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School District Consolidation: The Constitutional Unit of Equality

No compilation of factors to be considered in applying the balancing test can be complete because new considerations might be suggested as case law develops. Additional factors present no burden on the balancing of factors test. The strength of the test is in its adaptability—it is designed to include each new factor as a cost or a benefit at the time of the weighing analysis. The balancing test has been formulated as a solution to ineffective enforcement of NEPA. The standard determines both the maximum enforcement of NEPA and the point when imposition of the requirements of the statute will cause a result unintended by Congress, thereby avoiding a question of retroactive application. Therefore, in the future, utilization of the balancing of factors test will be the most efficient and comprehensive way to determine the applicability of NEPA to ongoing highway projects.

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SCHOOL DISTRICT CONSOLIDATION: THE CONSTITUTIONAL UNIT OF EQUALITY

In the eighteen years since the Supreme Court's decision in *Brown v. Board of Education*[1] (*Brown I*) that separate but equal schools are inherently unequal,[2] much progress has been made toward the goal, enunciated in *Brown v. Board of Education*[3] (*Brown II*), of achieving "a system of determining admission to schools on a nonracial basis."[4] In the years immediately following the *Brown II* decision, the progress was slow as school boards,[5] state legislatures,[6] and even courts[7] attempted to weaken

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

[2]*Id.* at 495.

[3]349 U.S. 294 (1955).

[4]*Id.* at 300-01.

[5]*E.g.*, School Bd. v. Atkins, 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957); Jackson v. Rawdon, 235 F.2d 93 (5th Cir.), *cert. denied*, 352 U.S. 925 (1956).

[6]*See generally* McKay, *"With All Deliberate Speed": Legislative Reaction and Judicial Development 1956-1957*, 43 VA. L. REV. 1205 (1957); Note, *Effect of School Assignment Laws on Federal Adjudication of Integration Controversies*, 57 COLUM. L. REV. 537 (1957); Note, *Legality of Plans for Maintaining School Segregation*, 54 MICH. L. REV. 1142 (1956).

[7]For example, in Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1956), the court stated that the "Constitution, in other words, does not require integration. It merely forbids discrimination."

In Thompson v. County School Bd., 144 F. Supp. 239, 239-40 (E.D. Va.), *aff'd*, 240 F.2d 59 (4th Cir. 1956), *cert. denied*, 353 U.S. 911 (1957), the district court stated that "it must be remembered that decisions of the Supreme Court . . . do not compel the mixing of different races in the public schools."

the directive of the Court. More recently, progress toward the goal has been facilitated by Supreme Court decisions expanding the range of affirmative equitable relief that is available.[8] It would appear, however, that while the Supreme Court has been expanding the broad contours of appropriate equitable relief, some lower federal courts have been developing new methods of conceptualizing the basic issue of whether a particular community or geographic area is operating a unitary or dual school system.[9] The problem inherent in this new approach is exemplified by the recent case of *Bradley v. Board of Education*.[10]

In *Bradley*, District Judge Robert Merhige ordered the public school system of the city of Richmond consolidated with those of the two surrounding counties of Chesterfield and Henrico. On appeal to the Fourth Circuit Court of Appeals, the decision was reversed.[11] Although *Bradley* involves many phases of the school desegregation problem,[12] one of the more elusive and potentially significant aspects involves the emerging concept of the appropriate "unit of equality"[13] in a school desegregation case. This concept seems to have been of importance to the district court in determining whether there was a unitary or a dual school system. Rather than considering the city of Richmond and the counties of Henrico and Chesterfield as three separate entities for the purpose of measuring compliance with the mandate of *Brown II*,[14] the district court found the area to be a single unit of equality to which one remedial decree could

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[8]*See* Swann v. Board of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

[9]A unitary school system is a system in which the schools cannot be identified as white schools or black schools on the basis of student assignment, faculty assignment, or quality of the facilities. For a situation in which such identifiability was due to state action, *see* Swann v. Board of Educ., 402 U.S. 1, 18 (1971).

