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THE UNITED STATES SUPREME COURT AND THE LEGAL ASPECTS OF BUSING FOR PUBLIC SCHOOL DESEGREGATION

by

Robert M. Stockard

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Dissertation Adviser

APPROVAL PAGE

This dissertation has been approved by the following committee of the Faculty of the Graduate School at the University of North Carolina at Greensboro.

Dissertation Adviser Joseph E. Bryson

Committee Members R. Hinkle

Richard A. Weller

D. Gentry

Donald W. Russell

April 26 1978
Date of Acceptance by Committee

April 26 1978
Date of Final Oral Examination

STOCKARD, ROBERT M. The United States Supreme Court and the Legal Aspects of Busing for Public School Desegregation. (1978) Directed by: Dr. Joseph E. Bryson. Pp. 225.

This study was made to determine the legal basis of court ordered busing in order to desegregate public schools. The results of this study can add to the accumulated knowledge of school administrators, school board members, and students when dealing with the problems of busing and pupil assignments for the purpose of desegregation. This information can serve as a foundation of information upon which decisions might be based and policies formulated. The process involved was an in-depth study of significant United States Supreme Court cases, as well as certain lower court cases, that had been involved in the employment of busing in order to desegregate a school system.

Research answered the following questions:

1. What did the United States Supreme Court consider reasonable in cross-district busing?

The United States Supreme Court considered busing as a reasonable tool for desegregation as long as restrictions included distance traveled, and the amount of time did not infringe on educational standards. Consideration was also made concerning the system's intent to desegregate since this required a remedy of considerable busing.

2. What was required by the United States Supreme Court in busing across administrative lines in order to correct an inequity in a segregated school system?

Administrative systems adjacent to a segregated school system were not involved in a remedy unless the system had had a history of segregation.

3. What was expected from the United States Supreme Court when a school system's white population had been significantly depleted?

The study found that the United States Supreme Court saw no necessity in making annual adjustments to attendance lines once a system had adopted a plan for desegregation.

4. How had the Supreme Court implemented busing in cases of de jure segregation?

It was the finding of this study that the United States Supreme Court constantly ruled against any school system's having de jure segregation. The remedy usually included extensive busing in cases where the Court considered busing to be an appropriate remedy.

5. How had the Supreme Court reacted to cases of de facto segregation?

Research revealed that in cases prior to 1976, the Supreme Court required some busing as a punitive remedy. However, the latest cases having no history of segregation were not required to bus because of segregative housing patterns. The remedy was also restricted to an equivalency to the wrong.

6. How had the Supreme Court ruled in cases where the intent to segregate by school officials was proven?

The United States Supreme Court's philosophy included a consideration of the intent to segregate 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.

7. To what extent did the United States Supreme Court mandate remedial plans to desegregate school systems?

The Court's most drastic remedy included extensive cross-district busing. This extensive mandate resulted from proven intent to segregate by school systems. The extent of this remedy was found to be proportional to the intent of the school system.

ACKNOWLEDGMENTS

The writer wishes to thank Dr. Joseph E. Bryson for the helpful criticism and encouragement rendered during the process of this study. Also for their guidance and assistance, I should like to express my grateful appreciation to Dr. Roland H. Nelson, Dr. Donald Russell, Dr. Arthur Svenson, and Dr. Richard H. Weller.

Finally, this dissertation would not have been possible without the encouragement, support, and understanding of my wife, Lois, and daughters, Sue and Catherine.

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CHAPTER I

INTRODUCTION

For decades public education and social life in the southern states was predicated on the legal foundation of Plessy v. Ferguson's[1] "separate but equal doctrine." This decision established social patterns for all areas of public life, including public schools. The doctrine of equal facilities, being constitutionally valid as long as equal, placed most school systems in the South with two separate systems--that is, one for Negro students and one for white students.

This principle had been questioned continuously throughout the early and mid-twentieth century. Small judicial inroads were made that gradually gave the Negro graduate student some limited form of equality for admission to all-white institutions.[2] However, little was done for the Negro public school student.

The actual breakthrough came with the Brown decision of 1954. Here in Brown v. Board of Education of Topeka,[3] the United States Supreme Court stated that the "separate but

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

[2] Ibid.

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

equal" doctrine was no longer applicable. This landmark case mandated dismantling of the dual school system within the South.

Attention of the Court turned from de jure segregation to the problems of larger school systems located in metropolitan areas. City housing patterns increased the complexities of desegregation. De facto segregation placed many school systems in legal jeopardy. Questions arose about school systems that had segregated communities and were concerned with the Court's position on de facto segregated school systems. The Supreme Court, once again, gave its answer in the form of cross-district busing in Swann v. Charlotte-Mecklenburg.[4]

The Court moved through a number of phases and plans in development of the present philosophy. The Supreme Court's desegregation philosophy originated with Brown I which prohibited segregation.[5] Later the Court mandated integration,[6] and finally the present Court became somewhat tolerant of an all-white or all-black school if the situation resulted from housing patterns that were not influenced by

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

[5] Brown v. Board of Education, 347 U.S. 482 (1954).

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

public officials.[7] By 1977, the Court only ordered extensive busing as a result of proven segregative intent by the authorities involved.[8]

This study examined such questions involved in the legality of busing as a means for desegregation as: (1) reasonableness of busing, (2) racial balance and ratios, (3) busing across administrative lines, (4) depletion of white students in an administrative unit, (5) busing in cases of both de facto and de jure segregation, and (6) racial intent versus extent.

PURPOSE OF THE STUDY

The purpose of this study was to determine the legal basis for court ordered busing for public school desegregation. It was necessary to examine pertinent United States Supreme Court decisions that had led to busing. Questions answered in this study were:

1. What did the United States Supreme Court consider reasonable in cross-district busing?
2. What was required by the United States Supreme Court in busing across administrative lines in order to correct an inequity in a segregated school system?

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

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

3. What was expected from the United States Supreme Court when a school system's white population had been significantly depleted?
4. How had the Supreme Court implemented busing in cases of de jure segregation?
5. How had the Supreme Court reacted to cases of de facto segregation?
6. How had the United States Supreme Court ruled in cases where the intent to segregate by school officials was proven?
7. To what extent did the United States Supreme Court mandate remedial plans to desegregate school systems?

This study dealt only with limited social influences as reflected in the Court's decisions, even though the study was factual in theme, as it examined the legal aspects of busing.

After explanation of the judicial decisions relating to busing, the study summarized constitutional mandates of busing for desegregation. The study further provided guidelines that were formulated with the view of helping school administrators avoid litigation encapsulating questions of desegregative busing and in pupil assignments.

METHOD OF PROCEDURE

The research in this paper was necessarily historical in nature. The primary sources that were examined were contained in The National Reporter System, The Corpus Juris Secundum, and The Supreme Court Digest. Secondary sources were also used. There were selected studies relating to busing, as well as discussions of various court cases having to do with integration, in general, and busing, in particular. Utilization was also made of books, articles in publications, and journals in an attempt to answer the key questions in this study.

Information in Chapter II was gathered from books, articles, and researching court decisions in order to review the earlier background cases prior to the court order to desegregate in Brown I. In Brown I the Supreme Court declared "we conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[9] The Supreme Court cases were complemented by comments from various authorities in order to better understand how and why the legal segregation existed in the first place and was later eliminated by the courts.

Chapter III developed research necessary to understand transition of the Court's philosophy that had carried

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[9]Brown v. Board of Education of Topeka, 347 U.S. 973 (1954).

the case from the simple prohibition of a segregated school system as in Brown I, to the Court ordered busing in Swann that closely approached mandatory integration of minorities within a school system. The Court's philosophy had transcended to a doctrine of "intent" vs. "extent." Chapter III further explored the historical review of the selected busing cases.

Chapter IV analyzed the most significant United States Supreme Court cases in order to give understanding to the legal aspects of busing through analysis. Each case produced a profound effect on the controversial topic of busing for desegregation in that a relatively clear pattern of Court decisions resulted. These decisions, although providing some guidance, were still in a state of uncertainty as to a full, clear meaning.

The summary attempted to consolidate the events of the entire historical study in such a way that understanding can be gained of the evolutionary development of the legality of busing for desegregation. The conclusion attempts to draw together the most important legal points of busing litigation. There are clear conclusions that are drawn, as one sorts through the numerous legal entanglements, as a result of this study. Among the most outstanding appear to be that the disallowing of "freedom of choice" in Greene is now allowed in Dayton as "freedom of enrollment." The recommendations are reduced to twelve legal principles that have grown out

of this study and have been placed in a form that can be used more easily by school administrators in decision-making processes.

LIMITATIONS OF THE STUDY

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 concerning 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. Litigation began with Plessy in 1896, proceeded through Brown in 1954, and ended with the study of Dayton in 1977. This study was thus limited to the United States Supreme Court decisions as of July 1, 1977. This review of such literature provided a setting in which to place our 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 administrations and school board members.

DEFINITIONS OF TERMS

Action: Court proceedings; "a suit," the bringing of legal action against another for the protection of a right.

Amicus Curiae: "friend of the Court," one who gives expert testimony to assist in the deliberation of the court.

Appellant: a court or agency that reviews power.

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

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

Defendant: The party who is defending the propriety of his acts and whom the relief is brought against in a court action.

de jure: Legislation that is made into law. In this study refers to law or policy that segregates.

de facto: Refers to "from the fact of one's own authority." In this study it often refers to the natural distribution of the population of a community although segregated.

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

Due Process: The provision that governmental power must protect the rights of the individual.

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

Enjoin: A court ordering a defendant to do or not to do something by writ of injunction.

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

Litigation: A court "suit"; court action.

Plaintiff: One in court who seeks relief for some injury to his rights.

Remand: The returning of a court case from a superior court to an inferior court.

Writ of Certiorari: (From Latin "to be informed of something"). A court order that a higher court issues to a lower court requesting that court records be sent to the higher court for review.

CHAPTER II

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

In a momentous decision by the United States Supreme Court, the social fabric of America was changed. 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.[1]

At the time this decision was handed down, in Brown v. Board of Education of Topeka, 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.[2]

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

[2] Ibid., p. 78.

LEGAL RACIAL DISCRIMINATION

The period of 1880 through the early 1900's brought about State laws that were directed toward keeping the black man "in his place." The so called "Jim Crow" term referred to laws and practices that were aimed at segregating the black man. According to C. Vann Woodward, the term "Jim Crow" came into use in the late 1800's 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" was uncertain, the connotation was clear.[3] In speaking of "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.[4]

North Carolina and Virginia passed laws that did not allow fraternal organizations whereby individual members of different races in the membership would address each other as "brother." Alabama laws did not permit white female nurses to attend black male patients. New Orleans confined

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

[4]C. Vann Woodward, The Strange Career of Jim Crow (New York: Oxford University Press, 1966), p. 7.

white and black prostitutes to different districts. In Birmingham, Alabama, blacks and whites were not legally allowed to play checkers or dominoes together, or even be in each other's company.[5]

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 somewhat successful. In most instances the court found that inequality had not been proven.[6] Only two cases were heard by the Supreme Court during some fifty years of de jure segregation.[7]

In taking a historical view of segregation two early legislative documents were important. The Civil Rights Act of 1866 and the Fourteenth Amendment, ratified in 1868, proved to be a paradox of the time. Although neither the Civil Rights Act of 1866 nor the Fourteenth Amendment mentioned education, each was concerned with the rights of every man and yet seemed to have provided the opportunity for a dual school system of education for Negroes and whites throughout the South.

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[5]Barth, Prophets With Honor.

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

[7]Hudgins, The Warren Court, p. 75.

The Civil Rights Act of 1866 was designed to protect the freedman from the Black Codes and other repressive laws. In addition, the act gave citizenship to the Negro. Briefly, 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. . . .[8]

The Fourteenth Amendment also gave definition to citizenship, provided citizenship for the Negro, and 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 to any person within its jurisdiction the equal protection of the laws.[9]

The question arose as to how states enacted laws which very clearly discriminated against Negroes in almost every area of life, including separate schools. The answer to the

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

[9]United States, Constitution, Amendment XIV, Section 1.

question became somewhat clearer as the atmosphere of the time of the legislative enactment was investigated.

During the debate on the Fourteenth Amendment in the 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 Negro schools.[10]

During the course of the debate in the Senate, Senator Cowan expressed a concern that the amendment would end segregation in the schools. However, the bill's patron, Senator Trumball of Illinois, assured the Senator 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."[11]

Soon after the Amendment was passed, Southern states enacted legislation that established separate schools for Negroes and whites. Alabama's law illustrated this by stating:

> 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.[12]

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[10]U. S. Congress, Senate, A Question of Intent, p. 3.

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

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

Legislation was often reflected in the social attitude of its people. John Dollard stated that "caste replaced slavery as a means of maintaining the essence of the old status order in the South."[13] Why were the laws not successfully challenged in the courts? Gunnar Myrdal stated 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.[14]

In the North an apparent attitude of separate schools for Negro children existed as early as 1849. The laws in some northern and western states, however, were changed after the 1860's. The issue of segregated schools arose in an early court case that questioned whether a general school committee could exclude a Negro child from attending a school nearest home when a special school was available for Negro children.

Sarah C. Roberts v. The City of Boston[15] was concerned with a five-year-old Negro child in Boston who applied

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[13]Dollard, Caste and Class in a Southern Town, p. 62.

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

[15]Sarah C. Roberts v. The City of Boston, 59 Massachusetts (5 cushing) 198 (1849), cited by Chester M. Nolte, School Law in Action, 101 Key Decisions with Guidelines for School Administrators (West Nyack, N. Y.: Parker Publishing Co., Inc., 1971), pp. 30, 31.

for a change to a school near the home. Admission was denied because the girl was black and because of a special provision set up for certain schools for colored students.[16]

The plaintiff applied for admission to the primary school nearest home, but the application was rejected. Earlier the girl had petitioned the general primary school which referred the case to the district committee. The district committee, however, denied admission. At this point, Sarah Roberts went directly to the school and was rejected by the teacher.[17] 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.[18]

Both the trial court and the appellate court held in favor of the defendant school board. Apparently the child was not excluded from school, and instruction was not closed for the student. The father, in fact, had denied Sarah Roberts' admission by not applying at the school provided.[19]

The Roberts case was cited forty years later in the landmark case of Plessy v. Ferguson.[20] From the time of the

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[16] Sarah C. Roberts v. The City of Boston, cited by Nolte, School Law in Action, 101 Key Decisions, p. 30.

[17] Ibid. [18] Ibid. [19] Ibid., p. 31.

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

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

During the period of Reconstruction, Southern states were permitted to maintain separate schools for the races. Strangely enough, the challenge to separateness came from states other than those in the South. However, these cases brought approval of the segregated school, and no case was found otherwise in the United States Supreme Court.[21]

A typical case of the time was a California case, Ward v. Flood.[22] Litigation involved Mary Frances Ward, a black child who attempted to enroll in a public school near the San Francisco home. After being rejected by the principal, the father, Noah H. Ward, appealed to the state court to have Mary admitted. The court, however, determined that the school principal may, on certain grounds, not enroll a child. The court further stated that privilege of attending the public school was not a privilege pertaining to or derived

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

[22]Ward v. Flood, 48 Cal. 36 (1874).

from national citizenship. The court also pointed out that California's constitution guaranteed to children the benefits of a common school system.[23] The court denied the writ because separate facilities were not considered to inherently discriminate more heavily against one race than another since each group was excluded from the other's school and did not, therefore, constitute the sort of denial of equal protection of the laws the Fourteenth Amendment forbade.[24]

The last federal civil rights legislation, until 1957, came in 1875. The Civil Rights Act of 1875 was designed to protect the civil and legal rights in that the act sought social, as well as political, equality for Southern Negroes. 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.[25]

This act went beyond the rights granted by Congress in the amendments drafted from Reconstruction. This legislation included very exact penalties for its violations by

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[23] Ward v. Flood, 48 Cal. 36 (1874).

[24] Ibid.

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

ordering fines or imprisonment, and further spoke of the possibility of the Supreme Court's having become involved in cases of violations.[26]

The Supreme Court ruled the act unconstitutional in 1883. The case was heard along with a group of civil rights cases that challenged the constitutionality of this Civil Rights Act. The Court ruled that the Civil Rights act was unconstitutional because the act did not spring directly from the Thirteenth and Fourteenth Amendments to the Constitution. The view of the Court was that the Thirteenth Amendment was concerned exclusively with slavery and that the Congress did not have the power to counteract the effect of state laws or policies. This Supreme Court ruling actually deprived the Negro of the three post-war Freedom Amendments--the Thirteenth, Fourteenth, and Fifteenth.[27]

One of Louisiana's "Jim Crow" laws was destined to become a Supreme Court landmark case. This statute concerned railway trains and was enacted to "promote the comfort of passengers on railway trains." The main purpose was to provide:

> All railway companies carrying passengers in their coaches in this State shall provide equal but separate accommodations. No person or persons shall be admitted to occupy seats in coaches, other than the ones assigned to them on account of the race they belong to.[28]

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[26]Ploski and Kaiser, The Negro Almanac, p. 132.

[27]Ibid., p. 252.

[28]Barth, Prophets With Honor, pp. 30-32.

The New Orleans Negro aristocracy was resentful of the anti-Negro feeling of the 1880's felt throughout the country. The Louisiana statute concerning separation of races on railroads was particularly distasteful to Negroes. The New Orleans Negro leaders were destined 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. Plessy was, by admission, seven-eighths white and one-eighth Negro. Homer Plessy appeared to be white.[29]

On June 7, 1892, Homer Plessy presented a first-class ticket and boarded the train. The man 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. The man was charged with a violation of the Louisiana statute. Plessy's friends, who were members of the Citizens Committee to Test the Constitutionality of the Separate Car Law, had employed two attorneys. They were James C. Walker and Albios Winegar Tourgée.[30]

Tourgée was a well known carpetbagger of the Reconstruction decades and a noted North Carolina leader. The

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[29]Barth, Prophets With Honor, pp. 30-32.

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

attorney published six novels based on personal Reconstruction experiences. Tourgée practiced law in Greensboro, North Carolina, in 1865. Here, as a leader in the Republican Party, the lawyer had a prominent role in writing the new constitution for North Carolina. Later Tourgee served as a superior court judge for six years.[31]

As the Committee searched for legal counsel, the group wrote Tourgée, "We know we have a friend in you and we know your ability is beyond question."[32] The attorney was told that the Committee's decision was made "spontaneously, warmly and gratefully."[33]

A plea was entered before Judge John H. Ferguson of 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. Judge Ferguson ruled against Plessy, but a hearing was held on a writ of prohibition and certiori in November, 1892, in the State Supreme Court.[34] The hearing was the origin of Plessy v. Ferguson. At a later hearing, Plessy was granted a writ of error that allowed the Negro man to seek redress before the Supreme Court of the United States.

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[31]Garraty, Quarrels That Have Shaped the Constitution, p. 148.

[32]Ibid. [33]Ibid. [34]Ibid., p. 151.

Tourgée's argument before the Court was more dramatic than factual. Tourgee said:

> The crime, for which he became liable to imprisonment so far as the Court can ascertain, was that a person of seven-eighths Caucasian blood insisted on sitting peacefully and quietly in a car the State of Louisiana had commanded the company to set aside exclusively for the white race. Where on earth should he have gone? Will the Court hold that a single drop of African blood is sufficient to color a whole ocean of Caucasian whiteness?[35]

Tourgée's most lasting statement came when the leader said that "justice is pictured as blind, and her daughter, the law, ought at least to be color-blind."[36] This comment must have made a lasting impression on Justice John Harlan because, in dissent, the Justice said that "our Constitution is color-blind. . . ."[37]

Tourgée did not find sympathy in the Court's decision concerning Plessy. 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.[38]

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[35] Barth, Prophets With Honor, pp. 32-33.

[36] Ibid., p. 33.

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

[38] Ibid., p. 551.

So the doctrine of "separate but equal" was upheld by the United States Supreme Court. There was, however, a cry in the wilderness in Justice John M. Harlan's dissent:

> . . . In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling, class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.[39]

During the next fifty-eight years the "separate but equal" doctrine was cited in most civil rights cases. However, application proved increasingly difficult because of the natural inadequacies. The Plessy doctrine applied to almost every phase of life, including education, even though Plessy was concerned with transportation.

Three years after the Plessy decision was adjudicated on the cornerstone of "separate but equal," a United States Supreme Court decision was handed down in the case of Cumming v. Board of Education.[40] This case involved public schools. The issue in Cumming was to decide whether the only black high school that enrolled sixty students could be constitutionally closed so as to convert to a three hundred student elementary school, while at the same time maintain the white high school. The black high school was not to be opened at that time because of a lack of school

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

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

funding. The injunction filed by the Negroes stated that an inequality existed because of the county's failure to provide a high school for Negroes while white students were furnished with a high school. In argument, the attorneys for the Negroes debated that separate schools were unconstitutional.[41]

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 Negroes. The Court held that because it would be "only tyranny" and because of economic conditions, Negro students were not deprived of their constitutional rights. Justice John M. Harlan delivered the Court's opinion and stated that the board could not be compelled, under the Fourteenth Amendment, to withhold funds for economic support for the white high school until support for the Negro high school was available.[42]

In Berea College v. Kentucky,[43] the United States Supreme Court faced a case that involved a state-chartered private college. The question was whether the institution could separate the races for instruction. In the charter

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[41]Cumming v. Board of Education of Richmond County, 175 U.S. 531 (1899).

[42]Ibid., p. 533.

[43]Berea College v. Kentucky, 211 U.S. 54 Ky. (1908).

granted by the state of Kentucky, the provisions instructing both Negroes and whites were included for the students. However, the state of Kentucky's law stated that there would be no instruction in any educational institution for Negro and white students simultaneously. The real question in this case was the validity of this state law.

The Court did not refer to the Plessy decision, but proceeded to uphold the Kentucky statute by other means. The Court declared that the state had a right to control the corporation. The state chartered college was considered a corporation in this case. The state, the Court insisted, was right, under this statute, in providing for the separation of the races for educational instruction.

The Court noted that the state had no right to prevent an individual, as opposed to a corporation, from teaching Negroes and whites together. A statute such as this was indeed in conflict with the Constitution because it denied the individuals "powers which they may rightfully exercise."[44]

This case stated clearly that separate facilities in tax-supported public school systems would suffer no censure from the Supreme Court.[45] The Plessy doctrine was upheld, but weakened, because there had been doubt raised in reference

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[44]Berea College v. Kentucky, 211 U.S. 55 (1908).

[45]Bardolph, The Civil Rights Record, p. 152.

to a double standard--one standard for a corporation and one standard for an individual.[46]

The 1927 case of Gong Lum v. Rice[47] reached the United States Supreme Court and met the first challenge to actual segregation. The case concerned a nine-year-old Chinese girl who, after attending class for one-half day, was notified that the student was not to be in the all-white Rosedale School. The school officials offered the girl the option of attending the Negro school or attending a private school.

A litigation was instituted by the father to admit the girl to the all-white school. The case raised the issue of whether a state could, for educational purposes, classify a Chinese child, born in the United States, and place the girl in the same grouping as Negro children.

Reference was made to Wong Him v. Callahan[48] which stated, in part, that "when separate schools are provided for children of Chinese or Mongolian descent, such children 'must not be admitted into any other schools.'"[49] The case also debated what proportion of Negro blood constituted "colored." Reference was also made to Wall v. Oyster to show that the

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[46]Nolte, School Law in Action, p. 34.

[47]Gong Lum v. Rice 275 U.S. 78 (1927).

[48]Wong Him v. Callahan, C C 11 Fed 381 (1902).

[49]Gong Lum v. Rice 275 U.S. 78 (1927).

1910 case proved that one-sixteenth proportion of Negro blood classified the individual as colored.[50]

Mr. Chief Justice William H. Taft delivered the opinion of the Court by stating that no school was maintained in the district for the education of children of Chinese descent, and there were none in Balvan County. The father was a taxpayer and the child was an educable citizen. The girl was not of Negro blood, nor mixed blood, but was of pure Chinese descent. The Supreme Court opinion declared most cases that had been cited arose over the establishment of separate schools as between black and white pupils, but the Court did not think that the question was any different or that any different result could be reached. Chief Justice Taft added, "assuming the cases cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races."[51] The Court declared that the state had the discretion of regulating its public schools; and, in turn, this did not conflict with the Fourteenth Amendment. The Supreme Court of the United States affirmed the previous holdings of the lower court.[52]

There was increasing doubt escalating over the justice in the "separate but equal" doctrine in Plessy. The

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[50] 33 Wall v. Oyster, 36 App. D.C. 50, 31 L.R.A. (N.S.) 180 (1910).

[51] Gong Lum v. Rice 275 U.S. 87 (1927).

[52] Ibid.

majority opinion reflected the doubt when Chief Justice Taft stated that if the mandate had not been so often approved in the past, the "separate but equal" doctrine of Plessy might have necessitated a "very full argument and consideration."[53] In a sense Justice Taft apologized to the plaintiffs in the ruling when stating, "assuming the case (such as Plessy and others cited) to be rightly decided. . . ."[54]

The case illustrated the change of attitude of the Court as early as 1927 in that there was some inadequacy of the "separate but equal." The courts, however, revealed the extent of willingness to proceed to uphold the right of the state to promote segregation in the public schools.

THE GRADUATE SCHOOL CASES

The mid 1930's saw the National Association for the Advancement of Colored People leadership planning a systematic legal assault on the discrimination in the schools. The plan was to attack the South's reluctance to admit Negroes to Southern graduate professional schools such as state university law schools. The considerations in adopting this strategy were based on the premise that the Southern states did not attempt to maintain equality in the professional schools. Thus the "separate but equal" was inappropriate.

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[53] Gong Lum v. Rice 275 U.S. 85 (1927).

[54] Ibid.

Even if Southern states had tried to circumvent this plan by attempting to provide equal facilities for the Negro's graduate education, the expense was prohibitive.

