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# The use of court-ordered busing to desegregate the public schools: Legal aspects of actions by the United States Supreme Court

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# THE USE OF COURT-ORDERED BUSING TO DESEGREGATE THE PUBLIC SCHOOLS: LEGAL ASPECTS OF ACTIONS BY THE UNITED STATES SUPREME COURT

by

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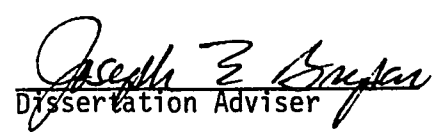

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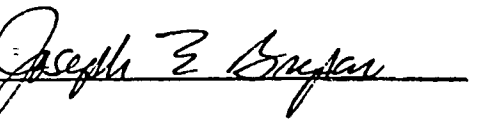
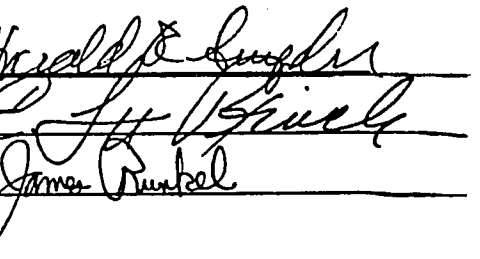
Dissertation Adviser 

Committee Members 

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The purpose of this study was to present a historical perspective and legal basis for court-ordered busing to desegregate the public schools. The study examined pertinent Supreme Court decisions which dealt with de jure and de facto segregated school systems as well as the possibility of a limited return to neighborhood schools. Emphasis was placed on the evolution of decisions of the United States Supreme Court as those decisions mirrored attitudinal and societal changes in America.

The findings of this study were: (1) the United States Supreme Court has consistently ruled against any school system in which de jure segregation has been found to exist, (2) in de facto segregation cases the Supreme Court required some busing as a punitive remedy, (3) if the Court found that an "intent" to segregate was present in a school system the "extent" of the remedy imposed by the Court often included extensive busing, (4) if a school system has been declared unitary its only responsibility is then to avoid illegal segregation, and (5) there is a trend for the Supreme Court to allow a return to neighborhood schools under proper circumstances.

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TABLE OF CONTENTS

Page

CHAPTER

# CHAPTER I

# INTRODUCTION



## 1.0. Overview

A review of court cases decided by the United States Supreme Court since 1954 establishes the fact that the use of court-ordered busing to desegregate the public schools is a real and present dilemma for many school systems today. A new chapter--perhaps the last one--in the troubled history of court-ordered busing has begun. Controversial and sometimes violent from the start, court-ordered busing was a pragmatic remedy for a shameful history of legally segregated public schools.[1] Children have the right to attend a school system that is free from illegal segregation, but that fact does not mean that they

[1]Aric Press and Ann McDaniel, "Busing: The Next Phase," Newsweek, November 17, 1986, p. 60.

have a right to attend racially balanced schools.[2] The Supreme Court has stated that there is no substantive constitutional right to any particular degree of racial balance or mixing.[3] Racial imbalance is unconstitutional only when and to the extent that it is caused by governmental actions taken for the purpose of separating students by race.[4] There have been many cases in which school districts were guilty of illegal separation of students by race. But at what point may a district stop trying to erase the sins of its forebears? The Supreme Court has never specified how or when integration plans may end.[5]

A review of judicial decisions, especially decisions of the United States Supreme Court, can help school administrators and school board members understand the complexity of the busing issue and the school district's responsibility for dismantling a dual system. It is also important that school decision-makers understand that they may be required to adopt a busing program as one tool of desegregation. Even more difficult for school administrators and school board members to understand is the fact that while attempting to move to a unitary school system, it is very difficult to make every school in a

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[2]Laurie Mesibov, "Busing in Unitary School Districts: A Board's Right to Modify the Plan," School Law Bulletin, Fall 1986, p. 22.

[3]Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24 (1971).

[4]Mesibov, "Busing," p. 22.

[5]Press and McDaniel, "Next Phase," p. 60.

community reflect the racial composition of the school system as a whole. The difficulty in achieving a system-wide racial balance leads to schools that are all or predominantly one race and that will be closely scrutinized to determine whether assignments to those schools are part of state-enforced segregation. School officials must be prepared to show that actions increasing or continuing the effects of a dual system serve important and legitimate ends.[6]

## 1.1. Significance of Study

Resistance to desegregation as a link in the move toward integration did not commence in 1954 with the Brown I decision, but has been evident throughout American history. When the Supreme Court ruled that racial segregation of school children was unconstitutional,[7] the public schools did not change overnight. Generations of attitudes and opposition to desegregation could not be washed away "with all deliberate speed" as directed by the 1955 Brown II decision.[8]

During the years following Brown II, the Supreme Court refrained from active involvement in the desegregation process. The Court relied on public school officials in the first instance and

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[6]Mesibov, "Busing," p. 22.

[7]Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[8]Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).

then, if necessary, on lower courts to bring about school desegregation.[9] Concerned with the slow progress being made, the Court, on May 27, 1968, rendered its Green v. County School Board[10] decision, and a new era in school desegregation began. This ruling ended the "freedom of choice" options that so many school systems in the South had used to implement desegregation and revealed the impatience of the justices at the slow speed with which school systems were being integrated.

The Court did not rule in Green that "freedom of choice" plans were unconstitutional; it stated, however, that "the burden on a school board is to come forward with a plan that promises realistically to work now."[11] The Court said that if there were other reasonable ways to bring about school desegregation then freedom of choice was unacceptable.

Methods of desegregation became an issue again in Swann v. Charlotte-Mecklenburg Board of Education,[12] which became known as the first busing case. Busing had been the mechanism for more equitable educational opportunity for millions of school children across the

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[9]Perry A. Zirkel, A Digest of Supreme Court Decisions Affecting Education (Bloomington, Indiana: Phi Delta Kappa, 1978), p. 74.

[10]Green v. County School Board of New Kent County, Virginia, 391 U.S. 430 (1968).

[11]Ibid.

[12]Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

country. Furthermore, children had been bused long distances for decades to perpetuate segregation. But when transportation for desegregation was decreed, busing suddenly became a national issue.[13]

While Swann can be viewed as being representative of de jure cases, the Supreme Court's involvement with a de facto segregated school system came about in 1973 in Keyes v. School District No. 1, Denver, Colorado.[14] The Court declared that "where no statutory dual system ever existed, plaintiffs must prove that it was brought about or maintained by intentional state action."[15] The plaintiffs in this case had proven this, and the Court ordered that desegregation proceed.

The Keyes decision meant that many northern and western school systems, guilty of such practices as altering school zones to maintain segregation, setting up segregative feeder systems, and assigning staff on a racially discriminatory basis, would have to correct these violations of constitutional rights. But evidence of such violations had to be presented on a case-by-case basis.

Busing was the primary tool of the district courts in public school desegregation. As desegregation was achieved in the South, and

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[13]U.S. Commission on Civil Rights, Fulfilling the Letter and Spirit of the Law: Desegregation of the Nation's Public Schools (Washington, D.C.: U.S. Government Printing Office, 1976), p. 5.

[14]Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973).

[15]Ibid., p. 194.

as de facto segregation was slowly addressed in the North and West, the Court became somewhat more tolerant of an all-white or all-black school if the situation resulted from housing patterns that were not influenced by public officials. This movement was evidenced in the 1974 Milliken decision.[16] Later, the Court ordered extensive busing only if it were proven that public authorities intended to promote segregation.[17]

The Supreme Court has declined to resolve a major split between two 1986 federal appeals courts over the constitutionality of school districts' plans to abandon court-ordered student busing and return to neighborhood schools.[18] The Court refused to consider the appeals of Riddick v. School Board of Norfolk,[19] and Board of Education of Oklahoma City Public Schools v. Dowell.[20] In Riddick the Court of Appeals for the Fourth Circuit held that black plaintiffs challenging a school board's decision to stop busing elementary students (in order to prevent "white flight") must prove that the school board acted with "intent" to reestablish racial segregation. The Court of

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[16]Milliken, Governor of Michigan v. Bradley, 418 U.S. 717 (1974).

[17]Austin Independent School District v. United States, 429 U.S. 991 (1976).

[18]Tom Mirga, "Justices Decline to Review Cases on Desegregation," Education Week, November 12, 1986, p. 1.

[19]Riddick v. School Board of Norfolk, 784 F. 2d 521 (4th Cir. 1986).

[20]Board of Education of Oklahoma City Public Schools v. Dowell, 795 F. 2d 1516 (10th Cir. 1986).

Appeals for the Tenth Circuit in Dowell, however, disapproved a similar school board initiative and insisted the inquiry was not whether stopping busing would create racial imbalance in the school district.[21] Thus, the Supreme Court failed to reach a conclusion on one of the last major unsettled issues of school-desegreation law: Must formerly segregated districts continue to bus students indefinitely, even though they have complied fully with court orders and are now considered "unitary?"

This study is significant for school boards and school administrators in that it provides a comprehensive analysis of the legal aspects of busing for public school desegregation. It offers historical perspectives and legal guidelines in making decisions concerning student assignment policies. The study provides direction to school districts now under court-ordered busing plans who may be considering a return to neighborhood schools.

## 1.2. Purpose of Study

The purpose of this study is to present a historical perspective and legal basis for Supreme Court-ordered busing to desegregate the public schools. It will be necessary to examine pertinent court decisions which deal with both de jure and de facto segregated school

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[21] "Conflicting Desegregation Rulings Upheld," Legal Notes for Education, December 1986, p. 8.

districts. The following questions are of primary concern as this study is conducted:

1. How has the Supreme Court ruled on the legality of busing involving de jure segregated school systems from Brown (1954) to 1988?
2. How has the Supreme Court ruled on the legality of busing involving de facto segregated school systems from Brown (1954) to 1988?
3. How has the United States Supreme Court ruled in cases where the intent to segregate by school officials was proven?
4. How has the Supreme Court ruled on the legality of busing in school systems that have achieved unitary status but have since undergone resegregation?
5. Are there specific trends to be determined from analysis of court cases?

## 1.3. Methodology

The basic methodology for this historical research study reviewed and analyzed the available references concerning the legal aspects of busing for the purpose of desegregation of the public schools in the United States.

In order to determine whether a need existed for such research, the investigator undertook a search of Dissertation Abstracts for related topics. This investigation indicated a vacuum in the research. This finding led the investigator to proceed with the study. A

computer search from the Educational Resource Information Center (ERIC) was also completed to determine related dissertation topics. Journal articles related to the topic were located through use of such sources as Reader's Guide to Periodical Literature, Education Index, Index to Legal Periodicals, and the Legal Resource Index.

General research summaries were found in the Encyclopedia of Educational Research, various books and guides to school law, and in a review of related literature obtained through a computer search from Educational Resource Information Center (ERIC).

Federal court cases related to the topic were located through use of the Corpus Juris Secundum, American Jurisprudence, the National Reporter System, American Digest System, and Shephard's Citations. Recent court cases were found by examining case summaries contained in issues of the NOLPE School Law Reporter. All of the cases were reviewed and placed in categories corresponding to issues noted from the review of literature.

## 1.4. Delimitations

This study was limited to questions regarding the legal aspects of busing for desegregation as viewed and decided by the United States Supreme Court. Because this study was factual in theme and legal in nature, the study did not address such areas as (1) society, (2) politics, (3) religion, and (4) economics. The study did not touch on these areas because of the nature of judicial investigation. Although the writer recognized the importance of these areas to a complete study of busing, such research was beyond the practical limitations of this one study.

Since the ultimate decisions concern ing the legality of busing for desegregation lay within the final power of the United States Supreme Court, the primary source for research was an analysis of United States Supreme Court cases. This study necessarily included all significant United States Supreme Court cases relating to integration as a prelude to busing. The study also included other actions of the United States Supreme Court, even though those actions may have not been official decisions of the Court. Litigation began with Plessy in 1896, proceeded through Brown in 1954, through the study of Dayton in 1977, and ended with the study of Riddick and Dowell in 1986. This study was limited to the United States Supreme Court decisions and actions as of January 1, 1988. This review of such literature provided a setting in which to place present day questions concerning busing.

An examination of such landmark cases as Green and Swann, for example, gave rise to the understanding of the Court's guidelines on such landmark cases. The limitations of this study should produce a more meaningful document to school administrators and school board members.

## 1.5. Coverage and Organization of Issues Involved

This is a historical study limited to the questions which address the legal aspects of busing for desegregation of the public schools. This study made use of selected court cases having to do with integration, in general, and busing, in particular. Utilization was made of books, articles, digests of Supreme Court decisions,

previous dissertation studies, and reports of the United States Commission on Civil Rights in the effort to answer the questions in this study.

Chapter II contains a review of literature related to the history of school desegregation. This review covers the period of time through the Brown decisions of 1954 and 1955. An in-depth study is made of segregation as it existed prior to the landmark Brown decisions.

Chapter III contains information on the legal aspects of busing for school desegretation. It describes the transition of the Supreme Court's philosophy from the prohibition of a segregated school system as in Brown I, to the Court ordered busing in Swann of de jure systems, through Court efforts against de facto segregated systems in Keyes, through recent court decisions which allow for relief of mandatory busing where segregation has been achieved.

Chapter IV will analyze significant court cases in order to provide understanding of the legal aspects of busing for desegregation. Facts of the cases, decisions of the courts, and discussion of the cases are presented for each category.

The concluding Chapter V of the study contains a summary of the information obtained from review of the literature and from analysis of selected court cases. The questions asked in the introductory part of the study are reviewed and answered. The conclusions draw together the most important legal points of busing litigation. Recommendations will be given that will help school administrators

and school boards better understand the complexity of the busing issue and serve as a guide in any decision-making activity involving busing for desegregation purposes.

## 1.6. Definition of Terms

For the purpose of this study, the following selected terms are defined:

Action. Court proceeding, a suit.

Appellant. A court or agency that has review power.

Concurring Opinion. The opinion of one of several judges which is in agreement with the majority yet for reasons other than those of the majority.

Consitutional Rule. A law deriving from the constitution or authoritative document of a nation or body of people.

Court. The term Court is capitalized when it refers to the United States Supreme Court.

De Facto. Existin g in actual fact, regardless of legal establishment of recognition.

Defendant. In a court action, one who defends the propriety of his acts and against whom relief is brought.

De Jure. Within the law; according to legal establishment as distinguished from actual fact.

Desegregate. To free of any law, provision, or practice requiring isolation of the members of a particular race in separate units.

Dissenting Opinion. The differing opinion from the majority opinion of a judge sitting on a panel.

En Banc. The federal judges of one circuit sitting as a complete panel or court.

Enjoin. To order or prohibit action.

Injunction. Judicial order that restrains a person or agency from a certain course of action.

Integration. The incorporation as equals into society or an organization of individuals of different groups (as races).

Litigation. The legal proceedings by which a lawsuit is settled.

Plaintiff. One who files a lawsuit.

Remand. The returning of a court case from a superior court to a lower court.

Segregation. The separation or isolation of a race, class, or ethnic group by enforced or voluntary residence in a restricted area, by barriers to social intercourse, by separate educational facilities, or by other discriminatory means.

Vacate. To make void or to annul a lower court's decision by action of a superior court.

Writ of Certiorari. A court order that a higher court issues to a lower court requesting that court records be sent to the higher count for review.

# CHAPTER II

# A REVIEW OF THE LITERATURE PRIOR TO BUSING FOR PUBLIC SCHOOL DESEGREGATION



## 2.0. Introduction

On July 10, 1776 the Declaration of Independence was published in the Pennsylvania Gazette. In that same issue an advertisement also appeared offering a black slave for sale.[22] Thus America was born over 200 years ago with a serious flaw. The Constitution itself was evidence of this flaw as it, in the first article, apportioned representatives according to the free population and "three-fifths of all other Persons."[23]

President Abraham Lincoln, on September 22, 1962 announced that on the first of the following January "all persons held as slaves within any state or designated part of a state . . . shall be then,

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[22]Pensylvania Gazette, No. 2481, July 10, 1776, p. 4.

[23]U.S. Commission on Civil Rights, Fulfilling the Letter and Spirit of the Law: Desegregation of the Nation's Public Schools, p. 1.

thence forward and forever free," and that on that day he would, by proclamation "designate that the states and parts thereof" which continued to hold slaves would be in "rebellion aginst the United States."[24] President Lincoln then issued the Emancipation Proclamation on January 1, 1863.[25]

The United States Supreme Court's Brown I decision in 1954 changed the social fabric of America. Chief Justice Earl Warren of the United States Supreme Court stated:

> We conclude that in the field of public education the doctrine of "separate-but-equal" has no place. Separate educational facilities are inherently unequal.[26]

At the time that Brown I was handed down seventeen states actually practiced segregation as was required by state constitutional or statutory law. The states were Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. The four additional states that permitted segregation were Arizona, Kansas, New Mexico, and Wyoming.[27]

The period of time between 1776, when the Declaration of Independence was published, and 1954, when the Brown I decision was

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[24]The Lincoln Library, 31st ed. (Buffalo, N.Y.: The Frontier Press Co., 1868), p. 400.

[25]Enamcipation Proclamation, 12 Stat. 1268 (1863).

[26]Brown v. Board of Education of Topeka, 347 U.S. 495 (1954).

[27]"High Court Bans School Segregation; 9-to-0 Decision Grants Time to Comply," The New York Times, May 18, 1954, p. 14.

handed down by the Supreme Court, was filled with opposition to desegregation. This was true of all aspects of daily life in the United States, including public schools. America simply could not quickly erase the deep imprint of almost a century of legal slavery and the racial prejudice that was a result of that legal system of slavery.

A complete review of literature pertaining to desegregation is unnecessary and impractical for this study. However, an historical perspective is presented in this chapter to give the reader an overview and understanding of this important subject. This background will help to understand what our nation faced as the attempt was made to desegregate the public schools.

## 2.1. Legal Racial Discrimination

A resolution for a Thirteenth Amendment to the Constitution was received by the United States House of Representatives in December 1863. This amendment would prohibit slavery within the United States or any place subject to its jurisdiction. The Thirteenth Amendment was ratified in January 1865 and slavery was officially abolished in the United States.[28]

In taking a historical view of segregation two early legislative documents are important. The Civil Rights Act of 1866 and the Fourteenth Amendment, ratified in 1868, were concerned with the rights of every man and yet seemed to provide the opportunity for a

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[28]U.S., Constitution, amend. XIII, sec. 1.

dual school system of education for blacks and whites throughout the South.

The Civil Rights Act of 1866 was enacted to protect the newly freed blacks from the Black Codes and other repressive laws. The statute stated:

> There shall be no discrimination in the Civil Rights of Immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous conditions of slavery . . . .[29]

In 1868 the Congress of the United States adopted the Fourteenth Amendment which provided blacks with citizenship and guaranteed them equal protection of the laws.[30] This equal protection of the laws also gave cause for intervention by the federal government where violations of individual constitutional rights were proven.

Section 1 of the Fourteenth Amendment was very precise in restriction of states enacting laws that limited the rights of citizens:

> Section 1. 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 any person within its jurisdiction the equal protection of the laws.[31]

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[29] Civil Rights Act of April 9, 1866, 14 Stat. 27.

[30] U.S., Constitution, amend, XIV, sec. 1.

[31] Ibid.

If the Fourteenth Amendment prevented states fron enacting legislation that abridged the rights of blacks, how then were states able to enact laws which clearly discriminated against blacks in almost every area of life, including separate schools? The answer to that question lies in the atmosphere of the time.

While the Fourteenth Amendment was being debated in the United States House of Representatives, the Senate passed "an act donating certain lots in the city of Washington for schools for colored children in the District of Columbia." The legislation also provided funds for equitable apportionment of school funds to schools for black children.[32]

During debate in the United States Senate on the Fourteenth Amendment concern was expressed that the amendment would end segregation in the schools. The bill's patron, Senator Lyman Trumball of Illinois, assured the Senate that the act affected only civil rights. The chairman of the Judiciary Committee stated, in opening debate, ". . . nor do they mean that their children shall attend the same schools."[33]

Southern states wasted little time in moving to enact legislation that established separate schools for blacks and whites. Alabama's law illustrates the action taken by the states in the

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[32]U.S. Congress, Senate, A Question of Intent, David J. Moys, Subcommittee on Constitutional Amendments, May 14, 1959, p. 2.

[33]Ibid., p. 2, Note 5.

South. It stated:

> The General Assembly shall establish, organize, and maintain a system of public schools in the state, for the equal benefit of the children, thereof, between the ages of seven and twenty-one; but separate schools shall be provided for the children of African descent.[34]

The social attitude of the people of the United States was reflected in the legislation that was enacted. John Dollard stated that "caste replaced slavery as a means of maintaining the essence of the old status order in the South."[35] The laws, during this time period, were not without challenge. From 1865 to 1935 the school segregation laws were challenged thirty-seven times. In each case, however, the courts upheld the separate schools. Only nine of these cases proved partially successful. The courts most often found that inequality had not been proven.[36] Only two cases were heard by the Supreme Court during some fifty years of de jure segregation.[37]

Why were the laws not successfully challenged in the courts? Again, the atmosphere of the time must be considered. Gunner Myrdal

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[34]John Dollard, Caste and Class in a Southern Town (New Haven: Yale University Press, 1937), p. 61.

[35]Ibid., p. 62.

[36]Richard Bardolph, The Civil Rights Record (New York: Thomas Y. Crowell Company, Inc., 1970), p. 216.

[37]H.C. Hudgins, Jr., The Warren Court and Its Public Schools (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1970), p. 76.

in An American Dilemma states the reasoning as:

> It is generally held that the Supreme Court acted in agreement with, and actually expressed what was then the general sentiment even in the North. The North had gotten tired of the Negro problem and, anyhow, saw no immediate alternative other than to let the white Southerners have their own way with the Negroes. But it must not be forgotten that the decisions of the Court had themselves a substantial share in the responsibility for the solidification of Northern apathy.[38]

Congress addressed the disintegrating rights of the black man in the Civil Rights Acts of 1870 and 1871, the latter known as the Ku Klux Klan Act. Both statutes sought to protect the black man's vote and his person from private as well as public intimidation.[39] The Civil Rights Act of 1871 specifically provided heavy penalties for any person who "under color of any law, statute, ordinance, custom, or usage of any State," deprived any person of rights secured by the Constitution.[40] The Civil Rights Act of 1875 sought to protect the black man against assaults on his dignity as well as his person. It was a law ahead of its time, a forerunner in concept to the public accommodations section of the 1964 Civil Rights Act. Section 1 of the 1875 Act provided simply that blacks should have access with whites to inns, theaters, and public transportation.[41] The act was

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[38]Gunnar Myrdal, An American Dilemma (New York: Harper and Row Publisher, 1962), p. 516.