[10]338 F. Supp. 67 (E.D. Va. 1972).

[11]Bradley v. School Bd., 462 F.2d 1072 (4th Cir. 1972).

[12]For previously reported aspects of *Bradley v. School Bd.*, *see* 325 F. Supp. 828 (E.D. Va. 1971) (adoption of desegregation plan involving busing); 53 F.R.D. 28 (E.D. Va. 1971) (motion for attorneys' fees denied); 324 F. Supp. 456 (E.D. Va. 1971) (motions to prevent school construction while suit was pending and to implement plan at mid-year denied); 324 F. Supp. 439 (E.D. Va. 1971) (motion to remove judge denied); 324 F. Supp. 401 (E.D. Va. 1971) (motion to dismiss denied); 324 F. Supp. 396 (E.D. Va. 1971) (motion for 3 judge district court denied); 317 F. Supp. 555 (E.D. Va. 1970) (where court approved freedom of choice plan to ensure schools would open in the fall). *See also* Note, *Merging Urban and Suburban School Systems*, 60 GEO. L.J. 1279 (1972); Comment, *Civil Rights—Judicial Consolidation of Public School Districts to Achieve Racial Balance*, 25 VAND. L. REV. 893 (1972); Comment, 40 U. CIN. L. REV. 470 (1972).

[13]The unit of equality concept was first explicitly used in Bulluck v. Washington, 468 F.2d 1096 (D.C. Cir. 1972) as a term to define the geographic area to which a school desegregation decree could apply.

[14]349 U.S. at 300-01. See text accompanying note 4 *supra*.

apply. Therefore, while the city and counties might each be operating a unitary school system, if the area was viewed as a whole the school system might be considered dual. As previously indicated, the unit of equality concept appears to be of very recent origin with virtually no substantive guidelines regarding its appropriateness or its limitations. Examining *Bradley* in terms of the unit of equality concept presents an interesting case for analysis.

Prior to the district court decision in *Bradley*, the unit of equality concept appears to have been employed in a school desegregation case on only one occasion. In *Bulluck v. Washington*,[15] the plaintiffs sought a declaratory judgment that a District of Columbia statute, forbidding the use of federal funds for the education of Washington, D.C. students outside the District, was an unconstitutional infringement upon efforts to promote desegregation. The United States Court of Appeals for the District of Columbia addressed itself to the problem of the relevant constitutional unit of equality involved and reasoned:

> [N]o case . . . has ever suggested that concepts of equal protection require one state to provide educational opportunities equivalent to those provided by another. The correlative of this proposition is, of course, that an individual who desires to participate in a given educational program has a right to participate in programs equal only to those afforded others by the same system.[16]

Under that formulation the question of what constitutes the applicable unit of equality in *Bradley* is still not answered. *Bulluck*, in the context of the District of Columbia, speaks of equality within an area "no larger than the state,"[17] so the case does not shed any light on the problem in *Bradley* where the area is a small part of the state. Specifically, the question is whether the phrase "equal only to those afforded others by the same system" refers to the state-wide system or to the school system of a particular school district. *Bulluck* did not answer that question and therefore provided only the framework for the unit of equality inquiry without providing any guidelines for its solution.

In order to evaluate the unit of equality concept in *Bradley*, it is necessary to elaborate upon the approach taken in the district court to justify consolidation, with particular emphasis upon the findings of fact and the court's interpretation of them. Essentially, the district court

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[15]468 F.2d 1096 (D.C. Cir. 1972). The court held there was no constitutional violation because the District of Columbia students had only the right to participate in programs equal to those provided other students in the District, not equal to those in the surrounding Maryland suburbs.

[16]*Id.* at 1105.

