Michigan Law Review

Volume 85
Issue 5 *Issue 5&6*

1987

When Honesty is "Simply…Impractical" for the Supreme Court: How the Constitution Came to Require Busing for School Racial Balance

Lino A. Graglia
University of Texas

WHEN HONESTY IS "SIMPLY . . . IMPRACTICAL" FOR THE SUPREME COURT: HOW THE CONSTITUTION CAME TO REQUIRE BUSING FOR SCHOOL RACIAL BALANCE

*Lino A. Graglia**

SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT. By *Bernard Schwartz.* New York: Oxford University Press. 1986. Pp. 245. $19.95.

Following in the footsteps of *The Brethren,* [1] *Swann's Way* purports to give a behind-the-scenes description of Supreme Court decisionmaking based on interviews with unidentified Supreme Court Justices, law clerks, and published and unpublished documents. While *The Brethren* covers a seven-year period, *Swann's Way* considers a single decision, also discussed in *The Brethren, Swann v. Charlotte-Mecklenburg Board of Education,* [2] the school busing case. Although padded with material, such as a description of the Supreme Court courtroom, of interest only to a general reader,[3] the book tells the story of the writing of the *Swann* opinion in a detail — a separate chapter is devoted to each but one of Chief Justice Burger's six drafts — that could be of interest, if at all, only to a specialist.

Six drafts of the *Swann* opinion were required because of the extraordinary fact that Chief Justice Burger assigned the writing of the opinion to himself despite the fact that he was in basic disagreement with a majority of the Justices as to the decision to be reached. This, however, was already well known, having previously been discussed in *The Brethren*[4] and elsewhere,[5] and *Swann's Way* adds little to our knowledge of the incident except that it publishes as an appendix the full text of Burger's first draft. It seems, therefore, an example of a history written less because of new insight into the events described

* Rex G. Baker and Edna Heflin Baker Professor of Constitutional Law, University of Texas. B.A. 1952, City College of New York; LL.B. 1954, Columbia University. — Ed.

1. B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

2. 402 U.S. 1 (1971).

3. *See, e.g.,* pp. 43-45 ("How the Court Operates"), 94-95 (description of Court chamber).

4. B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 95-112.

5. Totenberg, *Behind the Marble, Beneath the Robes,* N.Y. Times, Mar. 16, 1975, § 6 (Magazine), at 15; L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 140-41 (1976).

than simply because additional documents became available. It could be considered an extension of Professor Schwartz' previous book, *The Unpublished Opinions of the Warren Court,*[6] except that he here provides extensive commentary in the nature of cheerleading for what he considers the forces of good.

Few decisions merit further study and discussion more than the Supreme Court's decision in *Swann.* Legal historians will almost surely one day see it as the *Dred Scott*[7] of the twentieth century, the outstanding example of improper judicial behavior resulting in a decision of disastrous consequences.[8] No decision better illustrates both the magnitude of the Court's policymaking power and the lack of scruple — the essential irrelevance to the Court of logic and fact — in the Court's exercise of that power. In *Swann* the Court created a hardly credible constitutional requirement that public school children be excluded from their neighborhood schools and transported to more distant schools because of their race in an effort to make the schools more racially integrated than the neighborhoods in which the children live and, specifically, to disperse black students, to the extent possible, among white students. Because many middle-class parents, mostly white, typically refuse to permit their children to be subjected to the requirement, its usual effect in urban areas, where most blacks live, has been to increase, not decrease, racial separation, first in the public schools and then in the cities. The result is that the public school systems of all or nearly all of our major cities today are predominantly, and usually overwhelmingly, exclusive preserves for blacks, Hispanics, and the poor.

Because it could not openly state and defend a constitutional requirement of school racial integration, the Court in *Swann* wrote an opinion asserting, in direct contradiction of the facts of the case, that it was merely continuing to enforce *Brown v. Board of Education*'s[9] prohibition of legally compelled segregation.[10] The Court affirmed an order requiring the exclusion of children from their neighborhood schools because of their race with no other justification than that all such exclusion is constitutionally prohibited, something possible only for a Court that is indeed supreme. None of this is of interest to, or

6. B. SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT (1985).

7. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

8. *See* L. GRAGLIA, *supra* note 5. Roe v. Wade, 410 U.S. 113 (1973), holding unconstitutional the majority of states' abortion-restricting laws, effectively creating a national regime of abortion on demand, and making an enormously divisive national political issue out of what was previously being satisfactorily handled on a state-by-state basis, is undoubtedly the strongest competing contender for the title. Other contenders include Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

9. 347 U.S. 483 (1954).

10. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 221-22 (1973) (Powell, J., concurring in part and dissenting in part).

apparently even understood by, Professor Schwartz, however, who merely wants to tell once more the inspiring story of the Court's triumph, despite the machinations of Chief Justice Burger, over the racist opponents of *Brown.* Because Schwartz fails to understand the distinction between prohibiting segregation and requiring integration and, especially, the importance to the Court of seeming to maintain the distinction, *Swann's Way* fails even to inform the reader of what the struggle that resulted in the six drafts the book is devoted to describing was actually about.

The struggle over the *Swann* opinion was not, as *Swann's Way* leads the reader to think, merely about whether the requirement being imposed should be called "integration" or "desegregation" — no one favored openly calling it "integration" — but over whether the requirement that would continue to be called "desegregation" should be defined. The crux of the amazing story of the *Swann* opinion is that a majority of the Justices, led by Justice Brennan, labored to keep the meaning of "desegregation" and "unitary system" as obscure and confused as possible, so as better to conceal that the actual requirement was not compliance with *Brown's* prohibition of racial discrimination but, on the contrary, the *practice* of racial discrimination in order to create racially mixed or "balanced" schools and, in particular, to eliminate majority black schools.

Chief Justice Burger, on the other hand, sought to have the Court actually define the supposed desegregation requirement — as the elimination of unconstitutional segregation, not the elimination of all racial separation or "imbalance" whatever its cause — to make clear that it was not the same as a simple requirement of integration and, therefore, at least in theory, very limited. Burger could not deny Brennan the result he wanted, complete affirmance of the district judge's order of district-wide busing for near-perfect racial balance, but he was able to retain some of his language, despite the six drafts, insisting, despite the actual order being affirmed, that the Court was merely continuing to enforce *Brown's* prohibition of legally-compelled segregation. The result is perhaps the most schizophrenic decision in history: The meaning of *Swann* depends entirely on whether one looks to what the Court actually did on the facts or — as Burger, acting on his own, later explicitly urged[11] — at what the Court claimed to be doing.

11. Winston-Salem/Forsyth County Bd. of Educ. v. Scott, 404 U.S. 1221, 1227-31 (1971). Sitting as Circuit Justice, Burger reprimanded a hapless district court judge for undertaking "an independent, subjective analysis of how his case compared factually with the *Swann* case — something he could not do adequately without an examination of a comprehensive record not before him." 404 U.S. at 1225. As if he thought he had the power to undo alone what he was forced to do as spokesman for the Court in *Swann,* Burger had a copy of this opinion mailed to every lower federal court judge in the country, marked "For the personal attention of the Judge." L. GRAGLIA, *supra* note 5, at 140.

SEGREGATION, DESEGREGATION, INTEGRATION: FROM *BROWN* TO *GREEN*

An understanding of *Swann* and the present state of the law of school "desegregation" requires a brief review of prior developments. In *Brown* the Court, of course, held school racial segregation unconstitutional, invalidating state laws that required the assignment of children to separate schools on the basis of race. Although *Plessy v. Ferguson,* [12] permitting "equal but separate" public facilities for the races, was not "flatly overruled," as Professor Schwartz states (p. 47) (the Court took pains to distinguish *Plessy,* a railroad case, as "involving not education but transportation"[13]), it soon became clear that *Brown* was to be understood as prohibiting all racial discrimination by government.[14]

Because of the very real possibility that the Deep South would respond to *Brown* by simply abolishing free public education, leaving blacks worse off than before, the Court refused to require compliance in 1954. And in the following year, with the "all deliberate speed" formula, the Court took the unprecedented and unprincipled step of, in effect, making compliance optional for a decade.[15] *Brown*'s antidiscrimination principle finally became effective and enforceable when it was endorsed by Congress and the President in the 1964 Civil Rights Act,[16] and legally required school segregation then quickly came to an end. *Brown,* seemingly a daring gamble at the time, was seen as a great triumph, and the moral superiority of policymaking by the Supreme Court over policymaking by elected officials — even though it was the 1964 Act that brought segregation to an end — was widely accepted.

It soon appeared, however, that although school racial segregation had come to an end in the South, school racial separation would not. Despite the end of racial assignment, a high degree of separation would obviously continue to exist in the South just as it had always existed in the rest of the country.[17] Residential racial concentration, although less in the South than elsewhere (ironically, in part because

12. 163 U.S. 537 (1896).

13. 347 U.S. at 491.

