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"BROWN v. BOARD OF EDUCATION WAS THE BEGINNING"

THE SCHOOL DESEGREGATION CASES IN THE UNITED STATES SUPREME COURT: 1954-1979*

PHILIP B. KURLAND**

To mourn a mischief that is past and gone
Is the next way to draw new mischief on.

Othello, I:3:158

Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions, fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge?

Merchant of Venice, III:1:49

* A lecture delivered at Washington University on January 31, 1979, as the sixth in a series on *The Quest for Equality*. © Copyright 1979, Philip B. Kurland.

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Wrest once the law to your authority;
To do a great right do a little wrong.
Merchant of Venice, IV:1:210

To rehearse once again the story of the school desegregation cases cannot be an intriguing enterprise for either the writer or the reader. Unlike Shakespeare's plays, which can be produced again and again with new insights about the human condition almost every time, the story of school desegregation is too well known, too much a part of our own lives, to require, or even to permit, its presentation with any sense of novelty or inspiration. Even Shakespeare, for good reason, offered us no play about good Queen Bess, or even one on Bloody Mary. And certainly none would dare to equate Shakespearean poetry with the dull, devious, and doctrinaire language of Supreme Court opinions, not to speak of the words of those lesser mortals doomed to commentary on the ultimate voice of our Constitution. Nevertheless, it is the twenty-fifth anniversary of *Brown v. Board of Education*.[1] A retrospective look at the Supreme Court's efforts in the field of school desegregation may at least reveal something about how the Court works and about the limitations of the judicial process.

I.

The late Professor Alexander M. Bickel once wrote: "*Brown v. Board of Education* was the beginning."[2] He was not designating *Brown* as the first school desegregation case. It was not. The Court had been marching up the hill toward school desegregation for some time. Surely the tread was measured. One could, to borrow a later-adopted Supreme Court phrase, speak of the movement from the graduate school cases to the grammar school cases as made "with all deliberate speed."[3] The pre-*Brown* decisions were clear indications to some of what the outcome of the public school desegregation cases would be when the time came for the Supreme Court to decide them. To these observers, it was a question of when, not of what. The graduate school cases did not, however, afford any clear rationale for the grammar school decisions they anticipated.

1. 347 U.S. 483 (1954).
2. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 7 (1970).
3. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

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In *Missouri ex rel. Gaines v. Canada*,[4] Mr. Chief Justice Hughes spoke for seven of the nine Justices when he denied Missouri the right to exclude a black candidate for admission to its only state-run law school on either excuse that it offered: (1) that the State would afford him at least as good a legal education at any law school in another State that would have him; or (2) that the State was working toward the construction of an all-black law school that would soon afford a legal education equal to that at the University of Missouri.

The Court did not get rid of the albatross it had hung around its own neck—the *Plessy v. Ferguson*[5] doctrine that separate facilities for blacks and whites satisfied the equal protection clause so long as the facilities were equal. In a way it reaffirmed *Plessy*: "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to separated groups within the State."[6] The Chief Justice wrote that the appropriate measure was equal treatment not of blacks and whites as classes, but of individual applicants' rights to share in the State's beneficence:

> Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.[7]

Ten years later, in *Sipuel v. Board of Regents*,[8] the Court disposed of a factually similar case by a per curiam opinion of but a few paragraphs. No additional reasoning was offered: "The State must provide [a legal education] for her in conformity with the equal protection clause of the Fourteenth Amendment."[9] It was only a week later that the Court managed to avoid the question whether California's anti-Japanese land law was unconstitutional as applied to aliens ineligible for naturalization.[10] Clearly, the Court was not yet ready to presume the invalidity of any law classifying by race, national origin, or citizen-

4. 305 U.S. 337 (1938).
5. 163 U.S. 537 (1896).
6. 305 U.S. at 349.
7. *Id.* at 351.
8. 332 U.S. 631 (1948) (per curiam).
9. *Id.* at 633. The State adopted the same kind of evasive tactics in *Sipuel* that would later characterize the school desegregation cases. *See* Fisher v. Hurst, 333 U.S. 147 (1948).
10. Oyama v. California, 332 U.S. 633 (1948).

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ship. *Sweatt v. Painter*,[11] decided in 1950, afforded a somewhat more meaningful guide to the school desegregation cases in the offing. Texas had accomplished in *Sweatt* what Missouri and Oklahoma had only promised in *Gaines* and *Sipuel*: a separate law school for blacks. This was not, however, said the Court, adequate reason for denying admission to a black student who sought admission to the white law school. In a unanimous opinion for the Court written by Chief Justice Vinson, the Court held that by all measurable standards the alternative schools offered the black petitioner were not equal to the one at the state university. More important, however, the opinion made it clear that inequality inhered in the immeasurable cost of compulsory disassociation of black law students from white law students. Nevertheless, the Court refused to reexamine the *Plessy* doctrine, which, it said, did not control the disposition of this case.

On the same day, in another unanimous opinion by Vinson, the Court in *McLaurin v. Oklahoma State Regents*[12] struck down university regulations that "assigned" the black petitioner, who had been admitted to the University of Oklahoma Graduate School, "to a seat in the classroom in a row specified for colored students; . . . to a [particular] table in the library on the main floor; and . . . a special table" in the school cafeteria.[13] Once again the Court found lack of adequately equal treatment despite the essential identity of physical, tutorial, and curricula properties available to the petitioner. The evil to be abated apparently was not separate but unequal facilities, but the commanded separation itself. By imposing this physical separation from his fellow students, the State made McLaurin's education different and, therefore, the Court said, "unequal to that of his classmates."[14]

The Court went on to underline that it was the State-imposed nature of the restrictions, not social ostracism, that was constitutionally invalid:

> There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. . . . The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and

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11. 339 U.S. 629 (1950).
12. 339 U.S. 637 (1950).
13. *Id.* at 640.
14. *Id.* at 641.

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> choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.
>
> . . . Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races.[15]

Strangely, there was no mention of *Plessy* in the *McLaurin* opinion. It would have been difficult, indeed, to square the two. Strangely, too, not in *McLaurin*, not in *Sweatt*, not in *Sipuel*, and not in *Gaines* did the Court deign to take notice of its own opinions sustaining racial segregation in public schools, although the dissent in *Gaines* relied on two of them.[16]

Thus, by the time of *Brown*, the Court had two lines of authority between which to choose, each distinguishable on its facts from the other, if that were the Court's wish, but each implicitly, if not patently, inconsistent with the other in terms of equal protection doctrine. "Separate but equal" did not fit the graduate school cases, however much the Court was willing to pretend that it did.

II.

"*Brown v. Board of Education* was the beginning." Indeed, it was. It was the beginning of many things, not least of which was the self-licensing of the Court to recreate the equal protection clause in its own image. After the first set of arguments in the school desegregation cases, the Court set the cases for reargument on the question of what light the history of the origins of the clause might shed on the question of the constitutionality of racially segregated schools.[17] As the unanimous decision for the Court written by its new Chief Justice, Earl Warren, said:

> Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not

15. *Id.* at 641-42 (citations omitted).

16. Gong Lum v. Rice, 275 U.S. 78 (1927); Cummings v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

17. 345 U.S. 972 (1953).

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enough to resolve the problem with which we are faced.[18]

Alexander Bickel, who announced that "*Brown v. Board of Education* was the beginning,"[19] was present at the creation. Indeed, he had a hand in it. As law clerk to Mr. Justice Frankfurter during the 1952 Term, Bickel prepared the memorandum that was the basis for circulation by Frankfurter to the Court—and later saw light in a revised form in the *Harvard Law Review*[20]—that justified the proposition that the history neither compelled nor precluded a conclusion that the equal protection clause commanded desegregation. Bickel managed this result by bifurcating the question:

> Should not the search for congressional purpose . . . properly be twofold? One inquiry should be directed at the congressional understanding of the immediate effect of the enactment on conditions then present. Another should aim to discover what if any thought was given to the long-range effect, under future circumstances, of provisions necessarily intended for permanence.[21]

That the due process and equal protection clauses of the fourteenth amendment should be deemed elastic and dependent for their meaning on the wisdom of the Justices was long a favorite theme of Mr. Justice Frankfurter.[22] The Court, despite Mr. Justice Black's fulminations elsewhere against such broad construction as an improper invocation of "natural law,"[23] seemed willing to accept this position in *Brown* without specifically adopting it.

In 1939 Professor ten Broek, who became the prime explicator of the

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18. Brown v. Board of Educ., 347 U.S. 483, 489 (1954).

19. *See* note 1, *supra.*

20. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

21. *Id.* at 59.

22. *See, e.g.,* P. KURLAND, FELIX FRANKFURTER ON THE SUPREME COURT 223-24, 460, 546 (1970).

> With the great men of the Court constitutional adjudication has always been statecraft. The deepest significance of Marshall's magistracy is his recognition of the practical needs of government, to be realized by treating the Constitution as the living framework within which the nation and the States could freely move through the inevitable changes wrought by time and inventions. . . . Not anointed priests, removed from knowledge of the stress of life, but men, with proved grasp of affairs who have developed resilience and vigor of mind through seasoned and diversified experience in a work-a-day world are the judges who have wrought abidingly on the Supreme Court.

Id. at 121-22.

23. *See, e.g.,* Adamson v. California, 332 U.S. 46, 69 (1947); H. BLACK, A CONSTITUTIONAL FAITH 34-40 (1968).

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"old" equal protection,[24] wrote:

> Whenever the United States Supreme Court has felt itself called upon to announce a theory for its conduct in the matter of constitutional interpretation, it has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument or of the people who adopted it.[25]

It must be conceded that this resort to history was that of advocates for a position. As such landmark cases as *Dred Scott v. Sandford,*[26] *Myers v. United States,*[27] *Pollock v. Farmers' Loan & Trust Co.*,[28] and *Plessy v. Ferguson*[29] quickly reveal, the Justices readily found in the framing of the constitutional provisions at issue whatever intent they wished to find. A reader of the Court's opinion in *Brown* might be excused his cynicism which suggests that a finding of neutrality in the constitutional history means that there was no support to be found for the position that the Court was prepared to take.[30]

In any event, in *Brown* the Court abandoned the search for the framers' intent—an amorphous concept at best—and chose instead to write a Constitution for our times. "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 . . . ."[31]

The contemporary importance of education, or at least of schooling, hardly afforded a rationale for resolving the question before the Court, but only a reason for dispensing with the notion that what was meant

24. J. TEN BROEK, EQUAL UNDER LAW (1965); Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

25. ten Broek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CALIF. L. REV. 399 (1939).

26. 60 U.S. (19 How.) 393 (1857).

27. 272 U.S. 52 (1926).

28. 157 U.S. 429 (1895).

29. 163 U.S. 537 (1896).

30. Such cynicism would be fed by Raoul Berger's study of the origins of the fourteenth amendment. R. BERGER, GOVERNMENT BY JUDICIARY (1977). On the abuse of history by constitutional lawyers, see C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119. Nor can historians be credited with a lack of bias any more than lawyers. *See* D. FISCHER, HISTORIANS' FALLACIES (1970). It is the proof behind the assertions of each that must be the measure of truth, not the eminence of the proposer.

31. 347 U.S. at 492.

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in 1868 by the language of the fourteenth amendment was still controlling. Distortion of "original meaning" was not a novelty even before *Brown*. But *Brown* was the beginning of the expansive neo-natural law syndrome that allows the Justices to act not merely as interpreters of the Constitution, but as its creators. The conditions of education were different in 1868 than today; we, the Justices, shall decide what kind of constitutional provision would be most appropriate for today's conditions and we shall substitute the new meaning for the old.

Such behavior gives some people qualms about the meaning of constitutionalism, of what Bickel meant by "provisions necessarily intended for permanence,"[32] when the Constitution is acknowledged by its custodians to be so malleable. That concern is not abated because the Court acts one way and talks another, pretending that it speaks not with its voice but with that of the authors of the Constitution. "The voice is Jacob's voice, but the hands are the hands of Esau."[33]

"*Brown v. Board of Education* was the beginning" because it wiped clean the slate. It enabled the Court to write its own code of equality in substitution for the equal protection clause which, as late as the time of Mr. Justice Holmes, was regarded as the last resort of desperate litigants.[34] Professor Tribe's text on constitutional law describes "the model of equal protection,"[35] almost all of which is based on judicial manufacture since *Brown*.

III.

"*Brown v. Board of Education* was the beginning," but not of new constitutional doctrine or, if a beginning of constitutional doctrine, only the merest adumbration of it. The opinion affords no principle on which to build. There is only the factual proposition that compulsory separation of the races in public schools is detrimental to black children because it "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[36] That conclusion need not be questioned except to note that the opinion's statement of the result is far clearer than its proof. And it might be asked whether the meretricious state action

32. *See* note 20 *supra* and accompanying text.
33. *Genesis* 27:22.
34. Buck v. Bell, 274 U.S. 200, 208 (1927).
35. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1136 (1978).
36. 347 U.S. at 494.

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causing such feeling of inferiority should not have invoked the condemnation of the due process clause rather than the equal protection clause.

Aside from its conclusory statement, the Court relied only on its recent graduate and law school cases[37] and its own ipse dixit. "Separate educational functions are inherently unequal. . . . We have now announced that such segregation is a denial of the equal protection of the laws."[38]

The logical proposition in support of an equality argument that may be derived from the language of the Court is: (1) adequate schooling can be afforded only in classrooms that contain students of the white majority; (2) white majority students are free to participate in schooling with other white majority students, but black minority students are precluded by state law or constitution from sharing such schooling with whites; therefore, (3) black students are deprived of equal educational opportunity. The major premise, of course, has never been established and remains the subject of much controversy among scholars of many disciplines.

Whatever one feels about the conclusion reached by the Court—and I, for one, am wholeheartedly in agreement with the conclusion that compulsory segregation of schools by race is unconstitutional—the opinion was a shabby, disingenuous way of disposing of some of the most consequential cases before the Supreme Court since *Dred Scott*.[39] It has been excused largely on the ground that the opinion was the result of desperate negotiations aimed at assuring unanimity rather than clarity. Most committee efforts bear the stigmata of compromise. Certainly, majority Supreme Court opinions frequently do, and not least in cases of great social consequence, when unanimity must be regarded as "a miracle of rare device."[40]

The Court did not purport to overrule *Plessy v. Ferguson* or the doctrine of separate-but-equal that it spawned. Instead, after reciting the adverse effect of segregated schooling on the psyches of black students, the Court wrote: "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* con-

37. *See* notes 18-29 *supra* and accompanying text.

38. 347 U.S. at 495.

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

40. Coleridge, *Kubla Khan*, in OXFORD BOOK OF ENGLISH VERSE 669 (1940).

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trary to this finding is rejected."[41] It was here that the Court inserted a footnote with references to several social science papers, but only to support the proposal that the science of psychology had advanced beyond what it may have been in *Plessy's* day. It would take an extraordinarily sophisticated, or perhaps an extraordinarily naive, approach to judicial behavior to believe that the cited literature was the cause of the Court's judgment rather than the result of it.[42]

It is not enough, Professor Felix Frankfurter once told his colleague Professor Thomas Reed Powell, to point out to students that the Court's reasoning is defective. A good instructor would invite the students to speculate on the reasons for the shoddiness of the opinions. After all, Frankfurter said the Professor should tell his students, the Justices are "probably as bright as you are, even as bright as I am."[43] And so, without weighing the validity of the Frankfurter dictum, I ask the reader to ponder why the *Brown* opinion was so wanting in reason.

For myself, I thought that the answer was to be found in the proposition that I have been reiterating: "*Brown v. Board of Education* was the beginning." And so, the Court did not mean *Brown* to determine or even to suggest the answers to the myriad of legal problems that would flow from its revolutionary decision to strike down Jim Crow, at least in public school classrooms. Time and experience would be necessary for a fuller delineation of constitutional principles.

But my analysis will not wash in the light of the companion case of *Bolling v. Sharpe*,[44] which struck down the District of Columbia's school segregation law under the fifth amendment due process clause. Perhaps it was the still accepted constitutional concept of federalism, and the state power that it envisaged, that caused the reluctance to speak out in *Brown*. In *Bolling* that restraint was not present, and the opinion afforded principles, or at least measures, that have since been frequently invoked not only in school desegregation cases, but also in many decisions that make up Professor Tribe's equal protection model. In *Bolling* the Court apparently was willing, nay anxious, to turn the clock back at least to 1896:

> Classifications based solely upon race, must be scrutinized with particular care, since they are contrary to our traditions and hence constitution-

41. 347 U.S. at 494-95.
42. *See* Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).
43. H. PHILLIPS, FELIX FRANKFURTER REMINISCES 276 (1960).
44. 347 U.S. 497 (1954).

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> ally suspect. As long ago as 1896, this Court declared the principle "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race. . . .
>
> . . . Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. 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.[45]

Having supplied more than adequate basis for its decision in ruling that racial differences afford no rational basis for legal distinctions, the Court insisted on trying to lift itself by its bootstraps to a height it had already attained: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[46]

This is a classic case of insisting on putting the cart before the horse. Having used the proposition of illegal classification, theretofore an equal protection concept, to justify a finding of due process violation, the Court felt compelled to resort to its equal protection ruling, in which it did not rest on invalid classification, to bolster its due process ruling. How much better it might have been for the Court to have made *Brown* the tail to the *Bolling* kite, rather than vice versa.

A judicial critic even brighter than Frankfurter's "you or I," Judge Learned Hand, speculated about the meaning of what he called "The Segregation Cases":

> In these decisions did the Court mean to "overrule" the "legislative judgment" of states by its own re-appraisal of the relative values at stake? Or did it hold that it was alone enough to invalidate the statutes that they had denied racial equality because the amendment inexorably exempts that interest from legislative appraisal? It seems to me that we must assume that it did mean to reverse the "legislative judgment" by its own appraisal. . . . *Plessy v. Ferguson* was not overruled in form anyway . . . . I do not see how this distinction can be reconciled with the notion that racial equality is a paramount value that state legislatures are not to

45. *Id.* at 499-500.
46. *Id.* at 500.

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appraise and whose invasion is fatal to the validity of any statute.[47]

It may be that the Court really provided two strings for its bow: *Brown*, available to suggest the need to have judicial values prevail over a legislature's; and *Bolling*, to damn the use of race as a basis for legislative classification except in the nonexistent case of a reasonable connection between race and a legitimate governmental objective. Indeed, history has since revealed that the Court has vacillated between the alternative meanings suggested by Judge Learned Hand.

In fact, however, Hand's reliance on the Court's distinction, rather than overruling, of *Plessy v. Ferguson* was totally discounted by the Court's behavior in a series of per curiam decisions following *Brown* and *Bolling*. Citing *Brown* and not *Bolling*, the Court in quick sequence struck down state-maintained segregated parks,[48] beaches and bath houses,[49] golf courses,[50] and public transportation.[51] Despite the emphasis on the special quality of education as a reason for distinguishing *Plessy*, the Court readily demonstrated, with even less reasoning than it afforded in *Brown*, that the doctrine of separate-but-equal had been effectively demolished in the school desegregation cases. These memorandum decisions more appropriately would have been disposed of by reference to the *Bolling* standard that segregation by race "is not reasonably related to any proper governmental objective."[52] But the cases involved state action, not federal, and so the label invoked was *Brown* rather than *Bolling*, with the implication that they both said the same thing in different words.

After *Brown* and *Bolling*, school desegregation cases afforded the Supreme Court few vehicles for shaping equal protection doctrine, but only means for reshaping the Constitution's allocation and limitation of governmental powers among the three branches of the national government and between the national and state governments.

IV.

"*Brown v. Board of Education* was the beginning." The proposition

47. L. HAND, THE BILL OF RIGHTS 54-55 (1958).
48. Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954).
49. Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955).
50. Holmes v. City of Atlanta, 350 U.S. 879 (1955).
51. Gayle v. Browder, 352 U.S. 903 (1956).
52. *See* note 45 *supra* and accompanying text.

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is even more appropriately applied to *Brown II*,[53] as it has come to be called, than to *Brown I*. The *Brown* cases were first argued during the 1952 Term and were set for reargument during the 1953 Term. It has been said, without much evidence, that the intervening death of Chief Justice Vinson and his replacement by Earl Warren made the difference between victory and defeat for plaintiffs. I do not believe it. It might have made the difference between a unanimous opinion and a divided Court. It surely made a difference in the shaping of the opinion. But the price of unanimity may have come too high, and certainly we could have done with a better opinion.

After the decision in *Brown I*, the case was again set for reargument; not for reargument on the issue of constitutional violation, but for argument on the form of the decree. Again the Court put to counsel two of the questions first proposed for answer on the reargument of the merits. They were questions numbered "4" and "5," complex questions, not simple ones. The Court asked, first, whether it should enter a decree calling "forthwith" for admission of "Negro children . . . to schools of their choice . . . within the limits set by normal geographic school districting," or, in the alternative, whether the Court should "permit an effective gradual adjustment . . . from existing segregated systems to a system not based on color distinction."[54] The second question was whether the Supreme Court should itself frame the decree, appoint a special master to do so, or remand the cases to the trial courts for disposition.[55] The essential question, it turned out, was whether the Court should act in its ordinary judicial mode, or whether the special nature of the problem called for assumption of a legislative role. The Court chose the latter.

Counsel for plaintiffs argued that the Court should write a decree for immediate, or the quickest feasible, effectuation of its holding that segregation by race was unconstitutional. Counsel for defendants argued that so fundamental a change in the life of the South could not be brought about immediately, that time was necessary to secure conformity with the *Brown I* holding. Each case, they said, was factually unique, particularly with regard to the proportionate numbers of black and white schoolchildren to be accommodated within each system. Defendants' counsel contended that federal trial court judges were most

53. 349 U.S. 294 (1955).
54. 347 U.S. at 495 n.13.
55. *Id.*

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knowledgeable about the conditions of the school districts within their jurisdictions and could, therefore, best adapt the constitutional rule to particular facts.[56] Defendants prevailed.

Whether as the result of a sudden loss of nerve in light of the violent reaction to *Brown I*, or as a price paid for the unanimity it had shown there, the Court relegated the power of disposition to the federal district courts with the admonition that desegregation of the schools must occur "with all deliberate speed."[57] The "deliberate speed" phrase has been attributed to Francis Thompson's poem, *Hound of Heaven*, although Frankfurter, its obvious sponsor on this occasion, sought to trace it to classical equity decrees. It might have been better had the Court looked to Shakespeare's *Henry VI* rather than to Thompson's effort: "Defer no time, delays have dangerous ends."[58]

Brown II emphasized the breadth of equity powers that could be invoked by the district courts as well as the wide range of issues that could be taken into consideration by those courts in effecting the social revolution implicit in the substantive decision:

> [T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.[59]

In short, the federal courts were to substitute themselves for the local governing bodies with regard to the management of apparently all aspects of schooling except curriculum, and even that was later to come within the judicial ken. How much better it might have been had the Court directed, as it had suggested in question "4," that "Negro children" should "forthwith" be admitted "to schools of their choice . . . within the limits set by normal geographic school districting."[60] Every one of the items in the Court's catalogue of relevant factors, and particularly the powers over "transportation" and redistricting, were to lead

56. Plaintiffs' and defendants' arguments and briefs are reproduced in volumes 49 and 49A P. KURLAND & G. CASPER, LANDMARK BRIEFS AND ARGUMENTS IN THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (1977).