[39]J. Harvie Wilkinson, III, From Brown to Bakke (New York: Oxford University Press, 1979), p. 15.

[40]Third Enforcement Act of April 20, 1871, 17 Stat. 13 (also known as Civil Rights Act of 1871).

[41]Wilkinson, From Brown to Bakke, p. 16.

designed to protect the civil and legal rights of blacks in that it sought social, as well as political, equality for Southern blacks. In part, the act stated:

> Be it enacted, that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color regardless of any previous conditions of servitude.[42]

But the Supreme Court found this law unconstitutional in the Civil Rights Cases[43] of 1883. Discrimination by owners of theaters, hotels, and the like was a private matter, held the Court, and not at all the business of the Fourteenth Amendment.[44]

This ruling by the Supreme Court, in effect, said that the black man was no longer to be protected and looked after. It was high time, the Court now announced, for the black man to make his own way. In the decision, the Court stated:

> When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseperable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . ."[45]

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[42]Harry A. Ploski and Ernest Kaiser, The Negro Almanac (New York: Bellwether Publishing Co., Inc., 1971), p. 132.

[43]Civil Rights Cases, 109 U.S. 3 (1883).

[44]Ibid.

[45]Ibid.

In spite of the Thirteenth Amendment and the Fourteenth Amendment, the period of 1880 through the early 1900s saw the enactment of many state laws directed toward segregation of the black race. These laws were referred to as "Jim Crow" laws.[46] According to C. Vann Woodward, the term "Jim Crow" came into use in the late 1800s and possibly referred to a song and dance called "Jim Crow" which was written by Thomas C. Rice. Although the origin of the term "Jim Crow" is uncertain, the meaning of the term was quite clear.[47] In reference to "Jim Crow" practices Woodward stated:

> That code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism eventually extended to virtually all forms of public transportation, to sports and recreation, to hospitals, orphanages, prisons and asylums, and ultimately to funeral homes, morgues, and cemeteries.[48]

The states of Virginia and North Carolina enacted legislation that forbade all fraternal organizations that permitted members of different races to address each other as "brother." Alabama adopted a law prohibiting white female nurses from attending black male patients. A New Orleans ordinance segregated white and black prostitutes in separate districts. A Birmingham ordinance made it unlawful for a black person and a white person to play together at

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[46]C. Vann Woodward, The Strange Career of Jim Crow (New York: Oxford University Press, 1968), p. 7.

[47]Alan Barth, Prophets With Honor, First Vintage Books Edition (New York: Random House, Inc., 1974), p. 26.

[48]Woodward, The Strange Career of Jim Crow, p. 7.

games of dominoes or checkers, or even to be in each other's company. Oklahoma banned any companionship between the races while boating or fishing.[49]

As early as 1849 there existed in the North an attitude of separate schools for black children. Such laws in some Northern and Western states were changed after the 1860s.[50] The issue of segregated schools in the North arose in an early case that questioned whether a general school committee could exclude a black child from attending a school nearest the child's home when a special school was available for black children.

Sarah C. Roberts v. The City of Boston was concerned with a five-year-old black child in Boston who applied for a change to a school near her home. Admission was denied because the girl was balck and because of a special provision set up for certain schools for black students.[51]

The plaintiff had applied for admission to the primary school nearest her home, but the application had been rejected. Earlier the girl had petitioned the general primary school which referred the case to the district committee. The district committee denied permission to attend the school. The plaintiff, Sarah Roberts, then

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[49]Barth, Prophets With Honor, p. 26.

[50]Robert M. Stockard, The United States Supreme Court and the Legal Aspects of Busing for Public School Desegregation (Ed.D. Dissertation, University of North Carolina at Greensboro, 1978), p. 15.

[51]Sarah C. Roberts v. The City of Boston, 59 Massachusetts (5 Cushing) 198 (1849).

went directly to the school where she was rejected by the teacher.[52] The plaintiff sought a court order that would compel the defendant school board to pay damages under a statute that stated a qualified child could not lawfully be excluded from public school instruction.[53]

Both the trial court and the appellate court held in favor of the defendant school board. The ruling held that the child was not excluded from school, and instruction was not denied to the student. In fact, it was held that her father had denied Sarah Roberts' admission by not applying at the school provided.[54]

From the time of the Roberts case to the Brown I decision, the doctrine of separate facilities was considered common law. School boards had a constitutional right to provide separate schools for the instruction of black children and to prevent attendance in any other public school in the same school district. The 1954 Brown I decision overturned this concept when the Supreme Court held that "separate but equal" facilities were unequal as well as unconstitutional.

During the period following the Civil War, known as the period of Reconstruction, Southern states were permitted to maintain separate schools for the races. The challenge to separateness came

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[52]Chester M. Nolte, School Law in Action, 101 Key Decisions With Guidelines for School Administrators (West Nyack, N.Y.: Parker Publishing Co., Inc., 1971), p. 30.

[53]Ibid., p. 31.

[54]Ibid.

from states other than those in the South. These cases brought approval of the segregated school, and no case was found otherwise in the United States Supreme Court.[55]

The South suddenly found itself left to pursue its own way with blacks. Taking advantage of this situation, Southern states began in 1887 to enact rigid laws which established racial separation. One such early law, a Louisiana statute of 1890 requiring "equal but separate accommodations for black and white railway passengers," was at issue in Plessy v. Ferguson.[56]

The New Orleans black aristocracy was mindful and resentful of the natural anti-black feeling of the 1880s. The Louisiana statute concerning separation of the races on railroads was particularly distasteful to blacks. The black leaders of New Orleans determined to test the constitutionality of the law. Homer Plessy was sent to buy a first-class ticket on the East Louisiana Railway. The ticket placed the passenger in a first-class coach from New Orleans to Covington, Louisiana.[57]

Homer Plessy, the man who would be removed from the railroad car, appeared to be white. He was an octoroon, the offspring of a white and a quadroon. Plessy was only one-eighth black; only one of his great-grandparents had been black. For some, however, that was one great-grandparent too many. "One drop of Negro blood makes a

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[55]Bardolph, The Civil Rights Record, p. 90.

[56]Plessy v. Ferguson, 163 U.S. 537 (1896).

[57]Ibid., p. 541.

Negro," a character in a best-selling novel of the day exclaimed. "It kinks the hair, flattens the nose, thickens the lips, puts out the light of intellect and lights the fires of brutal passion . . . ."[58]

On June 7, 1892, Homer Plessy presented a first-class ticket and boarded the train. He was seated in an orderly fashion in the first-class car reserved for white passengers. The conductor asked Plessy to move to the car entitled "colored." Plessy refused and was arrested by Detective Christopher C. Cain. Plessy was charged with a violation of Louisiana statute. Plessy's friends formed a group called the Citizens Committee to Test the Constitutionality of the Separate Car Law and provided him with legal representation.[59]

A plea for Plessy was entered in the Criminal District Court for the Parish of New Orleans. Argument stated that the law Plessy was charged under was "null and void" and conflicted with the Constitution of the United States. The court ruled against Plessy, but a hearing was held on a writ of prohibition and certiorari in November, 1892 in the State Supreme Court. At a later hearing, Plessy was granted a writ of error that allowed him to seek redress before the Supreme Court of the United States.[60]

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[58]Wilkinson, From Brown to Bakke, p. 18.

[59]John A. Garraty, Quarrels That Have Shaped the Constitution (New York: Harper and Row, Publisher, 1964), p. 150.

[60]Ibid., p. 151.

On May 18, 1896 Associate Justice Henry Brown delivered the opinion of the Court:

> We consider the underlying fallacy of the plaintiff's argument (that separate but equal facilities for black and white passengers was psychologically damaging to Negroes) to consist in the assumption that enforced separation of the two races stamp the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chose to put that construction upon it.[61]

So the doctrine of "separate but equal" was upheld by the United States Supreme Court. During the next fifty-eight years this doctrine was cited in most civil rights cases. The Plessy doctrine applied to almost every phase of life, including education, even though Plessy was concerned with transportation.[62]

Three years after the Plessy decision, in 1899, a United States Supreme Court decision was handed down in the case of Cumming v. Board of Education.[63] This case specifically involved public schools. The issue in Cumming was to decide whether the only black high school in the school system, which enrolled sixty students, could be constitutionally closed in order to convert to a three-hundred student elementary school, while at the same time continuing to maintain the white high school. The black high school was not to be opened at that time due to a lack of school funding. The injunction filed by the

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[61]Plessy v. Ferguson, 163 U.S. 558 (1896).

[62]Stockard, The United States Supreme Court and the Legal Aspects of Busing for Public School Desegregation, p. 23.

[63]Cumming v. Board of Education of Richmond County, 175 U.S. 528, Ga. (1899).

blacks stated that an inequality existed because of the county's failure to provide a high school for blacks while white students were furnished with a high school. In argument, the attorneys for the blacks debated that separate schools were unconstitutional.[64]

The Court was unanimous in refusing relief and found no evidence of racial discrimination. The Justices also held that the relief requested was improper in that closing the white high school would not remedy the wrong suffered by the blacks. The Court held that because it would be "only tyranny" and because of economic conditions, black students were not deprived of their constitutional rights.[65] The "separate but equal" doctrine had been upheld and fully applied to the nation's schools.

In time the word equal became forgotten. Signs of inequality sprouted everywhere. A water fountain located in a park happened not to work; at the back of the restaurant was the black carry-out line; in the theater was the Jim Crow balcony.

In schools, especially, inequalities were evident.[66] In the early 1930s in Randolph County, Georgia, $36.66 was expended annually for the education of each white child, while only 43 cents was spent on each black child.[67] Russell County, Alabama, spent

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[64]Ibid., p. 531.

[65]Ibid., p. 531.

[66]Wilkinson, From Brown to Bakke, p. 19.

[67]Charles S. Johnson, Statistical Atlas of Southern Counties (Chapel Hill: University of North Carolina, 1941), p. 107.

$45.74 per white child each year and only $2.55 per black child.[68] In Upson County, Georgia, for every $1.00 of declared value of black schools, white schools were valued at $2,055.[69] In 1944 the South as a whole spent almost three times as much per white pupil as per black pupil; Georgia and Mississippi spent five times as much.[70]

It was in 1938 that the nation began the long road to equality of educational opportunity. In that year, the Supreme Court embarked on a series of decisions attempting to enforce the "separate but equal" doctrine. These decisions, known as the university school cases, ultimately led to the rejection of that doctrine.

## 2.2 The University School Cases

The National Association for the Advancement of Colored People began in the mid 1930s a legal assault on racial discrimination in the schools. Their plan was to attack the reluctance of Southern states to admit blacks to graduate professional schools such as state university law schools. The NAACP based its strategy on the premise that the Southern states had made no attempt to maintain equality in the professional schools. Thus "separate but equal" did not exist. Even if Southern states had tried to provide equal facilities for the graduate level education of blacks, the expense would have been prohibitive.[71]

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[68] Ibid., p. 52.

[69] Ibid., p. 111.

[70] Wilkinson, From Brown to Bakke, p. 19

[71] Stockard, The United States Supreme Court and the Legal Aspects of Busing for Public School Desegregation, p. 29.

The plan to attack segregation in Southern universities began slowly but later paid outstanding dividends. In the mid 1930s all Southern states and nearly half the United States still either required or permitted segregation in schools.[72] Few people doubted that black children were denied educational opportunities equal to that of white children.[73] Yet, the record of federal cases showed no serious breach in the color line as far as federal court decisions were concerned, until the Gaines case of 1938.[74]

In Gaines v. Canada, Registrar of the University of Missouri,[75] a black student sought entry to law school within his home state. He was denied admittance to the all-white University of Missouri Law School. The state in turn offered to pay his tuition at an out-of-state institution since Missouri provided no law school for blacks. The Court held this offer to be

> a denial of the equality of legal right to the enjoyment of the privilege which the state has set up . . . the provision for the payment of tuition fees in another state does not remove the discrimination.[76]

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[72] Garraty, Quarrels That Have Shaped the Constitution, p. 254.

[73] Hudgins, The Warren Court, p. 73.

[74] Gaines v. Canada, Registrar of the University of Missouri, 305 U.S. 337 (1938).

[75] Ibid.

[76] Ibid., p. 349.

The Court's decision actually, in effect, affirmed the "separate but equal" doctrine, even for law schools. The only obligation the state had was to furnish facilities within its borders for "legal education substantially equal to those which the State afforded for persons of the white race."[77]

The state of Missouri did erect a separate law school for black students; thus the principle of "separate but equal" was left unimpaired.[78] However, Gaines was a case wherein the Court considered the "equal" part of the separation principle. The Justices recognized the advantages of studying law in the state where people lived and expected to practice. The Court's decision was that a state was required to allow blacks to be admitted at the state university if equal educational facilities were not available. In Missouri this decision had the effect of establishing a separate graduate school for blacks.

In 1948 another black applicant asserted that she was entitled to a legal education at the University of Oklahoma Law School. The state contended that local law allowed for the provision of a separate law school for blacks upon demand or notice and that the applicant had not sought such relief. In Sipuel v. University of Oklahoma[79] the Supreme Court recognized that the plaintiff could not

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[77]Ibid., p. 351.

[78]Bardolph, The Civil Rights Record, p. 271.

[79]Sipuel v. University of Oklahoma, 332 U.S. 631 (1948).

be expected to wait for construction of a law school before completing her education. The Court stated:

> The petitioner is entitled to secure legal education afforded by a State institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group.[80]

Oklahoma tried another tactic with a black student admitted to a state university graduate school. Under a new state law, the student was provided an education on a segregated basis. He sat in a section of the classroom surrounded by a rail with a sign reading "Reserved for Colored." He was assigned one desk in the library and prohibited from using any other. He was required to eat in the cafeteria at a different time from all other students.

This arrangement did not satisfy the Court. It ruled in McLaurin v. Oklahoma State Regents[81] that:

> apart from the other students. The result is that the appellant is handicapped in his pursuit of effective graduate instruction. There is a vast difference - a Constitutional difference - between restrictions imposed by the State which prohibit the commingling of students, and the refusal of individuals to commingle where the State presents no such bar.[82]

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[80]Ibid., pp. 632-33.

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

[82]Ibid., p. 641.

The Court ruled that "state imposed restrictions which produce such inequalities cannot be sustained."[83] The Court concluded that conditions under which this appellant was required to receive his education deprived the man of "personal and present right to equal protection of the laws."[84] Thus the Supreme Court refused to uphold laws that separated the races for educational purposes.

In 1950, on the same day the McLaurin decision was handed down, the Court decided in Sweatt v. Painter[85] that a new separate law school for blacks operated by the state of Texas could not provide equal protection of the laws. The state of Texas had tried to circumvent the equal protection questions by hastily setting up a separate law school for blacks in the basement of a building located in Austin near the capitol. Meantime, Herman Sweatt was denied admission to the University of Texas on the grounds that "separate but equal" was indeed the law of Texas. The University was restricted to admit white students in accordance with Texas state law.[86]

The United States Supreme Court, in a decision written by Chief Justice Frederick M. Vinson, ordered Sweatt's admission to the

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[83] Ibid.

[84] Ibid.

[85] Sweatt v. Painter, 339 U.S. 629 (1950).

[86] Ibid., p. 631.

University's all-white law school as the Court recognized the inequality between the hastily erected law school at Austin and the University of Texas Law School. In this case, as well as in McLaurin, the Court emphasized the "intangibles" that make an educational institution equal:

> Such qualities . . . include the reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.[87]

The Court added that the new black law school excluded 85 percent of the population from which were drawn most of the lawyers, witnesses, jurors, judges, and other officials in the state that a black lawyer would eventually encounter. For this reason, the Court said, "We cannot conclude that the education offered the petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School."[88]

It was obvious that Sweatt and McLaurin were milestones in the fight for rights for blacks. There had been much progress in winning admission for some black graduate students to white schools. However, it looked as if there would be a long struggle before the black public school students would be allowed to attend school with white children.[89] The Court had actually done little to break down the

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[87]Ibid., p. 634.

[88]Ibid.

[89]Robert A. Liston, Tides of Justice (New York: Delacorte Press, 1966), p. 34.

"separate but equal" rule. The Court's findings seemed to strengthen the "separate but equal" rule since, in both cases, facilities were found not to be adequate because standards concerning the required "separate but equal" rule were not met.

While states were not able to achieve equality at the graduate school level, they could achieve equality in the black public schools if enough resources and time were available. All over the South white school boards began programs to improve black public schools. Governor James Byrnes confessed that improvements had to be made to "remedy a hundred years of neglect" of the education for black children lest the Supreme Court "take matters out of the states' hands."[90]

While these university school cases did not break down the "separate but equal" rule, they were the beginning blow that led to its demise. Dr. H.C. Hudgins, Jr. gave a clear view of the effect of the university school cases on the "separate but equal" principle. Hudgins stated:

> The significance of the four university cases is manifest as one sees a gradual erosion of the separation doctrine. Both Gaines and Sipuel opened the way for Negroes to attend white institutions. McLaurin held that, once a school has been desegregated its facilities must be made available to all alike, its students must be accorded similar treatment. Sweatt expanded the holding in showing a segregated school to be unequal and in pointing out intangible factors as measurements of potential success. It was these cases which actually provided the springboard for an attach on segregation in the public elementary and secondary schools in a case to be heard by the Warren Court.[91]

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[90]Garraty, Quarrels That Have Shaped the Constitution, p. 256.

[91]Hudgins, The Warren Court, p. 19.

## 2.3 The Brown Decision(s)

Follwoing the university cases, the NAACP found it necessary to alter its strategy. While it had been successful in attaching the "equal" part of the "separate but equal" laws, it had achieved no success in attacking the "separate" issue. The many states that had enacted segregation laws were apparently in compliance with the doctrine of "separate but equal." They were, in fact, quickly bringing about a more equal education for black students by improving school facilities for blacks, purchasing new equipment for black schools, and upgrading the staff of black schools.

The Southern states appeared determined to continue the segregation of black and white students at all levels of education, even if that course of action caused them to have to greatly increase their spending for black schools. School boards in South Carolina and in Virginia's Prince Edward County openly rejected any program that would provide more adequate schools while allowing some primary and secondary school desegregation.[92] The NAACP had indicated its willingness to accept some form of gradualist program. When any such program was rejected by the segregated states, the NAACP found it necessary to alter its strategy.[93]

In 1950 the NAACP held a National Strategy Conference in New York. Thurgood Marshal, Chief Legal Counsel for the group and later

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[92]Garraty, Quarrels That Have Shaped the Constitution, p. 257.

[93]Ibid.

a Justice of the United States Supreme Court, and his legal staff selected five segregation suits from around the nation. These five suits were to be the focal point of an effort to seek admission for black school children to all-white schools. Four of the suits were from the states of Kansas, South Carolina, Virginia, and Deleware. The fifth case was from the District of Columbia. That case was to be heard separately by the United States Supreme Court because the District of Columbia was governed by the United States Congress.

Four suits were filed in federal district courts seeking admission of black school children to all-white schools. These suits were based on the belief that the black schools were inferior to white schools. The NAACP charged that the "separate but equal" doctrine was a violation of the equal protection clause of the Fourteenth Amendment.

The fifth suit, Bolling v. Sharpe, was filed in the District of Columbia and charged violation of due process of the Fifth Amendment. Since the Fourteenth Amendment restricted states, and the District of Columbia was not governed by a state legislature but rather by Congress, a different procedure was used in this case.[94]

The four cases were Brown v. Board of Education of Topeka[95] from Kansas, Briggs v. Elliott[96] from South Carolina, Davis v.

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[94]Ibid.

[95]Brown v. Board of Education of Topeks, 345 U.S. 973 (1953).

[96]Briggs v. Elliott, 103 F Supp. 920 (1952).

County School Board of Prince Edward County[97] from Virginia, and Gebhart v. Belton[98] from Deleware. In each of the four cases, black students sought admission to the public schools of their community on a nonsegregated basis. State residents and taxpayers who were challenging these laws had been denied reflief, except for partial relief in the Delaware case. The federal district courts denying relief relied on the "separate but equal" doctrine announced by the Court in Plessy.[99]

South Carolina's state constitution and statutes required segregation of blacks. In Briggs v. Elliott[100] action was brought in the United States District Court to prevent the enforcement of these statutes in Clarendon County. The District Court determined that the black schools were inferior to the white schools in Clarendon County and ordered the state to equalize the schools. However, the court upheld the state constitution as valid if the facilities for black students were equal to facilities for the white students. During the period of equalization, the black children were denied the right to attend the white school. The equalization process was to be reported back to the court within six months. This decision was immediately appealed to the United Supreme Court but was returned to the lower

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[97]Davis v. County School Board of Prince Edward County, 103 F Supp. 337 (1952).

[98]Gebhart v. Belton, 91A 2d 137 (1952).

[99]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 80.

[100]Briggs v. Elliott, 103 F Supp. 920 (1952).

court to assess the progress toward equalization. The lower court found that there was substantial equality between the white and black schools except for buildings. The case was then returned to the Supreme Court.[101]

In Davis v. County School Board[102] the concerns of black parents were that even though blacks made up forty-six percent of the total county population every black school in the county was inferior.[103] They were especially concerned about overcrowded and decrepit conditions of the black high school. A plea was made in 1950 by the Parent Teachers Association to the county school board for a new high school. As was typical of the attitude of the South at that time, the black parents were told that there was no money for a new high school.[104]

Following the unsuccessful attempts by parents to improve the high school, black students then walked out of school and established picket lines. The black student leaders requested to meet with the superintendent of schools. The only way the superintendent would agree to meet with the students was if they returned to class. They

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[101]Stockard, The United States Supreme Court and the Legal Aspects of Busing for Public School Desegregation, p. 41.

[102]Davis v. County School Board of Prince Edward County, 103 F Supp. 337 (1952).

[103]August Meier and Elliott Rudwick, The Making of Black America, Vol. II (New York: Atheneum, 1969), p. 269.

[104]Ibid.

refused to do this and instead appealed to the NAACP for assistance. The initial litigation attempted to abolish the segregated school system.[105]

This Virginia suit, as well as the other four suits, involved introducing extensive testimony from experts in social science concerning the effects of segregation on black children. One such expert was a leading black psychologist from New York University, Kenneth Clark.[106] Professor Clark testified to the psychologically damaging effects of inferior black schools. He submitted a statement signed by thirty-two social scientists as expert witnesses who agreed with his position. Clark stated that based on his experiments the "fundamental effect of segregation is basic confusion in individuals and their concept about themselves." In Clark's opinion, the black children in segregated schools had been "definitely harmed in the development of their personalities."[107]

The three-judge district court panel refused to grant relief to the plaintiff. The court conceded that the black school was "substantially inferior," but since the Prince Edward County Board of

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[105]Davis v. County School Board of Prince Edward County, 103 F Supp. 337 (1952).