14. *See, e.g.,* Mayor of Baltimore v. Dawson, 350 U.S. 877, *affg.* 220 F.2d 386 (4th Cir. 1955) (public beaches and bath houses); Holmes v. City of Atlanta, 350 U.S. 879, *vacating* 223 F.2d 93 (5th Cir. 1955) (municipal golf courses); Gayle v. Browder, 352 U.S. 903, *affg.* 142 F. Supp. 707 (M.D. Ala. 1956) (buses).

15. Brown v. Board of Educ., 349 U.S. 294, 301 (1955); *see also* Shuttlesworth v. Birmingham Bd. of Educ., 358 U.S. 101, *affg.* 162 F. Supp. 372 (N.D. Ala. 1958) (upholding, four years after *Brown,* an Alabama "pupil placement" law that effectively guaranteed that no integration would take place).

16. 42 U.S.C. §§ 1971, 2000c (1982).

17. *See* Bickel, *The Decade of School Desegregation — Progress and Prospects,* 64 COLUM. L. REV. 193 (1964).

of school segregation, which meant the races could live together without going to school together), meant that the nonracial assignment of children to schools according to neighborhood would result in many schools all or largely of one race. In the euphoria of the late 1960s and early 1970s, when all things seemed possible through federal law, this result proved deeply disappointing to those who had fought so long and hard to establish and effectuate the *Brown* antidiscrimination principle.

Although no one was any longer being barred from any school — or, indeed, from any public facility or even, under the 1964 Act, any privately owned place of public accommodation — because of race, the cry went up that "nothing had happened." The civil rights establishment that had grown up and prospered with the acceptance of *Brown* was in need of new worlds to conquer, and the federal courts, now long-accustomed to directing the operation of school systems, were more than ready to provide further "moral leadership." If ending compulsory segregation did not produce the millenium of total racial integration, it was obviously time to move on to compulsory integration, even though this would mean abandoning the very principle of no racial discrimination by government that had made opposition to segregation irresistible.

There was no way, however, that a legal requirement of integration could be obtained through the processes of representative government. Congress, having just acted to eliminate official racial discrimination, could hardly be persuaded to reinstate it in order to compel racial mixing. Indeed, the 1964 Civil Rights Act explicitly defined "desegregation" as "the assignment of students to public schools . . . without regard to their race," and added, with a seeming excess of caution, that it "shall not mean the assignment of students to public schools in order to overcome racial imbalance."[18] But surely the Supreme Court, riding the crest of a wave of general acclaim for its many contributions to progress, would not fail to respond to a request for a new "advance" in the very area of law on which its enhanced prestige and status were based.

There are some things, however, that even the Supreme Court cannot do, and one was suddenly to announce — *Brown* having finally been accepted — that the Constitution not only permits racial discrimination by government, after all, but sometimes even requires it. The Court determined not to permit this difficulty to deter it from imposing the requirement nonetheless; it would simply be necessary to deny doing, or claim to be doing the opposite of, what it would do in fact. The basic decision to move from prohibiting segregation to requiring integration, while claiming still to be only enforcing *Brown,* was made, at least tentatively, not in *Swann* but in the much less noticed *Green v.*

18. 42 U.S.C. § 2000c(b) (1982). *See also* § 2000c-6(a).

County School Board[19] and two companion cases decided in 1968,[20] with Justice Brennan writing the opinions for a unanimous court.

New Kent County had only two schools, Watkins in the west, formerly for blacks, and New Kent in the east, formerly for whites, and a residentially integrated population, half black and half white. When segregation finally had to end in 1965 as a result of the 1964 Act, the school district adopted a freedom-of-choice method of school selection that had the predictable effect of minimizing the integration that would have occurred with geographic assignment. As was to be expected, no whites chose Watkins, and by 1967 only 15 percent of the blacks chose New Kent. In order to create a test case, the NAACP Legal Defense and Educational Fund attorneys stipulated that the school system was being operated free of racial discrimination. The district court and the Court of Appeals for the Fourth Circuit therefore held that the system was in full compliance with *Brown,* and dismissed the case. As the court of appeals put it, "Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination."[21]

Because it could not dispute the finding of the lower courts that racial discrimination had been completely eliminated in the operation of the New Kent County school system, the Supreme Court's only choice on appeal, it seemed, would be either to affirm the dismissal of the case or hold that compliance with *Brown's* prohibition of racial discrimination was no longer the constitutional requirement. The Court, however, managed to do neither. With a logic possible only for an institution not subject to review, the Court through Justice Brennan's opinion both insisted that compliance with *Brown* — the achievement of "a racially nondiscriminatory system"[22] — remained the requirement and held that the school district was not in compliance with *Brown* despite its achievement of a concededly nonracial system. Brennan denied that the fourteenth amendment was being read as "requiring 'compulsory integration,' " insisting that the only requirement was, as in *Brown,* to "remedy" unconstitutional segregation by "dismantling" the "dual system" and creating a "unitary system in which racial discrimination would be eliminated root and branch."[23] But the fact that the school system was found not to be "unitary," apparently because Watkins remained all-black, despite the

19. 391 U.S. 430 (1968).

20. Raney v. Board of Educ., 391 U.S. 443 (1968); Monroe v. Board of Commrs., 391 U.S. 450 (1968).

21. Bowman v. County School Bd., 382 F.2d 326, 328 (4th Cir. 1967), *vacated sub nom.* Green v. County School Bd., 391 U.S. 430 (1968) (companion to Green v. County School Bd., 352 F.2d 338 (4th Cir. 1967)).

22. *Green,* 391 U.S. at 435 (quoting Brown v. Board of Educ., 349 U.S. 294, 301 (1955)).

23. 391 U.S. at 437-38.

elimination of racial discrimination, seemed to show that the stated requirement was not the actual requirement and that compulsory integration was indeed being required despite the Court's denial.

The Court's insistence in *Green* that it was not requiring integration as such but only "desegregation," presumably meaning the ending and undoing of the segregation by law prohibited in *Brown,* had many advantages for the Court. Perhaps most important, it allowed the Court to escape the practically impossible task of having to reject or qualify *Brown*'s apparent prohibition of all racial discrimination by government and permitted the Court to claim, instead, that it was actually enforcing that prohibition. By the same token, the Court was also able to avoid the difficult task of attempting to justify compulsory integration in terms either of constitutional principle or of the benefits it might be expected to produce, something the Court has never attempted to do. The Court's only answer to why it requires racial integration in schools is still to deny that there is any requirement of integration as such and to insist that the requirement is only "desegregation," that is, merely to "remedy" the segregation held unconstitutional in *Brown.* This answer is patently false in that the racial separation being "remedied" is obviously the result of residential patterns, not of prior legally compelled segregation. The answer is in any event senseless: if compulsory racial integration is sound social policy, it would seem to be so regardless of the cause of existing racial separation. These defects have not, however, diminished the utility of the answer for the Court. The justifications that can be offered for a requirement of racial discrimination, disadvantaging people because of their race, are, after all, quite limited. The claim to be merely "remedying" past racial discrimination is, here as with other uses of "affirmative action," virtually indispensible, whatever its factual and logical defects. The Court had no need to fear, of course, that these defects might be pointed out by any of the nation's prominent constitutional law scholars, of whom Schwartz may be taken as the paradigm, for to do so would be to leave oneself open to the charge of siding with the racists. The Court's invariant claim to be merely enforcing *Brown* and remedying the violation found in *Brown* is certainly free from any word of doubt or criticism in *Swann's Way.*

Further, a simple requirement of integration would apply nationally, wherever racial separation or "imbalance" exists and whatever its cause, while a requirement of desegregation could only be applicable, it seemed, in the South, where there had been unconstitutional segregation. The unconstitutional dual system would have to be "dismantled," obviously, only where there had been such a system, and the constitutional violation found in *Brown* "remedied" only where there had been such a violation. The result was to divert the attention and lessen the concern of the rest of the country; the Court, it was widely believed at the time, had finally "lost its patience" with a devious and

recalcitrant South that undoubtedly deserved whatever the morally superior Court was planning to do to it. The time of the rest of the country for compulsory integration would come, but too late for it to seek the help of the South, and even then it would come only city by city, because it would be necessary for a judge first to purport to find unconstitutional segregation, not merely the obvious and always present racial separation, in each case. The effect has been that of a divide and conquer strategy, preventing the opponents of compulsory integration from mobilizing effective nationwide protest at a given time.

