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LEGAL ASPECTS OF BUSING FOR DESEGREGATION IN DE FACTO SEGREGATED SCHOOL DISTRICTS

The University of North Carolina at Greensboro Ed.D. 1983

LEGAL ASPECTS OF BUSING FOR DESEGREGATION IN DE FACTO SEGREGATED SCHOOL DISTRICTS

by

James N. Fuller

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Approved by

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APPROVAL PAGE

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FULLER, JAMES N. Ed.D. The Legal Aspects of Busing for Desegregation De facto Segregated School Districts. (1983) Directed by Joseph E. Bryson. 165 pp.

The purpose of this historical study was to examine the legal aspects of court-ordered busing for the purpose of desegrating de facto segregated public school systems. The study sought answers to the following questions: What has been the trend regarding court-ordered busing in de facto segregated school districts? How has the United States Supreme Court ruled in cases involving de facto school segregation? What is meant by the term "intent to segregate"? What has the United States Supreme Court required in busing across school district boundaries in order to correct an inequity in segregated school systems? To what extent has the United States Supreme Court mandated remedial plans to desegregate de facto segregated school s systems?

The investigative process used consisted of an analysis of the judicial decisions rendered in nine significant United States Supreme Court cases concerned with desegregating de facto segregated school districts. Each case was reviewed in light of its facts, its decisions, and the legal precedents it established.

The study provided the following findings in response to the five research questions:

1. The Court upheld busing in cases involving

segregative intent and racial classification when stated in school policies.

2. No busing was required in cases which had no history of segregative intent due to segregative housing patterns of migratory demographics.
3. When segregative intent was found on the part of school or state officials, the concept of de jure segregation was extended.
4. A multi-district remedy could not be instituted on a single school district unless the other districts through discriminatory acts had caused interdistrict segregation.
5. Remedial plans to desegregate school districts were mandated whenever there was evidence of segregation and intent to segregate by school authorities.

This study further established that judicial relief may be obtained in certain de facto school desegregation cases, but unanimous decisions in such cases is rare.

ACKNOWLEDGMENTS

The writer wishes to express sincere appreciation to those individuals who gave assistance in making this dissertation a reality. Indebtedness and heartfelt gratitude are extended to the chairman of my Dissertation Committee, Dr. Joseph E. Bryson, whose guidance, counsel, and encouragement made this study possible. Gratitude is extended to the other members of the Committee: Dr. Dale L. Brubaker, Dr. Dwight Clark, Dr. John A. Humphrey, and Dr. Donald W. Russell.

The support and assistance of the library staff at The University of North Carolina at Greensboro were essential to the completion of the study. The writer is also indebted to Ms. Peggy Joyner and Ms. Sharon Lopez for their help in this study.

Finally, this dissertation would not have been completed without the love, patience, and understanding of my wife, Gwendolyn, and sons, Carlos, Christopher, Sharn, and Markus.

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CHAPTER I

INTRODUCTION

The unclear aspects of de facto school segregation and the complexity of its migratory facets have aided its legal existence in many non-Southern school systems. While surface intent to racially segregate the schools by the governing bodies may be absent and legal de jure segregation no longer exists, racial segregation of students remains a stark reality in de facto segregated school districts.

The 1954 Brown v. Topeka Board of Education Supreme Court decision declared an end to legal public school segregation in the United States.[1] The ensuing years yielded an array of court-litigated public school decisions that severed the remaining vestiges of de jure public school segregation. These decisions, which often involved extensive busing, were aimed primarily at school districts in the South.

The federal courts ordered desegregation of most segregated minority schools and recommended that schools adopt plans approximately reflecting the racial ratio of the district.[2] Busing was used extensively in the implementation

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[1]Brown v. Board of Education of Topeka, Kansas, 34 U.S. 483, 98, LEd 873 74 S. Ct. 686 (1954).

[2]Gary Orfield, Must We Bus? (Washington D.C.: The Brooking Institution, 1978), p. 135.

of the Swann v. Mecklenburg Board of Education decision as well as in many other public school desegregation efforts in the Southern states. Although busing had been used to desegregate de jure segregated school districts, the legal aspects of busing for the desegregation of the de facto segregated school districts were more complex.

Statement of the Problem

The court litigation efforts to desegregate de facto segregated school districts became a paramount issue in the 1970's. Nearly thirty years after the Brown decision, many non-Southern school districts still consisted of some racially segregated schools. The legal aspects of busing for the desegregation of these school districts bear investigation. It is possible that trends from court decisions can indicate guidelines for eliminating all public school segregation. Presently, school administrators and school board members lack clear-cut guidelines and data relative to the legal aspects for the eradication of de facto segregation in the public schools. Thus, a need does exist for an examination and compilation of the legal aspects of busing for desegregation in the nation's de facto segregated public school.

Purpose of the Study

The purpose of this study was to present the legal basis for court-ordered busing to desegregate the de facto

segregated public schools. This study examined pertinent court decisions which have dealt with busing in de facto segregated school districts. The following questions were of primary concern in achieving the purpose of this study:

1. What has been the trend in court-ordered busing in de facto segregated school districts?
2. How has the United States Supreme Court ruled in cases involving de facto segregation?
3. What does the United States Supreme Court mean by "intent to segregate"?
4. What has the United States Supreme Court required in busing across school district boundaries in order to correct an inequity in segregated school systems?
5. To what extent has the United States Supreme Court mandated remedial plans to desegregate de facto school systems?

This study analyzed significant judicial decisions which related to busing in de facto segregated school cases. A review of the Congressional mandates concerning school busing was also presented. Finally, this study has provided insights into an often neglected chapter of public school desegregation.

Scope of the Study

This is a historical study limited to the questions which focus upon the legal aspects of busing for desegregation

in de facto segregated school districts. In order to specify certain parameters to this historical study, five pivotal questions were addressed.

The judicial investigations selected for this study begin with the United States Supreme Court Brown I decision in 1954 and terminate with the United States Supreme Court Crawford desegregation decision of 1982. These landmark litigations served as the primary source for this writer's research. A summary of recent legislative pursuits is presented and analyzed as related essentials for this research. Because of the numerous social facets of segregation, this study did not attempt to delve into areas beyond the legal aspects of busing for desegregation in de facto segregated school districts. Intensive research into other aspects of school desegregation was beyond the realistic limits of this study.

Methods, Procedures and Sources

The basic research procedure of this historical study was to review and analyze nine selected court cases regarding the legal aspects of busing in de facto segregated school districts. To determine whether a need existed for this research, an examination was made of the Dissertation Abstracts for topics focusing on busing as a means for school desegregation. The search revealed that very few studies have investigated this topic. Research summaries from the legislative actions of the 97th Congress were found

in issue briefs published by the Library of Congress Congressional Research Service. A partial review of the related literature was obtained through a computer search from the Educational Resources Information Center (ERIC). Journal articles on school desegregation were researched through the use of the Reader's Guide to Periodical Literature and The Education Index in order to acquire relevant information, viewpoints, and in-depth treatment of the subject.

Landmark court cases relating to the topic were researched using the U.S. Supreme Court Digest, the U.S. Supreme Court Reports, the U.S. Report Lawyer's Edition, the Federal Supplement, the West Education Law Report, and the Corpus Juris Secundum. Additional information was examined in selected related topics as cited in the bibliography.

Definition of Terms

The following definitions were pertinent to this study:

Action: Court proceeding; a suit

Appellant: A court or agency that has review power

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

Congressional Mandates: Orders authorized by the enactment of laws by the United States Congress

Constitutional Rule: A law deriving from the constitution or authoritative document of a nation or body of people

De Facto: Existing in actual fact, regardless of legal establishment of recognition; distinguished from de jure

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

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

Enjoin: To order or prohibit action

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

Litigation: The legal proceedings by which a lawsuit is settled

Plainiff: One who files a lawsuit

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

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

Writ of certiorari: A court order that a higher court issues to a lower court requesting that court records be sent to the higher court for review

Design of the Study

The remainder of the study is divided into four major parts. Chapter II contains a review of related literature,

focusing on the history of desegregation efforts in the public schools and showing the relationship between busing and the major issue of school desegregation. This chapter not only provides a profile of the eleven justices of the Supreme Court since 1973, but summarizes recent legislative action on busing for desegregation.