57. 349 U.S. at 301.

58. W. SHAKESPEARE, HENRY VI, Act I, sc. 3, l. 33.

59. 349 U.S. at 300-01.

60. *See* note 54 *supra* and accompanying text.

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to lengthy and complex litigation, some of which is still pending in the Supreme Court on the twenty-fifth anniversary of the *Brown I* decision.

Brown II was, thus, the beginning of the extensive use of federal courts as overseers of units of local government. In Hamiltonian terms, the courts were to have "will" and "force" as well as "judgment."[61] Today it is not regarded as unusual for the federal courts to undertake such assignments. Indeed, the Supreme Court was subjected to some chastisement when it recently rejected the proposal that federal courts take over the supervision of the Philadelphia police department.[62]

One of our most able federal judges, Judge Carl McGowan of the United States Court of Appeals for the District of Columbia Circuit, pointed out that it was the wisdom of the founding fathers in providing for the possibility of lower federal courts that made possible the great expansion of judicial power in recent years:

> It is, thus, no detraction from the Supreme Court's achievement in the school segregation cases to conclude that its path was made easier, its range of alternatives enlarged, by decisions taken earlier in the life of the republic with respect to the organization of national judicial power. The same can be said of many other advancements and alterations in legal doctrine summoned into being by the Supreme Court's expansive reading of familiar constitutional phrases. . . . Without the availability of the local federal courts, it is difficult to believe that this audacious venture by the Supreme Court into the political thickets would have appeared feasible in the first place.[63]

It was not just the availability of the lower federal courts, but the utilization of them as governing bodies exercising wide-ranging equitable discretion that marks the innovation of *Brown II*. "The general practice is to leave the enforcement of judge-made constitutional law to private initiative."[64] The immediate progeny of *Brown* in the Supreme Court was enforced in exactly this manner. Initially there were the cases decided with reference to parks, beaches, and public transportation[65] that were expected to be enforced without having the federal courts assume supervisory control over the parks, beaches, buses, and

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

62. Rizzo v. Goode, 423 U.S. 362 (1976); *cf.* O'Shea v. Littleton, 414 U.S. 488 (1974) (denying standing to challenge alleged racial discrimination in local administration of criminal justice). *See* L. TRIBE, *supra* note 35, at 89, 155-56, 309, 994.

63. C. MCGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES 16-17 (1969).

64. A. BICKEL, THE MORALITY OF CONSENT 111 (1975).

65. *See* notes 48-51 *supra*.

the like. Then there were the cases involving schools of higher education,[66] and even a high-school level academy run by the City of Philadelphia under a trust for the benefit of impoverished white youths.[67] In each of these cases, in which the Court undertook to issue per curiam opinions, particular applicants had been excluded "solely on account of their race and color." The Court ordered their immediate admission. The Court held *Brown II*, both in its provisions for federal court supervision and for delay of effectuation of a decree, irrelevant here. The Court did not suggest why *Brown II* should be irrelevant. The emotional and physical response to the southern university cases were not likely to be—indeed they were not—less violent than to grammar and high school desegregation. The invocation of federal police at the University of Mississippi and the University of Alabama to effectuate desegregation[68] was, with the possible exception of Little Rock,[69] never necessitated by lower school desegregation.

It is true that the black student numbers at the university level were small and would not quickly grow in light of the Court's mandate in *Hawkins v. Board of Control*[70] that admission was to be controlled by "the rules and regulations applicable to other qualified candidates."[71] It is also true that the higher education cases derived from rules established before *Brown* in *McLaurin* and *Sweatt*. And, perhaps most important, the upper school cases did not involve the necessary mix of the states' compulsory education laws with the rule against compulsory student segregation on the basis of race. But the Court never suggested these distinctions, or why they should be meaningful. It simply proceeded to treat these cases in the ordinary judicial mode.

V.

The next school desegregation cases to reach the Court reinforced the concept of the federal judiciary as promulgator of edicts rather than

66. Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957); Florida ex rel. Hawkins v. Board of Control, 350 U.S. 513 (1956); Lucy v. Adams, 350 U.S. 1 (1955). *See also* Tennessee Bd. of Educ. v. Booker, 353 U.S. 965 (1957); Louisiana State Univ. v. Tureaud, 351 U.S. 924 (1956); Board of Trustees v. Frazier, 350 U.S. 979 (1956); Wichita Falls Junior College Dist. v. Battle, 347 U.S. 974 (1954); Tureaud v. Board of Supervisors, 347 U.S. 971 (1954).

67. Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

68. *See* V. NAVASKY, KENNEDY JUSTICE 110-11, 159-61 (1971).

69. *See* notes 72-85 *infra* and accompanying text.

70. 350 U.S. 413 (1956).

71. *Id.* at 414.

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as resolver of disputes. The Court convened a Special Term to hear and dispose of *Cooper v. Aaron*,[72] which was the consequence of the invocation of force by the Governor of Arkansas and henchmen to forestall the implementation of a school board's voluntary desegregation plan.

Between 1955 and 1958, time had not been kind to the Court's expectations that reasonable men would, under the supervision of the federal district courts, work out methods for school desegregation in the South. Apparently, men of reason, no less men of good will, were in short supply when dealing with so emotional a subject as school desegregation. Moreover, politicians like Faubus in Arkansas, Wallace in Alabama, and Barnett in Mississippi, to name just a few of the more raucous, saw the fight against desegregation as their ladder to glory. Each saw himself as the Calhoun of his period instead of the tinhorn that probably would be his label in history. Wallace, indeed, all but parlayed his racism into a chance for the American Presidency.

In this instance, the School Board of Little Rock, reluctantly but expeditiously, had prepared a plan for desegregation of the city's schools even before the *Brown II* decision. The plan was certainly modest. It proposed desegregating the schools at the rate of two grades per year beginning with the eleventh and twelfth grades in 1957, and carrying down to the first and second grades as the last to be integrated in 1963. Plaintiffs did not see this as "deliberate speed," but were unsuccessful in trying to prevent its approval by the trial court and the Court of Appeals for the Eighth Circuit.

Meanwhile, the Governor and the State Legislature had declared *Brown* unconstitutional and took steps to make illegal its effectuation. But the school board proceeded with its plan. School integration was not yet a hot issue in Little Rock itself. Calm prevailed in Little Rock until the day before Central High School was to open its doors to a total of nine black students along with its more than two thousand white students. At that time, Faubus dispatched the Arkansas National Guard in force to surround the high school to prevent the blacks from entering. The school board, on petition for instructions to the district court, was ordered to effectuate its plan. But the state troops effectively prevented the admission of the blacks for three weeks. The nation was treated, on television and in the newspapers, to the unedifying spectacle

72. 358 U.S. 1 (1958).

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of the use of the military against the enforcement of the constitutional rights of nine black children.

The United States then intervened in the district court to seek an injunction against interference by the Governor and the officers of the national guard with the federal district court's order.[73] The court granted the injunction, and Faubus meekly removed his troops. But he had attained his objective. A sadly militant group of the Little Rock population replaced the troops. It became necessary for the United States to send in the army to assure the attendance of the nine, reduced to eight, black students. Thereafter, a portion of the national guard was federalized and became the students' protectors for the rest of the school year.

In the middle of the year, the school board petitioned the district court for leave to abandon its plan. The court found such "chaos, bedlam and turmoil," with repeated instances of "violence" against the black students, and "tension and unrest" among all concerned, that it granted the board's petition.[74] The Eighth Circuit Court of Appeals reversed,[75] but entered a stay against its own order pending review in the Supreme Court.

The Supreme Court did the only thing possible to do if law were not to be declared bankrupt against the claims of unlawful force. It affirmed the Eighth Circuit and removed the stay:

> One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the Board's legal position. Had Central High School been under the direct management of the State itself, it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights was rendered difficult or impossible by the actions of other state officials. The situation here is in no different posture . . . .

73. Faubus v. United States, 254 F.2d 797 (8th Cir.), *cert. denied*, 358 U.S. 829 (1958).

74. Aaron v. Cooper, 163 F. Supp. 13, 20-21 (E.D. Ark.), *rev'd*, 257 F.2d 33 (8th Cir.) *aff'd*, 358 U.S. 1 (1958).

75. 257 F.2d 33 (8th Cir.), *aff'd*, 358 U.S. 1 (1958). The Fifth Circuit already had rejected the argument of psychological unreadiness as a barrier to integration. *See* Jackson v. Rawdon, 235 F.2d 93, 96 (5th Cir.), *cert. denied*, 352 U.S. 925 (1956). *But see* Hawkins v. Board of Control, 93 So.2d 354 (Fla.), *cert. denied*, 355 U.S. 839 (1957). *See also* County School Bd. v. Thompson, 252 F.2d 929 (4th Cir. 1957), *cert. denied*, 356 U.S. 958 (1958); Allen v. County School Bd., 249 F.2d 462 (4th Cir. 1957), *cert. denied*, 355 U.S. 953 (1958).

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> The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which followed upon the actions of the Governor and Legislature.[76]

Few would quarrel with the Court's decision except those committed to lawlessness in the name of what they called a higher law. (This notion of a higher law has since been more frequently invoked by elements very different from the Faubuses and Wallaces of our land, but to the same end of destruction of the rule of law.)

The opinion, allegedly authored by all nine Justices, would have afforded no surprises, except that it proceeded far beyond the decision of the case. It had been the accepted learning that no one is bound by a court's judgment except parties to the litigation who had participated in it or had the opportunity to do so. "This means quite literally," Bickel once noted, "that no one is under any legal obligation to carry out a rule of constitutional law announced by the Supreme Court until someone else has conducted a successful litigation and obtained a decree directing him to do so."[77] That was not the Supreme Court's view of its authority as expressed in *Cooper v. Aaron*. "Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' "[78] Chief Justice Marshall, in *Marbury v. Madison*,[79] made the Supreme Court the ultimate arbiter of the Constitution. It is, therefore, incumbent on everyone, and particularly officials sworn to uphold the Constitution, to accept Supreme Court opinions as binding on them, although they were not parties to it. Or to revert to Bickel's words: "[A] constitutional rule once laid down by the Supreme Court creates a duty among all persons affected, and especially government officials who are oathbound to effectuate the Court's will to implement that law."[80] Thus, in one fell swoop, a judgment became a ukase, with a rigidity that the Court was never before willing to afford stare decisis.

The opponents of desegregation were asserting the same line of argument to a different end. They charged that the law of the land had been expressed in *Plessy v. Ferguson* and the series of cases sustaining segregated schooling that preceded the decision in *Brown*, and that it was binding not only on the populace but even on the Supreme Court.

76. 358 U.S. at 15-16.
77. A. BICKEL, *supra* note 64, at 111.
78. 358 U.S. at 18.
79. 5 U.S. (1 Cranch) 137, 177 (1803).
80. A. BICKEL, *supra* note 64, at 110.

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When, under *Cooper v. Aaron*, does a Supreme Court decision cease to be the law of the land? When the Supreme Court announces the change. But what opportunity will the Court have to announce the change if all persons are foreclosed from bringing the issue before it because of the requirement to abide by all Supreme Court decisions? If challenges through the courts and the ballot box are both foreclosed, the sole alternative is force.

Cooper v. Aaron offered the Court an emotion-packed issue. Frankfurter, who had not before agreed to the Court's assertion of imperialism,[81] wrote an impassioned concurring opinion, pleading with the nation to support and to adapt to the Court's *Brown* decision.[82] The rule of law was challenged by a sovereign state; "chaos, bedlam and turmoil" were in the offing. The Court responded first with a calm, reasoned expression of the resolution of the issue; then with its own highly emotional screed about its authority. It denied recognition to the fact that under our Constitution the executive and legislative will may be effected through force, but the judicial process depends on consensual acceptance of its authority, or it is doomed to self-destruction.

Contrary to the Court's Louis XIV's notion of itself, "*l'etat, c'est moi*," sociologists, who purport to be able to measure these things, tell us that the Court and the rule of law it represents are both declining in the people's estimation. Part of the cause of the decline is found in the expansive notions of its own functions. There is anomaly in the reported statistics. Thus, Professor Morris Janowitz reports: "On the basis of national samples . . . in 1949, 83.4% of the population expressed approval and trust in the Supreme Court, but by 1973, the figure had decreased to 32.6%. The Harris Survey for 1975 showed even lower 'confidence'; namely, 28%."[83] We are told by the same author that the decline is attributable to the Court's "changes in the criminal justice system and the use of law to direct sociopolitical change."[84] And yet, "[s]ince the U.S. Supreme Court decision on school desegregation, mass attitudes . . . in support of school integration have continually increased. Public support for the goal of school integration . . . grew

81. *See* United States v. United Mine Workers, 330 U.S. 258, 308 (1947).

82. 358 U.S. at 21.

83. M. JANOWITZ, THE LAST HALF-CENTURY: SOCIETAL CHANGE AND POLITICS IN AMERICA 383 (1978).

84. *Id.* at 366.

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from 53% in 1950 to 78% in 1972. . . .[85] While court actions have modified the practices in a wide range of institutions, they have also produced a marked decline in confidence in the legal system and in the legitimacy of the coercive sanction of the state."[86] If these are anomalies, there are still more of them to be found in the unfolding story of the school desegregation cases in the Supreme Court.

VI.

The Supreme Court did not render another opinion in school desegregation cases until 1963.[87] In the interim the lower federal courts were left to strike down various devices for evasion concocted by the states to prevent the effectuation of *Brown. Cooper v. Aaron*[88] afforded guidance to the lower courts for dealing with tactics of interference, whether taken in terms of the lofty doctrine of "interposition" or by the more mundane transfer powers under "pupil placement laws."[89] And the courts of appeals insisted on a stringent rule of desegregation for higher education in keeping with the Court's earlier mandate.[90]

The lower courts vacillated about the need to exhaust state remedies before seeking injunctive relief in the federal courts. Whichever decision the lower courts made, requiring exhaustion of remedies[91] or rejecting the requirement,[92] the Supreme Court refused to intercede.

The federal courts frustrated attempts to replace a complying school

85. *Id.* at 381.

86. *Id.* at 369.

87. Goss v. Board of Educ., 373 U.S. 683 (1963); McNeese v. Board of Educ., 373 U.S. 668 (1963).

88. *See* notes 71-85 *supra* and accompanying text.

89. *See* Bush v. Orleans School Bd., 364 U.S. 500 (1960).

90. *See, e.g.*, Mississippi v. Meredith, 372 U.S. 916 (1963); Gantt v. Clemson Agricultural College, 320 F.2d 611 (4th Cir.), *cert. denied*, 375 U.S. 814 (1963); Brunson v. Board of Trustees, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963); Fair v. Meredith, 298 F.2d 696, 305 F.2d 341, 306 F.2d 374 (5th Cir. 1961), *cert. denied*, 371 U.S. 828 (1962); Board of Supervisors v. Ludley, 252 F.2d 372 (5th Cir.), *cert. denied*, 358 U.S. 819 (1958); Booker v. Tennessee Bd. of Educ., 240 F.2d 689 (6th Cir.), *cert. denied*, 353 U.S. 965 (1957).

91. Allen v. County School Bd., 249 F.2d 462 (4th Cir. 1957), *cert. denied*, 355 U.S. 953 (1958); School Bd. v. Atkins, 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957); Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957); School Bd. v. Allen, 240 F.2d 59 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

92. Holt v. Raleigh City Bd. of Educ., 265 F.2d 95 (4th Cir.), *cert. denied*, 361 U.S. 818 (1959); Covington v. Edwards, 264 F.2d 780 (4th Cir. 1958), *cert. denied*, 361 U.S. 840 (1959); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957); Hood v. Board of Trustees, 232 F.2d 626 (4th Cir.), *cert. denied*, 352 U.S. 870 (1956).

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board with one that would not comply, and that position was affirmed by the Supreme Court.[93] Attempts to invoke various provisions of the Constitution as barriers to desegregation were all to no avail. No federal question was presented, it was said, in a suit to enjoin condemnation of land for a nonsegregated school site.[94] The first amendment did not preclude citation for contempt for segregationists urging defiance of court-ordered segregation,[95] and a federal court enjoined as invalid a state law making it a crime to induce support of desegregation.[96] The courts held that the eleventh amendment was no bar to suits against the states or their agencies to enjoin segregation.[97] The conversion of a building in an all-white neighborhood into an all-black elementary school did not constitute a taking of property without due process of law.[98] The imagination of lawyers for desperate clients knew no bounds. Their arguments would have been considered absurd at any time when the Constitution was not in such a state of flux.

There were some leaks in the dike. A few less obviously camouflaged tactics were successful. A decision to enlarge a school in a black neighborhood passed muster,[99] as did a school districting plan that placed a larger proportion of blacks in one district than in another.[100] The Alabama Placement Law was held not to be unconstitutional on its face and the refusal of a school board to assign pupils to the schools nearest their homes was sustained by a judgment later affirmed by the Supreme Court.[101]

At the same time, the Supreme Court affirmed three-judge court rulings that statutes authorizing the Governor to close desegregated

93. Bush v. Orleans Parish School Bd., 191 F. Supp. 871 (E.D. La.), *aff'd per curiam*, 365 U.S. 569 (1961).

94. Doby v. Brown, 232 F.2d 504 (4th Cir.), *cert. denied*, 352 U.S. 837 (1956).

95. Kasper v. Brittain, 245 F.2d 92, 97 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957).

96. *See* Gremillion v. United States, 368 U.S. 11 (1961) (*per curiam*), *aff'g*, 194 F. Supp. 182 (E.D. La. 1961).

97. *See, e.g.,* East Baton Rouge Parish School Bd. v. Davis, 287 F.2d 380 (5th Cir.), *cert. denied*, 368 U.S. 831 (1961); St. Helena Parish School Bd. v. Hall, 287 F.2d 376 (5th Cir.), *cert. denied*, 368 U.S. 830 (1961); Louisiana State Bd. of Educ. v. Allen, 287 F.2d 32 (5th Cir.), *cert. denied*, 368 U.S. 830 (1961).

98. Chandler v. Board of Pub. Educ., 313 F.2d 636 (5th Cir.), *cert. denied*, 375 U.S. 835 (1963).

99. Alexander v. County Bd., 371 U.S. 824 (1962) (denial of certiorari).

100. Sealy v. Department of Pub. Instruction, 252 F.2d 898 (3d Cir.), *cert. denied*, 356 U.S. 975 (1958).

101. Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 373, 384 (N.D. Ala.), *aff'd per curiam*, 358 U.S. 101 (1958).

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schools or to withhold state funds from them were unconstitutional.[102] And the Court refused to review a Fourth Circuit decision holding that Norfolk, Virginia, could not withhold previously appropriated funds from a school that had been desegregated.[103] Where a school board had, in good faith, commenced proceedings toward desegregation, the federal court stayed its hand;[104] but a school board that had yet taken no steps toward desegregation would not be afforded seven years to effectuate its plan.[105]

The lower courts, five years after the decision in *Brown II*, began to reject plans that failed to meet proper goals. A year-by-year integration plan was rejected as too little and too late.[106] Courts of appeals compelled temporary injunctions ordering commencement of desegregation processes against the will of reluctant trial judges.[107] Jury trials were held not available to parties in school desegregation cases.[108] The Court was not yet ready in 1964 to take up a case from Indiana holding that racial imbalance resulting from neighborhood school assignments was not a constitutional violation.[109] That question would worry the courts considerably at a later time.

The Supreme Court in 1963, eight years after *Brown II* and five years after *Cooper v. Aaron*, began to move into the desegregation arena. By this time, the issues were focused not on what was a constitutional violation, but rather on what was a proper and appropriate remedy to correct any such violation. In *McNeese v. Board of Education*,[110] the Supreme Court held that exhaustion of state remedies was not a prerequisite to a suit to enjoin segregation within a single public school in southern Illinois. "The First Congress," wrote Mr. Justice Douglas,

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102. Bush v. Orleans Parish School Bd., 187 F. Supp. 42 (E.D. La. 1960), *aff'd per curiam*, 365 U.S. 569 (1961); Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark.), *aff'd per curiam sub nom.* Faubus v. Aaron, 361 U.S. 197 (1959).

103. Duckworth v. James, 267 F.2d 224 (4th Cir.), *cert. denied*, 361 U.S. 835 (1959).

104. Avery v. Wichita Falls Ind. School Dist., 241 F.2d 230 (5th Cir.), *cert. denied*, 353 U.S. 938 (1957).

105. Allen v. County School Bd., 266 F.2d 507 (4th Cir.), *cert. denied*, 361 U.S. 830 (1959).

106. Evans v. Ennis, 281 F.2d 385 (3d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961).

107. Armstrong v. Board of Educ., 323 F.2d 333 (5th Cir. 1963), *cert. denied sub nom.* Gibson v. Harris, 376 U.S. 908 (1964); Davis v. Board of School Comm'rs, 322 F.2d 356 (5th Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

108. Robinson v. Brown, 320 F.2d 503 (6th Cir. 1963), *cert. denied*, 376 U.S. 908 (1964).

109. Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

110. 373 U.S. 668 (1963).

"created federal courts as the chief—though not always the exclusive—tribunals for enforcement of federal rights."[111] The rights sought to be enforced here were federal rights, and there was no reason to condition them on state action that, in any event, probably could not solve the deficiencies.

More central to the nation's concerns in this area was the decision in *Goss v. Board of Education*.[112] There, the trial court and the appellate court approved a desegregation plan providing for rezoning of the schools without regard to race. But, apparently having satisfied the requirements of *Brown*, the plan provided an escape hatch by a right of voluntary transfer from any school in which the student was in a minority to a school where he would be in the majority. The Supreme Court assumed the validity of the plan generally, but struck down the transfer provisions.[113] The Court's reasoning seemed clear cut:

> It is readily apparent that the transfer system proposed lends itself to perpetuation of segregation. . . . [T]here is no provision whereby a student might transfer upon request to a school in which his race is in a minority . . . .
>
> Classifications based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment. . . . The recognition of race as an absolute criterion for granting transfers which operate only in the direction of schools in which the transferee's race is in the majority is no less unconstitutional than its use for original admission or subsequent assignment to public schools. . . .
>
> The alleged equality—which we view as only superficial—of enabling each race to transfer from a desegregated to a segregated school does not save the plans. . . . Not only is race the factor upon which the transfer plans operate, but also the plans lack a provision whereby a student might with equal facility transfer from a segregated to a desegregated school. . . .
>
> This is not to say that appropriate transfer provisions . . . not based upon any state-imposed racial conditions, would fall. Likewise, we would have a different case here if the transfer provision were unrestricted, allowing transfers to or from any school regardless of the race of the major-

111. *Id.* at 672. *Cf.* Brown v. Rippy, 233 F.2d 796, 802 (5th Cir.) (Cameron, J., dissenting) (court should not interfere with administrative processes), *cert. denied*, 352 U.S. 878 (1956).