[106]Kenneth B. Clark, "The Social Scientists, the Brown Decision and Contemporary Confusion," in Argument: The Complete Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55, ed. Leon Friedman (New York: Chelsea House, 1969), pp. xxxvi-xxxvii.

[107]Lino A. Groglia, Disaster by Decree (Ithasa, N.Y.: Cornell University Press, 1976), pp. 27-28.

Education has agreed, in the meantime, to build a new black high school, "an injunction could accomplish nothing more."[108] The plaintiffs then appealed to the Supreme Court asking that the district court's decision be overruled and to require that the black students be admitted to the all-white high school.[109]

The case from New Castle County, Delaware, had achieved partial success. Suit was filed on behalf of elementary and high school black students to enjoin enforcement of segregation laws. An injunction was granted and it was ordered that black students were to be admitted to white schools on the grounds that the schools were "substantially unequal."[110] This decision was appealed to the Delaware Supreme Court where the lower court's ruling was upheld. The court did not overturn Plessy, but implied that a school for blacks that was more equal than the present school might, in the future, make racial segregation lawful. This decision was very different from the Virginia and South Carolina decisions in that the ruling stated the "right of the plaintiff to equal facilities to be present and personal."[111] It was held by the court that schools could be separate if they were currently equal. The decision was appealed by school authorities.

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[108]Meier and Rudwick, The Making of Black America, Vol. II, p. 272.

[109]Ibid.

[110]Gebhart v. Belton, 91A 2d 137 (1952).

[111]Hudgins, The Warren Court, p. 78.

They alleged that the state had not allowed a reasonable time for the equalization of facilities for blacks.[112]

The fourth case cited in Brown was from Kansas and become the command decision for all four cases to the United States Supreme Court. It arose from a complaint issued on behalf of a black child, eleven-year-old Linda Brown, and other black elementary school students who had been denied admission to public schools for white children. At question was a Kansas statute that allowed cities in Kansas with a population of 15,000 or more to maintain segregated school facilities for students grades one through eight. The Topeka school board segregated elementary school students in grades one through six.

Linda Brown was assigned to a school for black students. To reach this school it was necessary for her to travel over four times as far as would have been necessary if she had been permitted to attend an all-white school. The suit attempted to enjoin the enforcement of the Kansas statute and to declare the law unconstitutional. The basis for this request was that segregation created inferiority and was, therefore, a denial of due process and equal protection.[113]

The Topeka school board argued that schools for blacks and whites had been equalized, or were being equalized, with respect to buildings, curriculum, qualifications and salaries of teachers, and

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[112]Ibid.

[113]Brown v. Board of Education of Topeka, 347 U.S. 485 (1954).

other tangible factors.[114] The district court agreed with the plaintiffs that segregation in the public school was psychologically detrimental to black children. But the court chose not to overturn Plessy. It found that the schools were substantially equal. The court felt that it was bound by previous decisions made by the United States Supreme Court. It ruled that absolute equality was impossible.[115] The decision was appealed to the United States Supreme Court. In the meantime, however, the Topeka school board abolished elementary school segregation in 1953.[116]

The United States Supreme Court agreed to hear the four cases on appeal in 1952. The Court joined the cases and referred to the suit as Brown. Arguments were heard by the Court in the December, 1952 session. The NAACP argued that Plessy had been decided in error.[117] United States Attorney General Edward McGranahan requested the Supreme Court to declare school segregation invalid under the equal protection clause of the Fourteenth Amendment. Kenneth Clark, and some thirty other social scientists, attacked school segregation on the grounds that it did vast psychological damage to both black and

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[114]Ibid., p. 486 (Head Note 1).

[115]Hudgins, The Warren Court, p. 77.

[116]Ibid.

[117]Garraty, Quarrels That Have Shaped the Constitution, p. 265.

children. John W. Davis, a noted constitutional lawyer, presented a powerful argument for the defense.[118]

The Court appeared to be in sympathy with the cause of the NAACP and decided to reexamine the original meaning of the Fourteenth Amendment. It searched for some rational justification for setting aside the "separate but equal" doctrine resulting from the Plessy decision.[119]

In reargument, the Supreme Court gave the following directive:

> In their brief, and on oral argument, counsel are requested to discuss particularly the following questions in so far as they are relevant to the respective cases:
> 1. What evidence is there that the Congress which submitted, and the State legislatures and conventions which ratified the Fourteenth Amendment, contemplated or did not understand that it would abolish segregation in public schools?
> 2. If neither the Congress, in submitting, nor the States, in ratifying the Fourteenth Amendment, understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
>    (a) that future Congress might, in the exercise of their power under Section 5 of the Amendment, abolish such segregation, or
>    (b) that it would be within the judicial power in the light of future conditions, to construe the Amendment as abolishing such segregation of its own force?
> 3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?
> 4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,
>    (a) would a decree necessarily follow that, within the limits set by normal geographic school districting,

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[118] Ibid., p. 259.

[119] Garraty, Quarrels That Have Shaped the Constitution, p. 260.

Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption, on which questions 4(a) and (b) are based, and assuming further that the Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) is so, what specific issues should decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases; and, if so, what general directions should the courts of first instance follow in arriving at the specific terms of more detailed decrees?[120]

The NAACP called a total of 130 social scientists to help answer these questions. Thurgood Marshall argued from the viewpoint of legal advocacy rather than history. In the final decision the Court did not attempt to resolve the historical problem. The decision was based on sociological grounds.[121]

The Eisenhower Administration argued that the authors of the Fourteenth Amendment did not make their intent clear as to the abolishment of segregation. However, they argued, the broad purpose of the Fourteenth Amendment was to "secure for Negroes full and complete equality before the law, and to abolish all legal distinctions based upon race."[122] The brief presented by Attorney General Herbert

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[120]Brown v. Board of Education of Topeka, 345 U.S. 972 (1953).

[121]Brown v. Board of Education of Topeka, 347 U.S. 489 (1954).

[122]Garraty, Quarrels That Have Shaped the Constitution, p. 265.

Brownell suggested a one-year transition period in the South because of complicated racial and educational problems involved.[123]

The defense argued that the Reconstruction Congress had not intended for the Fourteenth Amendment to abolish segregation and had even voted funds for segregated schools in the District of Columbia.[124] South Carolina argued for states' rights by saying:

> The people of South Carolina may, on the exercise of their judgment, based on a first-hand knowledge of local conditions, decide that the state objective of free public education is best served by a system consisting of separate schools for white and colored children.[125]

The Court handed down a unanimous decision on May 17, 1954. The opinion was written by Chief Justice Earl Warren. He introduced the decision with a brief history of the case and the background of the case. The issue of the intent of the Fourteenth Amendment was addressed by Chief Justice Warren when he stated:

> It covered, exhaustively, consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of the proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.[126]

Chief Justice Warren referred to the condition of Southern education at the time of the Fourteenth Amendment's adoption as the

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[123]Stockard, The United States Supreme Court and the Legal Aspects of Busing for Public School Desegregation, p. 51.

[124]Garraty, Quarrels That Have Shaped the Constitution, p. 265.

[125]Ibid., p. 266.

[126]Brown v. Board of Education of Topeka, p. 489.

reason that education was not mentioned in the Fourteenth Amendment.[127]

Plessy, as well as the six cases that followed Plessy involving the "separate but equal" doctrine, were discussed in the decision. These cases, along with the graduate school cases, had failed to reexamine the doctrine. Mr. Warren summarized the Court's position by saying:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[128]

The decision further spoke of the value of education by stating:

> It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[129]

Chief Justice Warren then addressed the fundamental question by asking:

> Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.[130]

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[127] Ibid., p. 490.

[128] Ibid., p. 492.

[129] Ibid., p. 493.

[130] Ibid.

The doctrine of "separate but equal" as decided in Plessy was then rejected by Justice Warren:

> Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected. We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.[131]

The plans of many Southern school boards to build and improve all-black schools to make them equal was put to rest by this decision.

Finally, Justice Warren stated: "We have now announced that such segregation is a denial of the equal protection of the laws."[132]

An so, a long sought milestone was reached in the effort to desegregate the American society. However, there was much left to do to make desegregation a reality. The greatest obstacle to a massive desegregation of American society was overcome in the Brown I decision. But the Court had not decided how desegregation was to be administered. All cases under Brown I were sent back to district court for hearing in implementing Brown.[133]

Bolling v. Sharpe[134] was decided the same day as Brown I. This was the fifth case targeted by the NAACP and was adjudged as a separate suit. It was not encompassed under the umbrella of Brown I

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[131]Ibid., pp. 494-495.

[132]Ibid., p. 495.

[133]Stockard, The United States Supreme Court and the Legal Aspects of Busing for Public School Desegregation, p. 54.

[134]Bolling v. Sharpe, 347 U.S. 497 (1954).

because Brown I dealt with a challenge to states governed by the Fourteenth Amendment. The same issue was not appropriate to Bolling since it dealt with the District of Columbia which was governed by the United States Congress. Bolling questioned the due process in the Fifth Amendment which read:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[135]

The case had been brought because black children in the District of Columbia were excluded from attending an all-white junior high school. The case questioned segregation as being unconstitutional in the District of Columbia. The question was raised as to whether or not the District of Columbia's school board could legally operate a segregated school system. The school board moved for dismissal on the grounds that unequal facilities had not been questioned. The Supreme Court ruled as follows:

> Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.[136]

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[135]U.S., Constitution, amend. V.

[136]Bolling v. Sharpe, 347 U.S. 499 (1954).

This opinion caused the Bolling case to be placed for reargument along with the other four cases of Brown I.

Several states began to desegregate soon after the Brown I decision. Arkansas, Maryland, Missouri, West Virginia, Delaware, Arizona, New Mexico, and the District of Columbia took action to at least partially desegregate their school systems. Litigation was set off throughout the South as local school boards were petitioned to desegregate their all-white schools.[137]

Reargument of Brown was ordered by the Supreme Court in order to determine what kind of decree the Court should issue. Chief Justice Earl Warren made clear the implications of Brown by stating:

> These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle.[138]

One of the questions to be answered was who would carry out the order. Justice Warren discussed this by saying:

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith in the implementation of the governing Constitutional principles.[139]

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[137]Peter M. Bergman, The Chronological History of the Negro in America (New York: The New American Library, 1969), p. 536.

[138]Brown v. Board of Education of Topeka, 349 U.S. 298 (1955).

[139]Ibid., p. 299.

As to the question of when the order was to be carried out, the Court directed "that the defendants make a prompt and reasonable start toward full compliance . . . ."[140] The Court realized that once a start had been made "additional time is necessary to carry out the ruling in an effective manner."[141]

The Court realized the massive undertaking that faced school systems in the South. Justice Warren suggested problem areas to be considered in the desegregation process.

> To that end, the Court may consider problems related to administration, arising from the physical conditions of the school plant, the school transportation system, personnel, revisions of school districts and attendance areas into compact units to achieve a system of determining admission to the public school on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problem.[142]

The case(s) were then remanded to the district courts for implementation consistent with the Court's order. In remanding the case to the district courts Justice Warren once again gave consideration to the time element of implementation when he stated:

> The judgments below, except that in the Deleware case, are accordingly reversed, and the cases are remanded to the district courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscrimination basis with all deliberate speed, the parties to these cases.[143]

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[140] Ibid., p. 300.

[141] Ibid.

[142] Ibid., pp. 300-301.

[143] Ibid., p. 301.

Brown II of 1955 had sought relief from Brown I of 1954. But the Court held in Brown II that local school authorities have the primary responsibility for implementing the Brown I decision. The function of the federal courts is to decide whether a school board is complying in good faith and to reconcile the public interest in orderly and effective transition to constitutional school systems with the constitutional requirements themselves. The Court declared that a "prompt and reasonable start" toward full compliance must be made and compliance must proceed "with all deliberate speed."[144]

## 2.4 Summary

The problem of racial segregation was a reality long before the founding of America in 1776. The division of the black and white races in domestic and social areas of everyday life in this country naturally led to segregation in our public schools. Forced separation of the races, and domination of the black race by whites through the practice of slavery, led to severe anti-black feelings among whites which often resulted in outright cruelty. The resulting feeling was one of superiority by whites with attempts to keep the black race "in its place," often by legal means.

This racial segregation in America led, in part, to the Civil War. The question of whether slavery would be tolerated or not was answered with victory by the North. But simple military victory could not change generations of conditioning. Desegregation, and

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[144]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 81.

the treatment of blacks as equals, was slow to be achieved. The prohibition of slavery by the Thirteenth Amendment to the Constitution was only the beginning.

Several Civil Rights Acts were passed into law in the late 1860s and early 1870s to protect the rights of blacks. The Fourteenth Amendment to the Constitution had the effect of restricting the ability of states to enact laws that would limit the rights of citizens. This Amendment would become very important in the fight to desegregate the public schools. In spite of the Fourteenth Amendment and the Civil Rights Acts, there were many efforts by the states to continue a two-race system in America. The period of 1880 through the early 1900s saw the enactment of many state laws directed toward segregation of the black race. These laws came to be referred to as "Jim Crow" laws.

While these laws were challenged, blacks experienced little success during this period of time in their efforts to overcome segregation. In 1896, in Plessy, the United States Supreme Court ruled that it was legal for states to require the separation of the races in transportation as long as facilities offered to both races were equal. This came to be known as the "separate but equal" doctrine. This doctrine applied to all areas of life, including education.

The first serious challenge to legal segregation began in the 1930s with the University School Cases. These cases, brought by the NAACP, attacked the 'separate but equal" doctrine at the professional

school level of state universities. While the "separate but equal" doctrine was actually upheld in these cases, the prohibitive cost of equal facilities on the graduate school level led to desegregation at this level.

In 1950 the effort to gain admission of black students to all-white public schools became a national issue. Four cases were joined in the famous Brown decision(s) of 1954 and 1955. These suits were based on the belief that black schools were inferior to white schools. The Court ruled that separate schools for the races could not be equal and ordered the dismantling of segregated school systems. The stage was set for massive resistance by states in the South.

# CHAPTER III

# THE LEGAL ASPECTS OF BUSING FOR SCHOOL DESEGREGATION



## 3.1 Introduction

The Supreme Court developed the law governing school desegregation in a series of historic cases, beginning with Brown I of 1954 and running through Keyes v. School District No. 1 in 1973. The resulting doctrine concerning desegregation is, briefly, this:

> Racial imbalance among public school students violates the Equal Protection Clause of the Fourteenth Amendment if it results from policies, decisions, and acts of public officials carried out with intent to produce segregation (de jure segregation), but not if it results solely from demographic patterns (de facto segregation). A school system that is found by a court to have engaged in de jure segregation must take affirmative steps to eliminate its dual system and convert to a "unitary system in which racial discrimination is eliminated root and branch" (as the high court wrote in 1968 in Green v. County School Board).[145]

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[145]Benjamin Sendor, "These Two Cases Raise Key Questions (But Offer Ambiguous Answers) About School Desegregation," The American School Board Journal, January 1987, p. 12.

Brown II of 1955 reviewed and refined Brown I of 1954. However, the United States Supreme Court in Brown II remanded the cases to the federal district courts and charged the local school boards with the burden of instituting plans to desegregate. The Court required the local boards to proceed with "all deliberate speed."[146]

"All deliberate speed" became the catchword that spawned massive resistance as the South deliberated but refused to desegregate. Ten years after Brown I, only 1.2 percent of nearly three million black students in eleven Southern states attended school with white students.[147] During this ten-year period a large number of cases were considered that reinforced the requirements of Brown. Several of these reached the Supreme Court.

School boards and state legislatures in the South attempted to circumvent the legal requirements to desegregate with differing methods. Price Edward County, Virginia, tried to solve the segregation problem by simply abolishing its public schools. Other school districts found less dramatic ways to temporarily circumvent the law. Chief among these methods was the "freedom of choice" plan that permitted students to select the school they would attend.

As lower courts, and eventually the Supreme Court, considered cases arising from attempts to circumvent desegregation, it became evident that strong action must be taken if desegregation of the

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[146]Brown v. Board of Education of Topeka, p. 300.

[147]U.S. Commission on Civil Rights, Twenty Years After Brown: Equality of Educational Opportunity (Washington, D.C.: U.S. Government Printing Office, 1975), p. 46.

public schools was to be achieved. The stage was set for the next era in the desegregation of America's public schools. A tool that had long been used for the purpose of continuing segregation would help drive the final nail in the coffin of segregation. Busing for racial consideration was to become the focus of this continuing process.

## 3.2 Desegregation of Public Schools in the South

> Four years after the Supreme Court of the United States decision in Brown v. Board of Education, the school bell summoned America to the spectacle of screaming parents and troops with bayonets at the ready, escorting nine black students to Central High School in Little Rock, Arkansas.
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> "I tried to see a friendly face," declared Elizabeth Eckford, one of the nine. "I looked into the face of an old woman and it seemed friendly, but when I looked at her again she spat on me." And then Elizabeth Eckford wept.[148]

Efforts by the state government of Arkansas to refuse to obey a federal court order led to the incident described in this quote from Elizabeth Eckford. This attempt to disobey a federal court order was answered in the case of Cooper v. Aaron.[149] The case drew national attention when nine black students sought to integrate Central High School in Little Rock, Arkansas.

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[148]U.S. Commission on Civil Rights, Fulfilling the Letter and Spirit of the Law: Desegregation of the Nation's Public Schools, p. 1.

[149]Cooper, Members of the Board of Directors of the Little Rock, Arkansas, Independent School District v. Aaron, 358 U.S. 1 (1958).

The school board of Little Rock had taken action to adopt a new school board policy that would carry out the intent of Brown I. In the meantime the Arkansas state constitution had been amended by state authorities to oppose the action of the Supreme Court in Brown I and Brown II.[150]

The plan that had been adopted by the school board was to phase in school integration beginning in 1957 with complete desegregation by 1963. The plan would (1) initiate integration on the senior high school level, (2) integrate the junior high schools later, and (3) integrate the elementary schools immediately.[151] Blacks in Little Rock wanted a more immediate schedule for integration and sought relief in the District Court and the Eighth Circuit Court of Appeals. Both courts upheld the school board's plan.[152]

In the fall of 1957, when Little Rock Central High School opened for the school year, nine black students appeared to enroll. Governor Orval Faubus had dispatched the Arkansas National Guard to prevent integration.[153] The Guard was removed after three weeks when the district court and the attorney general enjoined Governor Faubus and the National Guard from preventing the enrollment of the black students. The nine black students entered the high school on September 23 but withdrew due to the appearance of a very hostile

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[150]Nolte, School Law in Action, 101 Key Decisions, p. 207.

[151]Ibid.

[152]Ibid.

[153]Cooper v. Aaron, p. 21.

crowd. Federal troops were ordered to the high school by President Dwight Eisenhower. These federal troops remained at the high school to maintain peace for two weeks. President Eisenhower then federalized the Arkansas National Guard and placed the troops at the school for the school year.[154]

Removal of black students at Central High School and a postponement of the desegregation plan was requested by the school board. Relief was granted by the District Court, but the decision was reversed by the Eighth Circuit Court of Appeals. The Supreme Court heard the case in special session. At issue in this case was whether the governor and state legislature must obey federal court orders. In this case the federal court order was Brown I.[155]

The Court's decision was delivered by Chief Justice Warren who stated:

> The conditions they depict are directly traceable to the action of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the Brown case, and which have brought about violent resistance to the decision in Arkansas.[156]
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> . . . the Constitutional rights of children are not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case and can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor

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[154]Nolte, School Law in Action, 101 Key Decisions, p. 207.

[155]Ibid.

[156]Cooper v. Aaron, p. 20.

> nullified indirectly by them through evasive schemes for segregation . . . .[157]

High schools in Little Rock were closed for the 1858-59 school year by Governor Faubus to prevent "violence and disorder." The schools were reopened after the school closing laws were declared unconstitutional by a federal court.[158]

In Goss another attempt to circumvent the Supreme Court's ruling in Brown was addressed. The school board in Knoxville, Tennessee, proposed a desegregation plan which provided for the rezoning of school districts without reference to race. The plan also contained a transfer provision under which any student would be permitted, solely on the basis of the student's race and the racial composition of the school to which the student was assigned by virtue of rezoning, to transfer from such a school where the student would be in the racial minority back to the student's former school. The transfer provisions clearly worked to move students in one direction, across racially neutral zoning lines and back into segregated schools.[159]

In Goss v. Board of Education of the City of Knoxville, Tennessee,[160] black students challenged the validity of Knoxville's

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[157]Ibid., p. 17.

[158]Ploski and Kaiser, The Negro Almanac, p. 30.

[159]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 82.

[160]Goss v. Board of Education of Knoxville, Tennessee, 373 U.S. 683 (1963).

desegregation plan. The case was decided, in 1963, with the Court's opinion delivered by Justice Tom C. Clark. Justice Clark stated the findings of the Court based on Brown II:

> The transfer plans, being based solely on racial factors, which under their terms, inevitably lead toward segregation of the students by race, we conclude that they run counter to the admonition of Brown v. Board of Education, wherein the District Court was directed to "consider the adequacy of any plan" proposed by school authorities "to effectuate a racially nondiscriminatory school system" Our conclusion here leads to reversal of the judgments of the Court of Appeals to the extent they approve the transfer provision of respondent boards in each of the cases. The only question with which we are here concerned relates solely to the transfer provisions and we are not called upon either to discuss or to pass on the other provisions of the desegregation plan.[161]

Justice Clark expressed concern about the plan operating with transfer procedures based on race:

> It is readily apparent that the transfer system proposal lends itself to perpetuation of segregation . . . . While transfers are available to those who choose to attend school where their race is in the majority, there is no provision whereby a student might transfer upon request to a school in which his race is in a minority, unless he qualifies for "a good course" transfer . . . . This Court has decided that state-imposed separation in public schools is inherently unequal, and results in discrimination in violation of the Fourteenth Amendment.[162]

Justice Clark then looked at the major issue of the case and gave indication of what type guidelines would be acceptable to the Court:

> Our task then is to decide whether these transfer provisions are likewise unconstitutional. In doing so, we note that

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[161] Ibid., p. 684-685.

[162] Ibid., p. 683.