[17]*Id.*

found that segregative patterns in the Richmond metropolitan area schools resulted from residential segregative patterns encouraged by public and private action.[18] These residential patterns, however, were found to be due in large part to the manner in which the three school districts had grown and historically been operated.[19] The effect of residential segregation was found to deprive blacks of their constitutionally protected right of equal educational opportunity. The district court reasoned that prior de jure school segregation[20] had provided blacks with inferior education which had lessened their earning power and narrowed their employment opportunities.[21] This, in turn, restricted the range of housing options and confined the blacks to the low-cost housing in the center city and to a low-skilled job market.[22] The racial identifiability of the Richmond city schools was also found to be due in part to school construction policy[23] and the actions of certain governmental agencies,[24] both state and federal.

The nexus between the foregoing findings of fact and the current racial identifiability of the metropolitan area schools was that prior de jure segregation in the schools had reinforced residential patterns, which thereby continually caused blacks to live close to black schools.[25] Thus, the prior de jure segregation created a symbiotic relationship between present school locations and residential patterns which is manifested in the form of racially identifiable schools in the city and two-county area. In other words, past de jure segregation was the source of present racially identifiable schools, and subsequent governmental choices regarding size

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[18]338 F. Supp. at 84. *See also* Brewer v. School Bd., 397 F.2d 37 (4th Cir. 1968); Davis v. School District, 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971). In *Davis*, the district court stated:

> For a school board to acquiesce in a housing development pattern and then to disclaim liability for the eventual segregated characteristic that such pattern creates in the schools is for the Board to abrogate and ignore all power, control and responsibility. A Board of Education simply cannot permit a segregated situation to come about and then blithely announce that for a Negro student to gain attendance at a given school all he must do is live within the school's attendance area. To rationalize thusly is to be blinded to the realities of adult life with its prejudices and opposition to integrated housing.

309 F. Supp. at 742.

[19]338 F. Supp. at 84.

[20]*See* Gomperts v. Chase, 404 U.S. 1237, 1238 (1971), wherein Justice Douglas characterized 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."

[21]338 F. Supp. at 85.

[22]*Id.*

[23]*Id.* at 86.

[24]*Id.* at 91-92.

[25]*See* Swann v. Board of Educ., 402 U.S. 1, 20-21 (1971).

and locating of schools and low cost housing projects have perpetuated the segregated neighborhoods originally caused by de jure school segregation. The result of this process is a never-ending cycle of cause and effect relationships.

The district court cited current census figures to show the concentration of blacks within the city of Richmond. The Richmond metropolitan area (Richmond, and Henrico and Chesterfield counties) had a total population of 480,840 according to the 1970 census.[26] Of this total, approximately 25.3% were black.[27] If the metropolitan area is viewed as a single unit rather than as three separate entities, approximately 85% of the black population of the area will be found in Richmond. Only about 11.2% of the residents of Chesterfield County and 6.5% of the residents of Henrico County were black,[28] while 41.9% of the residents of Richmond were black.[29]

This situation is reflected in the respective school systems. In 1969, the public schools of Richmond were 70% black.[30] In 1970, a predominantly white portion of bordering Chesterfield County was annexed to the city, thereby lowering the black student ratio to 64%.[31] As of May 1, 1970 within the Richmond city system there were three all-black high schools, two all-black middle schools, and seventeen all-black elementary schools.[32] There were twenty-five schools in which over 90% of the faculty and staff were black.[33] The schools in Chesterfield and Henrico counties, however, were 90.5% and 91.8% white, respectively.[34] Partially on the basis of these findings, the district court held that the freedom-of-choice plan then in effect in Richmond[35] had not achieved the unitary

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[26]U.S. BUREAU OF CENSUS, CENSUS OF POPULATION, VIRGINIA, PC(1)-B38, Table 34, at 117-20 (1971).

[27]*Id.*

[28]*Id.*

[29]*Id.*

[30]338 F. Supp. at 185.

[31]*Id.*

[32]*Id.* at 71-72. There are seven high schools, nine middle schools and forty-six elementary schools in the city of Richmond.