Professor Schwartz accepts the myth, as he does all other myths in this area, that compulsory integration can somehow be justified as a punishment merited by the South's supposed obstinate refusal to comply with *Brown.* Thus, according to Schwartz, the Court's "increasingly active role in the school cases . . . may be explained by the Justices' increasing exasperation at southern refusals to implement *Brown.* As their irritation grew . . . so did their intervention" (p. 64). Like all others making this argument, he ignores the facts that the Court had explicitly authorized delay in the implementation of *Brown,* that in any event a requirement of racial discrimination by school authorities to overcome the effects of residential racial separation cannot possibly be justified as enforcement of *Brown's* apparent prohibition of all official racial discrimination — even if by an irritated enforcer — that the South was in fact in compliance with *Brown* as a result of the 1964 Civil Rights Act, and that compulsory integration was later extended to the — presumably less irritating — rest of the country. The Court's "increasingly active role," after, in effect, hiding from the issue for ten years, is explained simply by the fact that the 1964 Civil Rights Act removed the Court's fear that *Brown* might not be enforceable. The Court moved from prohibiting segregation to compelling integration because it could now dare to do so, because acclaim whets the appetite for new triumphs — the work of moral leaders is never done — and because to doctrinaire ideologues dwelling in a world of words all things are possible. It is odd that Schwartz should think that the Court would make so momentous a move simply out of irritation.

A final advantage of calling the requirement "desegregation" instead of "integration" is that it made the requirement appear to comport with the 1964 Act, which also spoke of "desegregation," although the Act's definition — assignment of students without regard to race — was, of course, the precise opposite of what the Court required. Although manipulation of language is an inescapable part of the lawyerly arts, it would be difficult to find another area of law so totally dependent upon it. It is probably no exaggeration to say that if judges and lawyers could not use the word "segregation" — seemingly invoking *Brown* — to refer to all racial separation, however caused, and "desegregation" to refer to compulsory integration, the law could not have moved from *Brown* to *Green.*

The meaning of *Green,* however, was, to say the least, unclear. On the facts of the case, it was possible to interpret the decision as being what the Court said it was (and of course the Court should always be believed if possible): no more than an application of *Brown's* prohibition of racial discrimination. All the Court actually held was that freedom-of-choice in school selection — unusual, complex, and subject to racially discriminatory administration — could not be used by a school system immediately upon ending segregation when simple neighborhood assignment would produce a much higher degree of integration. Further, if a simple requirement of integration is to be distinguished, as the Court insists, from a requirement of desegregation, the distinction, presumably, is that the former would apply to all racial separation, however caused, and would require as much racial mixing as is achievable, while the latter applies only to the segregation held unconstitutional in *Brown* — racial separation caused by official racial discrimination — and would require only that degree of racial mixing that would exist if there had not been such segregation. Because the just-ended segregation would clearly continue to have an impact in New Kent County — for example, Watkins would retain for some time its former identification as the school for blacks — freedom-of-choice in school selection would not make the system as integrated as it would have been except for past segregation. Disallowing freedom-of-choice in favor of neighborhood assignment could therefore be justified as an actual requirement of desegregation, as necessary to undo separation resulting from past racial assignment.

Professor Schwartz, however, has no difficulty in interpreting *Green* as simply requiring integration because he fails to understand the importance to the Court of seeming to maintain the distinction between such a requirement and a requirement of desegregation that can be justified as enforcement of *Brown's* prohibition of official racial discrimination. Although he purports to recognize early in the book that the distinction "is of crucial importance" (p. 51), he makes clear throughout that he agrees with the statement he attributes to Brennan that the distinction is merely "semantic" and that the "duty of school boards [is] to maximize integration where feasible" (p. 60). For example, he refers at several points to the "Parker interpretation" of *Brown* as holding that the Constitution "does not require integration" but "merely forbids discrimination."[24] Under this "interpretation," he says, there would be "no duty to end existing dual school systems, provided only that they were no longer compelled by state law" (p. 51), and he criticizes Burger for adopting this interpretation and applauds Brennan for supposedly rejecting it. He apparently fails to understand that a "dual system" not "compelled by state law" would not

24. *E.g.,* pp. 51, 58, 60. The reference is to Circuit Judge John Parker's opinion in Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

be a dual system at all — certainly not the dual system condemned by *Brown* — but merely a system with racial separation or imbalance, and that it is still the law, at least in theory, that such a system is constitutionally unobjectionable. Neither the Court nor even Brennan (publicly) has ever expressed disagreement with the "Parker interpretation" of *Brown.* The Court has, instead, explicitly and repeatedly stated that racial separation not compelled by state law is not unconstitutional and that the Constitution does not require integration.[25] The Court's supposed requirement of "desegregation" is not, as Schwartz thinks, simply another way of saying that the requirement is integration. It is, on the contrary, the Court's way of avoiding saying the requirement is integration because such a requirement obviously cannot be justified as simply the requirement of *Brown.*

Schwartz' statement that *Green* "changed the constitutional rule from the *Brown* prohibition against compelled segregation to an affirmative duty immediately to dismantle all dual school systems" (p. 65) is similarly confused and confusing. If "dual school systems" means, as one would expect, systems segregated by law, they were, of course, prohibited by *Brown,* not *Green,* and if it means systems with racial separation not required by law or otherwise resulting from official discrimination, they are not prohibited at all. If, as is apparently the case, Schwartz believes that all school racial separation, however caused, should be prohibited, he should state and defend that position, not simply beg the question by labeling all racially imbalanced school systems as "dual school systems."

As a final example of Schwartz' confusion, he states on the one hand, quoting *Green,* that the constitutional requirement is "a unitary system in which racial discrimination would be eliminated root and branch" (p. 65), without noting that the school system in *Green* was found not to be unitary despite the undisputed fact that all racial discrimination had been eliminated. On the other hand, he states that *Green* created an "affirmative duty to provide a fully integrated school system" (p. 65), without noting that such a requirement would mandate the practice, not the elimination, of racial discrimination and without seeing any need to deal with the fact that the Court has denied imposing such a requirement. A sociologist or political scientist may perhaps be properly interested only in what the Court does, not what it says, but one would expect the validity and consistency of the Court's reasoning to be of at least some interest to a teacher of constitutional law. Professor Schwartz to the contrary notwithstanding, it was far from clear that the Court in *Green* had imposed a "duty to provide a fully integrated school system," even if one ignores that the Court denied doing so and looks only at what the Court actually did.

25. *E.g.,* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 417 (1977); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Milliken v. Bradley, 418 U.S. 717 (1974).

Such a duty was clearly imposed, however, by what the Court did in *Swann,* even though the Court continued to insist, now totally incredibly, that the requirement remained only the achievement of the nonracial system required by *Brown.*

JUDGE MCMILLAN: WHAT A DIFFERENCE A JUDGE MAKES

The misfortunes of the Charlotte-Mecklenburg School District began with its creation in 1961 by a merger of the school district of the City of Charlotte, North Carolina, and the district that comprised the remainder of Mecklenburg County.[26] This merger, which had nothing to do with race, produced one of the largest school districts in the country, 550 square miles in area. Although perfectly innocent at the time, the merger was to prove fateful a few years later because it permitted a federal district judge to "desegregate" Charlotte's predominantly black schools with whites who lived outside of Charlotte and would, therefore, have otherwise been unavailable for this purpose. Without the merger the "desegregation" of Charlotte's schools would have had to be confined to those schools, and it might never have taken place since the judge would have been unable to achieve his objective of placing blacks in schools with a high percentage of whites. Because the "desegregation" requirement is merely a ruse used by courts to require whatever integration seems to be available, sheer happenstance has played a much larger role than reason in its development and implementation.

In the 1968-1969 school year, the rapidly growing Charlotte-Mecklenburg School District had 107 schools and over 84,000 students, 71 percent of whom were white and 29 percent black.[27] The black student population, which had increased from 7500 in 1954 to 24,000 in 1968, was heavily concentrated in the city and mostly (95 percent) in a single section of the city.[28] In 1962 the newly created giant school district voluntarily adopted a plan of nonracial geographic assignment, to be implemented along with a five-year multimillion dollar school construction program, which was put into effect for all schools by 1966.[29] In short, the school district was at that time not significantly different in regard to race from the school districts of most cities throughout the United States: students were assigned to schools nonracially by neighborhood and as a result many schools were, like their surrounding neighborhoods, all or nearly all of one race.

The operation of the school system was challenged in 1965 and,

26. Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358, 1362 (W.D.N.C. 1969).

27. *Swann,* 402 U.S. at 6.

28. *Swann,* 300 F. Supp. at 1360.

29. Swann v. Mecklenburg Bd. of Educ., 369 F.2d 29, 30-31 (4th Cir. 1966).

after extensive litigation, held to be in full compliance with all constitutional and statutory requirements by the federal district court. This ruling was affirmed by the Court of Appeals for the Fourth Circuit sitting en banc in 1966.[30] The experience of school districts in the South since *Brown,* however, has been that they are no sooner brought into compliance with the Supreme Court's latest constitutional requirements when the requirements are again changed, as if to ensure that "desegregation" litigation never comes to an end and that school districts would never be free of the helpful ministrations of federal district judges.[31] This pattern held true in the case of the Charlotte-Mecklenburg School District. The court of appeals' holding that the Charlotte-Mecklenburg school system was in compliance with the Constitution did not protect it, despite ordinary principles of res judicata, from being attacked again as unconstitutional three years later. Nor did it prevent a different and newly appointed district judge from holding that the school system was indeed operating unconstitutionally after all.