> if the transfer provisions were made available to all students regardless of the racial composition of the school to which they requested transfer, we woule have an entirely different case. Pupils could then, at their option, (or that of their parents) choose, entirely free of any imposed racial consideration, to remain in the school of their zone or to transfer to another.[163]

Thus, in Goss, transfer plans were found unconstitutional if they were based on race. The guidelines that were given by the Court stated that transfer provisions must be made available to all students regardless of race and social composition of the intended school. The Court was actually saying that a transfer plan which used social factors in the operation deprived black students of their constitutional rights under the Fourteenth Amendment. While Goss found transfer plans based on race inappropriate, it left open the door for the development of desegregation plans that would be based on a "freedom of choice" transfer plan.

Perhaps the most extreme effort to circumvent the Court's ruling in Brown occurred in Prince Edward County, Virginia. Brown I had held that Virginia school segregation laws were unconstitutional and ordered that black students in Price Edward County be admitted to the public schools on a racially nondiscriminatory basis. Faced with the order to desegregate, the county school board refused, in 1959, to appropriate funds for the operation of public schools. However, tax credits were given for contributions to private white schools. The students in private schools became eligible for county and state

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[163]Ibid., p. 687.

tuition grants in 1960. Public schools continued to operate elsewhere in Virginia. The federal district court ordered the reopening of the public schools.[164] The case was appealed to the Fourth Circuit Court of Appeals where it was reversed on grounds that the District Court should have abstained in order to wait for a state court's determination concerning the validity of tuition grants.[165]

The United States Supreme Court granted certiorari and heard argument on March 30, 1964 of Griffin v. County School Board of Prince Edward County.[166] Justice Hugo L. Black delivered the opinion. Justice Black dealt with the position of the Court by stating:

> For reasons to be stated, we agree with the District Court that, under the circumstances here, closing the Prince Edward County Schools, while public schools in all the other counties of Virginia were being maintained, denied the petitioners and the class of Negro students they represent the equal protection of the law guaranteed by the Fourteenth Amendment.[167]

Justice Black addressed the question of local or state responsibility in actually closing the Prince Edward County Schools by stating:

> While a holding as to the constitutional duty of the Supervisor and other officials of Prince Edward County may have repercussions over the State and may require the District Court's orders to run to parties outside the county; it is, nevertheless, true that what is attacked

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[164]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 83.

[165]Ibid.

[166]Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964).

[167]Ibid., p. 225.

> in the suit is not something which the State had commanded Prince Edward County to do--close its public schools and give grants to children in private schools--but rather something which the county with state acquiescence and cooperation has undertaken to do on its own volition, decision not binding on any other county in Virginia . . . We hold that the single District Judge did not err in adjudicating the present controversy.[168]

Justice Black stated the real reason for closing the county schools as:

> . . . to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school.[169]

The reasons for closing the schools were found to be a denial of equal protection. Justice Black stated in reference to this:

> Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to segregation do not qualify as constitutional.[170]

The Court's findings were clarified further by Justice Black when he discussed the question of the decree for implementing the Court's judgment especially in regard to the question of financial support:

> . . . relief needs to be quick and effective . . . . The Board of Supervisors has the special responsibility to levy local taxes to operate public schools or to aid children attending the private schools now functioning there for white children. The District Court enjoined the county officials from paying county tuition grants or giving tax

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[168] Ibid., p. 228.

[169] Ibid., p. 231.

[170] Ibid.

> exemptions and from processing applications for state tuition grants so long as the county's public schools remained closed.[171]
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> . . . the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain, without racial discrimination, a public school system in Prince Edward County like that operated in other counties in Virginia.[172]
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> Justice Black closed the opinion by stating:
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> The time for mere "deliberate speed" has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia.[173]

In 1965 the growing impatience of the Supreme Court, caused by the many attempts to circumvent desegregation, was illustrated in the case of Rogers v. Paul.[174] This case dealt with a desegregation plan adopted by the Fort Smith, Arkansas, school board. The plan adopted was a "grade a year" plan.[175]

The 1957 Arkansas plan integrated the schools one grade each year. By 1964 all grades except ten, eleven, and twelve were integrated. Class action litigation was initiated by two black students. They challenged the integration plan on two factors: (1) the plan had not been followed; and (2) after seven years, grades ten, eleven,

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[171] Ibid., p. 232.

[172] Ibid., p. 233.

[173] Ibid., p. 234.

[174] Rogers v. Paul, 382 U.S. 198 (1965).

[175] Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 84.

and twelve in high school were still not desegregated. The black students attended a high school which did not have the range of courses offered at the white high school. The Court ruled as follows:

> . . . Petitioners and those similarly situated shall be allowed immediate transfer to the high school that has the more extensive curriculum and from which they are excluded because of race.[176]

Rogers illustrated the growing impatience of the Court concerning the implementation of Brown I. Some questions concerning compliance with "all deliberate speed" were left unanswered in this decision.[177]

By 1968 some thirteen hundred school systems in the South were using some form of "freedom of choice" desegreation plans. These plans were another attempt to slow down the process of integration as much as an individual county would allow.[178] In that year, three separate cases were heard by the United States Supreme Court. These cases were similar, and though they were not joined, the facts of the three were much the same. The cases came from Arkansas, Virginia, and Tennessee. Two of the cases concerned "freedom of choice" assignments and the third had a free choice plan.[179]

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[176]Rogers v. Paul, p. 199.

[177]Stockard, The United States Supreme Court and the Legal Aspects of Busing for Public School Desegregation, p. 73.

[178]Bardolph, The Civil Rights Record, p. 456.

[179]Ibid.

Green v. County School Board of New Kent County[180] came to the Supreme Court on appeal from the Fourth Circuit in Virginia. The New Kent County school system in Virginia was serving about 1,300 students approximately half of whom were black. There was no residential segregation in the county and persons of both races resided throughout. The school system had only two schools, one for whites and one for blacks. Each school served the whole county and 21 buses traveled overlapping routes in order to transport students to segregated classes.

In 1965, the school board, in order to remain eligible for federal financial aid, adopted a "freedom of choice" plan for desegregating the schools. The plan permitted students, except those entering first and eighth grades, to choose annually between schools. Those not choosing were assigned to the school they had previously attended. First and eighth graders had to choose a school.

During the plan's three years of operation no white student had chosen to attend the all-black school, and although 115 blacks had enrolled in the formerly all-white school, eighty-five percent of the black students in the system still attended the all-black school. The adequacy of this desegregation plan was challenged in this case.[181]

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[180]Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

[181]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 85.

Justice William J. Brennan delivered the Court's majority opinion. He first discussed the question before the Court:

> The question for decision is whether, under all circumstances here, respondent School Board's adoption of "freedom-of-choice" plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility "to achieve a system of determining admission to the public schools on a nonracial basis."[182]

Again, the Court's impatience with Southern school systems was displayed as Justice Brennan spoke of the delays of the school board in carrying out Brown I's mandate:

> In determining whether respondent School Board met that command by adopting the "freedom-of-choice" plan, it is relevant that this first step did not come until some eleven years after Brown I was decided, and ten years after Brown II directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of the new enunciated doctrine."[183]

While the Court did not find the "freedom of choice" plans completely unconstitutional, Justice Brennan suggested:

> We do not hold that "freedom-of-choice" can have no place . . . We do not hold that a "freedom-of-choice" plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system, a plan utilizing "freedom-of-choice" is not an end in itself.[184]

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[182]Green v. County School Board of New Kent County, p. 431.

[183]Ibid., p. 438.

[184]Ibid., pp. 439-440.

In regard to the New Kent County situation Justice Brennan gave the following order:

> The New Kent County School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system . . . In other words the school system remains a dual system. Rather than the further dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which Brown II placed squarely on the School Board. The Board must be required to formulate a new plan . . . The judgment of the Court of Appeals is vacated in so far as it affirmed the District Court, and the case is remanded to the District Court for further proceedings consistent with this opinion.[185]

In practice, few students chose to transfer schools under "freedom of choice" plans. The Court had addressed this in Green, ruling that such plans were unacceptable where speedier and more effective means were available.[186] The Court stated that "the burden of a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."[187]

Raney v. Board of Education of the Gould School District[188] was decided on the same day as Green. This was another "freedom of choice" case but was from a school district in Arkansas. The school system of Gould, Arkansas, contained a black population of about sixty percent. The school system provided two combination elementary

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[185]Ibid., p. 441.

[186]U.S. Commission on Civil Rights, Fulfilling the Letter and Spirit of the Law, p. 4.

[187]Green v. County School Board of New Kent County, p. 439.

[188]Raney v. Board of Education of the Gould School District, 391 U.S. 443 (1968).

and high schools approximately ten blocks apart in the district's only major town. The school system had been totally segregated until 1965. Again, as in Green, this action was taken in order for the school system to remain eligible for federal financial aid. The plan required all students to choose a school annually. Those not desiring to choose a school were assigned to the school they previously attended.[189]

By 1967 no white students had chosen the all-black Fields School. Eighty-five blacks had enrolled in the previously all-white Gould School. The number of students requesting to attend the Gould School soon exceeded the number of places available. Due to the absence of space, twenty-eight black students were refused admittance.[190]

Black students being required to attend the all-black Fields School sought injunctive relief. During this time the school board announced plans to build a new high school at Fields. Petitioners sought to enjoin construction and argued that the school should be built at the Gould site instead of at the Fields site.[191]

The District Court denied relief on the basis that: (1) the "freedom of choice" plan had been adopted without court action; (2) the plan had received approval by the Department of Health,

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[189]Ibid., p. 445.

[190]Ibid., p. 446.

[191]Ibid.

Education, and Welfare; and (3) some blacks had enrolled in the Gould schools.[192] This decision was affirmed by the Court of Appeals where the plan and its implementation was found to be adequate.[193]

Certiorari was granted by the United States Supreme Court. Justice William J. Brennan delivered the opinion of the Court concerning the adequacy of the "freedom of choice" plan. Justice Brennan stated:

> . . . The question of the adequacy of "freedom-of-choice" is properly before us. On the merits, our decision in Green v. County School Board, supra, establishes that the plan is inadequate to convert to a unitary, nonracial school system. As in Green, the "school system remains a dual system."
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> . . . The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with our opinion in Green v. County School Board.[194]

The third and final case relating to "freedom of choice" desegregation plans was Monroe v. Board of Commissioners of the City of Jackson.[195] This Tennessee case involved the city of Jackson's school system. Some forty percent of the student population was black. In an effort to desegregate its elementary and junior high school systems, the City of Jackson instituted a "free-transfer" plan. This plan permitted a child, after registering in the student's assigned school in the proper attendance zone, to transfer

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[192]Ibid.

[193]Ibid., p. 447.

[194]Ibid., p. 449.

[195]Monroe v. Board of Commissioners of the City of Jackson, 391 U.S. 450 (1968).

freely to another school of the student's choice if space were available. After three years of operation of the plan, the one black junior high school in the system was still completely black, one of the two white junior high schools was still almost white, and three of the eight elementary schools were still attended only by blacks. The black children challenged the adequacy of this plan and of the school board's efforts to meet its responsibility to effect a transition to a unitary school system.[196]

The school board proposed new zones for the three junior high schools, but petitioners objected because of alleged racially gerrymandered zones that failed to provide a nonracial system. The District Court insisted that petitioners had not proven their allegations that proposed junior high attendance zones were indeed gerrymandered.[197] The Court of Appeals affirmed.

Certiorari was granted by the United States Supreme Court. Justice William J. Brennan delivered the opinion which stated in part:

> The principles governing determination of the adequacy of the plan as in compliance with the Board's responsibility to effectuate a transition to a racially nondiscriminatory system are those announced today in Green v. County School Board, supra, tested by those principles, the plan is clearly inadequate.[198]

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[196]Zirkel, A Digest of Supreme Court Decisions Affecting Education, pp. 85-86.

[197]Monroe v. Board of Commissioners of the City of Jackson, pp. 453-454.

[198]Ibid., pp. 456-457.

Justice Brennan then spoke directly concerning the "free-transfer" plan by relying on Green:

> We do not hold that "free-transfer" can have no place in a desegregation plan. But like "freedom-of-choice," if it cannot be shown that such a plan will further, rather than delay, conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable . . . .
>
> The judgment of the Court of Appeals is vacated insofar as it affirmed the District Court's approval of the plan in its application to the junior high schools, and the case is remanded for further proceedings consistent with this opinion in Green v. County School Board, supra.[199]

The 1969 United States v. Montgomery County Board of Education[200] case was the last decision concerning desegregation that was handed down by the United States Supreme Court under Chief Justice Earl Warren. This case involved a plea to desegregate a school faculty in Montgomery County, Alabama. Evidence showed that the state had made no effort for ten years to integrate the public schools.[201] The action was begun in 1964 by black children and their parents in an attempt to dismantle the dual system in Montgomery and to stop assigning faculty to schools on the basis of race.

A local federal district judge ordered integration of certain grades to begin in September 1964. This resulted in eight black students being transferred to white schools. There were approximately 15,000 black students in the 40,000 student school system.[202] The

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[199]Ibid., pp. 459-460.

[200]United States v. Montgomery County Board of Education, 395 U.S. 225 (1969).

[201]Hudgins, The Warren Court, p. 93.

[202]Ibid.

1964 order also required an annual report to be made to the court annually. These annual records revealed an increasing recognition of the intent of the local school board to desegregate, even though more rapid progress could have been made.[203]

A 1968 order involved the desegregation of the school faculty at Jefferson Davis High School. The court-mandated goal required the school board to attain a uniform ratio of five to one (white to black) faculty members in each school in the system.[204] The Court of Appeals modified the District Court's order of systemwide five to one faculty ratio. The new order struck down that part of the order that set a specific goal and modified it to provide for "substantially or approximately" the five to one ratio earlier decreed.[205] The ratio was eliminated.

The Supreme Court disagreed with the ruling by the Court of Appeals. Justice Black held that:

> The modifications ordered by the panel of the Court of Appeals, while of course not intended to do so, would, we think take from the order some of the capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope.[206]

The orders of the District Court were to stand.

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[203]Ibid.

[204]United States v. Montgomery County Board of Education, p. 232.

[205]Ibid., p. 234.

[206]Ibid., p. 235.

Justice Black stated that "we do not . . . argue here that racially balanced faculties are constitutionally or legally required."[207] He noted that both parties to the case were interested in desegregating the schools; in this case it was simply a matter of determining to what degree. The real interest of the Supreme Court was in assuring that the spirit and intention of the Brown decisions be followed.[208]

Alexander v. Holmes[209] demonstrated the growing impatience of the Supreme Court with "all deliberate speed." In this case the Fifth Circuit Court of Appeals had granted a motion for additional time and delayed implementation of an earlier order mandating desegregation in thirty-three Mississippi school districts. These districts served thousands of students.[210] This delay was challenged in this case.

The case was argued before the Supreme Court in October of 1969. The decision was unanimous. Justice Black, in delivering the opinion of the court, stated:

> The Court of Appeals order of August 28, 1967, is vacated, and the case is remanded to that Court to issue its decree and order, effective immediately, declaring that each of

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[207]Ibid., p. 236.

[208]Hudgins, The Warren Court, p. 94.

[209]Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969).

[210]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 87.

> the school districts here involved may no longer operate a dual school system based on race or color, and directing that they begin immediately to operate, as unitary, school systems within which no person is to be effectively excluded from any school because of race or color.[211]

The Court stated in this case that delay could no longer be tolerated and the Sixth Circuit Court of Appeals must order immediate desegregation of the school districts. Modifications of and objections to the order could be considered while the order was being implemented, but the implementation could not be delayed.[212] The Alexander decision made two positions of the Supreme Court known. First, the Court emphasized that the time for desegregation was now. Second, the Court stated that the District Courts must maintain control of desegregation cases until a unitary school system had been achieved.

It was becoming very clear that the Supreme Court expected the immediate desegregation of public school systems in the South. The lower courts were expected to see that the Brown decisions were implemented fully. This expectation of the Supreme Court was shown once again in the case of Carter v. West Feliciana Parish School Board.[213]

Soon after the Court in Alexander v. Holmes County Board of Education vacated a lower court order granting a three-month delay

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[211]Alexander v. Holmes County Board of Education, p. 20.

[212]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 87.

[213]Carter v. West Faliciana Parish School Board, 396 U.S. 290 (1970).

in desegregation and mandated immediate action, the Fifth Circuit Court of Appeals decided Singleton v. Jackson Municipal Separate School District.[214] This case was a consolidation of sixteen major school cases and involved hundreds of thousands of school children. The decision was handed down in December of 1969. The Fifth Circuit was reluctant to require that these children be relocated in the middle of the school year. It required the desegregation of faculties, facilities, activities, staff, and transportation no later than February 1, 1970. Integration of student bodies was delayed until the beginning of the next school year.[215]

The United States Supreme Court considered the case on certiorari. Chief Justice Warren Burger's opinion stated:

> Insofar as the Court of Appeals authorized deferral of student desegregation beyond February 1, 1970, that Court misconstrued our holdings in Alexander v. Holmes County Board of Education . . . Accordingly, the petitions for writs of certiorari are granted, the judgments of the Court of Appeals are reversed, and the cases remanded to that Court for further proceedings consistent with this opinion. The judgments in these cases are to issue forthwith.[216]

Although this decision was on a vote of six to two, it reinforced further the determination of the Court to immediately implement desegregation plans.

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[214]Singleton v. Jackson Municipal Separate School District, 419 F. 2d 1211 (5th Cir. 1969).

[215]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 88.

[216]Carter v. West Feliciana Parish School Board, p. 291.

Two months after the Alexander decision, the case of Northcross v. Board of Education of the Memphis, Tennessee, City Schools[217] came to the United States Supreme Court. The Court granted certiorari. This case dealt with a May, 1969, District Court order that required the Memphis School Board to submit a desegregation plan based on geographic assignment. This plan was to be submitted by January of 1970.[218]

The plaintiffs in the District Court case believed, based on the Supreme Court's ruling in Alexander, that there should be a greater emphasis on the speed of desegregation. The District Court disagreed with this argument and required only the geographic plan by the January date. The plaintiffs appealed to the Sixth Circuit Court of Appeals and, at the same time, moved for an injunction to direct the District Court to order a plan for operating the Memphis schools as a unitary system during the current 1969-70 school year.[219]

The Sixth Circuit Court affirmed the denial that asked for further relief. The court also, at the same time, denied the injunction requested.

The United States Supreme Court granted certiorari. The Court held that the Court of Appeals had erred in denying relief. But the

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[217]Northcross v. Board of Education of the Memphis, Tennessee, City Schools, 397 U.S. 232 (1970).

[218]Stockard, The United States Supreme Court and the Legal Aspects of Busing for Public School Desegregation, p. 86.

[219]Northcross v. Board of Education of the Memphis, Tennessee, City Schools, p. 234.

Court declined to reverse the Sixth Circuit Court's denial of the injunction.[220]

Chief Justice Warren Burger urged in his concurrence of the Court opinion, that some "basic practical problems" concerning the requirement of a "unitary system" must be resolved. He said:

> . . . As soon as possible, however, we ought to resolve some of the basic practical problems when they are appropriately presented, including whether, as a constitutional matter, any particular racial balances must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; and to what extent transportation may or must be provided by prior holdings of the Court. Other related issues may emerge.[221]

3.3 The Use of Busing for Desegregation

In many Southern states school boards were able to easily solve the desegregation problem because of the rural nature of the South. In many cases these rural school systems had only two schools, one all-white and one all-black. Desegregation was accomplished by simply closing the all-black school and transferring the black students to the all-white school, or by simply exhanging black students for white students in the two schools.[222]

Metropolitan school systems faced a far more complex problem because there were large pockets of minorities located in inner city areas. These areas existed as they did, not because of any laws,

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[220]Ibid., p. 234.

[221]Ibid., p. 237.

[222]Green v. County School Board of New Kent County, p. 430.

statutes, or actions of officials, but simply because housing patterns had developed in this manner. However, officials in large metropolitan school systems had often gerrymandered attendance lines to maintain segregated schools. The existence of these circumstances in Northern and Western school systems made it evident that the problem of desegregation extended outside the South.[223]

The Supreme Court was growing more and more impatient with the speed of the desegregation process. The Court began to force school boards to look for a means of implementing the desegregation process that would be more effective than the methods that were being used. Busing was a solution that was apparent to many people. Busing was simply the process of using a school system's transportation system to join students from a majority race with students from a minority race.[224] The solution was not new because rural sections of the United States had used buses to transport students to consolidated schools for many years.[225]

Busing had also been been used in other school systems for differing reasons. Following World War II there had been a tremendous increase in the number of public school students. Student enrollment had exceeded the rate of school construction. Busing had been used to transport students into less crowded schools. One

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[223]"Testing Time for Busing," Newsweek, September 8, 1975, p. 79.

[224]Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1970).

[225]Ibid., p. 4.

example of this was in St. Louis, Missouri, where buses were used to shift students to schools with fewer pupils.[226] This plan had been implemented effectively as an alternative to the establishment of double shifts that otherwise would have had students divided into morning and afternoon groups.

School administrators had argued for decades that the use of busing could help achieve quality education.[227] This argument dealt quite often with attempts to consolidate small high schools into one larger and more comprehensive high school. This argument focused on providing a school that could compete with schools in the cities. There were, of course, objections to the use of the school bus. The most common objections to busing were: (1) length of time students spent on the bus; (2) distance traveled; and (3) safety and cost of busing.[228]

Prior to 1954, Southern states had bused students literally as a means of segregating the schools.[229] A dual bus system, one for white students and one for black students, operated in most Southern states. These buses often both operated on the same streets and

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[226]Nicholas Mills, "Busing: Who's Being Taken For a Ride?", Commonweal, March 24, 1972, p. 4.

[227]Ibid., p. 7.

[228]Ibid., p. 8.

[229]Bardolph, The Civil Rights Record, p. 322.

highways. Black students were often transported past all-white schools en route to the all-black schools and vice versa.[230]

Busing had been used to successfully desegregate the schools in some areas of the country. The Berkeley, California, school system was the first city to achieve full desegregation by busing in 1968.[231] Other cities such as Galveston, Texas, Oklahoma City, and Pontiac, Michigan, began utilizing busing to desegregate following the success in Berkeley.[232]

The use of busing had been suggested in earlier court cases. Judge J. Shelly Wright in Hobsen v. Hansen[233] in 1967 had suggested the use of busing as a means of desegregating school systems located in large cities.

But how far would the Court go in requiring that busing be used to desegregate the schools? There was much speculation about the limits of court ordered busing until this question was answered by the United States Supreme Court in the Swann[234] decision. In this landmark case the Supreme Court insisted that cross-district busing could indeed be instituted in order to desegregate the public schools.[235]

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[230] Ibid.

[231] Ibid., p. 321.

[232] Ibid.

[233] Hobsen v. Hansen, 269 F. Supp. 401 (1967).

[234] Swann v. Charlotte-Mecklenburg Board of Education, p. 1.