Chapter III describes the legal aspect of the de facto desegregation process. It begins with the segregative intent issue in Keyes and ends with the most recent United States Supreme Court ruling in the Crawford decision. Furthermore, this chapter contains an analysis of significant United States Supreme Court cases involving busing for desegregation in traditionally de facto segregated school districts.

Chapter IV provides a description of the selected nine landmark cases used in this study, presenting the facts, the decisions, and discussion of each case.

Chapter V summarizes the study and delineates the conclusions from the analysis of the selected United States Supreme Court Cases. The legal requirements derived from the landmark decisions are also designated. Based on the five selected questions underlying the study, the answers are presented with responses derived in the selected cases.

CHAPTER II

REVIEW OF THE LITERATURE

Overview

The awesome trust for an integrated education for black Americans did not originate in 1954. The development of that year was a milestone on a much longer, older and larger social movement for human equality. Indeed, the 1896 Plessy v. Ferguson decision,[1] a transportation case, had mandated a "separate but equal" doctrine which loomed as a dark cloud for black Americans for sixty years.

But on the morning of May 17, 1954, the United States Supreme Court etched a momentous decision in the pages of history known as the Brown decision. That pivotal decision annulled laws in seventeen states that had required or permitted racially segregated schools. Chief Justice Earl Warren stated:

> We conclude that in the field of public education the doctrine of 'separate-but-equal' has no place. Separate educational facilities are inherently unequal.[2]

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[1]Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256.

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

The Brown decision became the forerunner of unprecedented de jure segregated school litigations which were to take place in the following decade. For a while, the South responded with considerable resistance. However, in time, public school integration became more accepted and more complete in the South than in any other section of the country. In more recent years, the court litigations have been aimed at de facto segregation and at busing to achieve integration in de facto segregated school districts.

Legal Racial Discrimination and the Brown Decsision

On September 22, 1862, President Abraham Lincoln announced that on the first of the following January, "all persons held as slaves within any state or designated part of a state . . . shall be then, thence forward and forever free", and that on that day he would, by proclamation, "designate that the states and parts thereof" which continued to hold slaves should be in "rebellion against the United States".[3] President Lincoln issued the Emancipation Proclamation January 1, 1863.[4]

In December 1863, the United States House of Representatives received a resolution for a Thirteenth Amendment

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[3]The Lincoln Library, 31st ed. (Buffalo, New York: The Frontier Press Co., 1968), p. 400.

[4]Emancipation Proclamation, 12 Stat. 1268 (1863).

to the Constitution prohibiting slavery within the United States or any place subject to its jurisdiction. By January 1865, the Thirteenth Amendment had been ratified and the abolition of slavery became law.[5]

Three years after the abolishment of slavery in 1865, the Congress of the United States adopted the Fourteenth Amendment which provided blacks with citizenship and guaranteed them equal protection of the laws.[6] However, in spite of these constitutional amendments, by the 1880's, many state laws had been passed which were designed to segregate the black race.[7] "Jim Crow" was to become a code term for all these laws and their impact. Although the origin of the term "Jim Crow" was uncertain, the connotation was clear.[8] C. Vann Woodward in speaking of Jim Crow practices stated:

> That code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism eventually extended to virtually all forms of public transportation, to sports and recreation,

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

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

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

[8]Alan Barth, Prophets with Honor, (New York: Random House, 1974), p. 26.

> to hospitals, orphanages, and prisons and asylums, and ultimately to funeral homes, morgues, and cemeteries.[9]

From 1865 until 1970 the school segregation laws were challenged thirty-seven times.[10] In each case, however, the courts upheld separate schools. Only nine of these cases proved somewhat successful.[11] In most instances, the court found that inequality had not been proven.[12] Only two cases were heard by the Supreme Court during some fifty years of de jure segregation.[13] Although neither the Civil Rights Acts of 1866, 1870, 1871, or 1875, nor the Fourteenth Amendment, nor the United States Constitution at any place mentioned education, each was concerned with the rights of all citizens and yet seemed to have provided the opportunity for a dual school system of education for Negroes and whites to be established throughout the South.[14]

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[9]Woodward, p. 7.

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

[11]Ibid.

[12]Ibid.

[13]Hudgins, p. 75.

[14]Robert M. Stockard, The United States Supreme Court and The Legal Aspects of Busing for Public School Desegregation (EdD dissertation, University of North Carolina at Greensboro, 1978), p. 12.

In the Plessy case, Chief Justice Melville Weston Fuller choose Justice Henry Billings Brown to write the Supreme Court's opinion, with only one Justice dissenting from the Court majority.[15]

In the Court's opinion, Justice Brown wrote the following about the Fourteenth Amendment:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.[16]

Justice Brown stated further that:

> The distinction betwen laws interfering with the political equality of the Negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court.[17]

The legal end to de jure school segregation climaxed with the Supreme Court decision in the now famous case known as Brown v. Board of Education, which clearly denied the "separate but equal" doctrine.[18]

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[15]Richard Kluger, Simple Justice (New York: Vintage Books, 1975), p. 73.

[16]Ibid., p. 74

[17]Hudgins, p. 74.

[18]Brown v. Board of Education, 347 U.S. 483.

In Briggs v. Elliott, a companion South Carolina desegregation case to Brown and argued on the same day that Brown was argued, a counselor for the National Association for the Advancement of Colored People, Attorney Thurgood Marshall, stated to the court,[19] "Now is the time we submit that this Court should make it clear that this is not what our Constitution stands for."[20] Marshall's main thesis was that racial segregation imposed by law is a violation of the United States Constitution.

As far back as 1823,

> The court struck down a South Carolina law order that detained free Negro sailors who came to Charleston in jail so long as their ship was in port--a practice countenanced in the name of public safety and necessity.[21]

Among other examples, Mr. Marshall cited Justice Oliver Holmes' 1927 opinion in Nixon v. Herdon, the first of the Texas white primary cases, which noted:

> State may do a good deal of classifying that is difficult to believe rational, but there are limits and it is too clear for extended argument classification affecting the right set up in this case.[22]

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

[20]Langston Hughes, Fight for Freedom: The Story of the NAACP (New York: W. W. Horton & Company, Inc. 1962), p. 139.

[21]Quoted in Kluger, p. 570.

[22]Ibid.

The Court, Marshall declared:

> . . . has repeatedly said that these distinctions on a racial basis or on a basis of ancestry are odious and invidious, and those decisions, I think, are entitled to just as much weight as Plessy v. Ferguson or Gong Lum v. Rice.[23]

Former Solicitor General and accomplished appellate lawyer John W. Davis had three points to make about the case:

> First, South Carolina had compiled with the mandate of the court below and equalized its schools or was well on the way to doing so.
>
> Second, the right of a state to classify its public school pupils by race was 'not impaired or affected' by the Fourteenth Amendment.
>
> Third, the social-science testimony offered by the plaintiffs, 'be its merit what it may, deals entirely with legislative policy and does not tread on constitutional rights. Whether it does or not, it would be difficult for me to conceal my opinion that the evidence in and of itself is of slight weight and in conflict with the opinion of other and better informed sources.'[24]

Robert Carter, Marshall's key assistant on the National Association for the Advancement of Colored People's Legal Defense Fund Staff, had argued earlier in the day in the name of Oliver Brown:

> 'It is the gravamen of our complaint.' He asserted that the appellants were being deprived of the equal protection of the law, 'because the act of segregation in and of itself denies them equal educational opportunities which the Fourteenth Amendment secures.'

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[23]Ibid.

[24]Ibid.