[33]*Id.* at 72.

[34]*Id.* at 185.

[35]The district court summarized the plan as follows:

> The H.E.W. plan was basically a zoning plan, with some clustering of schools. In setting the zones for the various schools, the drafters of the plan considered the capacity of the school buildings, the proximity of the buildings to the pupil population, and factors such as the safety hazards on the immediate approaches to the schools in relation to where the pupils lived. The plan was, in essence, a neighborhood plan—a plan which under certain circumstances undoubtedly would be commendable. By reason of the residential patterns in the City of Richmond, however, wherein there

system required by law.[36]

The district court seems to have based its decision on a belief that "[e]mployment, education, and housing discrimination foster each other in the United States; the effects of one are causative of the others; they are interdependent phenomena."[37] Consequently the district court reasoned that it was under a duty to take affirmative action to end segregation where the school boards had defaulted in their responsibility to do so,[38] and that the court's remedial powers were not limited by the boundaries of the Richmond school district.[39] The court found that the boundary lines had not been viewed as barriers when busing had been used to preserve segregation[40] and that they should not be viewed as impenetrable barriers when the purpose was to achieve integration. The remedy of consolidation was justified on the grounds that Virginia had done all in its power to frustrate integration[41] and that these boundary lines were serving that purpose; that the boundary lines were not drawn along geographic landmarks or related to any administrative or educational necessities;[42] and finally, that the city and two counties were, in reality, a single demographic entity.[43]

In order to buttress its opinion that the city and two counties should be viewed as a single area, the district court cited many facts illustrating the large degree of interrelatedness between Richmond and the two counties. For example, in 1970-71, 45% of the residents of Henrico County who were employed worked in Richmond;[49] according to the 1960 census, 46.1% of the residents of Chesterfield County who reported their place of employment worked in Richmond.[45] A 1967 report prepared by the two counties recognized that there was a community of interest between the three jurisdictions as well as a relationship of mutual dependency.[46] The

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> are with rare exceptions distinct White areas and distinct Black areas, a true neighborhood school plan of necessity can result only in a system in which there are Black schools and White schools and not just schools.

Id. at 75.

[36] *Id.* at 72.

[37] *Id.* at 195.

[38] *Id.* at 81-82. *See also* Swann v. Board of Educ., 402 U.S. 1, 15 (1971).

[39] 338 F. Supp. at 79-80; *cf.* Bradley v. Milliken, Nos. 72-1809—72-1814 (6th Cir. Dec. 8, 1972) at 67.

[40] 338 F. Supp. at 112-13.

[41] *Id.* at 81, 92-94.

[42] *Id.* at 84. *See also* Brewer v. School Bd., 397 F.2d 37, 41 (4th Cir. 1968), in which the court found unacceptable school zone lines resulting in segregation and not justified by natural barriers.

[43] 338 F. Supp. at 178-80.

[44] *Id.* at 180.

[45] *Id.*

[46] *Id.* at 179.

city of Richmond and Henrico County had entered into contracts concerning municipal services such as fire protection, water and sewage;[47] and the city school board owns land in Henrico County and has a school on another site in that county.[48] Since 1971, pursuant to statutory provisions, the three-part area has been considered a single school division.[49] On the basis of these and similar facts, the district court found that the three-part area was a "single urban community."[50] Consequently, the boundary lines between the school systems should not determine or otherwise restrict the extent of the remedy,[51] since the "officials of the City of Richmond, Counties of Chesterfield and Henrico, as well as the State of Virginia, have by their actions directly contributed to the continuing existence of the dual school system which now exists in the metropolitan area of Richmond."[52]

The district court seems to have been presented with a situation similar to that involved in *Davis v. School District*,[53] In *Davis*, the racial imbalance in the schools was also attributed to residential segregation. The Sixth Circuit noted that a school board has no obligation to achieve racial balance in the schools when existing imbalance is not attributable to school board policies but is solely the result of housing patterns and other forces beyond the control of the school board.[54] However, in *Davis*, as in *Bradley*, the district court felt that the school board's policies contributed to the racial imbalance and that the board could have acted to alleviate the problem. The district court in *Bradley* quoted that portion of the district court opinion in *Davis* which stated:

> 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. Sins of omission can be as serious as sins of commission. Where a Board of Education has contributed and played a major role in the development and growth of a segregated situation, the Board is guilty of *de jure* segregation . . . .[55]

In *Bradley*, at the time the action was initiated, the power to act was

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[47] *Id.* at 184.