112. 373 U.S. 683 (1963).

113. *Id.* at 688. *Cf.* Calhoun v. Latimer, 377 U.S. 263 (1964) (district court needs to test the nature and effect of the plan); Watson v. City of Memphis, 373 U.S. 526 (1963) (desegregation of public park).

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ity therein.[114]

Although there was emphasis on the fact that the one-way transfer provision would be conducive to segregation, the Court's primary emphasis focused on the impropriety of the use by government of a racial classification as the basis for transfers. It appears from the Court's language that what was to become known as "freedom-of-choice" provisions, allowing free transfer to all students, would be valid.[115] It proved to be a short-lived notion in the Supreme Court's jurisprudence.

The Court began to shake its fist vigorously when faced with the history of clear defiance by the school board of Prince Edward County, Virginia. This county was one of the original defendants in the *Brown* cases. On oral argument there, its counsel had told the Court that he could not foresee acquiescence by the white community to sending the small minority of white students into what would necessarily be majority black schools, and, he said, because it was a farm community, its citizens were tied to the land; consequently, they had no way of avoiding desegregation by moving.[116] When finally faced with an order to desegregate, the County Board of Supervisors refused to appropriate moneys to run the public schools in Prince Edward County. In 1959 a private foundation operated a school for whites only. The public schools were closed. In 1960 the all-white school received county and state funds while public schools remained closed only in this one Virginia county. As a result of extensive litigation, the district court enjoined payments of tuition grants or tax credits so long as the public schools were closed and then ruled that the public schools could not remain closed so long as the other public schools in Virginia were open. The court of appeals, however, ordered the district court to stay its hand until state courts had determined the issue. Thus, *Griffin v. School Board*[117] came to the Supreme Court, which rejected the notion of ab-

114. 373 U.S. at 686-89. The Court thus adopted the position taken by Chief Justice Warren and by Justices Douglas and Brennan dissenting from the denial of certiorari in Kelly v. Board of Educ., 361 U.S. 924 (1959).

115. 373 U.S. at 689. *But cf.* Dillard v. School Bd., 308 F.2d 920 (4th Cir. 1962) (plan permitting transfer of student from school where student was in the minority held invalid), *cert. denied*, 374 U.S. 827 (1963); Northcross v. Memphis Bd. of Educ., 302 F.2d 818 (6th Cir. 1961), *cert. denied*, 370 U.S. 944 (1962).

The Court had previously ignored the Fourth Circuit's affirmance of a transfer plan that called for black students to meet special admissions requirements to enter a primarily white nonsegregated school. Slade v. Board of Educ., 252 F.2d 291 (4th Cir.), *cert. denied*, 357 U.S. 906 (1958).

116. *See* 49A P. KURLAND & G. CASPER, *supra* note 56, at 1163-68.

117. 377 U.S. 218 (1963).

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stention and proceeded to command relief.

The high court of Virginia had ruled that the County was empowered under Virginia law to close its schools. The Supreme Court acquiesced in that ruling as a determination of state law, but the Supreme Court held that closing the county's public schools while the other public schools in Virginia remained open was a denial of equal protection of the laws. Conceding that a state may choose to treat different counties within its domain differently, the Court said that constitutionally, different treatment for different counties was dependent on the validity of the reasons for that different treatment:

> But the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: 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. Whatever nonracial grounds 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 desegregation do not qualify as constitutional.[118]

The Court then faced the problem of determining the kind of decree it should frame to secure the objectives of its order. Not this time was the Court going to take the way out it used in *Brown II*: "That relief needs to be quick and effective."[119] That the district court could stop the payments to the all-white school by state and county authorities gave rise to no question. But the Court then took a giant step forward in the assertion of judicial authority:

> For the same reasons 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.[120]

The Court had become fed up with its "deliberate speed" formula. It should have been embarrassed that it took so long to say so: "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

118. *Id.* at 231.
119. *Id.* at 232.
120. *Id.* at 233.

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schools in the other parts of Virginia."[121]

The *Griffin* judgment had its problems. Although it purported to rest on discrimination between the children of the one Virginia county and the children in all the others,[122] that has never before, or since, been held to violate the Constitution. The Court itself would rule that it was not a constitutional violation in *San Antonio Independent School District v. Rodriguez*.[123] If it were a violation, it would be only because it was a means to an unconstitutional end—the perpetuation of segregated schools in Prince Edward County. Indeed, it was the discrimination between the black and white children of that county that was the fundamental issue. But, apparently fearful that the county would even close schools for all children as the least objectionable means of achieving equality, the Court had to come up with a rationale for an order compelling the reopening of public schools rather than simply an order against racial discrimination in the schools. This it accomplished by the proposition that an otherwise constitutional act became unconstitutional if undertaken with an unconstitutional motive. Certainly, that was highly dubious as a general constitutional proposition.

The opinion was even greater in its reach when it undertook judicial control of the appropriations and disbursements processes of the county. The husbanding of the taxing and appropriations powers to the elected representatives of the people was of the essence of the English and American constitutions. Revolutions were fought to establish that proposition in both countries.[124] Yet the Court, simply by its own say-so, assumed the powers that had been denied Kings and Presidents. The Court's simple proposition that its acknowledged power to negate state taxes and disbursements is no different from the power to create state taxes and disbursements is an excuse, not a justification, for usurpation of power. But then, if the Court can act in the legislative rather than the judicial mode, perhaps its taxation without representation is not inappropriate.

Griffin, however, marked the end of the first phase of Supreme Court adjudications in the area of school desegregation. *Griffin*, like *Goss* and *McNeese*, was still premised on the concept that the constitutional evil

121. *Id.* at 234.

122. *Id.* at 230.

123. 411 U.S. 1 (1973).

124. *See* Kurland, *The Colonies, the Parliament, and the Crown: The Constitutional Issues*, in POLITICAL SEPARATION AND LEGAL CONTINUITY 35 (1976).

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of school segregation inhered in its classification by race. The ultimate measure of racial balance was still to be discovered or, at least, acknowledged by the Supreme Court. Indeed, as with other illegitimates, it has never been fully acknowledged by its father. The racial balance cases stand the decisions from *Brown* through *Griffin* on their heads: the later cases do not forbid racial classifications; they command them.

VII.

There is, perhaps, both irony and justice—the two are not infrequently in each other's company—in the fact that the segregationists succeeded in delaying school integration only at the cost of causing the federal judiciary to multiply its demands severalfold. "*Brown v. Board of Education* was the beginning." And in the beginning plaintiffs' demands, purportedly met by *Brown I* if not satisfied by *Brown II*'s "deliberate speed," were for the elimination of race as a classification for the assignment of pupils to schools.

Thurgood Marshall, in his oral argument to the Court, exemplified the general position of the appellants throughout the *Brown* litigation that race was irrelevant to any legitimate governmental objective:

> Then I think whatever district lines they draw, if it can be shown that those lines are drawn on the basis of race or color, then I think they would violate the injunction. If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint.[125]

By 1968, continued frustrations of the Court's hopes brought about a change in what the Court viewed as its consitutional command. It was no longer sufficient that the law treat blacks and whites the same; it was now required that the law make them the same. The former was clearly within the ken of the judicial power. Equality before the law or equal protection of the laws, however you phrase it, has long been a principle of the rule of law applied by Anglo-Saxon courts. Making blacks and whites the same, rather than treating them the same, however, is beyond earthly powers. Pretense can be made by the reduction of individuals to numbers. For numbers can be added, subtracted, divided, and multiplied. The equation is a prime concept of even elementary mathematics as it can never be for the law, which, despite its recent pretensions, must remain a humanistic rather than a scientific

125. 49 P. KURLAND & G. CASPER, *supra* note 56, at 321.

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discipline. Individuals are not fungible. But there was no explicit constitutional bar to judicial pretension to heavenly power any more than there was such a bar to its pretension to the legislative function.

Green v. County School Board[126] marked a new beginning, for it started the changes in the meaning of desegregation from elimination of the use of racial factors in pupil assignment to homogenization of the student population within each school district and beyond. The issue in *Green* derived from the adoption of a "freedom-of-choice" plan in New Kent County, Virginia. Prior to the command for desegregation, New Kent had two schools, one for whites and one for blacks. Adapting to the commands of *Brown*, New Kent proposed that "each pupil, except those entering the first and eighth grades, may annually choose between the New Kent and Watkins schools and pupils not making a choice are assigned to the school previously attended; first and eighth grade pupils must affirmatively choose a school."[127] The Court conceded that this might have satisfied *Brown*, but for the first time revealed that the rule of *Brown* was to be considered only a first step in a far more sweeping judicial program. It did not say where in the Constitution the requirement for such a program derived:

> It was . . . dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were *required* by *Brown II* "to effectuate a transition to a racially nondiscriminatory school system." 349 U.S. at 301. It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from school attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the "white" schools. *See, e.g., Cooper v. Aaron*, 358 U.S. 1. Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . . .[128]

If *Brown* had secreted in its interstices what the Court in *Green* suggested it had—that the obligation of the states was to eliminate not only segregation but also its effects—it was one of the best kept secrets of contemporary times. There was no hint of it in the few previous excursions that the Court had ventured in this area. In any event, in *Green*

126. 391 U.S. 430 (1968).
127. *Id.* at 434.
128. *Id.* at 435-36.

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the Court suggested the possibility, but refused to rule, that the failure of the parents and students to desegregate the schools through freedom-of-choice was not a demonstration of free will on the part of the residents, but obviously the result of white coercion of black judgment. The record was all but barren of evidence to prove this point.[129]

It is true that New Kent County was hoist by its own petard. The school system consisted of two schools in a single county in which there was no housing segregation. Assignment of students to the school closest to their homes would have been a "colorblind" application of *Brown* that would have effected racially mixed schools. The resort to the more tenuous approach of freedom-of-choice plans in the light of this simple alternative may have put this case in the *Griffin* class, a constitutional plan vitiated by an unconstitutional motive.

Both *Green* and *Raney v. Board of Education*,[130] a companion case in which "freedom-of-choice" was rejected because it failed to change the makeup of the two schools in the county, made clear that the district court supervision of desegregation was not to end with the adoption of an acceptable plan, but was to continue through its implementation until assured that "disestablishment has been achieved."[131] The third of the troika of cases decided on May 27, 1968, fourteen years and ten days after *Brown*, again measured the validity of a plan by whether it resulted in biracial schools rather than whether the standards for admission were themselves nonracial. This time, however, the issue was a "free-transfer plan" rather than a "freedom-of-choice plan," although the substantive difference is hard to note.

In this new line of cases, again one found, some time later, more than met the eye. But essentially the patent argument was that where schools were originally divided between blacks and whites because of compulsory segregation laws, the school system would be required to devise a plan that would bring about biracial schools rather than totally segregated schools, and the school system could not leave it up to the

129. The only "evidence" that "freedom-of-choice" plans failed because of "coercion" derived from reports of the agency noted for its bias not its objectivity, the United States Civil Rights Commission. In note five of the opinion, 391 U.S. at 440-41, the Court sets out these findings preceded by the statement: "The views of the United States Commission on Civil Rights, which we neither adopt nor refuse to adopt, are as follows . . . ." This is somewhat reminiscent of Thomas Reed Powell's description of Chief Justice Stone as "neither partial, on the one hand, nor impartial on the other."

130. 391 U.S. 443 (1968).

131. *Id.* at 449.

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parents—in effect, the black parents—to bring about desegregation by transferring or registering their children in what previously had been all-white schools.

Strangely, that same Term, the Court affirmed per curiam a decision of a three-judge court that allowed for the preservation of an all-white state university and an all-black state university within the City of Montgomery, Alabama.[132] Mr. Justice Douglas' dissent remained unanswered:

> Can we say in 1969 that a State has no duty to disestablish a dual system of higher education based upon race? The three-judge court in a careful opinion seems to draw a line between elementary and secondary schools on one hand and colleges and universities on the other. The inference is that if this were an elementary school, the result would be different.
>
> The problem is in effect a phrase of "freedom of choice" which was before us in another aspect in *Green* . . . .[133]

Perhaps what Mr. Justice Douglas did not want to notice was that because Alabama's compulsory education laws did not extend to college and university level students, freedom-of-choice was the necessary mode for assignment of students of higher education. Nevertheless, the Department of Health, Education, and Welfare (HEW), if not the Constitution, would later accept Mr. Justice Douglas' view and demand desegregation of higher education in southern universities not by way of nonracial admissions standards, but by way of allocation of programs and benefits to lure whites into black schools and vice versa.[134]

The 1968 Term, one of the Court's busiest school desegregation efforts, ended its immediate reconstruction of *Brown* with a teacher integration case, *United States v. Montgomery County Board of Education*.[135] The trial court in that case ordered that the goal of the school system must be a "ratio of white to Negro faculty members [in each school] . . . substantially the same as it is throughout the system."[136] The court of appeals took exception to this part of the judge's

132. Alabama State Teachers Ass'n v. Alabama Pub. School & College Auth., 393 U.S. 400 (1969).

133. *Id.* at 401.

134. General Education Provisions Act, 20 U.S.C. § 1221d (1976).

135. 395 U.S. 225 (1969). The Court in Bradley v. School Bd., 382 U.S. 103 (1965), decided that segregation of teachers as well as segregation of students fell within the *Brown* rationale.

136. 289 F. Supp. 647, 654 (M.D. Ala.), *rev'd*, 400 F.2d 1 (5th Cir. 1968), *rev'd*, 395 U.S. 225 (1969).

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order:

> The decree under review states that schools with twelve or more faculty members must begin the school year 1968-69 with at least one of every six faculty and staff members being in a different race from the majority. Because of the difficulties inherent in achieving a precise five-to-one ratio, this part of the district court's order should be interpreted to mean *substantially or approximately* five to one. The decree is modified to this extent in order to allow a degree of flexibility in the application of the 1968-69 interim requirements.
>
> Additionally, whether the school board is in full compliance should not be decided solely by whether it has achieved the requisite numerical ratios.[137]

The opinion for the unanimous Court, written by Mr. Justice Black, was to a large extent an encomium to the trial judge, Frank Johnson, who had borne the brunt of the Wallaceite antipathies in Montgomery. The Court said, in effect, that were it not Judge Johnson, it might share the court of appeals' concern about "rigid or inflexible orders."[138] But it was Judge Johnson, and the Court thought "it best to leave Judge Johnson's order as written, rather than as 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."[139]

Such extraordinary deference—or perhaps, a simple counting of judicial heads gave Johnson's position a majority of one—was unusual. So, too, was the acknowledgment of change in controlling doctrine: "We also believe that . . . we follow the original plan outlines in *Brown II*, as brought up to date by this Court's opinions in *Green* . . . and *Griffin* . . . ."[140] Finally, it should be noted that this was the first time the Court stamped its approval on a racial ratio as a requirement of school desegregation, albeit at the faculty level.

"*Brown v. Board of Education* was the beginning," but only the beginning. The 1968 Term decisions, rather than the original ones, would hereafter control the Court's attempted restratification of the American society.

137. 400 F.2d 1, 8 (5th Cir. 1968) (footnote omitted), *rev'd*, 395 U.S. 225 (1969).

138. 395 U.S. at 234-36.

139. *Id.* at 235.

140. *Id.*

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VIII.

Before *Green*, federal courts of appeals had been satisfied with desegregation rather than racially balanced schools.[141] The constitutional ban was apparently understood as prohibiting the use of racial classifications,[142] rather than the fact of separation.[143] Yet, the lower courts, and particularly the Fifth Circuit, were ready to find racial standards in such measures as aptitude for study.[144] A fortiori, classifications on the basis of allegedly innate differences between the races could not stand.[145] Only after *Green* was it clear that geographic zoning that did not bring about desegregation was inadequate.[146]

The Supreme Court first chose to avoid the issue that it ultimately reached in *Green*. Thus, in cases affording it the opportunity to pass on the utilization of freedom-of-choice plans as supplemental to geographic zoning, the Court chose to vacate the judgments in per curiam decisions apparently because of the failure to provide for faculty desegregation as well.[147] Review was also denied to lower court rulings establishing that HEW minimum standards prevailed over freedom-of-choice plans.[148] That utilization of race as a standard for desegregation was not to be equated with use of race as a standard for segregation perhaps could have been inferred from the Court's refusal to review cases based on state law that called for racial balance in schools.[149]

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141. *See, e.g.*, Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

142. *See, e.g.*, Brown v. School Dist. No. 20, 328 F.2d 618 (4th Cir.), *cert. denied sub nom.* Allen v. Brown, 379 U.S. 825 (1964).

143. *See, e.g.*, Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

144. *See* Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55, 61, 62 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964).

145. *See* Jackson Mun. Separate School Dist. v. Evers, 357 F.2d 653 (5th Cir.), *cert. denied*, 384 U.S. 961 (1966).

146. *See, e.g.*, United States v. Greenwood Mun. Separate School Dist., 406 F.2d 1086 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969).

147. Rogers v. Paul, 345 F.2d 117 (8th Cir.), *vacated per curiam*, 382 U.S. 198 (1965); Gilliam v. School Bd., 345 F.2d 325 (4th Cir.), *vacated per curiam sub nom.* Bradley v. School Bd., 382 U.S. 103 (1965); Bradley v. School Bd., 345 F.2d 310 (4th Cir.), *vacated per curiam*, 382 U.S. 103 (1965).

148. United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

149. Boston School Comm. v. Board of Educ., 352 Mass. 693, 227 N.E.2d 729 (1967), *appeal dismissed*, 389 U.S. 572 (1968); Addabbo v. Donovan, 16 N.Y.2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68 (1965), *cert. denied*, 382 U.S. 905 (1966); Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964).

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For the most part, however, the Court, through its review-denying procedures, still supported the lower courts in their continued efforts to speed up the implementation of *Brown*. Courts of appeals were ordering trial courts to issue preliminary injunctions to bring about desegregation plans,[150] and lack of speed on the part of school boards brought on court-imposed plans, although one plan calling for in-service teacher training was too far in advance of its day.[151] The courts continued to strike down, with Supreme Court approval, state laws providing grants for private segregated schools.[152] The Supreme Court also affirmed a trial court order that called for statewide desegregation binding even on school boards not parties to the litigation.[153]

There had been nothing in the Supreme Court's certiorari and appeal processes that clearly revealed the shift that was to take place in *Green* from desegregation to integration as the compelled standard. It was not until Mr. Justice Brennan announced the result in *Green* that the so-called second-step implications of *Brown* were opened to public view.

IX.

That "all deliberate speed" was to be excised from the judicial canon was made clear by the Court in a series of per curiam opinions that denied postponement of effectuation of desegregation decrees, even pending appellate review of the legal questions raised by the lower courts' decisions.[154] In one of these cases, *Carter v. West Feliciana Parish School Board*,[155] Mr. Justice Harlan, joined by Mr. Justice White, thought it necessary to reveal what he considered the hidden rationale of these commands for immediate desegregation:

> However, in fairness to the Court of Appeals and to the parties, and with a view to giving further guidance to litigants in future cases of this kind, I

150. *See, e.g.,* Davis v. Board of School Comm'rs, 333 F.2d 53 (5th Cir.), *cert. denied,* 379 U.S. 844 (1964).

151. Board of Educ. v. Dowell, 375 F.2d 158, 168 (10th Cir.), *cert. denied,* 387 U.S. 931 (1967).

152. *See, e.g.,* Brown v. South Carolina State Bd. of Educ., 296 F. Supp. 199 (D.S.C.), *aff'd per curiam,* 393 U.S. 222 (1968); Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. 833 (E.D.La. 1967), *aff'd per curiam,* 389 U.S. 571 (1968).

153. Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala.), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967).

154. Northcross v. Board of Educ., 397 U.S. 232 (1970); Dowell v. Board of Educ., 396 U.S. 269 (1969); Carter v. West Feliciana Parish School Bd., 396 U.S. 226 (1969); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969).

155. 396 U.S. 226 (1969).

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> consider that something more is due to be said respecting the intended effect [of these decisions]. Since the Court has not seen fit to do so, I am constrained to set forth at least my own understanding . . . .
>
> 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 a prima facie showing of noncompliance with this Court's holding in *Green* [not *Brown*], 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.
>
> . . . .
>
> . . . [T]his 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 a time of the actual operative effect 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.[156]

Mysteriously, to me at least, Justices Black, Douglas, Brennan, and Marshall disassociated themselves from the Harlan opinion on the ground that it retreats "from our holding in *Alexander* . . . that 'the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.' "[157] Perhaps they meant only that eight weeks was too long, but if so, that would be a rather rigid reading of "at once," in light of the complexities involved in substituting a unitary school system for a dual one. That kind of speed would be consistent only with the substitution of a neighborhood school system for the dual one, and even there, eight weeks would hardly be excessive. The Chief Justice and Mr. Justice Stewart said that they would have been satisfied to allow the desegregation to occur at the beginning of the next school term as the court of appeals had provided.[158]

One Justice in this quartet also made it clear that it was the supervisory discretion of the courts of appeals that was to be invoked rather than that of the district courts, provided that it was invoked in favor of the plaintiffs. Thus, in *Alexander v. Holmes County Board of Education*,[159] the Court had ruled:

156. *Id.* at 291-93 (citations omitted).
157. *Id.* at 293.
158. *Id.*
159. 396 U.S. 19 (1969).

