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School Desegregation and Affirmative Equitable Relief: Swann and Beyond

SCHOOL DESEGREGATION AND AFFIRMATIVE EQUITABLE RELIEF: SWANN AND BEYOND

In 1954, *Brown v. Board of Education (Brown I)*[1] imposed on the states the duty to cease the establishment and maintenance of racially separate public schools. This general directive has presented a multitude of problems with which district courts and courts of appeals have had to contend for nearly two decades. In attempting to formulate detailed and specific guidelines for the implementation of *Brown's* mandate, the courts have improvised and experimented, thereby creating greater uncertainties and increased litigation.[2]

While the most publicly controversial issue now arising from *Brown I* is the issue of affirmative relief in the form of busing students,[3] culminating in *Bradley v. School Board*,[4] other more basic problems serve to question the continuing validity of the present judicial approach to school desegregation. These problems will be discussed through a consideration of three major areas: (1) the development of an affirmative duty to integrate, (2) the contours of equitable relief, and (3) alternative remedies for presently existing school segregation which is deemed not susceptible to judicial relief.

I. De Jure Segregation

The fourteenth amendment to the Constitution prohibits the denial of equal protection of the laws to any citizen of the United States. However, the "No state shall . . ." language of the amendment[5] indicates that the

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[1]347 U.S. 483 (1954).

[2]It is interesting to note that 166 school segregation cases were heard in the Fifth Circuit between December 2, 1969, and September 24, 1970. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 14 n.5 (1971).

[3]To date some 50 constitutional amendments prohibiting busing to achieve racial balance have been proposed and are being considered by the House Judiciary Committee. N.Y. Times, Feb. 27, 1972, § E at 4, col. 3.

[4]345 F.2d 310 (4th Cir.), *vacated*, 382 U.S. 103 (1965) (Free Choice); No. 3353 (E.D. Va. Jan. 5, 1972) (Consolidation); 325 F. Supp. 828 (E.D. Va. 1971) (City Integration); 53 F.R.D. 28 (E.D. Va. 1971) (Fees).

[5]The fourteenth amendment provides in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

prohibition has exclusive reference to state action resulting in that denial. Upon this basis, *Brown I,* relying largely upon sociological and psychological data indicating detriment to children in segregated schools, declared segregation by race in public schools to be a denial of equal protection. "Historically . . . [de jure segregation] meant the existence of state-created dual school systems . . . . [I]t was a mandate by the legislature, carried into effect by a school board, whereby students were assigned to schools solely by race."[6] It is still state-created, or de jure, segregation upon which courts must base any finding of a constitutional violation.[7] However, the historical definition is no longer entirely valid. No longer is de jure segregation limited to prior state-required dual systems[8] or their remaining effects. The term applies also to systems administered under state policies reflecting a segregative effect.[9] Further, the definitional boundaries of state action have been greatly expanded.

Before turning to extensions of the de jure concept, it is important to note judicial responses to situations determined to fall within the concept. *Brown I* struck down state-imposed segregation. *Brown II*[10] sought to provide remedial measures by which to eliminate the segregation which in fact remained after legislative school segregation was declared unconstitutional. Nonetheless, by 1968 when the Supreme Court considered *Green v. County School Board,*[11] very little progress had been made in areas where dual school systems had historically been maintained by operation of state laws.

The development of equitable remedies for violations of the equal protection clause has essentially been one of moving from the negative prohibition of official segregation to the affirmative duty to integrate. The decision in *Green* was the doctrinal turning point wherein the Court focused not upon the neutrality of the school board's policy but upon its failure to eliminate the effects of past discrimination. The duty of school officials is no longer one of simply refraining from discriminatory policies but one of undoing the present results of a prior dual system. At the same time, the court's role is expanded in that it must judge how well the

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[6]Gomperts v. Chase, 92 S. Ct. 16, 17 (1971).

[7]Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971).

[8]"[S]chools . . . [maintained] under laws requiring or permitting segregation according to race." Brown v. Board of Educ., 347 U.S. 483, 488 (1954). Since such laws no longer exist, any reference in this note to "dual systems" refers to those existing previously to *Brown I* and not to presently segregated systems maintained through covert discrimination. *See* Keyes v. School Dist. No. 1, 445 F.2d 990, 999 (10th Cir. 1971), *cert. granted,* 92 S. Ct. 707 (1972); Taylor v. Board of Educ., 294 F.2d 36 (2d Cir.), *cert. denied,* 368 U.S. 940 (1961).

[9]Brown v. Board of Educ., 349 U.S. 294 (1955).

[10]391 U.S. 430 (1968).

authorities have fulfilled the affirmative duty. Tracing the development of the affirmative duty and the concomitant expansion of a court's equitable power to act in case of default is an important prelude to assessing the present judicial commitment.

The role of the lower courts was initially cast in narrow, passive terms by a district court in *Briggs v. Elliott*.[12] Holding that the states need not mix persons of different races in the schools, the court declared only that:

> [A] state may not deny to any person on account of race the right to attend any school that it maintains . . . . The Constitution, in other words, does not require integration. It merely forbids [segregation].[13]

The spirit if not the letter of *Briggs* pervaded the approach to desegregation until the mid-1960s.[14] School officials merely had to lower the official barriers to allow Negro students to exercise their personal right to attend the school of their choice. That the choice was rarely exercised was seen as no concern of the state; "compulsory integration" was anathema to individual freedom since the fourteenth amendment prohibited only official discrimination.

Virtually overlooked was the fact that a freedom-of-choice policy, however neutral, served to perpetuate prior segregation, for the previous student assignment patterns under the pre-*Brown I* separate-but-equal rule were otherwise adhered to.[15] The doctrinal basis for equitable power to remedy the effects of past discrimination, from which a court could order school boards to take affirmative action to overcome those effects, simply had not developed.

The development of this equitable doctrine eventually materialized, arising out of litigation over voting rights rather than school desegregation. In *United States v. Louisiana*,[16] a three-judge court was confronted with a long history of state efforts to keep Negroes off voter registration

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[12]132 F. Supp. 776 (E.D.S.C. 1955).

[13]*Id.* at 777.

[14]For a comprehensive review of the effect *Briggs* had upon case law in the various circuits see United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir.), *aff'd en banc*, 380 F.2d 385 (1966), *cert. denied*, 389 U.S. 840 (1967).

[15]*See* Green v. County School Bd., 391 U.S. 430, 432-33 (1968), which noted that the state's pupil placement statute, until its repeal in 1966, operated to assign children each year to the school previously attended, unless upon application the state board assigned them to another school. In addition, the possible bias with which such a statute could be administered tended to place covertly discriminatory obstacles in the way of black students and parents attempting to exercise the ostensible grant of a "free choice." *See* Bradley v. School Bd., 345 F.2d 310, 321 (4th Cir.), *vacated*, 382 U.S. 103 (1965) (Free Choice) (Sobeloff & Bell, JJ., dissenting in part).

[16]225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

lists. Discriminatory administration of a vague "interpretation"[17] test had in the past disenfranchised practically all Negroes in Louisiana. The court enjoined that test as unconstitutional, but in the course of litigation the state enacted a new "citizenship"[18] test which purported to be neutral on its face. But it also was to be applied only to voters registering for the first time. Precluded from ruling that a neutral literacy test was itself unconstitutional,[19] the court nevertheless enjoined its enforcement in order to alleviate the effects of past discrimination. The court reasoned that unless the citizenship test were to apply to all prospective voters in a statewide re-registration, the "new test . . . will have the effect of perpetuating the differences created by the discriminatory practices of the past."[20] Without a general re-registration, the burden of the new test would fall primarily upon those Negroes who had been disenfranchised by the prior unconstitutional "interpretation" test. Grounding its reasoning in fragments of prior voting rights cases,[21] the court synthesized its newly-discovered equitable principle:

> The cessation of prior discriminatory practices cannot justify the imposition of new and onerous requirements, theoretically applicable to all, but practically affecting primarily those who bore the brunt of previous discrimination. An appropriate remedy therefore should undo the results of past discrimination as well as prevent future inequality of treatment. A court of equity is not powerless to eradicate the effects of former discrimination. If it were, the State could seal into permanent existence the injustices of the past.[22]

The Supreme Court had no difficulty in approving this expansion of equitable power under the fourteenth amendment's equal protection

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[17]The test required applicants to be able to give a reasonable interpretation of a section of the Louisiana state constitution chosen by the registrar. The court found that the standards for passing the test were unconstitutionally vague, that the test was unfairly administered to Negroes and sometimes not at all to whites, and that it was void generally on the grounds that too much discretion was placed in the hands of the registrar. *Id.* at 382-83.

[18]The applicant was required to draw one of ten cards and then from it answer four out of six multiple-choice questions correctly. The test was more difficult, but since there was no prior history of its administration from which the court could find discrimination or arbitrary power, the test could not be faulted constitutionally. *Id.* at 392-93.

[19]The Supreme Court had upheld a literacy test which was fair on its face and neutrally applied. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[20]225 F. Supp. at 393.