[48] *Id.*

[49] *Id.* at 123.

[50] *Id.* at 180.

[51] *Id.* at 84.

[52] *Id.* at 168.

[53] 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971).

[54] 443 F.2d at 575.

[55] 309 F. Supp. at 741-42.

authorized by statute.[56] A Virginia statute provided that school boards and local governments, along with the State Board of Education, had the power to determine whether school districts should be consolidated. This statute seems to recognize implicitly the unit of equality concept by permitting two school districts to realize that they have a community of interest and to ignore the boundary line which separates them. In *Bradley*, the district court apparently felt that the school boards had made no attempt to avail themselves of this statutory prerogative and thereby reasoned that there was a "sin of omission" warranting relief.[57]

The consolidation plan adopted by the district court in *Bradley* established one school board to administer the metropolitan district; the board would be composed of four members from Richmond, three from Henrico and two from Chesterfield.[58] The district would be divided into six subdivisions, five of which would have student populations of 17,000 to 20,000 with the sixth to have 9,000 students.[59] To accomplish that result, 78,000 children would be bused to school, but the great majority would attend schools within their subdivision and in no case would there be busing between noncontiguous subdivisions.[60] The district court found that the existing transportation system was capable of accommodating this plan, and that the proposed travel times and distances were reasonable.[61]

The Fourth Circuit, however, reversed, holding that there was no constitutional violation.[62] Apparently, the Fourth Circuit relied on the premise that since the three subdivisions had not acted in concert to produce segregated schools, the unit of equality employed to remedy any constitutional violation was limited by the tenth amendment to the boundaries of each school district. Specifically, the court stated:

> Because we think the last vestiges of state-imposed segregation have been wiped out in the public schools of the City of Richmond and the Counties of Henrico and Chesterfield and unitary school systems achieved, and because it is not established that the racial composition of the schools in the city of Richmond and the counties is the result of invidious state action, we conclude there is no constitutional violation and that, therefore, the district court judge exceeded his power of intervention.[63]

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[56]VA. CODE ANN. § 22-100.1 *et seq.* (1964 Repl. vol). However, see VA. CODE ANN. § 22-30 (Supp. 1972), which bars consolidation without local consent.

[57]338 F. Supp. at 113.

[58]462 F.2d 1058, 1072 (Winter, J., dissenting).

[59]*Id.*

[60]*Id.* at 1073.

[61]338 F. Supp. at 188.

[62]462 F.2d at 1070.

[63]*Id.*

The Fourth Circuit relied heavily on the decision of the District Court of New Jersey in *Spencer v. Kugler*,[64] asserting that *Bradley* was indistinguishable from *Spencer* on the facts and thus determinative of the decision in *Bradley*.[65] In *Spencer*, the plaintiffs attacked a New Jersey statute which defined each municipality as a separate school district,[66] contending that this was a violation of the equal protection clause of the fourteenth amendment which operated to cause racial imbalance in the schools. The district court found that the designation of municipalities as school districts was reasonable, particularly in light of the municipal taxing power, and that the school system was unitary because any racial imbalance among the school districts was merely a reflection of existing racial imbalance in the communities.[67] The district court held that as long as the boundary lines were drawn in a reasonable manner and not in a way which would foster segregation, they were not violative of the command in *Brown II*.[68]