The school district was much less fortunate in the second round of litigation than in the first in the all-important matter of the judge before whom its case happened to come. Because constitutional law, and most particularly the law of race and the schools, has little to do with either the Constitution or law and everything to do with who happens to make the decision, the contrast between the two district judges involved in the *Swann* case is worth noting. The late Judge J. Braxton Craven, who heard the case in 1965 and found the school district in full compliance with the Constitution, was a highly experienced and exceptionally able judge and a recognized legal scholar. Judge Craven was cognizant of his own and the law's limitations, and his reputation and prominence did not depend on spectacular decisionmaking. He believed that even school litigation should come to an end and, the purpose of *Brown* having been achieved as a result of the 1964 Civil Rights Act, he was glad to see the operation of school districts returned to school authorities.[32]

30. Swann v. Mecklenburg Bd. of Educ., 243 F. Supp. 667 (W.D.N.C. 1965), *aff'd.,* 369 F.2d 29 (4th Cir. 1966).

31. *See* Calhoun v. Cook, 332 F. Supp. 804, 805-08 (N.D. Ga.), *vacated,* 451 F.2d 583 (5th Cir. 1971) (referring to the "annual agony of Atlanta").

32. His view of the limited usefulness of litigation and of the role of a judge in remaking school systems is well illustrated by the opening paragraph of his 1965 *Swann* opinion:

> This is another school case. Our adversary system of justice is not well-adapted for the disposition of such controversies. It is to be hoped that with the implementation of the 1964 Civil Rights Act the incidence of such cases will diminish. Administrators, especially if they have some competence and experience in school administration[,] can more likely work out with School Superintendents the problems of pupil and teacher assignment in the best interests of all concerned better than can any District Judge operating within the adversary system. The question before this court, even within its equitable jurisdiction, is *not* what is best for all concerned but simply what are plaintiffs entitled to have as a matter of constitutional law. What *can* be done in a school district is different from what *must* be done.

Swann, 243 F. Supp. at 668 (emphasis in original).

The contrast in judicial temperament between Judge Craven and his successor who took office as district judge when Judge Craven was promoted to the Fourth Circuit Court of Appeals could hardly be more pronounced. Judge James B. McMillan was without significant judicial experience when he first heard the *Swann* case (p. 13). He was, Woodward and Armstrong report in *The Brethren,* "a member of the United World Federalists, a group of idealists working for world government."[33] He was apparently no less of an idealist with regard to what can be achieved by law and the possible contribution of judges to social betterment. Worse, he had the self-assurance of a successful middle-aged lawyer as to his competence in all fields, unburdened by knowledge of the difficulties; he felt, for example, entitled to his own "philosophy of education" and to instruct school authorities on its advantages.[34] He apparently believed that there must be a simple solution to even the most intractable of problems and that he was capable of finding it. To those who disagreed, his answer was always the same, that his solutions also happened to be the commands of the Constitution. The "complexities of this school system" could present no obstacle to his orders, he said, because "the Board and the community must still observe the Constitution."[35] That black leaders considered the closing of majority black schools "an affront to the dignity and pride of the black citizens" could not, of course, be permitted to "control over the Constitution."[36] Asked why school closings were necessary "[i]f the whites don't want it and the blacks don't want it," he replied, "The answer is, the Constitution of the United States."[37] Which would be worse, one must wonder, if he said these things about the Constitution without believing them or — as was almost surely the case, his capacity for belief apparently rivaling that of Alice's Red Queen — he actually did believe them?

One of the striking peculiarities of *Swann,* not noted by Professor Schwartz, is that although the school district lost its case in each court it came before, it lost each time on a different legal theory. It lost before District Judge McMillan because he believed that compulsory school racial integration was necessary to improve black academic performance,[38] a theory not mentioned in either the court of appeals or the Supreme Court. It lost in the court of appeals on the ground that although the racial separation in the school system was obviously the result of residential racial concentration, that concentration, the

33. B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 101.

34. L. GRAGLIA, *supra* note 5, at 107.

35. Swann v. Charlotte-Mecklenburg Bd. of Educ., 306 F. Supp. 1299, 1305 (W.D.N.C. 1969).

36. Swann v. Charlotte-Mecklenburg Bd. of Educ., 306 F. Supp. 1291, 1296 (W.D.N.C. 1969).

37. 306 F. Supp. 1291, 1293.

38. 306 F. Supp. 1291, 1297.

court believed with very little basis, was itself the result of official racial discrimination — and that, the court concluded with no basis at all, made elimination of the school racial separation a constitutional requirement.[39] Finally, the school district lost in the Supreme Court on the ostensible ground that, like the school district in *Green,* it had not yet achieved the unitary system free of all racial discrimination that was required by *Brown.* [40]

Although the fact that blacks as a group generally score much lower than whites on standard achievement tests is one of the best known and most studied problems in the field of education, it "was not fully known to [Judge McMillan] before he studied the evidence" in *Swann,* and he therefore naturally assumed that it was "obviously not known to school patrons generally."[41] Unfortunately for Charlotte-Mecklenburg, McMillan no sooner learned of the problem than he also learned, he thought, of the solution. The gap cannot "be explained solely in terms of cultural, racial or family background," he felt qualified to determine, because, he found, substituting emphasis for evidence, "*segregation itself is the greatest barrier to quality education*"[42] — meaning by "segregation," of course, simply racial imbalance or, more specifically, predominantly black schools. He had been informed by plaintiffs' "experts," three professors from Rhode Island College, that "a racial mix in which black students heavily predominate tends to retard the progress of the whole group,"[43] that is, that black schools are inherently inferior. This is bad news indeed, if true — which fortunately it almost certainly is not — for the majority nonwhite school systems of nearly all of our major cities. The solution to the problem of low scores for blacks was therefore clear: a "dramatic improvement" in black performance could be "produced" by simply "transferring underprivileged black children from black schools into schools with 70 [percent] or more white students."[44] And thanks to the happy accident that the city and county school districts had merged some years before, the requisite number of white students was available within the school district.[45]

Judge McMillan thereupon appointed one of plaintiffs' experts, Dr.

39. Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138, 141-42 (4th Cir. 1970), *aff'd. in part,* 402 U.S. 1 (1971).

40. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

41. *Swann,* 306 F. Supp. 1291, 1297.

42. 306 F. Supp. 1291, 1297 (emphasis in original).

43. Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1356, 1369 (W.D.N.C. 1969).

44. *Swann,* 306 F. Supp. 1291, 1297.

45. The growth of the school system was reversed with McMillan's assumption of control, and the number of white students declined (from 60,008 in 1969 to 45,223 in 1981) while the number of black students increased (from about 24,520 to 27,717 in the same period), causing white enrollment to decline from 71 percent to 62 percent. *Court-ordered School Busing: Hearings on S. 528 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judici-*

John Finger, as a court consultant, with all fees to be paid by the school district, and instructed him that "all the black and predominantly black schools in the system are illegally segregated" — despite the fact that many of those schools had never been segregated at all, having been recently built, or had been segregated white schools that became black as a result of black population growth — and that "efforts should be made to reach a 71-29 ratio" in all schools.[46] Judge McMillan rejected a school board plan that would have produced a far higher degree of integration than could possibly be justified as the undoing of unconstitutional segregation or than existed in any major school district with a substantial number of blacks. He then ordered implementation of a plan devised by Finger that would, by means of satellite zoning and cross-district busing, produce a system with no school more than thirty-nine percent black or less than nine percent black (except for one elementary school only three percent black).[47] "Jack," Professor Schwartz reports McMillan telling Finger, "this is political dynamite and will cause a real commotion. But let's go ahead" (p. 19). Objections to busing he dismissed as following an "absolutely false trail," and concern for the children being bused as "crocodile tears" (p. 19). The definitive answer to all objections — such as a preference for what he called the "neighborhood school theory" — was, of course, that they could not be permitted "to override the Constitution" (p. 19).

Although the doings and sayings of Judge McMillan in *Swann* would seem to be relevant to Professor Schwartz' tale of the six drafts of Chief Justice Burger's opinion primarily because they show how little similarity there is between what the district court actually did and what the Supreme Court purported to affirm, Schwartz makes no mention of this discrepancy. He apparently begins and ends his book with a discussion of McMillan only to add an element of human interest by providing a little morality play illustrating the triumph of courage and integrity over the forces of darkness. Thus, the book's first chapter, "The Education of a Southern Judge," which contains a section headed "On the Firing Line," is devoted to McMillan and the price he paid for his fidelity to the Constitution. Federal judges in the South, we are told, once "led an unruffled existence" and were figures of "universal esteem," but "Judge McMillan and his fellow district judges were placed right on the firing line in the post-*Brown* struggle to secure a unitary school system. Whatever their personal views on segregation," they "were bound by the Supreme Court decisions and acted, albeit gradually, to order desegregation in southern school dis-

ary, 97th Cong., 1st Sess. 562 (1981) [hereinafter *Hearings*]. As busing continued, however, the reduced percentage of whites presumably remained high enough for McMillan's purposes.