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> The Court of Appeals may in its discretion direct the schools here involved to accept all or any part of the . . . recommendations of the Department of [HEW], with any modifications which that court deems proper insofar as those recommendations insure a totally unitary school system for all eligible pupils without regard to race or color.
>
> The Court of Appeals may make its determination and enter its order without further arguments or submissions.[160]

Although a district court may consider amendments to the plan after it had been put in place, "[n]o amendment shall become effective before being passed upon by the Court of Appeals."[161] Apparently, however, there was to be no discretion in the appellate court to reject a trial court's institution of a plan on the ground that it was not yet a comprehensive one.[162] The roads to desegregation and integration were, indeed, becoming one-way. In *Northcross v. Board of Education*,[163] the Court ruled that the court of appeals could not reject the trial court's finding that Memphis was operating a dual school system, in favor of its own finding that it was a unitary system.[164]

Chief Justice Burger attempted to derive from *Alexander* a meaning for the phrase "unitary system": "In *Alexander* . . . we 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.' "[165] This sounds of an attempted retreat from *Green* back to *Brown*. This reading, however, does a discredit to the Chief Justice. He wanted the case to be heard on the merits, but did not push for it because there would be only seven Justices participating. He urged that:

> 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 balance 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 to achieve the ends sought by prior holdings of the Court. Other related issues may emerge.[166]

Surely this was a suggestion to take the matter out of the hands of the

160. *Id.* at 21.
161. *Id.*
162. Dowell v. Board of Educ., 396 U.S. 269 (1969).
163. 397 U.S. 232 (1970).
164. *Id.* at 235.
165. *Id.* at 236-37.
166. *Id.* at 237.

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various courts of appeals to reveal the Supreme Court's understanding. Burger, as a replacement for the haloed Warren, was suspect at the time as being anti-integrationist. When the opportunity came to address the issues, however, it was Burger who wrote the opinion for a unanimous Court in *Swann v. Charlotte-Mecklenburg Board of Education*.[167] But that was not to be until April of 1971.

X.

Between *Green* and *Swann*, the lower courts, under the scrutiny of the Supreme Court, began implementing the newly ordained rule.[168] Racial balance was the new rule.[169] Geographic zoning within a city, but freedom-of-choice outside the municipality, did not effect racial balance and was invalid.[170] Freedom-of-choice plans were all regarded as things of the past—satisfying *Brown*, but not *Green*.[171]

In light of *Alexander*,[172] immediacy was the order of the day.[173] State laws purporting to validate freedom-of-choice plans were in themselves unconstitutional,[174] and lower courts sustained busing requirements[175] despite the language of the Civil Rights Act of 1964.[176]

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167. 402 U.S. 1 (1971).

168. *See, e.g.*, Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969).

169. *See* Allen v. Board of Pub. Instruction, 432 F.2d 362 (5th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971); Pate v. Dade County School Bd., 315 F. Supp. 1161 (S.D. Fla.), *remanded*, 430 F.2d 1175 (5th Cir. 1970), *cert. denied*, 402 U.S. 953 (1971).

170. United States v. Indianola Mun. Separate School Dist., 410 F.2d 626 (5th Cir. 1969), *cert. denied*, 396 U.S. 1011 (1970).

171. United States v. Hinds County School Bd., 423 F.2d 1264 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970).

172. *See* notes 154-59 *supra* and accompanying text.

173. *See, e.g.*, Holmes County Bd. of Educ. v. Alexander, 396 U.S. 1218 (1970); Stanley v. Darlington County School Dist., 424 F.2d 195 (4th Cir.), *cert. denied*, 397 U.S. 1066 (1970); United States v. Tunica County School Dist., 421 F.2d (5th Cir.), *cert. denied*, 398 U.S. 951 (1970); Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th Cir.), *cert. denied*, 396 U.S. 1032 (1970).

174. Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971); Alabama v. United States, 314 F. Supp. 1319 (S.D. Ala.), *appeal dismissed for want of juris.*, 400 U.S. 954 (1970).

175. United States v. School Dist. 151, 301 F. Supp. 201 (N.D. Ill. 1969), *modified*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); Bradley v. Board of Pub. Instruction (unreported decision), *rehearing denied*, 431 F.2d 1377 (5th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); Youngblood v. Board of Pub. Instruction (unreported decision), *rev'd*, 430 F.2d 625 (5th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); Harvest v. Board of Pub. Instruction (unreported decision), *aff'd per curiam*, 429 F.2d 414 (5th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); Singleton v. Jackson Mun. Separate School Dist. (unreported decision), *rev'd*, 426 F.2d 1364, *modified*, 430

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The notions of *Cooper v. Aaron*[177] were still dominant. A parent was held in contempt of court for failing to send his child to school in conformity with a desegregation decree,[178] but white parents were proscribed from intervening to take an appeal that the school board had eschewed.[179] And the Third Circuit sustained reverse discrimination against white school teachers without Supreme Court interference.[180] Thus, all the soldiers were lined up to march straight toward desegregation through racial balance accomplished by busing. And that is what the Court confirmed in *Swann v. Charlotte-Mecklenburg Board of Education*.[181]

XI.

Swann v. Charlotte-Mecklenburg Board of Education[182] was the third level of the constitutional structure for school desegregation, of which *Brown* and *Green* were the first two. *Brown* was concerned with the invalidation of unconstitutional means: the use of race as a classification for assignment of students to the public schools, which they had to attend. *Green* transmuted the means test to an ends test, *i.e.*, it outlawed even nondiscriminatory assignment methods that did not bring about biracial schools, at least in communities where separate black and white schools had once been ordained by law. *Swann* was concerned both with refining the definition of the ends specified by *Green* and with the means that the courts could use to bring about those ends. It also told Congress that this was the judiciary's domain on which the legislature would not lightly be permitted to trespass.

The brush-off given the legislative action avoided serious constitutional questions such as to what degree, if at all, may the legislature proscribe equitable remedies used by federal courts. The Norris-LaGuardia Act,[183] which had foreclosed federal court injunctive pow-

F.2d 368 (5th Cir.) (decision of district court on remand unreported), *modified*, 432 F.2d 927 (5th Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).

176. *See* notes 185-87 *infra* and accompanying text.

177. *See* notes 72-81 *supra* and accompanying text.

178. Board of Educ. v. York, 429 F.2d 66 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

179. Spangler v. Pasadena City Bd. of Educ., 427 F.2d 1352 (9th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971).

180. Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).

181. *See* notes 182-202 *infra* and accompanying text.

182. 402 U.S. 1 (1971).

183. 29 U.S.C. §§ 101-115 (1976). *Compare* New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938) (Negro organization's picketing of grocery store that refused to hire Negro clerks

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ers in the area of labor injunctions, never reached the Supreme Court on a square question of its constitutionality, although it had been enforced many times on the assumption of its validity.[184] The other constitutional issue avoided was the degree to which Congress, under section five of the fourteenth amendment, could give meaning to the amendment that would be binding on the courts.[185]

Title IV of the Civil Rights Act of 1964 defined "desegregation" in terms that would have been highly restrictive if applied to the courts' remedies in constitutional segregation cases:

> "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.[186]

All in all, the definition read like a reaffirmation of *Brown* in its first sentence and a rejection of *Green* in its second.

A second section that would have created problems had it been held applicable in constitutional school desegregation cases authorized the Attorney General to institute desegregation suits, except that:

> [N]othing 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 or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.[187]

It does not take much training in the reading of the English language to notice that the "or otherwise enlarge" clause indicated that Congress, at least, thought that transfers to effect racial balance were an enlargement of the existing equity powers that the statute would restrict. Such easy reading of the statute was not for the Court. The Court chose instead an ingenious, or ingenuous, if you prefer, reading totally per-

held lawful; therefore, the Norris-La Guardia Act deprives federal courts of jurisdiction to issue injunction to halt picketing), *with* Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938) (labor union's unlawful picketing and harassment of market that did not require its employees to become union members may be subject to federal court's jurisdiction).

184. *See, e.g.*, Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970); Milk Wagon Drivers' Local 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940).

185. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966); Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81.

186. 42 U.S.C. § 2000c(b) (1976).

187. *Id.* § 2000c-6(a) (1976).

verting the legislative history it purported to rely on, which history it neither quoted nor even cited:

> On their face, the sections quoted purport only to insure that the provisions of Title IV of the Civil Rights Act of 1964 will not be read as granting new powers. The proviso in § 2000c-6 is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in 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 state authorities. In short, there is nothing in the Act that provides us with material assistance in answering the question of remedy for state-imposed segregation in violation of *Brown I*. The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[188]

And surely there was nothing in the fourteenth amendment to restrain the courts from imposing whatever remedies they saw fit.

According to *Swann*, the courts were to assume authority over site selection, construction, and abandonment of schools, and "district courts should retain jurisdiction . . . to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system."[189]

The trial court had ordered:

> [T]hat efforts be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others. . . .
>
> . . . .
>
> That no school be operated with an all-black or predominantly black student body.
>
> That pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students.[190]

188. 402 U.S. at 17-18.

189. *Id.* at 21.

190. 311 F. Supp. 265, 267-68 (W.D.N.C.), *vacated*, 431 F.2d 138 (1970), *reinstated*, 402 U.S. 1 (1971).

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This, said the Court, in its typically jejune fashion, was not a rule for racial balance in the school system:

> If we were to read the holding 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 disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.[191]

With its negatives and its negative pregnants, the opinion provided no guidance on why quotas were invalid, why this was not a quota, or what were the limitations on racial balance as an objective. All that we were told was that "the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court."[192]

The Court's ruling on the propriety of one-race schools in a desegregated system was not much more forthcoming. One-race schools in formerly dual school systems were suspect, but not necessarily invalid: "The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part."[193]

Of course, majority-to-minority transfer provisions were valid "as a useful part of every desegregation plan."[194] To support such transfers, the voluntarily transferring student must be provided free transportation, and space must be made available to him at whatever school he chooses within his options.[195]

The power of the trial court to alter attendance zones was very broad. The facts of the case "graphically demonstrate that one of the principal tools employed by school planners and by courts to break up the dual school system has been a frank—and sometimes drastic—gerrymandering of school districts and attendance zones."[196] The trial court also was free to pair, cluster, or group schools to move blacks out of black schools and whites out of white schools, although the resulting attendance zones "are neither compact nor contiguous; indeed they may be on opposite ends of the city. As an interim corrective measure,

191. 402 U.S. at 24.
192. *Id.* at 25.
193. *Id.* at 26.
194. *Id.*
195. *Id.* at 26-27.
196. *Id.* at 27.

this cannot be said to be beyond the broad remedial powers of a court."[197]

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.[198]

Having supported the bases for the widest possible dispersal of students among the schools in an area of "550 square miles—spanning roughly 22 miles east-west and 36 miles north-south,"[199] the Court left itself very little choice but to put its stamp of approval on compulsory busing. Anyway, it said, thirty-nine percent of the Nation's eighteen million public school students already went to school by bus all over the country.[200] Again, the limits on judicial power were not very stringent: "An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process."[201] But that, of course, was a matter for the discretion of the district court.

Swann opened a long but futile political debate over the desirability of compulsory busing. Although the briefs were replete with constitutional arguments that compelled busing as an unconstitutional infringement on the freedom of the bussed students, there was no attempt to meet the arguments in the opinion. It was easier to ignore them.

Throughout the opinion, the Court talked about the imposition of a desegregation plan as an interim affair, and the opinion concluded with a note regarded as hopeful by some and horrible by others: Once a unitary system had been achieved, the courts were no longer to be charged with maintaining racial balance.

> It does not follow that the communities served by such [unitary] systems will remain demographically stable, for in a growing mobile society,

197. *Id.*
198. *Id.* at 28.
199. *Id.* at 6.
200. *Id.* at 29.
201. *Id.* at 30-31.

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> few will do so. Neither school authorities nor district courts are constitutionally required to make year-to-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.[202]

Thus, with a denial of legislative power to interfere, an approval of a defined racial balance within a system, toleration of some one-race schools if proved not to be segregative in purpose, an authorization for even "bizarre" attendance zones, and the approval of busing, the Court created all the essential tools for complete judicial control of school systems that had once been state-mandated dual school systems. The third story of the Court's school desegregation edifice was far more detailed, if no more justified by reason rather than by fiat, than *Brown* or *Green*. But the structure was not yet complete.

Swann, in typical fashion, was but one of a cluster of cases. In a companion case, *Davis v. School Commissioners*,[203] the Court found that the discretion exercised by the trial and appellate federal courts was not to be indulged. The County of Mobile, Alabama, again a large area encompassing 1248 square miles including the metropolis of Mobile and 73,500 students in 91 schools, was bifurcated by a major highway essentially separating the city from the county. The "wrong" side of the tracks was made up of a school population that was 65% black and 35% white; the "right" side of the tracks had a white-student population of 88%. Both the trial court and the court of appeals plans treated the two sectors separately for purposes of pupil assignments, which left 9 of the 91 schools with a black student population of more than 90%. This the Supreme Court found intolerable.

Gerrymandering and busing were not only discretionary tools, as *Swann* had suggested, but compulsory ones: "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

202. *Id.* at 31-32.
203. 402 U.S. 33 (1971).

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of bus transportation and split zoning."[204]

Another companion case, *McDaniel v. Barresi*,[205] was an unusual case. There, the school board had effected a desegregation plan that had increased black enrollments in white schools from twenty to fifty percent by busing black students out of areas of black concentration. White parents brought suit in the state courts to enjoin the plan on the ground that it used race as the basis for assignment and contravened Title IV. The Georgia Supreme Court granted the relief requested. The Supreme Court reversed. Title IV was inapplicable and the use of race was not only permitted, but required as a basis for pupil assignment to secure desegregation.[206]

North Carolina's antibusing law, which forbade the use of busing to create racial balance, was held invalid in the fourth Burger opinion in the series. *North Carolina State Board of Education v. Swann*[207] held that "state policy must give way when it operates to hinder vindication of federal constitutional guarantees."[208]

> Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. . . .
>
> Similarly, the flat prohibition against assignment of students for the purpose of creating racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. . . .
>
> We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race . . . will similarly hamper the local authorities to effectively remedy constitutional violations.[209]

Before the Court's next major opinions, there were two ripples in the otherwise smooth judicial waters of desegregation. In *Spencer v. Kugler*,[210] the Court summarily affirmed a New Jersey district court's refusal to breach school district lines to effectuate greater racial balance among districts. In denying a stay in *Winston-Salem/Forsyth County*

204. *Id.* at 38.

205. 402 U.S. 39 (1971).

206. *Id.* at 41-42.

207. 402 U.S. 43 (1971).

208. *Id.* at 45.

209. *Id.* at 46. A fifth case in the series, Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971), was dismissed because (1) there was no case or controversy—both sides sought the validation of the statute held invalid in *North Carolina State Bd. of Educ. v. Swann*—and (2) the Court lacked jurisdiction over the appeal.

210. 404 U.S. 1027 (1972).

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Board of Education v. Scott,[211] Mr. Chief Justice Burger reiterated that *Swann* had not condoned a racial balance plan: "Nothing could be plainer, or so I had thought, than *Swann's* disapproval of the 71%-29% racial composition found in the *Swann* case as the controlling factor in assignment of pupils, simply because that was the racial composition of the whole school system."[212] With respect, it would seem that the lower courts reasonably could have believed that *Swann* had approved rather than disapproved such a racial balance formula. Certainly, after approving such a formula as "a starting point," the Court in *Swann* had suggested no stopping point.

XII.

After two further excursions into the problem of gerrymandering, this time by the Commonwealth of Virginia's school boards rather than by the courts, the Court entered the very deep waters of interdistrict desegregation and school desegregation in communities that had never maintained dual school systems by reason of state law or constitution. The latter have been denominated "Northern" school cases, but the term would seem to include all states outside the former units of the Confederacy and a few border states.

The two gerrymander cases were *Wright v. Council of the City of Emporia*[213] and *United States v. Scotland Neck City Board of Education.*[214] Virginia cities, as distinguished from towns, were independent of, and were not within, any county. Thus, a city's boundaries ordinarily also defined the school district boundaries. But cities were empowered to enter into agreements with adjacent county school systems to leave the control of schools within the county system.

In 1967 Emporia, which had been a town, became a city. By a 1968 agreement Emporia contracted with the county within which it was formerly located to use the county school system for the city school children. Since 1965, the county school system, including Emporia, had been operating under a court-approved freedom-of-choice plan. After *Green*, the district court entered a new judgment ordering a "pairing" plan in place of the outlawed freedom-of-choice plan. Two weeks after the district court decree, Emporia sought to opt out of the county

211. 404 U.S. 1221 (1971).
212. *Id.* at 1228.
213. 407 U.S. 451 (1972).
214. 407 U.S. 484 (1972).

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school system to operate its own. Plaintiffs sought to enjoin such separation of city from county on the ground that separation would increase the concentration of blacks in the county schools and increase the concentration of whites in the city schools. For the first time in a school desegregation case, the Court divided five-to-four. It ruled that the separation into two systems where there had been one was invalid.

Although most persons reading the bare facts would have concluded that Emporia's motivation was to bring about a whiter school population within its city—the sequence of events certainly suggest this—the majority of the Court ruled that the motive of the city council was irrelevant. The propriety of its action was to be measured by its effect. There was no doubt that the effect would be two unitary school systems in place of one, and that one of the two systems would be blacker than the system as a whole had been, and the other would be whiter. This was enough to sustain the injunction.

As to "motive," the Court said:

> This "dominant purpose" test [used by the court below] finds no precedent in our decisions. It is true that where an action by school authorities is motivated by a demonstrated discriminatory purpose, the existence of that purpose may add to the discriminatory effect of the action by intensifying the stigma of implied racial inferiority. And where a school board offers nonracial justifications for a plan that is less effective than other alternatives for dismantling a dual school system, a demonstrated racial purpose may be taken into consideration in determining the weight to be given to the proferred justification. . . . [But] we have focussed upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual school system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect.[215]

In sum, a pure heart is a necessary, but not a sufficient, condition for avoiding the restraints of a judicially mandated school desegregation plan. It is interesting that the Court designated a system with 28% white students and 72% black students, which would have resulted in the county if Emporia were allowed to secede, as a "Negro" school system, although the county school system as a whole, before the attempted change, was 34% white and 66% black, and yet, not a black school system. The Court, or its majority, attempted to explain this:

215. 407 U.S. at 461-62.

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> [O]ur holding today does not rest upon a conclusion that the disparity in racial balance between the city and county schools resulting from separate systems would, absent any other considerations, be unacceptable. 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 school system that had long existed in the area.[216]

This proposition offered hope to separate adjoining school districts with disparate racial populations. For the Court to suggest, however, that some day Emporia would be able to separate itself from the county schools, when it discovered a means for doing so without "an adverse effect upon the students remaining in the county,"[217] was a vain proposition at best.

In dissent Chief Justice Burger, speaking for himself and Justices Blackmun, Powell, and Rehnquist, agreed with the majority's principle but not its application. If the Emporia proposal, he wrote, "would either perpetuate racial segregation in the schools of the Greensville County area or otherwise frustrate the dismantling of the dual system in that area,"[218] the injunction would properly issue. For the minority, however, the substitution of two unitary school systems for one neither perpetuated segregation nor frustrated desegregation. The consequent means for assignment of schools would be geographically and, therefore, nonracially determined. Here, the minority cited *Spencer v. Kugler*[219] for the proposition that "a geographic assignment pattern is prima facie consistent with the Equal Protection Clause."[220] Although this may be sufficient of itself with reference to systems that have never been compulsorily segregated, the minority conceded that close scrutiny of the facts was required in a formerly segregated system. The facts revealed to them that "the proposed arrangement would completely eliminate all traces of state-imposed segregation,"[221] and the minority, at this point, mounted an attack on the norm of racial balance, which was the sole basis for the majority's conclusion:

> It is quite true that the racial ratios of the two school systems would differ, but the elimination of such disparities is not the mission of desegre-

216. *Id.* at 470.
217. *Id.*
218. *Id.* at 471 (Burger, C.J., dissenting).
219. 404 U.S. 1027 (1972). *See* text accompanying note 211 *supra*.
220. 407 U.S. at 472 (Burger, C.J., dissenting).
221. *Id.* at 473.

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> gation. . . . It can no more be said that racial balance is the norm to be sought, than it can be said that mere racial imbalance was the condition requiring a judicial remedy. The pointlessness of such a "racial balancing" approach is well illustrated by the facts of this case.[222]

The minority also concentrated heavy fire on what the Court as a whole seems long to have tolerated—the exercise of judicial discretion beyond what constitutional objectives require and the gross interference with local control of local school systems. It must have come as some surprise to read the Chief Justice's words on these matters:

> While we have emphasized the flexibility of the power of district courts in this process, the invocation of the remedial jurisdiction is not equivalent to having a school district placed in receivership. It has been implicit in all of our decisions from *Brown II* to *Swann*, that if local authorities devise a plan that will effectively eliminate segregation in the schools, a district court must accept such a plan unless there are strong reasons why a different plan is to be preferred. A local school board plan that will eliminate dual schools, stop discrimination, and improve the quality of education ought not be cast aside because a judge can evolve some other plan that accomplishes the same result, or what he considers a preferable result, with a two percent, four percent, or six percent difference in racial composition. Such an approach gives controlling weight to sociological theories, not constitutional doctrine.
>
> This limitation on the discretion of the district courts involves more than polite deference to the role of local governments. Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well.[223]

To many, this sounded like a declaration of independence by the four Nixon appointees from the doctrines that had been created before their arrival on the Court. This was somewhat ameliorated by the fact that the same four Justices joined in a concurring rather than a dissenting opinion in the *Scotland Neck* case.[224]

The factual situation was similar to *Emporia*. The state legislature authorized the city of Scotland Neck, located in Halifax County, to separate itself from the county school system and establish one of its own. Once again the Court found that the effect would be to impede the dismantling of the dual school system in Halifax County and should, therefore, be enjoined. The minority concurred in the judg-

222. *Id.*
223. *Id.* at 477-78.
224. United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972).

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ment here because: (1) the effect would be to preclude desegregation in an area of the county that would be left with a primarily black population; (2) Scotland Neck did not fall within the historic category of cities separate or separable from the county in which they were located, but had to be transmuted into this class by special legislation; and (3) there was no doubt that the motivation for the proposed separation was "the desire to create a predominantly white system more acceptable to the white parents of Scotland Neck."[225]

These cases were followed by a further rejection of any congressional role in school desegregation. In *Drummond v. Acree*,[226] Mr. Justice Powell denied a stay of a desegregation order sought under section 803 of the Education Amendments of 1972, which provided for a stay pending exhaustion of appellate review of any district court order "which requires the transfer or transportation of any student . . . for the purposes of achieving a balance among students with respect to race."[227]

Mr. Justice Powell reasoned that section 803 was limited to cases with a "racial balance objective," which did not include all cases requiring busing.[228] His conclusion was buttressed by the language of the preceding section of the statute[229] forbidding the use of federal funds not only for programs to "overcome racial balance," but also for those that would "carry out a plan of racial desegregation."[230] Because this case was not a case to effect "racial balance," but only one to promote "racial desegregation," there was no authorization in the statute to grant the stay. This niggardly reading of the intent of Congress was technically justifiable. It depended, however, on the notion that Congress knew the difference between the "racial balance" cases and "desegregation" cases, because that difference was made plain by *Swann*. Powell obviously found lucidity in *Swann* where most had found only confusion. The question of whether Congress can cut off funds for school transportation in desegregation cases is one that will certainly arrive at the Court again some time in the future.