However, in placing such reliance on *Spencer*, the Fourth Circuit may have overlooked certain features that seem to distinguish the two cases. New Jersey had no history of de jure segregation while Virginia was one of the last states to abolish such segregation.[69] In *Spencer*, the statute was directly attacked as unreasonable and drawn to foster segregation; in *Bradley*, however, the boundary lines themselves were not attacked as unconstitutionally drawn or as per se unconstitutional barriers. Rather, the role played by the boundary lines is secondary; they may be ignored to remedy a racial imbalance in the schools caused by the state's use of the lines for segregative purposes,[70] by the blacks' inability to move outside the city due to their economic status caused by prior de jure segrega-

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[64]326 F. Supp. 1235 (D.N.J. 1971), *aff'd mem.*, 404 U.S. 1027 (1972).

[65]462 F.2d at 1070.

[66]N.J. STAT. ANN. tit. 18A, § 8-1 *et seq.* (1953). Section 1 provides in part that "each municipality shall be a separate local school district except as otherwise provided in this chapter. . . ."

[67]326 F. Supp. at 1241-43. In *Bradley*, the Fourt Circuit noted:

> If we assume state action to keep blacks confined to Richmond, and none appears, it is evident that such action has failed to achieve its assumed invidious purpose. Richmond schools may be getting blacker, but so also are the schools of Henrico and the trend may soon reach to Chesterfield.

462 F.2d at 1066.

[68]326 F. Supp. at 1241. However, Mr. Justice Douglas dissented from the Court's memorandum opinion, stating:

> If any form of state-imposed segregation is proved, then the racially homogeneous neighborhoods and the consequent racial imbalance in schools would seem to be the result of state action.

404 U.S. 1027, 1028-29 (1972) (Douglas, J., dissenting).

[69]*See* 462 F.2d 1058, 1079 (Winter, J., dissenting).

[70]338 F. Supp. at 84.

tion,[71] and by the inaction of the state and its agents to remedy the situation when a remedy existed.[72]

In *Bradley*, the district court found that these lines, maintained as originally drawn, served to perpetuate the effects of past de jure segregation.[73] Because Virginia adhered to school districting and student assignment based on these lines, something related to private gerrymandering resulted. Segregated racial patterns had developed due to past de jure segregation,[74] and, due to present inaction by the school board in the face of the prevailing situation, white families could avoid the consequences of *Brown II* by moving across invisible, state-created boundary lines. The goal of desegregation, the district court in *Bradley* reasoned, should not be subordinated to state-created political subdivision lines.[75]

The crux of the difference between the district court and the Fourth Circuit in *Bradley* is difficult to isolate, although it appears to center around the unit of equality concept. While the Fourth Circuit held that the "last vestiges of state-imposed segregation have been wiped out in the public schools"[76] of the three political subdivisions, it specifically accepted the district court's finding that there has been "state (also federal) action tending to perpetuate apartheid of the races in ghetto patterns throughout the city, and that there has been state action within adjoining counties also tending to restrict and control the housing location of black residents."[77] However, the Fourth Circuit went on to observe that while there had been state action within each political subdivision to perpetuate residential segregation, there was never "joint interaction between any two of the units involved (or by higher state officers) for the purpose of keeping one unit relatively white by confining blacks to another."[78]

Insofar as the unit of equality concept is concerned, one of the basic problems with the Fourth Circuit's analysis is that it fails to explain the relevance of the failure to show joint interaction between the subdivisions for the purpose of keeping them heterogeneous. First, the district court did not seem to advance that argument or reach that conclusion. The district court seems only to have found that past de jure segregation, coupled with present state action, has resulted in a dual system when the city and two-county area is considered as a whole; and that this system has been, and will continue to be, self-perpetuating.[79] Second, it is particu-

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[71]See text accompanying notes 19-23 *supra*.

[72]See text accompanying notes 50-52 *supra*.

[73]338 F. Supp. at 84.

[74]*Id.*

[75]*Id.* at 83.