46. *Swann,* 306 F. Supp. 1299, 1312.

47. L. GRAGLIA, *supra* note 5, at 109-10.

tricts." This "made many of them outcasts in their own communities," and McMillan himself "became the target of abuse and a virtual pariah in Charlotte" as a result of his busing orders. "No wonder," Schwartz notes, "southern federal judges in school desegregation cases" have been described as "[l]onely [m]en" (pp. 5-6). But McMillan could not act other than as he did, according to Schwartz, because hearing the *Swann* case gave him a "factual education" into "the realities of the school segregation that still existed in Charlotte fifteen years after the *Brown* decision had ruled segregation unconstitutional." "As the evidence in the case accumulated," McMillan "began to realize the extent to which segregation still existed in the Charlotte school system," and as he put it, "I got in the position that I had to act on something that was based on fact and law rather than feelings" (p. 13).

Professor Schwartz's depiction of the situation, though thoroughly conventional, could hardly be more misleading. By the time McMillan became a district judge in 1968, the "struggle" was not to "secure a unitary system" as required by *Brown* but to impose on southern school districts an unadmitted and indefensible requirement of integration that had never been imposed elsewhere. The *Brown* decision had indeed "ruled segregation unconstitutional" fifteen years earlier, but can Professor Schwartz really be unaware that no such "segregation still existed in the Charlotte[-Mecklenburg] school system" (p. 13) — which had, after all, been declared constitutional only a short time before — and that for McMillan it was simply predominantly black schools that were unconstitutional?

Far from acting on the basis of "facts and law rather than feelings," McMillan ignored both the facts and the law and acted, his many opinions in the case make clear, on the basis of little other than his feelings. The facts showed, not the unconstitutional segregation he purported to find, but a large metropolitan school district operating nonracially in which the residential concentration of blacks, as in all urban areas, resulted in all- or nearly all-black schools. No law, statutory or decisional, required or supported McMillan's order that every school in the school district be made majority white; neither the Supreme Court nor any other court, not even the Fifth Circuit, which often took the lead in these matters, had ever required anything comparable to what McMillan ordered.[48]

Far from having to overcome his personal views of segregation because bound by the Supreme Court decisions, McMillan issued his unprecedented orders only because of his enthusiastic acceptance of the view — almost surely factually mistaken as well as, at least in theory, constitutionally irrelevant — that the effective education of blacks requires predominantly white schools. That the people of Charlotte were displeased with McMillan is, therefore, not as surprising as

48. *See id.* at 102-03.

Schwartz apparently finds it. Their perception that what was being done to them was not entirely the responsibility of the Constitution, as McMillan incessantly iterated, reflects a more accurate understanding of constitutional law than the understanding demonstrated by Professor Schwartz.

Judge McMillan may have suffered grievously for what he did in *Swann,* as Schwartz tells us, but surely his *Swann* experience can also be seen as not entirely one-sided. McMillan became and probably still remains the most important man in Mecklenburg County, even if also the most hated. Surely there is something exhilarating in holding the fate of a major city in your hands and seeing your notions of good social policy, no matter how ill-informed, faithfully carried out — an experience not possible for government officials subject to the restraint of the ballot. He became a national media figure, being named, for example, a *New York Times* "Man in the News,"[49] and a sought-after expert witness at congressional hearings on the subject of busing.[50] In 1981 he was honored at a testimonial dinner attended by "everybody who's anybody" in the area (pp. 190-91). His deeds have now been celebrated in a book by a prominent professor of constitutional law, as they had been earlier by famous reporters in *The Brethren.* His name, permanently associated with one of the nation's most controversial social experiments, compulsory integration by busing, will live in the annals of remarkable judicial achievements long after the name of Judge Craven, for example, who would have ended the case against Charlotte-Mecklenburg years earlier, is forgotten.

Charlotte-Mecklenburg's luck did not much improve in the Fourth Circuit. The opinion explaining why the school system was not in compliance with the Constitution, despite the same court's unanimous en banc holding to the contrary a few years earlier, was again written by a newly appointed judge, as would also prove to be the case in the Supreme Court. With Judge Craven not participating and Chief Judge Haynsworth, recently rejected by the Senate as a Supreme Court nominee, not taking his usual leadership role, the Fourth Circuit upheld all that McMillan did — although on a different theory, as noted above — except that it found "unreasonable" the amount of busing that McMillan required for elementary school students.[51]

CHIEF JUSTICE BURGER: A CHIEF IS EXPECTED TO LEAD

That the school district would not fare better, or even as well, in the Supreme Court was clearly indicated when the Court not only granted plaintiffs' petition for certiorari but at the same time directed

49. B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 112.

50. *See, e.g., Hearings, supra* note 45, at 511.

51. Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138, 146-47 (4th Cir. 1970).

that McMillan's order be fully reinstated.[52] The result was to require the restructuring of the school system in accordance with the Finger plan and the institution of massive busing even before the briefing and argument of the case in the Supreme Court. It was not surprising, therefore, that, as both *Swann's Way* (p. 105) and *The Brethren*[53] report, at the Court's first conference on the case following oral argument it appeared that a majority of the Justices favored upholding McMillan at least in part.

Justice Brennan apparently essentially agreed with McMillan that predominantly black schools are inherently inferior.[54] Justice Douglas, as always untroubled by facts or logic, had already circulated a memorandum supporting busing as necessary to remove "the black . . . [from] his *de jure* segregated school" (p. 92), simply ignoring the fact that no such schools were involved in the case. Justice Marshall, former general counsel for the NAACP Legal Defense and Educational Fund, the real party plaintiff, would have affirmed McMillan on the basis of strong rhetoric and unsupported factual assertions.[55] "[T]he time has come," he would have declared, "for the era of dual school systems to be ended" (p. 119), although, of course, it had been ended some years before. To permit all black schools to continue to exist would be, in his view, "to deny Negro students in Charlotte the relief they had been waiting on so long" and leave them with only "a hollow remedy indeed" (p. 119), although it is apparently perfectly permissible for many such schools to continue to exist in, say, Washington, D.C., where Marshall performs his public service. He found McMillan's conclusion " 'that all the black and predominately [*sic*] black schools are illegally segregated' was clearly supported by the record," although it was in fact not supported at all (p. 119). He was willing to attribute to McMillan his own "conclusion" that neighborhood assignment "would not produce an effective dismantling of the dual system" and then find that this, too, was "supported by the record" (p. 120), although no question of dismantling a dual system was in fact involved.

Less predictably, Justices Harlan and Stewart also favored affirmance. Harlan, Schwartz reports, "considered himself his grandfather's direct heir" (p. 39) on race issues, apparently ignoring the fact that compulsory integration was inconsistent with the view expressed in his

52. Swann v. Charlotte-Mecklenburg Bd. of Educ., 399 U.S. 926 (1970).

53. B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 100.

54. He would have held in *Green* that a "stigma of inferiority . . . attaches to Negro children in a dual school system," *i.e.*, a system with all-black schools. P. 60.

55. That this approach to decisionmaking is standard with Marshall is indicated by his very similar performance in Milliken v. Bradley, 418 U.S. 717, 781-815 (dissenting opinion), where his willingness to manufacture from whole cloth the facts necessary to support his position brought forth a specific response by Justice Stewart in a separate concurring opinion. 418 U.S. at 717, 756 n.2.

grandfather's famous dissent in *Plessy v. Ferguson,* that the Constitution was "color-blind."[56] Stewart, both *The Brethren*[57] and *Swann's Way* (p. 123) report, looked up McMillan in *Who's Who* and discovered that he and McMillan were of the same age, had both attended Ivy League law schools, and had both served in the Navy during World War II. Stewart, according to *The Brethren,* thereupon decided that "McMillan represented a courageous strain of Southern liberalism" and that he had to "admire his courage."[58] According to *Swann's Way,* Stewart thereupon "felt immediate empathy with the district judge and looked for ways to back his action" (p. 123). If either Stewart or McMillan had been in a different branch of the service or attended different law schools, it seems, the public school children of Charlotte-Mecklenburg might not have had to be bused. Only Chief Justice Burger and Justice Black, it seemed, had doubts about what McMillan had done, and the eighty-five year old Black, who had just two years earlier mindlessly insisted on the mid-year reassignment of students in thirty-three school districts to increase racial balance,[59] seemed hopelessly confused.[60]

Since it was clear that Burger was in fundamental disagreement with a majority of the Justices, he obviously should have simply stated that he would dissent from any decision affirming McMillan and left the writing of the Court's opinion to others. A dissent could have very effectively pointed out that only the 1961 merger of the city and county school districts made the case possible, that the school district's operation had been found constitutional in 1965, that McMillan's order was based on the erroneous theory that predominantly black schools are unconstitutional because inherently inferior, and that, in any event, busing for near-perfect racial balance in a large metropolitan school district that had ended segregation years earlier could not, like the prohibition of freedom-of-choice in *Green,* possibly be justified as desegregation required by *Brown.* The requirement imposed by McMillan, the dissent could have shown, was simply integration, involving not the prohibition but the use of racial assignment, and it obviously should be identified and defended as such, not obfuscated as the requirement of *Brown.* Such a dissent, probably joined by Black and perhaps Blackmun — who had not yet disappointed those who appointed him by joining the Brennan-Marshall camp — might have changed the course of decision in *Swann;* at a minimum it would have served to alert the nation to the fact that something very different

56. 163 U.S. 537, 559 (1896).