Thurgood Marshall, who later became an Associate Justice of the United States Supreme Court, was appointed by the National Association for the Advancement of Colored People in 1938 as special counsel in charge of such cases. In speaking of the emotions involved with the graduate school as opposed to the lower level schools, Marshall said:

> Those racial supremacy boys somehow think that little kids of six or seven are going to get funny ideas about sex and marriage just from going to school together, but for some equally funny reason, youngsters in law school aren't supposed to feel that way. We didn't get it, but we decided that if that was what the South believed, then the best thing for the moment was to go along.[55]

The plan had slow beginnings but later precipitated outstanding results. In the mid 1930's, all Southern states and nearly half the United States still either required or permitted segregation in the schools.[56] Few doubted that Negro children were denied educational opportunities equal to that of white children.[57] 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.[58]

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[55]Garraty, Quarrels That Have Shaped the Constitution, pp. 253, 254.

[56]Ibid., p. 254.

[57]Hudgins, The Warren Court, p. 73. [58]Ibid., p. 18.

In the succeeding years, a number of cases having to do with higher education followed. The decisions of these cases appeared to spell the doom of the doctrine derived from Plessy. In the case of Lloyd Gaines, N.S.W. v. Canada, Register of the University of Missouri,[59] Gaines was denied admittance to the all-white University of Missouri Law School. Gaines, a Negro, was offered tuition to be paid by the state if the student would attend a law school in an adjoining state since Missouri provided no law school for Negroes.

Although a separate opinion was delivered by Mr. Justice James C. McReynolds and Mr. Justice Pierce Butler who stated that Gaines ought to be satisfied since the "state had offered to pay his tuition at a nearby school of good standing,"[60] the Court struck down a statute offering educational segregation. Mr. Chief Justice Charles E. Hughes opined:

> Curators acted in accordance with educational policy in denying admission since the Legislature had said . . . Negroes could attend law school in another state with tuition paid pending the full development of Lincoln University. . . . The fact remains that instruction in law for Negroes is not now offered by the State, and the State excludes Negroes from the advantages of law school at the University of Missouri.[61]

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

[60] Ibid., p. 353. [61] Ibid., pp. 344, 345.

Justice Hughes also noted that discrimination might be temporary because tuition outside the state was temporary until the establishment of a law department for Negroes at Lincoln University. Mr. Hughes wrote that the equality of legal education offered blacks and whites was "beside the point."[62] The question was not the quality of education, but Hughes said:

> Its duty when it provides such training is to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri, a privilege has been created for white law students which is denied to Negroes because of their race.[63]

The Court's decision actually, in effect, affirmed the "separate but equal" doctrine, even for law schools. The only obligation the school 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."[64]

Although Lloyd Gaines disappeared soon after the legal triumph and was never located again, the state did erect a separate law school for Negroes. Even though the principle of "separate but equal" was left unimpaired,[65] Gaines was a case wherein the Court considered the "equal" part of the

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[62] Gaines v. Canada, Register of the University of Missouri, 305 U.S. 349 (1938).

[63] Ibid., [64] Ibid., p. 351.

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

separation principle because the Justices recognized the advantages to studying law in the state where people lived and expected to practice.[66] The Court's decision was that a state was required to allow Negroes to be admitted at the state university if equal educational facilities were not available. This created, in effect, a separate graduate school for Negroes.

A similar case during the same time period went only to the Maryland Court of Appeals. In University of Maryland v. Murray,[67] a twenty-year-old Baltimore Negro graduate of Amherst College rejected an out-of-state tuition grant when the man applied for admission to the University of Maryland Law School. The University did not admit Negro students to the law school, but as did many other states, the school offered scholarships allowing study outside of the state of Maryland. After being rejected, the student entered suit. The trial court issued a writ of mandamus, ordering the University to admit the Negro. The University appealed the case to the state's court of appeals; however, the appeals court sustained the lower court's ruling. The court stated that "equal treatment could only be furnished by the "one existing law school." The court stated that "the petitioner must be admitted then."[68]

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[66]Hudgins, The Warren Court, p. 18.

[67]University of Maryland v. Murray, 165 MD. 478 (1935).

[68]Ibid.

A companion case followed in Bluford v. Canada.[69] Suit was entered by Lucille Bluford, a Negro, against the University of Missouri School of Journalism. The United States District Court of Missouri emphatically reaffirmed that a state's right, under the Constitution of the United States, to furnish "separate but equal" schools for the races had not been, in any way, disparaged by the Gaines decision.

The United States Supreme Court heard, per curiam (by the court without an opinion by an individual justice), the case of Ada Lois Sipuel v. Board of Regents.[70] This case, once again, was intent upon chipping away at the legal armor of the "separate but equal" doctrine. Thurgood Marshall argued against the out-of-state grant offered to Ada Sipuel so that the girl could attend the University of Oklahoma Law School. The Court ruled that the substitute of going to an out-of-state law school was inadequate. It further stated that the state must provide "equal protection" for Negroes as for other citizens. The writ also declared that Ada Lois Sipuel was entitled to immediate admission to the all-white Oklahoma Law School and the school could not wait until protection was requested since such protection had not been provided by the state in furnishing a Negro law school. The Court did not actually require admission

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[69] Bluford v. Canada, 32 F. Supp. 707 (1940).

[70] Sipuel v. Board of Regents, 332 U.S. 631 (1948).

at this point, but mandated the ruling later in Sweatt v. Painter in 1950. The state of Oklahoma met the requirements of the Court by setting up a law school for Negroes. However, Ada Lois Sipuel refused to attend.

Two years later, in Parker v. University of Delaware,[71] a lower court concerned itself with the quality of a separate school, while at the same time, giving approval to the abstract principle of separate schools. The federal court ordered admission of a Negro to a white state college when finding the Negro college inferior. However, the Justices refused to hold that the latter was inferior merely because the school was segregated.

June 5, 1950, proved to be an important day in the cause of desegregation because the United States Supreme Court handed down two important decisions in Sweatt v. Painter[72] and McLaurin v. Oklahoma State Regents.[73] The decision of the Court strengthened the opinion expressed in Gaines in matters of public education where the races were not equal. The Court stated there was a vast constitutional difference that had been imposed by the state. In pointing out this difference, the Supreme Court refused to uphold laws that separated the races for educational purposes.

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[71]Parker v. University of Delaware 31 Del. 381, 75A 2d 225 (1950).

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

[73]McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 629 (1950).

In Sweatt v. Painter the state of Texas tried to circumvent the equal protection questions by hastily setting up a separate Negro law school in the basement of a building near the capitol in Austin. 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.[74]

Herman Sweatt, a Houston mail carrier, was invited to attend the newly established law school. Instead, Sweatt, along with Thurgood Marshall, instituted suit against the state court asking for admission to the University of Texas Law School. Marshall presented a large number of legal and academic experts who testified to the inadequacy of the Negro law school as compared with the all-white University of Texas State Law School. The Texas Supreme Court ruled against Sweatt.[75]

The United States Supreme Court ordered Sweatt's admission to the 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. Chief Justice Frederick M. Vinson declared:

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[74]Sweatt v. Painter, 339 U.S. 631 (1950).

[75]Ibid., p. 632.

> . . . We cannot find substantial equality of the educational opportunities offered white and Negro law students by the state. In terms of the number of faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law reviews and similar activities, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement, but which make for greatness in a law school. Such qualities, to name a few, include reputation of the faculty, experience of the administration, position and influence of the alumnae, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question closed.[76]

Herman Sweatt was admitted to the University of Texas Law School. The fact that the student promptly flunked out did not damage the case's legal significance in that a state's attempt to provide overnight "separate but equal" facilities could not stand up in court.[77]

In McLaurin v. Oklahoma Regents,[78] a decision of equal significance to Sweatt was handed down from the United States Supreme Court. The case centered around G. W. McLaurin, an Oklahoma Negro who was admitted to the University of Oklahoma Graduate School as a candidate for the degree of Doctor of Education. McLaurin was accepted because the Court compelled the University to admit him. The University attempted to maintain segregation internally by requiring

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[76] Sweatt v. Painter, 339 U.S. 633, 634 (1950).

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

[78] McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 629 (1950).

McLaurin to sit in a special section in the classroom that was surrounded by a rail that contained a sign reading, Reserved for Colored. In the library the student was required to sit at a designated place on the mezzanine floor. McLaurin was thus prohibited from using the regular desks in the reading room. In addition, the man was assigned to a particular table in the cafeteria as well as a designated time to eat that was different from the time other students would be eating in the cafeteria.

In the opinion given by Chief Justice Frederick M. Vinson, under the equal protection clause, the Court held that the Negro student must receive the same treatment at the hands of the state as students of other races. The opinion stated that the man might stand in line and talk with fellow students, but McLaurin must eat alone. The opinion rendered further said that:

> The result is that the appellant is handicapped in his pursuits of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussion, and to exchange views with other students; and, in general, to learn his profession.[79]

The Court ruled that "state imposed restrictions which produce such equalities cannot be sustained."[80] The Court concluded that conditions under which this appellant was required to receive his education deprived the man

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[79]McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 641 (1950).

[80]Ibid.

of "personal and present right to equal protection of the laws."[81]

It was obvious to Marshall and others on his staff that Sweatt and McLaurin were milestones in the fight for the rights of the Negro. 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 Negro public school students would be allowed to attend school with white children.[82] Clearly, the courts had actually done little to undermine the "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. Apparently, states were not able to achieve equality at the graduate school level, but could achieve equality in the Negro public schools if enough resources, as well as sufficient time, was found. All over the South, white school boards were beginning programs for improving Negro public schools. Governor James Byrnes confessed that improvements had to be made to "remedy a hundred years of

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[81] McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 642 (1950).

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

neglect" of the Negro education lest the Supreme Court "take matters out of the states' hands."[83]

A look in retrospect by H. C. Hudgins gave a clearer view of the tremendous blow to the "separate but equal" principle dealt by the university school cases. Hudgins stated:

> The significance of the university cases is manifest as one sees a gradual erosion of the separation doctrine. Both Gaines and Sipuel opened the way for blacks to attend white schools. McLaurin held that, once a school had been desegregated, its facilities must be made available to all alike; its students must be accorded equal 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 that actually provided the segregation in the public and elementary schools in a case to be heard by the Warren Court.[84]

THE BROWN DECISIONS

Apparently, the National Association for the Advancement of Colored People was placed in a quandary as to what strategy to pursue at this point. The states involved with segregation laws were seemingly in compliance with the doctrine of "separate but equal," and were, in fact, hastily attempting to bring about a more equal education for Negroes by the improvement of facilities and equipment and the upgrading of staff.

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

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

School boards in South Carolina and in Virginia's Prince Edward County rejected any gradualist program.[85] John Garraty, in his book, Quarrels That Have Shaped the Constitution, stated that Marshall had said:

> If the school boards in key Southern states had shown a general disposition to accept any kind of gradualist program combining more adequate schools with some primary and secondary desegregation, the Association might well have agreed to cooperate, at least for a time.[86]

At the New York National Strategy Conference of the National Association for the Advancement of Colored People in 1950, Thurgood Marshall and the legal staff selected five key segregation suits at selected points around the nation. The suits were in Kansas, South Carolina, Virginia, and Delaware. The fifth case was to be heard separately by the United States Supreme Court because the Congress, rather than a state legislature, governed the District of Columbia.

The National Association for the Advancement of Colored People filed four suits in equity in federal district courts in the name of the Negro school children demanding admission to the all-white schools. The charges in the suits were based on the fact that the Negro schools were inferior to the white schools. The National Association for the Advancement of Colored People also charged that the "separate but equal" idea violated the equal protection

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

[86] Ibid.

clause of the Fourteenth Amendment. The fifth suit, Bolling v. Sharpe,[87] involving the District of Columbia, charged violation of due process in the Fifth Amendment. The difference in procedure was initiated so as not to challenge state action, since the Fourteenth Amendment restricted states but not Congress.

In Briggs v. Elliott,[88] action was brought in the United States District Court in order to prevent the enforcement of South Carolina's state constitution and statutes that required segregation of Negroes in Clarendon County. The United States District Court found the Negro schools inferior and ordered the state to equalize the Negro schools. However, the court upheld the state constitution as valid if the facilities were equal to the white schools. The court, in time, denied the Negro children the right to attend the white school during the period of equalization. There was to be a further report on the progress of equalization to the court within six months. There was an immediate appeal to the United States Supreme Court. The case was returned to the lower court to assess the progress toward equalization. The finding of the lower court stated that there was substantial equality between the white and Negro schools with the exception of buildings. The case was then returned to the United States Supreme Court.

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

[88] Briggs v. Elliott, 103f Supp. 920 (1952).

The Prince Edward County, Virginia, case was known as Davis v. County School Board.[89] The events that led up to this case were somewhat typical of the five cases involved in Brown, as well as the attitude of the South at that time. This case, as well as the others involved in Brown, was the direct result of an organized effort to equalize the chasm of justice between the white and Negro schools.

Prince Edward County was located in the southern part of Virginia. In 1950, the population consisted of forty-five percent Negroes.[90] Although there was concern for the inferiority of all Negro schools by Negro parents in Prince Edward County, there was special concern for overcrowded and decrepit conditions of the Negro high school. Early in 1950, a plea was made by the Parent Teachers Association before the county school board for a new high school. After meeting on a regular basis for more than a year, and armed with facts and figures, Negroes were told that there was no money for a new high school. One of the Parent Teachers Association committee members stated:

> Finally we got them to agree to secure land for a new high school--if we could find a suitable plot, they'd buy it. We found a place, up where the new high school is now located, of sixty acres or more. But the Board then said they had no money to build with, and that we

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

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

> need not come back; they'd notify us through the press when they were in the position to build.[91]

During this time period the students walked out and set up picket lines. The student leaders requested a conference with the superintendent of schools; however, the superintendent refused to see the students unless the group returned to class. The students refused to return. Instead the leaders appealed to the National Association for the Advancement of Colored People for assistance. Litigation was initiated on the basis of abolishing the segregated school system.[92]

A new black high school, costing $900,000, was completed during the 1953-54 school year. The school was well-equipped with laboratories, shops, and a competent staff consisting of twenty-five teachers.[93]

The Virginia suit, as well as the other four suits, involved introducing extensive testimony from experts in social science, including the leading Negro psychologist, Kenneth Clark, from New York University.[94] Professor Clark testified to the psychologically damaging effects of inferior

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[91]Meier and Rudwick, The Making of Black America, Vol. II, p. 269.

[92]Briggs v. Elliott, 103f Supp. 920 (1952).

[93]Meier and Rudwick, The Making of Black America, Vol. II, p. 270.

[94]Brown v. Board of Education of Topeka, 347 U.S. 494, Note 11.

Negro schools.[95] Kenneth Clark submitted a statement signed by thirty-two social scientists as expert witnesses. Clark's testimony was based on an experiment conducted with black children who ranged in age from three to seven.[96] These children were in segregated Northern schools. Clark presented the children with both a brown doll with black hair and a light-colored doll with blond hair. The children were asked to pick the doll that was "nice" and "looked like you." The findings showed that the black children in the segregated school picked the white doll. Clark concluded that the study proved a "fundamental effect of segregation is basic confusion in individuals and their concept about themselves."[97] In Clark's opinion, the black children had been "definitely harmed in the development of their personalities."[98]

After extensive testimony, the three-judge district court panel refused to grant relief to the plaintiff.[99] The

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[95]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.

[96]Ibid; also "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement, Appendix to Appellants' Briefs, Brown v. Board of Education as quoted in Kenneth B. Clark, Prejudice and Your Child (Boston, 1956), p. 168.

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

[98]Ibid.

[99]Meier and Rudwick, The Making of Black America, Vol. II, p. 271.

lower court did indeed concede that the Negro school was "substantially inferior," but since the Prince Edward County school board was moving toward the construction of a new Negro school, "an injunction could accomplish nothing more."[100] The plaintiffs asked the Supreme Court, on appeal, to overrule the district court's decision and to require that children be admitted to the all-white high school.[101]

Partial success was achieved in the New Castle County, Delaware, case of Gebhart v. Belton.[102] Action by the National Association for the Advancement of Colored People attorneys on behalf of elementary and high school Negro students was to enjoin enforcement of segregation laws. The court granted an injunction and ordered the Negro children to be admitted to white schools on the grounds that this difference was "substantially unequal." The case was appealed to the Delaware Supreme Court which upheld the lower court. The court did not overturn Plessy, but rather the court implied that a more equal Negro school might, in the future, make racial segregation lawful. This decision was different from the Virginia and South Carolina decisions in that the ruling stated the "right of the plaintiff to equal facilities to be

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

[101]Ibid.

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

present and personal."[103] The court held that schools could be separate if currently equal. The decision was appealed, indicating that the state had not had a reasonable time to equalize Negro facilities.

The last of four cases to be cited in Brown[104] was the case that commonly carried the citation for all four cases to the United States Supreme Court. This Kansas case arose from a complaint issued on behalf of eleven-year-old Linda Brown and other elementary school Negro children denied admission to state public schools that white children attended. The petition asked the district court to enjoin the enforcement of a Kansas statute which permitted cities of more than 15,000 population to maintain segregated school facilities in grades one through eight. The Topeka school board segregated elementary schools under this statute in grades one through six.

Linda Brown was assigned to a Negro school and had to travel over four times as far to attend the white school. The suit attempted to enjoin the enforcement of the Kansas statute and to declare the law unconstitutional because segregation created inferiority and was, therefore, a denial of due process and equal protection.[105]

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

[104] Brown v. Board of Education of Topeka, 345 U.S. 974 (1953).

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

The brief filed by the Topeka school board offered historical evidence that the intent of the Fourteenth Amendment was not to dispose of segregation. The defense also stated a dislike of "federal interference" in the state schools. The argument further stated that white and Negro schools had been equalized, or were being equalized, with respect to buildings, curriculum, qualifications and salaries of teachers, and other tangible factors.[106]

The United States District Court agreed that segregation in the public school was psychologically detrimental to Negro children.[107] However, the court chose not to overthrow Plessy. The court found the schools in question substantially equal with respect to tangible factors. The court felt bound by previous decisions made by the Supreme Court and ruled that absolute equality was impossible.[108] The Kansas case was appealed to the United States Supreme Court. The Topeka school board, however, abolished elementary school segregation under the Kansas local option clause in 1953.[109]

The cases from Kansas, South Carolina, Virginia, and Delaware were re-argued in the United States Supreme Court.

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[106] Brown v. Board of Education of Topeka, 345 U.S. 486, Head Note 1.

[107] Garraty, Quarrels That Have Shaped the Constitution, p. 259.

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

[109] Ibid.

There was a total of seventeen other states that required segregation by law. The states were Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, West Virginia, Tennessee, Texas, and Virginia. Moreover, four states had laws permitting segregation--Arizona, Kansas, New Mexico, and Wyoming.[110]

Upon acceptance of the four cases, the Court joined and referred to the suit as Brown, on appeal in 1952. In the December, 1952, session, the United States Supreme Court heard arguments concerning questions previously asked by the Court. The lawyers for the National Association for the Advancement of Colored People contended Plessy had been decided in error, or in any event, was in error.[111] Attorney General Edward McGranahan filed a brief as amicus curiae requesting the Supreme Court to declare school segregation invalid under the equal-protection clause. Also, some thirty social scientists, including Kenneth Clark, attacked school segregation by declaring that segregation did vast psychic damage to Negro and white children. A powerful argument was presented, in defense, for the school boards by John W. Davis, a noted constitutional lawyer.[112]

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

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

[112]Ibid., p. 259.

In re-argument, the Court directed:

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, 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) if 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?[113]

The Court apparently turned its sympathy to the cause of the National Association for the Advancement of Colored People and decided to re-examine the original meaning of the Fourteenth Amendment.[114] The Court searched for some rational justification for setting aside the "separate but equal" doctrine of the long lasting Plessy decision.[115]

Justice Thurgood Marshall turned to the world of experts for answers to these questions--a decision he later evaluated as the "smartest move I ever made in my life."[116] Mr. Marshall called a total of 130 social scientists. The brief that was prepared argued from the viewpoint of legal advocacy rather than history. In the final decision the Court put aside the historical argument and did not attempt to "resolve the problem." Rather the decision was based on "sociological" grounds.[117]

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

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

[115] Ibid. [116] Ibid.

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

Attorney General Herbert Brownell, acting as amicus curiae, stated the position of the Eisenhower Administration and the Republican Party. The brief stated that the Fourteenth Amendment's authors' intent was not conclusive. However, the broad egalitarian purpose was to "secure for Negroes full and complete equality before the law, and to abolish all legal distinctions based upon race."[118] The brief also suggested a one-year transition period in the South because of complicated racial and educational problems involved.

Briefs from the defense lawyer emphasized the fact that the Reconstruction Congress had voted funds for segregated schools in the District of Columbia.[119] Defense stated that the Fourteenth Amendment intent was not to strike down segregation in schools. South Carolina argued to ensure 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.[120]

The Court handed down a unanimous decision on May 17, 1954. Chief Justice Earl Warren wrote the opinion. Justice Warren introduced the decision with a brief history of the

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

[119]Ibid. [120]Ibid., p. 266.

case and the background. Warren addressed the issue of the Fourteenth Amendment intent by insisting:

> 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.[121]

Justice Warren further referred to the condition of Southern education at the time the Fourteenth Amendment was drafted as the reason that education was not mentioned in the Fourteenth Amendment.[122]

Justice Warren continued by discussing Plessy and the six cases that followed Plessy involving the "separate but equal" doctrine, as well as the graduate school cases, as having 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 their way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[123]

Justice Warren further spoke of the value of education by stating:

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

[122] Ibid., p. 490. [123] Ibid., p. 492.

> 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.[124]

Chief Justice Warren then proceeded to a 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.[125]

At this point Justice Warren rejected Plessy by stating:

> 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.[126]

This put to rest plans many Southern school boards were carrying out to build and improve the all-Negro schools.

Finally Justice Warren insisted:

> We have now announced that such segregation is a denial of the equal protection of the laws.[127]

Senator Hubert Humphrey's assessment of the Brown decision was:

> The decision of the United States Supreme Court in the segregation cases of May 17, 1954, was one of the

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[124] Brown v. Board of Education of Topeka, 347 U.S. 493 (1954).

[125] Ibid. [126] Ibid., pp. 494, 495. [127] Ibid., p. 495.

> great moments of our time and one of the profound turning points of American history.[128]

And so, in an effort to desegregate the American society, the long sought milestone was reached. The step was only a milestone. The greatest obstacle to a massive desegregation of society was overcome in the Brown decision. An important battle was won, but the war continued. The Court did not decide how desegregation was to be administered. All cases under Brown were sent back to district court for hearing, in implementing Brown.

Bolling v. Sharpe,[129] a fifth case decided the same day as Brown, was adjudged as a separate suit. The case was not encompassed under the umbrella of Brown because Brown dealt with a challenge to states governed by the Fourteenth Amendment. Since the District of Columbia was governed by the Congress, the same issue was not appropriate. The action taken in Bolling, however, was questioning 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

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[128]Hubert H. Humphrey, Beyond Civil Rights: A New Day of Equality (New York: Random House, 1968), p. 33.

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

> due process of law; nor shall private property be taken for public use, without just compensation.[130]

Litigation was initiated because Negro children were excluded from an all-white junior high school. The case questioned segregation as being unconstitutional in the District of Columbia. The question was raised concerning the legal statutes of the District of Columbia school board's operating a segregated school system. The defense for the school board moved for dismissal on the grounds that unequal facilities had not been questioned. The case was then heard by the United States Supreme Court. Chief Justice Warren delivered the opinion by saying in part:

> 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.[131]

This opinion caused the Bolling case to be placed for re-argument along with the other four cases of Brown.

John A. Garraty, author of Quarrels That Have Shaped the Constitution, evaluated the Brown decision correctly by stating:

> The Court's decision, handed down on May 17, 1954, could hardly have occasioned any great surprises either to proponents or enemies of segregated schools.[132]

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[130] United States, Constitution, Amendment V.

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

[132] Garraty, Quarrels That Have Shaped the Constitution, p. 267.

A look at the cases preceding Brown indicated the decision placed before the Supreme Court of 1954 was no less than the greatest victory for the National Association for the Advancement of Colored People. Decisions such as Gaines, Sipuel, McLaurin, and Sweatt predicted the direction of this Court.

Following Brown I, Arkansas, Maryland, Missouri, West Virginia, Delaware, Arizona, New Mexico, and the District of Columbia at least partially desegregated their school systems. The Court's action set off litigations throughout the South by petitioning local school boards to desegregate the all-white schools.[133]

A final act concerning Brown was played out in further re-argument as ordered by the Supreme Court concerning what kind of decree the Court should issue. Re-argument came from the United States Attorney General, the states of Arkansas, Florida, North Carolina, Oklahoma, Maryland, and Texas, as well as the parties involved.

Chief Justice Earl Warren reiterated the necessary implications of Brown by saying:

> 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.[134]

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

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

The question of who would carry out the order was discussed by Justice Warren by insisting:

> 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.[135]

The Court made the controversial stand concerning time. Hopes of the National Association for the Advancement of Colored People were that a more specific time would be ordered by the Court. However, pertaining to time, the Court stated:

> While giving weight to the public and private considerations, the Court will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling.[136]

The Court continued with an outline of procedure and time by saying:

> Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner.

Chief Justice Warren placed the burden of compliance on the defendants by insisting:

> The burden rests upon the defendants to establish such time as is necessary in the public interest, and is consistent with good faith in compliance at the earliest practicable date.[137]

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[135] Brown v. Board of Education of Topeka, 349 U.S. 299 (1955).

[136] Ibid., p. 300. [137] Ibid.

Justice Warren suggested problem areas to be considered in the desegregation process when he reasoned:

> 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.[138]

Finally Justice Warren remanded the case to the district courts to implement consistent with the Court's order. In addition, concerning time, the opinion declared:

> The judgments below, except that in the Delaware 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.[139]

Brown II of 1955 sought relief from Brown I of 1954. 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 did, however, outline some of the problems of the desegregation process, while at the same time the Supreme Court required the local boards to proceed with "all deliberate speed."

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[138] Brown v. Board of Education of Topeka, 349 U.S. 300, 301 (1955).

[139] Ibid., p. 301.

CHAPTER III

LEGAL ASPECTS OF THE DESEGREGATION PROCESS

THE EVASIVE DESEGREGATION CASES

Two years after Brown II, a decision regarding private schools in Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia was initiated.[1] The case involved Girard College and its refusal to admit two Negro boys, aged six and ten. The "college" was operated under a trust fund left by Stephen Girard and managed under trusteeship by the city of Philadelphia mandated by the state statute.