> He added, 'Here we abandon any claim . . . of any constitutional inequality which comes from anything other than the act of segregation itself.' The act, he said, in summarizing the testimonies in the trial court, 'tended to relegate appellants and their group to an inferior casts . . . lowered their level of aspiration . . . instilled feelings of insecurity . . . retarded their mental and educational development.' Carter concluded, 'It is our position that any legislative or governmental classification must fall with an even hand on all persons similarly situated.[25]

Chief Justice Earl Warren wrote the opinion for the Court:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does . . .
>
> Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson. This finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.[26]

Chief Justice Earl Warren then concluded in his written opinion:

> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.[27]

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[25]Ibid., 570.

[26]Barth, p. 51.

[27]Ibid.

On May 18, 1954, the New York Times published an unprecedented eight pages of news and comments concerning the pronouncement, including the complete text of the Supreme decision.[28]

But a page of condensed opinions from all over the country quoted Alabama's Birmingham News as stating editorially: "The News believes that the considerations of public interest and states' rights which underlay the superceded decision of 1896 still apply and would better serve progress in racial relations and education."[29] Senator James O. Eastland of Mississippi was reported as saying flatly that the South "will not abide by nor obey this legislative decision by a political court."[30]

Just before the school bells began to ring in September 1954, the New York Times carried a report from Georgia's Governor Herman Talmadge which stated: "No force whatever could compel admission of Negroes and whites to the same school." Earlier he had called the Supreme Court decision a "step toward national suicide."[31]

The governor of Georgia, Herman Talmadge, and the Governor of South Carolina, James F. Brynes, threatened

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[28]Hughes, p. 140.

[29]Ibid.

[30]Ibid.

[31]Ibid., 141

to close the public schools rather than give up segregation.[32]

Following Thurgood Marshall's request that the Supreme Court order school segregation to begin "not later than September 1956", the Court on May 31, 1955, in Brown II, ordered that educational integration be achieved "with all delibrate speed" compatible with "practical flexibility."[33]

In this Brown II case,[34] the Supreme Court opinion stated:

> During this period of transition, the courts will retain jurisdiction of these cases.[35]

An article in the U.S. News & World Report described the early school integration years:

> The experience of Washington, the first major city to turn from segregated to integrated schools, may have meaning for other cities. For 20 years, the percentage of Negroes has been increasing steadily in Washington's population, growing even faster in the District's public schools. Already Negro pupils outnumber whites. Since school segregation was ordered ended in Washington last summer, this trend has picked up speed.[36]

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[32]Marion A. Wright and Arnold Shankman, Human Rights Odyssey (Durham, North Carolina: Moore Publishing Company, 1978).

[33]Hughes, p. 143.

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

[35]Hudgins, p. 84.

[36]"As Mixed Schools Come to the U.S. Capital," U. S. News and World Report, 12 November 1954, p. 52.

The third United States Supreme Court decision in support of Brown was handed down on October 10, 1955. It held that the constitutional rights of children must not be discriminated against in school admission on the grounds of race or color.[37] It may be unnecessary to add that this decision, like the "deliberate speed" decision, has not yet been fully implemented either.[38]

The landmark decision got its first out-of-court support from blacks and college youth through the civil rights movement. Support came alive in many forms: from Martin Luther King, Jr. at Montgomery; from the Freedom Riders, the student "sit-ins" and "other-ins", and the Student Non-violent Coordinating Committee; from voter registration campaigns, as in Birmingham, the Selma March, and from the March on Washington of 1963.[39]

The inevitability of involuntary busing could probably have been inferred in the Alexander v. Holmes case in Mississippi where the United States Supreme Court insisted that there was an obligation for every school district to terminate dual school systems at once and to operate

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[37]Leon Jones, From Brown to Boston, 2 Vols. (Metuchen, N. J.: Scarecrow Press, Inc., 1979), 1:11.

[38]Ibid.

[39]Ibid.

now and hereafter only unitary schools.[40]

That same year, 1969, the Dowell v. Board of Education of Oklahoma City decision maintained that the burden was on the school board to desegregate an unconstitutional dual system at once.[41]

Busing was to be an explicit tool for integration in the Swann case.[42]

The Swann Decision and Busing

The transportation of children to and from school originated in Massachusetts in 1869, when a law was passed which authorized the spending of public funds for school transportation.[43] (See Table 1)

The vehicles employed in this task were, for the most part, horse-drawn wagons or carriages, providers and drivers of which were paid in proportion to the number of students

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[40]Alexander v. Holmes County Board of Education 90 S. Ct. 437 396 U.S. 976, 24 L. Ed. 449 (1969).

[41]Dowell v. Board of Education of Oklahoma City Public Schools, 90 S. ct. 415, 396 U.S. 269, 24 L. Ed. 2d 414 (1969).

[42]James E. Swann et al. v. Charlotte-Mecklenburg Board of Education, 403 U.S. 912 29 L. Ed. 2d 689, 91 S. ct. 220, 2201 (1970).

[43] Nicolous Mills, "Busing: Who's Being Taken for a Ride?" In The Great School Bus Controversy, (New York: Columbia University, 1973), p. 4.

they hauled.[44] In 1927-1928, 12 percent of the school transportation vehicles used in 32 states were still horse-powered rather than motor powered.[45]

Nicholous Mills cited two myths surrounding busing: (1) busing is the exception and the neighborhood school is always the most desirable, and (2) riding on the bus is bad for children.[46] But the prevailing question was, "At what point is there excessive busing to achieve racial balance in the school desegregation issue?" Many persons argued that this point occurred in the Charlotte-Mecklenburg school district.

It is an accepted contention that the federal district court's management of school desegregation in the Charlotte-Mecklenburg schools required extensive busing.

The following arrangement occurred in the Charlotte-Mecklenburg School District:

> The schools in the heavily black inner city exchanged pupils with twenty-four mostly white schools in the fringes of the city or in the suburbs of surrounding Mecklenburg County. The bus routes, between schools averaged 15 miles in length and it was estimated that it required an average travel time of about 1 hour 10 minutes each way.[47]

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[44]Ibid.

[45]Ibid.

[46]Ibid.

[47]U.S. News & World Report, 16 March 1970, p. 31.

TABLE 1

Year of Statutory Authorization for Public Pupil Transportation by State: 1869 - 1918

Date	State	Date	State
1869	Massachusetts	1903	Virginia
1876	Vermont	1904	Maryland
1880	Maine	1905	Oklahoma
1885	New Hampshire	1905	Utah
1889	Florida	1967	Missouri
1893	Connecticut	1908	West Virginia
1894	Ohio	1909	Colorado
1895	New Jersey	1910	Mississippi
1896	New York	1911	Arkansas
1897	Iowa	1911	Georgia
1897	Nebraska	1911	Illinois
1897	Pennsylvania	1911	North Carolina
1898	Rhode Island	1912	South Carolina
1899	North Dakota	1913	Idaho
1899	South Dakota	1913	Tennessee
1899	Indiana	1915	Nevada
1901	California	1915	Alabama
1901	Minnesota	1915	Texas
1901	Washington	1916	Louisiana
1903	Michigan	1917	New Mexico
1903	Montana	1918	Delaware
1903	Oregon	1919	Wyoming

Source: Nicolous Mills, "Who's Being Taken for a Ride?" The Great School Controversity ed. Nicholous Mills (New York: Columbia University, 1973), p. 6.

Judge James McMillan said: "Cost is not a valid legal reason for continued denial of constitutional rights."[48] But a close examination revealed that the Charlotte-Mecklenburg school system, forty-third largest in the nation served 84,000 pupils, 71 percent white and 29 percent black. Two thirds of the black students attended just 21 schools which were either totally or more than 99 percent Negro as of June 1969.[49]

The school board, after vigorous prodding, presented only a partially completed plan.[50] In light of the board's failure to comply with the court's mandate, Judge McMillan appointed Dr. John Finger, an expert in educational administration, to prepare a desegregation plan for the court.[51] The "Finger Plan", as finally presented, was extremely controversial in its method of dealing with the desegregation of the junior and senior high schools, and it aroused heated local debate.[52]

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[48]Ibid.