[76]462 F.2d at 1070.

[77]*Id.* at 1065.

[78]*Id.*

[79]See text accompanying notes 19-23 *supra*.

larly difficult to understand the substantive significance that attaches to a lack of complicity or joint interaction since the Fourth Circuit declined to indicate, in any manner, what would have been an appropriate course of action if there *had* been a showing of complicity.

The Fourth Circuit seems to have said, in effect, that state action tending to perpetuate *residential* racial segregation within each political subdivision did not justify court intervention to relieve its apparent and inevitable consequence of resulting *school* segregation throughout the entire area considered as a whole. The apparent rationale for this conclusion is that because there has been state action only within each subdivision separately, with no interaction, there existed no justificationfor consolidating the area for purposes of effectuating a remedy. In other words, since any violation of a constitutionally protected right occurred solely because of action taken by officials of a particular subdivision, the appropriae unit of equality is limited by the boundaries of that political subdivision.

Although the Fourth Circuit stated that it found no state-imposed school segregation, it did accept findings of state-imposed residential segregation, of which a natural consequence would seem to be school segregation. Consequently, the court felt constrained to show that there had been no complicity between the three subdivisions to accomplish the resultant school segregation. The court stated:

> We think that the root causes of the concentration of blacks in the inner cities of America are simply not known and that the district court could not realistically place on the counties the responsibility for the effect that inner city decay has had on the public schools of Richmond.[80]

As noted in the dissenting opinion of Judge Winter, the premise underlying this statement by the majority seems to be that "each subdivision is free to operate in its own orbit so long as it obeys the fourteenth amendment and does not conspire with others to defeat it."[81] Within each of the three areas there may be a unitary school system; but, if the three areas are considered as a single entity, as they were by the district court, the sincle school system is not unitary. Accordingly, the essence of the difference between the district court and the Fourth Circuit seems to be that since the state does not treat the three-part areas as a single unit of equality, the tenth amendment[82] prevents the district court from doing so.

The argument that the integrity of state-created political subdivision

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[80]462 F.2d at 1066.

[81]*Id.* at 1076.

[82]U.S. CONST. amend. X provides:

> The powers not delegated to the United States by the Constitution,

boundaries is protected by the tenth amendment[83] seems to be subject to some limitations in the context of school desegregation cases. For example, in *Haney v. County Board of Education*,[84] the Eighth Circuit noted:

> If segregation in public schools could be justified simply because of pre-*Brown* geographic structuring of school districts, the equal protection clause would have little meaning. Such a position "would allow a state to evade its constitutional responsibility by carve-outs of small units."[85]

This seems to be precisely what the unit of equality concept is designed to overcome. As a result of state action, and regardless of joint interaction, the district court in *Bradley* saw, in effect, a "carve-out" and declined to legitimize it even though the area was a political subdivision. In *Haney*, the Eighth Circuit went on to note:

> State legislative district lines, congressional districts and other State political subdivisions have long ago lost their mastery over the more desired effect of protecting the equal rights of all citizens. . . . Political subdivisions of the state are mere lines of convenience for exercising divided governmental responsibilities. They cannot serve to deny federal rights.[86]

It seems clear that equal educational opportunity is deemed a fundamental right in the United States. In *Brown I* the Supreme Court stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity

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nor prohibited by it to the States, are reserved to the States respectively or to the people.

[83] *See* Hunter v. Pittsburgh, 207 U.S. 161 (1907). The Court noted:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.

Id. at 178.

[84] 410 F.2d 920 (8th Cir. 1969).

[85] *Id.* at 924, quoting Hall v. School Bd., 197 F. Supp. 649, 658 (E.D. La.) *aff'd*, 287 F.2d 376 (5th Cir. 1961), *aff'd per curiam*, 368 U.S. 515 (1962).