Emporia and *Scotland Neck* foreshadowed the harder problem al-

225. *Id.* at 492.
226. 409 U.S. 1228 (1972).
227. 20 U.S.C. § 1653 (1972) (expired 1974).
228. 409 U.S. at 1229.
229. 20 U.S.C. § 1652(a) (1972).
230. 409 U.S. at 1229.

ready making its way up from the lower courts. What if it were the trial court that sought to join two or more school systems into a single unit rather than school systems seeking to create two systems where only one had bloomed before?

XIII.

School Board of Richmond v. State Board of Education[231] offered the Court the opportunity to determine whether a trial court could compel the merger of three school districts to eliminate segregation in one. The factual situation was a common one. After desegregation of the schools of the City of Richmond, an independent school system the boundaries of which had been defined by the city's boundaries since the inception of public education in Virginia, demographic changes had turned the city school population heavily black. The trial court, at the instance of the city school system, which had been a defendant in the desegregation case, ordered the amalgamation of the city school system with those of two surrounding counties, Chesterfield and Henrico, which were almost all white.[232] The Court of Appeals for the Fourth Circuit ruled that a compulsory joinder to change the racial composition of schools attended by the students of Richmond was beyond the power of the district court.[233] Because Mr. Justice Powell had played an important role in the events of the case, both in the city school system and in the educational authority of the Commonwealth, he disqualified himself when the case got to the Supreme Court. The Court thereupon divided equally and affirmed the Fourth Circuit's judgment without opinion. Speculation became rife on both how the Court divided and what Mr. Justice Powell's position would be when the next interdistrict remedy case made its appearance.

Before the Court would again reach the interdistrict issue, however, it addressed the problem of the obligation to desegregate school systems that had never been subject to a de jure rule of segregation that had prevailed in the South and border states before *Brown* and that alone had been the subject matter of the opinions from *Brown* through *Scotland Neck*. Thus, *Keyes v. School District No. 1*[234] marks the

231. 412 U.S. 92 (1973).

232. 338 F. Supp. 67, 79, 245 (E.D. Va.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973).

233. 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973).

234. 413 U.S. 189 (1973).

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fourth level of the Court's desegregation structure. This time Mr. Justice White excused himself, but the Court, although divided, had no difficulty in finding a majority in support of the opinion and judgment. Nevertheless, there were four separate statements of position. Six Justices joined in the Court's opinion and only Mr. Justice Rehnquist dissented.

That *Keyes* was an excursion into a new realm was evidenced by the opening paragraph of Mr. Justice Brennan's opinion for the Court:

> This school desegregation case concerns the Denver, Colorado, school system. That system has never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education. Rather, the gravamen of this action . . . is that respondent School Board alone, by use of various techniques such as the manipulation of student attendance zones, schoolsite selection and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools throughout the school district, entitling petitioners to a decree directing desegregation of the entire school district.[235]

It is interesting to note at the outset that Mr. Justice Brennan bracketed as alleged constitutional violations the charge that the school district had "created or maintained" segregated schools. Certainly, "creating" separation by command must be considered a violation of *Brown*, but never before had the Court said that the maintenance of, or failure to eliminate, racially identical schools, except to redress de jure segregation, was a violation of *Green*. If it were, the Court was taking on a huge additional burden, for then de facto segregation—separation of the races not caused by intentional governmental action—like de jure segregation required cure and, presumably, cure now and not with "all deliberate speed." But once again, the Court refused to walk a straight line. It appeared to know where it wanted to go, but not exactly how to get there.

The City of Denver, coterminous with the school district, contained two major pockets of nonwhite population, one in the core city and the other in an area designated Park Hill. The schools within the bounds of these neighborhoods housed the bulk of the nonwhite student population. The trial court found that the Park Hill segregation was the consequence of deliberate action taken by the school board to encapsulate nonwhites in that area by such means as siting a new school in the

235. *Id.* at 191.

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middle of the area, gerrymandering attendance zones, the use of "optional zones," and excessive use of mobile classroom units.[236] That court, therefore, ordered desegregation—presumably, busing out blacks and busing in whites—on grounds that Park Hill constituted "de jure" segregation.[237] The court refused, however, to boost itself from that finding directly to the proposition that the entire district constituted a de jure violation because a portion of it did. It did hold that the racially identifiable schools in the core city were "educationally inferior" to the white schools elsewhere and thus were in violation of the "separate but equal" rule of *Plessy v. Ferguson*; the court ordered a cure for this defect by "a system of desegregation and integration which provides compensatory education in an integrated environment."[238]

The court of appeals affirmed the Park Hill portion of the decree, but rejected the program for the core city schools because it found no intentional segregative acts as to them.[239] The Supreme Court in *Keyes* held that the lower courts had applied an erroneous standard for the core city schools and reversed.

First, the Court noted that the trial court erred in considering the Denver population to be triracial rather than biracial for purposes of determining segregation.[240] At the time of the lawsuit, the schools of Denver were "66% Anglo, 14% Negro, and 20% Hispano."[241] For purposes of measuring segregation, the Supreme Court said the proper distinction was between majority and minorities, with the minorities grouped together to measure the degree of separation.

The Court accepted the trial court's conclusion that there was clearly de jure violation in Park Hill. The board's policies showed " 'an undeviating purpose to isolate Negro students' in segregated schools 'while preserving the Anglo character of [other] schools.' "[242] The Supreme Court said this segregative policy directly affected a substantial part of the Denver school district. (The Court played a little bit with the numbers here and asserted that the area included 37.69% of all black pupils in Denver. Of the total school population, Park Hill included 9% of the student body. Although the Park Hill minority was primarily black, in

236. 303 F. Supp. 279, 284-86 (D. Colo. 1969).
237. *Id.* at 288.
238. 413 U.S. at 194.
239. 445 F.2d 990, 1002, 1007 (10th Cir. 1971).
240. 413 U.S. at 195-98.
241. *Id.* at 195.
242. *Id.* at 199.

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the total city school population Hispanos outnumbered blacks in a ratio of ten to seven.)

This substantial amount of de jure school segregation in Park Hill was sufficient to trigger a requirement for desegregation of the entire system:

> [W]here plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.[243]

One man's "common sense" is another's nonsense. But the Court is free to define a dual system as it sees fit. After all, the term was one of its own creation.

Although it remanded the question "whether respondent School Board's deliberate racial segregation policy with respect to Park Hill schools constitutes the entire Denver school system a dual school system,"[244] the Court made it very clear, indeed, that there was only one tolerable answer to that question. Just in case the lower courts were to find that Park Hill was an isolable division in the school district, however, the Court directed its attention to the improper failure to find the core city schools in "a current condition of segregation resulting from intentional state action directed specifically to the core city schools."[245]

That there was segregation, the Court said, was beyond doubt: Eleven of the schools were more than 90% minority and twenty-two of them were more than 70% minority. The finding of the lower courts that there was no de jure segregation because there was no racially discriminatory purpose and no causal connection between the acts complained of and racial imbalance "was clearly incorrect."[246] It was incorrect because the lower courts did not properly weigh the intentional segregation in Park Hill as evidence of segregative intent in the core city:

> Applying these principles in the special context of school desegregation cases, we hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful

243. *Id.* at 201.
244. *Id.* at 204.
245. *Id.* at 205-06.
246. *Id.* at 207.

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> segregative design on the part of the authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. This is true [whatever may have been said in part II of the opinion] even if it should be determined that different areas of the school district should be viewed independently of each other because, even in that situation, there is a high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system. We emphasize that the differentiating factor between *de jure* segregation and so called *de facto* segregation . . . is *purpose* or *intent* to segregate. . . .
>
> This burden-shifting principle is not new or novel. . . .
>
> In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions.[247]

Certainly, the shifting of a burden of going forward with the evidence was not a novel concept. It should be readily understood, however, that the burden of proving a negative of this kind was equivalent to the creation of an irrebuttable presumption or a rule of law. (One wonders what Mr. Justice Brennan would have done with a state statute that provided that the necessary deliberation and premeditation to prove a homicide could be derived from proof that at some earlier period the accused had been guilty of a willful crime.) "The Court notes that if respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools."[248] That the School Board had indulged in a neighborhood school policy, and that it was not responsible for the clustering of blacks and Hispanos in the core city was not to be an adequate defense in light of the fact that it had discriminated in Park Hill. All roads lead to Rome, or in *Keyes*, at least, all roads lead from Park Hill.

Justices Douglas and Powell wrote separately in favor of abolishing the distinction between de jure and de facto school desegregation. For Mr. Justice Douglas, a school district in which there were any racially

247. *Id.* at 208-10.
248. *Id.* at 211.

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identifiable schools was subject to a court desegregation decree, whatever its history, because the board had either affirmatively caused this segregation or failed to alleviate it, which was also a violation of its constitutional duty.[249] Although this argument of duty to desegregate whatever the cause of segregation had often been proffered to it, the Supreme Court had refused to adopt it. This "no-fault" rationale for judicial intervention in school segregation situations has not yet found justification in an opinion of the Court.

Mr. Justice Powell also favored a single rule for both de facto and de jure segregation. The affirmative duty to desegregate southern schools announced in *Green* could, and should, be applied to northern schools. He rejected the notion that the affirmative duty found in *Green* derived from the need to restore the community schools to the condition they would have been in but for the South's compulsory segregation laws:

> [T]he familiar root cause of segregated schools in *all* the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of the public school authorities. This is a national, not a southern, phenomenon. And it is largely unrelated to whether a particular State had or did not have segregative school laws.
>
> Whereas *Brown I* rightly decreed the elimination of state-imposed segregation in that particular section of the country where it did exist, *Swann* imposed obligations on southern school districts to eliminate conditions which are not regionally unique but are similar both in origin and effect to conditions in the rest of the country. As the remedial obligations of *Swann* extend far beyond the elimination of the outgrowths of the state-imposed segregation outlawed in *Brown*, the rationale of *Swann* points inevitably toward a uniform, constitutional approach to our national problem of school segregation.[250]

But, as Mr. Justice Holmes once noted, "the inevitable comes to pass . . . through effort."[251] And the Court has refused to put forth that effort on behalf of "no-fault" desegregation. Mr. Justice Powell also sought to invoke the notion of a prophylactic rule similar to that which the Court invoked so frequently in rewriting the fourteenth amendment into a criminal code of procedure[252] for the states: "Having school

249. *Id.* at 214-17.
250. *Id.* at 222-23.
251. O. HOLMES, UNCOLLECTED LETTERS 201 (1936).
252. *See* P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 74-84 (1970).

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boards operate an integrated school system provides the best assurance of meeting the constitutional requirement that racial discrimination, subtle or otherwise, will find no place in the decisions of the public school officials."[253] The Court, however, refused to have *Brown* torn up by the roots. It adhered to the principle that judicial intervention must find a predicate in constitutional violation, which, here, is state commanded separation of the races, however tenuous that predicate may be, as in the case of the core districts in Denver.

At the same time that Mr. Justice Powell sought an extension of *Green* and *Swann*—and he preferred to assert that *Swann* was the culprit—to the nonsouthern tiers of states, he also would have cut back *Swann*'s approval of compulsory busing for everyone. Uniformity of rule was his standard.

And a uniform busing rule also should be adopted:

> 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. Nothing in our Constitution commands or encourages any such court-compelled disruption of public education. . . .
>
> The Equal Protection Clause does, indeed, command that racial discrimination not be tolerated in the decisions of public school authorities. But it does not require that school authorities undertake widespread student transportation solely for the sake of maximizing integration.
>
> This obviously does not mean that bus transportation has no place in public school systems or is not a permissible means in the desegregative process.[254]

Mr. Justice Powell then expatiated on the desirability of the neighborhood school system, the financial strain so widely suffered by the educational system, the unequal effect on the nation's school systems of bearing the financial burden of compulsory busing—it would fall on mixed urban communities—and "the fact that the remedy exceeds that which may be necessary to redress the constitutional evil."[255] It will be readily seen that the second part of Mr. Justice Powell's opinion is not perfectly consistent with the first in its reliance on the need for a constitutional violation as predicate for judicial remedy.

253. 413 U.S. at 227.
254. *Id.* at 238, 242-43.
255. *Id.* at 249.

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Powell then touched on the question that would be coming to the fore again and again: Who pays?

> The compulsory transportation of students carries a further infirmity as a constitutional remedy. With most constitutional violations, the major burden of remedial action falls on offending state officials. . . . It is they who bear the brunt of remedial action . . . . But when the obligation further extends to the transportation of students, the full burden of the affirmative remedial action is borne by children and parents who did not participate in any constitutional violation.[256]

Then came a proposition that is surely inconsistent not only with the rule of school desegregation cases, but with the general egalitarian push of Supreme Court decisions—that equality, as the Court defines it, is the prime and, therefore, overwhelming constitutional value.[257] Powell said that he would return to the rationale of *Brown* and

> [i]n the balancing of interests so appropriate to a fair and just equitable decree, transportation orders should be applied with special caution to any proposal as disruptive of family life and interests—and ultimately of education itself—as extensive transportation of elementary-age children solely for desegregation purposes. As a minimum, this Court should not require school boards to engage in the unnecessary transportation away from their neighborhoods of elementary-age children.[258]

Nevertheless, Mr. Justice Powell had concurred in the judgment imposing desegregation on Denver. Mr. Justice Rehnquist dissented alone. For Rehnquist, too, the objective was to go back to *Brown*, but for him *Brown* meant the elimination of racial standards, not the attainment of a proper racial mixture. In summation, he objected to the extension of *Green* to northern school districts and to the transparent use of presumptions by the Court in *Keyes* to effect that extension:

> The Court has taken a long leap in this area of constitutional law in equating the district-wide consequences of gerrymandering individual attendance zones in a district where separation of the races was never required by law with statutes or ordinances in other jurisdictions which did so require. It then adds to this potpourri a confusing enunciation of evidentiary rules in order to make it more likely that the trial court will on remand reach the result which the Court apparently wants it to reach.[259]

It took seventy-seven pages of opinions to bring judicially mandated

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256. *Id.* at 249-50.
257. It has been for some time. *See* P. KURLAND, note 252 *supra*, at 98-169.
258. 413 U.S. at 251.
259. *Id.* at 265 (Rhenquist, J., dissenting).

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desegregation to nonsouthern schools. It required only a few pages in *Brown I* to initiate the whole process. But it is doubtful that guidance by way of principles is to be found in either case, except for the notion that the lower courts should do the best they can, and that the Supreme Court will deny review unless the exercise of discretion by the lower courts brings about results that offend the consciences of the Justices of the Supreme Court.

XIV.

Between *Swann* and *Keyes*, the Court had continued to use its discretionary review process essentially to stamp its *nihil obstat* by denying certiorari, with an occasional imprimatur by way of summary affirmance, on the rulings of the lower federal courts. The lower courts seemed to understand both the rulings and the directions of the Supreme Court's decisions.

The Court affirmed a judgment that the promotion of a white junior college to four-year status in the same city that had a black four-year college violated the equal protection clause.[260] Of course, there was neither Supreme Court precedent nor principle on which to rest such a decision. Bringing higher education into the racial balance context would not readily lend itself to explanation by opinion.

Busing became the rule—almost a requirement rather than an optional tool for desegregation.[261] Racial balance was the goal.[262] The shaky distinction between de facto and de jure segregation became

260. Norris v. State Council of Higher Educ., 327 F. Supp. 1368 (E.D. Va.), *aff'd sub nom.* Board of Visitors v. Norris, 404 U.S. 907 (1971).

261. *See, e.g.,* Northcross v. Board of Educ., 466 F.2d 890 (6th Cir.), *stay denied*, 409 U.S. 909 (1972), *cert. denied*, 410 U.S. 926 (1973); Brown v. Board of Educ., 464 F.2d 382 (5th Cir.), *cert. denied*, 409 U.S. 981 (1972); Acree v. County Bd. of Educ., 458 F.2d 486 (5th Cir.), *cert. denied*, 409 U.S. 1006 (1972); Brewer v. School Bd., 456 F.2d 943 (4th Cir.), *cert. denied*, 409 U.S. 892 (1972); Dandridge v. Jefferson Parish School Bd., 456 F.2d 552 (5th Cir.), *cert. denied*, 409 U.S. 978 (1972); Monroe v. Board of Comm'rs, 453 F.2d 259 (6th Cir.), *cert. denied*, 406 U.S. 945 (1972); Clark v. Board of Educ., 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); United States v. Watson Chapel School Dist. No. 24, 446 F.2d 933 (8th Cir. 1971), *cert. denied*, 404 U.S. 1059 (1972); Adams v. School Dist. No. 5, 444 F.2d 99 (4th Cir.), *stay denied*, 404 U.S. 1221, *cert. denied*, 404 U.S. 912 (1971); Davis v. School Dist. of Pontiac, 443 F.2d 573 (6th Cir. 1970), *cert. denied*, 404 U.S. 913 (1971); United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), *supp. mem.*, 330 F. Supp. 235 (1971), *cert. denied*, 404 U.S. 1016, *stay denied*, 404 U.S. 1206 (1972). *But see* Pate v. Dade County School Bd., 434 F.2d 1151 (5th Cir. 1970), *aff'd*, 447 F.2d 150 (5th Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972).

262. Adams v. Evansville-Vandenburgh School Corp., 409 U.S. 1060 (1972); Harrington v. Colquitt County Bd. of Educ., 460 F.2d 1191 (5th Cir.), *cert. denied*, 409 U.S. 915 (1972).

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shakier, with a tendency to treat them as if they were the same, *i.e.*, calling for judicial integration,[263] just as resegregation after desegregation called for judicial intervention.[264]

Further attempts at evasive devices by school boards and state legislatures proved unfruitful. The courts forestalled sales of public schools to all-white private academies,[265] and denied tax-exempt status to private segregated schools.[266] If achievement tests resulted in segregating classrooms in desegregated schools, they were illegal segregative devices.[267] And, of course, the courts held state antibusing laws unconstitutional.[268]

XV.

It is not quite clear whether *Milliken v. Bradley*[269] should be regarded as the fifth story on an evergrowing Supreme Court structure of school desegregation or as an undermining of its foundation. At the time of its decision, Mr. Justice Marshall, speaking for four members of the Court, asserted that, "After 20 years of small, often difficult steps toward that great end," which he described as nothing less than "making 'a living truth' of our constitutional ideal of equal justice under law," "the Court today takes a giant step backwards."[270] If so, it could hardly have come as a complete surprise to the Justices who had battled to a four-to-four tie in the *Richmond* case.[271] *Richmond*, moreover,

263. Johnson v. Combs, 471 F.2d 814 (5th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973); Cisneros v. Corpus Christi Ind. School Dist., 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 413 U.S. 920, 922 (1973); United States v. Board of Educ., 459 F.2d 720 (10th Cir.), *vacated*, 409 U.S. 823 (1972); California v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (1971), *cert. denied*, 405 U.S. 1016 (1972).

264. Stout v. Jefferson County Bd. of Educ., 466 F.2d 1213 (5th Cir. 1972), *cert. denied*, 411 U.S. 930 (1973); Dowell v. Board of Educ., 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972); Ellis v. Board of Pub. Instruction, 465 F.2d 878 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); Flex v. Potts, 464 F.2d 865 (5th Cir.), *cert. denied*, 409 U.S. 1007 (1972).

265. McNeal v. Tate County School Dist., 460 F.2d 568 (5th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973); Wright v. City of Brighton, 441 F.2d 447 (5th Cir.), *cert. denied*, 404 U.S. 915 (1971).

266. Green v. Connelly, 330 F. Supp. 1150 (D.D.C. 1970), *aff'd*, 404 U.S. 997 (1972).

267. Moses v. Washington Parish School Bd., 456 F.2d 1285 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972).

268. Strout v. Jefferson City Bd. of Educ., 466 F.2d 1213 (5th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973).

269. 418 U.S. 717 (1973), *on remand*, 402 F. Supp. 1096 (E.D. Mich. 1975), *aff'd*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

270. *Id.* at 782 (Marshall, J., dissenting).

271. School Bd. v. State Bd. of Educ., 412 U.S. 92 (1973). *See* notes 231-35 *supra* and accompanying text.

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arose in a de jure state, whereas *Milliken* was a northern variety case closer in its alleged violations to *Keyes* than *Swann*. But it is understandable that *Milliken* was a great disappointment to the dissenters, for it marked the first Supreme Court school case decided by opinion in which a majority of the Court had denied relief requested by NAACP plaintiffs. If it was the first, it was one of very few. The NAACP hold on the Supreme Court had been broken here or in *Richmond*, but it would ultimately, if not immediately, be restored.

The decision was, of course, not a reversal of any earlier one. At most, it was a refusal to take the Court's desegregation cases beyond *Keyes*. To this extent, it may be that *Milliken* did not add that additional story to the desegregation building. On the other hand, what it did was instruct the lower courts on what findings they should make to justify the kind of multidistrict remedy that was rejected in *Milliken*. The lower courts took full advantage of this guidance.[272]

The suit in *Milliken*, like that in *Richmond*, originated as a suit to desegregate a central city school system, which was fast becoming an island of black students surrounded by a ring of white suburban school districts. The violations on which the original suit rested were racial gerrymander, site-selection and construction, and pupil assignments exactly of the kind represented by the Park Hill district in *Keyes* and there found to be de jure segregation. The trouble was that these provable violations were committed in Detroit by the Detroit school board, which was to turn from a defendant into a plaintiff in an attempt to use white suburban students to effectuate a desired racial mix in Detroit. It was quite clear that Detroit, like other major metropolitan school districts, did not have enough white students in its own system to bring about the desired result. As the Chief Justice, writing for the five-man majority, said:

> Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the primary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable. Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated—in their view of what constituted desegregation—unless the racial composition of the student body of each school substantially reflected the racial composition of the

272. *See* note 340 *infra*.

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population of the metropolitan area as a whole.[273]

The Chief Justice reasserted his proposition that racial balance was not the measure of desegregation.[274] The lower court was not free to erase the school district boundaries and restructure local school board jurisdictions. Local control of education was too important and too well imbedded in our educational customs to be so lightly ignored.[275] Lest anyone should think, however, that the restructuring of local government was beyond the ken of the federal judicial power, the Court asserted: "Of course, no state law is above the Constitution. School district lines and the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe adequate remedies."[276] And so, the Court would look, "for the first time, [at] the validity of a remedy mandating cross-district or interdistrict consolidation to a remedy of segregation found to exist in only one district."[277]

The Court then proceeded to announce a standard that made the question a rhetorical one. If segregation was found in only one district, there could be no interdistrict remedy.