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

[50]Ibid.

[51]Ibid.

[52]Ibid.

The board plan proposed substantial assignment of Negroes to nine of the system's ten high schools, producing 17 percent to 36 percent Negro population in each.[53] The projected Negro attendance at the tenth school, Independence, was 2 percent. The proposed attendance zones for the high school were typically shaped like wedges of a pie extending outward from the center of the city to the suburban and rural areas of the county in order to afford residents of the center city area access to outlying schools.[54]

Furthermore, the board plan rezoned the twenty-one junior high areas so that in twenty the Negro attendance would range from none to 38 percent. The other school, located in the heart of the Negro residential area, was left with an enrollment of 90 percent Negro.[55]

The board plan with respect to elementary schools relied entirely on gerrymandering of geographic zones. More than half of the Negro elementary pupils were left in nine schools that were 86 percent to 100 percent Negro; approximately half of the white elementary pupils were assigned to schools 86 percent to 100 percent white.[56]

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[53]Nicolous Mills, The Great School Bus Controversy, p. 49.

[54]Ibid.

[55]Ibid.

[56]Ibid.

The Finger Plan departed from the board plan chiefly in its handling of the system's 76 elementary schools. Rather than relying solely upon geographic zoning, Dr. Finger proposed the use of zoning, pairing, and grouping techniques, with the result that student bodies throughout the system would range from 9 percent to 38 percent Negro.[57]

Justice McMillan described the district court's plan as follows:

> Like the board plan, the Finger Plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desgregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black schools.[58]

Eleven years later, Justice McMillan explained the Court's position in the following manner:

> A bus is like a building or a teacher, or a curriculum. The location of buildings is permanent. The buildings were located that way for segregation. As long as they continue to be used for education, the teachers and children will have to be transported. A lot of them don't have cars.[59]

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[57]Ibid.

[58]Ibid.

[59]Quoted in Dudley Clendenin, "School Bus Blocked?", Greensboro News and Record, Greensboro, N. C., 6 June 1982, sec. C, p. 1.

Dr. Jay M. Robinson, who became superintendent of the Charlotte-Mecklenburg school system in 1977, acknowledged a similar position: " . . . well, when all the blacks live here, and all the whites live over here, how the hell can you be for integration but against busing? You got to be for trucking, or training, or something to get them from here to here."[60]

The District Court ordered, among other things, (1) that faculty members be reassigned in such a manner as to result in the ratio of Negro and white faculty members in each school being approximately the same as the ratio of Negro and white faculty members throughout the school system; (2) that in accordance with the school board's plan, as modified by the Finger's plan, new attendance zones be created for secondary schools, and some inner-city Negroes be transported to outlying, predominantly white schools, so that the percentage of Negroes would range from about 17 percent to less than 36 percent in each high school and would range from about 9 percent to about 33 percent in each junior high school; and (3) that in accordance with the Finger plan, new attendance zones and pairings and grouping of schools be used for elementary schools, and the amount of busing of elementary school students be substantially increased so that the percentage

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[60]Ibid.

of Negroes in each elementary school would range from about 9 percent to about 38 percent.[61]

Speaking for the court, Chief Justice Warren Burger's opinion confounded court watchers and the Nixon administration alike, for it specifically upheld not only busing but also racial quotas, pairing or grouping of schools, and gerrymandering of attendance zones as well as other devices designed to remove "all vestiges of state-imposed segregation . . . Desegregation plans cannot be limited to the walk-in school."[62]

Meanwhile, the United States Congress became involved when a proposed constitutional amendment on busing by Long Island Republican Congressman Norman Lent stated: "No public school student shall, because of his race, creed or color, be assigned to or required to attend a particular school."[63]

The language of the proposal brought the following editorial response from the New Republic magazine:

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[61]James E. Swann, et al. v. Charlotte-Mecklenburg Board of Education et al. 402 U.S. 1, 15 (1971).

[62]Henry J. Abraham, "Civil Rights and Liberties in the United States", in Freedom and the Court (New York: Oxford University Press, 1977), p. 380.

[63]William F. Buckley, "Busing Amendment", The New Republic (Editorial) 26 February 1972, p. 5.

> The subject is not a suitable one for inclusion in the Constitution. The Constitution is not the Internal Revenue Code or the Primary and Secondary Education Act of 1972. It is the place, as all conservatives should appreciate, for fundamental, substantive procedural and structural provisions, suited, as John Marshall said, for ages to come, nothing more preposterously out of place has been proposed for treatment in the Constitution since prohibition and its repeal. No reasonable person would want to convert the Constitution into a code of detail regulations, dealing with the grievances of each passing day, after the fashion of so many state constitutions, which are amended semi-annually and replaced in toto every other decade.[64]

The Court in Swann referred to desegregation as "States having a long history of maintaining two sets of schools . . . operated to carry out a governmental policy to separate pupils solely on the basis of race."[65]

President Richard Nixon is recorded as having said in 1971:

> I would also like to restate my position as it relates to busing. I am against busing, as that term is commonly used in school desegregation cases. I have consistently opposed the busing of our nation's school children to achieve a racial balance, and I am opposed to busing of children simply for the sake of busing.[66]

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[64]Ibid.

[65]James Bolner and Robert Shanley, Busing: The Political and Judicial Process (New York: Praeger Publishers, 1974), p. 16.

[66]Mills, p. 3.

But in 1971, Chief Justice Warren Burger submitted an opinion of a different viewpoint:

> 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.[67]

Moreover, while de jure segregation was being completely dismantled by the United States Supreme Court and the lower courts, busing itself was becomjing the object of public and legal criticisms. In Swann, the United States Supreme Court upheld the implementation of forced busing to desegregate and racially balance the schools in the Charlotte-Mecklenburg school system. However, in Swann, the question of reasonableness seemed not to have forged with the desired results of school integration by the courts.[68]

In the de facto segregated school cases which were soon to come before the courts, busing as a legitimate tool for the implementation of school integration was to be viewed and scrutinized in a far more resistive vein by several members of the United States Supreme Court and by various members of Congress.

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[68]Joseph E. Bryson. "'Salting the Bird's Tail' and The Question of 'Reasonableness' in Public School Desegregation," unpublished paper, University of North Carolina at Greensboro.

The Politics of Justice and Presidential Influence in the Supreme Court decisions

The justices under Chief Justice Earl Warren made the Supreme Court appear less conservative than today's Court under Chief Justice Warren Earl Burger. Furthermore, the highest Court in the land underwent six changes between 1969 and 1982. These changes on the Supreme Court were not only positional, but they also involved a shift to a more conservative conscience in the rendering of judicial decisions concerning involuntary busing for school integration.

The Court's ambiguous ideological viewpoint can be analyzed by examining the court's decisions in non-Southern school desegregation cases which can be contrasted with earlier Southern school desegregation cases. The perceived independence and the so-called absolute beliefs of the individual justices are unable to be measured, for these personal traits must be balanced in conjunction with the political nomination to the Court by the United States President and the confirmation of the Court by the United States Senate.