57. B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 100.

58. *Id.* at 101.

59. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969). *See* pp. 67-87; L. GRAGLIA, *supra* note 5, at 92-94.

60. *See* B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 124.

and much more important was happening than the enforcement of *Brown* on a recalcitrant southern school district.

Chief Justice Burger, unfortunately, was not the man to issue such a dissent. For one thing, President Nixon had recently "issued an extraordinary eight-thousand word policy statement on desegregation" strongly opposing busing and favoring neighborhood schools, in which he correctly pointed out that for judges to order busing to overcome the effects of residential racial concentration was obviously to go far beyond what was required in *Brown.*[61] To some of the Justices this made it all the more necessary that McMillan be affirmed in order to provide, as Schwartz put it in connection with an earlier case, a "categorical rebuff of the Nixon Administration" (pp. 88-89) and make clear that a president, especially this president, had no power to influence the Court. To Burger, Nixon's opposition to busing presented the problem that a dissent — especially one not joined by either of the two "conservatives," Harlan and Stewart — would leave him open to the charge, devastating among academics responsible for making a Chief Justice's reputation, of being "Nixon's Chief Justice."

Further, Burger apparently saw the *Swann* case as being for him essentially what *Brown* was for his predecessor Earl Warren.[62] Warren wrote the *Brown* opinion at the beginning of his tenure as Chief Justice, it was forever seen as his greatest achievement, and he was particularly acclaimed for the fact that the Court was unanimous. *The Brethren* reports that Burger "knew that his ability to hold the Court together on the sensitive busing issues would be a crucial test of his leadership. Unanimity in key school desegregation cases was a tradition."[63] Burger should have realized, of course, that *Brown,* a decision prohibiting the exclusion of children from their neighborhood schools because of their race, presented an occasion for leadership that *Swann,* a decision requiring such exclusion, did not, and that he could not in any event aspire to Warren's acclaim unless he adopted Warren's view of the Court as an instrument of social change.[64] But he was foolishly determined to be the author of the *Swann* opinion and if possible to obtain a unanimous Court.

At the Court's first conference on *Swann,* therefore, Burger purported to be in essential agreement with the majority so that as Chief Justice and a member of the majority he could assign the writing of

61. *Id.* at 96.

62. *See* pp. 88-89, 101; *see also* B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 95-97.

63. B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 97.

64. Warren, Schwartz reports, approached legal issues in terms of "ultimate values," which made "opposition based on traditional legal-type arguments seem[] inappropriate, almost pettifoggery." Pp. 27-28. Schwartz' approval of this approach is illustrated by his casual reference to "the Supreme Court's role as primary lawgiver in the American system." P. 95. Burger had already disappointed Schwartz in an earlier case by showing that he "was no Earl Warren so far as the Court's role in desegregation cases was concerned." P. 89.

the opinion to himself. This meant of course that he would be required to write an opinion affirming at least in part — in full, the majority would insist — an order requiring about as drastic and complete a program of compulsory integration as could be imagined. He apparently believed, however, that he could minimize the damage by writing an opinion that would make clear that the requirement was very limited in theory, even though he was not yet in a position to limit it in fact — the effect of which would be to leave the requirement vulnerable to easy abandonment by a later Court. Because the Court in *Green* had imposed a requirement of integration in the guise of enforcing *Brown,* the requirement could be undermined by simply making clear what the actual requirement of *Brown* was.

JUSTICE BRENNAN: WATCH THE PEA CLOSELY

If virtually all constitutional law may be said to be fraudulent in that it is not, as represented, derived from the Constitution, the law of race and the schools since *Green* is doubly so in that it is, in addition, the very opposite of what it purports to be; incredible as it may seem, the Court has been able to impose a requirement of racial discrimination in the assignment of students to schools only by insisting that it is enforcing a prohibition of all such discrimination. Thus, in *Green,* as already noted, the Court purported to require, pursuant to *Brown,* "a unitary system in which racial discrimination would be eliminated root and branch"[65] but found the operation of a school system unconstitutional despite the elimination of all racial discrimination, apparently because it was insufficiently racially mixed. Similarly, in *Alexander v. Holmes County Board of Education,* [66] one year later, the Court, repeating that school districts must "operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color," again held the operation of the defendant school districts unconstitutional, despite the absence of any evidence of such exclusion, because of insufficient racial mixing.[67] Finally, in *Carter v. West Feliciana Parish School Board* [68] the Court reiterated its holding in *Alexander v. Holmes County Board of Education* that . . "the obligation of every school district is to terminate dual school systems at once" but again found a constitutional violation not because the district practiced racial discrimination, but because it did

65. Green v. County School Bd., 391 U.S. 430, 438 (1967).

66. 396 U.S. 19 (1969).

67. 396 U.S. at 20. Schwartz apparently believes that *Alexander* was the Court's response to "Mississippi's resistance to *Brown.*" P. 75. In fact, the school districts involved were not resisting *Brown* or even *Green* but merely claiming that a few additional months would be required — a claim the lower courts accepted and the Supreme Court did not dispute — in order to abandon previously approved "desegregation" plans and create and implement new plans. *See* L. GRAGLIA, *supra* note 5, at 92-94.

68. 396 U.S. 290 (1970).

not, and required that students be assigned on the basis of race during the school year in order to increase integration.[69]

The Court's effort to conceal the requirement of integration it had been imposing since *Green* by calling it the desegregation required by *Brown* necessitated that the actual requirement be kept as confused and obscure as possible. This is clearly illustrated by the Court's disposition of *Northcross v. Board of Education,*[70] two months after *Carter,* its first school case under Chief Justice Burger. *Northcross* presented a preview of *Swann:* Burger began his efforts to have the Court clearly define the *Brown* requirement that it was supposedly enforcing, and Brennan maneuvered to keep it undefined in order to prevent the house of contradictions he had constructed in *Green* from crumbling. Very briefly, in May 1969 the district judge in Memphis ordered the school board to implement by January 1, 1970, a "desegregation plan" based on geographic assignment. As very little integration would have resulted under the plan, apart from the seven-month delay, it seemed clear that more was required under *Green* and later cases. Plaintiffs, therefore, moved for an order requiring a "unitary system," which they explicitly defined — exactly what Brennan wanted to avoid — as one in which "every public school in Memphis . . . would have . . . 55% Negroes and 45% whites," with departures of 5 percent to 10 percent to be "tolerated."[71] The district judge denied the motion and the Court of Appeals for the Sixth Circuit affirmed, pointing out that according to *Alexander* a "unitary system" was simply one in which no student was excluded from any school because of race, and that already was or soon would be the situation in Memphis upon implementation of the geographic assignment plan.[72]

Professor Schwartz reports that Burger, supported by Harlan, Stewart, and White, wanted to grant certiorari to the plaintiffs in *Northcross* in order to "reach the issue of what was required for a school system to be unitary" (p. 89). The most interesting and instructive item in Schwartz' book, although he clearly is unaware of its significance, is his description of Brennan's (successful) efforts to prevent this from happening. Brennan, supported by Black and Douglas, "urged the conference to avoid reaching the issue." "[A]ny 'realistic' definition by the Court," he argued, "would appear to be a retreat from *Brown* and any other type of definition would, given the views of most whites, simply be impractical" (pp. 89-90). Brennan, that is, if Schwartz' report is correct, openly took the position that the Court should not define the constitutional requirement it was supposedly en-

69. 396 U.S. at 293.

70. 397 U.S. 232 (1970).

71. Northcross v. Board of Educ., 420 F.2d 546, 548 (6th Cir. 1969), *aff'd.,* 397 U.S. 232 (1970).

72. 420 F.2d at 548.

forcing, because to do so would make it impossible for the Court to require integration in the guise of enforcing *Brown,* and integration could be required in no other way.

The problem Brennan faced was that, on the one hand, the only definition of "unitary system" that was "realistic" for the Court — the only one it could openly state — was the one it was purporting to use: a system without racial discrimination. Far from being "a retreat from *Brown,*" as Brennan argued, this definition stated, of course, the actual requirement of *Brown.* That definition was entirely unsatisfactory to Brennan, however, because actually to prohibit all racial discrimination by school authorities would preclude rather than support the requirement of integration that it was his objective to impose. On the other hand, the Court could not, like the plaintiffs in *Northcross,* openly define a "unitary system" as a highly integrated or racially balanced system or one without predominantly black schools, which is the definition that was actually being applied, because, "given the views of most whites," an open and admitted requirement of integration would be opposed and would have to be defended, and that, Brennan knew, could not be done.