[235] Ibid.

Before looking in detail at the Swann decision, it is important to remember that the position of the United States Supreme Court had changed between 1954 and 1969. It had changed from one of prohibiting de jure segregation to one of requiring integration.

The questions that Chief Justice Burger raised in Northcross[236] were answered, in part, in Swann v. Charlotte-Mecklenburg Board of Education.[237] Those questions concerned: (1) constitutional matters of racial balance; (2) alteration of school districts; and (3) the extent of transportation.

Swann dealt with the question of compulsory integration of a school system in order to dismantle the dual system that existed. Central to the case was a desegregation plan that was based on geographic zoning with a free-transfer plan. Initial approval had been given to the plan by the DistrictCourt in 1965. A petition seeking further relief, based on the Court's ruling in Green,[238] was filed in September of 1968. Both the plaintiffs and the school board agreed that the present plan did not fully achieve the required unitary school system. The school board was ordered to develop a plan to include student and faculty desegregation.[239]

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[236]Northcross v. Board of Education of the Memphis, Tennessee, City Schools, p. 237.

[237]Swann v. Charlotte-Mecklenburg Board of Education, p. 1.

[238]Green v. County School Board of New Kent County, p. 430.

[239]Swann v. Charlotte-Mecklenburg Board of Education, p. 9.

Examination in 1969 revealed that the Charlotte-Mecklenburg school system was the forty-third largest school system in the nation. The system contained over 84,000 students in 107 schools. The school district was a combined system which included the entire county as well as the city of Charlotte. Twenty-nine percent of the students were black and concentrated in the city. Fourteen thousand black students were enrolled in twenty-one schools that were either totally or more than ninety-nine percent black.[240]

The school board had submitted two different plans; one in June, 1969, and one again in August, 1969. The court ordered that a third plan be developed. After much prodding, the school board presented only a partially complete plan. In light of the board's failure to comply with the court's mandate, District Court Judge James McMillan appointed Dr. John Finger, an expert in educational administration, to prepare a desegregation plan for the court. The "Finger Plan," as finally presented, was extremely controversial in its method of dealing with the desegregation of the junior and senior high schools, and it aroused heated local debates.[241]

In February, 1970, the District Court was presented a "board plan" and the "Finger Plan." The board plan with modifications was adopted by the District Court. On appeal, the Fourth Circuit Court

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[240]Frank T. Read, "Judicial Evolution of the Law of School Integration Since Brown v. Board of Education," in The Courts, Social Science, and School Desegregation, ed. Betsy Levin and W. C. Hawley (New Brunswick, N.J.: Transaction Books, 1975), p. 34.

[241]Ibid.

affirmed the District Court's order, in part, and vacated, in part. The case was then remanded to the District Court for reconsideration. The United States Supreme Court granted certiorari and ordered reinstatement of the District Court order.

On remand, the District Court was presented with two new plans. After lengthy hearings, Judge McMillan concluded that the "Finger Plan" was acceptable. The District Court then ordered the school board to accept one of the three plans or provide a new one. The "Finger Plan" was to remain in effect until the school board presented a new plan. In August, 1970, the school board gave the court notice that it would "acquiesce" to the "Finger Plan," but stated that the plan was not reasonable. Judge McMillan then ordered the "Finger Plan" to remain in effect.[242]

The majority opinion of the United States Supreme Court was delivered by Chief Justice Warren Burger:

> We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under the Court's mandates to eliminate racially separate public schools established and maintained by state action.[243]

Chief Justice Burger first addressed the problem of defining the "responsibility of school authorities in desegregating a state-enforced dual school system in light of the Equal Protection Clause."[244] He explained that this was basically a problem of student

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[242]Swann v. Charlotte-Mecklenburg Board of Education, p. 11.

[243]Ibid., p. 5.

[244]Ibid., p. 18.

assignment. In referring to school systems that had been operating dual systems, the first obligation of school authorities was to eliminate racial distinctions in transportation, supporting personnel, extra curricular activities, maintenance of buildings, and distribution of equipment.

Justice Burger's opinion then concentrated on four problems in Swann:

> (1) to what extent racial balance or racial quotas might be used as an implement in a remedial order to correct a previously segregated system;
> (2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;
> (3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and
> (4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.[245]

The District Court's order had addressed the 71-29 percent white to black ratio in the Charlotte-Mecklenburg schools. Justice Burger drew heavily on this in addressing the problem of "racial balance" or "racial quotas." He cautioned:

> . . . If we were to read the holdings of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disproved and we would be obliged to reverse.[246]

According to Justice Burger it was not necessary for the racial composition of the community to be reflected in the school system.

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[245]Ibid., p. 22.

[246]Ibid., p. 24.

Desegregation could be achieved without this. He insisted that the District Court used the mathematical ratio only as a starting point in formulating a plan, not as a requirement.[247] Justice Burger suggested that there were circumstances that caused certain schools to be composed of all one race. But he also pointed out that this would continue until new schools were built or until neighborhood patterns changed.

In order to break up a dual system, Justice Burger said that "remedial altering of attendance zones"[249] was to be utilized. Sucy practices as gerrymandering school districts and attendance zones, as well as pairing, and clustering or grouping of schools might be used in order to eliminate the all-white and the all-black schools.[250] Justice Burger also pointed out that a school system with no history of discrimination might assign its pupils to the school nearest their homes.[251]

In regard to the "transportation of students"[252] Justice Burger said that no rigid guidelines should be given because of the many

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[247] Ibid.

[248] Ibid., p. 25.

[249] Ibid., p. 27.

[250] Ibid.

[251] Ibid., p. 28.

[252] Ibid., p. 29.

problems in thousands of situations.[253] The Swann decision actually addressed the question of busing very briefly. After a historical discussion and analysis that school buses had been a part of public education for years, the Court developed the thesis that because bus transportation was an accepted tool in education the District Court could indeed use buses to effectively dismantle the dual system.[254] Therefore, busing was an acceptable remedy because "desegregation plans cannot be limited to the walk-in school.[255]

The final point addressed in Swann dealt with an answer to what was later to prove to be a problem concerning "white flight." Mr. Burger addressed future adjustments of busing plans by saying:

> It does not follow that the communities served by such systems will remain demographically stable . . . Neither school authorities nor district courts are constitutionally required to make year-to-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.[256]

This line of reasoning later became more fully developed in Pasadena[257] and was important in several cases in the mid-seventies and mid-eighties.

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[253]Ibid.

[254]Ibid., p. 30.

[255]Ibid.

[256]Ibid., pp. 31-32.

[257]Pasadena v. Spangler, 427 U.S. 424 (1976).

Swann was truly a landmark case in the efforts of the Supreme Court to desegregate the public schools. The decision's full impact was not realized until years later. This case made clear the Court's rationale that: (1) racial balance was indeed a consideration; (2) cross-district busing was a requirement when necessary to achieve a desegregated school system; and (3) school systems were not required to have student bodies and faculties with the same racial proportion as the community as a whole. Swann also introduced the philosophy of "intent" v. "extent." This philosophy states that the degree of "intent" to segregate determines the "extent" of the remedy of a court.[258]

A companion case to Swann appeared to demonstrate even more clearly that busing could be required to achieve racial balance. Davis v. Board of School Commissioners of Mobile County[259] concerned a challenge to a school desegregation plan for Mobile County, Alabama as well as the city of Mobile and its suburbs. An area of 1,248 square miles coverage was included. In 1969 the school system contained some 73,500 students enrolled in ninety-one schools. Approximately fifty-eight percent of the students were white and forty-two percent were black.[260]

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[258]Stockard, The United States Supreme Court and the Legal Aspects of Busing for Public School Desegregation, p. 93.

[259]Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33 (1971).

[260]Ibid.

The metropolitan area of Mobile, Alabana, is divided by a major north-south highway. About ninety-four percent of the black students in the metropolitan area live east of the highway. The schools in the western section were relatively easy to desegregate. However, the plan formulated by the Department of Justice and approved by the Court of Appeals resulted in nine nearly all-black schools in the eastern section. The eastern section served sixty-four percent of all of the black elementary school students in the metropolitan area. In addition, over half of the black junior and senior high school students in metropolitan Mobile were attending all or nearly all-black schools. The plan which resulted in this number of black schools dealt with the eastern and western sections separately and did not provide for the movement of students across the highway as a means for effective desegregation. The adequacy of the plan was challenged.[261]

On appeal by the plaintiffs, the plan was rejected.[262] The Court held that plans to create constitutionally mandated unitary school systems are not limited by the neighborhood school concept. The transition from a segregated to a unitary school system should include every effort to achieve actual desegregation. Bus transportation and split zoning must be given adequate consideration by the

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[261]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 91.

[262]Davis v. Board of School Commissioners of Mobile County, p. 35.

courts in developing effective desegregation plans and these methods must be used when other measures were ineffective.[263]

In delivering the Court's opinion, Chief Justice Warren Burger insisted that the Court of Appeals had erred when it allowed the isolation of the eastern section and had not considered all available techniques to produce optimum desegregation:

> On the record before us, it is clear that the Court of Appeals felt constrained to treat the eastern part of metropolitan Mobile in isolation from the rest of the school system, and that inadequate consideration was given to the possible use of bus transportation and split zoning.[264]

Another companion case to Swann reiterated the Supreme Court's desire to see de jure segregated schools desegregated. The case of McDaniel v. Barresi[265] came to the Court from the state of Georgia. The Clarke County, Georgia, school system had a white-black ratio of pupils in the elementary schools of approximately two-to-one. The Board of Education of Clarke County devised a student assignment plan for desegregating the elementary schools. The plan relied primarily upon geographic attendance zones drawn to achieve greater racial balance. Additionally, the pupils in five heavily black attendance

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[263]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 91.

[264]Dvis v. Board of School Commissioners of Mobile County, p. 38.

[265]McDaniel v. Barresi, 402 U.S. 39 (1971).

zones either walked or were transported by bus to schools located in other attendance zones.[266]

The board's plan resulted in elementary schools with black enrollment ranging from twenty percent to forty percent in all but two schools. In those two schools the black enrollment was fifty percent. Parents of white students sued to enjoin the plan's operation, alleging that it violated the equal protection clause "by treating students differently because of their race and that transporting pupils in order to achieve racial balance is prohibited by Title IV of the Civil Rights Act."[267]

In a unanimous decision, the Supreme Court held that a school board that operates a dual school system is charged with the affirmative duty to take whatever steps are necessary to convert to a unitary system. Transporting students based on race is an acceptable method that may be used to achieve this. The Court based its decision on the belief that transition from a dual to a unitary system will almost invariably require that students be assigned differently on the basis of race. The equal protection clause of the Fourteenth Amendment requires this rather than prohibits it. This type plan is not barred by Title IV of the Civil Rights Act since the

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[266]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 92.

[267]McDaniel v. Barresi, p. 41

Act is directed only at federal officials and does not restrict state officials in assigning students within their school systems.[268]

Swann and its companion cases were followed by another North Carolina case, Winston-Salem/Forsyth County Board of Education v. Catherine Scott.[269] This case centered around appeals resulting from an order of the United States District Court which approved a modified plan for desegregation for certain North Carolina schools. This suit was pending in the United States Court of Appeals for the Fourth Circuit when the Supreme Court reached its decision in Swann. The Court of Appeals recommended the "instant proceedings with instructions to the District Court to receive new school board plans to meet the requirements of the Swann decision."[270] The District Court interpreted the remand order to require a plan which would "achieve the greatest possible degree of desegregation."[271] A revised plan was presented by the school board which would achieve a "fixed racial balance in the schools through a substantial increase in pupil busing.[272] The new plan was then approved by the District Court. Following this approval the school board applied to Fourth Circuit

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[268]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 92.

[269]Winston-Salem/Forsyth County Board of Education v. Catherine Scott, 404 U.S. 1221 (1971).

[270]Ibid., p. 1224.

[271]Ibid., p. 1225.

[272]Ibid.

Supreme Court Justice Warren Burger for a stay of the District Court's mandate. This stay was requested to allow the school board to "petition for certiorari to renew the Court of Appeals' decision."[273]

Justice Burger denied the request for stay by reasoning that "The stay application was not presented until seven and three days, respectively, before the school term"[274] There was not enough time for the Court to deal adequately with the stay. The effect of this ruling was that the busing plan approved by the District Court was to be implemented.

Following the Swann decision in 1971 the District Courts responded with many court ordered desegregation plans. The tool of desegregation in many of these decisions was busing. Efforts were made by local school boards as well as by state legislatures to circumvent these plans. In some situations local boards of education presented desegregation plans with busing as an integral part. These plans were often challenged by white parents.

In Wright v. Council of the City of Emporia[275] the Court addressed one effort to prevent a desegregation plan from being implemented that involved "pairing" of schools as well as the use of busing. Until the 1969-70 school year, the public schools in Greenville County, Virginia, were run on a segregated basis. All of the white

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[273]Ibid., p. 1231.

[274]Ibid.

[275]Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

students in the county had been attending schools located in the town of Emporia. Black students had been attending schools located largely outside of Emporia. There was one school for blacks in Emporia. In 1967, Emporia changed its status from a "town" to a "city" that could, under state law, maintain a separate school system. However, until a court-ordered adoption of a plan by which all children enrolled in a particular grade level would attend the same school, Emporia chose to remain part of the county school system.[276]

The Greenville County school board had originally adopted a "freedom-of'choice" plan that had been approved by the District Court. Following the Green decision of 1968, a suit was brought to force the plan to be changed in order to comply with the Court's decision in Green. A "pairing" plan involving busing was initiated by the District Court effective at the beginning of the 1969-70 school year.[277] Two weeks later the City of Emporia announced that the city would operate its own school system. Suit was brought to enjoin the city from withdrawing Emporia children from the county public schools.

The District Court insisted that such action would create a "substantial increase in the proportion of whites in the schools attended by city residents, and a concomitant decrease in the county schools."[278] The increase would cause the county system to be

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[276]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 94.

[277]Wright v. Council of the City of Emporia, p. 451.

[278]Wright v. Council of the City of Emporia, 442 F. 2d 590.

twenty-eight percent white and seventy-two percent black, while the city schools would be forty-eight percent white and fifty-two percent black.[279]

Certiorari was granted by the United States Supreme Court to consider whether a federal court might enjoin state or local officials from dividing and creating a new school district from a segregated school district. The Court held that the segregation had been county-wide. The withdrawal of Emporia, the site of the better equipped, traditionally white schools, from the county school system would impede the dismantling of the unconstitutional, segregated school system and was therefore not to be permitted.[280]

In a similar case, United States v. Scotland Neck City Board of Education,[281] decided on the same day as Wright, the use of state legislative action to impede desegregation was addressed by the Court. This case came to the Court from North Carolina.

The schools of Halifax County, North Carolina, were completely segregated by race until 1965. In that year, the school board adopted a "freedom-of-choice" plan that resulted in little desegregation. In 1968, the Department of Justice and the school board agreed to a plan to create a unitary system for Halifax County beginning with the 1969-70 school year. In 1969, a bill was passed by the state

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[279]Wright v. Council of the City of Emporia, 407 U.S. 464 (1972)

[280]Ibid., p. 464.

[281]United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972).

legislature enabling the city of Scotland Neck to create, by majority vote, its own separate school district. Scotland Neck was part of the county school system until this time. The newly created district would be fifty-seven percent white and forty-three percent black. The schools in the rest of Halifax County would be about ninety percent black. The United States Department of Justice instituted litigation enjoining the implementation of the statute on grounds that it "created a refuge for white students and promoted school segregation in the county."[282]

The United States Supreme Court granted certiorari. The question before the Court was to decide whether the dismantling of a dual school system was furthered or hindered by creating a new school district from the larger school district.

The Court ruled that the dismantling of a segregated school system cannot be impeded by the legislative creation of two new districts, one white and one black.[283] The Fourteenth Amendment, as interpreted in the Brown decisions, forbids state action creating, supporting, or perpetuating segregated schools. That state action involved in this case was by legislative action rather than by school board action does not change its segregative effect or make it valid.[284]

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[282] Ibid.

[283] Ibid., p. 489.

[284] Ibid.

In the case of Drummond v. Acree[285] the Court considered a challenge to a desegregation plan from white parents in Augusta, Georgia. The District Court had ordered the busing of students to accomplish desegregation of the elementary school system in Augusta. Parents sought a stay of the order premised on the federal statute, Title VIII, section 803, which reads:

> In the case of any order on the part of any United States district court which requires the transfer or transportation of any student . . . for the purposes of achieving a balance among students with respect to race . . . the effectiveness of such order shall be postponed until all appeals . . . have been exhausted.

The Court ruled that Title VIII, section 803, does not act to block orders requiring the transportation of students for the purpose of desegregating a school system. It postpones implementation only of those orders requiring the transportation of any student for the purpose of achieving a balance among the students with respect to race.[286] The Swann finding, that 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, was verified in this decision.

The issue of consolidation of school districts to achieve racial balance came to the Court in School Board of Richmond, Virginia v. State Board of Education of Virginia in 1973. The Richmond school system had been involved in a series of segregation

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[285]Drummond v. Acree, 409 U.S. 1228 (1972).

[286]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 96.

cases and litigation. The student enrollment had increased from forty-three percent black to over seventy percent black in 1969.[287]

In 1971, the District Court ordered a racial-balance plan intended to eradicate "racial indentifiability of each facility to the extent feasible within the city of Richmond."[288] Richmond moved to have the city's school system consolidated with two nearby county school systems that were ninety-one percent white. The District Court ordered the consolidation.[289]

The order was appealed to the Court of Appeals for the Fourth Circuit by the two county school boards. The District Court's judgment was reversed.[290] The issue centered around whether a school system might be consolidated to create a system with a lower ratio of black students. Having relied on Swann, the court found that there was no constitutional requirement for racial balance other than in the process of dismantling the dual system.[291]

The United States Supreme Court granted certiorari. The Court's decision was split 4-4 thus sustaining the Fourth Circuit's

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[287]Bradley v. School Board of City of Richmond, Virginia, 412 F. 2d 1058, 1074 (1972).

[288]Bradley v. School Board of City of Richmond, Virginia, 325 F. Supp. 835 (1971).

[289]Bradley v. School Board of City of Richmond, Virginia, 338 F. Supp. 67 (1972).

[290]Bradley v. School Board of City of Richmond, Virginia, 462 F. 2d 1058 (1972).

[291]Ibid., p. 1060.

decision.[292] Justice Powell did not participate in the Court's decision because he had served on the Richmond school board for twenty-five years. To have participated in the Court's decision would have been a conflict of interest for him.

In 1982 the Supreme Court found itself considering an extraordinary question in the Washington v. Seattle School District No. 1[293] case. The question before the Court was whether an elected school board could use the Fourteenth Amendment to defend its program of busing for integration from attack by the State. Seattle School District No. 1 was largely coterminous with the city of Seattle, Washington, and was charged by state law with administering 112 schools and educating approximately 54,000 public school students. Approximately thirty-seven percent of those students were of Black, Asian, American Indian, or Hispanic ancestry. Because segregated housing patterns in Seattle had created racially imbalanced schools, the school system had historically taken steps to alleviate the isolation of minority students.[294]

In 1977 the school system came under increasing pressure to accelerate its program of desegregation. The school board responded by enacting a resolution defining "racial imbalance" as "the situation that exists when the combined minority student enrollment in a

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[292]Bradley v. School Board of City of Richmond, Virginia, 412 U.S. 92 (1972).

[293]Washington v. Seattle School District No. 1, 458 U.S. 457 (1982).

[294]Ibid., p. 460.

school exceeds the district-wide combined average by 20 percentage points." No school was to have a minority enrollment of more than fifty percent.[295] In 1978 the school system enacted the so-called Seattle Plan for desegregation of its schools. The plan made extensive use of mandatory busing.

Subsequently, a state-wide initiative (Initiative 350) was drafted to terminate the use of mandatory busing for purposes of racial integration in the public schools of the State of Washington. The initiative prohibited school boards from requiring any student to attend a school other than the one geographically nearest or next nearest to his home. There were some exceptions to this prohibition, but these exceptions permitted school boards to assign students away from their neighborhood schools only for nonintegrative purposes. The initiative was passed at the November 1978 general election. The Seattle School District, along with two other districts, brought suit challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment.[296]

The District Court held the initiative unconstitutional because it established an impermissible racial classification. The initiative permitted busing for nonracial reasons but forbade it for racial reasons. The court permanently enjoined implementation of the initiative's restrictions. The Court of Appeals for the Ninth Circuit affirmed the District Court's ruling. The United States Supreme Court

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[295] Ibid.

[296] Ibid., p. 464.

upheld the position of the Court of Appeals and declared that Initiative 350 violated the Equal Protection Clause of the Fourteenth Amendment.[297] Justice Blackmun, in delivering the opinion of the Court, stated:

> In reaching this conclusion, we do not undervalue the magnitude of the State's interest in its system of education. Washington could have reserved to state officials the right to make all decisions in the areas of education and student assignment. It has chosen, however, to use a more elaborate system; having done so, the State is obligated to operate that system within the confines of the Fourteenth Amendment. That, we believe, it has failed to do.[298]

## 3.4 Implications for De Facto Segregation

After 1971, the Swann decision mandated nationwide racial quotas by busing, if necessary, requiring all school systems to eliminate de jure segregation. The legal battle then transferred to non-Southern school districts where the issue was de facto segregation. Because of the absence of state-imposed segregation laws, proof of discrimination was very difficult to assess in such situations.[299]

De facto segregation and busing became almost inseparable issues. The decade of the seventies produced numerous cases concerning school desegregation. Unlike prior de jure cases in which the Supreme Court always decided with near unanimity, de facto cases

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[297] Ibid., p. 487.

[298] Ibid.

[299] James N. Fuller, The Legal Aspects of Busing for Desegregation in De Facto School Districts (Ed.D. Dissertation, University of North Carolina at Greensboro, 1983), p. 79.

brought diverse opinions. Litigations received thorough examinations and individual justices often gave differing constitutional reviews.[300]

During the 1960s, the United States Supreme Court had given Northern and Western cities a reprieve. Urban school districts with neighborhood schools had been left undisturbed by the judiciary. Courts had simply been too preoccupied with school systems in the rural South. When Swann switched the spotlight from rural to urban school systems the North and West became exposed to possible action.[301] "You cannot conclude," wrote the Los Angeles Times, "that Los Angeles and other Californian and Northern cities are wholly unaffected by the Court's claim of reasoning in Swann."[302] The effect would soon be felt. On October 12, 1972, sixteen months after Swann, the Supreme Court heard its first "Northern and Western" case.[303]

The case was Keyes v. School District Number One, Denver, Colorado.[304] This case was different from Southern de jure cases because there had never been required segregation in Denver, Colorado. Keyes was a de facto case. The significance of the Keyes decision was that the United States Supreme Court extended the definition of

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[300]Ibid., p. 83.