Phillipa Strum sought to clarify the true disposition of all courts in America with the following poignant observation:

> The interpretative power of the court serves as a methodology by which a supposedly neutral third force can arbitrate between the government and its citizens when a difference of purpose or of understanding arises between them. Although

> most American children are taught in the fifth grade and again in high school that the "founding fathers" thoughtfully provided them with a government composed of three branches, American adults seem to visualize their government as a two-pronged entity, with a disinterested and unconnected judiciary somehow established on the sidelines. 'Politics' to these Americans means 'elections', and since there is no apparent relation between the federal judiciary and polling places, a negative syllogism concludes that the courts are apolitical and therefore non-governmental. Pupils learn that the independence of the judges enables them to remain above the corrupting tensions of the political process. The lesson further states that instead of making their decisions on the basis of party or personal interest, judges rely upon an inanimate and impartial body of precedents, which may sometimes be misinterpreted but which can never be manipulated.[69]

Phillipa Strum clarified this misconception by presenting these additional statements:

> If this theory is inaccurate, it is not only the schools which are to blame. The courts themselves seemingly attest to its veracity by proclaiming a rigid adherence to stare decisis -- and the only strange element in this situation is that they occasionally appear to believe their own propaganda. Popular belief in an independent judiciary enables the courts to place a final stamp of legitimacy upon all governmental acts, including those which might otherwise come under direct attack in the form of disobedience.[70]

Supreme Court decisions are occasionally regarded as less than effectual unless these decisions have the

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[69]Phillipa Strum, The Supreme Court and "Political Question": A Study in Judicial Evasion (University, Alabama: The University of Alabama Press, 1974), pp. 2-3.

[70]Ibid.

support of the populace and the other two branches of the government. This is especially true if these decisions have national effect rather than individual effect. It is interesting to speculate whether Supreme Court justices vote with their personal conscience, by way of popular opinion, or in accordance with the conventional ideology of the president's who appointed them to the Court. In all likelihood, all three of these factors play important roles in the Supreme Court decision-making process depending upon the nature of the case, the population alignment, and the personal convictions of the individual justices.

Decisions in school desegregation cases began the Warren Court's long involvement in the development of race relations law.[71] Subsequent opinions underscored the universal permanence and enduring nature of the newly announced constitutional doctrine in Brown I, which was the Supreme Court's new interpretation of the Fourteenth Amendment.[72] Segregation was struck down in the public parks, in intrastate and interstate commerce, at public golf courses and other recreational facilities, in airports

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[71] The Warren Court, R. H. Sayler, Barry B. Boyer, and R. E. Gooding, eds. (New York: Chelsea House, 1968), p. 47.

[72] Ibid.

and interstate bus terminals, in libraries, and in the facilities of public buildings and courtrooms.[73]

Perhaps, the voting trend of the United States Supreme Court should not be noted with much amazement. Richard Funston emphasized the political aspects of the Supreme Court in writing:

> The Supreme Court of the United States is a political agency. Unless this is fully appreciated at the outset, attempts at understanding the Court will be in vain. Among judicial bodies throughout the world, past as well as present, the Court stands out as a uniquely powerful political institution.[74]

The political eminence of the Supreme Court may be viewed in terms of the flexibility of the Court's interpretive powers, but this flexibility may also be evaluated in terms of the Court's legal impreciseness where it is legal preciseness that the Court has been entrusted to render. Moreover, Funston, contended overemphasis of either the political nature or the legal nature of the Court to the exclusion of the other obscures the essential reality.

Finally, Richard Funston asserted the political nature of the Court:

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[73]Ibid.

[74]Richard Funston, A Vital National Seminar, The Supreme Court in America (Palo Alto, Ca.: Mayfield Pub. Co., 1978), p. 1.

> The most rigorous survey done thus far estimates that about three-fourths of those justices for when an evaluation could be made conformed to the expectations of the President who appointed them. While this suggests a laudable degree of judicial independence (after all, one-fourth of the justices did not conform to the expectation of their nominators), it also indicates that most of the time the Court tends to reflect the general values of the political coalition capable of electing the president and thus, the values of the President himself.[75]

A President's personal association with a Supreme Court nominee is not an imperative alliance, but a parallel judicial philosophy is probably desired by the nominating President.

William Beaney expressed the following sentiments concerning the influence of recent Presidents:

> The present century has been marked not only by short range ebbing and flowing of executive power, but also by congressional acceptance of a largely ratifying and checking role in its relationship with the President. The twentieth century clearly is the age of executive initiative and administrative government. The great era of Congress lies in the past.[76]

According to Alan Barth, the assurance that the Court appointees will vote the will of the Presidents who nominated them cannot ever be assumed.

> President Franklin D. Roosevelt's court-enlargement or court-packing plan failed; but by the time

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[75]Ibid.

[76]William M. Beaney, "The Warren Court and the Political Process," in The Warren Court ed. Richard H. Sayler, Barry B. Boyer, and Robert E. Gooding, Jr. (New York: Chelsea House 1974), p. 153.

> the Gobitis[77] case came up for review, the President had been able to put five of his nominees on the Court: Black, Reed, Frankfurter, Douglas, and Murphy. This majority was, of course, peculiarly aware that the Court ought not to operate as a super-legislature, second-guessing as it were, and imposing its will and judgment upon elected representatives directly responsive and accountable to the public.[78]

Richard Kluger noted that President Eisenhower had ranked, the qualities he considered in recommending candidates for Court:

> Character and ability that would inspire 'respect, pride, and confidence of the populace' came first. Then he looked for high ideals, a moderately progressive social philosophy--A middle of the roader, in other words, in his own image--and a substantial ration of common sense. Judicial experience would be helpful but not essential. The nominee should give geographic and religious balance to the Court and should not be older than sixty-two. Both the FBI and American Bar Association, furthermore, had to clear the man.[79]

Personal friendship as well as politics has often been a prevailing influence in United States Supreme Court nominations. Former Columbia Broadcasting Correspondent Eric Sevareid recorded the following excerpts in an interview with William O. Douglas during the summer of 1972 at Goose Praire, Washington:

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[77]Minersville School District v. Gobitis 310 U.S. 586 (1940) (Johovah's Witnesses Flag Salute Case).

[78]Barth, p. 113.

[79]Kluger, p. 657.

Sevareid: I wanted to ask you, Mr. Justice, about some of the well-known people in the last generation you've known very well. After all, you've been around a long time now--thirty-three years on the Court, since you were forty years old. Did you get really intimate with Franklin Roosevelt, who appointed you?

Douglas: Yes, I got to know him pretty well.

Sevareid: Why do you think he appointed you? You were forty years old, and had that brief experience with SEC, the Securities and Exchange Commission at that time as I remember.

Douglas: I have no idea. I was not a candidate. I had no ambition for any public office. As a matter of fact, I had been elected Dean of the Yale Law School. I was going back there in a few months. . . I often wonder what would have happened to Yale If I'd been Dean of the Law School.

Sevareid: Well, I suppose Roosevelt just liked your general approach to things. Your general cast of mind. You made quite a record on the SEC. Wasn't it Joseph Kennedy who brought you into the Security Exchange?

Douglas: Yes, Joe Kennedy brought me down . . . in 1934. I didn't know him, but he'd heard about me. I'd been active in the field, and he brought me down to head up the reorganization.

Sevareid: And why would a man like that want you in on reorganizing finance?

Douglas: 'Cause he knew I knew something about it.[80]

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[80]Eric Sevareid, "An Interview with William O. Douglas, In Honor of Justice Douglas, ed. Robert H. Keller, Jr. (Westport, Connecticut: Greenwood Press, 1979) pp. 1480150.

Bob Woodward and Scott Armstrong described Justice Byron White's association with the late President Kennedy with the following statement:

> Byron White clerked a year at the Court for Justice Fred Vinson, and renewed his friendship with Representative John Kennedy, whom he had known in England and later in the South Pacific during World War II. He later ran a nationwide Citizen for Kennedy Committee during the 1960 presidential campaign for which he was rewarded with the number two post in the Justice Department. A year later, President Kennedy appointed White to the Court.[81]

Woodward and Armstrong also described President Richard Nixon's version of an ideal Chief Justice:

> . . . Nixon wanted someone with judicial experience, someone whose views were fully predictable, not a crony or political friend, someone with integrity and administrative ability. Someone young enough to serve at least ten years.[82]

Most of President Nixon's apointees were Republican loyalists who shared both President Nixon's and President Ford's belief in judicial restraint and tended to adopt legal interpretations that favored law enforcement agencies rather than accused criminals.[83] All of President Nixon's appointees appear to have met his strict constructionist, law-and-order criteria. So has Justice John Paul Stevens,

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[81]Bob Woodward and Scott Armstrong, The Brethen (New York: Simon and Schuster, 1979), p. 47.