[86] 410 F.2d at 924-25. *See also* Reynolds v. Sims, 377 U.S. 533 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

> of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[87]

Consequently, it would appear that the right to equal educational opportunity is one so fundamental that it outweighs the state's interest in the sanctity of its political subdivision lines, particularly if those lines operate to perpetuate school segregation.

The most recent case dealing with consolidation is *Bradley v. Milliken*.[88] Confronted with a fact situation very similar to the one existing in Richmond, the Sixth Circuit affirmed a district court opinion[89] which ordered the consolidation of the Detroit city schools with those of the surrounding suburbs. The Sixth Circuit did not mention the unit of equality concept, but it did decline to follow the Fourth Circuit's reasoning, stating:

> This record reflects a present and expanding pattern of all black schools in Detroit (resulting in part from State action) separated only by school district boundaries from nearby all white schools. We cannot see how such segregation can be any less harmful to the minority students than if the same result were accomplished within one school district.
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> . . . .
>
> The instant case calls up haunting memories of the now long overruled and discredited "separate but equal doctrine" of *Plessy v. Ferguson*, 163 U.S. 537 (1896). If we hold that school district boundaries are absolute barriers to a Detroit school desegregation plan, we would be opening a new way to nullify *Brown v. Board of Education* which overruled *Plessy* . . . .[90]

The Sixth Circuit relied instead on the large amount of state control and influence over the educational system[91] and on two recent Supreme Court cases[92] holding that school boundary lines could not be altered or new school systems created where the result would be a larger racial imbalance in school systems in which all vestiges of state enforced segre-

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[87]347 U.S. at 493.

[88]Nos. 72-1809—72-1814 (6th Cir. Dec. 8, 1972), *rehearing granted. See also* Keyes v. School Dist., 445 F.2d 990 (10th Cir.), *cert. granted*, 404 U.S. 1036 (1972); United States v. School Dist. 151, 404 F.2d 1125, 1132-34 (7th Cir. 1968), *modified*, 432 F.2d 1147 (1970), *cert. denied*, 402 U.S. 943 (1971).

[89]Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971).

[90]Nos. 72-1809—72-1814 at 57, 65.

[91]*Id.* at 41-49.

[92]United States v. Board of Educ., 407 U.S. 484 (1972); Wright v. City of Emporia, 407 U.S. 451 (1972).

gation had not been eliminated.[93] Consequently, the Sixth Circuit reasoned that if "school boundary lines cannot be changed for an unconstitutional purpose, it follows logically that existing boundary lines cannot be frozen for an unconstitutional purpose."[94] Thus, it would appear that in situations wherea dual school system exists, state-created political boundary lines are not to be immovable barriers to the framing of a particular remedy.

In *Bradley*, however, the district court not only ignored the boundary lines in framing a remedy, but also ignored them in making the determination that a dual school system existed. The district court's consolidation order was in large part based on the premise that these three political subdivisions were only a single demographic entity, or unit of equality, and within that unit there was a dual school system.

The Fourth Circuit, on the other hand, may have never grasped the central idea of the district court's opinion that for the purposes of school desegregation the entire metropolitan area constituted one unit. The great reliance the Fourth Circuit placed on the lack of complicity and interaction between the subdivisions seems to point to the conclusion that the court never addressed itself to the unit of equality idea. Consequently, the Fourth Circuit actually did not deal with the same issue as did the district court; the district court's findings of fact and decision had a completely different frame of reference from that of the Fourth Circuit's opinion.

An examination of *Bradley* in terms of the unit of equality concept reveals interesting differences in the efforts of the courts to conceptualize the contemporary school desegregation issues. As indicated at the outset, the concept is of very recent origin and it seems reasonable to conclude that further clarification is required if it is to serve as a useful doctrinal reference. Whether that clarification will be forthcoming, or whether the concept will be laid to rest at its early stages, should be one of the questions answered when the Supreme Court decides the *Bradley* case in the coming months.

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[93]Nos. 72-1809—72-1814 at 66.

[94]*Id.* at 67.