The institution was all white at the time of request for admission by the two Negro youths. Upon rejection of admittance, legal action was instituted against the board of directors contesting the refusal as a violation of the Fourteenth Amendment. Relief was denied by the Pennsylvania Supreme Court.[2]

The case was heard by the United States Supreme Court in a brief per curiam opinion. The opinion first established

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[1]Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, 353 U.S. 230 (1957).

[2]Ibid., 1 L ed 2d 792.

that the two Negro boys were otherwise qualified for admittance by stating:

> In February, 1954, the petitioners, Foust and Felder, qualified for admission to the "college." They met all qualifications except that they were Negroes. For this reason the Board refused to admit them.[3]

Chief Justice Earl Warren insisted the Board of Trustees was a state agency by virtue of being created by the State Legislature:

> The Board which operates Girard College is an agency of the State of Pennsylvania; therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment.[4]

At this point Justice Warren cited Brown I and continued:

> . . . the judgment of the Supreme Court of Pennsylvnnia is reversed and the case is remanded for further proceedings not inconsistent with the opinion.[5]

This case clearly illustrated the relationship of the state and desegregation. The Court implicitly stated that the state must not participate, in any manner, in discriminatory practice.[6]

In Cooper v. Aaron[7] the power of a state government to refuse to obey a federal court order was questioned when

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[3]Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, 353 U.S. 1 L ed 2d 792.

[4]Ibid., p. 231. [5]Ibid. [6]Ibid.

[7]Cooper, Members of the Board of Directors of the Little Rock, Arkansas, Independent School District v. Aaron, 358 U.S. 20 (1958).

it applied to Brown I. The case drew national attention when nine Negro children sought to integrate Central High School in Little Rock, Arkansas.

The Little Rock school board adopted policy to carry out the intent of Brown I. Meantime, state authorities amended the state's constitution. This legislation opposed the United States Supreme Court's decisions of May 17, 1954, and May 31, 1955.[8] The plan adopted by the school board would: (1) initiate integration at the senior high school; (2) junior high integration was to occur later; and (3) the elementary school was to be integrated. Integration was scheduled to begin in 1957 and to be completed by 1963. However, Negroes wanted a more immediate schedule of integration.[9] Relief was sought in the district court and the court of appeals where the school board's plan was upheld. As Little Rock Central High School opened doors in the fall of 1957, nine Negro students appeared for the purpose of enrolling. Governor Orval Faubus, however, had dispatched units of the Arkansas National Guard to prevent integration.[10] After three weeks of opposition, the district court and the attorney general enjoined Governor Faubus and the National

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[8]Chester M. Nolte, School Law in Action, 101 Key Decisions with Guidelines for School Administrators (New York: Parker Publishing Co., Inc., 1971), p. 207.

[9]Ibid.

[10]Cooper v. Aaron, 358 U.S. 21.

Guard. Therefore, the Guard was removed.[11] Although on September 23 nine Negroes entered the high school, the students withdrew when a very hostile crowd appeared. President Dwight Eisenhower ordered federal troops to the school site, where they remained for two weeks.[12] President Eisenhower then federalized the Arkansas National Guard and placed the troops at the school for the entire school year.[13] The school board asked for a postponement of the desegregation plan as well as removal of Negro students at Central High School. The district court did grant relief, but the circuit court reversed the decision. Argument was heard by the United States Supreme Court in special session. The decision of the circuit court was affirmed. The issue in the case was whether the governor and State Legislature were obligated to obey federal court orders, such as in Brown.

Chief Justice Warren delivered the Court's opinion by stating, in part:

> 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.[14]

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[11] Nolte, School Law in Action, p. 207.

[12] Ibid. [13] Ibid.

[14] Cooper, Members of the Board of Directors of the Little Rock, Arkansas, Independent School District v. Aaron, 358 U.S. 20 (1958).

Justice Warren further emphasized the position of the Court concerning Arkansas by insisting:

> . . . 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 can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation, whether attempted "ingeniously or ingenuously."[15]

In a concurring opinion, Mr. Justice Felix Frankfurter, in October, 1958, spoke of responsibility by stating:

> That the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling, but to help form its understanding, is especially true when they are confronted with a problem like a racially discriminating public school system.[16]

Little Rock high schools were closed for the 1958-1959 school year by Governor Orval E. Faubus to prevent "violence and disorder." Schools were reopened after school closing laws were declared unconstitutional by a federal court.[17]

In Goss v. Board of Education of the City of Knoxville, Tennessee,[18] the question was raised concerning whether a desegregation plan was valid if the plan entitled a student, on the basis of race and the racial composition of the assigned school, to transfer from a school, where the student

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[15] Cooper v. Aaron, 358 U.S. 17 (1958).

[16] Ibid., p. 26.

[17] Harry A. Ploski and Ernest Kaiser, The Negro Almanac (New York: Bellwether Publishing Co., Inc., 1971), p. 30.

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

was in a minority, back to a school where the pupil would be in racial majority. The case was decided, in 1963, with the Court's opinion delivered by Mr. Justice Tom C. Clark. Shortly after reiterating the desegregation plan as well as the question, 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.[19]

Again 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.[20]

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[19] Goss v. Board of Education of Knoxville, Tennessee, 373 U.S. 684, 685 (1963).

[20] Ibid., p. 683.

Justice Clark then looked at the major issue of the case and gave some indication of guidelines that 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 if the transfer provisions were made available to all students regardless of the racial composition of the school to which they requested transfer, we would 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.[21]

In Goss, guidelines were given by the Court which 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 was depriving Negro students of constitutional rights under the Fourteenth Amendment.

The same day decision in Goss was handed down, another segregation case was decided in McNeese v. Board of Education for School District 187, Cahokia, Illinois.[22] This Illinois case arose over the questions of the transfer of students from Centreville School to Chenot School and internally segregated assignments of students. Allegedly, the Chenot School

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[21] Goss v. Board of Education of Knoxville, Tennessee, 373 U.S. 687 (1963).

[22] McNeese v. Board of Education School District 187 Cahokia, Illinois, 373 U.S. 668 (1963).

was a segregated school and in conflict with the rights as guaranteed by the Fourteenth Amendment of the Constitution.

The attendance boundaries were redrawn for the Chenot School in 1957 because of overcrowded conditions in the nearby Centreville School. The fifth and sixth grade classes of Centreville were transferred to Chenot. There classes consisted of 97 percent white students. The enrollment-ment at Chenot changed to 251 Negro and 254 white. The white students came from Centreville.[23] At Chenot School all but eight Negro students transferred from Centreville School. Separate exits and entrances were assigned to Negro students.

Relief was asked by plaintiffs. This included registration of the Negro students in an integrated school that was in compliance with a plan approved by the district court.[24]

In the district court the board moved for dismissal on the grounds that plaintiffs had not exhausted prescribed Illinois laws which were administrative remedies for such situations. The district court granted the motion. On a petition of writ of certiorari the case was heard, in the Supreme Court. The opinion was delivered by Mr. Justice William O. Douglas. Justice John M. Harlan dissented.[25]

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[23] McNeese v. Board of Education School District 187 Cahokia, Illinois, 373 U.S. 669 (1963).

[24] Ibid. [25] Ibid., p. 678.

Justice Douglas cited a precedent in dealing with the state actions as a prerequisite to federal proceedings when he stated:

> We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy.[26]

He then cited Monroe v. Dape 365 U.S. 167, as a precedent to this case. Justice Douglas continued by summarizing the Court's opinion:

> It is no answer that the State has a law which would give relief. The federal remedy is supplementary to the state remedy and the latter need not be first sought and reused before the federal one is involved.[27]

Justice Harlan's dissent began with a question from Burford v. Sun Oil Company, ". . . assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?"[28] Mr. Harlan further stated that this approval had been used by lower federal courts.

The dissent determined that this should be left to local authorities:

> The alleged discrimination practices relate rather to the manner in which this particular school district was formed and the way in which the internal affairs of the school are administered. These are matters in

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[26] McNeese v. Board of Education School District 187 Cahokia, Illinois, 373 U.S. 671 (1963).

[27] Ibid.

[28] Burford v. Sun Oil Co., 319 U.S. 315, 317, 318, 87L ed 1424, 63 SG 1098.

> which the federal courts should not initially become embroiled. Their exploration and correction, if need be, are much better left to local authority in the final instance.[29]

Justice Harlan stated that the state of Illinois, prior to Brown, had provided for dealing with discrimination:

> Finally, we shall be slow to hold, unavailing, an administrative remedy afforded by a state which long before Brown v. Board of Education . . . had outlawed, both by its constitution and statutes, racial discrimination in the public schools, and which since Brown has passed the further implementing legislation drawn in question in the litigation.[30]

Therefore a ruling resulted because of the federal Civil Rights Act. To exhaust the state's system of recourse before relief was sought in federal court was not necessary. Another guideline was set down in procedures for handling segregation suits.

In 1964 Prince Edward County, Virginia, was once again brought back to the attention of the Supreme Court in Griffin.[31] Prince Edward County was one of the original cases consolidated in Brown I. The case evolved from an attempted plan for closing the county's public schools and operating segregated private schools by using public funds contributed for support. This suit was filed in district court in an attempt to enjoin the school board from failing to provide public schools for the county and to enjoin the

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[29] McNeese v. Board of Education, 373 U.S. 677 (1963).

[30] Ibid., p. 679.

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

use of public funds in support of the private segregated schools.[32] The district court found the county's public schools could not be closed in order to circumvent desegregation while other public schools in the state were being operated. Upon appeal the Fourth Circuit Court of Appeals reversed, with one dissent, by insisting that the district court should have abstained in order to await the state court's determination concerning the validity of tuition grants as well as the closing of the public schools.[33]

The United States Supreme Court granted certiorari by stating:

> In view of the long delay in the case since our decision in the Brown case and the importance of the question presented, we grant certiorari, and put the case down for argument March 30, 1964, on the merits as we have done in other comparable situations without waiting for final action by the Court of Appeals.[34]

Mr. Justice Hugo L. Black delivered the opinion. First a summary of the events was given, and then 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 Price Edward County Schools, while public schools in all the other counties of Virginia were being maintained,

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[32] Griffin v. County School Board of Prince Edward County, 377 U.S. 224 (1964).

[33] Griffin v. Board of Supervisors of Prince Edward County, 322 F 2d 332 (1963).

[34] Griffin v. County School Board of Prince Edward County, 375 U.S. 391, 392 (1964).

> denied the petitioners and the class of Negro students they represent the equal protection of the law guaranteed by the Fourteenth Amendment.[35]

Justice Black addressed the question of local or state responsibility in actual closing of 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 in the suit is not something which the State has commanded Prince Edward 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.[36]

Justice Black then looked at the 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.[37]

Mr. Black adjudged the reasons for closing as a denial of equal protection by saying:

> Whatever non-racial 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 desegregate do not qualify as constitutional.[38]

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[35] Griffin v. County School Board of Prince Edward County, 375 U.S. 225 (1964).

[36] Ibid., p. 228. [37] Ibid., p. 231. [38] Ibid.

Justice Black turned then to the question of the decree for implementing the Court's judgment:

> That 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 exemptions and from processing applications for state tuition grants so long as the county's public schools remained closed.[39]

Justice Black directed the district court to require financial support if necessary by saying:

> . . . 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.[40]

Mr. Justice Black closed the opinion in summary:

> 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.[41]

Mr. Justice Tom C. Clark and Mr. Justice John M. Harlan filed a concurring and dissenting opinion and insisted that federal courts did indeed have the power to reopen the public schools of Prince Edward County.[42] They otherwise joined the Court's majority opinion.[43]

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[39] Griffin v. County School Board of Prince Edward County, 375 U.S. 232 (1964).

[40] Ibid., p. 233. [41] Ibid., p. 234.

[42] Ibid., p. 235. [43] Ibid., p. 234.

In Price Edward County the school board closed the school system rather than integrate.[44] The action was declared unconstitutional by the district court. Moreover, the United States Supreme Court declared such action as a denial of "equal protection."

THE DISMANTLING OF THE DUAL SCHOOL SYSTEM

Ten years had lapsed since the Court had stated "with all deliberate speed" in Brown II.[45] Then Rogers v. Paul[46] was placed before the United States Supreme Court. This case illustrated the impatience of the Supreme Court in dealing with a desegregation plan that incorporated one-grade-a-year.[47]

The case came to the United States Supreme Court per curiam, in 1965, as a challenge to the desegregation plan of Fort Smith, Arkansas' public high school. The 1957 Arkansas plan integrated one grade each year; however, in 1964, grades ten, eleven, and twelve were still not integrated. Class action litigation was initiated by two Negro students. The plaintiffs challenged two factors: (1) the plan had not been followed; and (2) after seven years, grades ten, eleven, and twelve in high school were still not desegregated. To this Chief Justice Earl Warren opined:

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[44] Griffin v. County School Board of Prince Edward County, 375 U.S. 223 (1964).

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

[46] Rogers v. Paul, 382 U.S. 198 (1965). [47] Ibid., p. 199.

> . . . 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.[48]

The petitioners also questioned the desegregation of faculties. The allegation was one of assignment on a racial basis. The Court remanded a hearing on the issue and further stated:

> Two theories would give students not yet in desegregated grades sufficient interest to challenge racial allocation of faculty: (1) that racial allocation of faculty denies them equality of educational opportunity without regard to segregation of pupils and (2) that it renders inadequate an otherwise constitutional pupil desegregation plan to be applied to their grades.[49]

Rogers illustrated the growing impatience of the Court concerning the implementation of Brown I. However, the Court left some question unanswered concerning compliance with "all deliberate speed" in Brown I.

In 1968, three separate, but similar, cases were heard in the United States Supreme Court. Although the cases were not joined by the Court, the facts of each 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. The cases were important to the South because some thirteen hundred

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[48] Rogers v. Paul, 382 U.S. 199 (1965).

[49] Ibid., p. 200.

Southern school systems were using some form of "freedom-of-choice" to retard the integration process as much as the county would allow.[50]

Green v. County School Board of New Kent County[51] came on appeal from the Fourth Circuit in Virginia. New Kent County's population consisted of about one-half Negro with no residential segregation. Two schools were maintained, one in the eastern part of the county and one in the west.

In 1965, the school board adopted a "freedom-of-choice" plan for desegregating the schools. This was done in order to establish eligibility and receive federal aid. The plan called for students to choose, each year, between the schools. The plan excluded pupils entering the first and eighth grades to choose schools annually. The students who did not choose a school were assigned schools in the attendance zones. The district court approved the plan, and the court of appeals sustained; however, the court of appeals remanded for a more specific and comprehensive plan concerning teachers.[52]

The plan operated for three years with no white student choosing the all-Negro school. However, there were

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[50]Richard Bardolph, The Civil Rights Record (New York: Thomas Y. Crowell Company, Inc., 1970), p. 456.

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

[52]Ibid., p. 434.

115 Negro students admitted to the formerly all-white school. Therefore, eighty-five percent of the Negro students in the system attended the all-Negro school.

Mr. Justice William J. Brennan delivered the Court's majority opinion. Mr. Brennan 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."[53]

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 newly enunciated doctrine."[54]

Continuing, Justice Brennan established guidelines:

> The matter must be assessed in light of the circumstances present and the option available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. . . . Where the Court finds the board to be acting in

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[53] Green v. County School Board of New Kent County, 391 U.S. 431 (1968).

[54] Ibid., p. 438.

> good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief.[55]

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

> We do not hold that "freedom-of-choice" can have no place in such a plan. 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.[56]

Finally Justice Brennan spoke to the New Kent County questions:

> 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.[57]

Another "freedom-of-choice" case decided the same day was Raney v. Board of Education of the Gould School District.[58] This Arkansas school district contained a Negro population of about sixty percent. The school district

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[55] Green v. County School Board of New Kent County, 391 U.S. 439 (1968).

[56] Ibid., pp. 439, 440. [57] Ibid., p. 441.

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

provided two combination elementary and high schools some ten blocks apart in the district's only major town. Up to 1965 the system had been totally segregated. However, in 1965, a "freedom-of-choice" plan was adopted in order to assure eligibility for federal financial aid. The plan required all pupils to choose a school annually. Those not desiring to choose were assigned to the school previously attended.[59] By 1967 no white student had chosen the all-Negro Fields School. However, eighty-five Negroes had enrolled in the previously all-white Gould Schools. The plan was initiated in 1965. However, the number of students who requested the Gould Schools exceeded the number of places available. Therefore, twenty-eight Negro students were refused admittance.[60]

Injunctive relief was sought by the Negroes required to attend the Fields Schools. Meanwhile, the school board announced plans to construct a new high school at Fields. Petitioners sought to enjoin construction and stated the school should be built at the Gould site instead of the Fields site.[61]

District court denied relief and insisted that: (1) the "freedom-of-choice" plan had been adopted without

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[59] Raney v. Board of Education of the Gould School District, 391 U.S. 44 (1968).

[60] Ibid., p. 446. [61] Ibid.

court action; (2) the plan had received approval by the Department of Health, Education, and Welfare; and (3) some Negroes had enrolled in the Gould schools. Therefore, the plan was not a pretense or a sham.[62]

The Court of Appeals affirmed the district court decision and stated that adequacy of the plan was not questioned and neither was the implementation.[63] Certiorari was granted by the United States Supreme Court. Mr. Justice William J. Brennan delivered the opinion of the Court. Concerning the adequacy of the "freedom-of-choice" plan, Justice Brennan said:

> . . . 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."[64]

Justice Brennan closed the opinion by relying on Green:

> 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.[65]

The third and final case relating to "freedom-of-choice" was Monroe v. Board of Commissioners of the City of Jackson.[66] This Tennessee case involved the city of

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[62] Raney v. Board of Education of the Gould School District, 391 U.S. 446 (1968).

[63] Ibid., p. 447. [64] Ibid. [65] Ibid., p. 449.

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

Jackson's school system. The system contained eight elementary schools, three junior high schools, and two senior high schools. Some forty percent of the student population was Negro. The system was operated as a segregated system, according to Tennessee statute, with five elementary schools, two junior high schools, and one senior high school operating as all-white. Three elementary schools, one junior high school, and one senior high school were operated as "Negro" schools. The pupil placement law enacted by Tennessee was not upheld in district court.[67] The local school board enacted a "free transfer" plan in 1963. The plan provided for assignment of pupils within geographic or natural boundaries according to capacity and facilities. The "free transfer" portion of the plan provided the student an opportunity to transfer to the school of choice if space was available.[68]

After one year of operation, 118 Negro students transferred among four formerly all-white schools. All former Negro elementary schools remained all-Negro. The district court was petitioned for relief by the Negro students. 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.

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[67] Monroe v. Board of Commissioners of the City of Jackson, 391 U.S. 453 (1968).

[68] Ibid., pp. 453, 454.

The district court insisted that petitioners had not proven allegations that proposed junior high attendance zones were indeed gerrymandered.[69] The court of appeals affirmed, except the serious issue of faculty desegregation.

The United States Supreme Court granted certiorari. Justice William J. Brennan delivered the opinion. In part, Mr. Brennan said:

> 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.[70]

Justice Brennan then spoke directly concerning the "free transfer" plan by relying on Green.[71]

> 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.[72]

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[69] Monroe v. Board of Commissioners of the City of Jackson, 391 U.S. 453, 454 (1968).

[70] Ibid., pp. 456, 457.

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

[72] Monroe v. Board of Commissioners of the City of Jackson, 391 U.S. 459, 460 (1968).

The last Warren Court decision concerning education was the United States v. Montgomery County Board of Education.[73] This case concerned a plan to desegregate the Montgomery County, Alabama, school faculties. In 1964, the district judge issued an order that required integration of certain grades followed each year by an annual report. This suit was initiated by Negro children and Negro parents.

A 1968 order involved the desegregation of faculties. The court-mandated goal required the school board to attain a uniform ratio of five to one (white to Negro) faculty members in each school throughout the system.

The court of appeals modified the district court's order of a systemwide five to one (white to Negro) faculty ratio. The new order read only "substantially or approximately."[74] Thus the ratio was eliminated.

In delivering the Court's opinion, Justice Hugo L. Black held:

> We believe it best to leave Judge Johnson's order as written rather than modified by the 2-1 panel, particularly in view of the fact that the Court of Appeals, as a whole, was evenly divided on this subject. We also believe that under all the circumstances of this case we follow the original plan outlined in Brown II, or brought up to date by this Court's opinion in Green v. County School Board, supra, and Griffin v. School Board 337 U.S. 218.[75]

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

[74] Ibid., p. 234. [75] Ibid., p. 235.

The district court's original order for faculty desegregation was:

> . . . each school with fewer than twelve teachers was required to have at least two full time teachers whose race was different from the race of the majority of the faculty of that school, and in schools with twelve or more teachers, the race of at least one out of every six faculty and staff members was required to be different from the race of the majority of the faculty and staff members at that school.[76]

After the decision was rendered by the Warren Court in United States v. Montgomery,[77] Justice Burger replaced the retired Chief Justice Earl Warren. During the next two years three additional changes were made in the United States Supreme Court. Henry A. Blackmun replaced Associate Justice Abe Fortas. William H. Rehnquist and Lewis F. Powell replaced retired Associate Justices Hugo Black and John M. Harlan. Each Justice was appointed by President Richard M. Nixon.

The Supreme Court's impatience with "all deliberate speed" was demonstrated in Alexander v. Holmes.[78] This controversial litigation grew out of the Fifth Circuit Court of Appeals' order that required a new plan to desegregate thirty-three Mississippi school districts.

In a per curiam opinion, Mr. Justice Hugo L. Black, as Circuit Justice, was asked to vacate the Fifth Circuit's

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[76] United States v. Montgomery County Board of Education, 395 U.S. 232, 233 (1969).

[77] Ibid.

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

order.[79] Justice Black stated the decision in Brown had not been completely enforced and there were still states with many all-white and all-Negro schools. Thus the application to vacate the suspension of the order was denied. Then Justice Black stated the reason:

> This has resulted in larger part from the fact that in Brown II the Court declared that this unconstitutional denial of equal protection should be remedied, not immediately but only "with all deliberate speed." . . . Unfortunately, this struggle has not eliminated dual school system, and I am of the opinion that so long as that phrase is a relevant factor that will never be eliminated. "All deliberate speed" has turned out to be only a soft euphemism for delay.[80]

While Justice Black recognized a single Justice was speaking, the reasoning was clear:

> I recognize that in certain respects, my views as stated above, go beyond anything this Court has expressed held to date. Although Green reiterated that the time for "all deliberate speed" has passed, there is language in that opinion which might be interpreted as approving a "transition period" during which federal courts would continue to supervise the passage of the Southern schools from dual to unitary systems.[81]

Justice Black, in conclusion, invited the applicants to "present the issue to the full Court at the earliest possible opportunity."[82] The case was argued in October with the unanimous, but brief, decision rendered shortly thereafter. Justice Black said, in part:

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[79] Alexander v. Holmes County Board of Education, 396 U.S. 1218 (1969).

[80] Ibid., p. 1219. [81] Ibid., p. 1222.

[82] Ibid.

> 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 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.[83]

The Court further ordered the court of appeals to "retain jurisdiction in order to issue prompt and faithful compliance with its order."[84]

The Court's further impatience was illustrated in Carter v. West Feliciana Parish School Board.[85] The United States District Court had rejected a proposed desegregation plan for the 1969-1970 school year. The United States Fifth Circuit Court of Appeals reversed the decision in December, 1969. The court of appeals further ordered school boards to desegregate faculties and formulate a plan for converting the school systems to a unitary one by February 1, 1970. The court did, however, authorize a delay in desegregating the pupils until September, 1970.

The United States Supreme Court considered the case on certiorari and rendered a per curiam opinion. Chief Justice Warren Burger's opinion read:

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[83]Alexander v. Holmes County Board of Education, 396 U.S. 20 (1969).

[84]Ibid., p. 21.

[85]Robert Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970).

> 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, 396 U.S. 19, 240 Ed. 2d 19, 905 ct 29. 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.[86]

In a separate opinion, Mr. Justice John M. Harlan and Mr. Justice Byron R. White were not content just to tender the decision, but the Justices felt that further guidelines were needed:

> The intent of Alexander, as I see it, was that the burden in actions of this type should be shifted from plaintiffs, seeking redress for a denial of constitutional rights, to defendant school boards. What this means is that upon a prima facia showing of non-compliance with this court's holding in Green, . . . sufficient to demonstrate a likelihood of success at trial, plaintiffs may apply for immediate relief that will, at once, extirpate any lingering vestiges of a constitutionally prohibited dual school system. . . .
>
> Such relief, I believe it was intended, should consist of an order providing measures for achieving disestablishment of segregated school systems, and should if appropriate, include provisions for pupil and teacher reassignments, rezoning or any other steps necessary to accomplish the desegregation of public school systems as required by Green.[87]

Justice Harlan then turned to an exact timetable of events needed in such cases as was declared:

> . . . This would lead to the conclusion that in no event should the time from the finding of noncompliance with the requirements of the Green Case to the time of

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[86] Robert Carter v. West Feliciana Parish School Board, 396 U.S. 291 (1970).

[87] Ibid., pp. 291, 292.

> the actual operative effects of the relief, including the time for judicial approval and review, exceed a period of approximately eight weeks. This I think, is indeed the "maximum" timetable established by the Court today for cases of this kind.[88]

Justices Black, Douglas, Brennan, and Marshall expressed disagreement because they considered procedures too lenient. They said:

> . . . to direct summary reversal without argument and without opportunity for exploration of the varying problems of individual school districts seems unsound to us.[89]

Although the decision was a six to two vote, it reinforced further the determination of the Court in viewing full compliance of Alexander.[90]

Two months later, Northcross v. Board of Education of the Memphis, Tennessee, City Schools[91] came to the United States Supreme Court, and the Court granted certiorari. The case involved a May, 1969, district court order that required the Memphis School Board to submit a plan based on geographic assignment by January, 1970. After Alexander,[92] plaintiffs concluded that there was to be greater emphasis on speed of desegregation since there was a constitutional requirement.

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[88]Robert Carter v. West Feliciana Parish School Board, 396 U.S. 293 (1970).