[21]Lane v. Wilson, 307 U.S. 268 (1939); United States v. Atkins, 323 F.2d 733 (5th Cir. 1963); United States v. Dogan, 314 F.2d 767 (5th Cir. 1963); United States v. Lynd, 301 F.2d 818 (5th Cir. 1962), *cert. denied*, 371 U.S. 893 (1963); United States v. Penton, 212 F. Supp. 193 (M.D. Ala. 1962).

[22]225 F. Supp. at 393.

clause, laying down a rule that was later to be implemented in *Green:*

> We bear in mind that 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.[23]

Faced with fundamentally the same problem in both voting rights and school desegregation cases—intractable state resistance to minority group advancement—the courts deemed *Louisiana's* equitable principle[24] aptly suited for application to the latter. A compelling fact situation in *Green*[25] prompted the Court to go beyond a mere examination of whether the school board had ceased to discriminate. Instead, noting that "[t]his deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system,"[26] the Court demanded a plan

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[23]Louisiana v. United States, 380 U.S. 145, 154 (1965).

[24]The concept became known as the "freezing" principle because it suspended the operation of a new literacy test until the effects of the discrimination under the prior invalid test were undone. The Fifth Circuit in a subsequent case, United States v. Ward, 349 F.2d 795 (5th Cir. 1965), spoke with obvious approval of its use as an equitable tool:

> Like decisions in other fields, this was but new material out of which, with much coming later, and in the best Anglo-American juridical tradition, we synthesize principles and sanctions which experience demonstrates are needed. This experience has been rich, abundant in volume, and instructive . . . . From it we have . . . learned that unless there is some appropriate way to equalize the present with the past, the injunctive prohibitions even in the most stringent, emphatic, mandatory terms forbidding discrimination in the future, continues for many years a structure committing effective political power to the already registered whites while excluding Negroes from this vital activity of citizenship.

Id. at 802.

[25]The county had two schools, one all black, one all white. There was no pattern of residential segregation; black and white students were bused from all parts of the county to their respective schools. Under the State Pupil Placement Board, no black student had asked for a transfer through 1964. In 1965, under threat of loss of financial aid, the school board adopted a freedom-of-choice plan. Prior assignments were continued unless a transfer was requested, and the county-wide busing continued. The county appeared before the Court in 1968 with virtually completely segregated schools. 391 U.S. at 431-37. The county's argument that their plan could be faulted only by reading the fourteenth amendment as requiring "compulsory integration"—that they had fulfilled their duty by ceasing to discriminate under *Brown II*—proved disastrous for segregationists in light of the breadth of the *Green* holding.

[26]391 U.S. at 438. Therein lay the crucial retroactive element in *Green.* States which had made the transition from discrimination to "neutrality" were mistakenly following the narrow *Briggs* interpretation by viewing the segregation which continued after the transition as de facto: the result of private choice. *Green* retroactively converted this "de facto" segregation into de jure, repudiating the *Briggs* theory as having ignored the crux of *Brown II:*

> Brown II was a call for . . . dismantling . . . tempered by an awareness

that "promises realistically to work now."[27] The burden of securing a desegregated education was now shifted from the individual to the state, which shift was accompanied by an increase in the court's equitable power. The courts were now endowed with the power to evaluate a proposed desegregation plan, weighing its provisions in light of other feasible and possibly more effective alternatives.[28]

The ghost of *Briggs*, and its simplistic distinction between "desegregation" and "integration" as to the duty of the school board, had thus been laid to rest. Plaintiffs now had the leverage with which to attack token desegregation in any system where the existing imbalance was traceable to prior discriminatory policies. *Green* did not simply invalidate a particular "freedom-of-choice" plan, but it ruled that *all* plans for dismantling prior dual systems would henceforth be judged by their results.

As noted above, the Supreme Court had little difficulty in drawing upon the equitable doctrine that had been developed in earlier voting rights cases. Whatever functional differences existed between the securing of voting rights and the establishment of unitary school systems were simply passed over in *Green* in order to formulate a much-needed mandate applicable especially to the South.

Yet, considering the pivotal importance of *Green's* broad holding as the source from which presently existing equitable power is drawn, it is worthwhile to stop and examine the differences passed over in *Green*. Primarily, the end for which affirmative relief was fashioned in *Louisiana* was conceptually clear: the voting franchise. Quite difficult constitutional questions are involved in determining what conditions the state may place

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> that . . . problems would arise . . . [requiring] time and flexibility . . . . School boards . . . then operating state-compelled dual systems were *nevertheless clearly* charged with the affirmative duty . . . to convert to a unitary system . . . .

Id. at 437-38 (emphasis added).

Although it may have been argued that *Brown II's* language did not explicitly support the reading given to it by *Green*, the groundwork for finding an affirmative duty had been laid rather persuasively in a classic Fifth Circuit decision. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 861-78 (5th Cir.), *aff'd en banc*, 380 F.2d 385 (1966), *cert. denied*, 389 U.S. 840 (1967). As has been noted, both *Green* and *Jefferson*, unlike *Brown II*, could find doctrinal support for their position in the "freezing" principle used in voting rights cases, wherein it has been reasoned that equity must be able to act to overcome the effects of past discrimination. Louisiana v. United States, 380 U.S. 145 (1965). It should be noted that primary credit for the synthesis of the affirmative relief concept in racial discrimination cases should go to Judge Wisdom of the Fifth Circuit, who wrote both the lower court decision in *Louisiana* and the first opinion in *Jefferson*.

[27] 391 U.S. at 439.

[28] *Id.*

upon its exercise,[29] but there is no difficulty in identifying the vote as an entity. The contours of a "unitary school system" are not so easily identifiable. Identification is tied to the complexities and variables existing in the locality out of which the school system is created, thus inviting dispute in each instance over what is to be achieved. Likewise, the difficulty of defining the limits of either the school board's duties or the court's powers acts as a stimulant to litigation.

A second basic difference lies in how the remedial pursuit of equal voting opportunity and nondiscriminatory school systems affects private individuals. There are no countervailing costs or considerations involved in the pursuit of equal voting rights for minorities by the use of the *Louisiana* rule to remedy the effects of the past. But it is an inescapable fact that attainment of the constitutional mandate of *Green* involves considerable individual sacrifice.[30] The accompanying frustration is heightened by the fact that private individuals have virtually no voice in a school desegregation decree in which a court touches upon matters of intense public concern.

Conversely, and perhaps most importantly, equal voting opportunity is by its nature bound up almost exclusively with state action. Private action and discrimination do not materially affect the duty owed by the state to the minority group under the command of "No state shall. . . ." On the other hand, school segregation may well reflect only a neighborhood segregated by private discrimination. But notwithstanding difficulties in the application of the affirmative duty, it is apparent that in terms of the actual elimination of segregation this duty is the most important and desirable adjunct of the de jure label.

The affirmative duty, moreover, is not easily circumscribed. Although it will be seen that good faith is an important factor in determining the validity of present school policies, such is not the case where a dual system previously existed and an affirmative duty has been imposed: "[G]ood faith does not excuse . . . non-compliance with . . . [the] affirmative duty to liquidate the dual system."[31] Only when a desegregation plan is acceptable (*i.e.*, fulfills the affirmative duty) does good faith become relevant. Once good faith does become relevant, *Green* indicates that it is an essential ingredient of an effective plan by pointing out that

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[29]The Supreme Court abolished the poll tax in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), and the arbitrary ban on servicemen's voting rights in Carrington v. Rash, 380 U.S. 89 (1965). The Court upheld Congress' exercise of power in the Voting Rights Act Amendments of 1970, 42 U.S.C. § 1973b (1970), to abolish all literacy tests. *See* Oregon v. Mitchell, 400 U.S. 112 (1970).

[30]*See, e.g.*, Bradley v. School Bd. (Consolidation), No. 3353 (E.D. Va. Jan. 5, 1972).

[31]Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682, 684 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969).

even though a plan be effective, the availability of more promising courses of action may indicate a lack of good faith. If this appears to be the case, the school board will have the burden of justifying its preference for the less effective method.[32]

Henry v. Clarksdale Municipal Separate School District,[33] a case involving a school board's adoption of a geographic zoning plan, held that although the school board had used good faith in its selection of zoning criteria,[34] its good faith was irrelevant in that the plan failed to disestablish the dual school system. In essence, the board had failed to take into account the most important criterion: desegregation. Admitting the general relevance of the criteria used, the court of appeals nonetheless maintained that ordinarily relevant and rational criteria may be insufficient to meet constitutional standards.[35]

Further evidence that desegregation is the overriding consideration in any plan proposed to eliminate dual school systems is furnished by *United States v. Indianola Municipal Separate School District.*[36] In holding that a plan does not promise to work if it presently provides no desegregation whatever, the court of appeals invalidated a plan which failed to result in substantial desegregation. The existence of several nondiscriminatory reasons for adoption of the plan (*i.e.,* safety, proximity of residences to schools, and maximum utilization of existing facilities) did not justify the lack of consideration of desegregation in formulating the plan.[37]

Litigation has been particularly prevalent in those situations in which school boards have ceased overt discrimination but have substituted plans tending to reinforce dual school systems. The courts have consistently invalidated plans by which school boards have evaded, intentionally or otherwise, the constitutional mandate of *Brown I.*[38] Realizing that these

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[32]391 U.S. at 439.

[33]409 F.2d 682 (5th Cir.), *cert. denied,* 396 U.S. 940 (1969).