[82]Ibid.

[83]Ibid.

President Gerald Ford's selection in 1975.[84] President Ronald Reagan's nominee, Justice Sandra O'Connor, has not served on the High Court long enough for legal historians to record a predictable voting trend.

President Jimmy Careter promised to choose the judges he appointed to the federal courts on the basis of "strict merit", not partisan politics. President Carter's pledge, however, was unlikely to silence the controversies over judicial philosophy that have surrounded the federal courts since they were established about 200 years ago.[85]

Presidents have been known, however, to react to Court decisions in unpredictable fashion. As Gary Orfield described:

> When Governor Orval Faubus defied a court order in 1951, and Governor George Wallace defied one in 1963, Presidents Dwight Eisenhower and John Kennedy, respectively, mobilized the executive branch in support of the courts. The Nixon Administration, however, gave implicit support to Governor Claude Kirk efforts to block a busing plan in Manatee County School District.[86]

Regardless of presidential opinions and desires or the populace's zeal, the independence of the Supreme Court is thoroughly inscribed in the Constitution of the United States.

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[84]Ibid.

[85]The Supreme Court-Justice and the Law (Washington, D.C.: Congressional Quarterly, 1977), p. 4.

[86]Gary Orfield, Must We Bus? (Washington, D.C.: The Brookings Institution, 1978), p. 329.

Article III, Section 1, of the Constitution of the United States establishes the concept of complete judicial independence for the United States Supreme Court:

> Judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.[87]

Furthermore, the Supreme Court is given jurisdiction by Congress to review the following cases:

1. All cases in lower federal courts.
2. All cases in state courts involving a question of a federal statute or a constitutional provision.[88]

The following charts illustrate and outline the structure of the Federal Court system. The Federal Court system provides avenues for court cases to reach the United States Supreme Court.

Personal Profiles of the Justices in Relation to Voting Trends

Introduction

The 1973 Keyes decision was the first de facto segregation decision after Brown I in 1954. Author Gary Orfield described the ensusing years in the following manner:

> There is a sense of deja vu as residents of peacful cities in the Deep South read about the antibusing

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[87]U.S., Constitution, art. III, sec. 1.

[88]Edward C. Bolmeier, The School in the Legal Structure, 2nd ed. (Cincinnati: W. H. Anderson Company, 1974), p. 55.

TABLE 2

FEDERAL COURT SYSTEM

United States Supreme Court

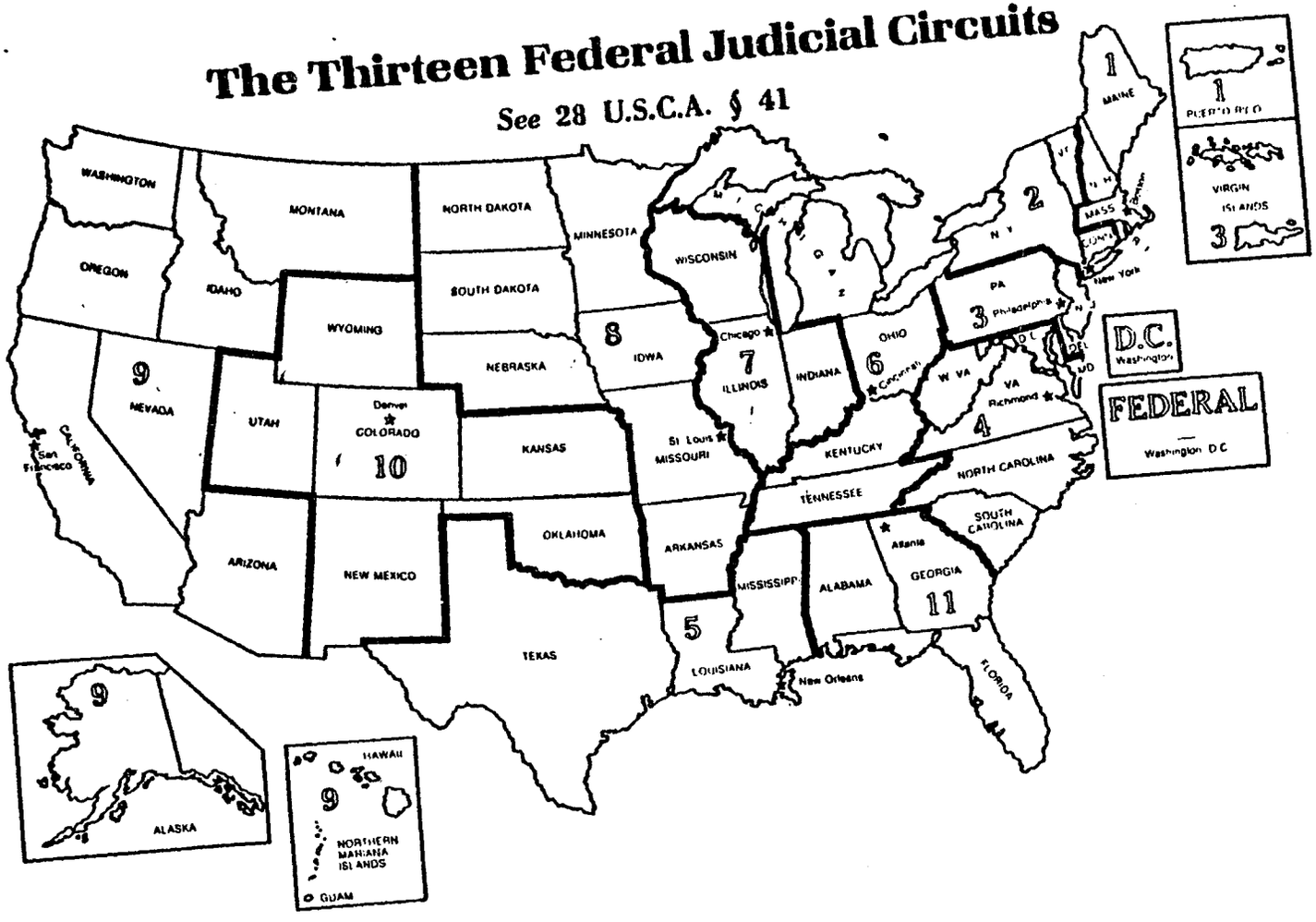
9 Justices

Appeals from lower federal courts or disputes between states, or cases involving Ambassadors, Consuls, or representatives of foreign governments

Courts of Appeal	Court of Claims	Court of Customs & Patent Appeals
Cases on appeal from U.S. District Courts and review of actions of Tax Court and federal administrative agencies for errors of law	Cases in which individuals and corporations sue the government for money damages	Appeals from Customs Court, Tariff Commission, and Patent Office

U.S. Tax Court	District Courts	Customs Court
Disputes between taxpayers and Internal Revenue Service	Civil and criminal cases (1) involving violations of federal law; (2) arising under federal law; or (3) between parties of different states	Cases involving classification validation of imposed merchandise

TABLE 3


The Thirteen Federal Judicial Circuits
See 28 U.S.C.A. § 41
WASHINGTON
OREGON
CALIFORNIA
San Francisco
9
NEVADA
IDAHO
MONTANA
WYOMING
UTAH
ARIZONA
Denver
COLORADO
10
NEW MEXICO
NORTH DAKOTA
SOUTH DAKOTA
NEBRASKA
KANSAS
OKLAHOMA
TEXAS
MINNESOTA
IOWA
8
MISSOURI
St Louis
ARKANSAS
LOUISIANA
New Orleans
WISCONSIN
Chicago
7
ILLINOIS
INDIANA
MICHIGAN
OHIO
6
KENTUCKY
TENNESSEE
MISSISSIPPI
ALABAMA
GEORGIA
Atlanta
11
SOUTH CAROLINA
NORTH CAROLINA
5
FLORIDA
W VA
VA
Richmond
4
PA
3
Philadelphia
N Y
2
New York
MAINE
1
MASS
D.C.
Washington
FEDERAL
Washington D.C
PUERTO RICO
1
VIRGIN ISLANDS
3
ALASKA
9
HAWAII
9
NORTHERN MARIANA ISLANDS
GUAM

