93 Yale L.J. 1073, 1083 (1984); In structural reform cases “courts must oversee and manage the remedial process for a long time—maybe forever. This, I fear, is true of most school desegregation cases, some of which have been pending for twenty or thirty years.”

228. Moreover, Swann flows from Green. As the Court has said, Green “was the effective predicate for imposing busing and pupil assignment programs to end dual school
The remedy in a desegregation case may be transitional, but in another sense it is permanent. Its function is to eradicate, insofar as practicable, discrimination and its lingering effects. The remedy is transitional because, over time, it should be possible to substitute neutral methods of school administration for race conscious methods without resurrecting effects of past discrimination. The decision of the Fourth Circuit in Riddick treated the remedy as temporary, rather than transitional. The court assumed that, once the school authorities had bandaged old wounds, the bandages could be removed without regard to vestigial injury. But the injunction—which is, after all, available only when legal remedies are inadequate—would itself become inadequate if it failed to provide permanent relief.

As more school boards adopt retrogression plans and black plaintiffs challenge them, the nature and validity of the corrective function of law are at stake. The corrective function demands approval of plans which properly address effects of past discrimination and disapproval of plans which reinstate effects of past discrimination.

systems.” Bazemore v. Friday, 106 S. Ct. 3000, 3013 (1986) (White, J., joined by Burger, C.J., Powell, Rehnquist, and O'Connor, J.J., concurring). The overthrow of Swann would logically require the overthrow of Green. It seems doubtful that a majority of the Supreme Court wishes to overthrow either case. Five members of today's Court were members when the Court rendered its unanimous decision in Swann. On the other hand, the most likely form of any attack on the civil rights decisions of the 1960's and 1970's would be an indirect rather than a direct challenge. Moreover, as the composition of the Court gradually changes, appreciation of the conditions which drove the Court to its conclusion in Swann inevitably weakens. Compare Exodus 1:8: "There arose in Egypt a new pharaoh who knew not Joseph."

229. See Gewirtz, supra note 90, at 789.