[34]The criteria used were: maximum utilization of school buildings, density of population, proximity of pupils to schools, natural boundaries, and the welfare of the students. *Id.* at 687.

[35]It should be remembered that de jure segregation resulting from prior dual systems is not the only instance in which a standard otherwise relevant has been declared inadequate to satisfy constitutional mandates. For example, although literacy tests bear a rational relationship to the right to vote, they may be struck down where the tests tend to freeze the effects of past discrimination. Gaston County v. United States, 395 U.S. 285, 296-97 (1969); text accompanying notes 15-21 *supra.*

[36]410 F.2d 626 (5th Cir. 1969), *cert. denied,* 396 U.S. 1011 (1970).

[37]*Id.* at 628.

[38]Although the following examples are by no means an exhaustive list, they are indicative of neutral plans which, although they appeared fair, tended to perpetuate segregated systems: Monroe v. Board of Comm'rs, 391 U.S. 450 (1968) (Tennessee "free transfer" plan); Green v. County School Bd., 391 U.S. 430 (1968) (Virginia "freedom of choice" plan); Raney v. Board of Educ., 391 U.S. 443 (1968) (Arkansas "freedom of choice" plan);

cases involve school systems previously maintained as dual, one must nevertheless assume that a system without a history of duality in the *Brown I* sense,[39] but in which covert discrimination has been practiced, will be required to eliminate whatever segregative results its covert discrimination has had. To counteract the lack of progress in the years following *Brown I*, the courts have developed less stringent standards in order to find state action.

Of necessity, the determination that segregation exists must be made before the problem of state action in assigning responsibility is confronted. In addition to student assignment, the most important indicia of a segregated system are existing policies and practice in regard to faculty, staff, transportation, extracurricular activities, and facilities.[40] Systems whose schools are racially identifiable in terms of these indicia may be said to be segregated systems[41] and, if state-imposed, in violation of the mandate to maintain unitary systems.[42] Though whether there is segregation must be a question of fact,[43] the courts have had little trouble in recognizing racial imbalance.[44] However, only substantial proportional balance is required:

Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682 (5th Cir. 1969) (geographic zoning plan which took advantage of segregated residential patterns); Northcross v. Board of Educ., 302 F.2d 818 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962) (Tennessee pupil assignment law not fulfilling the state's affirmative duty).

[39]Note 8 *supra*.

[40]Green v. County School Bd., 391 U.S. 430, 435 (1968); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 846 (5th Cir.), *aff'd en banc*, 380 F.2d 385 (1966), *cert. denied*, 389 U.S. 840 (1967).

[41]Bradley v. School Bd. (Consolidation), No. 3353 (E.D. Va. Jan. 5, 1972), is the most extreme example of how far a court has looked in order to find racial imbalance. The city of Richmond is primarily black while the two surrounding counties are primarily white. Disregarding the boundaries of the political subdivisions, the district court found racial imbalance for the area as a whole.

[42]Green v. County School Bd., 391 U.S. 430, 435 (1968).

[43]Since statutes no longer provide for the maintenance of dual systems, the courts must look to the school system in practice. Though a negligible change in systems previously having a dual system will indicate that the policies used are not effective, it must be remembered that in the determination of whether segregation (*i.e.*, racial imbalance) exists, the prior maintenance of a dual system is irrelevant.

[44]*See, e.g.*, Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682, 689 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969) ("still all-Negro schools, or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities . . . ."); United States v. Greenwood Mun. Separate School Dist., 406 F.2d 1086 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969) (1.8% of black students receiving integrated education; only four white faculty and staff members in still-existing all-black schools); United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1968), *modified*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971) (six schools within district, two with 99% black enrollment and four almost exclusively white).

> The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.[45]

Having examined both the affirmative duty to disestablish racially imbalanced schools caused by state-imposed segregation and the case-by-case determinations of the existence of racial imbalance, the discussion now turns to the standards by which the racial imbalance is found to be de jure. From a review of the cases, it becomes clear that two situations will allow a court to grant affirmative relief: (1) where a state has been found to have previously maintained an intentionally segregated dual school system and has not yet fulfilled its affirmative duty to eliminate the vestiges of that system (even though presently utilizing an apparently neutral school assignment plan); and (2) where a state or its agent, the school board, has been found to be presently engaging in actively discriminatory policies. It will be seen that, as worded, both situations fulfill the two elements of de jure segregation: segregative practices and state action. Since the actions of local school board officials are considered those of the state acting through its agents[46] and since the affirmative duty to convert to a unitary system falls upon state school boards as well as local officials,[47] the courts have found no difficulty in assigning to the state the responsibility for any action by local officials. There has been, however, some difficulty in formulating guidelines for assessing whether a practice is discriminatory when engaged in by the state[48] and, indeed, in determining when a segregated school system can be linked to a causal chain involving the state.

Previous cases have indicated that there are two basic approaches to existing segregation. The first approach, used where de jure segregation is found, focuses on and forbids segregative assignment on a racial basis and requires the disestablishment of school segregation resulting therefrom. The second approach, that which would alleviate racial imbalance where there is no showing that the imbalance was brought about by state discrimination, would apparently have to focus on the fact that segregation exists and hold the cause irrelevant. This can be called the de facto approach. While the de jure situation is the one in which the courts have granted affirmative relief, there has been a trend toward a focus on the

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[45]Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971).

[46]*See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 16-17 (1958); United States v. Board of School Comm'rs, 332 F. Supp. 655, 659 (S.D. Ind. 1971).

[47]Godwin v. Johnston County Bd. of Educ., 301 F. Supp. 1339 (E.D.N.C. 1969).

[48]Since school board discrimination is attributed to the state for purposes of finding state action, future use of the term "state" will encompass school board actions as well as those of state agencies or officials.

segregation itself. The de jure label has remained, but that which can be called state action in causing segregation has far exceeded its traditional boundaries.

Two recent Supreme Court decisions, *Swann v. Charlotte-Mecklenburg Board of Education*[49] and *Spencer v. Kugler*,[50] go far toward providing a comprehensive statement of the current law on de jure segregation. *Swann*, although grounded in the de jure approach, moves slightly toward the second approach while *Spencer* appears to reaffirm *Swann's* at least temporary limit on that movement.

The assignment plan deemed inadequate in *Swann* was not one of intentional gerrymandering of districts based on race but was a seemingly innocent neighborhood school plan assigning students to the school nearest their homes. The Court held that, notwithstanding the fact that racial criteria had not been used, the plan would not fulfill the school board's affirmative duty to convert to a unitary system. The violation was the result of the Court's finding of a causal connection between the board's past discrimination and the present segregation.[51] In other words, the Court's focus was that of the first, or de jure, approach above. The past wrongdoing engendered a finding of state-imposed segregation.

Although the holding did not derive from a focus on the segregated pattern of school attendance itself, the Court's establishment of an evidentiary presumption, resolving doubts against the school board,[52] does

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[49]402 U.S. 1 (1971).

[50]92 S. Ct. 707 (1972), *aff'g mem.* 326 F. Supp. 1235 (N.D.N.J. 1971).

[51]The connection was suggested by the assumption that previous dual systems caused racial groups to live nearest their respective schools, thereby influencing the patterns of residential development. Further, past choices regarding size and location of school construction "may well [have promoted] segregated residential patterns which, when combined with 'neighborhood zoning' further [locked] the school system into the mold of separation of the races." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971). These choices were often in the form of closing schools which appeared likely to become racially mixed through changes in residential patterns and building new schools in white areas farthest from the boundaries of black population expansion. In addition, construction of schools so small as to be able to accommodate only a racially homogenous area was and may continue to be an attempt to perpetuate segregation. The Court stressed:

> In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is . . . a factor of great weight. In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or restablish the dual system.

Id.

[52]The presumption is stated as follows:

> [I]n a system with a history of segregation the need . . . to assure a school authority's compliance with its constitutional duty warrants a presump-

move toward the second, or de facto, approach. It has been suggested that this presumption is a response "to the fact that . . . causal connections between past discrimination and present segregation [used in *Swann*] are no more than theoretical possibilities and obviously involve significant elements of conjecture."[53] It must be noted that the Court did not hold that segregated patterns are sufficient, in themselves, to establish a constitutional violation. It emphasized the past discriminatory conduct and limited the presumption to those school systems bearing the requirement to convert from a dual system to a unitary system:

> Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.[54]

The burden is a heavy one. Not only must the board show assignment on a basis other than race, but it must also show that it has contributed no part of the causal chain producing the segregated residential patterns on which the plan is allegedly based. The extreme difficulty of bearing the burden will, of necessity, lead to a focus on the segregated patterns themselves. Emphasizing further that the evidentiary presumption is not to be strained to encompass all segregated patterns, *Swann* points out that no year-by-year adjustments of racial balance in schools are to be made "once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."[55] There must be a showing that some agency of the state has deliberately affected the racial composition of the schools through the alteration of demographic patterns in order to achieve resegregation.

Spencer v. Kugler[56] reaffirms the limitation that is implicit in *Swann:* although racial imbalance alone will provide a presumption against school systems which were previously dual, segregated patterns of school

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> tion against schools that are substantially disproportionate in their racial composition.