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. . . . Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. . . . without any interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.[278]

For the majority, the record was bare of evidence of such "constitutional wrongs." There was evidence only of violations of the Constitution by the Detroit board within its own district. The Court rejected the notion that because of the state's involvement in local education by

273. 418 U.S. at 739-40.
274. *Id.* at 740-41.
275. *Id.* at 741.
276. *Id.* at 744.
277. *Id.*
278. *Id.* at 744-45.

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control over financing and site-selection, the state, too, was guilty of segregative acts or, if it were, that its conduct justified an interdistrict remedy.[279] Nor did one or two isolated instances in which one or another of the suburban districts might be implicated suffice to justify an interdistrict remedy.[280] The proposed remedy affected fifty-eight districts, not one or two of three.

The Chief Justice defined the right and remedy involved:

> The constitutional right of the Negro respondent residing in Detroit is to attend a unitary school system in that district. . . . The view of the dissenters, that the existence of a dual system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils, cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, and expansion without any support in either constitutional principle or precedent.[281]

All that the Chief Justice said may have been true. Neither substantive rule nor remedial decree by way of precedent could justify the judgment of the court below. The difficulty was that it equally could be said of each step the Court took—from *Brown* to *Green*, from *Green* to *Swann*, and from *Swann* to *Keyes*—that the latter decision was "without any support in either constitutional principle or precedent." That was the nature of the desegregation cases from the beginning; they eschewed principle and avoided precedent. And so, it could be said of *Milliken*, too, that if there was neither principle nor precedent in support of interdistrict relief, there was no principle or precedent that foreclosed such relief. The Court, in its legislative mode, simply decided to draw the line at this point. It was simply a matter of counting judicial votes, as it had been for twenty years.

Mr. Justice Stewart in concurrence, after joining the Court's opinion, asserted that what was at issue was not constitutional law but remedy, because there was a "finding of a violation of the Equal Protection Clause"[282] with which there was no quarrel. "The courts [below] were in error for the simple reason that the remedy they thought necessary was not commensurate with the constitutional violation found."[283]

279. *Id.* at 750-51.
280. *Id.* at 750.
281. *Id.* at 746-47.
282. *Id.* at 753.
283. *Id.* at 754.

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Had the state, to support "separation of the races,"[284] drawn or redrawn the school district lines, or transferred students between school districts, or purposefully discriminated by use of state housing or zoning, an interdistrict remedy might be warranted. "In this case, however, no such interdistrict violation was shown."[285] Mr. Justice Stewart's strong attack on the Marshall dissent reveals the plastic nature of both fact and law as treated by the highest court in the land:

> My Brother MARSHALL seems to ignore this fundamental fact when he states, *post*, at 799, that "the most essential finding [made by the District Court] was that Negro children in Detroit had been confined by intentional acts of segregation to a growing core of Negro schools surrounded by a receding ring of white schools." This conclusion is simply not substantiated by the record presented in this case. The record here does support the claim made by the respondents that white and Negro students within Detroit who otherwise would have attended school together were separated by acts of the State or its subdivision. However, segregative acts within the city alone cannot be presumed to have produced—and no factual showing was made that they did produce—an increase in the number of Negro students *in the city as a whole*. It is this essential fact of a predominantly Negro school population in Detroit—caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears—that accounts for the "growing core of Negro schools," a "core" that has grown to include virtually the entire city. The Constitution simply does not allow federal courts to attempt to change that situation unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist. No record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity, and it follows that the situation over which my dissenting Brothers express concern cannot serve as the predicate for the remedy adopted by the District Court and approved by the Court of Appeals.[286]

If "judicial restraint" was the mark of the majority opinions in *Milliken*, hyperbole was the cachet of the dissenters, as it so frequently is. Mr. Justice Douglas combined the majority judgment here with the decision in *San Antonio School District v. Rodriguez*[287] to assert that the

284. *Id.* at 755.
285. *Id.*
286. *Id.* at 756 n.2.
287. 411 U.S. 1 (1973).

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blacks would be set "back to the period that antedated the separate but equal regime of *Plessy v. Ferguson*."[288] His reasoning was simple, if fallacious. *Rodriguez* refused to command equal state financial support for all school districts.[289] The blacks might be isolated in "poor districts." The blacks, therefore, would be confined to poorer schools. The problem with this reasoning is twofold. First, the plaintiffs in *Rodriguez* had rejected the invitation to suggest that the district on whose behalf they were suing was a racially identifiable district. *Rodriguez* did not, of course, hold that racially identifiable districts could be deprived of equal support. Second, it is frequently the case that school districts containing a high proportion of lower economic population also contain the highest real property tax base. The New York and Chicago school districts, for example, are not the least benefitted school districts within each of their states, although they do contain the highest concentration of minorities in their states. Nor was Detroit.[290]

For Douglas, however, it was the condition of segregation—not the cause of that condition—that was to be abated. And, as he had indicated in *Keyes*, a state is guilty of either creating segregation or failing to abate it; in either case it is in violation of the Constitution.[291]

Mr. Justice Douglas wrote a solo dissent. Justices White and Marshall wrote dissenting opinions joined by all of their dissenting brethren. Mr. Justice White disposed of the matter essentially by demeaning the refusal to approve interdistrict relief as based on "administrative inconvenience to the State."[292] This justification, of course, carries very little weight on the scales of judicial discretion.

He further asserted what few lower federal courts have fully appreciated, whether or not their masters have:

> The task is not to devise a system of pains and penalties to punish constitutional violations brought to light. Rather, it is to desegregate an *educational* system in which the races have been kept apart, without, at the same time, losing sight of the central *educational* function of the schools.[293]

White was concerned that there was no internal remedy in Detroit to

288. 418 U.S. at 759.
289. 411 U.S. at 55.
290. *Id.* at 23, 57. *See also* Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972).
291. 418 U.S. at 761.
292. *Id.* at 763.
293. *Id.* at 764 (emphasis in original).

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prevent an ever increasing black school population. He accepted and seemingly approved of the trial court's concern about "white flight" and its contribution to that ever increasing concentration of blacks in the cities. An interdistrict remedy would reverse this trend; and he could not see why the alleged "administrative difficulties" that Michigan would face should be a barrier to the only measure that would alleviate racial concentration in the Detroit schools. It is the state that is responsible under the fourteenth amendment for its own acts and those of its subordinate bodies. There is no reason why the federal courts should be limited in their compulsion on the state to do what the state is perfectly capable of doing.

Mr. Justice White closed by coming out where Mr. Justice Douglas did: "Ultimately, . . . [the Court] is unresponsive to the goal of attaining the utmost actual desegregation consistent with restraints of practicability and thus augurs the frequent frustration of the remedial powers of the federal courts."[294] For White, as probably for all four dissenters, although Mr. Justice Brennan never said so in his own words, it is the condition of separation that is the constitutional violation to be abated, and the federal courts alone were the ones who could do so if they did not frustrate their own ambitions for hegemony.

Mr. Justice Marshall's opinion was a long lament for the topping off of a structure in whose construction he played so major a role, first as advocate for the black school children, then as advocate for the Government, and finally as judicial creator. His frustration at the failure of the Court to take the next step after *Keyes* apparently caused him to conclude that the Court was indulging the sin of conforming to public opinion rather than flouting it:

> Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white,

294. *Id.* at 781.

> the other black—but it is a course, I predict, our people will ultimately regret.[295]

The self-righteousness and the certainty of both majority and dissent that they alone understood the Constitution's mandate and were applying "neutral principles of law" was not unique to this case. It was just a little surprising that Thurgood Marshall would invoke the concept of "neutral principles" after the treatment given Professor Wechsler for his suggestion that "neutral principles" should control in desegregation cases.[296]

XVI.

The attempts to effect so-called metropolitan area desegregation plans were due, in part, to the difficulties encountered in single-district desegregation where immediately adjacent areas were available for escape by white students who had to be kept in the system if meaningful racial mix were to be accomplished within the system. The central cities' school systems were turning black without regard to desegregation plans. The rush to the suburbs of the middle class, essentially white at the beginning but now including blacks if at a smaller rate, was a post-World War II phenomenon that preceded as well as followed *Brown*. The desire for a more healthful environment, for better housing in one-family units rather than in apartments, for escape from dirt, crime, and violence, all contributed to a very large exodus of the middle class. There can be little doubt, however, that the immediate threat of desegregation and the effectuation of a decree was also a cause of what came to be called "white flight."

The courts were not very clear about where to place white flight on the scales used in the exercise of their discretion. It was usually said that the threat of white flight was insufficient reason for a less onerous decree, and most courts took the risk that white flight would leave the cities with large numbers of one-race (black) schools. The hope for metropolitan plans was that they would prescribe a whole arc around the city so that escape by moving to the suburbs would become impossible. This explains the Richmond plan's inclusion of all of two counties, Henrico and Chesterfield, within the program. It explains the

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295. *Id.* at 814-15.

296. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See also* Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

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Detroit plan's requirement for participation by almost sixty nearby suburban school systems. It explains the Wilmington plan's combination of the school districts of all northern Delaware, encompassing more than half the students in the entire state.

There was, however, another escape hatch—the removal of students not from the geographical area, but within the geographical area to nonpublic schools. The major cities of the North had extensive parochial school systems already in existence. And the experience in Boston showed that these would certainly be used to avoid busing into central city schools, whatever the professions of the local Catholic hierarchy not to allow their schools to be used for this purpose. The growth of private academies, however, was not confined to religiously affiliated schools, and attempts were made to reduce the attractiveness of this potential for avoidance of public school desegregation.

The grossness of the State's behavior in the *Griffin* case[297] was both easy and groundbreaking. State-supported private schools would not be allowed to be used to break the back of a desegregation plan. In *Norwood v. Harrison*,[298] the Court sealed another leak. Since 1940, Mississippi provided for the loan of textbooks to both public and private school students. The Supreme Court had sustained the validity of similar loans when attacked on the ground that they violated the establishment clause of the first amendment.[299] The question raised in *Norwood* was whether similar assistance to students attending private schools that discriminated on the basis of race violated the equal protection clause. The Court held that it did.[300] All of the Justices agreed. Seven joined in the opinion by Chief Justice Burger. Justices Douglas and Brennan concurred in the result without opinion, perhaps resenting the Court's distinction of the parochial school cases in lieu of holding that loans to either religious or discriminatory private schools were valid.

The Chief Justice began his opinion by noting that, "Private schools in Mississippi have experienced a marked growth in recent years."[301] Catholic schools aside, there were in 1963-64 only 17 private schools with 2,632 students in Mississippi. By September 1970, there were 155

297. Griffin v. School Bd., 377 U.S. 218 (1963). See text accompanying notes 116-24 *supra*.
298. 413 U.S. 455 (1973).
299. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236 (1968).
300. 413 U.S. at 466.
301. *Id.* at 457.

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such schools with an enrollment of 42,000.[302]

The Court pointed out that there was no question raised in this case about the right to maintain a private school with admission limited by race, national origin, or religion. The trial court had sustained the statute on the ground that it was not racially motivated, as evidenced by its enactment in 1940, and that it came within the rationale of the Court's religious school-textbook case.[303] The Supreme Court first disposed of a straw man argument that the Constitution compelled the loan of textbooks to private school students if it lent them to public school students. It then stated that the textbook loan program was not distinguishable from the tuition grant or loan programs, which the lower federal courts had long since held invalid with the Supreme Court's approval.[304]

The constitutional violation lay in the fact that the textbook program provided substantial assistance to private schools that were free to discriminate on the basis of race. The fact that the public schools of the state had been given a clean bill of health and found to be unitary was irrelevant. Like freedom of religion, "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . ."; unlike freedom of religion, "it has never been accorded affirmative constitutional protections."[305] This, of course, does not mean that aid should be cut off from all private schools but only from those engaged in discrimination on the basis of race. The Court concluded with a statement that would appear to be inconsistent with the ruling in *Keyes*: "No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law."[306] But the difference between *Norwood* and *Keyes* may lie in the fact that state government, unlike persons and corporations, is not entitled to "due process of law."

Norwood closed a small part of the private academy escape route. In 1974 *Gilmore v. City of Montgomery*[307] closed it a little more. There, the city parks in Montgomery had been desegregated. The trial court enjoined the city from permitting the use of the parks by segregated

302. *Id.*
303. 340 F. Supp. 1003, 1013 (N.D. Miss. 1972), *rev'd*, 413 U.S. 455 (1973).
304. 413 U.S. at 461-63.
305. *Id.* at 470.
306. *Id.* at 471.
307. 417 U.S. 556 (1974).

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private school groups as well as other discriminatory membership organizations. The court of appeals held that the injunction was too broad because it prevented "[t]he freedom to choose one's associates in private clubs, churches and civic organizations."[308] The Supreme Court spoke through Mr. Justice Blackmun, who had not previously authored an opinion in the area of school segregation.

Blackmun began his opinion with a statement of principle:

> The Equal Protection Clause of the Fourteenth Amendment does not prohibit the "[i]ndividual invasion of individual rights." *Civil Rights Cases*, 109 U.S. 3, 11 (1883). It does proscribe, however, state action "of every kind" that operates to deny any citizen the equal protection of the laws. *Ibid.* This proscription on state action applies *de facto* as well as *de jure* because "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 U.S. 296, 299 (1966).[309]

On this basis, the Court held that an injunction against the "exclusive use" of any public facility by a discriminatory group properly issued:

> Here, the city's actions significantly enhanced the attractiveness of segregated private schools, formed in reaction against the federal court school order, by enabling them to offer complete athletic programs. The city's provision of stadiums and recreational fields resulted in capital savings for those schools and enabled them to divert their own funds to other educational programs. It also provided the opportunity for the schools to operate concessions that generated revenue. . . . [T]his assistance significantly tended to undermine the federal court order mandating the establishment and maintenance of a unitary school system in Montgomery. It therefore was wholly proper for the city to be enjoined from permitting exclusive access to public recreational facilities by segregated private schools and by groups affiliated with such schools.[310]

The Court then found the record inadequate to determine whether the nonexclusive use of "zoos, museums, parks, and other recreational facilities by private school groups in common with others . . . involves government so directly in the actions of those users as to warrant court intervention on constitutional grounds."[311] Mr. Justice Blackmun then laid out a blueprint for plaintiffs' proof of such invalid government par-

308. 473 F.2d 832, 839 (5th Cir. 1973), *rev'd in part*, 417 U.S. 556 (1974).
309. 417 U.S. at 565.
310. *Id.* at 569.
311. *Id.* at 570.

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ticipation. He concluded with a warning that even bigots are entitled to the constitutional freedom of association. Thus, "a person's mere membership in an organization which possesses a discriminatory admissions policy would not alone be ground for his exclusion from public facilities."[312] Having given this much, however, he retracted even more:

> [W]e must also be aware that the very exercise of the freedom to associate by some may serve to infringe that freedom for others. Invidious discrimination takes its own toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action.[313]

Mr. Justice Marshall would have left the entire matter "to the sound discretion of the District Court Judge who has lived with this case for so many years and who has a much better appreciation both of the extent to which these . . . matters are actual problems in the city of Montgomery and of the need for injunctive relief."[314]

Justices White and Douglas would "enjoin all school-sponsored and school-directed nonexclusive uses of municipal recreational facilities."[315] Mr. Justice Brennan would not go that far:

> Private segregated schools are not likely to maintain their own zoos, museums, or nature walks. Consequently, permitting segregated schools to take their students on field trips to city facilities of that kind would not result in a direct financial benefit to the schools themselves. An injunction against use by segregated schools of such city facilities would be appropriate, in my view, only if the District Court should find that the relief is necessary to insure full effectuation of the Montgomery desegregation decrees.[316]

The Court's big step toward closing down the private academies escape route came in a case resting not on the Constitution, but on the Civil Rights Act of 1866, as now found in Title 42 of the United States Code, section 1981. In *Runyon v. McCrary*,[317] the Court ruled that the statute forbade a private academy from excluding blacks because of their race. Mr. Justice Stewart wrote the Court's opinion.

When black parents applied for admission of their children to pri-

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312. *Id.* at 575.

313. *Id.*

314. *Id.* at 577 (Marshall, J., concurring in part and dissenting in part). *See* text accompanying notes 138-39 *infra.*

315. *Id.* at 578.

316. *Id.*

317. 427 U.S. 160 (1976).

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vate schools, school officials informed them that the schools limited their student body to whites. The lower court held that the schools' refusal to enter into contracts with the applicants violated the 1866 statute's grant of the right to contract.[318] At the beginning of his opinion, Mr. Justice Stewart narrowed its focus:

> It is worth noting at the outset some of the questions that these cases do not present. They do not present any question of the right of a private social organization to limit its membership on racial or any other grounds. They do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. They do not even present the application of § 1981 to private sectarian schools that practice *racial* exclusion on religious grounds. Rather, these cases present only two basic questions: whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional . . . .[319]

However erroneous they may have been,[320] earlier decisions of the Court, particularly *Jones v. Alfred H. Mayer Co.*,[321] established the principle that the 1964 statute establishes not only the right to make contracts, but the duty to enter into contracts with blacks in the same way as with whites. Thus, there was nothing left to do here except to determine whether the imposition of that duty on the private academies would violate their constitutional rights.

Mr. Justice Stewart found no right of association infringed by section 1981.

> [I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.[322]

This is a strange rule to derive from the argument about association—that there is freedom to preach it, but not to practice it.

318. 515 F.2d 1082, 1087 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976).

319. 427 U.S. at 167-68 (footnotes omitted).

320. *See, e.g.*, C. FAIRMAN, RECONSTRUCTIONAL REUNION 1207-58 (1971); Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89.

321. 392 U.S. 409, 441-43 n.78 (1967). *See also* Johnson v. Railway Exp. Agency, 421 U.S. 454, 459-60 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439-40 (1973).

322. 427 U.S. at 176.

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Since there is a right to preach and teach segregation, and the schools involved are free to do so even after admission of blacks, there is no infringement of parents' rights as declared in *Meyer v. Nebraska*,[323] *Pierce v. Society of Sisters*,[324] or *Wisconsin v. Yoder*.[325] But apparently, parents' rights concerning the schooling of their children are confined to those delineated in these cases. There is no right to privacy invaded here. Although the statute's application to the right of admission of black students does "implicate [white] parental interests," parents' privacy interests are constitutionally confined to their "child-bearing" decisions and their freedom to make them.[326] Thus, the right to contract created by section 1981 can be fully implemented by compelling the admission of black students to all-white schools on the same conditions—provided they are not racial—as whites.

Justices Powell, Stevens, White, and Rehnquist formed a peculiar minority. Apparently, they were all convinced "that § 1981 was not intended to restrict private contractual choices."[327] But the Court already construed the statute that way and for Justices Powell and Stevens that construction was binding. Mr. Justice Powell felt it necessary to reject the position of dissenting Justices White and Rehnquist that the decision implies "the intrusive investigation into the motives of every refusal to contract by a private citizen."[328] For Powell, "[t]he case presented on the record before us does not involve . . . [a] personal contractual relationship."[329] He would draw a distinction, although neither the majority opinion nor the precedents that he found controlling suggest it, that:

> § 1981, as interpreted by our prior decisions, does reach certain acts of racial discrimination that are "private" in the sense that they involve no *state* action. But choices, including those involved in entering into a contract, that are "private" in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by the 19th century Civil Rights Acts. The open offer to the public generally involved in the cases before us is

323. 262 U.S. 390 (1923).
324. 268 U.S. 510 (1925).
325. 406 U.S. 205 (1972).
326. 427 U.S. at 170.
327. *Id.* at 186 (Powell, J., concurring).
328. *Id.* at 187.
329. *Id.* at 188.

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simply not a "private" contract in this sense.[330]

It is appropriate to note, first, that Mr. Justice Powell retreats to the intention of the framers of the 1866 legislation to sustain his conclusion, although he conceded that the framers' intention probably was inconsistent with the Court's earlier interpretations of the statute that had brought him to concur. Second, this position was personal. He obviously had not persuaded the majority to buy it. Mr. Justice Stevens revealed a commitment to stare decisis that is rarely seen among the Justices of recent years. "For me," he wrote, "the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided."[331] But,

> [f]or the Court now to overrule *Jones* [the erroneous precedent] would be a significant step backwards, with effects that would not have arisen from a correct decision in the first instance. Such a step would be so clearly contrary to my understanding of the *mores* of today and I think the Court is entirely correct in adhering to [precedent].[332]

One cannot help but wonder what Mr. Justice Stevens would have done had he been faced with deciding the *Brown* case. The "erroneous" precedents there—the school segregation cases resting on *Plessy*—would, if his reasoning in *Runyon* is correct, have foreclosed his joining the majority.

Mr. Justice White's dissenting opinion, joined by Mr. Justice Rehnquist, rehearsed the evidence of clear error in the earlier decisions on which the Court rested here. His argument is telling and unrefuted. Moreover, the precedent established the meaning of section 1982. As he noted, the section 1982 precedent "is a Thirteenth Amendment statute under which the Congress may and did seek to reach private conduct, at least with respect to sales of real estate. The latter [§ 1981] is a Fourteenth Amendment statute under which the Congress may and did reach only state action."[333]

The Court apparently saw this argument as it was seen by Mr. Justice Stevens—a distinction without a difference. In any event, it was Mr. Justice Stewart who had written the opinion in *Jones*. There is nothing so telling in argument to a Supreme Court Justice as a precedent of his own making. Admission of error is certainly too much to

330. *Id.* at 189.
331. 427 U.S. at 189 (Stevens, J., concurring).
332. *Id.* at 191-92.
333. 427 U.S. at 213 (White, J., dissenting).

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expect from the biggest of men.[334]

Whether the opening of private academies to blacks as well as whites will have the effect of cutting back on white flight from desegregated school systems remains to be seen. There is no requirement in *Runyon* to afford scholarships; it may well be that the judgment affords only an escape mechanism for middle-class blacks as well as middle-class whites. And that, too, has been the result of the growing movement of middle-class blacks to the suburbs. Mr. Justice Douglas' concern in *Milliken*,[335] that desegregated city school systems will encompass only the poor who cannot escape either to private schools or to the suburbs, may well prove true. The proposal of the Internal Revenue Service to deny tax-exempt status to private schools discriminating on the basis of race[336] will only make such schools more expensive, thus exacerbating the problem for those who must move if they lose the choice of a proprietary school.

XVII.

Meanwhile, the judicial desegregation process went forward in the lower courts. The Supreme Court declined to interfere,[337] even where substantial numbers of all black schools remained extant under the plan,[338] or where the trial and appellate courts ignored the *Keyes-Milliken* requirements of matching remedy to violation.[339]

The lower courts had no difficulty finding bases for interdistrict segregation despite the strictures of *Milliken* and without Supreme Court

334. *But see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

335. *See* notes 288-296 *supra* and accompanying text.