> amendments to the state constitutions recently adopted in the States of California and Washington. The North, seemingly unaware that the South has passed through many of the same stages, appears unwilling to learn anything from that experience.[89]

Orfield described integration in America's public schools in the following manner:

> During the 1962-63 school year, 99 of every 100 southern black children were in all-black schools. Only 14 of every 100 were in all-blacks schools in 1974-75. (Thirty-two percent of the black students in the Northeast, and 45 percent in the Northwest, were in schools with virtually no whites in 1974-75). During 1974-75, 44 percent of southern black children attended predominantly white schools, compared with less than a fourth in the West (Congressional Record, June 18, 1976). Calculations by the Department of Health, Education, and Welfare (HEW) based on 1976 enrollment statistics found that blacks in the Northeast were more than twice as likely to be segregated (Washington Post, September 1,2 1978).[90]

Perhaps these statistics can be partially attributed to the majority voting record of the Burger Court in de facto school segregation cases.

Stephen Wasby wrote:

> A court in transition, whether the Burger Court or some other court, is 'divided, uncertain, and adrift;' its doctrinal path is 'sawtooth

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[89]Gary Orfield, "Why It Worked in Dixie: Southern School Desegregation and Its Implications for the North," in Race and Schooling in the City, ed. Adom Yarmolinsky, Lance Liebman, and Corinne S. Schelling (Cambridge: Harvard University Press, 1981), p. 24.

[90]Ibid.

rather than linear.'[91]

Therefore, a profile of each sitting justice since the 1973 Keyes case should offer a base to blend former decisive Court decisions with the seemingly ambiguous present and perhaps some future decisions in school desegregation chases. In addition, the brief profile should project some indication of the viewpoints of each of the following eleven justices of the United State Supreme Court.

Chief Justic Warren E. Burger

Born: St. Paul, Minn.
Education: B.A., University of Minnesota, 1927, LL. B., magna cum laude St. Paul College of Law (now Mitchell College of Law), 1931.

Chief Justice Warren Burger, said to be strongly task-oriented, took a position favorable to the United States government in 70 percent of the cases available in his first term, as compared to Chief Justice Earl Warren, who voted for the government 19 percent of the time in criminal cases over sixteen years.[92]

After the noted Swann decision, the Houston Chronicle published the following comments on April 22, 1976:

> The Burger Supreme Court, at least in matters of school integration, has proven to be virtually

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[91]Stephen L. Wasby, Continuity and Change (Pacific Palisades, California: Goodyear Publishing Company, Inc., 1976), p. 2.

[92]Ibid., p. 24

indistinguishable from the old Warren Court.[93]

After the Supreme Court in 1974 Detroit decision, the following comment was published in the Chicago Daily Defender July 30, 1974 edition:

> Justice Warren Burger's opinion that the lower courts had authorized a wholly impermissible remedy by including 53 Detroit suburban school districts in the integration plan, is a reasoning whose rationale is consonant with racist thinking. This is a Nixon victory by a Nixon Court.[94]

A summary of Chief Justice Warren Burger's voting record in school integration cases includes the following:

A dissent vote in Wright v. Emporia City Council (5-4 vote that the federal court can halt state or local action creating new school districts with the effect of impeding school desegregation).[95]

A concurring vote in the San Antonio Independent School District v. Rodriguez decision (5-4 vote that equal protection guarantee does not require that courts give the strictest scruntiny to state decisions to finance public schools from local property taxes). This decision will cause wide disparities among districts in the amount

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[93]Witt, The Supreme Court Justice and the Law p. 55.

[94]Judith F. Buncher, The School Busing Controversy, 1970-75 (New York: Facts on File, 1975), p. 39.

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

spent per pupil.[96]

A concurring vote in the Keyes v. Denver School District No. 1 (7-1 vote which held that school officials were required to desegregate a school system if the segregation was caused by the policies of the school board).[97]

A concurring vote in the Lou v. Nichols decision (a 9-0 vote that upheld the Civil Rights Act of 1964 that school officials must provide non-English-speaking students in their system remedial English instruction, bilingual classes, or some other methods.[98]

A concurring vote in Milliken v. Bradley (5-4 vote where the court reversed a lower court's order directing busing across city, county and district lines in order to desegregate the schools of Detroit, Michigan).[99]

A concurring vote in Pasadena City Board of Education v. Spangler (6-2 vote that once a school board has implemented a racially netural plan for attendance of students at city schools, the board is not required to continue juggling student assignments in order to maintain

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[96]San Antonio Independent School District v. Rodriguez, 411 U.S. 13 (1973)

[97]Keyes v. Denver School District No. 1, 413 U.S. 189.

[98]Lou v. Nichols, 414 U.S. 563 (1974).

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

a racial balance in each school).[100]

A concurring vote in both Columbus Board of Education v. Gary L. Penick[101] and in Dayton Board of Education v. Brinkman[102] where district-wide busing plans were upheld.

A concurring vote in Crawford v. Board of Education of the City of Los Angeles (8-1 vote that state court cannot mandate busing for racial and ethnic purposes.[103]

Chief Justice Warren E. Burger is customarily viewed as a conservative.

William Orville Douglas

Born: Maine, Minn.
Education: B.A. Whitman College, 1920, Phi Beta Kappa, LL. B. Columbia Law School, 1925.

The Congressional Quarterly's Guide to the United States Supreme Court described Justice William O. Douglas with the following statements:

> By the time the Depression struck in 1929, Douglas had already developed a reputation as one of the country's foremost financial law experts.

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

[101]Columbus Board of Education v. Penick, 443 U.S. 449 (1979)

[102]Dayton Board of Education v. Brinkman, 443 U.S. 449, (1979).

[103]Crawford v. Board of Education of the City of Los Angeles, No. 81-38 (Slip Opinion), 1982.

> So when President Franklin D. Roosevelt needed staff for the newly formed Securities and Exchange Commission (SEC), created in 1934, he called on Douglas, who joined the commission in 1936; he became its chairman in 1937.
>
> Douglas' 1939 Supreme Court nomination sailed through the Senate. Such easy relations with Congress, however, were not to mark Douglas' forthcoming years in Washington. Twice he faced the threat of impeachment, although neither in 1953 nor in 1970 did the move gain any real support.
>
> Douglas' lifestyle and liberal political views--plus conservative resentment at the Senate's rejection of two of President Nixon's Supreme Court nominees--were the main spur behind the 1970 impeachment attempt. The justice's relations with the Parvin Foundation, recipient of considerable income from gambling interests, were held up for scrutiny. Anti-establishment sentiments expressed in one of his many books further fueled the attack. His controversial marital history also raised congressional eyebrows. But a special House Judiciary Subcommittee created to investigate the charges found no grounds for impeachment.
>
> Douglas suffered a paralytic stroke in January 1975. At first, Douglas attempted to continue his work on the court, but in November 1975 he resigned, citing the pain and physical disability resulting from the stroke. At the time of his retirement, he had served 36 years and seven months, longer than any other justice.[104]

Associate Justice William O. Douglas' decision distinguished him as one of the more liberal justices on the United States Supreme Court.

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[104]Elder Witt ed., Guide to U.S. Supreme Court (Washington, D.C.: Congressional Quarterly, 1979), p. 60.

Associate Justice William J. Brennan, Jr.