[301]Wilkinson, From Brown to Bakke, p. 195.

[302]Editorial, Los Angeles Times, April 22, 1971.

[303]Wilkinson, From Brown to Bakke, p. 195.

[304]Keyes v. School District Number One, Denver, Colorado, 413 U.S. 189 (1973).

de jure segregation to include school systems intentionally segregating even if not by state statute.

Litigation in Keyes originated from petitioners seeking to desegregate the Park Hill area schools in Denver. The District Court ordered desegregation of these schools, and the suit was extended in an attempt to secure desegregation of the remaining Denver schools.[305] The District Court denied the additional relief sought by proclaiming that the deliberate racial segregation of the Park Hill schools was not proof enough that a similar segregation policy addressed specifically to the core city schools existed and demanded that the petitioners prove de jure segregation existed for each area that they sought to desegregate.[306]

The District Court found that "white" schools in other parts of the school district were superior to segregated core city schools and relied on Plessy to order the school system to provide substantially equal facilities for the core city schools. This relief was reversed by the Tenth Circuit Court of Appeals even though that court affirmed that, although the Park Hill schools were deliberately segregated, there was no overall school board activity that established a policy of system-wide segregation.[307]

On appeal, the United States Supreme Court modified and remanded the case. Justice William Brennan delivered the opinion of

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[305] Ibid.

[306] Ibid., p. 196.

[307] Ibid., p. 197.

the Court in which he conceded this case did not meet the "segregation by statute" rule as was decided upon in Brown I, Brown II, and Swann. He then added:

> Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation, . . . it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.[308]

Thus the Supreme Court for the first time in Keyes all but ordered busing for a city outside the South. It relieved black plaintiffs of the task of proving school board discrimination in each and every school in a Northern or Western school system before city-wide busing could be imposed. And the Court served notice that when two reasonable alternative courses existed, the school board had best choose the one which resulted in greater integration.[309]

In 1974, the twentieth anniversary of Brown I, the Supreme Court of the United States ruled on a case of extreme importance. The case was Milliken, Governor of Michigan v. Bradley.[310] The question in Milliken was one of remedy; whether courts could use suburban pupils to desegregate inner city schools. Federal District Judge Stephen Roth had found that the Detroit Board of Education was guilty of the usual ploys to obstruct integration. Those usual ploys included optional attendance zones, gerrymandered school boundaries,

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[308]Ibid., p. 213.

[309]Wilkinson, From Brown to Bakke, p. 198.

[310]Milliken, Governor of Michigan v. Bradley, 418 U.S. 718 (1974).

and segregative transportation and school construction policies. The state of Michigan was also found to have delayed Detroit's desegregation by its funding policies and use of special legislation.[311] Judge Roth joined fifty-three of Detroit's eighty-five outlying suburban school districts with the city school district in the desegregation decree and ordered a nine member panel to draft a detailed plan.[312]

The scope of Judge Roth's order was staggering. The new metropolitan school district would contain 780,000 pupils, of whom some 310,000 would be daily transported in the interest of desegregation. Busing was to be "a two-way process with both black and white pupils sharing the responsibility for transportation requirements at all grade levels." Even kindergarten was to be included.[313] The Sixth Circuit Court of Appeals affirmed, by a vote of six to three, Judge Roth's findings and the need for a metropolitan desegregation plan.[314]

On certiorari, July 25, 1974, the Supreme Court reversed and remanded the case for the development of a plan restricted to the city of Detroit.[315] By a vote of five to four, the Court "saved" the suburbs. Justice Powell, who had abstained in the Bradley decision, voted with the majority. The Court ruled that Judge Roth had wrongly

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

[312]Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972).

[313]Ibid., p. 919.

[314]Bradley v. Milliken, 484 F. 2d 215 (CA6 1973).

[315]Milliken v. Bradley, 418 U.S. 717 (1974).

included the outlying suburban school districts with Detroit in the desegregation decree.[316] The holding was that absent a showing that the outlying districts had failed to operate unitary school systems or had committed acts that fostered segregation in other school districts, a court-ordered school desegregation plan could not cross school district lines to include the districts in the plan.[317]

A 1975 decision by the Supreme Court in Tasby v. Estes[318] let stand an order by the Fifth Circuit Court of Appeals which mandated busing in Dallas, Texas. The actual busing began in the fall of 1976 when approximately seventeen thousand students, in grades four through eight, were bused.[319] Some ten thousand students were bused voluntarily in order to take advantage of special educational programs that were offered in schools outside their neighborhoods. The plan incorporated seven Dallas suburbs because of a charge that the district operated a racially segregated system of blacks and Mexican-Americans.[320] This case differed from the Detroit case in that there was: (1) no unitary system established in Dallas; and (2) there was prima facie evidence of a segregated system.

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[316]Wilkinson, From Brown to Bakke, p. 222.

[317]Zirkel, A Digest of Supreme Court Decisions Affecting Education, p. 102.

[318]Tasby v. Estes, 423 U.S. 93 (1975).

[319]"Another Year of Turmoil in Schools?" U.S. News and World Report, September 31, 1976, p. 31.

[320]"Testing Time for Busing," Newsweek, September 8, 1975, p. 79.

Some lower courts still sought to implement metropolitan desegregation after Milliken. That case, they believed, reflected the unmanageability of large metropolitan areas such as Detroit. In middle-sized areas, such as Wilmington, Delaware, and Louisville, Kentucky, suburban busing appeared to be more feasible. The Supreme Court declined to upset lower court judgments in either the Buchanan v. Evans[321] case, which required twelve school districts to merge in Wilmington, Delaware, or the Newburg Area Council v. Jefferson County Board of Education[322] case, which required the merger of three school districts in Louisville, Kentucky. In both these cases de jure segregation was proven to have been established by legislative statute.

On January 28, 1976, the United States Supreme Court handed down another landmark decision in Pasadena City Board of Education v. Spangler.[323] There the plan approved by the District Court required that "there shall be no school in the Pasadena District, elementary or junior high or senior high, with a majority of any minority students."[324] The District Court had also interpreted this provision to require adjustments in the racial composition of schools on an annual basis.[325]

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[321]Buchanan v. Evans, 423 U.S. 963 (1975).

[322]Newburg Area Council v. Jefferson County Board of Education, 421 U.S. 931 (1974).

[323]Pasadena City Board of Education v. Spangler, 427 U.S. 427 (1976).

[324]Ibid., p. 428.

[325]Ibid., p. 433.

The Supreme Court emphatically rejected that view. Once desegregation was accomplished, and student assignments placed on a racially neutral basis, yearly readjustments were not required. The Court held that resegregation might even take place, if it did so through "random" population movement and not by official blessing or design.[326] The lack of segregative intent on behalf of the school board proved more important in this case than the actual segregated housing pattern which resulted in the racial ratios in the schools. By the time of this case, segregation by intent, by school boards or state agencies, had become the primary issue in Supreme Court decisions.

In Austin Independent School District v. United States[327] the issue of student assignments was questioned. Most of Austin was residentially segregated. The school board's policy was to assign students to schools nearest their homes. This resulted in forty-five percent of the Mexican-American students attending schools that had enrollments that were sixty percent black or Mexican-American. The complaint was that this policy constituted de jure segregation. In writing the majority decision of the Court, Judge Powell stated:

> The principal cause of racial and ethnic imbalance in urban public schools across the country--North and South--is the imbalance in residential patterns. Irish residential patterns are typically beyond the control of school

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[326] Ibid., pp. 435-436.

[327] Austin Independent School District v. United States, 429 U.S. 991 (1976).

> authorities. For example, discrimination in housing, whether public or private, cannot be attributed to school authorities . . .[328]

Justice Powell did not, however, discount the use of busing to desegregate. He did outline the use of busing under certain circumstances:

> Large scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past.[329]

Once again the Court proclaimed that the order for busing would be predicated on a history of de jure segregation as in Swann and Keyes. Without that burden of proof, the Court said there would be no widespread busing as a remedy.

In the 1978 Bustop v. The Borad of Education of the City of Los Angeles[330] case, Justice Rehnquist, as Circuit Justice, addressed the question of whether a state could impose more atringent requirements for desegregation on school systems than were required by the United States Constitution. The case came from California where the Superior Court of Los Angeles County had prescribed a desegregation plan for the schools of Los Angeles County. The plan required the reassignment of over 60,000 students in the school district; and the busing of some of these students involved a one and one-half hour

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[328]Ibid., p. 996.

[329]Ibid., p. 998.

[330]Bustop v. The Board of Education of the City of Los Angeles, 439 U.S. 1380 (1978).

ride to school. The Court of Appeals of California had ordered a stay of the plan, but the Supreme Court of California had vacated this stay.[331]

An organization representing students who would be bused under the plan applied to Circuit Justice Rhenquist for a stay of the California Supreme Court's order, pending the filing of a petition for certiorari or an appeal. The plaintiffs argued that the decision of the Supreme Court of California was at odds with recent United States Supreme Court rulings on school desegregation. The plaintiffs argued that the state court had gone further than what was required by the Equal Protection Clause of the Fourteenth Amendment.

Justice Rhenquist denied the application for stay on the basis of four premises: (1) The state's highest court premised its decision not on the Equal Protection Clause of the Fourteenth Amendment, but on the state constitution, which it had construed to require less of a showing on the part of the plaintiffs who seek court-ordered busing than the United States Supreme Court had required of Plaintiffs who sought similar relief under the Federal Constitution.[332] (2) It was not probable that four Justices of the Supreme Court would vote to grant certiorari.[333] (3) Even if the applicant was viewed as having a stronger federal claim on the merits, the fact that the schools were scheduled to open in four days was an equitable consideration

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[331] Ibid.

[332] Ibid., p. 1381.

[333] Ibid., p. 1382.

counseling against once more upsetting the expectations of the parties in the case. (4) The school board raised no objection to the plan and the state's highest court had apparently placed its approval on it, the complaints of the parents and children being complaints about state law, and it being in the forums of the state that such questions must be resolved.[334] Thus, the Supreme Court refused to become involved in state actions requiring more extensive actions for school desegregation.

In the 1979 Columbus Board of Education v. Pennick[335] case, the Supreme Court upheld a district-wide busing plan. The Court insisted that because the school system had been segregated at the time of Brown I, the school board had an affirmative constitutional responsibility to end that segregation. The Columbus, Ohio, public schools of 96,000 students were highly segregated with seventy percent of all students attending schools that were at least eighty percent black or eighty percent white. In addition, half of the 172 schools were ninety percent black or ninety percent white. The Court held that local board actions such as teacher assignment, attendance zoning, and school site selection could constitute sufficient proof of discriminatory intent and impact to establish an equal protection violation and to warrant a district-wide busing plan. It was held

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[334]Ibid., p. 1383.

[335]Columbus Board of Education v. Pennick, 443 U.S. 461 (1979).

that the system had "never actively set out to dismantle this dual system."[336]

The decision of the Supreme Court in this case chipped away at the distinction between de jure and de facto segregation. Court-ordered busing was upheld in a school system where segregation was not state imposed or state sanctioned.

The Dayton case began in 1972 when several students, through their parents, brought charges that the Dayton Board of Education and various officials as well as the Ohio State Board of Education were operating a segregated school system in violation of the Equal Protection Clause of the Fourteenth Amendment.[337] In this Dayton I case, the District Court found: (1) the existence of racially imbalanced schools; (2) the use of optional attendance zones; and (3) a recent Dayton Board of Education recission of resolutions passed by the previous Board, which resolutions had acknowledged a role played by the Board in creation of segregative racial patterns. Based on these findings the District Court ruled that there was cumulatively a violation of the equal protection clause in the operation of the Dayton schools.[338]

The United States Sixth Circuit Court of Appeals approved a District Court plan involving district-wide racial distribution of each school which was to be brought within fifteen percent of the

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[336]Ibid.

[337]Dayton Board of Education v. Brickman, 433 U.S. 406 (1977).

[338]Ibid.

black-white ratio of Dayton.[339] On certiorari, the United States Supreme Court vacated and remanded, because the Court held that constitutional violations found by the District Court did not justify the broad district-wide remedy imposed.[340] This decision seemed to increase the burden of demonstrating nonsegregative intent by school officials and to limit the extent of remedies.[341] The city's desegregation plan was ordered left in place.

In Dayton II, after the District Court had dismissed the complaint, the Court of Appeals ruled that at the time of Brown I in 1954, the Dayton Board of Education had operated a racially segregated dual school system. Furthermore, the Court of Appeals held that the school board was constitutionally required to disestablish that system and its effects, but that it had failed to discharge this duty. Finally, the Court of Appeals held that the consequences of the dual system, together with the intentionally segregative impact of various practices since 1954, were system-wide and needed a system-wide remedy.[342]

On July 2, 1979, the Supreme Court upheld the Court of Appeals ruling in Dayton II as well as the Columbus ruling on the same day. These two Ohio cases strengthened the doctrine established in Keyes

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[339] Ibid.

[340] Ibid.

[341] James B. Stedman, Busing for Segregation, Issue Brief Number IB 81010, (Washington, D.C.: The Library of Congress, Congressional Research Service, 1982), p. 78.

[342] Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979).

that federal courts could order a remedy where public school segregation was found to be the result of actions by school boards or other school governing units.

3.5 A Possible Return to Neighborhood Schools

Since 1979 the United States Supreme Court has left school desegregation cases involving busing to the lower courts. The Court apparently feels that it has established clear guidelines for busing for desegregation purposes. In the Court's effort to eliminate all vestiges of de jure segregation in the American school systems, it has often been necessary to bus students outside their neighborhoods to achieve better racial balance in the schools.

But what happens once a school board complies with a court-ordered desegregation plan and establishes a racially unitary system? Must the board continue to follow that plan? Or may it alter or even abandon the plan? And what should a board do if a court-ordered desegregation plan designed to improve racial balance actually makes things worse by triggering white flight?[343] These questions are currently being dealt with by school systems attempting to return to neighborhood schools.

These questions have been answered differently by Courts of Appeals in the Fourth and Tenth Circuits. This led to confusion about how school boards might cope with resegregation. In November, 1986, the United States Supreme Court declined to resolve the split

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[343]Sendor, "These Two Cases Raise Key Questions," p. 12.

between these two federal appeals courts over the constitutionality of school districts' plans to abandon court-ordered busing and return to neighborhood schools.[344]

The move by the Court surprised many legal observers. The Court voted eight to one to let stand conflicting appellate-court rulings in desegregation cases involving the Norfolk, Virginia, and Oklahoma City, Oklahoma, public schools.[345]

In the Norfolk case, the United States Court of Appeals for the Fourth Circuit, in February, 1986, upheld a new student assignment policy that resulted in black enrollments of more than ninety percent in ten of the district's thirty-six elementary schools. In contrast, the United States Court of Appeals for the Tenth Circuit, in June, 1986, invalidated a similar neighborhood schools' plan that had left thirty-three of the Oklahoma districts' sixty-four schools more than ninety percent black.[346]

The appeals courts thus reached opposite conclusions on one of the last major unsettled issues of school desegregation law: Must formerly segregated districts continue to bus students indefinitely, even though they have complied fully with court orders and are now considered unitary?[347]

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[344]Tom Mirga, "Justices Decline to Review Cases on Desegregation," Education Week, November 12, 1986, p. 1.

[345]Ibid.

[346]Ibid.

[347]Ibid., p. 9.

The Norfolk case, Riddick v. School Board of City of Norfolk,[349] addressed a plan by the Norfolk school board to return to neighborhood schools at the elementary school level. The Norfolk school system originally operated as a dual system. In 1972, the Fourth Circuit affirmed a District Court order that called for cross-town busing as a remedy for de jure segregation and a means of arriving at a unitary system. The school board complied. In 1975, after declaring the Norfolk public schools a racially unitary system, the District Court dismissed the desegregation suit.[350]

Over the next few years, white flight began to erode the accomplishments of the court-ordered plan. Between 1970 and 1980, Norfolk's population changed from a racial mix of seventy percent white and twenty-eight percent black to a mix of sixty percent white and thirty-five percent black. The change was more dramatic in the public schools. The result was an outright reversal of the school systen's racial composition, from fifty-seven percent white and forty-three percent black in 1970 to forty-three percent white and fifty-seven percent black in 1980.[351]

The racial change was accompanied by a drop in total enrollment. The school board closed seventeen elementary schools. Most of

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[348] Ibid.

[349] Riddick v. School Board of Norfolk, 784 F. 2d 521 (4th Cir. 1986).

[350] Sendor, "These Two Cases Raise Key Questions," p. 12.

[351] Ibid.

these seventeen were in predominantly black neighborhoods. In 1977, only one elementary school was more than seventy percent black. Due to the loss of white students the number of elementary schools that had more than seventy percent black enrollment increased to seven by 1981. And during the same years, parent involvement in many of the schools dropped sharply, with PTA membe-ship declining from between 15,000 and 20,000 to only 3,500.[352]

To remedy these problems, the school board in 1983 adopted a voluntary desegregation plan that eliminated all cross-town busing of elementary school students. All Norfolk elementary schools became neighborhood schools, with attendance zones gerrymandered to produce the maximum integration possible without busing. The plan also permitted any students attending schools in which their race constituted at least seventy percent of the student body to transfer to schools in which their race constituted less than fifty percent. Finally, the plan called for programs to boost parent involvement and to expose elementary school students to students of other races. This plan resulted in twelve of the city's thirty-six elementary schools becoming more than seventy percent black, ten of those twelve would be more than ninety-five percent black, and six other elementary schools would become more than seventy percent white.[353]

The plan was approved by the District Court. On appeal, the Fourth Circuit affirmed the lower court's decision.

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[352]Ibid.

[353]Riddick v. School Board of Norfolk, p. 524.

The Court of Appeals reasoning for its decision was based on the District Court's 1975 declaration that Norfolk had achieved a unitary system. This declaration freed the school board from any duty to continue court-ordered busing for desegregation. Once de jure segregation was declared ended, the board had a clean slate and was free to change its pupil assignment system as long as the changes made were not undertaken with discriminatory intent.[354] The court also felt that the school board's desire to stop white flight and boost parent participation was a legitimate reason for shifting to a neighborhood elementary school system.

The Court of Appeals stated:

> While the effect of the plan in creating several black schools is disquieting, that fact alone is not sufficient to prove discriminatory intent, . . . We do not think this is a case in which a school board, upon obtaining a judicial decision that it is unitary, turns its back on the rights of its minority students and reverts to its old discriminatory ways. If such were the case, we would, of course, not approve Norfolk's new assignment plan.[355]

The group of black parents and students who opposed the school board's plan sought Supreme Court review of the Riddick case, but the High Court declined to hear it. That decision left the Fourth Circuit's ruling intact without approving it.

Reactions to the Riddick decision have ranged from approval to alarm. The United States Department of Justice, which had supported the board's plan to end the busing, called the result "a much needed

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[354]Sendor, "These Two Cases Raise Key Questions," p. 12.

[355]Riddick v. School Board of Norfolk, p. 572.

breath of fresh air in our continuing effort to achieve meaningful desegregation that is more fully sensitive to the educational needs of public school students not only in Norfolk, but throughout the country."[356] But to Napoleon B. Williams, Jr., an attorney for the NAACP Legal Defense Fund, which represented the Norfolk plaintiffs, the Riddick decision is likely to reverse more than thirty years of progress in school desegregation. He is concerned that the decision will be "an open invitation" to districts across the country to obtain a declaration of unitariness, let it stand for a few years, and then go back to racially identifiable neighborhood schools.[357] James Nabrit, III, director of the NAACP Legal Defense and Education Fund, states that the decision could "permit a very general resegregation of the public schools of the South."[358]

As stated earlier, the Riddick decision applies only to states in the Fourth Circuit, but it may well be considered as a precedent by courts across the country and used by those who believe that federal courts should now step aside in school districts that have converted from dual to unitary systems.[359] The United States Department of Justice Civil Rights Division announced that the legal principles in the case could apply to "many, many other school districts

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[356] School Law News, February 20, 1986, p. 1.

[357] Education Week, February 19, 1986, p. 18.

[358] Education USA, June 9, 1986, p. 316.

[359] Mesibov, "Busing in Unitary School Districts," p. 19.

across the country."[360] In school desegregation suits involving the Justice Department, one hundred seventeen school districts are now declared unitary, and forty-seven have had desegregation orders dismissed by the courts. These districts can use the Riddick decision if they choose to eliminate busing.[361] Most of them are in rural Alabama and Georgia. Desegregation experts say there are no accurate statistics on the total number of districts that have been declared unitary and which may be able to consider ending busing plans.[362]

In Dowell v. Board of Education of Oklahoma City Public Schools,[363] the Tenth Circuit Court of Appeals faced a similar situation to that addressed in Riddick. Federal court supervision of the Oklahoma City schools began in 1961. In 1972 a federal district court ordered the school board to adopt a systemwide desegregation plan that included busing. This plan, known as the "Finger Plan," restructured attendance zones for high schools and middle schools so that each school had both black and white students. Elementary schools that had a majority black enrollment were converted to fifth-grade centers. Elementary schools with a majority white enrollment were converted to serve grades one through four. The general result of this plan was that most white students in grades one through four

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[360] News and Observer (Raleigh, N.C.), June 17, 1986, p. 1A.

[361] Education Week, February 26, 1986, p. 9.

[362] Education Week, November 12, 1986, p. 9.

[363] Dowell v. Board of Education of the Oklahoma City Public Schools, 795 F. 2d 1516 (10th Cir. 1986).

continued to attend neighborhood schools, while black students in these grades were bused. Most black fifth graders attended the fifth grade centers in their neighborhoods with white fifth graders being bused. Students in grades one through five who already attended schools in integrated areas were allowed to stay in their neighborhoods.[364]

In 1977, the Western District Court in Oklahoma ruled the Oklahoma City schools a racially unitary school system and terminated active supervision of the case. However, the Court's order did not vacate or modify the 1972 order mandating busing of students for desegregation purposes. The 1972 order also required court approval before any changes could be made in the operation of the school system under this plan. The court did not foresee that the plan would be dismantled when its jurisdiction ended or that the board would intentionally take any action to undermine the unitary system.[365]

Several years later, Oklahoma City began to experience a drop in enrollment of white students, a large decrease in parent involvement, and changing housing patterns.[366] Without seeking approval of the court, the school board decided to abandon the court-ordered desegregation plan and adopt a new one that reinstituted neighborhood elementary schools for grades one through four. If students were assigned to a school where their race was in the majority, they would

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[364]Mesibov, "Busing in Unitary School Districts," p. 25.