336. Proposed Revenue Procedure on Private Tax-Exempt Schools, 43 Fed. Reg. 37296 (1976) (to be codified in I.R.C. § 501(c)(3)).

337. *See* Eller v. Vaughans, 414 U.S. 999 (1973) (denying certiorari); Board of Educ. v. Vaughans, 414 U.S. 999 (1973) (denying certiorari); United States v. Texas Educ. Agency, 512 F.2d 896 (5th Cir. 1974), *cert. denied*, 423 U.S. 837 (1975); Carr v. Montgomery County Bd. of Educ., 511 F.2d 1374 (5th Cir. 1974), *cert. denied*, 423 U.S. 986 (1975); Kalamazoo Bd. of Educ. v. Oliver, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Mapp v. Board of Educ., 477 F.2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1977).

338. *See* Mapp v. Board of Educ., 525 F.2d 169 (6th Cir. 1975), *cert. denied*, 427 U.S. 911 (1975); Northcross v. Board of Educ., 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974); Goss v. Board of Educ., 482 F.2d 1044 (6th Cir.), *cert. denied*, 414 U.S. 1171 (1973).

339. *See, e.g.*, Morgan v. Kerrigan, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); Brinkman v. Gilligan, 518 F.2d 853 (6th Cir.), *cert. denied*, 423 U.S. 1000 (1975); Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

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review.[340] Moreover, if as the Supreme Court indicated, segregative intent is a necessary element for de jure segregation, the courts of appeals found that intent may be derived from the segregative effects,[341] thus making a perfect circle.

Busing still had to be pushed,[342] although in a demonstration of impartiality one court chose those to be bused on the basis of random selection.[343] Recalcitrant school districts protected by idiosyncratic district court judges still had to be brought into line.[344] The rules created to protect black children against discrimination were extended to Hispanics.[345] Indians were barred from claiming a right to separate schools.[346] The lower courts protected their own jurisdiction by holding that local boards had standing to enjoin state boards from transferring students,[347] and by enjoining state court procedures that would attack federal court decrees.[348]

Earlier Supreme Court decisions were given more sway than some of those to which the lower courts took no liking. Courts forbade textbook loans to segregated schools,[349] stopped the attempted creation of a new school district to avoid desegregation[350]—gerrymandering is allowed only for one side of the controversy—and held that racial balance among faculty justified even the replacement of a black principal by a white one.[351] The power of the federal court to fix tax rates as part

340. *See, e.g.,* Board of Educ. v. Newburg Area Council, Inc., 421 U.S. 931 (1975) (denying certiorari); United States v. Missouri, 515 F.2d 1365 (8th Cir.), *cert. denied,* 423 U.S. 951 (1975); United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974), *cert. denied,* 421 U.S. 929 (1975); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd on rehearing,* 423 U.S. 963 (1975).

341. *See* United States v. School Dist. of Omaha, 521 F.2d 530 (8th Cir.), *cert. denied,* 423 U.S. 946 (1975); Morales v. Shannon, 516 F.2d 411 (5th Cir.), *cert. denied,* 423 U.S. 1034 (1975). *But see* Soria v. Oxnard School Dist., 488 F.2d 579 (9th Cir. 1973), *cert. denied,* 416 U.S. 951 (1974).

342. Medley v. School Bd., 482 F.2d 1061 (4th Cir.), *cert. denied,* 414 U.S. 1171 (1973).

343. Farha v. Unified School Dist. No. 259, 414 U.S. 1091 (1973).

344. *See, e.g.,* Tasby v. Estes, 517 F.2d 92 (5th Cir.), *cert. denied,* 423 U.S. 930 (1975).

345. United States v. Midland Ind. School Dist., 519 F.2d 60 (5th Cir. 1975), *cert. denied,* 424 U.S. 910 (1976).

346. Geraud v. Schrader, 531 P.2d 872 (Wyo.), *cert. denied,* 423 U.S. 904 (1975).

347. *See, e.g.,* State Bd. of Educ. v. Akron Bd. of Educ., 490 F.2d 1285 (6th Cir.), *cert. denied,* 417 U.S. 932 (1974).

348. *See* Kershaw v. Brooks, 414 U.S. 824 (1973) (denying certiorari).

349. Graham v. Evangeline Parish School Bd., 484 F.2d 649 (5th Cir. 1973), *cert. denied,* 416 U.S. 970 (1974).

350. United States v. Saluda County School Dist., 488 F.2d 804 (4th Cir. 1973), *cert. denied,* 417 U.S. 912 (1974).

351. Board of Educ. v. Dowell, 423 U.S. 824 (1975) (denying certiorari).

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of the desegregation power was accepted by the Court, but over the expressed wish of the Chief Justice and Mr. Justice Powell to hold hearings on the question.[352] The power to withhold HEW funds went without saying.[353]

XVIII.

Whatever fears *Milliken*[354] evoked that the Court was reversing its direction in school desegregation cases seemed to be confirmed by the Court's decision in *Pasadena City Board of Education v. Spangler*,[355] decided in June of 1976. Only Justices Brennan and Marshall dissented.

Private parties had brought suit in 1968 to desegregate the high schools of the Pasadena Unified School District. The United States intervened and was successful in broadening the case to include all the schools of the system. In 1970 the trial court approved a desegregation plan.[356] There was no appeal. In ordering the creation of the plan, the trial court demanded that "[t]he plan shall provide for student assignments in such a manner that . . . there shall be no school in the District . . . with a majority of any minority students."[357] The plan that went into effect in 1970 conformed with that injunction.

Four years later, the school board went to court seeking to be relieved of "the requirement that there be 'no school in the District, elementary or junior high or senior high school, with a majority of any minority student.' "[358] Following the 1970-71 initiation of the plan, a black majority emerged at one school in 1971-72, in four schools in 1972-73, and in five schools by the time of the hearing:

> [T]here was . . . no showing . . . that those post-1971 changes in the racial mix of some Pasadena schools . . . were in any manner caused by segregative actions chargeable to the defendants. The District Court rejected petitioners' assertion that the movement was caused by so-called "white flight" traceable to the decree itself. It stated that the "trends evidenced in Pasadena closely approximate the state-wide trends in California schools, both segregated and desegregated." . . . [The changes in the

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352. United States v. Missouri, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).
353. HEW v. Ferndale School Dist., 414 U.S. 824 (1973) (denying certiorari).
354. *See* notes 269-96 *supra* and accompanying text.
355. 427 U.S. 424 (1976).
356. 311 F. Supp. 501 (C.D. Cal. 1970).
357. *Id.* at 505.
358. 427 U.S. at 429.

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> school mix] apparently resulted from people randomly moving into, out of, and around the [Pasadena] area. This quite normal pattern of human migration resulted in some change in the demographics of Pasadena's residential patterns, with resulting shifts in the racial makeup of some schools.[359]

The Court ruled that in the absence of segregative actions on the part of the school board, there was no basis for holding the board responsible for the increase of blacks in some schools, quoting from *Swann* that "[n]either 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."[360]

The trial court had asserted that the school system had not yet been desegregated, largely because of the failure to reassign students each year to assure that *every* school had a white majority or plurality.[361] But the Supreme Court held that requirement invalid: "[W]e 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."[362] This requirement for annual revision, the Court indicated, would be invalid even where a unitary system had not been attained on the institution of the plan.[363]

The issue was a narrow one. There could be little doubt, however, that at an earlier day, the result probably would have been different. Certainly before *Swann*, if not later, the trial court's decision to compel continued reassignments to maintain racial balance, once a predicate of constitutional violation was established in the first place, would have been regarded as a matter of judicial discretion. And, indeed, this is where Justices Marshall and Brennan still thought it belonged.[364]

Pasadena was followed by a series of cases that gave cold comfort to

359. *Id.* at 435-36.

360. *Id.* at 436 (quoting Swann v. Board of Educ., 402 U.S. 1, 31-32 (1971)).

361. 311 F. Supp. at 522.

362. 427 U.S. at 435.

363. *Id.* at 438 n.5.

364. By way of a parting gesture, Mr. Justice Marshall gave a reading to the Rehnquist opinion not supported by the Rehnquist text. *Id.* at 444 n.2. Marshall contended that Rehnquist would have regarded the case differently had the demographic changes been attributable to "white flight" from the desegregation decree. This conclusion is based solely on the language quoted *supra* note 359 and accompanying text, which hardly sustains his reading.

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those who recalled the unchanging line of successes from *Brown* through *Swann* and up to *Milliken*. But in a second run at *Milliken*,[365] the Court expanded the area of discretionary control of the trial courts over the content of the educational program to be adopted by a school system under a desegregation decree. In *Milliken II*, in an opinion by Chief Justice Burger in which all but Mr. Justice Powell joined, the Court ruled that "a District Court can, as part of a desegregation decree, order compensatory or remedial educational programs for schoolchildren who have been subject to past acts of *de jure* segregation" and may "require state officials found responsible for constitutional violations to bear part of the costs of these programs."[366]

Plaintiffs, on the remand of *Milliken I*, submitted a Detroit-only plan limited to pupil reassignment and calling for each school to have a student composition within 15% of the racial ratio of the district as a whole. (The whole school district was 71.5% black, 26.4% white, and 2.1% other.) The Detroit school board's competing plan called for the elimination of any identifiably white school, assurance of some neighborhood schooling for every child, and less busing than plaintiff's plan. In addition, the board inserted thirteen compensatory educational programs in the plan. The State Board of Education was particularly laudatory about the proposed in-service training and guidance and counseling components. The trial court, after hearings, approved the Detroit board's plan, as it emerged with four educational components: reading, in-service training, testing, and counseling and career guidance. The district court said "that it had 'been careful to order only what is essential for a school district undergoing desegregation.' "[367] The additional programs were to be paid for equally by the Detroit school board and the state defendants.

The Supreme Court admitted the novelty of the issue, but had no difficulty in finding authority for "remedial educational programs as part of a school desegregation decree"[368] in such earlier generalizations of its own as that in *Brown II*, holding that in "fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles."[369] It would be difficult to think of court ac-

365. Milliken v. Bradley, 433 U.S. 267 (1977).
366. *Id.* at 269.
367. *Id.* at 277.
368. *Id.* at 279.
369. *Id.* at 279-80.

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tions that could not be justified under such a generalization. The Court tried, however, to be a bit more specific. A remedy must be "related to 'the *condition* alleged to offend the Constitution.' "[370] It must in fact be "*remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' "[371] It also should take into account the interests of the state and local authorities in running their own affairs "consistent with the Constitution."[372]

There was no contention made that the programs were not designed to restore the school children to a position they would have had were it not for the violations by the school board and the state of their equal protection rights. But, just as the match between violation and remedy was assumed rather than shown, there was no evidence to support the conclusion that somehow children were being restored to the condition in which they would have been but for the segregative acts. There was no invasion of the province of the school board, said the Court, since it was the board itself that chose the programs in the first place. There is no strength to the proposition that "the court's decree must be limited to remedying unlawful pupil assignments." Three requirements that the Court established earlier were, not surprisingly, found to be satisfied. The Court relied extensively on lower court decisions to show that it was only approving tactics that had long been used without disapproval.[373]

After making it clear that its decision was ad hoc, applying only to the facts of this case and not "a blueprint for other cases,"[374] the Court turned to the contention that the order for the State to pay one-half of the additional costs for these programs was a violation of the eleventh amendment. Because it was an order for payments of future, not past, costs, the case fell outside the recently decided *Edelman v. Jordan*,[375] which barred required state payment of disability benefits wrongfully withheld: "That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school sys-

370. *Id.* at 280 (emphasis in original).
371. *Id.*
372. *Id.* at 281.
373. *Id.* at 283-88.
374. *Id.* at 287.
375. 415 U.S. 651 (1974).

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tem."[376] The decree was obviously Janus-faced.

State liability for segregative violations here does not square easily with the Court's exoneration of the state from liability to effectuate an interdistrict remedy in *Milliken I*. The two cases taken together suggest that where an interdistrict remedy is sought, even if the state is culpable, interdistrict relief cannot be granted unless external school districts sought to be utilized in the plan are themselves guilty of constitutional violations. But no Justices recorded notice of this implication.

Mr. Justice Marshall wrote a concurrence applauding the Chief Justice's opinion and rejecting Mr. Justice Powell's opinion concurring in the judgment only.[377] Mr. Justice Powell was concerned about the posture of the case. The exact nature of his concern proved elusive. It was somehow that there no longer was a controversy between students and parents seeking desegregation and a recalcitrant school board. It was now a controversy between the delinquent school board turned plaintiff, on the one hand, and the State on the other. And it was not a suit for desegregation; it was a suit for money. The school board wanted $5,800,000 from the State to effectuate an educational program of its own creation. It was a case of so peculiar a nature to require dismissal of the writ as improvidently granted. Having set out the unique nature of the case—it was apparently that with which Mr. Justice Marshall disagreed—Mr. Justice Powell concurred that the remedy was appropriate against a state guilty of constitutional violations, that the remedy did not exceed the scope of the violations, that the eleventh amendment was no bar, and that the district court appropriately "assumed the role of school superintendent and school board" because the Detroit school board was in such a condition of "exceptional disarray,"[378] and because the school board had "invited this assumption of power."[379]

The Powell opinion is certainly startling if its position is that local government in "exceptional disarray" becomes subject to receivership by a federal court, or that it can delegate its governmental functions to a federal district court when it feels unable to perform them. That is probably not the intended reading of the opinion, which probably only reflects that all Justices share the notion of the omnicompetence of the federal judiciary. But how else can one explain the proposition that

376. 433 U.S. at 290.
377. *Id.* at 291 (Marshall, J., concurring).
378. *Id.* at 296 (Powell, J., concurring in the judgment).
379. *Id.* at 297 n.3.

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approves transfer of power from "a board of education consisting of members possessing no experience in education"[380] to a federal judge equally devoid of that same experience.

In conclusion Mr. Justice Powell, too, mouthed the magic formula, which need only be stated and not proved: "our settled doctrine requiring that the remedy be carefully tailored to fit identified constitutional violations is reaffirmed by today's result."[381] But, as Powell all but acknowledged, this is only a designation of a conclusion: "In my view, it is at least arguable that the findings in this report were too generalized to meet the standards prescribed by this Court."[382] The assumption by all the Justices that the remedy met the violation can be accepted only in its most general form. If the violation can be any segregative act and the remedy any contribution to relief of segregation, then the formula was satisfied here. If the violation is to be particularly identified, however, there was no such identification here, and if the remedy must be "tailored" to the identified violation, it was not done here. Certainly, there was no evidence to suggest that but for the segregative acts, whatever they may have been, the black students would not have required remedial reading, career and other counseling, or would be able to respond better to tests. There was no evidence of what the condition of the children would have been had there been no segregative acts, or that the proposed remedies would restore the deprived children to the place they would have had but for the segregation. A remedy matches a violation when a court says it does and fails to do so when a court says it does not.

Here in the identification of violations and appropriate remedies lies the most recent controversy in school desegregation cases. Before *Milliken II*, the Court had made it clear that there could not be a constitutional violation in the absence of intentional segregative acts by the local government to be charged. Mr. Justice White, speaking for the Court, clearly stated the position in *Washington v. Davis*.[383] That was not a school desegregation case, but a case of alleged government employment discrimination. But the Court relied upon school desegregation cases for its conclusion:

> The school desegregation cases have also adhered to the basic equal

380. *Id.* at 297.
381. *Id.* at 298.
382. *Id.*
383. 426 U.S. 229 (1976).

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protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. . . . The essential element of de jure segregation is "a current condition of segregation resulting from intentional state action." Keyes v. School District No. 1, 413 U.S. 189, 205 . . . . "The differentiating factor between de jure segregation and so-called de facto segregation . . . is *purpose* or *intent* to segregate." Id., at 208. See also id., at 199, 211, 213 . . . .[384]

Mr. Justice Powell, writing for the Court in *Arlington Heights v. Metropolitan Housing Corp.*,[385] reiterated the proposition that segregative intent was a prerequisite to a constitutional violation. Like *White*, *Arlington Heights* did not involve school segregation but relied on school segregation precedents.[386] These two cases, *White* and *Arlington Heights*, were brought home to school desegregation situations in cases handed down the same day as the *Milliken II* decision.

In *Dayton Board of Education v. Brinkman*,[387] Mr. Justice Rehnquist delivered the opinion for the Court. The other two decisions were per curiam reversals calling on the courts below on remand to apply the intent rule of *Arlington Heights* and the remedy rule of *Dayton*.[388]

The *Dayton I* rule, as abstracted from the opinion by the Court in the two per curiam cases, reads:

> If such [intentional] 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 the racial distribution of the Dayton school population as presently constituted, when that 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.[389]

When one remembers that this case was decided on the same day as *Milliken II*, the possibility occurs that the Justices do not read each others' opinions before they are handed down. Certainly, the standard in *Dayton* of incremental remedies for incremental violations hardly could be said to have been applied in *Milliken II*. But then it may be

384. *Id.* at 240.
385. 429 U.S. 252 (1977).
386. *Id.* at 264-68.
387. 433 U.S. 406 (1977).
388. Brennan v. Armstrong, 433 U.S. 672 (1977); School Dist. of Omaha v. United States, 433 U.S. 667 (1977).
389. 433 U.S. at 420.

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that the remedy standard of *Dayton I* was intended to be applicable only to the issue of student assignment, *i.e.*, the issue of the extent of busing, which was not involved in *Milliken II.*

Again, *Dayton I* may have represented the application of *Milliken I* to a single district desegregation case. Fault is the measure of liability in both. In both, it is suggested that the remedy must be addressed only to curing the wrong.

Incremental relief for incremental wrongs is not inconsistent with *Milliken II.* Both may fall under the label of requiring the remedy to be addressed to restoring the plaintiffs to the condition they would have had but for the segregative act. Clearly, *Dayton I* seemed much more rigid in its demand for the delineation of the violation and for an equally clear delineation of the remedy to match that violation, with specific findings to be made on both questions by the trial court and scrutinized by the appellate court.[390]

In *Dayton I*, the Court held that the broad busing order went far beyond the "cumulative violations" that were alleged.[391] All eight Justices (Mr. Justice Marshall recused himself), including Mr. Justice Brennan in dissent, agreed that the remedy exceeded the violation. Mr. Justice Stevens' concurrence entered a caveat. For him, the question of intent depends on objective evidence and not on subjective motivation, but he took no exception to the excessive remedy ruling.

XIX.

In the 1978 Term, perhaps in celebration of the twenty-fifth anniversary of *Brown I*, the Court added further to its jerry-built edifice of school desegregation doctrine. After standing the meaning of congressional language and its legislative history on their heads in *United Steelworkers v. Weber*,[392] in which the Court withdrew from its earlier readings of the Civil Rights Act of 1964 that the statute required equal treatment of individuals, both minorities and majorities,[393] the Court also recanted its recent apostasies in school desegregation cases and returned to the dogma and creed of the NAACP to which it had earlier been true. (From apostle to apostasy—however short-lived—to apoth-

390. *Id.* at 417-20.

391. *Id.* at 418.

392. 99 S. Ct. 2721 (1979).

393. *See, e.g.*, T.W.A. v. Hardison, 432 U.S. 63, 71-72 (1977); McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 278-80 (1976); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

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eosis in a quarter of a century.) It thus demonstrated once more that, wherever its head may be,[394] the Court's heart is in the right place.

Columbus Board of Education v. Penick[395] and *Dayton Board of Education v. Brinkman*[396] were decided on 2 July 1979. They addressed and purported to answer three fundamental constitutional questions. First, had the Court meant what it said in its recent cases[397] about segregative intent as a necessary precondition for finding a constitutional violation? The answer was: "Yes, but . . .," which must properly be interpreted as "No." Second, did the Court mean what it had said in its recent cases about the necessity to tailor the remedy to the constitutional violation?[398] The answer, again, was: "Yes, but . . .," which reads "No." Finally, the question answered was: "Is there an obligation on the part of the states to assure racial balance in its public schools even in the absence of what the Court had once called "de jure segregation?" The answer here was "No, but . . .," which, in common sense, means "Yes." The Court obviously lacks none of the powers over the language once asserted by Humpty-Dumpty.[399]

The *Columbus* and *Dayton II* cases concerned two Ohio cities, in neither of which had there ever been constitutional or statutory requirements for the separation of the races in public schools. In *Columbus*, however, the Court established a new meaning for the phrase "dual school systems." Theretofore, those words seemed to have meant a requirement that there be separate school systems for black students and for white students. In *Columbus*, the phrase came to mean a school system in which blacks were predominant in some schools while whites predominated in others. Given the prevalence of neighborhood schools

394. " 'You are old Father William,' the young man said,
'And your hair has become very white;
And yet you incessantly stand on your head—
Do you think, at your age, it is right?'
'In my youth, Father William replied to his son,
'I feared it might injure the brain;
But, now that I'm perfectly sure I have none,
Why, I do it again and again.' "

L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS & THE HUNTING OF THE SNARK 45 (Schocken ed. 1978).

395. 99 S. Ct. 2941 (1979).

396. 99 S. Ct. 2971 (1979).

397. *See, e.g.,* text accompanying note 281 *supra.*

398. *See, e.g.,* text accompanying notes 262, 278, 280, 282 *supra.*

399. L. CARROLL, *supra* note 394, at c. 6, 191-204, and especially at 197.

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in most metropolitan areas of the nation, it would appear that all cities in the country have been or are operating "dual school systems."

From the premise of the existence of dual school systems, the conclusion of constitutional violation readily flowed. For once a dual school system is found to exist, the duty of the school board to take affirmative steps to "convert it to a unitary school system" has long since been found to be implicit in *Brown II*.[400] "Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment."[401]

Moreover, not only did the school board fail its "affirmative duty to disestablish the dual school system,"[402] it engaged in practices that were themselves segregative in effect and, therefore, constitutional violations, such as assignment of black teachers to substantially black schools until 1974;[403] "the intentionally segregative use of optional attendance zones, discontiguous areas, and boundary changes; and the selection of sites for new school construction that had the foreseeable and anticipated effect of maintaining the racial separation of the schools."[404] "Gerrymandering of boundary lines also continued after 1954."[405]

On the question of the required segregative intent, the Court denied that the trial court had lifted itself by its own bootstraps by deriving intent from effect. But this denial was contradicted by its own use of the same device:

> The District Court, however, was amply cognizant of the controlling cases. It is understood that to prevail the plaintiffs were required to " 'prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action,' " 429 F.Supp., at 251, quoting *Keyes*, *supra*, at 198—that is, that the school officials had "intended to segregate." 429 F.Supp., at 254. See also 583 F.2d, at 801. The District Court also recognized that under those cases disparate impact and foreseeable consequences, without more, do not establish a constitutional violation. See, *e.g.*, 429 F.Supp., at 251. Nevertheless, the District Court correctly noted that actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate effect,

400. Green v. County School Bd. 391 U.S. 430, 437 (1968).
401. 99 S. Ct. at 2947.
402. *Id.* at 2948 (quoting McDaniel v. Barresi, 402 U.S. 39, 41 (1971)).
403. *Id.*
404. *Id.* at 2948-49.
405. *Id.* at 2949 n.10.