[89]Ibid.

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

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

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

However, the district court denied the motion for further relief and required only the geographic plan by the January date. Plaintiffs appealed to the Sixth Circuit Court of Appeals while, 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.[93]

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

The United States Supreme Court granted certiorari. The Court held that the court of appeals erred. Justice Hugo White wrote the opinion and enumerated:

> . . . The Court of Appeals erred in its own findings that respondent Board is "not now operating a dual school system." . . . It was premature for the Court of Appeals to rule that the Board has, subject to complying with the present commands of the District Judge, converted its pre-Brown dual system into a unitary system "within which no person is to be effectively excluded because of race or color." In holding that Alexander v. Holmes County Board is applicable to this case the Court of Appeals order of remand of December 19, 1969 affirmed, but with the direction that the district court proceed promptly to consider the issues before it and to decide the case consistently with Alexander v. Holmes County Board. The order of the Court of Appeals of January 12, 1970, denying the injunctive relief is affirmed. The motion for injunctive pending certiorari filed in this Court is denied.[94]

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[93]Northcross v. Board of Education of the Memphis, Tennessee, City Schools, 397 U.S. 234 (1970).

[94]Ibid., p. 235.

Mr. Chief Justice Warren Burger concurred separately, and at the same time urged the Court to resolve some "basic practical problems"[95] concerning the requirement of a "unitary system" by having 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.[96]

Justice Burger stated that the reason he was not in favor of setting the case down for an expedited hearing was the fact that Justice Thurgood Marshall did not participate. Thus the Court was limited to seven Justices.

BUSING AS A MEANS OF DESEGREGATION

The questions that Chief Justice Burger raised in Northcross[97] opinion were answered, in part, in Swann v. Charlotte-Mecklenburg Board of Education.[98] Speaking for the Court, Justice Burger discussed compulsory integration in order to "dismantle the dual system." The case centered around a desegregation plan that was based on geographic

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[95] Northcross v. Board of Education of the Memphis, Tennessee, City Schools, 397 U.S. 237 (1970).

[96] Ibid. [97] Ibid.

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

zoning with a free-transfer provision. The plan was initially approved by the district court in 1965. In September, 1968, a petition seeking further relief based on Green[99] was filed. Both parties agreed the present plan did not achieve the required unitary school system. The school board was ordered to formulate a plan that would include student and faculty desegregation.[100] Even though the school board submitted a plan in June, and again in August of 1969, a third plan was required. The Court, however, after having reviewed the partial plan, declared the ideas unacceptable. Dr. John Finger was appointed by the court to design a desegregation plan.[101] In February, 1970, the district court was presented a "board plan" and the "Finger Plan."

The district court adopted the board plan with modifications. On appeal, the Fourth Circuit Court 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.

The district court, on remand, was presented two new plans. After lengthy hearings, the district court concluded

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

[100]Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 9 (1971).

[101]Ibid., p. 8.

the "Finger Plan" was acceptable. The court ordered the school board to accept one of three plans or provide a new one. The "Finger Plan" remained in effect until the school board did provide a new plan. In August, 1970, the school board gave the court notice that it would "acquiesce"[102] in the "Finger Plan," but stated that the plan was not reasonable. The district court then ordered the "Finger Plan" to remain in effect.

Chief Justice Warren Burger delivered the Court's majority opinion:

> 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.[103]

Chief Justice Burger turned to the problem of defining "responsibility of school authorities in desegregating a state-enforced dual school system in light of the Equal Protection Clause."[104] He acknowledged the problem was of student assignment. In referring to systems that had operated on dual decrees, the first obligation of school authorities was to eliminate racial distinctions in transportation, supporting personnel, and extra curricular activities, maintenance of buildings, and distribution of equipment.

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[102] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 11 (1971).

[103] Ibid., p. 5. [104] Ibid., p. 18.

Justice Burger then centered his attention 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.[105]

In addressing the problem of "racial balance" or "racial quotas," Justice Burger drew heavily on the district court's order concerning a 71-29 percent ratio in the Charlotte school system. However, Justice Burger 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.[106]

Justice Burger further stated that the order to desegregate schools did not mean that there must be a reflection of the racial composition of the community in the school system. Justice Burger insisted the district court used the mathematical ratio only as a starting point in formulating a plan, and not as a requirement.[107]

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[105] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 22 (1971).

[106] Ibid., p. 24. [107] Ibid.

Concerning the "one-race school,"[108] Justice Burger suggested there were circumstances that caused certain schools to be composed of all one race. Justice Burger pointed out, however, that this would prevail until new schools were provided or until neighborhood patterns changed.

According to Justice Burger, "remedial altering of attendance zones"[109] was to be utilized in order to break up a dual school system. The practice of gerrymandering school districts and attendance zones, as well as pairing, "clustering" or "grouping" of schools occurred in order to eliminate the all-white and the all-Negro schools.[110] Continuing, Justice Burger pointed out that a school system with no history of discrimination might assign its pupils to the schools nearest their homes.[111]

Regarding "transportation of students"[112] Justice Burger said that no rigid guidelines should be given because of the many problems in thousands of situations.[113] Mr. Burger then cited the extensive use of bus transportation used in the nation for educational purposes and maintained that busing was an acceptable tool. Justice Burger then justified the district court's order by stating:

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[108] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 25 (1971).

[109] Ibid., p. 27. [110] Ibid. [111] Ibid., p. 28.

[112] Ibid., p. 29. [113] Ibid.

> . . . thus the remedial techniques used in the district court's order were within that Court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.[114]

The Court did point out that there was an objection to the transportation of students when time or distnce traveled would risk health or would infringe upon the education of the child.

In closing, Justice Burger turned attention to a shift in population:

> It does not follow that the communities served by such systems will remain demographically stable, for in a growing mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year by year adjustments of racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action's eliminated from the system.[115]

The full impact of Swann was not realized until years later. It was, however, immediately apparent 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) schools were to have student bodies and faculties with the same racial proportion as the school systems on a whole. Also, it became clear in this case that the Court had introduced the philosophy of "intent" v. "extent," and the degree of "intent" to segregate dictated the "extent" of the remedy of a court.

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[114] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 30 (1971).

[115] Ibid., pp. 31, 32.

The companion case to Swann, Davis v. Board of School Commissioners of Mobile County,[116] concerned a challenge to a school desegregation plan for Mobile County, as well as the city of Mobile and its suburbs. An area of 1,248 square miles coverage was included. At the beginning of 1969 the school system contained some 73,500 students enrolled in ninety-one schools. Approximately 58 percent of the students were white and forty-two percent Negro. Most of the Negro students were residents concentrated in an area of the city east of a north-south highway.[117]

The district court ordered a plan that required school pairing as well as rezoning.[118] The plan mandated nineteen schools to have sixty percent of the Negro student population, while others were either totally black or nearly all-black. On appeal by plaintiffs the plan was rejected. The western zone was treated in isolation from the eastern zone and the plan provided no transportation for students for the purpose of desegregating schools. Therefore, the court of appeals directed the district court to reach the same ratio for staff and faculty as existed in the district as a whole. In delivering the court's opinion, Chief Justice Warren Burger affirmed the court of appeals' decision concerning faculty and staff ratio as was stated:

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

[117] Ibid. [118] Ibid., p. 35.

> The Court of Appeals concluded that with respect to faculty and staff desegregation, the board had almost totally failed to comply with earlier orders, and directed the District Court to require the board to establish a faculty and staff ratio in each school substantially the same as that for the entire district.[119]

Justice Burger continued by insisting the court of appeals had erred in isolating 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.[120]

Davis, even more than Swann, appeared to demonstrate clearly that busing could be required to achieve racial balance.

Swann and its satellites were followed by another North Carolina case--Winston-Salem/Forsyth County Board of Education v. Catherine Scott.[121] The case centered around appeals from an order of the United States district court approving a modified plan for desegregation of certain North Carolina schools. The suit was pending in the United States Court of Appeals for the Fourth Circuit when the United States Supreme Court decided Swann. Therefore, the appeals court

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[119] Davis v. Board of School Commissioners of Mobile County, 402 U.S. 35 (1971).

[120] Ibid., p. 38.

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

recommended the "instant proceedings with instructions to the district court to receive new school board plans to meet the requirements of the Swann decision."[122] The district court, however, interpreted the remand order as requiring a plan to "achieve the greatest possible degree of desegregation." The school board submitted a revised plan to achieve a "fixed racial balance in the schools through a substantial increase in pupil busing."[123] After approval of the new plan by the district court, the school board applied to Circuit Justice Burger for a stay of the lower court's mandate pending "disposition of the Board's petition for certiorari to renew the Court of Appeals' decision."[124]

Justice Burger's reasoning for the denial was:

> The stay application was not presented until seven and three days respectively, before the school term.[125]

Thus, there was not enough time for the Court to deal adequately with the stay. Justice Burger further indicated that the application did not include "specific allegations as to the time of travel or other alleged hardships involved in the added bus transportation program."[126] Finally Justice Burger insisted the record was inadequate to evaluate the issue.

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[122] Winston-Salem/Forsyth County Board of Education v. Catherine Scott, 404 U.S. 1224 (1971).

[123] Ibid., p. 1225. [124] Ibid., p. 1231. [125] Ibid.

[126] Ibid.

In Wright v. Council of the City of Emporia,[127] the issue concerned the credibility of a new school district created where boundaries were in a system that had a history of state enforced racial segregation.

Schools in Emporia, Virginia, operated as a part of the county public school system under a "freedom-of-choice" plan approved by the district court. After the Green decision there was a motion by petitioners to change the plan in order to comply with the Court's decision. Thus a "pairing" plan was initiated by the district court June 25, 1969, effective at the beginning of the 1969-1970 school year.[128] Two weeks later the City of Emporia announced the city would operate the school system. On August 1, 1969, petitioners filed a request to enjoin the city from withdrawing Emporia children from 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."[129] The increase would cause the county system to be twenty-eight percent white and seventy-two percent Negro, while the city schools would be

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

[128] Ibid.

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

forty-eight percent white and fifty-two percent Negro.[130] The district court also found that if Emporia did withdraw, this would frustrate the June 25th decree, and the court enjoined respondents from pursuing the plan. The district court held for the plaintiffs, while the court of appeals insisted that the purpose was a "cover-up" for racial discrimination; therefore, the court reversed.

The United States Supreme Court granted certiorari considering whether a federal court might enjoin state or local officials from dividing and creating a new school district from a segregated school district. The United States Supreme Court concluded that the court of appeals had erred and the district court order was proper.

The Court opinion was delivered by Justice Potter Stewart. Justice Stewart insisted the Court would be guided by the effect of school officials' actions in meeting Fourteenth Amendment constitutionality. In reference to racial ratios Justice Stewart said:

> We need not and do not hold that this disparity in racial composition of the two systems would be a sufficient reason, standing alone, to enjoin the creation of the separate school district. The fact that a school board's desegregation plan leaves some disparity in racial balance among various schools in the system does not alone make that plan unacceptable.[131]

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

[131] Ibid.

Justice Stewart referred to Swann in speaking of the disparity of buildings and equipment:

> The record reflects that the school buildings in Emporia are better equipped and are located on better sites than are those in the county. We noted in Swann that factors such as these may, in themselves, indicate that enforced racial segregation has been perpetuated.[132]

Justice Stewart then turned to a third factor, a question of timing. Justice Stewart felt that the district court was correct in the conclusion that Emporia's withdrawal from the Greenville County System would have an adverse psychological effect on its children.

Noting another factor concerning timing Justice Stewart proclaimed:

> In August, 1969, one month before classes were scheduled to open, the city officials were intent upon operating a separate system despite the fact that the city had no buildings under lease, no teachers under contract, and no specific plans for the operation of the schools. Thus, the persuasiveness of the "quality education" rationale was open to question.[133]

Justice Stewart spoke to the question concerning the future:

> Once the unitary system has been established and accepted, it may be that Emporia, if it still desires to do so, may establish an independent system without such an adverse effect upon the students remaining in the county, or it may be able to work out a more satisfactory arrangement with the county for joint operation of the existing system.[134]

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

[133] Ibid., p. 468. [134] Ibid., p. 470.

Another case, United States v. Scotland Neck City Board of Education,[135] presented a similar question to Wright[136] and both cases were decided June 22, 1972. In March, 1969, the North Carolina State Legislature created a new school district for Scotland Neck, North Carolina. The Halifax County school system was in the process of dismantling its dual school system at that time. 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."[137] The district court permanently enjoined the implementation of State Statute, Chapter 31. The court of appeals reversed the decision.[138]

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.

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

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

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

[138]Ibid.

Justice Potter Stewart again delivered the majority opinion by citing Wright.

> If the proposal would impede the dismantling of a dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out, Wright v. Council of City of Emporia, supra at 460. The District Court in this case concluded that chapter 31 "was enacted with the effect of creating a refuge for white students of the Halifax County School System, and interferes with the desegregation of the Halifax County System," 314 F Supp. at 78.[139]

The court of appeals was reversed.

The issue of consolidation of school districts came to the Court in School Board of Richmond, Virginia, v. State Board of Education of Virginia in 1973. Through a series of segregation cases and litigation in courts the Richmond system moved from 56.5 percent white and 43.5 black to a high of 70.5 percent black in 1969.[140]

In 1971, the district court ordered a racial-balance plan intended to eradicate "racial identifiability of each facility to the extent feasible within the city of Richmond."[141] 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 then ordered the consolidation.[142]

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[139]United States v. Scotland Neck City Board of Education, 407 U.S. 489 (1971).

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

[141]Ibid., 325 F Supp, 835 (1971).

[142]Ibid., 338 F Supp 67 (1972).

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.[143] The issue centered around whether a school system might be consolidated to create a system with a lower ratio of Negro students.[144] Having relied on Swann, the court found there was no constitutional requirement for racial balance other than in the process of dismantling the dual system.[145]

The United States Supreme Court granted certiorari. However, a decision was never reached because of an equally divided court. Therefore, the Fourth Circuit's decision was affirmed.[146]

"INTENT" V. "EXTENT"

In June, 1973, the United States Supreme Court divided on Keyes v. School District Number One, Denver, Colorado.[147] This case differed from de jure cases from the South because there never was required integration. Keyes was a de facto case. In addition, the Court focused attention

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

[144] Ibid., p. 1060. [145] Ibid.

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

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

on the issue of "intent" of the school board. Thus the Court ordered an extensive remedy. The Court was also a divided Court. Justice Lewis Powell concurred in part and dissented in part, whereas Justice William Rehnquist dissented. However, Justice Byron White took no part.

Litigation originated from petitioners seeking to desegregate the Park Hill Schools of Denver. The district court ordered relief, and the suit was extended in an attempt to secure desegregation in the remaining schools of Denver. Emphasis was placed on desegregating the core city schools. The district court found that the core city schools were educationally inferior to the white schools outside the core city area. By relying on Plessy v. Ferguson,[148] the school board was ordered to provide equal facilities for the core city schools. The Tenth Circuit Court of Appeals denied core city relief but affirmed the Park Hill decision. Park Hill segregation had been deliberate and actually proved nothing in reference to the school board's overall policy of segregation.

Mr. Justice William J. Brennan, Jr., delivered the majority opinion and was joined by Justices Douglas, Stewart, Marshall, and Blackmun. Chief Justice Burger concurred; Justice Powell agreed in part and dissented in part. Justice Rehnquist filed a dissenting opinion, and Justice White took no part in the decision.

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

Justice Brennan insisted the district court had erred in defining a segregated core city school because it had not included Hispanos in the same category as having experienced educational inequalities for Negroes as compared with treatment of white students, when the opinion stated:

> The District Court, in assessing the question of de jure segregation in the core city schools, preliminarily resolved that Negroes and Hispanos should not be placed in the same category to establish the segregated character of a school. . . . The Court concluded that a school would be considered inferior only if it has "a concentration of either Negro or Hispano students in the general area of 70 to 75 percent. . . ." We intimate no opinion whether the District Court's 70 percent to 75 percent requirement was correct. . . . In addition to the racial and ethnic composition of a school's student body, other factors such as the racial and ethnic composition of faculty and staff, and the staff, community and administrator's attitudes toward the school, must be taken into consideration.
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> We conclude, however, that the district court erred in separating Negroes and Hispanos for purposes of defining a "segregated school."[149]

Justice Brennan insisted the district court did not apply proper legal standards in dealing with arguments concerning school board's policy of deliberately segregating the core city schools. Justice Brennan suggested at the trial court level proof could be established indicating school board did have a segregation policy in a large portion of the school district.

Justice Brennan directed the district court to decide whether the school board's segregation policy concerning Park

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[149] Keyes v. School District Number One, Denver, Colorado, 413 U.S. 196, 197 (1973).

Hill included the entire Denver school district as a dual school system.[150] Justice Brennan further pointed out in cases of intentional proven segregation that included significant portions of a district, the school board must prove segregated schools were not segregated by intent. Finally Justice Brennan suggested:

> The judgment of the Court of Appeals is modified to vacate instead of reverse the parts of the Final Decree that concern the core city schools, and the case is remanded to the District Court for further proceedings consistent with this opinion.[151]

Justice William H. Rehnquist's dissenting opinion rejected the hypothesis that compulsory integration followed from Brown. The opinion was simply to the point of prohibiting racial discrimination:

> To require that a genuinely "dual" system is disestablished, in the sense that the assignment of a child to a particular school is not made to depend on his race, is one thing. To require that school boards affirmatively undertake to achieve racial mixing in schools where such mixing is not achieved in sufficient degree by naturally drawn boundary lines is quite obviously something else.[152]

Justice William O. Douglas concurred in a separate opinion but added that there was no constitutional difference between de jure and de facto school segregation.[153] Mr. Justice Powell concurred in part and dissented in part by insisting "grounds that the distinction between de jure

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[150] Keyes v. School District Number One, Denver, Colorado, 413 U.S. 213 (1973).

[151] Ibid., p. 214. [152] Ibid., p. 258. [153] Ibid., p. 225.

and de facto segregation should be abolished in favor of a constitutional rule requiring genuinely a integrated school system."[154]

Milliken v. Bradley[155] introduced a proposed remedy for extending Detroit's district lines into the suburbs. The action alleged that the Detroit public school system was a racially segregated school system and was segregated because of the policies and actions of both state and city officials. The action sought to implement a plan that would provide a unitary school system.[156]

The district court concluded that certain acts of the school board, as well as the state, had created segregation. The court ordered the school board to prepare a desegregation plan that involved only Detroit. In addition, the state was ordered to submit a plan that included a three-county metropolitan area. There was no valid claim that the eighty-five school districts within the three counties were guilty of any constitutional infractions.[157]

The district court ruled the board of education's plan inadequate to accomplish desegregation. The court, therefore, sought to find a solution beyond the limits of

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[154]Keyes v. School District Number One, Denver, Colorado, 413 U.S. 214 (1973).

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

[156]Ibid., p. 717. [157]Ibid.

the Detroit school district by cross busing across administrative district jurisdiction. The district court appointed a panel to formulate a plan for the Detroit schools that would include fifty-three of the eighty-five suburban school districts as well as Detroit.

The Sixth Circuit Court of Appeals affirmed the district court's finding concerning constitutional violations and required the school board to implement the plan involving fifty-three suburban districts. However, the court of appeals vacated the order to obtain 295 school buses subject to a more appropriate time.[158]

The state officials and the school district interveners, (but not the Detroit Board of Education), obtained a writ of certiorari from the United States Supreme Court. The issue before the Court was:

> . . . whether a federal Court may impose a multi-district, area wide remedy to a single-district de jure segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any findings that the included districts committed acts which affected segregation within the other districts.[159]

Chief Justice Warren E. Burger delivered the Court's majority opinion and was joined by Justices Stewart, Blackmun,

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

[159] Ibid., p. 721.

Powell, and Rehnquist. Justice Stewart filed a concurring opinion. Justice Douglas filed a dissenting opinion. Justice White also dissented and was joined by Justices Douglas, Brennan, and Marshall. Justice Marshall dissented and was joined by Justices Douglas, Brennan, and White.

Justice Burger insisted the district court erred in the use of standard development of a metropolitan area plan. Reasoning was that such a plan would prevent the school system from having a pupil racial composition not in proportion to the metropolitan area.[160]

Justice Burger further stated that the school district lines would not be ignored and local control of public education was a deeply rooted tradition.[161] Continuing, Justice Burger suggested the interdistrict could extensively disrupt public education in Michigan and that the district court would become a de facto "legislative authority, as well as a 'school superintendent' for the entire area, a task that few judges are qualified to perform."[162]

Justice Burger then outlined conditions the Court might approve in such cases by stating that racial discrimination acts by the state or local school districts must be proven [163] having not proved violations by the fifty-three

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[160] Milliken, Governor of Michigan v. Bradley, 418 U.S. 739-741 (1974).

[161] Ibid., pp. 741, 742. [162] Ibid., pp. 743-744.

[163] Ibid., pp. 744-745.

school districts and having found no interdistrict violation constituted a violation.

The opinion of the Court closed by saying:

> We conclude that the relief ordered by the district court and affirmed by the Court of Appeals was based upon an erroneous standard and was unsupported by record evidence that acts on the outlying districts effected the discrimination found to exist in the school of Detroit. Accordingly the judgment of the Court of Appeals is reversed and the case is remanded for further proceeding consistent with this opinion leading to prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city school, a remedy which has been delayed since 1970.[164]

Justice Marshall, joined by Justices Douglas, Brennan, and White, asserted:

> After 20 years of small, often difficult steps toward that great end, the court today takes a giant step backward. . . . I cannot subscribe to this emasculation of our constitutional guarantee of equal protection of the laws and must respectfully dissent.[165]

After the case was remanded for further proceedings, the city of Detroit was not spared the remedy of busing when a plan was denied by the district court to bus students within the city limits.[166]

The Supreme Court, on June 27, 1977, handed down a second decision concerning Milliken.[167] Chief Justice Warren

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[164] Milliken, Governor of Michigan v. Bradley, 418 U.S. 752 (1974).

[165] Ibid., p. 782.

[166] Merrill Sheils, "Smooth Ride in Detroit," Newsweek, February 9, 1976, p. 45.

[167] Ibid.

Burger delivered the opinion. The case centered around plans devised by the district court, on remand, to include decreed components of reading, in-service teacher training, testing, and counseling as a necessary part of the plan to carry out desegregation in the Detroit City Schools.[168] The Court further directed that the cost be borne by both the Detroit School Board and the State of Michigan. The Sixth Circuit Court of Appeals sustained the decision.

The United States Supreme Court granted certiorari in order to consider the question of whether a district court could, as a component of a desegregation plan, order remedial educational programs and whether a federal court could require state officials, found responsible for constitutional violations, to bear part of the cost of such programs.[169] As the Supreme Court affirmed the judgment of the court of appeals, Chief Justice Burger stated that

> . . . in light of the mandate of Brown I and Brown II, federal courts have, over the years, often required the inclusion of remedial progress in desegregation plans to overcome the inequalities inherent in dual school systems.[170]

Concerning question of responsibility for costs of the remedial program, Justice Burger stated, "The decree to share the future costs of educational components in this case

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[168] William G. Milliken, Governor of the State of Michigan v. Ronald Bradley (Milliken II), 97 S. Ct. 2749 (1977).

[169] Ibid. [170] Ibid.

fits squarely within the prospective compliance exception reaffirmed by Edelman."[171] This case questioned the right of Illinois officials to withhold disability benefit payments.

This decision answered the question of the financial responsibility in cases of violations of de jure segregation. The Court had said unanimously that (at least in Michigan) the responsibility of those who had been in constitutional violation was to pay one-half the cost to implement the remedial program.[172]

On November 4, 1975, Tasby v. Estes[173] came to the United States Supreme Court, on certiorari denied, let stand an order by the Fifth Circuit Court of Appeals which mandated Dallas, Texas, to begin busing. The Fifth Circuit declared a 1971 desegregation plan inadequate and that a new plan must be implemented by January, 1976.[174]

The rejected plan relied on: (1) some school closings; (2) student assignments, school site selections; (3) new school construction; and (4) a proposal to utilize television hookups. The Fifth Circuit Court of Appeals declared the stated plan did not alter the racial character of the schools.[175] Continuing, the court of appeals further

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[171] Edelman v. Jordan, 415 U.S. 651 (1974).

[172] Milliken v. Bradley, 97 S. Ct.27749 (1977) (Milliken II).

[173] Eddie Mitchel Tasby v. Nolan Estes, 423 U.S. 939 (1975).

[174] Ibid., 517 2nd 92. [175] Ibid., p. 93.

stated that the district's plan was constitutionally inadequate because proper weight to racial composition of the student bodies was never considered when the plan was under construction. Moreover, the court insisted the dual structure must be dismantled by beginning of the second semester 1975-1976 academic year.[176] However, the case was remanded to the district court. On October 16, 1975, United States District Court Judge William M. Taylor authorized a delay until August, 1976, with the explanation that a busing plan implemented in the middle of the year would be disruptive.[177]

The actual busing began in the fall of 1976 when approximately seventeen thousand students, in grades four through eight, were bused.[178] Some ten thousand students were bused voluntarily so as to take advantage of special educational programs that were offered in schools outside the neighborhood. The plan incorporated seven Dallas suburbs because of a charge that the district operated a racially segregated system of Negroes and Mexican-Americans.[179] This case differed from Detroit in that there was: (1) no

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[176] Eddie Mitchel Tasby v. Nolan Estes, 423 U.S. 93 (1975).

[177] The World Book Encyclopedia, Field Enterprises Educational Corporation, Yearbook 1976, p. 269.

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

[179] Newsweek, "Testing Time for Busing," Sept. 8, 1975, p. 79.

unitary school system established in Dallas; and (2) that there was prima facie evidence of a segregated system.

In November, 1975, the Supreme Court upheld the three judge United States District Court of Delaware in Buchanan v. Evans.[180] The district court had enjoined the enforcement of the Delaware state statute known as the Educational Advancement Act, enacted by the State Legislature in June, 1968. The statute was designed

> . . . to provide the framework for an effective and orderly reorganization of the existing school districts of this state through the retention of certain existing school districts.[181]

The statute stated that the "city of Wilmington shall be the City of Wilmington with the territory within its limits."[182]

The case centered around three contentions: (1) an unconstitutional dual system in New Castle County, which included Wilmington, was maintained; (2) the state, by virtue of practices which included low-cost housing policies, was the cause of the discrimination that had resulted in segregated schools; and (3) the Educational Advancement Act, in substance, directed Wilmington to continue as a school district, thus preventing the state board from dismantling the dual system.[183]

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[180] Madeline Buchanan v. Brenda Evans 423 U.S. 963 (1975).