[365]Ibid.

[366]Sendor, "These Two Cases Raise Key Questions," p. 13.

be allowed to transfer to a school where their race was in the minority. The new plan also contained other methods to insure the equality of schools and means of bringing white and black students together several times a year. As a result of the new plan, thirty-three of the system's sixty-four elementary schools became at least ninety percent black or ninety percent white.

A group of black parents and students asked the District Court to reopen the case it had closed in 1977. The District Court found the new plan to be constitutional and refused to reopen the original case.[367] The group appealed to the Tenth Circuit Court of Appeals, which reversed the lower court's ruling.

The Tenth Circuit judges disagreed with their colleagues from the Fourth Circuit. They ruled that being declared a unitary school system did not end the school board's duty to adhere to the court-ordered desegregation plan. The court ruled that it would be necessary for the school board to prove that the original need for the desegregation plan had vanished and that new circumstances had made the court-ordered plan oppressive.

In giving its opinion, the Tenth Circuit Court of Appeals said:

> When it is asserted that a school baord under the duty imposed by a mandatory court order has adopted a new attendance plan that is significantly different from the plan approved by the court and when the results of the plan indicate a resurgence of segregation, the court is duty bound either to enforce

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[367] Dowell v. Board of Education of the Oklahoma City Schools, 606 F. Supp. 1548 (W.D. Okla. 1985).

> its order or inquire whether a change of circumstances . . . has occurred.[368]

The Dowell decision leaves the door open for the Oklahoma City school board to go back to the District Court and to attempt to prove what the Fourth Circuit said in Riddick: that the court-ordered plan had indeed become oppressive because changed circumstances, such as white flight and decreased parent involvement in the schools, had themselves caused resegregation and diminished the quality of education.[369] The Tenth Circuit Court of Appeals made it clear that its decision should not be interpreted as addressing the ultimate issue of the constitutionality of the attendance plan presented by the school board.

The main differences in the decisions in Riddick and Dowell are procedural in nature. The Fourth Circuit put the burden on the plaintiffs to prove the Norfolk school board intended to discriminate when it changed its pupil assignment plan. The Tenth Circuit, on the other hand, put the burden on the school board to prove the propriety of its new plan. It is also important to note that the Oklahoma City School Board attempted to implement its new plan without requesting District Court approval. The Norfolk School Board sought District Court approval of its proposed plan before implementation.

The Supreme Court's decision not to grant certiorari in these two cases took many observers by surprise. The Supreme Court Justices

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[368]Dowell v. Board of Education of the Oklahoma City Schools, 795 F. 2d, p. 1520.

[369]Sendor, "These Two Cases Raise Key Questions," p. 13.

usually act quickly to resolve differences in rulings handed down by the federal circuit courts.[370] It also left in doubt what the Court's true message was behind this action to deny certiorari. Several theories have been offered to try to explain the Court's action.

One theory holds that a majority of the Justices concluded that it would be better at this time to leave the lower courts with broad discretion, even though inconsistent decisions might result from such action, than to set a single nationwide rule for ending desegregation cases.

Another theory suggests that the Court could not reach a majority decision on this issue and, therefore, decided to let the issue wait. This theory suggests that the Court did not want to produce a ruling filled with several concurring and dissenting opinions.

A third theory, and possibly the most plausible, contends that a five- or six-member bloc has emerged within the Court to uphold the Fourth Circuit's decision. This would explain the Court's vote not to hear the Norfolk case. This theory suggests that this majority denied review in the Oklahoma City Case because several procedural matters must be resolved when the suit is sent back to federal district court. If the Tenth Circuit ruling is still intact on a

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[370] Education Week, November 12, 1986, p. 9.

second appeal to the Court, the theory concluded, the Justices will then vote to overturn it, establishing a clear national precedent.[371]

Whatever the real intention of the Supreme Court was, the decision not to hear Riddick and Dowell has resulted in unfortunate confusion about how school boards may cope with resegregation. But the issue will not go away. Many urban school systems presently face the same type of conditions as do Norfolk and Oklahoma City. These school systems seem to have only two choices. They can stay with the court-ordered plans now in place and risk a school system that is free of de jure segregation but which has few white students; or they can adopt a new attendance plan that will help preserve the systemwide level of white enrollment but which results in the resegregation of some schools.[372]

## 3.6 Summary

School authorities in every school district in the United States have an obligation to operate a school system that is free from racial discrimination. If, and only if, they fail in this obligation can judicial authority be invoked. If judicial action is necessary, the court's task is to take action that will result in correction of the condition that offends the Constitution. Such action has been necessary on numerous occasions when school systems have been found to be operating illegal segregated systems.

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[371] Ibid.

[372] Ibid.

Segregation is unconstitutional if it is state-compelled or state-authorized and results from state action that was adopted with the specific intent of separating students on the basis of race and does so. Sometimes, the term segregation is also used to apply to situations in which separation of students occurs as an incidental and unintended consequence of some governmental or private action. Under this use of the term, segregation is not illegal.

The United States Supreme Court has addressed two types of segregation. De jure segregation results as a matter of law and is unconstitutional. De facto segregation is not unconstitutional and results from an incidental and unintended basis.

Brown I held that segregation of children in public schools solely on the basis of race was a violation of the equal protection clause of the Fourteenth Amendment. Brown II authorized lower courts to take various actions to order school districts to remedy state imposed segregation. The use of busing to remedy illegal segregation of public school students became a reality with the Swann decision of 1971. Following Swann, busing became a common tool of the District Court as it sought to enforce the desegregation of de jure segregated school systems.

De facto segregation was addressed by the Court in the Keyes decision of 1973 and the Milliken decision of 1974. The finding was that de facto segregation, in itself, is not unconstitutional. It becomes unconstitutional only if there is proof that there was purposeful discrimination in the action that caused the de facto

segregation. If such purposeful discrimination is proven then the court has the responsibility of requiring action by the school system that will undo the dual school system and will result in a unitary school system. Busing was often the tool used to accomplish this task.

The Pasadena case of 1976 gave some relief to school systems under court-ordered busing plans when the Court stated that annual adjustments to the plan were not necessary. The 1986 refusal of the Supreme Court to stop the implementation of a return to neighborhood schools in Norfolk, Virginia, provides further hope for some school systems that the continuing use of busing may be reduced. Perhaps the Supreme Court will soon agree to hear one, or several, cases concerning the return to neighborhood schools by school systems that have been declared to now be unitary. Such action by the Court would set definitive standar-s for boards of education as they attempt to reverse white flight and the reduction of parental involvement in the public schools.

# CHAPTER IV

# REVIEW OF COURT DECISIONS



## 4.0 Introduction

The Brown decision(s) of 1954 and 1955 served as a basis for all other court decisions concerning the use of busing for school desegregation. Two points from the Brown decision(s) are important when considering action taken by the courts. First, in Brown I the Supreme Court ruled that state laws requiring separate schools for the races are illegal. In regard to this, the Court said that "separate but equal facilities cannot be equal." In Brown II, a second key point was made when the Court required that desegregation plans were to proceed "with all deliberate speed."

This chapter presents a review of landmark decisions and other significant court decisions regarding busing for school desegregation. Each case is presented by giving the facts of the case, the decision

in the case, and a discussion of the case. Categories and cases are listed below:

1. Legalized Busing:

   Swann v. Charlotte-Mecklenburg Board of Education (1971).

   Davis v. Board of School Commissioners of Mobile County (1971).

2. Alteration of School Districts:

   Wright v. Council of the City of Emporia (1972).

   United States v. Scotland Neck City Board of Education (1971).

3. Intent to Segregate:

   Keyes v. School District No. 1, Denver, Colorado (1973).

   Milliken, Governor of Michigan v. Bradley (1974).

   Buchanan v. Evans (1975).

4. Annual Readjustment of Attendance Zones:

   Pasadena City Board of Education v. Spangler (1976).

5. Extent of the Remedy:

   Austin Independent School District v. United States (1976).

   Dayton Borad of Education v. Brinkman (1979).

   Columbus Board of Education v. Pennick (1979).

6. Once a School System is Unitary:

   Riddick v. School Board of Norfolk (1986).

   Dowell v. Board of Education of the Oklahoma City Public Schools (1986).

These landmark United States Supreme Court decisions are reviewed because they pertain directly to this study. Decisions in landmark cases have established legal precedents which influence the decisions of lower courts related to busing for school desegregation. Decisions from lower courts presented in this chapter are important in that they establish precedent until the Supreme Court addresses the question of when a school system may end busing for school desegregation.

## 4.1 Legalized Busing

Overview. Following the Brown decisions of 1954 and 1955 desegregation of de jure segregated school systems in the South moved at a snail's pace. Growing more and more concerned by the reluctance of Southern school systems to desegregate, the United States Supreme Court took stronger and stronger action to insure compliance with its decision in Brown. The question of how far the Court would go in requiring compliance was answered in the two cases presented in this category. Both Swann and Davis were cases where the Supreme Court upheld lower court rulings requiring the use of busing to desegregate school systems. Both decisions were handed down by the Court on the same day. While Swann is considered the landmark legalized busing case, Davis is equally important, and actually addressed busing to a greater degree than did Swann.

## Swann v. Charlotte-Mecklenburg Board of Education

402 U.S. 1 (1971)

### Facts

The Charlotte-Mecklenburg school system, with a student body which was seventy-one percent white and twenty-nine percent black remained largely segregated in 1969. This was true despite implementation of a 1965 desegregation plan based upon geographic zoning with a free-transportation transfer provision. After the school board failed to produce a new plan, one was imposed by the district court. This plan, known as the Finger Plan, grouped several outlying elementary schools with each black inner city school and required extensive busing. The plan also required that as many schools as practicable reflect the seventy-one percent to twenty-nine percent white/black ratio then existing in the district as a whole. This plan was challenged as being too burdensome.

### Decision

On a unanimous nine to zero vote, the Supreme Court held that when school authorities fail to devise effective remedies for state-imposed segregation, the district courts have broad discretion to fashion a remedy that will assure transition to a unitary school system. The Court held the following:

(1) District courts may constitutionally order that teachers be assigned to achieve a certain degree of faculty desegregation.

(2) District courts may forbid patterns of school construction and abandonment which serve to perpetuate or reestablish a dual system.

(3) Racial quotas, when used not as inflexible requirements but as a starting point for the shaping of a desegregation plan, may be imposed by the courts. Once desegregation is achieved, school boards will not be required to make yearly adjustments in the racial composition of student bodies.

(4) District courts may alter school attendance zones, may group and pair noncontiguous zones, and may require busing to a school not closest to the students' homes in order to achieve desegregation.

Discussion

Swann has become known as the "busing" case. Actually, the busing issue in this opinion was somewhat brief. The Court developed the thesis in Swann that because bus transportation was an accepted tool in education, buses could be effectively used to dismantle a dual system. The Court held that a school desegregation plan was to be judged by how effective it was. Such a plan might require student transportation. Furthermore, when school authorities default in their obligation to provide an acceptable remedy to be used to desegregate their school system, the district courts had broad power to fashion a remedy that would assure a unitary school system.

## Davis v. Board of School Commissioners of Mobile County

402 U.S. 33 (1971)

### Facts

The metropolitan area of Mobile, Alabama, was divided by a major north-south highway. About ninety-four percent of the black students in the metropolitan area lived east of the highway. The schools west of the highway were relatively easy to desegregate. However, the plan formulated by the Department of Justice and approved by the Court of Appeals resulted in nine nearly all-black schools in the eastern section. These nine schools served approximately sixty-four percent of all the black elementary school students in the metropolitan area. In addition, over half of the black junior and senior high school students in metropolitan Mobile were attending all or nearly all-black schools. The plan which led to these results dealt with the eastern and western sections separately and did not provide for movement of students across the highway as a means for desegregation. The adequacy of the plan was challenged.

### Decision

On a unanimous nine to zero vote the Supreme Court held that plans to create constitutionally mandated unitary school systems are not limited by the neighborhood school concept. The transition from a segregated to a unitary school system should include every effort to achieve racial desegregation. Bus transportation and split zoning must be given adequate consideration by courts in formulating effective plans and must be used when other measures are ineffective.

Discussion

Davis seemed to demonstrate even more clearly than did Swann that busing could be required to achieve racial balance. The Court held that, based on the equal protection clause of the Fourteenth Amendment, black school children have a present right to public education that is free of state-created or state-supported segregation. The Court showed that it was disturbed by the delay of school systems in the transition to unitary schools. Effective action was required now, and such effective action included the busing of students.

4.2 Alteration of School Districts

Overview

Following the Supreme Court's lead in Swann and Davis, the lower courts began to use busing as a tool to achieve desegregation in school systems in the South. Such plans were especially distasteful to many Sourthern school systems and efforts were made by these systems to circumvent such court orders. The cases discussed in this category, Wright v. Council of the City of Emporia and United States v. Scotland Neck Board of Education, are classic examples of these efforts. Such efforts almost worked, due to the division of the Supreme Court Justices on this issue. But when the decisions were handed down by the Court, it became evident that the effort to desegregate the public schools would not be deterred by school board or state legislative action designed to continue segregation.

## Wright v. Council of the City of Emporia

407 U.S. 451 (1972)

### Facts

Until the 1969-70 school year, the public schools in Greenville County, Virginia, were run on a segregated basis. All of the white students in the county attended schools located in the city of Emporia. Black students attended schools located largely outside of Emporia. There was one school for blacks in Emporia.

In 1967, Emporia changed its status from a town to a city that could, under Virginia state law, maintain a separate school system. However, until a court-ordered adoption of a plan by which all children enrolled in a particular grade level would attend the same school, Emporia chose to remain part of the county school system.

Following the desegregation order, Emporia withdrew from the county system and proposed a plan for an Emporia-only desegregated school system. Emporia's proposal would have resulted in the perpetuation of the division between better equipped white schools in Emporia and black county schools. The validity of creating a separate city school system was challenged.

### Decision

On a five to four vote the Supreme Court ruled against the city of Emporia. Segregation had been county-wide. The withdrawal of Emporia, the site of the better equipped, traditionally white schools, from the county school system had the effect of impeding

the dismantling of the segregated school system. Such action was, therefore, not permitted.

Discussion

The Supreme Court saw through the efforts of the city of Emporia to reduce the amount of desegregation that occurred in the schools within its boundaries. Discord among the Justices was evident by the five to four vote. The Court felt that the effect of the withdrawal of the city of Emporia from the county school system would serve to perpetuate a dual school pattern. Based on the Fourteenth Amendment, the Court's ruling served to prohibit the establishment of a separate school system during the time of transition from a segregated system to a unitary system.

United States v. Scotland Neck City Board of Education

407 U.S. 484 (1972)

Facts

Th- schools of Halifax County, North Carolina, were completely segregated by race until 1965. In that year, the school board adopted a "freedom-of-choice" plan that resulted in very little actual desegregation. In 1968, the Department of Justice and the school board agreed on a plan that would create a unitary system for Halifax County in the 1969-70 school year. In 1969, the North Carolina General Assembly passed a bill enabling the city of Scotland Neck to create, by majority vote, its own separate school system. Scotland Neck was part of the Halifax County school system.

The newly created Scotland Neck school system would be fifty-seven percent white and forty-three percent black. The schools in the rest of Halifax County would be about ninety percent black. Thus the effect of this plan would be to nullify the 1968 desegregation plan and to maintain a system in which Scotland Neck schools were largely white and the county schools were largely black. The validity of this state legislation was challenged in this case.

Decision

This case was also decided on a five to four vote of the Supreme Court. The Court ruled that the dismantling of a segregated school system cannot be impeded by the legislative creation of two new districts, one largely white and one largely black. The state action dividing Halifax County into two school districts was found to interfere with the desegregation which is required by law and thus the state action was unconstitutional.

Discussion

The case was somewhat unique in that a state legislature became involved in the attempt to circumvent the Court ruling to desegregate. Apparently, the incorrect logic was that the Supreme Court would not overrule state legislation. The Supreme Court had ruled in Brown that the Fourteenth Amendment fordibs state action creating, supporting, or perpetuating segregated public schools. That state action involved in this case was legislative rather than by the school board does not change its segregative effect or make it valid.

## 4.3 Intent to Segregate

### Overview

Nearly twenty years after Brown the Supreme Court turned its attention to the question of de facto segregation. School systems in the South had been guilty of de jure segregation because there were specific laws requiring separate schools for the races. De facto segregation does not result from governmental action intended to separate children on the basis of race. Instead, it develops from either governmental action adopted without segregative intent or it results from the acts of private citizens, such as their choice of where to live. The factor that distinguished de jure segregation from de facto segregation is intent.

The cases discussed in this category, Keyes v. School District No. 1, Denver, Colorado and Milliken, Governor of Michigan v. Bradley, present the Court's reaction to cases outside the South which involve de facto segregation. The findings in both cases relate directly to the Court's perception of the intent of the governmental officials involved.

### Keyes v. School District No. 1, Denver, Colorado

413 U.S. 189 (1973)

### Facts

This case originated in 1967 when suit was brought as a result of a shift in the desegregation plans for the Park Hill area schools in Denver, Colorado. The Park Hill area schools had become

increasingly black. A portion of the original desegregation plan called for busing of students in the Park Hill schools in order to implement integration in Denver schools. The plan was never carried out because of replacement of two school board members. The new members opposed the plan.

The district court found that Park Hill schools were segregated and ordered desegregation of Park Hill area schools. The court ordered this desegregation because it found evidence that segregation of the Park Hill area had been caused by prior school board action. However, the district court found no evidence of de jure segregation in the remainder of the Denver schools and declined to force desegregation outside the Park Hill area. In this case, those favoring integration of the Denver schools sought desegregation orders for the remaining schools in the district and sought to have Hispanic students, as well as black students, counted as minority students.

Decision

On remand, the Supreme Court directed the district court to give the school board the opportunity to prove that the Park Hill area was a separate area from the rest of the district and thus should be treated in isolation. If this could not be proven, then the district court was to decide if school board policy had resulted in the segregation of Park Hill. The school district was unable to prove that the school district was divided into clearly unrelated units. School board action was found to have caused segregation in

a substantial portion of the district, therefore the entire district was found to be segregated. This required desegregation of the entire school system.

Discussion

Keyes was a distinct landmark decision involving the issue of "intent" to segregate. It serves as the legal reference for almost all subsequent judicial decisions relating to de facto segregation. Subsequent judicial decisions relative to de facto segregation have been based upon the legal tenets of this case. This decision meant that Northern and Western school districts, guilty of such practices as gerrymandering school zones, setting up feeder systems that promoted segregation, and assigning staff on a racially discriminatory basis, would be faced with correcting these violations of constitutional rights. But it also meant that plaintiffs would have to present convincing evidence of official action responsible for dual school systems on a case-by-case basis.

## Milliken, Governor of Michigan v. Bradley

418 U.S. 717 (1974)

Facts

This case arose after a district court ordered a desegregation plan for Detroit's schools which encompassed a number of outlying school districts as well as the city of Detroit. Detroit did not have a history of segregation ordered or permitted by law. However,

there was a long history of public and private discrimination that had helped produce residential segregation.

Detroit school children and their parents claimed that the school board's imposition of school attendance zones over existing segregated residential patterns had produced an unconstitutional dual system in Detroit. They cited the school board's policy in school construction and its approval of optional attendance zones in fringe areas. The district court found the Detroit Board of Education and the State of Michigan guilty of segregative actions. The court ordered the joining of fifty-three of Detroit's outlying suburban school districts with the city school system. The scope of the order was staggering with over 310,000 students to be bused daily.

The fact that unconstitutional segregation existed in Detroit was not questioned in this case. What was in question was the constitutionality of the court-ordered desegregation plan extending to outlying school districts with no history of segregative action on the part of their school boards or local governments.

Decision

On a five to four vote the Supreme Court found that absent a showing that the outlying school districts had failed to operate unitary school systems or had committed acts that fostered segregation in other school districts, a court-ordered school desegregation plan could not cross school district lines to include them in the plan. The desegregation plan using busing was to be implemented in Detroit, but not expanded to outlying school systems. The district court ruling was reversed.

Discussion

Milliken v. Bradley became the legal foundation for the rejection of a multi-district remedy for a single district's segregation problem. This famous case provided the Court's viewpoint concerning the merger of school districts for the purpose of racial balance in school districts when only one of the school districts involved was responsible for the segregation problem. The district court's argument in this case was that the Fourteenth Amendment prohibits state action which denied minority group school children equal protection of the law by maintaining a segregated school system. The district court had held that since the outlying school districts were subdivisions of the state, and the state contributed to segregation in the city of Detroit, therefore, the outlying districts were subject to a multi-district school desegregation plan. The Court rejected that argument. In order for a multi-district remedy to be ordered by a court, the local governments of outlying districts must have committed segregative acts.

Buchanan v. Evans

423 U.S. 963 (1975)

Facts

Action was brought complaining that black children in Wilmington, Delaware, were being compelled to attend segregated schools. The three-judge trial court held that the presence of de jure black schools which remained identifiably black was a clear

indication that segregated schooling had never been eliminated in the city and that there still existed a dual school system, despite the adoption of racially neutral attendance zones. The court required the State Board of Education to come forward with plans to remedy existing segregation. Consequently, the state passed an act authorizing the Board of Education to consolidate school districts according to the dictates of sound educational administration. The Wilmington school district was excluded in the act from reorganization by the State Board. The district court held that this statute was unconstitutional. The court imposed an interdistrict remedy involving the reorganization or consolidation of the New Castle County School District and the Wilmington School District in order to achieve desegregation.

Decision

The United States Supreme Court affirmed, on a six to three vote, the district court's decision calling for the implementation of an interdistrict busing plan. It was established that the state of Delaware and the city of Wilmington were parties to segregative policies because Wilmington had been excluded in a state-wide school district consolidation act. The Court ruled that act of omission constituted de jure segregation.

## 4.4 Annual Readjustment of Attendance Zones

### Overview

The United States Supreme Court in its original busing decision in Swann recognized that communities do not stay the same. It is important to remember that students do not have a constitutional right to attend integrated schools; they do have the right to attend schools that are free of laws and actions that require students of different races to attend separate schools. Thus school authorities do not have to operate integrated schools unless they have intentionally been operating a dual school system. But what happens once a school system that has been declared to be a dual system takes the necessary action, including busing, to desegregate its schools? Is it necessary for the school system to constantly readjust its attendance zones to match the changing demographics of the community it serves? This question was addressed by the Supreme Court in the landmark case Pasadena City Board of Education v. Spangler.