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> forbidden purpose. Those cases do not forbid "the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn." *Id.*, at 255. Adherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn." *Ibid.* The District Court thus stayed within the requirements of *Washington v. Davis* and *Arlington Heights.* See *Personnel Administrator of Massachusetts v. Feeney*, 99 S.Ct. 2282, 2296 n.25 (1979).[406]

Thus, it would seem that if the trial court says that it is cognizant of the need to find segregative intent elsewhere than in the segregative effects that is sufficient to meet the Court's requirements, even in the absence of any other facts to sustain its conclusion.

The Court's reasoning was equally concise and cogent with regard to the requirement that the remedy be no more extensive than the violation. Again, that was easy if the conclusion that Columbus maintained a dual school system was valid. But the Court did not rely on this. Instead it accepted the trial court's ruling that, in effect, any segregative acts within a school system necessarily have a systemwide effect justifying a systemwide remedy. That conclusion, as quoted in the Supreme Court's opinion, reads:

> "Actions and omissions by public officials which tend to make black schools blacker necessarily have the reciprocal effect of making white schools whiter. '[I]t is obvious that the practice of concentrating Negroes in certain schools by structuring attendance zones or designating "feeder" schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white.' *Keyes* [, *supra*, at 201 . . .]. The evidence in this case and the factual determinations made earlier in this opinion support the finding that those elementary, junior, and senior high schools in the Columbus school district which presently have a predominantly black student enrollment have been substantially and directly affected by the intentional acts and omissions of the defendant local and state school boards." 429 F.Supp., at 266.[407]

It is not quite clear how the *Keyes* proposition about "keeping other *nearby* school predominantly white" results in bringing *all* schools

406. *Id.* at 2950.
407. *Id.* at 2951 n.16.

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under the guillotine. But the expansiveness of judicial language from the particular to the general is ubiquitous in Supreme Court opinions.

The remedy invoked here was a proportional distribution of white and black students in every school in the system. The Court justified this by ignoring some language in *Swann* and then deriving its justification from *Swann*. The ignored language was this:

> If we were to read the holding 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 disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.[408]

This language of *Swann* apparently did not mean what it said, for the Court, in reliance on *Swann*, accepted the requirement of systemwide racial balance:

> Petitioners also argue that the District Court erred in requiring that every school in the system be brought roughly within proportionate racial balance. We see no misuse of mathematical ratios under our decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22-25 (1971), especially in light of the Board's failure to justify the continued existence of "some schools that are all or predominantly of one race . . . ." *Id.* at 26; see Pet. App. 102-103. Petitioners do not otherwise question the remedy if a systemwide violation was properly found.[409]

Mr. Justice White, who had written the opinion for the Court in *Columbus*, also wrote the Court's opinion in *Dayton*. It was no surprise, therefore, that the *Dayton* opinion tracked the *Columbus* opinion with regard to all the major issues. There was one additional problem in *Dayton* that the Court readily overcame. In *Columbus* the Court relied very heavily on the findings of fact and determinations of the trial court, but it could not do so in *Dayton* because the facts found by the trial court were in conflict with the conclusion that the Court wanted to achieve.

The trial court should not be blamed. After repeated reversals by the Court of Appeals for the Sixth Circuit because its remedy was inadequate, the trial court's judgment finally reached the Supreme Court in *Dayton I*.[410] There, the Supreme Court reversed the Sixth Circuit and "concluded that there was no warrant for imposing a systemwide rem-

408. 402 U.S. at 24.
409. 99 S. Ct. at 2945 n.3.
410. *See* text accompanying notes 387-91 *supra*.

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edy."[411] The case was remanded to the trial court to "determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations."[412] The district court engaged in this additional fact finding and came to the conclusion that "plaintiffs had failed to prove that acts of intentional segregation over 20 years old had any current incremental segregative effects."[413] Moreover, the trial court found that there was insufficient "evidence that the racial separation [in *Dayton*] had been caused by the Board's own purposeful discriminatory conduct."[414] These hurdles did not faze Mr. Justice White. He simply wrote the same opinion as in *Columbus*, substituting the words "The Court of Appeals held" for the proposition "the District Court found." The number of skinned cats lying around the halls of the marble palace is testimony to the diversity of methods available there to remove an epidermis. Certainly there is more than one way.

The judgments in *Columbus* and *Dayton* were not unanimous. In both cases, the opinion for the Court commanded a bare majority. There were five Justices in support of the Court's judgment in *Dayton* and seven in *Columbus*. The Chief Justice and Mr. Justice Stewart concurred in the judgment, but not the opinion, in *Columbus* and dissented in *Dayton*. Each wrote one opinion for both cases and the Chief joined the Stewart opinion. Mr. Justice Stewart had two primary quarrels with the Court's position. First, he insisted on the importance of the trial court's judgment on the issues of fact involved both in the question of necessary intent and in the question of the scope of the violation and the remedy appropriate to its cure:

> Whether actions that produce racial separation are intentional within the meaning of *Keyes v. School Dist. No. 1*, 413 U.S. 189; *Washington v. Davis*, 426 U.S. 229; and *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, is an issue that can present very difficult and subtle factual questions. Similarly intricate may be factual inquiries into the breadth of any constitutional violation, and hence of any permissible remedy. See *Miliken v. Bradley I*, 418 U.S. 717; *Dayton Board of Education v. Brinkman I*, 433 U.S. 406. Those tasks are difficult

411. 99 S. Ct. at 2976.
412. *Id.* (quoting from 433 U.S. at 420).
413. *Id.*
414. *Id.*

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> enough for a trial judge. The coldness and impersonality of a printed record, containing the only evidence available to an appellate court in any case, can hardly make the answers any clearer.[415]

His judgment followed his premise that the trial court was better at finding the facts than the court of appeals and so he joined the judgment in *Columbus* but not in *Dayton*.

Second, it was Stewart's view not that the Court's label of a dual school system was in error, but that the proposition that followed from finding the existence of a dual school system—that the burden of proof was on the school boards to show that there was no current segregative consequences of the 1954 original sin—was in error. Although this probably should have led him to disagreement with the Court's conclusion in *Columbus* as well as in *Dayton*, it did not.

The Chief Justice's opinion showed basic sympathies with those of Justices Powell and Rehnquist who dissented in both cases:

> I agree especially with that portion of MR. JUSTICE REHNQUIST's opinion that criticizes the Court's reliance on the finding that both Columbus and Dayton operated "dual school systems" at the time of *Brown v. Board of Education*, 347 U.S. 489 (1954), as a basis for holding that these school boards have labored under an unknown and unforeseeable affirmative duty to desegregate their schools for the past 25 years. Nothing in reason or our previous decisions provides foundation for this novel legal standard.
>
> I also agree with many of the concerns expressed by MR. JUSTICE POWELL with regard to the use of massive transportation as a "remedy." It is becoming increasingly doubtful that massive public transportation really accomplished the desirable objectives sought. Nonetheless our prior decisions have sanctioned its use when a constitutional violation of sufficient magnitude has been found. We cannot retry these sensitive and difficult issues in this Court; we can only set the general legal standards and, within the limits of appellate review, see that they are followed.[416]

Mr. Justice Rehnquist wrote a dissenting opinion in each case. Both his opinions were joined by Mr. Justice Powell. Powell wrote an additional dissent of his own making two points that are given no consideration whatsoever in the majority opinion, although their importance cannot be gainsaid. He objected to the "wholly new constitutional concept applicable to school cases."[417] He thought the time had come to

415. 99 S. Ct. at 2983 (Stewart, J., concurring in *Columbus* and dissenting in *Dayton*).

416. 99 St. Ct. 2941, 2952 (1979) (Burger, C.J., concurring).

417. 99 S. Ct. 2982, 2988 (1979) (Powell, J., dissenting).

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recognize that "the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country."[418] Powell was concerned on the basis of evidence he cited that the growth of the school desegregation industry was proving harmful to the educational prospects of all school children and not least the minority children who were supposedly the beneficiaries of the Court's *noblesse oblige.*

It was left to Mr. Justice Rehnquist, as it often is these days, to dissect and destroy the reasoning of the Court's opinions. If rationality were the basis for Supreme Court judgments, the Court's constitutional jurisprudence would be substantially different from what it is. Academics tend to charge Rehnquist's opinions to his personal predilections rather than putting that label where it belongs—on Justices Brennan and Marshall who are often, as here, the beneficiaries of sentimentality by Justices White, Blackmun, and Stevens. Rehnquist's position here, as elsewhere, suffers less from his passion than from his dispassion, less from sentimentality than from rationality, less from an adherence to a "higher law" than from adherence to constitutional law. If we do not like what Rehnquist has to say, we should be bold enough to acknowledge the reasons we do not like it. But like a majority of the Court, we are not prepared openly to choose emotion over reason as the guide to decision, however much we prefer decisions that satisfy our predilections to those that satisfy our intellect.

To analyze the Rehnquist opinions here would be to take the reader back through all that already has been noted in this article. I, therefore, impose on the reader only the barest adumbration of his opinion. After decrying the replacement of local school boards by federal courts, he also disparaged the Court's substitution of words for facts in its disposition of two of the fundamental questions presented to it: " 'Discriminatory purpose' and 'systemwide violations' are to be treated as talismanic phrases which once invoked, warrant only the most superficial scrutiny by appellate courts."[419]

What Rehnquist does do, by comparing what was done here with what the Court did in the past, is to reveal the giant changes so casually effected:

> The Court suggests a radical new approach to desegregation cases in

418. *Id.*
419. 99 S. Ct. at 2952 (Rehnquist, J., dissenting).

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> systems without a history of statutorily mandated separation of the races; if a district court concludes—employing what in honesty must be characterized as an irrebuttable presumption—that there was a "dual" school system at the time of *Brown I*, 347 U.S. 483 (1954), it must find post-1954 constitutional violations in a school board's failure to take every affirmative step to integrate the system. Put differently, *racial imbalance* at the time of the complaint is filed is sufficient to support a systemwide, racial balance school busing remedy if the district court can find *some* evidence of discriminatory purpose prior to 1954, without any inquiry into the causal relationship between those pre-1954 violations and current segregation in the school system.[420]

Rehnquist points out that if this standard is applied, it may mean that almost every urban school system in the nation is in violation of the fourteenth amendment and subject to a judicial decree commanding racial balance proportionate to the overall ratios in every school in every system:

> If that standard were to be applied to the average urban school system in the United States, the implications are obvious. Virtually every urban area in this country has racially and ethnically identifiable neighborhoods resulting from a melange of past happenings prompted by economic considerations, private discrimination, discriminatory school assignments, or a desire to reside near the people of one's own race or ethnic background. See *Austin Independent School District v. United States*, 429 U.S. 990, 994 (1976) (POWELL, J., concurring). It is likewise true that the most prevalent pupil assignment policy in urban areas is the neighborhood school policy. It follows inexorably that urban areas have a large number of racially identifiable schools.
>
> . . . .
>
> But the Constitution does not command that school boards not under an affirmative duty to desegregate follow a policy of "integration über alles." If the Court today endorses that view, and unfortunately one cannot be sure, it has wrought one of the most dramatic results in the history of public education and the Constitution. A duty not to discriminate in the School Board's own actions is converted into a duty to ameliorate or compensate for the discriminatory conduct of other entities and persons.[421]

Mr. Justice Rehnquist's doubts about the breadth of innovation in these cases can, I submit, be supported only by hope. Surely, the Court did not announce in the plain terms of *Brown I* or *Green* that it was

420. *Id.*
421. *Id.* at 2964.

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seriously modifying the constitutional standards that had theretofore applied. But strangely, in the face of the challenge of the dissenters, the majority was silent and did not deny that it had wrought such basic changes with which it was charged.

To the outsider it would seem that the Court has, in fact, abolished the distinction between de facto and de jure segregation and has ruled that any federal district court is free—perhaps compelled—to order systemwide racial balance in any system in which some schools have black majorities and others have white majorities. The only reason to doubt this is the Court's general lack of concern for the doctrine of stare decisis, so that however much the lower courts are bound by Supreme Court decisions, it is itself bound to follow only those of its decisions of which it approves.[422]

It would appear that *Columbus* should be placed in the Pantheon along with *Brown* and *Green* as major achievements of the Court's restructuring of the American society. That there was little fanfare on the announcement of *Columbus* may be due to the low key in which the majority opinion was written. It may be that it fell in the shadow of the previously announced *United Steelworkers v. Weber*. It may be that, in the closing rush, the Justices' law clerks failed to inform them of the magnitude of their achievement. The lack of commotion, however, only demonstrates that the Court's social engineering may be accomplished insidiously as well as blatantly.

XX.

In a recent edition of his book on jurisprudence, Lord Lloyd of Hamstead, Quain Professor of Jurisprudence at the University of London, reported that "[o]ne of the most significant contemporary characteristics of jurisprudence is the coming together of positivism and natural law."[423] That conjunction may be descriptive of the school desegregation cases in the Supreme Court. Certainly, however, there is more of what is called natural law than positivism in the decisions.

422. There is another reason to doubt that the desegregation structure has finally been topped off. Although the Court denied certiorari in several of the cases that it had held pending disposition of *Columbus* and *Dayton*, it retained jurisdiction over the Wilmington multidistrict racial balance order. *Delaware State Bd. of Educ. v. Evans*, 47 U.S.L.W. 3414 (U.S. Dec. 12, 1978) (No. 78-671). The *Wilmington* case would appear to have been held for disposition pending elucidation of the Supreme Court's decision in some unidentified case to be decided during the 1979 Term.

423. D. LLOYD, INTRODUCTION TO JURISPRUDENCE 84 (3d ed. 1972).

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The incentive for the joinder of natural law and positivism—akin to mixing oil and water—was explained by Lloyd:

> Behind all these attempts to find a place for a higher law may be discerned a feeling of discontent with justice based on positive law alone, and a strenuous desire to demonstrate that there are objective moral values which can be given a positive content and expressed in normative form, and that law which denies or rejects these values is self-defeating and nugatory.[424]

One difficulty, as the Court's segregation decisions reveal, is that there is not now, and there seems never to have been, any "objective moral values" on which to base resolution of the particular problems that come before a court. And, in a democratic society, in which the members are purportedly governed only with their consent, any such consensus of "moral values" is more likely to be found in the legislature's will than in the judiciary's judgment. Except in terms of religious dogma and often even there, "moral values" will likely prove to be subjective rather than objective. In any event, they are subject to change from place to place and from time to time.

If one seeks the "objective moral value" that grounds the decision in *Brown* and the cases that followed from it, and not merely the desegregation cases, it is likely to be stated in the word "equality." Perhaps, however, the true morality would be found in the rejection of the use of race as a legitimate governmental device and of the need for racial balance in the public school classroom. The latter is a refutation of the former.

If not a "moral value," equality, or "approximate equality," in Professor H.L.A. Hart's terminology, is a "truism" about the human condition in society.[425] Hart's other four "truisms" are "human vulnerability," "limited altruism," "limited resources," and "limited understanding and strength of will." These give rise to "the minimum content of natural law":

> For it is a truth of some importance that for the adequate description not only of law but of many other social institutions, a place must be reserved, besides definitions and ordinary statements of fact, for a third category of statements: those the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have.[426]

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424. *Id.* at 87-88.
425. H. HART, THE CONCEPT OF LAW 189-95 (1961).
426. *Id.* at 195.

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Neither "equality" nor any of the five Hart truisims, however, gives rise to a judicial standard for the governance of human conduct. For to return to Lloyd:

> [A]lthough Hart refers to the implications of what he calls the approximate equality between human beings, he himself recognizes that no universal system of natural law or justice can be based upon the principle of impartiality, or that of treating like cases alike. For the essential question here is by what criteria we are to determine which cases are to be treated as alike, and no such feature of the physical or psycho-somatic condition of human beings as embodied in the idea of approximate equality can indicate how a society may decide which cases are alike for this purpose. . . . The rule of equality, therefore, cannot be derived from any formal principle of impartiality, any more than it can be derived from the physical or psychic nature of human beings or from the character of human practice and experience in this age or other ages. The idea of equality or non-discrimination is essentially a value judgment which cannot be derived from any assertions or speculations regarding the nature of man. No insistence, therefore, on the idea of impartiality, or the rules of natural justice, or the "inner morality" of the law in the sense used by Professor Fuller can afford a basis for arriving at such a principle as that of non-discrimination. This, indeed, is fully recognized by Hart himself, when he remarks that the idea of impartiality is "unfortunately compatible with very grave iniquity."[427]

Perhaps this justifies the framers in their failure to provide for equality in the Constitution, even as amended. The Constitution states a limit on governmental action. It is negative in form and substance. It says that none shall be deprived of the equal protection of the laws. And that was long taken to mean that legislative—governmental—inequalities of treatment cannot be justified by specious reasons, reasons that cannot sustain the use of a standard as a means to a legitimate legislative objective. The color of a man's skin has to be just such an irrelevant standard. No case has come before the Supreme Court in which skin color, whether black, brown, red, yellow, or white, was shown to be an appropriate measure for governmental sanction or benefit. The argument that the *Japanese Evacuation Cases*[428] reveal a rational classification on grounds of race is simply false. Whatever rationality was found in the classification was attributed to nationality

427. D. LLOYD, *supra* note 423, at 86-87.

428. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

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and not race. It might equally have been applied to Germans and those of German descent, or Italians and those of Italian descent, during World War II. Nationality is not the equivalent of race.

It was this notion of forbidding the states to classify students by race that afforded strength to the *Brown* and *Bolling* decisions. For the purposes of the law, the Court said a black skin is the same as a white skin. No other distinctions may be attributed to differences in pigmentation. When it moved beyond the equation for legal purposes of black skin and white skin and substituted an equation of all blacks with one another and all whites with one another, the Court committed a mischief that may take longer to cure than the various uses of race by American governments to deny black-skinned persons admission to the American polity.

Race does not define a cognizable legal class. That does not mean that race does not afford, at least among minorities, a sense of separateness and loyalty. The only commonality about a race is the color of skin or the geographic origin of forebearers. To use race as a class is necessarily to assert that there are fundamental differences between races and not merely the named superficial ones. To treat race as a class is indeed to turn back the clock—back beyond *Plessy*'s 1896, back beyond the fourteenth amendment's 1868, back to 1857 and Chief Justice Taney's opinion in *Dred Scott v. Sandford*,[429] which was indeed based on the proposition that skin color carried with it all sorts of other attributes—physical, moral, intellectual—which distinguished all black persons from all white persons. We cannot eradicate racism by adopting its fundamental premise that there are differences between races that justify distinct treatment by the law.

The principal effect of the fourteenth amendment was the obliteration of the racial classification made by *Dred Scott*. It took almost a hundred years to get the constitutional engine started toward that objective. That was the contribution of *Brown* and *Bolling*. Somewhere since, the engine seems to have been sidetracked, perhaps on the premise of Mr. Justice Blackmun in his separate opinion in *Bakke*,[430] that having used racial categories to justify burdens on blacks, it is not inappropriate to use racial categories to confer benefits upon them. Even so, as far as the school cases are concerned, I have some difficulty in

429. 60 U.S. (19 How.) 393 (1857).
430. Board of Regents of Univ. of Cal. v. Bakke, 436 U.S. 297 (1978).

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assuring myself that blacks are being benefitted by their compelled association with whites in the classrooms of our public schools.

"*Brown v. Board of Education* was the beginning." It was the instigation of a social revolution, a revolution still in progress. But it is one thing to start probing a revolution; it is another to accomplish it. The limits on judicial power are not externally imposed. They are intrinsic in the judicial function. A court cannot command societal change, whatever it may do to induce it.

The Court went beyond *Brown* and *Bolling* to *Green*, perhaps on the mistaken assumption that segregation was the consequence of the laws, when in fact the laws were the consequence of segregation. Or it more likely acted on proof that elimination of Jim Crow did not automatically end school segregation. So something more had to be done. In choosing the schools as the primary means for bringing blacks into full partnership in American society, the Court may also have mistakenly assumed that the schools are the place where social values are inculcated, so that bringing black and white children together would result in proper understanding about the absence of real differences between them. Subsidiary to this misplaced faith in the efficacy of the public schools to reduce if not eliminate racial prejudice was the expectation that the same educational opportunities for black children and white children would result in equal educational accomplishments for all. One cannot say that the Court succeeded in either of these objectives, if they were its objectives. Frustration marks the course of its decisions. In seeking to effect racial balance in America's public schools, the Court frequently has been thwarted by the complexities of existing demographic patterns and by the fact that demographic distributions are highly plastic and malleable and still largely controlled at the discretion of the parents rather than the government. Demography, geography, wealth, and history—not to mention the plain cussedness of a democratic society that does not always understand what's good for it—were factors that the courts could not control and were, therefore, left out of the desegregation plans that were instituted almost everywhere that black and white children attend school in the same area.

The Court has not been without its successes in school desegregation. Surely, more black children are attending school with white children than ever before, if that's a measure of success. But it is the failures that rankle. Almost every major American city has a predominant and increasing black student body located in geographic areas more note-

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worthy for delinquency, disease, and drugs than for educational excellence.

The courts will continue to grind out their desegregation decrees. Some will have the same effect as Canute's mandate to the tide. But the Court may take pride in the fact that it addressed "The American Dilemma" when no other branch of government was able or willing to do so. Its accomplishments are real, but inadequate. Perhaps, admission to the American society must come for the black, as it has for the new entrants of times gone by, through entry into the middle class. Education—schooling—is one of the hallmarks of the middle class: it may be a necessary, but it is not a sufficient, condition. In any event, the school desegregation cases soon lost sight of education as the concern that justified its entry into the arena. Whether the school cases have enhanced or inhibited the reconciliation of the races is a question that I think is not yet answered.

None, however, should gainsay the good faith and integrity of a Court dedicated to wanting to bring about what it believes must be good for the nation. If it has erred, its error was in trying too much, not too little.

Between the idea
And the reality
Between the motion
And the act
Falls the Shadow

Between the conception
And the creation
Between the emotion
And the response
Falls the Shadow[431]

431. T. ELIOT, THE COMPLETE POEMS AND PLAYS 58-59 (1952).

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