[181] Ibid., p. 964.

[182] 14 Del. C. Section 1001-05 (Educational Advancement Act).

[183] Ibid.

The Educational Advancement Act was declared unconstitutional and remedial action was deemed necessary by the district court.[184] The Supreme Court's memorandum decision affirmed the lower court ruling and allowed interdistrict busing in Wilmington[185] because the city schools were approximately eighty-five percent black, and the suburban districts were practically all white.[186] District court ruled the state or local school district, by racially discriminatory acts, had caused an interdistrict segregation under Milliken.[187]

The difference between the Detroit case and the Delaware case seemed to be that in Detroit there was never prima facie evidence that the state had enacted unconstitutional legislation with segregative "intent" nor was there evidence of de jure segregation in the fifty-three suburbs of Detroit. In Wilmington, Delaware, however, the state had unconstitutional statutes that promoted segregation by "intent." Thus there was an extensive remedy that involved the Wilmington suburbs.

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[184] 28A 393 F Supp. 438-439.

[185] Madeline Buchanan v. Brenda Evans, 423 U.S. 963 (1975).

[186] "Busing in Schools," Greensboro Daily News, Sept. 4, 1977, p. 81.

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

On January 28, 1976, the United States Supreme Court handed down a landmark decision in Pasadena City Board of Education v. Spangler.[188] The primary question concerned whether a school system was

> . . . constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.[189]

The 1968 class action case was brought against school officials by high school students and their parents.[190] Injunctive relief came from allegedly unconstitutional segregation of the Pasadena public schools.

In historical retrospect, in 1970 a district court decision found that Pasadena school system's educational policies and procedures violated the Fourteenth Amendment. Defendants were enjoined from failing to adopt a plan to desegregate. The school system was ordered to submit a plan that would desegregate the school system, beginning with the 1970-1971 school year.[191] This plan included the provision that no school would be "with a majority of any minority students."[192] The defendants than submitted the "Pasadena Plan" which was approved by district court.

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[188] Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

[189] Swann v. Board of Education, 402 U.S. 32 (1971).

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

[191] Ibid., p. 424. [192] Ibid., p. 428.

In 1974 a motion was filed with the district court to modify the 1970 "Pasadena Plan." The motion was denied and appeal was made to the Ninth Circuit Court of Appeals, where, although one judge dissented, the district court's decision was affirmed.

On appeal the United States Supreme Court granted certiorari and the judgment of the district court was vacated and remanded for further proceedings. Justice William H. Rehnquist delivered the Court's opinion. Justice Rehnquist insisted that the Pasadena school system did not have to make

> . . . year by year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system [established in Swann] . . . .[193]

The decision was six to two, with Justices Marshall and Brennan dissenting. The dissent was largely attributed to the argument that the racial discrimination had not been eliminated from the school system in Pasadena. Justices Marshall and Brennan interpreted Swann as saying that "until such a unitary system is established, a district court may act with board discretion--discretion which includes the adjustment of attendance zones."[194]

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

[194] Pasadena City Board of Education v. Spangler, 427 U.S. 442 (1976).

In Austin, Texas, the Supreme Court rendered a different decision. Here the Court struck down a Fifth Circuit Court of Appeals' decision busing twenty-five thousand students to desegregate Austin's city schools.[195]

In Austin Independent School District v. United States,[196] the issue concerning the assignment of students was questioned. Most of Austin was residentially segregated. The school board's policy was to assign students to schools nearest their homes. Thus forty-five percent Mexican-American students attended schools in which sixty percent were black or Mexican-American.[197] The complaint was that this policy constituted prima facie de jure segregation which violated the Equal Protection Clause. The Fifth Circuit Court of Appeals' judgment was vacated.

In writing the majority decision, Judge Powell stated:

> The principal cause of racial and ethnic imbalance in urban public schools across the county--north and south--is the imbalance in residential patterns. Irish residential patterns are typically beyond the control of school authorities. For example, discrimination in housing, whether public or private, cannot be attributed to school authorities. . . .[198]

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

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[195]"Court Nixes Busing Plan," Burlington Time News, Dec. 7, 1976, p. 4A.

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

[197]Ibid. [198]Ibid., p. 996.

> 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.[199]

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 June, 1977, an Ohio case developed along the same issues and the United States Supreme Court rendered its decision in the Dayton case.[200] The decision vacated judgment of the Fifth Circuit Court of Appeals and remanded the case for further proceedings. The district court insisted that the Dayton School Board had practiced racial discrimination in school operation. Discrimination was established on the basis of "cumulative violation" of the Equal Protection Clause of the Fourteenth Amendment. On appeal to the Sixth Circuit Court of Appeals, a plan that included requirements for district wide racial distribution was approved. The ruling required the Dayton school system to attain a racial distribution for each school within the system that would be within 15 percent of the 48 to 52 percent black-white

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[199] Austin Independent School District v. United States, 429 U.S. 998 (1976).

[200] Dayton Board of Education v. Mark Brinkman, 97 S. Ct. 2766 (1977).

population of Dayton.[201] This plan employed the techques of "pairing," redefining attendance zones, centralizing special programs, and the institution of "magnet schools."[202]

Granting certiorari, the Supreme Court sought to determine whether the appeals court remedy was consistent with constitutional violations as determined by the lower courts. In vacating the court of appeals' decision the Supreme Court directed the lower courts to determine whether the school board's action intended to "discriminate against minority pupils, teachers, or staff" as the Court saw racial "intent."[203] Justice William H. Rehnquist delivered the court's opinion by directing that if discrimination was found, the district court must determine "how much incremental segregative effect those violations had on the racial distribution of the Dayton school population as presently constituted."[204] The Court ordered the solution to be "designed to redress that difference, and only if there had been a systemwide impact may there be a systemwide remedy."[205]

The Dayton case once again: (1) outlined procedures for a lower court to follow; and (2) set precedence in

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[201] Dayton Board of Education v. Mark Brinkman, 97 S. Ct. 2766 (1977).

[202] Ibid., p. 2766. [203] Ibid., p. 2775.

[204] Ibid., p. 2768. [205] Ibid.

examining the racial "intent" of the school system. Such examination would determine the extent of the remedy to erase discrimination as directed by the courts.

CHAPTER IV

REVIEW AND ANALYSIS OF SELECTED BUSING CASES

BACKGROUND

After the Brown[1] decision mandated desegregation in the South and other Southern border states' schools, there was a period of some ten years of resistance before implementation in those states. The decade of delay was an agonizingly slow period of desegregation. This was illustrated by the Civil Rights Report, Federal Enforcement of School Desegregation, September 11, 1969.[2]

Table 1 represented the percentage of students attending desegregated schools in seven Southern states during a period of time in 1963 as compared to a time in 1969.[3] Many Southern states had accomplished only token desegregation by 1963-1964. Yet, while the federal courts focused attention only on the South, there were difficult problems that faced the desegregation process in the Northern and mid-Western states. Moreover, in many Southern states,

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

[2]U. S. Commission on Civil Rights, Federal Enforcement of School Desegregation (September, 1969), p. 31.

[3]Ibid.

TABLE 1

Percentage of Students Attending Desegregated Schools in Seven Southern States

State	1963-1964 Percentage of All Negro Students	1968-1969 Percentage of All Negro Students
Alabama	.007	7.4
Georgia	.052	14.2
Louisiana	.602	8.8
Mississippi	.000	7.1
North Carolina	.537	27.8
South Carolina	.003	14.9
Virginia	1.63	25.7

the problem of desegregation faced by school boards was solved because of the rural nature of the South. This was accomplished by closing the all-black school and transferring these students to the all-white schools, or by simply exchanging black students for white students.[4] Schools located in large metropolitan areas, however, faced a far more complex problem because of large pockets of minorities located in the inner city area.[5] This problem was illustrated by Representative Richardson Preyer when stating that "it was hard to see how the twenty square mile block area of Chicago can be integrated in any practicable way."[6]

Researchers from the University of Michigan conducted a study using an "array of indicators"[7] to determine a desegregation scorecard revealing how school integration had progressed in United States cities. The findings were based on data obtained from the United States Office for Civil Rights and the United States National Center for Educational Statistics.[8]

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[4]Green v. County School Board of New Kent County, 391 U.S. 430 (1868).

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

[6]Richardson Preyer, "Beyond Desegregation--What Ought to be Done?" North Carolina Law Review, Volume 51, Number 4 (March 1973), p. 660.

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

[8]Ibid.

Table 2, based on University of Michigan research and published in Newsweek magazine, indicated a rating of cities on a scale of 0 for total segregation and 100 for complete racial balance in 1967.[9] The problem of desegregation during the 1960's extended outside the South. Not only did the University of Michigan's study show that Southern cities such as Atlanta scored a five, but also that the Northern city of Chicago scored eight.

The Supreme Court, growing impatient with the speed of desegregation, forced school boards to look for a means of implementing the desegregation process.[10] One solution, busing, was apparent to many people. Busing meant students from a majority race were joined by bus with students from a minority race.[11] After all, the solution was not new because rural sections of the United States had used buses to transport students to consolidated schools for many years.[12]

Congressman Morris Udall voiced the feelings of some decision makers in the West and North when he said:

> In many respects the Civil Rights revolution of the 1960's was a striking success. But in the area of education we have largely had a psychological victory and practical failure. Many of our Southern friends told us that things were not all so simple and that

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

[10] United States v. Jefferson County Board of Education, 372 F. 2d 836

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

[12] Ibid., pp. 4-6.

Table 2

Rating of Cities on a Scale of 0 for Total Segregation and 100 for Complete Racial Balance in 1967

City	Rating
Atlanta	5
Boston	26
Charlotte	23
Chicago	8
Dallas	8
Denver	8
Detroit	21
Indianapolis	15
Jacksonville	8
Los Angeles	11
New York	48
Oklahoma City	3
Philadelphia	24
San Francisco	33
Tampa	12

> there would be different reactions when the tough school integration problems came North. We know that much of what they said was right.[13]

The present day busing practice illustrated below showed only about 3 percent students bused for the purpose of desegregation, according to a 1972 Department of Health, Education, and Welfare memorandum.[14]

Number of children bused to school	19.6 million
Cost of busing (including replacement)	1.5 billion
Busing cost in states as percentages of total educational outlays	0.7% to 6.9%
Number of buses	256,000
Number of drivers	275,000
Miles traveled per year	2.2 billion

Concerning pupil transportation and the responsibility of transportation as applied to education, the North Carolina State Board of Education said:

> As long as we have accepted a narrow and limited education as satisfactory, the State discharged this responsibility primarily through the establishment of a small school within walking distance of most pupils. But demands on the school for a broadened program increased. Those and other factors have resulted in transportation of pupils to and from school becoming one of the most important of the auxiliary activities of the schools.[15]

The post World War II era brought about an influx of large numbers of students. Student enrollment surpassed the rate of school construction. Therefore busing was utilized

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[13] Congressional Record, 11. 11883 (daily ed. March 8, 1972).

[14] Nicolaus Mills, The Great School Bus Controversy (New York: Teachers College Press, 1973), pp. 6-8.

[15] Nicolaus Mills, "Busing: Who's Being Taken for a Ride?", Commonweal, March 24, 1972, p. 4.

as an implement for transporting students into less crowded schools. In St. Louis, Missouri, buses were used to shift students to schools with fewer pupils.[16] This plan was an effective alternative to the establishment of double shifts that otherwise would have had students divided into morning and afternoon groups.

Administrators had tried for decades to sell busing as a means to achieve quality education.[17] This plea focused on providing a school that could compete with schools in the cities. Objections concerning the school bus were: (1) length of time students spent on the bus; (2) distance traveled; and (3) safety and cost of busing.

Prior to 1954, students were bused in the Southern states literally as a means of segregating the races.[18] Most Southern states operated a dual bus system, one for white children and one for black children.[19] Often both buses operated on the same streets and highways.[20] Buses transporting black students often passed near white schools en route to the all-black school.[21]

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[16]Nicolaus Mills, "Busing: Who's Being Taken for a Ride?", Commonweal, March 24, 1972, p. 4.

[17]Ibid., pp. 6-8.

[18]Richard Bardolph, The Civil Rights Record (New York: Thomas Y. Crowell Co., 1970), p. 322.

[19]Ibid. [20]Ibid.

[21]Ibid.

Thus the formerly accepted means of improving education became a paradoxical solution when applied to desegregating schools. Violent opposition to busing for desegregation in such places as Detroit, Louisville, and Boston had a familiar ring. Such concerns as (1) safety, (2) distance children had to travel, and (3) associated costs were exhibited by the opponents of busing.[22]

James Bolner concluded:

> . . . we are convinced that the busing issue is in large part a symbol of opposition to school desegregation and residential integration. That is, busing has become one of the battlegrounds on the central question: Does the United States want a socially integrated society.[23]

The busing issue that had arisen over the Supreme Court's ordered busing for desegregation was found to be a symbol of resistance for people opposed to the entire integration doctrine by two Duke University researchers.[24] These researchers had only recently established through research what was thought true by others.[25] That is, that attitudes opposed to school busing were based more on racial feelings than on a real concern for the quality of the educational process.[26] In summary the findings were:

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[22]Bardolph, The Civil Rights Record, p. 321.

[23]James Bolner, Busing: The Political and Judicial Process (New York: Praeger Publishers, 1974), p. 234.

[24]"Antibusing Called Symbolic Racism," Greensboro Daily News, August 29, 1977.

[25]Ibid. [26]Ibid.

> Symbolic racism is a much greater factor in busing opposition than conventional racism based on negative stereotypes of blacks. Racial attitudes are "closely related to antibusing attitudes . . . the more racist, the more opposed to busing." . . . The inconvenience of busing and concern for quality of education were only weakly associated with opposition to the belief of some researchers.[27]

The Berkeley, California, school system became the first city to achieve full desegregation by busing in 1968.[28] Other cities such as Galveston, Texas, Oklahoma City, and Pontiac, Michigan, started to utilize busing after the success in Berkeley.[29]

This desegregation method was mentioned in Hobsen v. Hansen as a means of desegregating school systems located in larger cities.[30]

There was much speculation about the limits of court ordered busing until this question was answered by the United States Supreme Court in the decision of Swann.[31] In this famous landmark case the Supreme Court insisted that cross district busing could indeed be instituted in order to desegregate the school systems.[32]

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[27] "Antibusing Called Symbolic Racism," Greensboro Daily News, August 29, 1977.

[28] Bardolph, The Civil Rights Record, p. 321.

[29] Ibid.

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

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

[32] Ibid.

It seemed appropriate, however, before looking at Swann, to examine three cases that set the stage for Swann. The Court moved from a prohibition of segregation to a requirement of racial balance. Obviously this led to the busing in Swann.

Griffin v. County Board of Prince Edward County[33] came to the Supreme Court just ten years after the Court had insisted, in Brown II, that a "prompt and reasonable" start must be made in order to comply with the 1955 decision of Brown II.[34] The Court remanded the cases in Brown II to the district court and directed to "admit to public schools on a racial non-discriminatory basis with 'all deliberate speed' the parties to these cases."[35] However, the ten-year period that passed brought about few results and impatience of the Court. The planned delays, reflected in Griffin, concerning the closing of public schools and the state's paying the tuition for students to attend private schools, denied Negro children equal protection, the Court said. Justice Hugo Black referred to Brown II when he said, "The time for mere 'deliberate speed' has run out."[36] It was clear that the

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

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

[35]Ibid.

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

Court had moved from a position of tolerance and delay, because of unexpected problems, to one of intolerance and indignation. The time for compliance with Brown I had come.

In a 1967 case, United States v. Jefferson County Board of Education,[37] the United States Supreme Court failed to grant certiorari and thus established a Fifth Circuit's decision as the one to be followed. Because of this decision, many provisions of the Civil Rights Act of 1964 were reversed and rendered worthless.[38] The district court was explicit in the language when stating "the only school desegregation plan that meets constitutional standards is one that works."[39] Thus again, more emphatically, the Court of the land had stated that the decade of "tokenism" was over.

The intent of the district court was clear. However, the court's decision entered into semantics when using "integration" and "desegregation" as being interchangeable.[40] The district court referred to the doctrine in Brown, (specifically Briggs v. Elliott),[41] in that Brown did not require integration but only forbade enforced segregation.[42]

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[37]United States v. Jefferson County Board of Education, 340 U.S. 480 (1967).

[38]Lino A. Graglia, Disaster by Decree (Ithaca, N. Y.: Cornell University Press, 1976), p. 66.

[39]United States v. Jefferson County Board of Education, 372 F. 2d 836 (1967).

[40]Ibid., p. 59.

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

[42]Bardolph, The Civil Rights Record, p. 452.

Specifically, the district court referred to the "mystique" developing over the differences between the terms in stating just how incorrect the dictum was:

> The dictum is a product of the narrow view that Fourteenth Amendment rights are only individual rights; that, therefore, Negro school children individually must exhaust their administrative remedies and will not be allowed to bring class suits to desegrate a school system. However, we use the term "integration" and "desegregation" of a formerly segregated dual system to a unitary, non racial system--lock, stock, and barrel: students, faculty, staff, facilities, programs and activities. . . .[43]

The district court then stressed necessity to integrate the system by saying:

> As we see it, the law imposes an absolute duty to . . . disestablish segregation. And an absolute duty to integrate. . . . Racial mixing of students is a high priority educational goal. . . .[44]

Interestingly enough the Court also referred to the Civil Rights Act as the fact that the Court had ". . . taken a close look at the background and objectives of the Civil Rights Act of 1964. . . ."[45] However, section 401 of the Civil Rights Act of 1964 stated quite clearly:

> Desegregation means that assignment of students to public schools and within such schools without regard to their race, color, religion or national origin, but desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance.[46]

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[43] United States v. Jefferson County Board of Education, 372 F. 2d 836 (1967).

[44] Ibid.

[45] Civil Rights Act, Section 401,11964, as cited in Graglia, Disaster by Decree, p. 61.

[46] Ibid.

The Court spoke to this with a different interpretation.

> The affirmative position of this definition down to its "but" clause, describes the assignment provision meaning in a plan for conversion of a de jure dual system to a unitary, integrated system. The negative portion, starting with "but" includes assignment to overcome racial imbalance, that is, it acts to overcome de facto segregation. As used in the Act, therefore, "desegregation" refers only to the disestablishment of segregation in de jure segregated schools.[47]

The district court's reasoning was somewhat inconsistent with logical reasoning.[48] The civil rights language stated that desegregation did mean the assignment of students. This fact was clear. However, clear or not, litigation had now entered the dictum of the Court, and thus ratios and racial balance became legal tools for desegregation. Legal direction had shifted the meaning of the Civil Rights Act of 1964.[49]

Four years after Griffin, and only one year after the Jefferson County case, many school systems in the South were under a "freedom of choice" plan. This plan allowed students to choose schools; otherwise, students were assigned to the school nearest home. Although there were variations in each school system, the plans basically were similar.

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[47]United States v. Jefferson County Board of Education, 372 F. 2d 878 (1967).

[48]Graglia, Disaster by Decree, p. 61.

[49]Ibid.

The New Kent County School Board had generally such a plan. However, the plan actually desegregated the schools very little.

The case that dealt the death blow to the effective use of "freedom of choice" was Green v. County School Board of New Kent County.[50] The Court stated New Kent School Board's "freedom of choice plan cannot be accepted as a sufficient step to effectuate a transition to a unitary system."[51] Although the Supreme Court did not rule the plan unconstitutional, the Court termed the plan was ineffective and, in turn, directed the school board to "provide a plan that promises realistically to work now."[52] Justice William Brennan delivered the opinion of the Court.

Lino Graglia described the 1968 Green decision as working a "revolution in the law of school segregation comparable to, indeed more drastic than, that effected by Brown.[53] Graglia further insisted "the Court changed the constitutional mandate from a prohibition to a requirement of racial discrimination in school assignment."[54] Graglia charged that the Court had not only required desegregation but had gone even further to integrate the schools; therefore,

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

[51]Ibid., p. 441. [52]Ibid., p. 439.

[53]Graglia, Disaster by Decree, p. 67.

[54]Ibid.

discrimination resulted. The situation was referred to as reverse discrimination. This hypothesis was difficult to accept until there was a decision on reverse discrimination. Currently there are reverse discriminatory cases pending before the Court and only after a decision could the requirement be declared actual discrimination. Although full acceptance of the hypothesis was questionable, there were a number of questions that arose from inconsistencies in Court reasoning.

The Court insisted that the dual school systems of Brown I era were unconstitutional and dual systems that were "part white and part Negro" be abolished. If this were the only mandate of the Court's opinion, then the New Kent County School Board had complied by abolishing the attendance requirements in 1965 when the "freedom of choice" plan was adopted.[55] However, the Court continued by insisting that the school system was "required by Brown II to effectuate a transition to a racially nondiscriminatory school system."[56]

The Court acknowledged that school board position contended the board had "fully discharged its obligation" by virtue of having the "freedom of choice" plan in which each student might choose a school, regardless of race.[57] The

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[55] Green v. County School Board of New Kent County, 391 U.S. 433 (1968).

[56] Ibid., p. 430.

[57] Ibid., p. 437.

Court responded by stating that the plan "ignores the thrust of Brown II."[58] Thus, the thrust of Brown II appeared to be the basic disagreement between the school board and the Court. The Court then insisted what must be done after the "Board opened the doors" to the Negro children:

> School boards were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.[59]

This was construed to mean no more than Brown I requirement.

Green did not speak of requiring integration as the Fifth Circuit Court of Appeals had but rather spoke of requiring desegregation.[60] However, as in Jefferson County, the Supreme Court's interpretation of Brown I as applied to Green was radically changed and went beyond simply ending a dual system.[61] The Court insisted the school board must go further in the desegregation process.

In Alexander v. Holmes County Board of Education,[62] the United States Supreme Court, one year later, spoke more

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[58]Green v. County School Board of New Kent County, 391 U.S. 437 (1968).

[59]Ibid., pp. 437, 438.

[60]Graglia, Disaster by Decree, p. 73.

[61]Ibid.

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

strongly to thirty-three Mississippi school districts.[63] In only a one-paragraph opinion, the Court stated that "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible."[64] However, the thirty-three school districts were ordered by the Green imperative to offer new plans. An extension of the time was requested and granted by the Fifth Circuit. Upon a motion to vacate the order Justice Hugo Black acknowledged that

> . . . Federal Courts have ever since Brown II struggled with the phrase, "all deliberate speed." Unfortunately, this struggle has not eliminated dual school systems, and I am of the opinion that so long as that phrase is a relevant factor, they will never be eliminated.[65]

Justice Black insisted that there was no "reason why such a wholesale deprivation of Constitutional rights should be tolerated another minute."[66]

The issue before the Court was, however, not one of whether "all deliberate speed" was constitutionally permissible. The basic issue concerning application was to vacate the postponement of the date for submission of a new plan for desegregation.[67] The Court made use of the opportunity to elaborate on the new position and insisted that the "dual

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[63] Alexander v. Holmes County Board of Education, 396 U.S. 1219 (1970).

[64] Ibid., p. 20. [65] Ibid. [66] Ibid., p. 1219.

[67] Ibid., p. 1218.

system must be eliminated 'at once.'"[68] The Court did not question whether the Fifth Circuit had erred or whether the Department of Justice and the Department of Health, Education, and Welfare were inappropriate in requesting an extension.[69] The Court delivered a per curiam opinion.

The position of the United States Supreme Court, between 1954 and 1969, changed from one of prohibiting de jure segregation to one of integration. This position proved to be one of banning segregation that turned to one of requiring integration.

Although the full significance of these early cases may not have been so apparent at the time, these background cases illustrated the Court's redefined stand in Brown I and II. The observer might look back and well visualize the realities of racial balance as those that would indeed void the scarcity of the neighborhood schools.

LEGALIZED BUSING

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

In March, 1970, Chief Justice Warren E. Burger reflected on many of the questions that had confused many school boards and much of the nation. In Northcross,[70]

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[68] Alexander v. Holmes County Board of Education, 396 U.S. 1218 (1970).

[69] Ibid.

[70] Northcross v. Board of Education of the Memphis, Tennessee, City Schools, 397 U.S. 234 (1970).

Justice Burger stated that "as soon as possible, we ought to resolve some of the basic practical problems."[71] Justice Burger referred to questions concerning: (1) constitutional matters of racial balance; (2) alteration of school districts; and (3) the extent of transportation. The answers to the questions were not long in coming. The April, 1971, Swann case partially provided answers. The Swann decision approved busing as one of several means of eliminating a dual school system that had a past history of de jure discrimination.

The United States District Court had ordered extensive busing in order to achieve the same ratio of blacks and whites throughout the district. Some years earlier the school system had complied with a federal court order that required much less drastic desegregation.[72]

The school district was a combined system which included the entire county as well as the city of Charlotte.[73] The system in the 1968-1969 school year contained over 84,000 students in 107 schools. Twenty-nine percent of the students were black and concentrated in the city. Fourteen thousand Negro students were enrolled in twenty-one schools that were 99 percent black.[74] The Supreme Court granted certiorari

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[71]Northcross v. Board of Education of the Memphis, Tennessee, City Schools, 397 U.S. 237 (1970).

[72]Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 7 (1971).

[73]Ibid., p. 6. [74]Ibid., p. 5.

> . . . to review important issues as to the duties of school authorities and the scope of power of federal courts under the court's mandate to eliminate racially separate public schools established and maintained by state action.[75]

The actual opinion established a requirement of racially balanced schools.[76] It included cross-district busing for racial balance in a city with patterns that developed outside the direct control of the school board. Like most of the nation, neighborhood school assigmments were utilized.

The Court made use of the Green mandate by insisting that racial balance was necessary in order to "dismantle the dual system." The district court had stated that the racial balance was required in order to improve academic performance of black students.[77]

The Supreme Court stated that the objective was "to eliminate from the public schools all vestiges of state-imposed segregation."[78] Because of the past history of discrimination, the Court seemed to be intent on some form of punishment for the public school system.[79] The Court apparently was not satisfied with simply abolishing the de jure dual system. This issue reappeared in later de facto cases outside the South.[80]

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[75] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 6 (1971).