Brennan had solved this dilemma in *Green* by purporting to adopt the "realistic" definition of "unitary system" as one without racial discrimination, but then simply ignoring that definition and holding that the school system was not unitary despite the absence of racial discrimination because it was inadequately integrated. This "solution" obviously required that the meaning of "unitary system" be as obscure as possible, that the deliberate obfuscation of the requirement begun in *Green* be maintained. Brennan therefore acted to have *Northcross* disposed of without briefing, oral argument, or full opinion (p. 90), so that the Court could stay as far away as possible from having actually to state what school systems would have to do to be "unitary." The school systems would just have to learn from experience — the experience of being repeatedly declared in violation of *Brown* despite the elimination of racial discrimination — what they could not be told, that the actual requirement was not the elimination but the practice of racial discrimination in order to increase integration.

Brennan, Schwartz reports, industriously undertook on his own to prepare, over a weekend, a brief *per curiam* opinion disposing of *Northcross* without actually addressing the "unitary school" issue. Brennan's masterfully confusing draft in effect berated the Sixth Circuit for making all too clear that a "unitary system" under the *Alexander* definition need not be an integrated one, but without ever actually stating that the Sixth Circuit's view of the law was incorrect and without reversing the Sixth Circuit's decision in any respect. Brennan apparently somehow persuaded first Stewart and White and then Harlan to agree to this disposition of the case, and with the concurrence of

Black and Douglas, his draft became the Court's opinion.[73]

Only Chief Justice Burger objected, urging in a separate concurring opinion that the Court "as soon as possible" resolve "the basic practical problems" involved in the requirement of a "unitary system."[74] The opinion was muddled, however, by his statement that the "suggestion that the Court has not defined a unitary school system is not supportable," because *Alexander* had stated "albeit perhaps too cryptically, that a unitary system was one 'within which no person is to be effectively excluded from any school because of race or color.' "[75] The difficulty, of course, was not that the *Alexander* definition of a unitary system was cryptic — it was actually quite clear — but that it was exactly the opposite of what the Court required in fact, as is clear from the fact that no issue of excluding any student from any school because of race was involved in *Alexander* or in any case beginning with *Green.*

Burger's objective to limit compulsory integration and Brennan's to further it resulted in very different approaches to opinion writing in "desegregation" cases. One of the many remarkable feats Brennan accomplished in *Green* was that he managed to write the opinion without once even citing the 1954 *Brown* decision that was purportedly being enforced; the actual holding of *Brown* is best kept out of sight, of course, if compulsory integration is to be imposed in the name of *Brown.* Burger, by contrast, began the first draft of his *Swann* opinion by citing *Brown* in the very first paragraph and stating explicitly that what *Brown* prohibited was "a governmental policy to separate pupils in schools solely on the basis of race," adding for emphasis, "That was what *Brown v. Board of Education* was all about" (p. 208). Burger then took every opportunity to insist, albeit in direct contradiction of the result he was required to reach, that the "implementation of *Brown I* is all that is presented now" (p. 212). He found it "helpful to restate the essential holding" of *Brown* because some people apparently were incorrectly viewing *Brown* "as imposing a requirement for racial balance, *i.e.,* integration, rather than a prohibition against segregation," despite the fact that "[n]o holding of this Court has ever required assignment of pupils to establish racial balance or quotas" (p. 215). *Green,* the obvious source of the apparent misunderstanding, he added in a footnote, cannot be properly read "as a mandate for integration," because even though "fully desegregated schools will, of course, tend to bring about integration," only the "former is constitutionally required" (p. 215 n.10). The only requirement, therefore, was and remains "the elimination of the discrimination of the dual school systems" (p. 215).

73. 397 U.S. 232 (1969).

74. 397 U.S. at 237.

75. 397 U.S. at 236-37.

As already noted, a prime source of the confusion that has enabled the Court to compel integration in the name of prohibiting segregation is the use of the word "segregation" to mean any racial separation, however caused, when the requirement is being applied, but to mean the segregation by law that was prohibited by *Brown* when the requirement is being justified. Burger attempted in this first draft of the opinion to make this ploy impossible by making clear that racial separation is not unconstitutional unless caused by official racial discrimination: "The heart and core of the cases from *Brown I* to the present embraces two basic elements: (a) separation by race in public schools; (b) enforcement of that separation by governmental action" (p. 215). Far from requiring integration — the undoing of all racial separation regardless of its cause — the Court's only objective, Burger said, was "to see that school authorities exclude no pupil of a racial minority from any school — directly or indirectly — on account of race."[76] Racial imbalance may indicate a possible constitutional violation, but it is only the assignment of pupils to schools on the "basis of racial origin to perpetuate segregation" that is unconstitutional (p. 218). The Constitution does not compel a school board "to construct a system with racial balance," and it is certainly "not the function of a court" to require a school board to do so (p. 218).

Burger would have also made clear that a true requirement of desegregation differs from a simple requirement of integration not only in that it applies only to unconstitutional segregation, not to all racial separation, but also in that it requires only the undoing of that segregation, not the production of as much actual racial mixing as may be achievable. "The objective," he said "should be to achieve as nearly as possible that distribution of students and those patterns of assignments that would have normally existed had the school authorities not previously practiced discrimination" (p. 220). The objective, that is, was simply the discontinuance of "separate schools for two racial groups" and the creation of "a single integrated system functioning on the same basis as school systems in which no discrimination had ever been enforced" (p. 216). Finally, Burger sought to make clear in the first draft that school authorities were not required to overcome "disproportionate racial concentration in some schools" resulting from "residential problems, employment patterns, location of public housing, or other factors beyond the jurisdiction of school authorities" (p. 216), and that "the maintenance of schools, all or predominantly all of one racial composition in a city of mixed population" is not unconstitutional, "so long as the school assignment is not part of state-enforced school segregation" (p. 219).

All of this was, of course, anathema to Brennan, as Burger should

76. P. 216. Burger pointed out in a footnote that an "indirect" exclusion would occur when, for example, attendance zones were drawn on a racial basis. P. 216 n.11.

have realized from the beginning; clarification of the constitutional requirement supposedly being enforced was the opposite of what Brennan wanted. The majority, led by Brennan, wanted to retain the claim to be enforcing *Brown* only as a smoke screen while, by affirming Judge McMillan, imposing precisely the requirement of integration that Burger had shown could not be justified under *Brown.* Five additional drafts were necessary before agreement — grudgingly on Brennan's part — could be reached on an opinion only because of the majority's insistence, which ultimately proved mostly successful, that Burger's clarifications of the supposed constitutional requirement be removed or diluted.

The final *Swann* opinion still begins by stating that *Brown* was "all about" the maintenance of "two sets of schools in a single school system . . . to separate pupils in schools solely on the basis of race,"[77] but the majority would not permit an explicit statement that *Brown* did not impose a requirement of integration. Nor could the majority permit Burger to make clear that the *Brown* requirement of desegregation supposedly being enforced differed from compulsory integration in that it applied only to unconstitutional segregation, not all racial separation, and was limited to undoing such segregation, that is, to making the schools only as racially mixed as they would be if there had not been such segregation.[78] Such clarity would obviously have made compulsory integration in the name of enforcing *Brown* impossible. As Justice Douglas noted at the outset of the struggle, if the courts were to be concerned in fact as well as name with merely curing racial discrimination by school authorities, "the orders for integration would seem to be quite limited" (p. 118).

Chief Justice Burger did manage, however, to retain in the final opinion a few less specific statements that would, if taken seriously, limit the integration requirement. For example, he reaffirmed that the power of federal courts is only "remedial" and therefore to be "exercised only on the basis of a constitutional violation" and only to the extent required by "the nature of the violation"[79] — which is to say, rather abstractly, that the supposed requirement of desegregation is really quite different from a requirement of integration. Burger was allowed to retain a statement that the Court's concern in all the cases beginning with *Brown* was with the "elimination of racial discrimina-

77. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 5-6 (1971).

78. Burger was finally able to make such a statement three years later in Milliken v. Bradley, 418 U.S. 717, 746 (1974), where he was a legitimate member of the majority: "But the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." The result of thus defining desegregation as applicable only to unconstitutional segregation was, of course, to find that no further steps to increase racial mixing were required, despite the existence of all-black and all-white schools in close proximity. Justices Douglas, Brennan, White, and Marshall dissented.

79. *Swann,* 402 U.S. at 16.

tion in public schools," not with "other forms of discrimination" such as discrimination in housing, the basis on which the court of appeals affirmed McMillan — but the majority required that he largely negate this statement by adding that "[w]e do not reach in this case the question" whether "school segregation" not caused by "discriminatory action by the school authorities, is a constitutional violation."[80] Finally, Burger ended his opinion with a statement that school authorities would not be "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."[81] In other words school boards will be compelled to achieve racial balance in the name of desegregation only once, after which racial imbalance would be constitutionally permissible, there being, of course, no requirement of integration. Unfortunately, Burger was unable to state when, if ever, the busing that is necessary to achieve racial balance could be stopped (short of the system becoming all black), when stopping it would immediately result in the reappearance of the all- or nearly all-black schools that the busing was instituted to remove — the principal question facing school systems that are operating under busing orders.