Id. at 26. For the burden which this presumption forces upon the school board see text accompanying notes 54-55 *infra.*

[53]Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation,* 38 U. CHI. L. REV. 697, 700 (1971).

[54]402 U.S. at 26.

[55]*Id.* at 32.

[56]92 S. Ct. 707 (1971), *aff'g mem.* 326 F. Supp. 1235 (N.D.N.J. 1971).

attendance per se will not provide a ground for judicial relief. Racial imbalance in *Spencer* was caused solely by housing patterns within the school districts with no showing that state action had contributed to those patterns. The Supreme Court held that racial imbalance caused by factors other than discriminatory state action was not susceptible to federal judicial intervention.

It would seem clear that in the absence of a previously dual system, *Swann* and *Spencer* preclude the possibility of judicial relief for school segregation when that segregation is the result solely of districts innocently based upon housing patterns. However, although an impartially maintained neighborhood school plan does not per se violate constitutional rights even when the result is racial imbalance, the motives of the school board may be examined to determine whether there is a purposeful desire to perpetuate segregation. A course of conduct so motivated will result in an infringement of the students' constitutional rights.[57]

Nonetheless, there is a further question presented. If state action other than that of school boards (*e.g.*, public housing practices, state enforcement of previously existing restrictive covenants, state enforcement of discriminatory FHA policies prior to 1947)[58] results in segregated residential patterns, are students in the resulting segregated schools entitled to judicial relief? In other words, is the school board violating constitutional rights when basing attendance zones upon segregated housing patterns which were arrived at by discriminatory state actions of agencies other than school boards? *Swann*[59] and *Spencer* did not deal with the question, but *Swann* does predict the result of an action brought on that basis:

> The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, al-

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[57]Keyes v. School Dist. No. 1, 445 F.2d 990, 1000 (10th Cir. 1971), *cert. granted*, 92 S. Ct. 707 (1972); *see* United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971); Hobson v. Hansen, 269 F. Supp. 401, 429 (D.D.C. 1967), *modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (Ct. App. 1971).

[58]*See* Spencer v. Kugler, 92 S. Ct. 707 (1972) (Douglas, J., dissenting).

[59]*Swann* specifically mentions the problem:

> We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree.

402 U.S. at 23.

> though desegregation of schools ultimately will have impact on other forms of discrimination.[60]

It would appear that while the acts of the agent (local or state school boards) will be attributed to the master (the state), the converse is not true.[61] Although intentional perpetuation of segregation by a school board is susceptible to judicial relief, it nonetheless appears that school boards may innocently utilize housing patterns and not be considered to have thereby adopted other discriminatory acts of the state. Of course, such an analysis does not preclude judicial relief for the other forms of discrimination. It indicates rather that the relief should be sought directly rather than through a school desegregation action.

If this analysis is correct, it has a serious impact upon the language of other cases. *Davis v. School District*,[62] though apparently correctly decided, uses broad language which seems to be in conflict with the analysis. The district court found that the racially identifiable nature of faculty and administration in the district's schools constituted a prima facie showing of a constitutional violation. The school board failed to show that the faculty imbalance resulted from nondiscriminatory conduct. The court's finding is in accordance with the presumption found in *Swann*, which may be used to infer a segregative motive in drawing district lines according to housing patterns. Intentional segregation by school boards as found in *Davis* is, of course, de jure. However, the court's language implied that it also found intent because the resulting segregation was foreseeable. Emphasizing that there was no difference between a sin of commission and a sin of omission, the court maintained that:

> When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance that situation.[63]

Although the case's factual findings support the determination of intentional wrongdoing, the above-quoted language goes much farther, apparently assigning responsibility to a school board when it draws its lines in accordance with segregated housing patterns even though those lines are not gerrymandered. That position is in apparent conflict with *Swann* if applied to a situation without a prior history of dual schools or

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[60] *Id.* at 22-23.

[61] *But see* text accompanying notes 62-67 *infra.*

[62] 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 92 S. Ct. 233 (1971).

[63] 309 F. Supp. at 741.

where duality and its effects had been eliminated. Indeed, without a finding that the school board had contributed to the present patterns, the language of the district court in *Davis* would seem to be in conflict with the very position to which the opinion later gives recognition:

> This Court acknowledges the recently enunciated position that a Board of Education has no affirmative duty to eliminate segregation when it has done nothing to create it . . . .[64]

Bradley (Consolidation)[65] contains language which, if followed, would have even greater effect:

> School authorities may not constitutionally arrange an attendance zone system which serves only to reproduce in school facilities the prevalent pattern of housing segregation, be it publicly or privately enforced. To do so is only to endorse with official approval the product of private racism.[66]

It must be remembered, however, that the court was confronted with a previously dual school system. Therefore, the school board had an affirmative duty to disestablish the segregation for which it was responsible. The board had a heavy burden in seeking to show the lack of a causal chain involving the state. Nonetheless, the *Bradley (Consolidation)* dictum seems to say too much, for the state had a duty to disestablish only that for which it (acting through state or local officials) was responsible.[67] *Brown I* was never construed to prohibit racially imbalanced schools provided they are established and maintained on racially neutral criteria.[68] Assuming no intent to segregate or to perpetuate privately caused segregation, a school board cannot be found guilty of a constitutional deprivation simply by basing school zones upon segregated residential patterns to which school authorities did not contribute.[69]

It is clear that the precise limits of de jure segregation have not yet been drawn. Whether state discrimination in areas other than school board activities is sufficient state action is still in controversy. *Swann* places at least a temporary limit on relief fostered by the expansion of the de jure concept. Thus a court's pronouncement that the state has played no part in bringing about the segregation means that no relief can

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[64]*Id.* at 742.

[65]No. 3353 (E.D. Va. Jan. 5, 1972).

[66]*Id.* at 30.

[67]*See* cases cited note 127 *infra.*

[68]Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967); Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964).

[69]Spencer v. Kugler, 92 S. Ct. 707 (1972).

be granted. If, as is generally recognized, the segregated school is inferior, it can be little consolation to the minority student that his state did not discriminate twenty years ago and is now, therefore, free to maintain segregated schools.

II. Power to Remedy De Jure Segregation

Green increased the tempo of desegregation litigation, for, as one writer has phrased it, "[o]nce loosed, the idea of Equality is not easily cabined."[70] Racial minorities pressed federal courts to find evidence of prior discriminatory action, attempting to expand further the definition of de jure segregation, in order to trigger the affirmative duty that *Green* had imposed. But the lower courts had difficulty in ascertaining both the scope of this affirmative duty and the limits of their remedial power when the school authorities defaulted.

It is to *Swann's* response[71] to the lower courts' difficulties in framing relief that the discussion now turns, specifically to cast light upon: (1) the contours of the expansive commitment of equitable powers in *Swann;* (2) possible difficulties raised by that commitment with respect to the future course of school desegregation.

The Contours of Equitable Power in Swann

The decision in *Swann* represents an emphatic commitment of federal judicial power and resources in aid of a minority: an attempt to counter the effects of an apartheid policy to which the Southern states committed their official power.[72] That the strength of the commitment is equal to the task—eliminating from school systems "all vestiges of state-imposed segregation"—is evidenced by three characteristics of the holding in *Swann:*[73] (1) a system with a past history of official segregation together

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[70]Cox, *Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91 (1966).

[71]*Swann* authorizes a panoply of remedial powers touching upon: (1) the quality of the building, facilities, and staff; (2) racial composition of the faculty; (3) school placement and construction; (4) racial composition of the student body; (5) attendance zones; (6) transportation. 402 U.S. at 20-31.

[72]*See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir.), *aff'd en banc,* 380 F.2d 385 (1966), *cert. denied,* 389 U.S. 840 (1967). *Jefferson,* the first clear exposition of affirmative relief, declared that an expansion of equitable power was a necessary development:

> [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.

372 F.2d at 869. (original emphasis deleted).

[73]*See* Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation,* 38 U. CHI. L. REV. 697 (1971).

with a present substantial racial imbalance comes to the court with the presumption of a constitutional violation;[74] (2) once a violation is established, an inquiry need not be made as to the degree of segregation attributable to prior official discrimination with an eye toward confining the remedial order to undo only past *state* action;[75] (3) all other policy considerations, apparently regardless of good faith,[76] must yield to the value of integration.

The Court in *Swann* emphasized further that its holding, in directing the lower courts to exercise broad remedial power to correct the effects of past discrimination, represented no substantial departure from traditional equitable principles. Attempting to counter possible claims that *Swann* had gone significantly beyond the prior limits of federal judicial power, the Court stressed the following: (1) the equitable power of the federal courts to remedy past wrongs is broad;[77] (2) equity provides flexibility for balancing between public and private interests and between competing private interests;[78] (3) fashioning equitable remedies in desegregation cases is not fundamentally different from that done in other cases which seek to remedy a constitutional wrong;[79] (4) "[a]s with any equity case, the nature of the violation determines the scope of the remedy."[80]

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[74]*See* text accompanying notes 51-55 *supra.*

[75]Fiss, *supra* note 73, at 705.