[76] Ibid., p. 6. [77] Ibid., p. 7.

[78] Graglia, Disaster by Decree, p. 117.

[79] Ibid. [80] Ibid., p. 118.

The Court's impatience with progress of the desegregative process during the decade and a half surfaced as the Court reasoned, "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be involved."[81] The Court continued by stating that "judicial authority" was within the much broadened scope of the district court's power at this point.[82]

Chief Justice Warren Burger was concerned with Title IV of the 1964 Civil Rights Act when stating that the language and history of Title IV showed that "it was not enacted to limit, but to define, the rule of the Federal Government in the implementation of the Brown I decision."[83] Mr. Burger then defined segregation by quoting Section 2000c (b) of the Civil Rights Act of 1964:

> Desegregation means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance.[84]

The proviso of Section 2000C-6 was also quoted by the Court:

> Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another

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[81] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 15 (1971).

[82] Ibid. [83] Ibid., p. 16. [84] Ibid., p. 17.

> or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the Court to ensure compliance with constitutional standards.[85]

Justice Burger stated that the proviso of Section 2000 C-6 was not intended to restrict those remedial powers of courts.[86] Mr. Burger further elaborated that Congress was concerned with a "right of action under the Fourteenth Amendment" in reference to racial imbalance created by de facto segregation when there was no history of discrimination by state authorities.[87] According to Lino Graglia, the objective of provisions in Section 2000c (b) and Section 2000C-6 was inserted at the insistence of the representatives from the South.[88]

Mr. Burger then turned to the "central issue" in the case and proceeded to outline four problem areas:

> (1) to what extent racial balance or racial quotas may 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.[89]

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[85] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 17 (1971).

[86] Ibid. [87] Ibid.

[88] Graglia, Disaster by Decree, p. 123.

[89] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 22 (1971).

(1) Racial Balances or Quotas

Mr. Burger elaborated on the first problem area of racial balance by stating that the

> . . . constant theme and thrust of every holding from Brown I to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause.[90]

Mr. Burger pointed out that the Court's concern was with the "elimination of the discrimination inherent in the dual school systems."[91] Chief Justice Burger stated that the Court was not concerned in this case with all the problems of racial prejudice even when these problems contribute to disproportionate racial concentrations in some schools.[92]

Chief Justice Burger referred to the district court's use of the percentages, 71 percent of the pupils being white and 29 percent Negroes, as based on the fact that there had been a de jure dual school system until 1969.[93] However, in 1965, the Fourth Circuit had accepted a plan that placed over two thousand Negro students in schools that had a majority of whites.[94] This plan later found favor with the district court with a suggestion that the Charlotte-Mecklenburg system had "achieved a degree and volume of desegregation of

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[90] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 22 (1971).

[91] Ibid. [92] Ibid., p. 23. [93] Ibid., p. 7.

[94] Graglia, Disaster by Decree, p. 122.

school apparently unsurpassed in these parts."[95] This indicated that, at least in 1965, the school board was indeed progressing with the obligation to eliminate the dual system.

(2) One Race Schools

Concerning the second area, one-race schools, Mr. Burger discussed whether "every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation."[96] The Court clearly stated that under some circumstances certain schools might remain as "all or largely one-race schools until new schools could be provided or neighborhood patterns change."[97] The Court hastened to point out that where a school system was in the process of conversion to a unitary system the school board had the burden of showing that these schools were nondiscriminatory.[98] Here the Supreme Court had partially answered a question concerning desegregation of the large pockets of minority groups in the metropolitan areas.[99]

(3) Remedial Alterations of Zones

The third question the Court pondered concerned "the limits, if any, on the arrangement of school districts and

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[95] Swann v. Charlotte-Mecklenburg Board of Education, 243-Supp. 662 (W.D.N.C. 1965) affirmed 269 F 2d 29 (4th Circuit, 1966).

[96] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 22 (1971).

[97] Ibid., p. 25. [98] Ibid., p. 26.

[99] Graglia, Disaster by Decree, p. 123.

attendance zones as a remedial measure."[100] In speaking of the tools employed, Mr. Burger stated that the Court approved gerrymandering of school districts and attendance zones as possible steps, and included pairing and "clustering" or grouping as a means of breaking up attendance patterns of a de jure dual school system.[101]

Once again, the Court seemed to be speaking to the large metropolitan areas that traditionally used the neighborhood concept by insisting that a school system with no history of discrimination employ a plan that assigned students to schools nearest their home.[102]

(4) Transportation of Students

Fourth, Mr. Burger discussed what "limits were, if any, on the use of transportation facilities to correct state-enforced racial school segregation."[103] Actually, the busing issue in the opinion was somewhat brief, even though Swann was important because of the busing issue. After a brief 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.[104]

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[100] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 22 (1971).

[101] Ibid., p. 27. [102] Ibid. [103] Ibid., p. 22.

[104] Ibid., p. 30.

Therefore, busing was an acceptable remedy because "desegregation plans cannot be limited to the walk-in school."[105]

The final point the Court made in Swann had to do with an answer to what was later to prove to be a problem with the so called "white flight." Mr. Burger spoke to future adjustments of busing thusly:

> 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-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.[106]

This line of reasoning later became more fully developed in Pasadena[107] and other important cases of the mid seventies.

As a final footnote to Swann, Judge James McMillan, after overseeing the busing in Charlotte, decided the Federal Court no longer needed to be involved in the day to day implementation. Thus Justice McMillan removed Swann from the "active" docket in an order that he subtitled "Swann Song."[108]

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[105] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 30 (1971).

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

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

[108] "Judge's Swann Song Orders Integration Case," Greensboro Daily News, July 21, 1975.

ALTERATION OF SCHOOL DISTRICTS

School Board of Richmond, Virginia v. State Board of Education of Virginia, 412 U.S. 92 (1973).

The central issue in this case concerned three separate school districts being required to consolidate and form a new district that contained a smaller ratio of black students. The Richmond City School District became 69 percent black and 31 percent white in 1971.[109] The city school board tried to prevent the school district from becoming all-black by attempting to have the city system consolidate with two surrounding county systems. This was followed by an order by district court. The consolidation would have changed the black-white percent to 60 percent white and 34 percent black.[110] However, the system would have expanded to over 750 square miles and 100,000 students.[111] The Court of Appeals for the Fourth District en banc reversed the district court.[112]

Fourth Circuit Judge Craven stated the question before the court was "whether a federal district judge may require a state to change its internal governmental structure in order to achieve racial balance in its schools."[113] The

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[109] Bradley v. School Board City of Richmond, 462 F 2d 1058 (4th Circuit 1972).

[110] Ibid., pp. 1058, 1074. [111] Ibid., p. 1074.

[112] Ibid. [113] Ibid., p. 1060.

Fourth Circuit Court of Appeals found that there was no requirement for internal consolidation except for the purpose of dismantling a dual system. The Court insisted that Richmond had "done all it can do to disestablish to the maximum extent possible, the formerly state imposed dual school system within its municipal boundary."[114] The Supreme Court continued by saying that such a consolidation of school systems would be such size that it would produce

> . . . practicalities of budgeting and finance that boggle the mind and the only reason for the consolidation was the concept that it was good for children of different economic and social backgrounds to associate together.[115]

Certiorari was granted in the Richmond case. Justice Lewis Powell did not participate and the remaining Justices divided equally. The Fourth Circuit's decision was thus affirmed.[116]

Wright v. Council of the City of Emporia, 407 U.S. 451 (1972)

The General Assemblies in North Carolina and Virginia sought to frustrate the Brown I and II mandate by carving presumably majority white administrative units out of heavily black county school units. The Supreme Court spoke forcefully

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[114] Bradley v. School Board City of Richmond, 462 F 2d 1061 (4th Circuit 1972).

[115] Ibid., p. 1065.

[116] Graglia, Disaster by Decree, p. 158.

to this issue in Wright v. Council of City of Emporia[117] and United States v. Scotland Neck City Board of Education.[118] In Emporia, the attempt was made to split the combined school district into a county school system and a city of Emporia school district. This attempt came after the Court ordered the schools to be "paired." The proposed split would cause the county system to be 72 percent black and 28 percent white. The result in the city would have been 48 percent white and 52 percent black, whereas the combined system has 66 percent black and 34 percent white. Although the district court had enjoined the split because of reduced white students in the county schools, the Fourth Circuit Court of Appeals reversed the decision on the grounds that the city of Emporia had sound educational reasons.[119] The Supreme Court also noted that there was only a small impact on the racial composition.

The Supreme Court granted certiorari in order to consider the circumstances under which a federal court might enjoin state or local officials from "carving out a new school district from an existing district that had not yet completed the process of dismantling a system of enforced racial

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

[118]United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1971).

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

segregation."[120] The Court stated that the "problem has confronted other courts."[121]

Justice Potter Stewart, relying heavily on the Green mandate, insisted that the method of desegregation must not fail to "provide meaningful assurances of prompt and effective disestablishment of a dual system."[122] Moreover, the Court was evidently concerned with racial balance as a primary issue, although the issue was not reflected in the opinion. The Court did demonstrate concern by insisting that

> . . . we need and do not hold that this disparity . . . [the split would make the city 48 percent white and 52 percent Negro] in the racial composition of the two systems would be a sufficient reason . . . to enjoin the creation of a separate school district.[123]

The Supreme Court then, relying on Swann, insisted 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 whole.[124]

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[120] Wright v. Council of the City of Emporia, 407 U.S. 452-453 (1972).

[121] Ibid., p. 453.

[122] Green v. County School Board of New Kent County, 391 U.S. 438 (1968).

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

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

The Court pointed out that there were three factors in addition to racial percentages: (1) the county white school children would go to academies; (2) school buildings in Emporia were better equipped; and (3) timing of the split would cause an adverse psychological effect upon the remaining children in the county schools.[125] The Court, in summary, acknowledged that

> . . . the city's creation of a separate school system was enjoined because of the effect it would have had, at the time, upon the effectiveness of the remedy ordered to dismantle the dual system that had long existed in the area.[126]

The dissent of Chief Justice Warren Burger, joined by three other Justices, indicated the discord within the Court at this time.[127] The most convincing argument in the dissent centered around an analysis of the resulting circumstances of the two districts if they were split. Justice Burger stated that "if the severance of the two systems were permitted to proceed . . . assignments to schools would in no sense depend on race."[128] Justice Burger said that he believed a system could be produced without a "white school and a Negro school, but just schools if Emporia had been permitted to operate its own school system."[129] Justice Burger insisted

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[125] Wright v. Council of the City of Emporia, 407 U.S. 464, 465, 466 (1972).

[126] Ibid., p. 470. [127] Ibid.

[128] Ibid., pp. 470-471. [129] Ibid., p. 471.

that separation would "completely eliminate all traces of state-imposed segregation."[130] Justice Burger pointed out that although there would be different racial ratios in the two school systems these disparities were not the mission of desegregation. The Justices who dissented recognized this fact concerning racial ratios. The dissenting Justices, Blackmun, Powell, and Rehnquist, continued with an elaboration on racial balance when pointing out that the great concern of the district court on the 6 percent increase in the Negro students in the county schools of Emporia was withdrawn.[131] Footnote number one pointed out that the pupil-teacher ratio of twenty-five to one would give the 6 percent racial shift a change of 1.5 students per class and that Justice Burger said that a difference of one or two children would not render the school as a dual system.[132]

Justice Burger then condemned racial proportions in a given geographical area by saying:

> Since the goal is to dismantle the dual school systems rather than to reproduce in each classroom microcosmic reflections of the racial proportions of a given geographical area, there is no basis for saying that a plan that provides a uniform racial balance is more effective or constitutionally preferred.[133]

Next Justice Burger turned attention to an issue that was not part of the majority opinion, "racial balance."

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[130] Wright v. Council of the City of Emporia, 407 U.S. 473 (1972).

[131] Ibid., p. 475. [132] Ibid., p. 473. [133] Ibid., p. 474.

Justice Warren Burger said:

> Just as racial balance is not required in remedying a dual system, neither are racial ratios the sole consideration to be taken into account in devising a workable remedy.[134]

United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1971)

Scotland Neck had many similar characteristics of Emporia. As in Emporia, the General Assembly had proposed to separate Scotland Neck from the Halifax County school system. The system, in 1968-1969, had 10,655 students of whom 77 percent were Negro, 22 percent white, and 1 percent American Indian. The proposed New Scotland Neck system would have had 695 students, of whom 399 or 57 percent were white and 296 or 43 percent were Negro.[135]

The Legislature enacted a bill that created the new system in March of 1969.[136] The district court enjoined the implementation of the state's action by saying that "the act in its application creates a refuge for white students, and promotes segregated schools in Halifax County."[137] The district court also stated that the act defeated plans to desegregate the schools. However, the Fourth Circuit Court

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[134] Wright v. Council of the City of Emporia, 407 U.S. 465 (1972).

[135] United States v. Scotland Neck City Board of Education, 407 U.S. 485 (1971).

[136] Ibid., p. 484. [137] Ibid., p. 488.

of Appeals reversed the ruling because "severance was not part of a desegregation plan proposed by the school board," but stated that it was the "legislature redefining the boundaries."[138]

The Supreme Court reversed the Fourth Circuit, thus affirming the district court's ruling that the legislation "was enacted with the effect of creating refuge for white students in the Halifax County School System."[139] Justice Potter Stewart delivered the opinion of the Court, in which Justices William J. Brennan, Byron R. White, and Thurgood Marshall joined. Chief Justice Warren Burger filed an opinion concurring in the result, in which Justices Harry Blackmun, Lewis F. Powell, and William F. Rehnquist joined.[140] The Court acknowledged concern for the result of separation

> . . . in this litigation, the disparity in the racial composition of the Scotland Neck School and the schools remaining in District I of the Halifax County System would be "substantiated" by any standard of measurement.[141]

The Court spoke of the Scotland Neck's proposed transfer plan as being one that would cause the Scotland Neck school system to be the "white school" and the other schools would stay "Negro schools."

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[138] United States v. Scotland Neck City Board of Education, 442 F. 2d 583.

[139] United States v. Scotland Neck City Board of Education, 314 F. Supp. 78.

[140] Ibid., p. 484.

[141] United States v. Scotland Neck City Board of Education, 407 U.S. 490 (1972).

The Court quickly disposed of the state's action issue and relied on Swann quoting, "State policy must give way when it operates to hinder vindication of federal constitutional guarantees."[142] The court held as no "constitutional significance" that the act was State General Assembly action rather than action by school boards or city authorities.[143]

Although the cases were not termed landmark cases they were significant because of the following points: (1) although Richmond[144] decision came from a divided Court there was support within the Supreme Court that restricted busing within a city; (2) the practicalities of racial balance in the proposed consolidation of Richmond[145] were outweighed by such factors as numbers of pupils, costs, size of area and expected gain; (3) in Emporia[146] the Court did not see racial balance as a requirement in splitting a school district; and (4) in Scotland Neck[147] state policy had to

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[142] North Carolina Board of Education v. Swann, 402 U.S. 45 (1972).

[143] United States v. Scotland Neck City Board of Education, 407 U.S. 492 (1972).

[144] School Board of Richmond, Virginia v. State Board of Education of Virginia, 412 U.S. 92 (1973).

[145] Ibid.

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

[147] United States v. Scotland Neck City Board of Education, 407 U.S. 485 (1971).

give way to federal authority when such policy inhibited or obstructed desegregation. The fact that there was a major division in the Court in Richmond indicated some Justices were unwilling to involve school districts outside the city in solving problems of racial balance within a city.

INTENT TO SEGREGATE

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

In Keyes, the Supreme Court found proven segregative intent policy by the school board.[148] This case further explored what Justice Douglas called "no constitutional difference between de jure and de facto segregation."[149]

Justice Brennan delivered the opinion of the Court and was joined by Justices Douglas, Stewart, Marshall, and Blackmun. Justice Douglas filed a separate opinion. Chief Justice Burger concurred in the result. Justice Powell concurred in part and dissented in part. Justice Rehnquist dissented. Justice White took no part.[150]

The significant point made in Keyes was the fact that the cases in Swann showed that there was a history of a dual system that produced segregation. The circumstances in Denver were somewhat different in that integration was imposed even

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

[149] Ibid., p. 214. [150] Ibid., p. 190.

though the school system had provisions that permitted the separation of races in the public schools. In fact, Justice Brennan pointed out that the Colorado Constitution prohibited "classification of pupils . . . on account of race or color."[151] This was pointed out by Justice William Brennan in delivering the Court's opinion. However, Justice Brennan saw fit to direct compulsory integration on grounds other than as an appropriate remedy as it had been in the cases from the South.

The case originated in 1967 when suit was brought as a result in a shift in the desegregation plans for the Park Hill area schools that had become increasingly black. The plan was simply an adopted resolution that the school board had developed. The resolution included the following: (1) that racial, ethnic, and socioeconomic factors be considered in establishing boundaries and new schools; (2) a later resolution adopted by the school board stated that the superintendent of schools was to submit a plan that would integrate the Denver schools.[152] That portion of the plan included busing students in the Park Hill schools in order to implement integration. The resolution was never to be carried out because of the replacement of two board members

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[151] Colorado Constitution, Article IX, Section 8, p. 191.

[152] Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 195, 196 (1973).

by election. The supporters of the resolution brought suit because of the alleged violation of the Fourteenth Amendment to the Constitution.[153] The petitioners also charged that the entire Denver school system was operating as a segregated system because not only were black and white separated but also "Hispanos" and "Anglos."

The district court issued an order for the desegregation of the Park Hill area schools after expanded legal action to obtain desegregation of the rest of the Denver schools.[154] However, the district court denied this additional relief by stating that this was unlike the racial segregation of the Park Hill Schools. The court, however, asked petitioners to prove de jure segregation. Relying on Plessy v. Ferguson[155] in its "separate but equal" doctrine, the district court found the core city schools segregated and the schools were educationally inferior to other schools in the district.

Then the Tenth Circuit Court of Appeals heard the case. The district court ruling concerning Park Hill schools was affirmed.[156] However, the Circuit Court reversed the decision

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[153]Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 195 (1973).

[154]Ibid.

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

[156]Graglia, Disaster by Decree, p. 176.

concerning Denver and other racially imbalanced schools.[157] The court of appeals remanded the case for consideration of the 1964 Civil Rights Act and pointed out, "the limitation of the power of the federal courts to achieve racial balance by transportation of children from one school to another."[158]

The Supreme Court granted certiorari but restricted review to court of appeals' ruling that reversed district court's core city decree. The school board requested that Park Hill school be delineated from certiorari. The request was granted.

Justice William Brennan, writing the majority opinion, began by examining the "District Court's method of defining a 'segregated school.'"[159] He pointed out that Denver had a racial composition of 66 percent Anglo, 14 percent Negro, and 20 percent Hispano in the public schools.[160] He further acknowledged the Supreme Court had no opinion concerning the district court's definition of an inferior school as being 70-75 percent white.[161] However, a "segregated" school in the de jure sense depended on the "facts of each particular case," as well as the faculty, staff, community, and administrative attitude.[162] The district court erred by

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[157]Graglia, Disaster by Decree, p. 176.

[158]Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 206 (1973).

[159]Ibid., p. 196. [160]Ibid., p. 195. [161]Ibid.

[162]Ibid., p. 209.

separating Negroes and Hispanos when defining a segregated school. Justice Brennan referred directly to the district court as recognizing Negroes and Hispanos as having common economic and cultural deprivation. The primary purpose was to insist that "Hispanos" were an identifiable group.[163]

Justice Brennan then spoke to the question of whether the "lower courts applied an incorrect legal standard" in not ruling that there was no "de jure segregation" in the core city schools.[164]

> The segregated character of the core city schools could not be, and is not denied. Petitioner's proof showed that at the time of trial, twenty-two of the schools in the core city area were less than 30% in Anglo enrollment and eleven of the schools were less than 10% Anglo.[165]

Justice William J. Brennan further acknowledged that only "common sense" led to a conclusion that if de jure segregation existed the remainder of the school system was a dual system.[166] Justice Brennan distinguished the difference between de facto and de jure segregation to be one of intent rather than extended result.

Justice Brennan stated that a "meaningful" part of the school system was intentionally segregated or there was other segregation in the same system. The rule that the

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[163] Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 197 (1973).

[164] Ibid., p. 206. [165] Ibid.

[166] Ibid., p. 212.

school authorities must bring forward proof to support the fact that the segregation was not of intent prevailed.

Although the school board had explained the racial concentrations in the "core city" mandated by the neighborhood school policy, Justice Brennan would not dismiss the argument. He further elaborated that

> . . . it is enough that we hold that the mere assertion of such a policy is not dispositive where, as in this case, the school authorities have been found to have produced de jure segregation in a meaningful portion of the school system by techniques that indicate that the "neighborhood school" concept has not been maintained free of manipulation.[167]

Thus Justice Brennan would not consider the neighborhood school issue "simply because it appears to be neutral."[168] Many school systems around the nation were disappointed that Justice Brennan refused to deal with the neighborhood school questions.[169]

The Supreme Court directed the district court on remand that the school board be given opportunity to prove that the Park Hill area was "a separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district."[170] If the school

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

[168] Ibid., p. 213.

[169] Bolner, Busing, p. 36.

[170] Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 213 (1973).

board failed, the district court would determine if the school board policy over the past ten years mandated deliberate segregation in the Park Hill schools. If the entire Denver school system was determined to be dual, then the school board had an "affirmative duty to desegregate the entire school system."[171] If, on the other hand, the entire system was not a dual system, then the Court would "afford the school board opportunity to rebut petitioners prima facie case of intentional segregation."[172] The school board then must establish that policies concerning school sites, school size, school renovations and additions, student attendance zones, student assignments and transfers, mobile classrooms, transportation, and faculty assignments were not used to effectuate segregation in the core city.[173] If the school board failed to rebut, then the "District Court would decree all-out desegregation of the core city schools."[174]

The constitutional violation was found by the district court. Moreover, the school board did not provide an acceptable plan to the court. District court then employed Dr. John Finger, prominent consultant in the Swann case. Dr. Finger developed a plan that involved extensive busing. On

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[171] Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 213 (1973).

[172] Ibid. [173] Ibid., p. 214.

[174] Ibid.

appeal Tenth Circuit affirmed the district court's decision except for a portion of the plan.[175]

Some insight was gained from Justice Powell's concurring and dissenting opinion. James Bolner assessed Mr. Powell as "sounding much like a Southern congressman supporting a variant of a Stennis-Ribicoff 'nationalizing' amendment."[176] In dissent, Justice Lewis F. Powell used the occasion to challenge the Swann decision as wrong constitutional direction because the decision mandated desegregation of Southern schools.[177] Justice Powell referred to his dissatisfaction of busing when he stated, "To the extent that Swann may be thought to require large-scale or long-distance transportation of students in our metropolitan school districts, I record my profound misgivings."[178]

Justice Powell listed four reasons why "remedial requirement of extensive student transportation solely to further integration" could not be justified. Justice Powell stated that districts that had "little or no biracial population" would have little problem in "educational disruption."[179]

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[175]Graglia, Disaster by Decree, pp. 198-201.

[176]Bolner, Busing, p. 37.

[177]Ibid., p. 185.

[178]Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 248 (1973).

[179]Ibid.

However, large metropolitan districts that had extensive biracial areas must undertake elaborate transportation plans to achieve the scale of integration mandated by the courts. This would occur at a time that "the economic burdens of such transportation can be severe."[180]

Second, Justice Powell observed that the "remedy exceeds that which may be necessary to redress the constitutional evil."[181] His assessment was one of busing, excluding the constitutional requirement, and he doubted that this was truly necessary.

Third, Justice Powell was concerned that the "full burden of the affirmative remedial action (compulsory transportation) was borne by children and parents who did not participate in any constitutional violation."[182]

Finally, Justice Powell questioned the reality that busing was a "risk" that was setting in motion unpredictable and unmanageable social white flight. Justice Powell stated that busing would expedite the "exodus to private schools" and might cause the "movement from inner city to suburbs and the further geographical separation of the races."[183]

Justice Powell stated that requests for racial mixing might have been maintained; however, Mr. Powell would have had the mixing more reasonable. Moreover, Justice Powell

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[180] Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 248 (1973).

[181] Ibid., p. 249. [182] Ibid., p. 250. [183] Ibid.

would have approved further integration without risking the neighborhood school and the undermining of public support.[184]

Justice Rehnquist also filed a dissenting opinion. Mr. Rehnquist rejected the doctrine of compulsory integration as the doctrine deviated from Brown I and II and would return to the prohibition of racial discrimination:

> To require that a genuinely "dual" system be disestablished, in the sense that the assignment of a child to a particular school is not made to depend on his race, is one thing. To require that school boards affirmatively undertake to achieve racial mixing in schools where such mixing is not achieved in sufficient degree by neutrally drawn boundary lines is quite obviously something else.[185]

The unanimous decision of the Warren Court in Brown was a far cry from the wandering path of decisions that were prior to Keyes. Keyes left no doubt that there was a divided United States Supreme Court.

Milliken, Governor of Michigan v. Ronald Bradley, 418 U.S. 717 (1974) (I)

The Detroit case was significant in two areas of busing for desegregation. First, the Detroit school system was found to practice de jure segregation by the district court and was affirmed by the Court of Appeals of the Sixth Circuit. Second, the United States Supreme Court struck down a plan that involved the desegregation of Detroit's school system by merging it with those surrounding counties.

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[184] Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 250 (1973).

[185] Ibid., p. 258.

In order to explore the questions of de jure segregation in this case, it was necessary to look at the lower courts' findings. The district court found that constitutional violations existed because the board and the State of Michigan, during the 1950s, had utilized a policy that tolerated optional attendance zones in neighborhoods that were undergoing racial transitions which, in the district court's eyes, allowed white students to escape "black schools."[186] Also, district court found that the board, while busing pupils to relieve overcrowded schools, had bused black pupils past closer white schools.[187] The school board had changed attendance zones and grades to such a degree that it maintained racially segregated schools. The district court also insisted that the school board's policies were unconstitutional.