### Pasadena City Board of Education v. Spangler

427 U.S. 424 (1976)

### Facts

As a result of a law suit brought by parents, students, and the United States Government, the City of Pasadena, California was ordered to desegregate its public schools. The court required that, beginning with the 1970-71 school year, there would be no school with a majority of any minority students. The board of education assigned students

in a racially neutral manner and in 1970-71 the court's requirements were met. In the years following 1970-71, the school system had an increasing number of schools that were not in compliance with the requirement. This change in student population was not caused by segregative board action but by random population shifts in the district.

The board of education sought to have the "no majority of minority students" requirement dropped. The district court refused to grant the school board relief from its order because it perceived that the school board had not properly complied with its order after the first year it was in force. The school board had adjusted attendance zones in 1970 to comply with the order but had not readjusted each year thereafter. As a result, schools slipped out of literal compliance with the not-to-exceed fifty percent mandate. The district court made it clear that it expected the school board to readjust student attendance figures yearly to comply with the court's ruling. The court of appeals upheld the district court's decision.

Decision

On a six to two decision, the United States Supreme Court reversed the district court's decision. The Court held that once desegregation of student populations was achieved to eliminate school system discrimination brought about by official action, school officials could not be required to make yearly alterations of student assignment plans in order to maintain a strict numerical ratio of

majority to minority students. Such ratios may be used only as guidelines or starting points for the initial transition from segregated to unitary schools.

Discussion

The Pasadena case spoke only to students reassignments and made it clear that school systems did not have to make annual readjustments to attendance zones once they had successfully desegregated. Pasadena did not address the issue of busing itself and at what point busing might end. It did show the Court's trend of restraint in desegregation cases. Litigation-weary school officials were offered some hope by this decision that they would not have to go back to court each year. Pasadena hinted at long awaited liberation from judicial supervision and promised an end to annual judicial reshufflings.

## 4.5 Extent of the Remedy

### Overview

The degree of the intent to segregate determines the extent of the remedy imposed by the courts. The simple fact that segregation exists in a sommunity does not mean that the court will impose any type of desegregation plan on that community's school system. There must also be proof that governmental officials intended segregation by not acting and that the school system was segregated as a result of this nonaction by officials. The United States Supreme Court used this reasoning in three decisions in the late 1970s that clearly

showed that the Court would impose a desegregation plan in direct proportion to the degree of proven intention to segregate. These three cases were Austin Independent School District v. United States, Dayton Board of Education v. Brinkman, and Columbus Board of Education v. Pennick.

## Austin Independent School District v. United States

429 U.S. 991 (1976)

### Facts

The Austin case dealt with a district court order that directed the city of Austin, Texas, to implement a busing program for 18,000 to 25,000 students in order to achieve racial balance in the Austin School System. This plan was endorsed by the court of appeals. The plan included busing of kindergarten through eighth-grade students in schools over fifty percent minority or ninety percent Anglo. The extensive busing plan was predicated on findings of the district court that Mexican-American children in Austin schools received an education that was inferior to the shite students, and thus there was a violation of the equal protection clause. Moreover, the court found that action of school authorities caused or contributed to school segregation and/or continued the segregation practices that existed.

### Decision

The United States Supreme Court vacated the judgment of the Court of Appeals for the Fifth Circuit. The Court rejected the plan

on its belief that the remedy in desegregation cases must be limited to those conditions that are caused by unconstitutional acts of local officials, and, in this case, the Court did not find such violations.

Discussion

The Austin decision in 1976 indicated a shift in the opinion of the Supreme Court. The remedy had to be equivalent to the wrong. Desegregation plans were not to be punitive in nature. This was a definite change in the Court's philosophy since earlier Court decisions had indeed been punitive in nature. In Austin the Court held that the extreme remedy of extensive busing exceeded that necessary to correct the condition.

## Dayton Board of Education v. Brinkman

443 U.S. 526 (1979)

Facts

After the Supreme Court had vacated the lower court's order of a systemwide remedy in Dayton I, the district court held a supplementary evidentiary hearing. After reviewing the entire record, the district court found that although there had been various instances of purposeful segregation in the past, there was not proof that those acts caused the current segregation that existed in Dayton, Ohio, and dismissed the case. The Sixth Circuit Court of Appeals reversed the district court's dismissal. The Court of Appeals held that the consequences of Dayton's dual system in combination with the

intentionally segregative impact of its various past practices were an appropriate basis for a systemwide plan.

Decision

On a five to four vote the United States Supreme Court upheld the court of appeals decision to require district-wide busing in Dayton.

Discussion

An important factor to emerge from this decision was that the Court reversed the burden of proof requirement. The Court was now stating that school authorities bore responsibility by considering the system's segregation status at the time of Brown I as relevant to the present case. To establish a sufficient case for a system-wide remedy, plaintiffs needed only to show that a school board had failed to fulfill its duty to disestablish the dual system. It was not necessary for plaintiffs to prove each act of the board to be discriminatory.'

The theory of "intent" v. "extent" was also addressed in this case. The "extent" of the remedy required, in this case district-wide busing, was based on the "intent" of officials to segregate the school system.

## Columbus Board of Education v. Pennick

443 U.S. 449 (1979)

### Facts

A group of students in the Columbus, Ohio, school system brought a class action suit claiming that cumulative actions of the board of education had the purpose and effect of causing and perpetuating racial segregation in violation of the Fourteenth Amendment. The district court found the following: (1) at the time of Brown the board had not been operating a racially neutral unitary school system, but had been operating separate black schools in one area of the city as a direct result of intentional acts of the school board and its administrators; (2) the school board had failed to discharge its constitutional obligation to disestablish the dual school system since 1954; and (3) that since 1954 the school board's actions and practices had aggravated rather than alleviated racially identifiable achools through decisions such as teacher assignment, attendance zoning, and school site selection. The district court found that these intentionally segregative acts violated the Fourteenth Amendment and ordered a systemwide desegregation plan using busing.

### Decision

On a five to two vote the United States Supreme Court upheld the district court's ruling. The Court felt that local board actions such as teacher assignment, attendance zoning, and school site

selection can constitute sufficient proof of discriminatory intent and impact to establish an equal protection violation and warrant a systematic remedy.

Discussion

The Columbus case once again showed the Court's belief that the intent to segregate determined the extent of the remedy. The Court found clear evidence that the Columbus school system had never truly tried to end its dual school system. Such a finding justified the extreme measures taken in the desegregation plan ordered by the district court.

4.6 Once a School System is Unitary

Overview

Feeling that it has established clear guidelines for decisions on the use of busing for desegregation, the Supreme Court has left decisions on busing cases to the lower courts since 1979. However, circumstances continue to change and once again a new issue must be considered. Urban school systems that have implemented desegregation plans successfully, and thus have been declared unitary by the courts, are facing new problems. These school systems are facing problems of white flight, decline of parental participation in schools, and a resegregation of schools due to natural demographic changes.

In an effort to battle these changing conditions, urban school systems are looking seriously at a return to neighborhood schools at

the elementary school level. This question has not been addressed yet by the United States Supreme Court but cases from the Fourth and Tenth Circuits have presented divided opinions on the legality of returning to neighborhood schools. This section discusses the cases of Riddick v. School Board of the City of Norfolk and Dowell v. Board of Education of the Oklahoma City Public Schools.

## Riddick v. School Board of Norfolk

784 F. 2d 521 (4th Cir. 1986)

### Facts

The plaintiffs, Paul R. Riddick and others, appealed to the United States Court of Appeals for the Fourth Circuit on the district court's refusal to invalidate a new pupil assignment plan for the elementary schools (grades K-6) in the city of Norfolk, Virginia. Under the new assignment plan, mandatory cross-town busing, required at first by court order in 1971, was abolished. In its place, students were assigned in most instances to neighborhood schools, with a transfer provision with free transportation for minority students who desired it. This neighborhood school plan was adopted by the school board to help alleviate white flight from the school system and to help encourage parent participation in the schools. Plaintiffs contended that adoption of the new assignment plan was racially motivated and that its implementation violated their constitutional rights under the Fourteenth Amendment.

Decision

The United States Fourth Circuit Court of Appeals upheld the district court's ruling allowing the return to neighborhood elementary schools in Norfolk. The three judge panel was unanimous in its decision. The United States Supreme Court denied certiorari.

Discussion

Riddick is currently the law in the Fourth Circuit. It allows school systems that have been declared unitary to consider a possible return to neighborhood schools. The ruling does not give school systems the right to end busing at will. It does allow school officials to take that step when their school systems meet two criteria: (1) when they have "eradicated all vestiges" of segregation by law, achieving instead thoroughly integrated school systems; and (2) there is no proof that the motive is to discriminate against blacks.

Dowell v. Board of Education of the Oklahoma City Public Schools

795 F. 2d 1516 (10th Cir. 1986)

Facts

Federal court supervision of the Oklahoma City school system began in 1961. A systemwide desegregation plan which included busing was ordered by the district court in 1972. In 1977 the school system was declared to be unitary and active court supervision was ended. Due to a drop in enrollment of white students, a large decrease in

parent involvement in the schools, and changing housing patterns the school board decided to abandon the court-ordered desegregation plan and adopt a new one that reinstituted neighborhood elementary schools for grades one through four. The plan had a transfer provision with free transportation for minority students if they desired to use it. Black parents and students asked the district court to reopen the case it had closed in 1977. The district court found the new plan to be constitutional and refused to reopen the original case. The plaintiffs appealed to the Tenth Circuit Court of Appeals.

Decision

The Tenth Circuit Court of Appeals reversed the district court's decision. They ruled that being declared unitary did not end the school board's duty to adhere to the court-ordered desegregation plan. The United States Supreme Court denied certiorari.

Discussion

Dowell is the law in the Tenth Circuit. The court made it clear that it would not accept movement by a school board to a plan that resegregated the schools. This decision put the burden on the school board to prove that the original need for a desegregation plan had vanished and that new circumstances made the court-ordered plan oppressive. This opinion was in direct conflict with the Fourth Circuit's ruling in Riddick. It left open the door for the Oklahoma City school board to go back to district court and prove that new circumstances dictated the need for a new plan.

# CHAPTER V

# SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS



## 5.0 Summary

The process of desegregating the American public schools had been extremely slow. The position of the United States Supreme Court on this issue has changed and adapted in much the same way as America has changed and adapted. Such change has forced the Court to address the question of desegregation from several differing aspects.

Prior to the Brown decision(s) of 1954 and 1955 there had been three distinct periods in the history of desegregation efforts. Those periods included the doctrine of Plessy, the university school case, and the Brown case. Different approaches were used by the Court during each of these periods to eliminate the injustices that existed.

The idea of "separate but equal" was the approach used during the Plessy period which ran from 1896 to the 1930s. The belief was that if public facilities were equal the races could legally be separated. This belief applied to all aspects of public life such as

public schools, transportation, and even to drinking fountains. The "separate but equal" doctrine was considered to be legal and early school cases were decided on the basis of this belief. The result was that segregation of the races in public schools was considered to be legal. Many states actually adopted legislation requiring separate schools for blacks and whites.

Changes began to occur in the attitude of the courts in the late 1920s. It was then that the NAACP began to challenge segregation in the graduate schools of several colleges and universities. These attacks were successful in several instances and black students gained admission to these all-white schools.

With the 1954 Brown decision, black students were admitted to all-white schools in four separate cases. The Supreme Court declared that the "separate but equal" doctrine could not longer be justified. The Court also declared that, because of generations of feelings of inferiority by blacks, separate school facilities were inherently unequal. Regardless of the condition of separate facilities, ruled the Court, they could not be equal as long as they were separate. The Brown I decision was based on the Equal Protection Clause of the Fourteenth Amendment. The Brown II case, decided one year later, ordered that the desegregation of dual school systems be done with "all deliberate speed."

Following the Brown decision(s) was a period of time in which many school systems originated what the Supreme Court considered to

be delay tactics and attempts to circumvent desegregation. Such efforts to delay or circumvent ranged from freedom of choice plans, to gerrymandering school attendance zones, to the actual closing of entire school systems. The Court issued decisions requiring that such systems be desegregated immediately. These decisions placed the responsibility for seeing that desegregation was achieved directly on local school boards. Often, desegregation plans were designed by the lower courts and imposed on school districts. Components of these public school desegregation plans included students, transportation, buildings, and faculty and staff.

Five questions were formulated and listed in Chapter I of this study. While the review of literature provided an understanding of the historical background of segregation, the answers to these questions were contained in Chapters III and IV. The answers to these questions offer school administrators and other educational decision-makers a legal basis on which to make decisions concerning the use of busing for the desegregation of public schools.

The first question listed in Chapter I was:

How has the Supreme Court ruled on the legality of busing involving de jure segregated school systems from Brown (1954) to 1988?

It was the finding of this study that the United States Supreme Court has consistently ruled against any school system in which de jure segregation has been found to exist. The Supreme Court

has said that it is not possible to have equal educational opportunity if de jure segregation is present in a school system. De jure segregation is a violation of the Equal Protection Clause of the Fourteenth Amendment. School systems that have been found by the Court to have engaged in de jure segregation have been required to take affirmative steps to eliminate dual school systems. School boards all across the United States have been ordered to eliminate all vestiges of de jure segregation. The remedy imposed on school boards has usually included extensive busing of students outside their neighborhoods to achieve better racial balance in the schools.

The second question listed in Chapter I was:

How has the Supreme Court ruled on the legality of busing involving de facto segregated school systems from Brown (1954) to 1988?

It was the finding of this study that in de facto segregation cases prior to 1976, the Supreme Court required some busing as a punitive remedy. From 1976 to the present, the Supreme Court has developed a conservative posture in de facto segregation cases. The key to Supreme Court decisions concerning de facto segregation has involved a case by case investigation of the intent of governmental actions that have caused segregation to occur. If there is no evidence of intentional action to segregate, the Court has found no constitutional violation and has ruled in favor of the school system. When an intent to segregate was found by the Court, the remedy imposed often included extensive busing for highly segregated school systems.

The Court has gone as far as requiring the consolidation of school systems with cross-district busing as part of the remedy. In de facto segregation cases the Court has considered the intent to segregate in deciding the extent of the remedy required.

The third question listed in Chapter I was:

How has the Supreme Court ruled in cases where the intent to segregate by school officials was proven?

It was the finding of this study that the United States Supreme Court's philosophy included a consideration of the intent to segregate by governmental agencies. When the intent to segregate was found, the extent of the remedy often included extensive busing as a remedy for highly segregated school systems. This philosophy of the Court is known as the "intent" v. "extent" theory. The extent of the remedy imposed is determined by the intent of the segregative action.

The fourth question listed in Chapter I was:

How has the Supreme Court ruled on the legality of busing in school systems that have achieved unitary status but have since undergone resegregation?

It was the finding of this study that the Supreme Court has ruled that a court may order desegregation only if a school board has engaged in de jure segregation. Consequently, the goal of court-ordered desegregation required by the Supreme Court is the ending of intentional segregation by school boards. The goal of achieving an enduring racial balance in a school system is not the concern of the

Supreme Court. The Court has held that year-by-year adjustments of the racial composition of student enrollment are not required of local school systems once they have implemented a court-ordered desegregation plan. Once a school system has been declared by the courts to be unitary, the system's only responsibility is to avoid illegal segregation. This means that a school system cannot take action that is intended to separate the races. It does not mean that a local school board may not implement a plan for valid educational reasons that might possibly result in a resegregation of the schools. The Supreme Court, in its refusal to hear two recent cases, has left unanswered the question of when a unitary school system will be allowed to end a court-ordered busing plan. However, its refusal to overturn a plan which ends the busing of elementary school students in Norfolk, Virginia, strongly indicates that the Court will allow busing to end under certain circumstances.

The fifth question listed in Chapter I was:

Are there specific trends to be determined from analysis of court cases?

It was the finding of this study that there is a trend for the Supreme Court to allow, under proper circumstances, a return to neighborhood schools at the elementary school level. This will only be allowed where a school system has been found to be unitary and where there is clear evidence that there is no intent by the school board to separate students by race. There must be valid reasons for

the school board's desire to end busing and return to neighborhood schools. Such valid reasons include white flight, decrease in parental involvement in the schools, and the natural demographic changes of communities. The Supreme Court has said, in effect, that equal educational opportunity is not possible under de jure segregation but is possible under de facto segregation.

## 5.1 Conclusions

The following conclusions are presented, based on an analysis of United States Supreme Court decisions dealing with desegregation and, more specifically, busing. The information serves as a foundation for understanding how future cases may be decided by lower courts as well as by the United States Supreme Court.

(1) Racial imbalance among public school students violates the Equal Protection Clause of the Fourteenth Amendment if it results from policies, decisions, and acts of public officials carried out with intent to produce segregation (de jure segregation), but not if it results solely from demographic patterns (de facto segregation).

(2) The Court has held that if a dual system existed in a school system in 1954, then the school board has a continuing duty to eradicate the effects of the dual system.

(3) It is within the power of the courts to order relief by using bus transportation as a tool to desegregate a school system.

(4) There is no Constitutional requirement that a desegregation plan must always reflect the racial composition of the community in the school system.

(5) School authorities are not required to make year-to-year adjustments once a plan that will achieve a unitary system has been implemented.

(6) Creation of new school systems will not be tolerated by the Court if such creation will have a detrimental effect on a school system in the process of dismantling its dual system.

(7) In de facto desegregation cases the burden of proof is on the plaintiff to show that there was segregative intent in either making policy or failing to act by local governmental officials.

(8) An interdistrict remedy by the courts for proven de jure segregation is possible only if it has been shown that there were constitutional violations within all of the affected school districts.

(9) A school system found in violation by the courts can expect the imposed remedy to be based upon the intent of the constitutional violation, and the extent of the remedy would not exceed that which is necessary to eliminate the segregative effect of the violation.

(10) Once a school system has eradicated all vestiges of segregation, has been declared unitary by the courts, can show clear educational reasons as its motive, and there is no proof of an intent to discriminate against blacks, a return to neighborhood schools may be permitted.

## 5.2 Recommendations

The stated purpose of this study was to present a historical perspective and legal basis for Supreme Court-ordered busing to desegregate the public schools. The study was planned to help provide direction to educational decision-makers as they make decisions concerning student assignment policies. The information presented does provide direction to school districts now under court-ordered busing plans that may be considering a return to neighborhood schools.

School officials can fairly well ascertain the opinion of the Supreme Court in the question of busing. No major decisions have been made by the Court since the 1979 Dayton case. It is unlikely that the Supreme Court will again become involved in de jure or de facto segregation cases. The Court feels that it has established the appropriate legal precedents for such cases and prefers to leave these cases to the lower courts. There are strong indications that the Supreme Court will, at an appropriate time in the near future, hand down a landmark decision concerning the possible return to neighborhood schools by school systems that have been declared unitary.

De jure segregation in American public schools has all but been eradicated. With the exception of those school systems still under court order to bus students as part of a desegregation plan, this should not be an issue in the future. Such boards should be careful not to adopt any policy or plan that intentionally segregates the races.

De facto segregation still provides opportunity for legal action. De facto segregation is permissible before the law and does not require any specific action on behalf of the governing bodies to change or correct this situation if state or local officials were not responsible for the segregation. Boards of education must be careful in establishing attendance zones, constructing new schools, and making other decisions that might result in segregated schools. Such actions could result in a belief by the courts of segregative intent which could lead to some type of desegregation plan being required. This plan could involve busing.

In a school system that is making the transition from a dual system to a unitary system, there should be the expectation that the system will be closely scrutinized. If the system has schools that are all or predominantly of one race, and the system is composed of students from mixed populations, assignments to those schools will be studied to determine if segregative intent exists in the school system. Attendance policies that result in racially identifiable or unbalanced schools are a signal to the federal court that is supervising the transition, and school authorities must be prepared to justify the attendance policies on sound educational grounds.

A large number of school systems have implemented desegregation plans for several years and have now been declared unitary by the courts. Once a school district has completed its duty to desegregate its schools and has been declared unitary, it has no further

constitutional duty to maintain integration. Its only duty is to avoid illegal segregation. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies to keep the schools racially balanced. If the supervising federal court has declared the school system to be unitary, the school board is then free to pursue any legitimate policies it may desire. The school board may determine that there exists areas of concern that are more important than the continuation of busing.

Many school districts, primarily those in urban areas, are finding that court-ordered desegregation plans designed to improve racial balance are actually making things worse by triggering white flight. This white flight leads to a reduced involvement of parents in the schools and ultimately to a school system that is heavily populated by blacks and other minorities. There have been attempts by two such systems in Norfolk, Virginia and Oklahoma City, Oklahoma, to end cross-town busing for elementary students as an effort to discourage and reverse white flight. While the Supreme Court has refused to hear appeals on these two cases, it is extremely important to note that the Court refused to stop the implementation of such a plan in Norfolk. The result of this refusal by the Court is that the Norfolk City Schools, which have been declared unitary by the courts, are being allowed to end busing for elementary school students and return to neighborhood schools at the elementary level. The Court's

refusal to stop the implementation of Norfolk's plan is a strong indication that the Court is willing to allow an end to busing by systems that have been declared unitary and have legitimate reasons to return to neighborhood schools.

It is unlikely that the Court will allow busing to end at the middle school or high school level. Certainly, school systems located in the Fourth Circuit can give strong consideration to a return to neighborhood schools at the elementary level if they meet the criteria discussed in this section. Such potential action must be based on sound educational reasons and the local school board should work through the original supervising court before implementing such a plan. School systems located in the Tenth Circuit can approach the court about plans for the possible return to neighborhood schools. The Tenth Circuit Court of Appeals is unlikely to approve any such plan if the result of the plan is resegregation of the schools.

It is important to note that even if a court has no basis for ordering busing, a school board is free to establish and maintain a busing program. If local school authorities decide that each school should have a prescribed racial balance which reflects the balance of the district as a whole, the board has the power to implement such a plan.

## 5.3 Concluding Statement

Boards of education face many very difficult and emotional decisions as they seek to offer the very best education possible for each student. As boards make decisions they must be ever mindful of the legality of the actions they take. In designing school attendance policies and in changing a busing program, boards of education are limited by the Constitution. Local or state officials may not engage in deliberate segregation on the basis of race. If such segregation occurred in the past, present school officials must take the action necessary to eradicate the effects of that segregation. A school board also cannot adopt a policy that, even though not intended to cause segregation of the races, is intended to have an adverse impact on minority children and has that effect.

If these constitutional restrictions are properly observed, the formulation of a student assignment policy becomes a task that involves the local board in deciding among competing values. What is more important, racial balance or an end to white flight? What is more important, having students attend neighborhood schools or having students experience educational opportunities with students of other races? This study has shown that Supreme Court decisions have adapted and evolved to the point where a school board may choose to give other legitimate concerns greater priority than it gives to racial balance and it may, under specific circumstances, return to neighborhood schools at the elementary school level.

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