[76]An important pair of cases is now before the Court involving whether a small town, formerly part of a county-wide school system, can form its own school district for revenue purposes, in spite of the prior dual history of the system and the fact that the newly-created district's percentage of white students would be substantially higher than the county-wide white percentages existing before the separation. The plaintiffs successfully asserted that the towns, regardless of whether increased revenues were the real motivation behind the separation, established "white enclaves;" the new school districts should be disallowed because they reduced integration. The Fourth Circuit disagreed, reversing the district court in both cases: Wright v. Council of City of Emporia, 442 F.2d 570 (4th Cir. 1971); United States v. Scotland Neck City Bd. of Educ., 442 F.2d 575 (4th Cir. 1971). Both cases are now before the Supreme Court on certiorari. 92 S. Ct. 47 (1971).

[77]The language used in *Swann,* though not cited, is traceable directly to Green v. County School Bd., 391 U.S. 430, 438 n.4 (1968):

> If school authorities fail in their affirmative obligations under [*Green*], judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

402 U.S. at 15.

[78]The language quoted in *Swann* comes from Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944). *Brown II* had paraphrased *Hecht's* language as part of its guidelines to the lower courts.

[79]402 U.S. at 15-16.

[80]*Id.* at 16.

The initial inquiry becomes one of examining the above four assertions in order to discover whether they can properly serve to ground the holding in *Swann* in traditional equitable principles. It is not precisely clear what line of reasoning the Court envisaged, since little authority was cited in support of the Court's propositions. With regard to the first proposition it was pointed out above[81] that inherent differences between voting rights and desegegation may work against treating the two alike in the application of a remedial principle developed in the former area. Moreover, the implication that this remedial principle, first appearing in 1965 in *Louisiana,* occupies a traditional, immutable position in the Court's "historic equitable remedial powers" cannot withstand analysis: whatever wisdom inures to *traditional* equity principles through their having survived the test of history cannot be imparted to affirmative relief.

The second equity concept[82] was taken directly from *Brown II.* There the Court made clear that the valid public interest in allowing time for the systematic elimination of various statutory and administrative obstacles[83] was a factor to be considered in spite of the plaintiffs' interest in "admission to public schools as soon as practicable on a nondiscriminatory basis."[84] *Swann,* notwithstanding its assertion that the public interest is to be considered, affords little guidance as to what might validly weigh against the minorities' right to a unitary school system. That the costs[85] of attaining the greatest degree of intergration possible might force cut-backs in educational programs, including remedial education designed to benefit the inner-city students, is not even mentioned in *Swann.* Those public policies which might favor geographic zoning, neighborhood schools, or decentralization, as public policies, must give way to remedies which "may be administratively awkward, inconvenient and even bizarre . . . ."[86] Furthermore, the role that competing private interests should normally play in the process of equitable adjustment is quite minimal. Objections by any racial minority[87] to transportation plans apparently can run only to situations

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[81]Text accompanying notes 29-30 *supra.*

[82]Note 78 *supra.*

[83]Brown v. Board of Educ., 349 U.S. 294, 300 (1955).

[84]*Id.* at 300.

[85]*See* Senator Walter F. Mondale's article, *Busing in Perspective,* THE NEW REPUBLIC, Mar. 4, 1972, at 18-19.

[86]402 U.S. at 28.

[87]The Chinese minority in San Francisco objected vehemently to the dispersal of their children by buses throughout the city's schools under a court-ordered plan in Johnson v. San Francisco Unified School Dist., ___ F. Supp. ___ (N.D. Cal. 1971). Their application for a stay was denied. Guey Heung Lee v. Johnson, 92 S. Ct. 14 (Douglas, Circuit Justice, 1971).

> when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process.[88]

It is submitted, then, that the Court's assertion that its holding is grounded in the "essence of equity jurisdiction"[89] is simply not borne out by the manner in which the actual affirmative remedies are framed; the contours of "public interest" and "competing private claims," in light of the stated goal of complete integration, remain amorphous at best.

The Court makes the further assertion that fashioning equitable remedies in desegregation cases is not fundamentally different than the task of framing relief in other cases of constitutional denials. No cases are cited in support of this proposition, but the line of equal protection cases which is suggested is that of *Reynolds v. Sims*[90] and subsequent holdings[91] espousing the one-man, one-vote rule. However, despite protestations that the Court would be ensnarled in the "political thicket,"[92] the remedial problems in the apportionment cases have not proven to be especially complex, simply because the standard chosen—one-man, one-vote—has been held to override almost all justifications for variance,[93] leaving the federal court with an exercise in simple arithmetic. A "unitary school system," however, is a standard incapable of quantification.[94] It is the proliferation of variables inherent in the goal of freeing school systems from racial discrimination which sets school desegregation cases apart from other remedial problems arising under the Constitution.

Finally, the Court attempts to characterize *Swann* as falling under the traditional precept that in equity, "the nature of the violation determines the scope of the remedy."[95] One would expect to find language directing the lower courts to tailor their decrees to undo only that portion of existing segregation that is traceable to prior official action, leaving untouched the effects of private action. There would be conceptual merit to such an attempt under the de facto—de jure distinction, but the almost insurmountable proof problems probably kept the Court from making the attempt. In any case, once a violation in a prior dual system is demonstrated, *Swann's* remedial powers apparently operate to correct

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[88]402 U.S. at 30-31.

[89]*Id.* at 15.

[90]377 U.S. 533 (1964).

[91]*See, e.g.*, Wells v. Rockefeller, 394 U.S. 542 (1969) (congressional districting); Avery v. Midland County, 390 U.S. 474 (1968) (local government reapportionment); Swann v. Adams, 385 U.S. 440 (1967) (state legislative reapportionment plan).

[92]*See* Baker v. Carr, 369 U.S. 186 (1962).

[93]*See* Reynolds v. Sims, 377 U.S. 533 (1964).

[94]*See* text accompanying note 29 *supra.*

[95]402 U.S. at 16.

racial imbalance of whatever cause. Again, the assertion that the Court is following traditional equitable principles seems to be contradicted by the reality of the holding.

The initial inquiry—whether the specific guidelines laid down in *Swann* are truly grounded in traditional equitable doctrine—seems to require a negative conclusion: the commitment in *Swann*, notwithstanding its doctrinal language, appears to extend measurably beyond what courts sitting in equity have undertaken, even in vindication of constitutional rights. The perceptible disparity between what the Court in *Swann* says it is doing and what it actually does—essentially a gap between principle and rule—portends of more than jurisprudential difficulties.[96] Beyond academic difficulties lie identifiable risks which can be seen as accompanying *Swann's* significant expansion of federal remedial power, these risks falling roughly into three interrelated problem areas: (1) the effectiveness of *Swann* in fulfilling the promise of *Brown I;* (2) the federal courts' role in making fundamental policy decisions; (3) the Court's dual role as a judicial and political institution. Important to the task of drawing a perspective on *Swann* and the concept of affirmative relief is an examination of the nature of these risks and the extent to which they might become realities as the process of school desegregation moves into its third decade.

The Future Role of Swann: Final Step or Transition?

Continuing to speak with emphatic unanimity, the Court in *Swann* has revitalized *Brown II* in pursuit of the eradication of the vestiges of prior discrimination. With its extensive commitment of federal judicial power, *Swann* promises to make the concept of a unitary school system a reality for those to whom it has been denied; policies which may carry equal weight with integration in systems with no history of discrimination are submerged in de jure segregation situations in order to avoid the risk of inviting further delay and subterfuge. Whatever risks are entailed in *Swann's* departure from the traditional role of the federal judiciary seem initially to pale in light of the unprecedented nature of past obstructionist tactics.

Thus, nothing could provide a more certain justification for the extensive commitment in *Swann* than its effectiveness in bringing about concrete realization of the promise of *Brown I.* The optimistic hint of finality in *Swann* was two-fold: implementation of the specific remedies would

[96]For an excellent discussion of the doctrinal difficulties in the Warren Court opinions see A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

bring the goal of full compliance within immediate reach,[97] and the role of the federal courts, their powers expanded to meet the felt necessities, could then substantially diminish.[98] But the pursuit of an effective solution carries with it the risk that private action may render the goal of unitary school systems rather meaningless. A distinguished writer has noted the phenomenon of the "tipping point"[99] of integration, wherein, whether motivated by racism or not, whites flee newly-integrated schools in which they find themselves in the minority and re-establish in the suburbs or in private schools. Posing the question whether there are gains in the continued pursuit of integration sufficient to offset the whites' flight, his response is:

> What is the use of a process of integration . . . that very often produces, in absolute numbers, more black and white children attending segregated schools than before . . . ?[100]

Such a situation had developed in Richmond, Virginia, to the point where the plaintiffs, while continuing to press for full desegregation within the city,[101] simultaneously pressed the court for a consolidation decree, thus putting the promise and commitment of *Swann* to a critical test. The court in *Bradley (Consolidation)*,[102] finding a failure on the part of the *state* to fulfill its affirmative duty to overcome the effects of its prior discriminatory policies, ordered the consolidation of the school systems of the two outlying counties with that of the city.

It is important to note first the underpinnings of the court's action in *Bradley (Consolidation)*. The racial imbalance existing between the city and the counties was seen as more than simply the product of private action. The state's prior history of discrimination formed a background

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[97]The Court envisaged an end to desegregation litigation in the near future:

> 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*.