Upon establishing school board's de jure segregation practices the district court's second consideration was the appropriate remedy.[188] The district court's remedy required busing of 310,000 pupils across fifty-three school districts.[189]

While the Circuit Court of Appeals approved practically all of the district court's ruling on the de jure segregation

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

[187] Ibid. [188] Ibid., p. 719.

[189] Ibid., p. 718.

issue, the case was remanded to district court because school districts outside Detroit had no opportunity to be heard.[190] The 7th Circuit Court of Appeals established the positions that the metropolitan plan, that included fifty-three districts, was the only feasible solution and was indeed within the district court's equity power.[191]

State officials and the Detroit school district obtained a writ of certiorari from the Supreme Court based on:

> . . . whether a federal court may impose a multi district, area-wide remedy to a single-district de jure segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within this district, absent any claim for finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which affected segregation within the other districts, and absent of meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multi district remedy or on the question of constitutional violations by those neighboring districts. . . .[192]

Thus the Supreme Court did not deal directly with the question of whether de jure segregation as required in Swann was properly ruled on in the lower courts as applied to a school system that had never had assignments based on races.[193] In Milliken the finding was one of racial imbalance. However, this issue received only passing comment in the form of a footnote.[194] In view of the district court's de jure

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

[191] Ibid. [192] Ibid., p. 721.

[193] Ibid., p. 746. [194] Ibid., p. 747.

segregation finding the Court's attention was focused on the lower court's mandate of the metropolitan plan.[195]

In rendering the Court's opinion, Chief Justice Warren Burger insisted that the Detroit plan could not "accomplish desegregation."[196] This would "clearly make the entire Detroit public school system racially identifiable."[197] Justice Burger further stated:

> . . . both courts proceeded on an assumption that the Detroit schools could not be truly desegregated . . . unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole.[198]

Justice Burger acknowledged that the district court erred by requiring implementation of a plan that would have "no school, grade, or classroom . . . substantially disproportionate the overall pupil racial composition."[199] In relying on Swann Justice Burger insisted that there was no requirement of "any particular degree of racial balance."[200] Justice Burger did point out there was a difference in "equating racial imbalance with a constitutional violation calling for a remedy" as opposed to the continued existence of some schools that are all or predominantly one race "in a dual system that necessitates authorities showing school assignments are

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[195] Milliken v. Bradley, 418 U.S. 748 (1974).

[196] Ibid., p. 747. [197] Ibid., p. 739.

[198] Ibid., p. 740. [199] Ibid. [200] Ibid., p. 741.

genuinely nondiscriminatory."[201] Justice Thurgood Marshall noted, in a dissenting opinion, that "the use of racial ratios in this case in no way differed from that in Swann."[202]

The Court rejected the district court's statement that "school district lines are no more than arbitrary lines on a map drawn for political convenience." Justice Burger described the issue of administrative lines as being "more deeply rooted than local control over the operation of schools."[203] Justice Burger then asked serious questions concerning the status of authority, education of the school board, taxes and general financing, curriculum, and the general operations of the new school district that would involve as much as three quarters of a million people. The nature of these questions by the Court demonstrated the unmanageability of such a mammoth school system in order to provide a "remedy."[204]

Justice Burger stated the underlying principle rejecting the Metropolitan Plan was the "scope of the remedy is determined by the nature and extent of the constitutional violation."[205] Thus the metropolitan remedy would not be required unless:

> . . . there has been a constitutional violation within one district that produces a significant segregative effect in another district. . . . it must be shown that racially discriminatory acts of the state or local school

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[201] Milliken v. Bradley, 418 U.S. 741 (1974).

[202] Ibid., p. 788. [203] Ibid., pp. 741-744.

[204] Ibid., p. 744. [205] Ibid.

> districts, or of a single school district, have been a substantial cause of interdistrict violation and interdistrict effect. There is no constitutional wrong calling for an interdistrict remedy."[206]

Thus Justice Burger insisted that the constitutional violation was limited to the Detroit district.[207] Therefore, there was no requirement involving outer school districts with no constitutional violations.

Justice Burger did not find that even if the lower courts were correct, in the analysis that the state was "derivatively responsible for the Detroit Board's violation," it did not follow that an "interdistrict remedy is constitutionally justified or required."[208] The United States Supreme Court's reversal of the lower court's decision was based largely on two major points: (1) there would be an unmanageable school system due to size and numerous entities; and (2) there were no violations indicated in the sub outer school districts.[209]

Justice Douglas, in a dissenting opinion, argued that "metropolitan treatment of metropolitan problems is commonplace" and that "if this were a sewage problem or water problem . . . it sought a metropolitan remedy."[210] Justice Douglas differentiated the Richmond case from Milliken

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[206] Milliken v. Bradley, 418 U.S. 741 (1974).

[207] Ibid. [208] Ibid., p. 744. [209] Ibid.

[210] Ibid., pp. 757-758.

by insisting that in Virginia the local school boards had exclusive authority, whereas in Michigan the state operated the schools.[211]

Justice Douglas pictured the Court's decision as a "dramatic retreat" from Brown and Plessy when the segregated schools were described as "black schools that are not only separate but inferior."[212] He said that the issue was one concerning the use of various devices by the states that "end up with black schools and white schools that brought the Equal Protection Clause into effect."[213]

Justice Douglas's dissent seemed to condemn the concept of racial imbalance or "de facto segregation." However, he appeared to require a showing of racial discrimination. Thus racial imbalance existed.[214]

Both Justice Byron White and Justice Thurgood Marshall applied the desegregation doctrine of Green, Swann, and Keyes in the dissenting opinions by saying racially balanced schools were not required to do more than remedy "de jure segregation."[215] Such remedy did, however, require metropolitan "desegregation."[216]

Justice Marshall referred to precedents established in earlier cases by saying that "state-imposed segregation,"

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[211] Milliken v. Bradley, 418 U.S. 757 (1974).

[212] Ibid., p. 761. [213] Ibid., p. 762. [214] Ibid.

[215] Ibid., p. 812. [216] Ibid., p. 813.

when demonstrated, would require the state to eliminate "root and branch, all vestiges of racial discrimination, in order to arrive at the greatest degree of actual desegregation."[217] Further, Justice Marshall elaborated on what was considered to be the seriousness of the violation when stating that the "constitutional violation found here was not some de facto racial imbalance." However, Justice Marshall described the Detroit schools as "intentional, massive, de jure segregation." He then proposed "relief short of outright consolidation of the school district."[218] This point was somewhat argumentative because the extensive system that was proposed if the metropolitan plan had been required would have literally amounted to a consolidation of fifty-three systems.[219]

Justice Marshall closed his dissent by attributing the Court's decision to the fact that the decision was "a reflection of a perceived public mood" that had gone far enough in the enforcement of the Constitution.[220] Justice Marshall concluded that the decision would allow the metropolitan areas to become "one white" and "the other black."[221]

In Milliken the Court did not reverse its previous landmark cases. The Court did, however, limit busing as a

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[217] Milliken v. Bradley, 418 U.S. 782 (1974).

[218] Ibid., pp. 782-783. [219] Ibid., p. 718.

[220] Ibid., p. 814. [221] Ibid., pp. 814-815.

remedy when racially discriminatory acts of one or more school districts had resulted in racial segregation in a nearby district.

Time magazine described the Milliken decision as a "Historic Reversal."[222] The publication described Milliken as much more dramatic than the impact indicated.[223] The true significance of the case simply lay in the limitations of the United States Supreme Court's doctrine as requiring integration plans to extend across administrative lines.[224]

As a postscript to this landmark case, the United States Supreme Court handed down a decision November 9, 1975, refusing to listen to arguments of the Detroit School District concerning payment for buses to transport pupils to desegregate the schools.[225] After five years of judicial battles which did indeed limit busing, Milliken ended with a decision by United States District Judge Robert De Moscio, which included a busing plan inside the city limits. Judge De Moscio's plan resulted in 21,883 students being bused into new schools. Over half of the city's 280 schools were more than 90 percent black before the busing plan. However, the plan desegregated only fifteen of these schools.[226]

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[222]"Desegregation: A Historic Reversal," Time, August 5, 1974, p. 55.

[223]Ibid. [224]Ibid.

[225]Board of Education of Detroit v. Milliken, Governor of Michigan, 427 U.S. 913 (1975).

[226]"Smooth Ride in Detroit," Newsweek, Feb. 9, 1976, p. 26.

Newsweek stated that there was little opposition to busing because "no matter which side of the busing issue they are on, a good many citizens may simply think that Detroit is no longer worth fighting for."[227]

Milliken v. Bradley was once again before the United States Supreme Court in June, 1977.[228] This time the question before the nation's highest Court was whether state officials could be legally held financially responsible. This would mean that they would be liable for paying one-half the cost of implementing remedial educational programs as a part of a federal court requirement to effectuate a means of remedy for de jure segregation in the city of Detroit.

The Supreme Court, by affirming the judgment of the court of appeals, announced that it was indeed within the power of the lower federal courts to mandate some form of remedial program designed to correct the discrimination acts by those responsible within the local and state governments. This decision put to rest any question that a system had in reference to the financial obligation a school system had in the court-required compensatory programs. The Court had said that the federal courts had the power to require agencies responsible for the constitutional infraction to bear the

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[227]"Smooth Ride in Detroit," Newsweek, Feb. 9, 1976, p. 26.

[228]Milliken, Governor of Michigan v. Ronald Bradley, 97 S. Ct. 2749 (1977).

financial obligation of such remedial programs as were necessary to compensate minority groups for racial isolation.

Eddie Mitchell Tasby v. Nolan Estes
517 2d 92

On November 3, 1975, the United States Supreme Court let stand a federal court order that would begin busing for the purpose of desegregation of the Dallas, Texas, school system. Although this case had no written opinion by the Supreme Court, there was significance in looking at this case because of the plans that were ruled as inadequate by the lower courts.

This case came on appeal from the Dallas Independent District. The Dallas Independent School District is the eighth largest school system with 180,000 students and 180 schools. The case came on appeal from the Dallas school system. The system contained 180 separate campuses. The school boundaries of this vast system did not coincide with the city limits of Dallas. The boundaries extended into Dallas County along with several other independent school districts including Highland Park, which was locked in the city of Dallas.[229]

The Dallas independent school system had been involved in a desegregation litigation since 1955. The history included

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[229] Eddie Mitchell Tasby v. Nolan Estes, 517 2d 95, Certiorari denied November 3, 1975, 423 U.S. 939.

seven separate decisions that produced no significant change in the desegregation patterns of Dallas. In 1970, a class action suit was brought by black students and parents and Mexican-American students and their parents.[230]

The complaint included:

(a) 71% of the DISD's 180 schools were 90% or greater white
(b) 40 of the DISD's schools were 90% or greater black
(c) 49 of the DISD's school student populations were 90% or greater of minority race (black and Mexican-American)
(d) 91.7% of all black students in the DISD attended schools in which the student body was composed of 90% or greater minority racial makeup
(e) Less than 3% of all black students in the DISD attended elementary or secondary schools in which the majority of the student body was white
(f) Only 2% of black elementary students in the DISD attended schools in which the majority of the student body was white
(g) Of the 37 new schools constructed, or those to which additions had been made, between 1965 and 1970, 34 had student enrollments 90% or greater black, 90% or greater minority (black and Mexican American) or 90% or greater white.[231]

Relief was asked of the district court as:

(a) Meaningful desegregation of the DISD
(b) Assignment of faculty members to each DISD school in proportion to the racial composition of the entire student body of the DISD
(c) The Adoption of policies designed to lower the high drop out rate among Mexican-American students in the DISD.[232]

United States District Court Judge William Taylor insisted that:

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[230] Tasby v. Estes, 517 2d 96.

[231] Ibid. [232] Ibid.

> I am opposed to and do not believe in massive cross-town busing of students for the sole purpose of mixing bodies. I doubt that there is a Federal Judge anywhere that would advocate that type of integration as distinguished from desegregation.[233]

Judge Taylor then asked the school board to look at one of the plans suggested by the Texas Educational Desegregation Technical Assistance Center.[234] The plan employed use of television in the elementary grades along with an occasional bus visit between paired ethnic groups.[235]

Judge Taylor, after receiving a plan from plaintiff and defendant, approved the television plan that was to:

(a) Establish clustering so as to bring together as a 2:1 ratio the minority and Anglo Classroom
(b) To use a "neighborhood" approach with the elementary schools
(c) To provide elementary classes with a daily minimum of oral hour contacts with students of other races. This is to be done by television. Also there is to be a once each week visit between the two paired schools
(d) The desegregation of the faculty with no more than a 10% variance
(e) At the secondary level there is to be a majority-to-minority transfer program with the students participating having only a four-day school week
(f) An advisory committee is to be appointed for advising DISD as to desegregation matters
(g) The adoption of a school construction policy that would prevent a dual school system.[236]

The Supreme Court's rationale was apparent because of the segregative history of Dallas. For as late as 1975 Dallas

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[233] Tasby v. Estes, 342 F. Supp. 995.

[234] Ibid., p. 98. [235] Ibid., p. 100.

[236] Tasby v. Estes, 517 2d 99, 100.

legally maintained a 90 percent ratio of white students in over half of the schools.[237]

On appeal to the 5th Circuit Court of Appeals on July 23, 1975, Judge Simpson wrote the opinion for the court. Judge Simpson stated that the court of appeals would evaluate the progress of the Dallas school system "eliminating the vestiges of the dual educational system formerly mandated by Texas law."[238]

In speaking of the "television plan" the court stated:

> The Supreme Court has made it clear that nothing less than the elimination of predominantly one-race-schools is constitutionally required in the disestablishment of a dual school system based upon segregation of the races. For this reason, the district court's elementary school "television plan" must be rejected as a legitimate technique for the conversion of the D I S D from a dual to a unitary educational system.[239]

The court relied on Green and its inadequate "freedom of choice" doctrine as well as Swann.[240] In Swann the Court noted the unconstitutionality of the one-race school. Finally the court termed the "television plan" as incompatible with all the jurisprudence of the past twenty years as to public school desegregation, and hence failed to pass muster.[241] It would appear that the "television plan" did not

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[237] Tasby v. Estes, 517 2d 93.

[238] Ibid., p. 94. [239] Ibid., p. 103.

[240] Ibid., p. 104. [241] Ibid.

desegregate the elementary school as was ordered in similar cases by the United States Supreme Court.

In dealing with the secondary plan, the Court saw the 90 percent as an insufficient effort to meet the requirements to desegregate the dual school systems because of the district's 60 percent white, 32 percent black, and 8 percent Mexican-American. Thus, the Court rejected this part of the plan as constitutionally inadequate.[242]

Concerning questions of school construction, the Court declared the district court needed to approve only the projects which would assist the process of desegregation. This was due to the finding that previous construction had been based on neighborhood attendance zones and had thus further segregated the school system.[243]

The question of the status of the Mexican-American was declared correctly treated. The Mexican-Americans were declared as a "separate ethnic minority group for desegregation purposes."[244]

The question concerning the involvement of the outer school districts within Dallas County was answered as the court of appeals found no violation by the outer school districts. Thus a multi-district plan was rejected.[245]

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[242] Tasby v. Estes, 517 2d 104.

[243] Ibid. [244] Ibid. [245] Ibid.

The court of appeals found much of the ruling of the district court in error. The appellate court, in addition, gave direction to the further proceedings by directing the Dallas School System to "be completely dismantled by the start of the second semester of the 1975-76 academic year."[246] The court further directed the steps to be those as mandated in Swann.

The court of appeals elected an elementary and secondary student assignment plan which complied with the direction of the United States Supreme Court in Swann.[247] The plan was to be formulated by the Fifth Circuit in time for the start of the second semester of the 1975-76 school year. On appeal in November, 1975, the United States Supreme Court denied certiorari, thus sustaining action of the Fifth Circuit Court of Appeals.

This case encapsulated several important principles: (1) both the state circuit court of appeals, as well as the United States Supreme Court, were impatient with the long legal proceedings of the Dallas Independent School District; (2) the so called "television plan" was considered as only "token integration"; and (3) Mexican-Americans were to be considered as a separate ethnic minority group for desegregation.

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[246] Tasby v. Estes, 517 2d 110.

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

Madeline Buchanan v. Brenda Evans,
423 U.S. 963 (1975)

On November 17, 1975, the United States Supreme Court ruled on the case from Wilmington, Delaware. By affirming the district court's decision, the Supreme Court provided the legal means of interdistrict busing. This decision followed Milliken v. Bradley, which, in effect, had restricted busing to the city of Detroit. There were many similarities in the Detroit and the Delaware cases: they were both concerned with some form of consolidation of predominantly white suburbs with black inner-city schools which would in effect create busing between the two areas. However, the difference found by the Court was that the suburban district in the Detroit area was not to have been involved in any segregative policies or practices which was de facto. Wilmington, however, as well as the entire governing system of Delaware, was involved because Wilmington was excluded in a statewide school district consolidation measure which was de jure segregation.

Buchanan v. Evans was appealed to the United States Supreme Court directly from the three-judge United States District Court for the District of Delaware which enjoined the enforcement of a state statute.[248] The state legislature enacted the Educational Advancement Act in June, 1968. The

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[248]Madeline Buchanan v. Brenda Evans, 423 U.S. 963 (1975).

stated purpose of the legislation was "to provide the framework for an effective and orderly reorganization of the existing school districts and the combination of other existing school districts."[249] Implementation of the reorganization consisted of a development plan by October 4, 1968. By July 1, 1969, the plans as adopted would be established and reorganization of the school districts complete.[250]

An exception within the statute, which came under judicial attack, mandated that the city of Wilmington shall be the "city of Wilmington with the territory within its limits."[251] The district court insisted the "exception" provision discriminated against blacks.[252] The statute effects would

> . . . lock in Negro children within the school district in such a manner that might not otherwise have resulted if the school district had been subject to the state school board's discretionary power to consolidate as were all the remaining districts in the State under the 1968 legislation.[253]

Litigation began in 1971. However, appellees had contended in the 1960's that the Wilmington black students were required to attend segregated schools.[254] The objection

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[249] Delaware Code Annotated, Title 14, Section 1001 (1975).

[250] Buchanan v. Evans, 423 U.S. 965 (1975).

[251] Delaware Code Annotated, Title 14, Section 1004.

[252] Buchanan v. Evans, 423 U.S. 295 (1975).

[253] Ibid., p. 966. [254] Ibid.

was in three parts: (1) the state still maintained a dual school system that was unconstitutional (New Castle County and Wilmington); (2) the state, by mandated policies and procedures, did in effect discriminate in resulting segregation through its low-cost housing policies; and (3) the Educational Advancement Act had provided Wilmington a means to continue as a separate school district, thus preventing the dismantling of the dual system.[255]

The district court found, after oral arguments, that a percentage of suburban students of both races were traveling into Wilmington in order to attend segregated schools prior to 1954.[256] The district court also found that there was a demographic shift of white students migrating to the suburbs, which was encouraged by government policies.[257] This segregative action produced interdistrict effects.

Finally, the district court found that the reorganizational power of the Educational Advancement Act, by its exclusion of Wilmington, created a racial classification under the Equal Protection Clause.[258] The statute also created an interdistrict violation under Milliken.[259] Further, the district court insisted that when the Educational

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[255] Buchanan v. Evans, 423 U.S. 297 (1975).

[256] Ibid. [257] Ibid. [258] Ibid.

[259] Ibid., p. 296.

Advancement Act "redrew" the district lines for Wilmington, it removed established boundaries from the authority of the State Board at a time when other districts in the state were considered for some form of a consolidation program.[260]

The district court declared unconstitutional that portion of the Educational Advancement Act which removed Wilmington from consideration for consolidation.[261] The court further ruled that a plan that would remedy the segregation within the present district of Wilmington and include other areas of New Castle County would be presented.[262] The court's order enjoined the State Board from relying on the Educational Advancement Act for the formulation of a plan.

The United States Supreme Court, after reviewing the Delaware case and without written opinion, affirmed the district court judgment. The Supreme Court was not without dissent. Justice Rehnquist wrote the dissenting opinion. Justices Powell and Burger joined in part.[263] Justices Burger, Rehnquist, and Powell maintained that the enjoining of the enforcement of the state statute was never a question in Milliken (on which the Court relied). Moreover, the Justices insisted the date of the statute had expired effective July 1, 1969. Afterward, by statutory mandate, voters of Wilmington approved all consolidation plans by referendum.

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[260] Buchanan v. Evans, 423 U.S. 296 (1975).

[261] Ibid., p. 294. [262] Ibid., p. 297.

[263] Ibid., p. 293.

Justice Rehnquist maintained that the district court could not enjoin the implementation of a statute which had already expired. Therefore, the only course for the Court was to reverse the injunctive degree that was issued by the district court and remanded the case for consideration.[264]

The case was then returned to the district court; and after the State of Delaware failed to submit a plan that was acceptable, the district court itself ruled that an inter-district remedy was necessary in order to desegregate the Wilmington schools on May 19, 1976. The court's opinion described Northern New Castle County as having a school population of 80,678 with 78.5 percent white. Seventy-four and six-tenths percent of the black students in this area attend school in Wilmington. The Wilmington public schools are 84.7 percent black.[265] In examining the many plans presented the court pointed out that Milliken[266] clearly stated that the remedy must be commensurate with the scope of the violation found.

The district court rejected arguments that suburban districts operated a unitary system and, in turn, were not committing any constitutional violation.[267] The court responded that because the local school boards were creatures

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[264] Buchanan v. Evans, 423 U.S. 293 (1975).

[265] Ibid., p. 965.

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

[267] Ibid.

of the state and the state through de jure segregation caused the racial disparity; therefore, the remedy must include the northern New Castle district.[268]

The court saw its duty as one of ordering a remedy that would "place the victims of the violation in substantially the position which they would have occupied had the violation not occurred."[269] The court considered limiting the desegregation plan to the boundaries of Wilmington and just what level of desegregation would be attained. On the other hand how wide should the district court geographical area be in order to bring about the "greatest possible actual degree of desegregation by a plan that was reasonably certain to achieve desegregation now" as in Davis.[270]

The district court found none of the proposed plans acceptable. Therefore, the district court required a reorganization plan. Acknowledging the district court was not the proper agency to reorganize the districts of northern New Castle County and the District of Wilmington, a representative board, from existing boards, was charged with the reorganization by judicial decree. An interim board was to be appointed by the system outlined in the Educational

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

[269] Ibid.

[270] Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33 (1951).

Advancement Act. The board assumed such responsibilities as initial assignment of students for desegregation, tax levying, employing faculty, and the choosing of curriculum. The new students' assignments were made by the fall of 1977.[271]

The court insisted that it was not bound by such state laws in formulating a federal remedy for the violation of constitutional rights. The district court also chose to ignore a state law that limited school district enrollments to twelve thousand students.[272] Abiding by the state statute would, in the court's reasoning, cause the districts to be divided into patterns that would make such a reorganization impossible.[273] The district court decided to reorganize only into and consolidate whole districts in order to avoid problems of the redistribution of population and tax rates.

Thus a mammoth school district of eighty thousand students was formed because of past discriminatory practices. Those practices were brought about by the fact that Wilmington schools were supported by state action. In turn, the state had enforced discriminatory housing and zoning provisions as well as the reorganization of school districts under the Educational Advancement Act. This state statute unconstitutionally isolated Wilmington from joining other school districts.[274]

[271] Buchanan v. Evans, 423 U.S. 965 (1975), Note 4.

[272] Ibid., p. 964. [273] Ibid.

[274] Law Week Review, 44 LW 2461, June, 1976.

ANNUAL READJUSTMENT OF ATTENDANCE ZONES

In the Delaware, Detroit, and Richmond cases the Court dealt with the problem of inclusion of the city's suburbs in ordering a remedy. However, in Detroit and Richmond the Court found no constitutional violation that would cause the suburb to be included in the remedy. Delaware was different in that constitutional violation was found in a state statute that caused segregative practices to continue in Delaware.

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976)

The decision that was handed down from the United States Supreme Court in Pasadena v. Spangler answered several questions about growing problems of shifting populations within the cities of the United States. This shift was one of white middle class families moving from the suburbs. Such population movement raised concerns from many school systems which had attained unitary status as well as those in the process of desegregation. This raised the question of the necessity of adjustments each school year.

The case originated in 1968, with a class action by high school students and parents against the school officials of Pasadena for relief from alleged unconstitutional segregative practices. The United States became a party to the plaintiff under section 902 of the Civil Rights Act of 1964. The district court found the Pasadena school officials and

procedures in violation of the Fourteenth Amendment. The district court ordered the Pasadena school officials "enjoined from failing to prepare and adopt a plan to correct racial imbalance" in the Pasadena schools.[275] The defendants were then ordered to submit a plan to the district court that would desegregate the Pasadena schools. Also the plan was to include attention to assignment of staff as well as school construction and location. Specifically the court ordered:

> The plan shall provide for student assignment in such a manner that, by or before the beginning of the school year that commences in September of 1970, there shall be no school in the District, elementary or junior high or senior high school with a majority of any minority students.[276]

School officials then developed the "Pasadena Plan" which was found acceptable by the district court. The Pasadena Plan was initiated in 1970.[277] The plan included, in addition to having no school with a majority of students of any minority race, a provision to divide the district into four zones and to bus students to each zone so as to eliminate the all-black majority schools. This plan eliminated the original condition of 85 percent of the black grade school students within the district being located in eight schools with a black majority. Nearly one-half of the black junior high school students attended one school.[278]

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[275] Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

[276] Ibid. [277] Ibid., p. 425.

[278] "Integration Order Update Ruled Out," Greensboro Daily News, June 29, 1976, p. 1A.

This plan continued in operation until 1974 when the successors to the board of education filed a motion seeking relief from the 1970 court order. The petition included four parts: (1) elimination of the stipulation of "no school in the District, elementary or junior high, or senior high school, with a majority of any minority students;" (2) ending of the district court's jurisdiction over the board; (3) the dissolving of the district court's injunction; and (4) having the district court in approval before the school board could modify the "Pasadena Plan."[279] On March 1, 1974, the district court, after a hearing, denied all the motions.[280]

The case was appealed to the Ninth Circuit Court of Appeals where a divided court affirmed the district court's judgment and remanded the case.[281] Certiorari was granted by the United States Supreme Court because it was considered important to the extension of the district court's authority in ordering a plan that was designed to attain unitary status in a school system.[282]

The Court's first concern was that original student petitioners had graduated from the Pasadena School System. Therefore, the case should have been considered moot and no longer have a vested interest in the outcome. Justice William Rehnquist pointed out that the United States was still an

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[279] Pasadena City Board of Education v. Spangler, 427 U.S. 429 (1976).