SCHWARTZ' WAY: ALL'S WELL THAT ENDS WELL

Burger's attempt to define the constitutional requirement supposedly being enforced by the Court in *Swann* is as objectionable to Professor Schwartz as it was to Brennan. In Schwartz' view "the entire [first] draft was negative and indecisive in tone" and objectionable "particularly in its assertion that the Constitution required only elimination of state-enforced segregation, not the fostering of integration" (p. 117). He is apparently unaware that the elimination of "state-imposed segregation" is precisely what Brennan, the co-hero (with McMillan) of *Swann's Way,* said was the constitutional requirement in *Green,* and that no opinion of the Court to date has claimed that the Constitution requires "the fostering of integration" as such. Incredible as it seems, Schwartz apparently has no notion of the Court's need to claim to be requiring desegregation, enforcing *Brown,* and not simply to be requiring "the fostering of integration."

Perhaps most offensive to Schwartz, Burger's first draft "was overly conciliatory toward southern school boards, going so far at one point as to refer to their 'most valiant efforts' to meet the desegregation requirements" (p. 117). It is of course an established part of the mythology of this subject that southern school boards were manned by unworthy people, perhaps even, as he says of other southerners, per-

80. 402 U.S. at 22-23.

81. 402 U.S. at 32.

sons of "warped fervor"[82] — the worse they were, the more easily one can justify what the Supreme Court did to them — and *Swann's Way* does not at any point deviate from established mythology. The fact is, however, that most southern school boards did the best they could in very difficult circumstances to comply with ever-escalating "constitutional" requirements that the Court was not authorized to impose and that they knew would work to the detriment of their school systems.[83]

Virtually every statement in the *Swann* opinion that attempts to justify McMillan's order as "desegregation," a "remedy" for unconstitutional segregation, or necessary to create a "unitary system" is contradicted by the facts of the case.[84] For example, the Court stated that "state-enforced segregation by race in public schools"[85] is the constitutional violation requiring remedy, but there was no such segregation in the Charlotte-Mecklenburg school system. As the system was in compliance with all constitutional requirements, as had been held just a short time earlier, no issue of desegregation, remedy, or creating a unitary system was in fact present in the case. The Court tried to indi-

---

82. P. 56. That Schwartz is a man of good heart and strong feeling, even if not of good understanding or good prose, is seen in his denunciation of the whites of Prince Edward County, Virginia, where the public schools were closed when the time to end segregation finally came, as rallying "to the ghost of a brutal civil war, which with blurred, myth-befogged memory, they chose to recall as glorious. In their warped fervor, they saw themselves as the last stalwart hopes of a noble way of life that had, in fact, become a euphemism for shallow bigotry." For a somewhat different perspective on the events in Prince Edward County, including the NAACP's opposition to private schooling for the black children, see R. WOLTERS, THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION 65-127 (1984).

83. For a more realistic view than Schwartz' of the situation of school boards in the South during the relevant period, see the statement of two district court judges in Calhoun v. Cook, 332 F. Supp. 805 (N.D. Ga.), *vacated,* 451 F.2d 583 (5th Cir. 1971):

> This case is now in its thirteenth year before this court, having been filed in 1958. Atlanta in 1961-62 was one of the first major southern cities officially abandoning the dual school system. In its court experience, the original desegregation order was one of the few unappealed and assented to. Periodically as each new specific to Brown v. Topeka was belatedly developed by the higher courts, the School Board has been returned to court and given new directions. . . . Each has been accepted and promptly implemented. In the interim, the system voluntarily accelerated from the early concept of grade-by-grade annual integration to system-wide integration; it voluntarily and studiously located new schools and rezoned so as to maximize integration; it voluntarily liberalized its pupil-transfer plan; and in various ways increased responsibility for its black teaching personnel, principals, and area superintendents. Through court order, it has advanced from the initial requirement of two teachers of opposite race to each school to a computerized mathematical distribution of its faculty by race throughout the city; and from historical and traditional attendance zones to a court-supervised optimum [integration] plan. No one has successfully challenged the good faith of its elected Board of Education, the appointed Superintendent, . . . or of its administrative personnel throughout this uncertain decade. . . . Each change has produced convulsive implosions within the system and what has now become the annual agony of Atlanta has caused significant change in the character of the system, both physically and psychologically.
>
> . . . .
>
> Of paramount significance, however, is the obvious result. Atlanta now stands on the brink of becoming an all-black city.

332 F. Supp. at 805, 808.

84. *See generally* L. GRAGLIA, *supra* note 5, at 104-44.

85. *Swann,* 402 U.S. at 11.

cate, as always in these cases, that the "dilatory tactics" and "failure of local authorities to meet their constitutional obligations"[86] somehow justified what was being done, even though no such tactics or failure were involved in the case. The Court stated that McMillan's order sought to "accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools,"[87] when, in fact, very few such transfers — none at the junior high and high school levels — were involved. The Court stated that McMillan sought to "counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation,"[88] when no attempt was made or could have been made by McMillan to justify his orders on that basis. The Court stated that its objective was to "see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race,"[89] when the only such exclusion involved in the case was the exclusion ordered by McMillan. The Court, of course, made no mention of the actual basis of McMillan's decision, the need to place blacks in predominantly white schools in order to improve their academic performance.

Even less defensible, if possible, than the Court's gross misstatement of the facts in *Swann* and of McMillan's opinion, is its treatment of the 1964 Civil Rights Act. The Act, as noted above, defines "desegregation" as the assignment of students to schools "without regard to their race" and not assignment "in order to overcome racial imbalance."[90] It also explicitly denies empowering federal courts "to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils,"[91] which, of course, is exactly what McMillan had done. Following the suggestion of Justice Douglas, the *Swann* opinion disposes of this embarrassment by asserting that the legislative history of the Act "indicates that Congress was concerned that the Act might be read" as applying to "the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of school authorities."[92] The Court, unfortunately, neglected to cite the portion of the legislative history in which it found this indication of Congress' concern. In fact, the Court's statement is totally without support in the Act's legislative history. That history makes clear be-

86. 402 U.S. at 14.

87. 402 U.S. at 27.

88. 402 U.S. at 28.

89. 402 U.S. at 23.

90. 42 U.S.C. § 2000c(b) (1982), *see also* notes 16-18 *supra* and accompanying text.

91. 42 U.S.C. § 2000c-6(a) (1982).

92. *Swann*, 402 U.S. at 17-18.

yond possible doubt, as of course does the language of the Act itself, that the Court's statement is in direct contradiction to Congress' actual purpose. A clearer example of judicial bad faith in dealing with an act of Congress would be difficult to find.[93] Hamilton's defense of judicial review, it should be remembered, was based on the explicit assumption that federal judges could readily be impeached.[94]

Because of lack of understanding or lack of interest on the part of Professor Schwartz, neither the absence of relation between the opinion and the facts in *Swann* nor the opinion's indefensible treatment of the 1964 Act is a subject of comment in *Swann's Way.* It is apparently enough for Schwartz that he approves of the result the Court reached. He believes that McMillan's orders have been beneficial to Charlotte. In 1973, the people of Charlotte gave up trying to fight McMillan and elected a school board with, as McMillan put it, a "more positive attitude" and "willing to obey the law of the land" (p. 192). In 1984, Schwartz reports, a *New York Times* article stated that

> [i]t has been a dozen years since anyone has been elected to the Board of Education on an antibusing platform, and two of the nine board members are black. For the past four years, the county's students have scored above average in a national achievement test, and the gap in test scores between black and white students has been narrowing. [pp. 192-93]

In 1983, he adds, as a further achievement attributable to McMillan, "Charlotte elected its first black mayor" (p. 193). Indeed, he might also have noted, busing's tendency to drive whites from school systems and cities makes the election of black political leaders one of its most frequent and predictable effects. Whatever the merits of compulsory school racial integration by busing as a matter of social policy, however, the function of a constitutional law scholar, such as Professor Schwartz, is to provide analysis of the validity and propriety of the process by which the policy was imposed on the country as a matter of constitutional law. *Swann's Way* fails utterly to perform that function.

---

93. As Senator Sam Ervin stated:

> There is not a word in this whole title that indicates any intention of Congress to regulate "de facto segregation" that is based upon residence. Yet, the Supreme Court nullified this act of Congress by holding that Congress was a bunch of legislative fools and that Congress had attempted to regulate "de facto segregation" instead of "de jure segregation."

Busing of School Children: Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 93d Cong., 2d Sess. 42, 43 (1974).

94. THE FEDERALIST No. 78 (A. Hamilton).