402 U.S. at 31.

[98]Recognizing that the desegregated communities will hardly remain static, the Court declared:

> Neither school authorities nor district courts [absent deliberate alteration of demographic patterns] are constitutionally required to make year-by-year adjustments . . . once the affirmative duty to desegregate has been accomplished . . . .

Id. at 31-32.

[99]Bickel, *Desegregation—Where Do We Go From Here?*, THE NEW REPUBLIC, Feb. 7, 1970, at 21.

[100]*Id.*

[101]*See* Bradley v. School Bd., 325 F. Supp. 828 (E.D. Va. 1971) (City Integration).

[102]No. 3353 (E.D. Va. Jan. 5, 1972).

against which the court considered the findings as to the city-county lines: (1) the lines had been deemed less than inviolate on many occasions in the past when students had been transferred across them to avoid integration; (2) consolidation, within the power of the state school authorities, had never been used anywhere in the state for purposes of integration, and evidence supported the inference that it was strenuously avoided in Richmond because of the integration that would come about; (3) Richmond, Henrico, and Chesterfield were specifically declared separate school districts only in 1971.[103] The court concluded that the state school board was not maintaining historically "neutral" city-county lines but instead was continuing the past policy of using those lines purposefully to bar effective integration.[104]

The defendants' opposition to the crossing of political boundaries for integration purposes, in light of prior discriminatory crossings evinced a double standard[105] which was used to rebut any claim that the borders in question were of any practical or administrative necessity. That *Bradley (Consolidation)* ordered the state to ignore school district lines which are themselves governmental subdivisions seems well-grounded in similar

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[103]*Id.* at 59. The State Board of Education of Virginia is vested with general supervisory powers over the school system of the state and has the power to make rules for the management and conduct of schools. VA. CODE ANN. §§ 22-11, -19 (Supp. 1971). The State Board prescribes by regulation the division superintendents' duties and powers. No. 3353 at 89.

School divisions of the state have been created or dissolved by the State Board of Education. *Id.* at 95. The board's policy has been to encourage consolidation of two or more sparsely populated rural counties. Whereas that policy would not apply to the areas involved in *Bradley (Consolidation)*, it should be noted that consolidation has not been used to ameliorate segregation. *Id.* at 102. Indeed, the court in *Bradley (Consolidation)* found the modification of school division lines had been avoided whenever the result would have been integration. *Id.* at 106.

The Virginia Code was amended, subsequent to the initiation of the *Bradley (Consolidation)* suit, to prohibit the State Board of Education from placing two political subdivisions in one school division without requests from the school boards involved and the approval of the governing bodies of those political subdivisions. VA. CODE ANN. § 22-30 (Supp. 1971).

Although the state maintained that consolidation of the districts would only have resulted in a single superintendent with each board continuing to operate its own schools, the court in *Bradley (Consolidation)* found the statement to be inconsistent with the state law and practice. No. 3353 at 105-06.

[104]Bradley v. School Bd. (Consolidation), No. 3353 at 177-84 (E.D. Va. Jan. 5, 1972); *accord*, United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1968), *modified*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971).

[105]United States v. Indianola Mun. Separate School Dist., 410 F.2d 626, 628 (5th Cir. 1969), *cert. denied*, 296 U.S. 1011 (1970) (previously crossed railroad tracks now sought to be maintained as boundary for safety reasons).

desegregation case law[106] and falls within the following language:

> Political subdivisions of the state are mere lines of convenience for exercising divided governmental responsibilities. They cannot serve to deny federal rights.[107]

Furthermore, *Reynolds v. Sims*[108] has already made clear that the political subdivisions of a state are not sovereign entities but rather agents exercising the state's governmental functions. The state carries a heavy burden if it wishes to use the integrity of political subdivisions to justify[109]

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[106]Natural boundaries are insufficient obstacles to remedial action when zones based thereon have been gerrymandered to foster segregation. *See* Keyes v. School Dist. No. 1, 445 F.2d 990, 1000 (10th Cir. 1971), *cert. granted*, 92 S. Ct. 707 (1972); United States v. School Dist. 151, 404 F.2d 1125, 1132-34 (7th Cir. 1968), *modified*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); Taylor v. Board of Educ., 294 F.2d 36, 38-40 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961). But even without evidence of gerrymandering, zones drawn along natural boundaries may simply fail to fulfill the affirmative duty to overcome the prior discrimination. *See* Davis v. Board of School Comm'rs, 402 U.S. 33 (1971); Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682, 683 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969); United States v. Greenwood Mun. Separate School Dist., 406 F.2d 1086, 1092-93 (5th Cir. 1969), *cert. denied*, 395 U.S. 907 (1969).

[107]Haney v. County Bd. of Educ., 410 F.2d 920, 925 (8th Cir. 1969). The Supreme Court of New Jersey was faced with a problem somewhat analogous to *Bradley (Consolidation)* in Jenkins v. Township of Morris School Dist., 58 N.J. 483, 279 A.2d 619 (1971). In holding that the State Commissioner of Education could bridge town boundary lines in ascertaining and disestablishing segregation, the court maintained that such lines were no obstacle to the vindication of state constitutional rights. It is noteworthy that, as in *Bradley (Consolidation)*, the area involved was composed of residential, white suburbs and a primarily commercial, black urban center. The court, in viewing the interrelationship between the two officially separated communities, treated the two as a single community for purposes of ascertaining racial imbalance.

[108]377 U.S. 533 (1964).

[109]The defendants in *Bradley (Consolidation)* may nevertheless argue on appeal that under *Reynolds* the integrity of city and county lines can be a valid countervailing consideration to the consolidation relief ordered. The *Reynolds* test may be phrased as follows: deviations from the strict one-man, one-vote population standard are permissible *if* legitimate considerations can be found which serve to further rational policies *unless* population is thereby submerged as the controlling standard. 377 U.S. at 579-81. *Reynolds* discussed one, perhaps the only one, legitimate consideration which might justify deviations: giving a voice to political subdivisions as such. Recognizing subdivision integrity would further two rational policies: (1) maintaining the state's ability to pass local legislation; (2) avoiding the partisan gerrymandering that might result if subdivision lines were totally ignored. But even the above considerations would fail if the resulting divergence from the population standard indicated that population had ceased to become the *controlling* standard, *i.e.*, the one-man, one-vote goal must occupy a position of slight dominance over the value of subdivision integrity. *Id.* at 580. In light of the above, how would *Bradley (Consolidation)* fare? As a threshold matter, the *Reynolds* test might never be reached for at least one reason: as noted, evidence of the state's double standard with respect to city-county lines could work a kind of estoppel against the defendants. But even if the test could

a failure to perform affirmative constitutional duties: "The political thicket, having been pierced to protect the vote, can likewise be pierced to protect the education of children."[110]

Assuming for the moment that the *Bradley (Consolidation)* decision will be upheld under *Swann,* the case nevertheless presents with increased intensity the problems raised previously with respect to *Swann's* departure from traditional equitable concepts. As a starting point, it is submitted that *Bradley (Consolidation)* speaks primarily to the problem of white flight and is not grounded on any substantial causal connection between prior state action and the existing city-county racial imbalance. Yet, as has been pointed out, *Swann* did not direct the lower courts to tailor their remedies to respond only to prior state action. Hence, private action is reached by consolidation in order to avoid the resegregation phenomenon; the commitment of equitable power in *Swann* has been expanded to counteract the results of white flight.

On the other hand, considering that the finding of inherent inferiority in separate school systems was the impetus behind *Brown I,* the pursuit of integration in *Bradley (Consolidation)* cannot help but carry more than a trace of irony for minorities seeking their own cultural identity: "[the] subtle implication [is] that blacks cannot learn unless in the presence of whites."[111] That *Bradley (Consolidation)* may well be the first in a long line of consolidation decrees should be considered in light of the following:

> [T]he government is . . . putting itself on a collision course with the aspirations of an articulate and vigorous segment of national Negro leadership. Even if we succeed at whatever cost, in forcing . . . massively integrated school systems . . . , may we not find ourselves eventually dismantling them again at the behest of blacks seeking decentralized community control?[112]

Bradley (Consolidation) cannot be faulted on the effectiveness of its

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be seen to apply to *Bradley (Consolidation),* apparently the state could not satisfy it. For assuming that the state could fulfill the "if" clause above as to rational policies—manageable size of school districts, more local autonomy, use of county tax base—the state on the facts could be seen as nevertheless having "submerged" the goal of desegregation as the "controlling factor." Virginia's 1971 law preventing consolidation except upon local approval indicates that the value of achieving desegregation through consolidation has been subordinated to the importance of subdivision integrity. *Cf.* Reitman v. Mulkey, 387 U.S. 369 (1967).

[110]Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation,* 40 N.Y.U.L. REV. 285, 305 (1965) (footnote omitted).

[111]NEWSWEEK, Mar. 13, 1972, at 21; quoting Mr. Roy Innis of The Congress of Racial Equality.