[280] Ibid., p. 425. [281] Ibid., p. 429. [282] Ibid.

interested party that joined the litigation at an early stage.[283]

In answering the petition to dissolve the injunctive order which required that no school in the Pasadena School District have a majority of any minority students enrolled, the Supreme Court pointed out that the district court's decision was largely based on the fact that the system had "failed properly to comply with its original order."[284] The 1970-1971 school year racial ratios went beyond the previous years as four schools exceeded 50 percent of enrollment. That year the litigation was initiated in five schools out of the thirty-two which were in violation of "no majority of any minority"[285] provision.

The Court decision was delivered by Justice William Rehnquist, in which Chief Justice Warren Burger and Justices Potter Stewart, Byron White, Harry Blackmun, and Lewis Powell joined. Justice Thurgood Marshall filed a dissenting opinion, in which Justice William Brennan joined.[286] The Supreme Court stated that consideration was only given to the question of whether the district court had exceeded its authority when it denied relief in the modification of the "no majority" provision. The Court deemed the meaning unclear to the parties. In response to argument, district court said in 1970

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[283] Pasadena City Board of Education v. Spangler, 427 U.S. 431 (1976).

[284] Ibid., p. 424. [285] Ibid. [286] Ibid., p. 427.

that "at least during my lifetime there would be no majority in any school in Pasadena."[287] However, the Supreme Court relying on Swann,[288] insisted the district court had an inflexible requirement "that was to bear an adjustment within each school in the system annually." The Supreme Court maintained that limits must be recognized in such instances.[289] The Court continued by quoting from Swann that "absent any constitutional violation there would be no basis for judicially ordering assignments of students on a racial basis."[290] As the Court stated, the Pasadena system was found in violation in 1970. However, the Court saw the Pasadena system as having adopted its plan at that time and establishing a "racially neutral system of student assignment in Pasadena United States District."[291] The Court then revealed its decision by stating:

> . . . We think that in enforcing its order so as to require annual readjustment of attendance zones so that there would not be a majority by any minority in any Pasadena Public school, the District Court exceeded its authority.[292]

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[287] Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

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

[289] Ibid., p. 28.

[290] Pasadena City Board of Education v. Spangler, 427 U.S. 434 (1976).

[291] Ibid. [292] Ibid., p. 435.

The Court pointed out that the school authorities were not required to submit a "step at a time" plan that would be determined as incomplete at its implementation. The Court continued to specify that the plan did not include the alteration of attendance zones of the schools as well as an assessment of such alterations in achieving a "unitary System."

The Court assessed "white flight" by pointing out that the district court had stated that the "trends evidenced in Pasadena closely approximate the state-wide trends in California schools, both segregated and desegregated."[293] The Court recognized the demographic changes as resulting from "people randomly moving into, out of, and around the Pasadena United States District area."[294] The Court then observed that this was a normal pattern of migration with the residential changes reflected in the school system.[295]

For school systems that had not yet totally achieved unitary status, the Court revealed that this act did not "undercut" Swann's restriction on making the year-to-year adjustments.[296] The Court felt that the implementation of an approval plan had not met requirements. Moreover, barring

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[293] Pasadena City Board of Education v. Spangler, 375 F. Supp. 1306, p. 436.

[294] Pasadena City Board of Education v. Spangler, 427 U.S. 435 (1976).

[295] Ibid., p. 436. [296] Ibid., p. 423.

any further segregative attempts by government agencies, no requirement for demographic adjustment was necessary. This judgment of the Ninth Circuit Court of Appeals was vacated and remanded for decision on the question that included whether Judge Reel's order from the district court should be lifted or modified.[297]

Justice Marshall and Justice Brennan filed dissenting opinion. The two Justices stated that the official racial discrimination had not been eradicated from the school system; therefore, the district court was not in error in refusing to modify the order.[298] In concurring with the lower court, Justice Marshall cited Judge Ely's statement:

> I agree with Judge Ely that there is abundant evidence upon which the district judge, in reasonable exercise of his discretion, could rightly determine that the danger which induced the original determination of constitutional infringements in Pasadena have not diminished sufficiently to require modification or dissolution of the original order.[299]

Justice Marshall saw the Court's decision as unwarrantingly extending the Court's statement in Swann:

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies (then emphasis is added as the point of contention) once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is limited from the system.[300]

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[297] Pasadena City Board of Education v. Spangler, 427 U.S. 442 (1976).

[298] Ibid., p. 441. [299] Ibid., p. 442.

[300] Ibid., p. 424.

The difference between the majority Court and the dissenters lay in interpretation of what point the "unitary system" was established, rather as in Swann, when "the affirmative duty to desegregate has been accomplished."[301] However, the Court's majority stated that the adoption of a plan and initiation was enough to satisfy the "affirmative duty" when:

> . . . the unappealed finding afforded a basis for its initial requirement that the defendants prepare a plan to remedy such racial segregation, its adoption of the Pasadena Plan in 1970 established a racially neutral system of student assignment in Pasadena United States District. Having done that, we think that in enforcing its order so as to require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school, the District Court exceeded its authority.[302]

The Pasadena case was important in answering several questions concerning busing:

(1) When the United States was a party to the plaintiff the case was not considered moot, even though the student respondents had graduated from the school system.

(2) Once a school system had adopted a plan for desegregation, there was no need for further annual adjustments of attendance zones because of population shifts.

However, there were several broad questions that were left unanswered:

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[301] Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

[302] Ibid., p. 427.

(1) The Supreme Court did not speak to the question of the length of time a school system remained under the supervision of the Court.

(2) The Supreme Court did not determine whether a particular degree of racial balance was required by federal courts.

Again the Court did not determine whether a particular degree of racial balance was required by the federal courts. In numerous cases the Supreme Court had failed to answer the question of balance while upholding lower courts that had ordered racial percentages on the one hand and still only referred to the balance and ratios as "starting points in the process of shaping a remedy."[303]

EXTENT OF THE REMEDY

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

On December 16, 1976, a decision from the United States Supreme Court indicated a shift in the opinion of the Court. The Court vacated the judgment of the Court of Appeals for the Fifth Circuit. The rejection of a plan that called for the busing of from 18,000 to 25,000 students in Austin rested on the Court's philosophy that the remedy must be limited to those conditions that are caused by unconstitutional

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[303] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 25 (1971).

acts of local officials, and, in this case, the Court did not find such violations.

The Austin case dates back to an earlier case where district court[304] found segregative intent. District court ordered a plan that was designed 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 the eighth grade students in schools over 50 percent minority or 90 percent Anglo. The East Austin kindergarten through fourth grade were to be bused through a congested center to the west side of Austin. In grades four through eight, students in west Austin were to be bused to the eastern side of Austin. The plan for secondary school students consisted of a system of "feeder" schools. The overall plan required busing of 18,000 to 25,000 students, which was 32 to 42 percent of the Austin city school population.

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 white students, and thus there was a violation of the equal protection clause. Moreover, action of school authorities caused or contributed to school segregation and/or continued the segregation practices that existed. The final

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[304] United States v. Texas Educational Agency, 467 F 2d 848.

charge against the school board was based partly on a finding of fact that ethnic segregation did result from the natural cause of events such as predictable segregation.[305]

The district court ruled that proven intent was not a necessary part of the process on discrimination where there was a resulting discriminatory effect. Thus the district court found segregation of Mexican-Americans within the Austin system that had resulted from the Austin School Board's neighborhood school pupil assignment policy.[306]

Most of the city of Austin had ethnic segregation in housing patterns. The district court referred to this as a natural, forseeable, and inevitable result.[307] Thus, the court saw a segregated school system throughout most of the city of Austin.[308] The court also found the school system's affirmative action efforts resulting in directions contrary to desegregation.

The Fifth Circuit Court of Appeals upheld district court's judgment. It relied, in part, on Keyes,[309] beyond the requirements of Brown[310] that extended the violation of

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[305] United States v. Texas Educational Agency, 467 F 2d 848.

[306] Ibid. [307] Ibid. [308] Ibid.

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

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

segregation to Mexican-Americans.[311] The Supreme Court pointed out that the violation of the equal Protection Clause was a result of "state action." The Fifth Circuit Court of Appeals' decision recalled the definition of de jure segregation by the Supreme Court as "a current condition of segregation resulting from intentional state action directed specifically to the (segregated) schools."[312] The Court then reasoned that to establish the burden of proof that a school system had unlawful segregation: (1) there must be segregation; (2) the state officials intended segregation by not acting; and (3) there was a segregated school system as a result of the above.

United States v. Texas Educational Agency, 467 F 2d 848 and Cisneros v. Corpus Christi Independent School District, 467 F 2d 142 (1973) were relied on by the Court of Appeals as in ruling that a violation of equal protection would only result from the action of school authorities that maintained or caused additional segregation. The earlier Court had held that discriminatory motive and purpose were not necessary to a constitutional violation.[313]

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[311] Austin Independent School District v. United States, 429 U.S. 992 (1976)

[312] Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 208 (1973).

[313] Ibid.

The Court pointed out that Keyes supervened Cisneros by insisting that before an order to desegregate a de facto school system there must be proof of intent of segregation practices by state's action.[314] The Court of Appeals acknowledged that Keyes was additional reasoning for finding the Austin school system in violation and segregation was an "inevitable result" and a "forseeable consequence" of the actions of the Austin School Board.[315]

Additionally, the Court ruled that the responsibility of state officials "should reasonably foresee segregation" as a result of the acts. The Court pointed out that there was difficulty in gathering evidence of a state official's intent, as was found in Monroe v. Pope, 365 U.S. 167 (1961). Monroe rejected specific intent as a necessary action under 42 U.S.C. Section 1983.

The Supreme Court found difficulty in establishing intent by state officials. However, the Court did see a continuing school system that employed a policy of neighborhood school assignments with an inference of intent. This, therefore, established a prima facie evidence of de jure segregation of Mexican-Americans in the Austin School District.[316]

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[314] Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 208 (1973).

[315] Ibid., p. 995.

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

The United States Supreme Court heard the case and rendered its decisions by vacating the judgment of the Fifth Circuit Court of Appeals. The case was remanded for further consideration. Justice Lewis F. Powell, along with Chief Justice Burger and Mr. Justice Rehnquist, spoke for the Court. In the memorandum order, Mr. Justice Powell related that he could speak to the "issue of remedy in the remand order because of what appears to be a misapplication of a core principle of desegregation cases."[317] He cited Swann and Milliken by saying that the obligation of the Court was to make corrections by a balance of "the individual collective interests." Justice Powell pointed out that federal courts' remedial powers could only be used when there was a constitutional violation and equity case, but the "nature of the violation determines the scope of the remedy."[318] Justice Powell stated that the Fifth Circuit Court of Appeals may have erred in its "readiness to impute to school officials segregative intent far more pervasive than the evidence justified."[319] Furthermore, the Court of Appeals erred in ordering a desegregation plan far exceeding any identifiable violations of constitutional rights.[320]

In speaking of residential segregation Justice Powell pointed out that most of the large cities with "large minority

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

[318] Ibid., p. 993. [319] Ibid., p. 995.

[320] Ibid.

population" had "problems for school officials" who were attempting to attain a nonsegregated school system, and Austin had a problem that worsened an attempt to desegregate because of population distribution. Justice Powell noted that even the Court of Appeals had recognized the problem when stating:

> Countless efforts by school officials, consultants, and visiting teams have found it impossible to produce significant desegregation by boundary line changes, contiguous pairing of schools, magnet schools, or other effective means short of cross-town busing incident to contiguous pairing of . . . schools.[321]

However, Justice Powell concluded the Court of Appeals decided that only cross-town transportation would remedy the segregative problem. Justice Powell evaluated the plan approved by the Fifth Circuit Court of Appeals as "remarkably sweeping." The Court insisted the lower court was apparently "misconceiving the import of language in Green to the effect that there should be no 'Negro' school or 'white' school."[322] This, Justice Powell said, caused the Court of Appeals to believe that every school must achieve a racially balanced status to a degree. However, Justice Powell concluded that Green was a case involving a rural community with sparse population and only two schools, and this language did not apply to a large urban school district.

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[321] Austin Independent School District v. United States, 429 U.S. 992 (1976).

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

Justice Powell viewed this plan as "designed to achieve some predetermined social and ethnic balance in the schools rather than to remedy the constitutional violation committed by the school authorities."[323] Justice Powell said the plan was "impermissible" because of the holdings of Pasadena.[324]

Justice Powell stated that whether Austin authorities discriminated with intent against the minorities or just failed to "fulfill alternative obligations" to desegregate, the remedy ordered by the Court of Appeals exceeded that which was necessary to alleviate any effects from official acts.[325] Justice Powell observed

> . . . the Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin School system would have been integrated to the extent contemplated by the plan."[326]

Finally Justice Powell said that extensive busing would be possible only where there was evidence that the scale of integration sought to be achieved by busing would have been accomplished by the school authorities carrying out the "constitutional obligation" from the beginning. Mr. Powell further classified busing as a remedial measure as opposed to punitive measure.

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[323] Austin Independent School District v. United States, 429 U.S. 993 (1976).

[324] Pasadena City Board of Education v. Spangler, 427 U.S. 425 (1976).

[325] Austin v. United States, p. 994. [326] Ibid.

According to Justice Powell the remedy had to be equivalent to the wrong. Justice Powell also acknowledged that lower courts were inclined to interpret the obligation as punitive. This was a different philosophy for the Supreme Court, whereas earlier cases were indeed punitive in nature.

Justice Powell did not indicate that a change of magnitude had occurred, although there was some shift in the Court. The shift was seen: (1) in Keyes where the plan amounted to some rather extensive busing because of a proven constitutional violation by school authorities; (2) in Austin where the remedy was limited to those conditions that caused the violations; and (3) in Austin where the Court felt that the school authorities did not cause the racial imbalance. Thus the extreme remedy of extensive busing, in the Court's opinion, exceeded that necessary to correct the condition.

Dayton Board of Education v. Mark Brinkman, 97 S. Ct. 2766 (1977).

In June, 1977, the United States Supreme Court delivered an opinion that vacated an order by district court that would have transported 15,000 students in a massive busing plan for Dayton, Ohio. The Supreme Court stated the enjoined remedy would be "out of proportion to the constitutional violations" that were the findings of the district court.[326]

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[326]Dayton Board of Education v. Mark Brinkman, 97 S. Ct. 2766 (1977).

Litigation was begun in April, 1972, by the parents of black children. After a hearing by the district court in 1972, the court ordered a desegregation plan for the public schools of Dayton. On appeal, the Sixth Circuit Court of Appeals reversed and remanded the plan.[327] A new plan was drawn up, and once again the Court of Appeals reversed and directed the district court to "adopt a system-wide plan for the 1976-1977 school year."[328] The new plan was affirmed by the court of appeals. The approved plan involved system-wide racial distribution requirements. The plan directed that in the 1976-1977 school year the racial distribution of each school in the school system would be within 15 percent of the 48 percent, 52 percent citywide black-white population ratio. The techniques involved in the plan included pairing, redefinition of attendance zones, numerous special programs, and "magnet schools."[329]

The Supreme Court saw the importance in this case because of the disparity between the district court and the court of appeals with the federal judicial system. The Court pointed out that the case was important because the Court was asked by the plaintiffs, as students in the school system, to "restructure the administration of that system."[330]

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[327] Brinkman v. Gilligan, 503 F. 2d 684 (1974).

[328] Ibid., 518 F. 2d 853 (1975).

[329] Ibid., 589 F. 2d 1984 (1976). [330] Ibid.

In 1972 the district court found "isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system."[331] Vague and historical violations emerged. In the 1920's there was physical segregation of black students, segregation of athletic teams, and racial imbalance within schools. During the 1960's school board policy established "freedom of enrollment" and "optional attendance zones." The district court concluded that racially imbalanced schools, optional attendance zones, as well as recent school board action, created "cumulative violations" that violated the Equal Protection Clause.[332] The Supreme Court insisted the district court's use of the term, constitutional violation, was "not free from ambiguity."[333] A newly elected board of education had, in 1972, rescinded resolutions that were passed by the previous board. The district court saw this action as creating segregative racial patterns. In dealing with the rescission the court of appeals decided:

> The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. . . . If the Board was not under such duty, then the rescission of the initial action in and of itself

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[331] Dayton Board of Education v. Mark Brinkman, 97 S. Ct. 2766 (1977).

[332] Ibid., p. 2770. [333] Ibid., p. 2772.

> cannot be a constitutional violation. If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission ipso facto (self-evident) is an independent violation of the Constitution.[334]

The court of appeals found it unnecessary to "pass on the question of whether the rescission (of the board resolutions) by itself was a violation"[335] of the Constitution. The Court reversed the district court's approval of the plan because "the remedy ordered . . . is adequate, considering the scope of cumulative violations."[336] It did uphold the three-part "cumulation violation," however. Actually the court of appeals gave no direction to the district court in adopting a new plan on remand. The district court was left without direction:

> The Court now reaches the reluctant conclusion that there exists no feasible method of complying with the mandate of the United States Court of Appeals for the Sixth Circuit without the transportation of a substantial number of students in the Dayton school system.[337]

The United States Supreme Court granted certiorari in order to "consider the propriety of the court-ordered remedy in light of the constitutional violations which were found by the courts below."[338] Justice William H. Rehnquist,

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[334] Dayton Board of Education v. Mark Brinkman, 97 S. Ct. 2772 (1977).

[335] Ibid., p. 2773. [336] Ibid., p. 2774.

[337] Brinkman v. Gilligan, 518 F. 2d 353 (1975).

[338] Dayton Board of Education v. Mark Brinkman, 97 S. Ct. 2766 (1977).

in delivering the opinion of the Court, stated that the remedy as based on the three-part "cumulative violation"[339] was not based on an understanding of the authority of the district courts.

The United States Supreme Court stated that by the court of appeals the remedy for the plan was out of proportion to the constitutional violation that the district court had found.[340] The Supreme Court ordered the case remanded to the district court for more definite findings and the possibility of taking more evidence.[341] This stemmed from the Court's assessment of the cumulative violation being described as an "ambiguous phrase."[342] The Court saw that such an extreme remedy did not result from the meager evidence as found by the district court.

The Supreme Court directed the lower court to make "new findings and conclusions as to violations in the light of this opinion."[343] The district court was then ordered to "fashion a remedy" that was in compliance with Swann.[344] A Supreme Court further cautioned the lower court by saying that the power of federal courts was not to restructure the operation of local governments and that "it is not plenary

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[339] Dayton Board of Education v. Mark Brinkman, 97 S. Ct. 2773 (1977).

[340] Ibid. [341] Ibid. [342] Ibid., p. 2775.

[343] Ibid. [344] Ibid.

and power is to be exercised if a constitutional violation exists."[345] If the constitutional violation was found, then the Court was to fashion the "scope of the remedy to fit the nature of the violation."[346]

Justice William H. Rehnquist continued by outlining further the duty of the district court and the court of appeals. Justice Rehnquist insisted:

> The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on racial distribution of the Dayton school population as presently constituted, when the distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.[347]

In a concurring opinion, Justice Brennan acknowledged that district courts and courts of appeal had a difficult task with deliberation of desegregation cases, yet those courts had gone beyond the remedy necessary for such violations.[348]

Justice Brennan also maintained the constitutional violation was insufficient to support such a widespread

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[345] Dayton Board of Education v. Mark Brinkman, 97 S. Ct. 2775 (1977).

[346] Ibid. [347] Ibid., p. 2726. [348] Ibid.

remedial action as a remedy. However, Justice Brennan did indicate that school board action showed an indication of intent. Once intent of school authorities was established in creating a segregative system, the Court considered assessing a remedy.[349] The action in such findings was not only considered blatant, but also subtle. In such a situation, if proven, there would be redressing by the extensive busing plan such as the one ordered by the lower court's plan. If, as Justice Brennan expanded the hypothesis, the violation included a "systemwide impact," there should be a "systemwide remedy."[350] He continued that under Keyes the school board must find that there is an "affirmative duty to desegregate the entire system 'root and branch.'"[351] Justice Brennan pointed out an additional citation when stating that as in Milliken and Swann the obligation of the school board was to "take the necessary steps to eliminate from the public schools all vestiges of state-imposed segregation."[352] This portion of Mr. Justice Brennan's concurrence outlined the levels of remedial action in relation to the level of the violation.

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[349] Dayton Board of Education v. Mark Brinkman, 97 S. Ct. 2776 (1977).

[350] Ibid.

[351] Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 213 (1973).

[352] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 115 (1971).

CHAPTER V

SUMMARY AND CONCLUSIONS

Summary

The early period of desegregation prior to the Brown decision was punctuated with three distinct phases of history. Those phases included the doctrine of Plessy, the graduate cases, and finally, the Brown case. Each of these periods of history was distinctive in the approach to eliminate existing injustices at the time.

The period from 1896 to the 1930s relied entirely on the doctrine that if public facilities were equal the races could legally be separated, whether in schools, railroad cars, or at water fountains. The early school cases were decided on the basis that the "separate but equal" doctrine was legal. Some of the early cases included children of races other than Negro.

However, by 1927, there was a change of attitude by the courts; at least there was an apologetic attitude within the high Court. The strategy of the National Association for the Advancement of Colored People was to attack the graduate schools of certain selected colleges. This venture was moderately successful because admission was gained by Negro students in several instances, even though some restrictions were placed on the students.

The final thrust came in the form of a victory for students finally admitted to all-white schools in four separate cases that were referred to as Brown. In this momentous series of cases the Court declared the "separate but equal" doctrine could no longer be legally justified. The Court further dictated that separate educational facilities were unequal because of the generations of feelings of inferiority by the minority races. This series of decisions relied on the Equal Protection Clause of the Fourteenth Amendment. One year later the Court ordered that a "prompt and reasonable start" be initiated in order to comply with the original Brown ruling with "all deliberate speed" in desegregation of dual school systems.

After Brown I and Brown II had established a legal basis for the desegregation of public schools, a period of history followed in which many school systems originated what the Supreme Court considered delay tactics. These tactics ranged from the actual closing of entire school systems to plans allowing students to choose the school of choice. However, the Supreme Court saw these as delay tactics and soon became impatient to the point of issuing orders that included the phrase "at once" and at the same time placed the responsibility of dismantling a dual school system directly on school boards. Public school desegregation included: (1) students, (2) transportation, (3) buildings, and (4) faculty and staff.

Research answered the following questions:

1. What did the United States Supreme Court consider reasonable in cross-district busing?

The United States Supreme Court considered busing as a reasonable tool for desegregation as long as restrictions included distance traveled, and the amount of time did not infringe on educational standards. Consideration was also made concerning the system's intent to desegregate since this required a remedy of considerable busing.

2. What was required by the United States Supreme Court in busing across administrative lines in order to correct an inequity in a segregated school system?

Administrative systems adjacent to a segregated school system were not involved in a remedy unless the system had had a history of segregation.

3. What was expected from the United States Supreme Court when a school system's white population had been significantly depleted?

The study found that the United States Supreme Court saw no necessity in making annual adjustments to attendance lines once a system had adopted a plan for desegregation.

4. How had the Supreme Court implemented busing in cases of de jure segregation?

It was the finding of this study that the United States Supreme Court constantly ruled against any school system having de jure segregation. The remedy usually included

extensive busing in cases where the Court considered busing to be an appropriate remedy.

5. How had the Supreme Court reacted to cases of de facto segregation?

Research revealed that in cases prior to 1976, the Supreme Court required some busing as a punitive remedy. However, the latest cases having no history of segregation were not required to bus because of segregative housing patterns. The remedy was also restricted to an equivalency to the wrong.

6. How had the Supreme Court ruled in cases where the intent to segregate by school officials was proven?

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.

7. To what extent did the United States Supreme Court mandate remedial plans to desegregate school systems?

The Court's most drastic remedy included extensive cross-district busing. This extensive mandate resulted from proven intent to segregate by school systems. The extent of this remedy was found to be proportional to the intent of the school system.

Conclusions

The recommendations of this study must necessarily be in the form of certain principles as derived from selected court decisions that can be outlined to the school authorities. These principles can be the considerations necessary to make sound decisions by school authorities. These legal principles have evolved from the many court decisions by the United States Supreme Court dealing with desegregation and, more specifically, busing. As the court's evolutionary process continues, these principles have become more of a foundation upon which future cases would be decided by both lower courts as well as the United States Supreme Court.

The following principles have evolved from the most significant court decisions:

(1) It is within the power of the courts to order "equitable relief" by using bus transportation as a tool to desegregate a school system or remedy a constitutional violation even if the rights of the majority race children are violated.

(2) The Constitution does not dictate a plan for desegregation that must always reflect the racial composition of the community in the school system.

(3) Once a school system has initiated a plan that will achieve a unitary system, the school authorities are not required to make year-by-year adjustments.

(4) Creation of new school systems will not be tolerated by the courts if they have a detrimental effect on a school system in the process of dismantling its dual system.

(5) Minority race children, such as Hispano students, are placed in the same category as Negro students if both groups suffer the same "educational inequities" as compared with the treatment afforded Anglo students.

(6) The burden rests upon the school authorities to prove that there is no segregative attempt in either making policy or the failure to act.

(7) An interdistrict remedy by the courts for proven de jure segregation is possible only if it has been shown that there was a constitutional violation within one of the affected districts.

(8) State and local officials are held financially responsible for the cost of remedial educational programs, as well as the cost of busing, that are designed to eliminate school segregation.

(9) A school system found in violation by the courts can expect the imposed remedy to be based upon the extent of the constitutional violation, and this would not exceed that which is necessary to eliminate the segregative effect of the officials.

(10) The state is not immune to responsibility for policies and official acts that lead to constitutional violations.

(11) Courts have announced that the use of racial balance and ratios is merely a "starting point" used to remedy a violation.

(12) A neighborhood school policy by school authorities must allow the Negro student a constitutional right to a nonsegregative education.

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