[112]Bickel, *supra* note 99, at 22.

solution in moving one step closer to *Brown I*. Yet the tendency to press *Swann* to outer limits intensifies another risk inherent in *Swann's* commitment: the federal courts may find themselves questioned even by minorities as to their competence to render policy decisions in such a complex area. Equity should normally act only after a judicious balancing of competing interests and policies. But *Swann*, though professing to apply the balancing principle, has elevated integration as a social policy to the exclusion of all others. That this approach tends toward rigidity is illustrated by a recent public housing discrimination case, *Gautreaux v. Chicago Housing Authority*,[113] in which the court was faced with a pattern of discriminatory site selection reinforcing urban residential segregation. In fashioning a remedy, the court chose the more direct means of overcoming the prior discrimination: it required that a substantial portion of future units were to be built in white neighborhoods. Totally ignored were competing ethnocentric values.[114] Asserting that the court in *Gautreaux* failed to appreciate the limits of judicial competence in this area, a writer critically noted:

> An awareness of [a court's] limitations is particularly important in cases like *Gautreaux* which, even on remedy, implicitly involve

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[113]296 F. Supp. 907 (N.D. Ill.), *judgment order entered*, 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971). The court's language reflected the single-mindedness of the pursuit of integration:

> It is . . . undenied that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued.

296 F. Supp. at 914.

[114]One value not fostered by the "integration" ethic is that of building a political and communal base of solidarity and power on which minority groups can begin to establish actual equality. Consideration of this kind of alternative was advocated by the late Senator Robert F. Kennedy, urging the placement of the great *majority* of new housing in the ghetto:

> To seek a rebuilding of our urban slums is not to turn our backs on the goal of integration. It is only to say that open occupancy laws alone will not suffice and that sensitivity must be shown to the aspirations of Negroes and other non-whites who would build their own communities and occupy decent housing in neighborhoods where they now live. And, in the long run, this willingness to come to grips with blight of our center city will lead us toward an open society. For it is comparability of housing and full employment that are the keys to free movement and to the establishment of a society in which each man has a real opportunity to choose whom he will call neighbor.

Hearings on S. 3029 Before the Subcomm. on Housing and Urban Affairs of the Senate Banking and Currency Comm., 90th Cong., 2d Sess. (1968), *quoted in* Comment, *Public Housing and Urban Policy: Gautreaux v. Chicago Housing Authority*, 79 YALE L.J. 712, 718 (1970).

> legal institutions in a major, unresolved problem of the country's future—the question of whether the society will be one where groups retain their identities or one where the goal is assimilation of its peoples.[115]

Whether minority students in Richmond or any other urban area would prefer to remain in inner-city schools, perhaps with increased educational expenditures, is of course problematic; nor would this discussion presume to decide that any given policy is the most propitious. The essential point is that the viability of possible alternatives does not enter into any balancing process undertaken by *Swann,* nor would any lower court be authorized to consider such claims made on behalf of minorities.[116] But the fact that "equality"—political, social, and economic—might best be pursued indirectly through schools to which material resources rather than white students are brought is at least a valid countervailing consideration. In addition, the fact that another segment of the same minority group might prefer the *Bradley (Consolidation)* solution merely serves to heighten the growing strain upon the federal courts.

Finally, the fact that the Supreme Court exercises both judicial and political power[117] intensifies the problems raised by the implementation of the equity power in *Swann* in future decisions such as *Bradley (Consolidation).* Constitutional doctrine, judicial power, and political and policy considerations each exert such conflicting limits and pressures that even a compromise position may be unsatisfactory. If the Court were to find that the consolidation decree in *Bradley (Consolidation)* had gone beyond the hazy limits of federal remedial power authorized by *Swann,* the basis for decision would necessarily rest upon a view that the state had no affirmative duty to consolidate the system. But that view in turn could follow only after determining that there was factual error in *Bradley's (Consolidation)* finding of a double-standard,[118] for otherwise the Court would be taking what under *Swann* would be an unacceptable position:

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[115]Comment, *Public Housing and Urban Policy: Gautreaux v. Chicago Housing Authority,* 79 YALE L.J. 712 (1970).

[116]Note 87 *supra.* It would seem that a federal court could not, once plaintiffs had shown a violation of the equal protection clause, allow the plaintiffs to tailor their own remedies, for the benefit of the remedies has traditionally run to the class and not to the individual litigants. For a court to grant relief, for example, in the form of allowing individual black or Chinese students to remain in predominately one-race schools could be seen as contrary to equal protection ideals in that it merely caters to the racial prejudice of the minority. Even if the motive behind such a demand was asserted to be a non-prejudicial desire for ethnic solidarity, there would still be the substantial danger that that assertion could easily be used as a veil for underlying racial prejudices.

[117]*See* Kalven, *Even When a Nation Is at War,* 85 HARV. L. REV. 3, 3-4 (1971).

[118]*See* text accompanying notes 104-05 *supra.*

the finding of a constitutional violation for which there was no remedy.[119] But even a legally principled reversal of *Bradley (Consolidation)* would from a political perspective carry an unmistakable message to the nation's minority groups: the legislative process—dominated by white America—is the ultimate arbiter of your quest for equality, not the federal courts.[120]

On the other hand, an approval of consolidation as a remedy, while making *Swann* a truly effective force against the resegregation phenomenon, would nevertheless reinforce the federal courts' commitment to the ethic of integration which, as observed,[121] may soon come into sharp conflict with the trend toward ethnic solidarity. Furthermore, the hypothetical approval of consolidation as an affirmative duty would almost certainly be accompanied, under *Swann,* by the doctrinal limitation to de jure situations, thus precluding its application to most of the urban North and West. Although the existing de jure-de facto distinction is grounded in the state action requirement of the fourteenth amendment, the implementation of a powerful remedy such as consolidation to only a particular region would not enhance the Court's role as a supposedly national institution. Such a development would freeze the remedial powers of the federal courts into a kind of all-or-nothing rigidity, when the asserted doctrinal basis for those remedial powers was the inherent flexibility of equity.[122] As one writer has pointed out:

> [N]o national institution can afford to be unresponsive to the popular pressures likely to be engendered by an appearance of differential treatment of certain regions of the country. Even the Supreme Court is not immune from such pressures, particularly when they become identified with the ideal of equal treatment.[123]

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[119]Such a position would be in direct contradiction to *Swann's* language. *See* note 77 *supra.*

[120]The Court could also not help but be aware of the effect a reversal would have in aggravating the problem of white abandonment of urban areas, creating further racial imbalance and generally escalating the national urban crisis. *See generally* E. BANFIELD, THE UNHEAVENLY CITY (1970).

[121]Text accompanying notes 111-16 *supra.*

[122]*See* text accompanying note 78 *supra.*

[123]Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation,* 38 U. CHI. L. REV. 697, 705 (1971).

[124]However, before the Court has an opportunity for exercising possible self-restraint in cases like *Bradley (Consolidation)* and beyond, Congress and the White House seem virtually certain to take some kind of initiative in sharply curtailing the equitable power of the federal courts to order busing. *Bradley (Consolidation)* in particular galvanized the anti-busing sentiments in the populace, and, in an election year, the administration and the legislators have begun to move toward a statutory limitation of the federal courts' role. How successful Congress will be in attempting to shrink federal equity power under the four-

The above scenario contemplates the kind of limits that the Court might place upon further expansion of its role in reaching the problems of racial segregation in the schools.[124] Yet the momentum of the promise in *Brown I* is not so quickly or easily dissipated. The Court could be seen as moving along a continuum toward adopting a general result-oriented approach more responsive on a national level to school segregation and inferior education.[125] It is to the possible future steps along that continuum that the discussion now turns.

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teenth amendment is a question that goes beyond the scope of this discussion, but for an excellent treatment of the basic framework of the problem see C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §§ 22-26 (2d ed. 1970). The following is a brief summary of the status of the legislative move against busing. (1) The House passed its version of the Higher Education Act of 1971, H.R. 7248, 92d Cong., 1st Sess. (1971), to which specific anti-busing measures were amended: (a) district court orders requiring busing to achieve racial balance shall be stayed until all appeals have been exhausted; (b) funds cannot be used for busing as part of a desegregation plan; (c) no federal agency can condition receipt of federal funds upon the adoption of a busing plan. For a full text of the act see 117 CONG. REC. 10458 (daily ed. Nov. 4, 1971). *See* N.Y. Times, Nov. 5, 1971, at 1, col. 8. (2) The Senate, after heated debate during which various stringent anti-busing measures were proposed and eventually voted down, passed a moderate amendment to the education act which provided that: (a) no federal funds be used for busing unless requested by local officials; (b) funds shall not be used for busing which exceeds the limits placed upon transportation plans by *Swann* (*see* text accompanying note 88 *supra*); (c) federal agencies may not require busing, as a condition of receiving funds, of students beyond the limits of *Swann* or to a school where the educational opportunities are substantially inferior to that school to which the student would normally have been assigned under a nondiscriminatory geographic zoning system; (d) any district court order which requires the transportation of students from one "local educational agency" to another or which requires consolidation of same for desegregation purposes shall be stayed pending the exhaustion of appeals. But this provision is to expire on June 30, 1973. For the complete text of the amendment see 118 CONG. REC. 2448 (daily ed. Feb. 23, 1972). Senator Scott, who with Senator Mansfield sponsored the amendment, gave an extensive interpretation of the provisions on the floor of the Senate. 118 CONG. REC. 2541 (daily ed. Feb. 24, 1972). (3) The House and Senate have now begun meeting in a joint conference, but the House took the unusual measure of ordering its members of the joint committee not to compromise its anti-busing proposals. Washington Post, Mar. 9, 1972, at 1, cols. 7-8. (4) President Nixon issued an 8,000-word message to Congress, calling for immediate legislation to: (a) declare a moratorium on all court-ordered busing until July 1, 1973; (b) authorize new funds to make the poorer schools equal in educational opportunity; (c) prohibit future busing orders until a court had exhausted a long list of other remedies and found them inadequate. Washington Post, Mar. 18, 1972, at 1, col. 7.

[125]For an unenthusiastic view of the Warren Court's moves in the direction of assimilation and egalitarianism see A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 103-81 (1970). *But see* Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. REV. 285 (1965).

III. De Facto Segregation

De facto segregation is defined as the situation in which "racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities."[126] In essence the opposite of de jure, de facto segregation is a racially imbalanced situation to which the state has not contributed and for which judicial relief may not be granted.[127] As de jure grew from its traditional definition[128] to include within the concept of state action policies such as gerrymandering of districts, building site and size selection, and student transfers by state agencies to achieve segregation, de facto situations were diminished. Nonetheless, substantial de facto segregation remains.

If segregation is to be eliminated, only judicial action can be expected to provide meaningful relief. Since there is no per se constitutional right to integration,[129] it would seem that there are three major alternatives by which judicial remedies may be made to reach those situations which are presently considered de facto and, therefore, not subject to judicial relief in desegregation cases: (1) judicial extension of those acts which will be recognized as state action in finding de jure segregation, (2) showings by plaintiffs of actual inequality in schools, grounding the claim upon denial of equal protection through inferior education rather than through segregation, and (3) the bringing of suits aimed at the real causes of de facto segregation (*e.g.*, discriminatory administration of public housing, unequal employment opportunities). As will be seen, the third category is probably the most helpful and presently fruitful approach.

The first alternative is nothing more than a projection of the judicial trend in school segregation cases since *Brown I*. It would be possible for the courts to employ a sort of tort theory, based on foreseeability, to the school board's assignment policies. If the geographic proximity-type plan is superimposed on a segregated residential pattern, the result is foreseeable. Knowing this result to be inevitable, the school board which combines this plan with the legal compulsion to attend school can be said to have violated the constitutional mandate of *Brown I*. The compulsory attendance law would be the basis for a finding of state-imposed segrega-

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[126]Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17-18 (1971).

[127]Spencer v. Kugler, 92 S. Ct. 707 (1972); Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

[128]The Court recently articulated the traditional de jure segregation as "a mandate by the legislature, carried into effect by a school board, whereby students were assigned to schools solely by race." Gomperts v. Chase, 92 S. Ct. 16 (1971).

[129]Downs v. Board of Educ., 336 F.2d 988, 998 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Bell v. School City, 324 F.2d 209, 213 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

tion.[130] Alternatively, the above situation could afford only a presumption that the school board was intentionally segregating, especially where other, equally feasible zones would have resulted in less imbalance. This approach is simply an extension to all segregated systems of the existing presumption against school boards which are found to have previously maintained dual systems. However, the difference between the approaches is negligible since both are severely limited if there are no other reasonable means to set up the school districts. Since good faith would probably be relevant in both instances,[131] the absence of racially oriented motive in the continued maintenance of this segregation may be evidenced by such factors as safety of students, costs incident to change, and the availability of facilities.[132] Nonetheless, the showing necessary to rebut the presumption and avoid judicial intervention would be a difficult one. It is conceivable that a substantial portion of presently de facto situations would be affected.

Further, state government is heavily implicated in any form of residential segregation. By taking a broader look at state policy and all contributing state agencies, the federal courts would be more successful in finding state complicity in segregation. Whether the policies have been racial residential zoning, enforcement of restrictive covenants, cooperation with prior FHA segregative policies, discriminatory public housing administration, or discrimination in job opportunities,[133] state discrimination can be found.[134] Such discrimination has resulted in segregated patterns into which minority groups have been sealed by school board zoning. Although the above suggestions are fully consistent with the language of the fourteenth amendment, the Supreme Court has not been willing to move this far. Indeed, it appears that *Swann* is a temporary stopping point for doctrinal advance in this area. While not expressly rejecting the possibility of finding state discrimination in areas other than school segregation, the opinion has been shown to indicate that school desegregation cases should not be made to correct segregation resulting from that other discrimination.[135] At best the suggestions are only a hopeful projection of future Supreme Court decisions.

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[130]*See* Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964).

[131]Text accompanying notes 31-32 *supra.*

[132]*See* People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 262, 96 Cal. Rptr. 658, 663-64 (Ct. App. 1971).

[133]*See Hearings before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare,* 91st Cong., 2d Sess., at 352-54 (1970).

[134]*See* Bradley v. School Bd. (Consolidation), No. 3353 at 253, 289-302, 321-22 (E.D. Va. Jan. 5, 1972). While the holding is based primarily upon the prior existence of a state-imposed dual system, the research on other areas of government discrimination is comprehensive.

[135]Text accompanying notes 57-61 *supra.*

Gomperts v. Chase,[136] a recent Supreme Court decision, may indicate that the Court will follow the projection. Although a preliminary injunction was denied because the opening of school was three days away and confusion might result from the proposed desegregation plan, interesting questions were raised. While there was no evidence that a dual school system had contributed to the existing segregation, the argument was that other state discrimination had created de jure segregation. The alleged discriminatory actions relied upon were: (1) a major freeway isolated blacks and resulted in a separate black high school; (2) state planning groups fashioned and built a black community around that school; (3) realtors, licensed by the state, practiced discrimination; (4) banks chartered by the state shaped the policies that handicapped blacks in financing homes outside the black ghetto; (5) residential segregation, fostered by state-enforced restrictive covenants, resulted in segregated schools. The Court indicated that although this was not a classical de jure situation, the question of whether the five factors would add up to de jure segregation in the sense of state action condemned in *Brown I* had not yet been decided by the Court. The opinion can be understood as an indication that the Court will be willing to listen to arguments based upon this sort of causal chain. If so, it is perhaps the start of further doctrinal advances.

The second alternative by which judicial remedies may be expanded, that of showing a denial of equal protection through inferiority of education in segregated schools, retains the use of the fourteenth amendment but shifts emphasis to inequality of the schools themselves when there is no showing of state-imposed segregation. No longer is the focus upon the official's motives but upon the detriment occurring in the racially imbalanced school. What is being urged in this context is a revival of the *Plessy v. Ferguson*[137] mandate that separate facilities be equal:

> [I]f white and Negroes, or rich and poor, are to be consigned to separate schools . . . the minimum the Constitution will require and guarantee is that for their objectively measureable aspects these schools be run on the basis of real equality, at least unless any inequalities are adequately justified.[138]

Since an adequate justification as quoted above may be virtually impossible to prove,[139] a showing of inequality is, for practical purposes, the establishment of a constitutional violation.

A true inequality must be shown, with reliance being placed on "imperfect indices of quality, such as overcrowding, differences in curricula,

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[136]92 S. Ct. 16 (1971).

[137]163 U.S. 537 (1896).

[138]Hobson .v Hansen, 269 F. Supp. 401, 496 (D.D.C. 1967).

[139]*Id.* at 506-08.

tenure of teachers, costs per pupil, or scores on standardized tests."[140] Although *Brown I* indicates that separate schools are inherently unequal, it does not go as far as equating inequality with a constitutional violation. In order to find a violation, it must be shown that the state has denied equality when it has not contributed to the segregation. Therefore, if reliance is placed upon such intangible considerations as the ability to engage in discussions and exchange views with students of other backgrounds,[141] the courts would come close to basing decisions upon inherent inequality through segregation. The question of whether racial segregation in public schools denies the minority group equal educational opportunities is a question of fact dependent upon the circumstances in the particular case. Considerations of judicial administration may prompt the courts to create presumptions of inadequacy in public schools. These presumptions would overcome the greatest difficulty of this approach, that of showing actual inequality when reference must be to indecisive factors, but such presumptions, even if not conclusive, appear to be an adoption of *Brown I's* "separate is unequal" without *Brown's* corollary of state-imposition.

In a general way, the potential remedy for this approach may provide more than a "segregated equality."[142] Since the suit might well be based upon class discrimination in inferior slum schools rather than upon racial discrimination, there would be three alternative remedies: (1) the upgrading of the inferior schools, (2) a sharing of the inferior facilities by all classes, or (3) a decree enabling the state to choose between the above two. The probable inadequacy of a court order in upgrading a facility in regard to hard-to-measure factors may lead to the less complicated order to integrate in such a way that all classes share both superior and inferior facilities. Practically, therefore, a duty to integrate racially may be the ultimate result just as it was through *Brown I's* order running to state-maintained dual systems.

Nonetheless, the undesirable nature of relying upon questionable data and the heavy burden of proof in showing actual inequality make this second alternative, like the first, more hopeful than productive. The third alternative, the approach suggested by *Swann*,[143] seems the most promising:

> On the national level, housing segregation is the principal basis for school segregation . . . . Employment, education, and housing

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[140]Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 604 (1965).

[141]*See* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[142]*See* Gomperts v. Chase, 92 S. Ct. 16 (1971).

[143]402 U.S. at 22.