Born: 1906, Newark, New Jersey
Education: B.A., University of Pennsylvania, 1928
LL. B., Harvard Law School, 1941

Justice William Brennan is described in The Supreme Court, Justice and The Law, with the following remarks:

> During the first dozen years as a justice, Brennan often spoke for the liberal majority of the Warren Court, sharing its belief that the courts were the guardians of the individual rights, obligated to act when other parts of the government failed to do so. It was Brennan in 1962 who wrote the opinion asserting the court's jurisdiction over the 'political' question of electoral districts, clearing the way for enuciation of the 'one person, one vote', standard for redistricting.[105] William Brennan, a former member of the New Jersey Supreme Court, is a liberal, Catholic Democrat, who satisfied President Eisenhower's need for a nominee with judicial experience after he had been criticized for naming former Vice-Presidential candidate Earl Warren, who had no previous judicial experience, to be Chief Justice.

Stephen Wasby described Justice William Brennan as a member of the Court's liberal wing who seldom dissented from his position.[106]

> . . . However, as the Court's idological position shifted during the transition, he sopke out more and more frequently along with Justices Douglas and Marshall. During the Warren Court, Brennan attempted to develop a coherent position on the standards by which allegedly obscenity material should be judged, although his success in gaining a majority to support his position

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[105]Witt, The Supreme Court-Justice, p. 51.

[106]Wasby, p.

> was not great. Because of the difficulty in defining abscenity, Brennan has now moved toward a position of deregulating it.[107]

Associate Justice Potter Steward

> Born: 1915, Jackson, Michigan
> education: B.A., Yale Univeristy, cum laude, 1937
> fellow, Cambridge University, 1937-38,
> LL. B., cum laude, Yale Law School, 1941;

Before becoming a member of the United States Court, Potter Stewart had been active in politics and in the judicial system. He had served on the city council and as vice mayor of Cincinnati, Ohio before becoming a judge on the U.S. Court of Appeals for the sixth circuit.[108]

The Guide to U.S. Supreme Court presents the following description of Justice Potter Stewart:

> Stewart is the son of an established middle-class Cincinnati family with a strong tradition of public service and respect for the benefits of a good education. Stewart's father, James Garfield Stewart, was major of Cincinnati from 1938 to 1947 and was the Republican nominee for governor of Ohio in 1944. He served on the Ohio supreme court from 1947 until his death in 1959.
>
> After early schooling in Cincinaati, Stewart was sent to two of the most prestigious eastern schools--Hotchkiss preparatory and Yale University, where he received numerous academic honors and graduated Phi Beta Kappa in 1937. After completing his undergraduate work at Yale, he spent a year abroad doing post graduate work at Cambridge University in England. Returning to the United States in 1938, he began law school at Yale. After graduation 1941, Stewart moved to New York, where he joined a Wall Street law firm. He had hardly begun work there, however,

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[107]Ibid., p. 21

[108]Witt, Guide, p. 68.

when World War II broke out and he joined the Navy. Stewart found himself a deck officer aboard oil tankers plying the Atlantic and Mediterranean.

After the war, Stewart at first returned to his New York law practice but soon moved to his home town of Cincinnati, where he joined one of its leading law firms.

Once Stewart settled in Cincinnati, he took up the family's tradition of public service. He was twice elected to the city council and served one term as vice major. He was also actively involved in the 1948 and 1952 Republican presidential campaigns. In both years, he supported the efforts of his friend Senator Robert A Taft to secure the Republican presidential nomination. When Eisenhower won the party's endorsement instead in 1952, Stewart actively supported him in the fall campaign.

Stewart's appointment in 1954 to the U.S. Court of Appeals for the sixth circuit ended his direct participation in politics. He was President Eisenhower's fifth and last appointment to the Supreme Court. He received a recess appointment in 1958, and Eisenhower sent his nomination to the new Congress early in 1959.[109]

Associate Justice Byron R. White

Born: 1917, Fort Collins, Colorado
Education: B.A., University of Colorado, Phi Beta Kappa, 1938; Rhodes Scholar. Oxford University, 1939; LL. B., Yale Law School, magna cum laude, 1946

Although Byron White was nominated to the Supreme Court by President John F. Kennedy in 1962, he is said to fit President Richard Nixon's description of a "strict constructionist". He has the reputation of taking liberal

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[109]Ibid.

approach to legal issues, leavened at times by his pragmatic assessment of circumstances.[110]

Stephens Wasby described Justice White with this observation:

> Bryon White is perhaps best known because of his 'swing position', a result of more conservative coming to the Court. During the Warren Court years, he often differed with colleagues. 'Overtiming, public acceptance and the effectiveness of the Court overtime.' He dissented frequently, both in criminal procedure cases and on other civil liberties issues. When he joined the majority, it was often on extremely narrow grounds. At best a moderate, White leans toward the government's position in a great many cases 'His opinions show great sympathy for the official--whether cabinet officer or patrolman--who is given a messy complicted job without the resources or the training he really needs and then is second-guessed by judges after the event.' Portrayed when they clash with government actions and worse, 'an icy aloofness' toward those in the civil rights movement. Such a justice, even if appointed originally by Kennedy, certainly fits well into the Nixon mold.[111]

Associate Justice Thurgood Marshall

Born: 1908, Baltimore,Md.
Education: A.B., cum laude, Lincoln University, 1930; LL. B., Howard University Law School, 1933

When President Johnson named Thurgood Marshall to the Supreme Court in 1967, he became the Court's first black justice. At fifty-nine, he was the ninety-sixth man to serve on the nation's highest court when Justice

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[110]Witt, The Supreme Court Justice, p. 22.

[111]Wasby, p. 22.

Tom Clark stepped down.[112] Thurgood Marshall had won 29 of the 32 cases he argued before the Supreme Court for the National Association for the Advancement of Colored People Legal Defense and Educational Fund.[113]

Bob Woodward and Scott Armstrong related the political relationship between President Lyndon Johnson and Justice Thurgood Marshall:

> In 1965, Lyndon Johnson appointed Marshall Solicitor General. When Marshall hesitated, Johnson's closing argument was, 'I want folks to walk down the hall of the Justice Department and look in the door and see a nigger sitting there.' Two years later Johnson appointed Marshall to the Supreme Court. Marshall had not sought and had not wanted the appointment. He preferred the more active give-and-take of public interest law. His jurisprudence was long settled; so at conference, Marshall was relaxed, almost intuitively reaching his common-sense solution. He had not fit easily into the Warren liberal majority. Plain spoken and direct, Marshall saw his job as casting his vote and urging his colleagues to do what was right. On the Court, he had little interest in perfecting the finer points of the law. He often told his clerks only half jokingly, 'I'll do whatever Bill [Brennan] does', sometimes even jotting 'follow Bill' on his notes. He trusted Brennan's resolution on the detailed, technical questions of legal scholarship. The clerks had taken to calling Marshall 'Mr. Justice Brennan-Marshall'. Often he would follow White on antitrust cases. But on discrimination, Marshall followed no one.[114]

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[112]Kluger, p. 760.

[113]Witt, The Supreme Court Justice, p. 54.

[114]Woodward and Armstrong, p. 48.

Associate Justice Harry A. Blackmun

Born: 1908, Nashville, Ill.
Education: B.A., Harvard University, Phi Beta Kappa, summa cum laude in mathematics, 1929; LL. B., Harvard Law School, 1932

Justice Harry Blackmun has been viewed as a pale carbon copy of Chief Justice Burger.[115] Bob Woodward and Scott Armstrong Contended that Justice Blackmun had authored some of the opinions of the Eighth Circuit Court of Appeals in the Little Rock desegregation cases, yet Justice Blackmun worried that McMillan's order would destroy the role played by neighborhood schools in formulating community values.[116]

Author Stephen Wasby gave a portrait of Justice Harry Blackmun with the following comments:

> Justice Blackmun is thoughtful and restrained in position and tone. Blackmun often makes use of a distinction between what he could do as a legislator and what he can do as a judge, where he cannot substitute his own wisdom for the legislators. This position was expressed most clearly in his dissent from the Court's invalidation of the death penalty. Blackmun said he 'yielded to no one in the depth of my distaste, antipathy, and, indeed abhorrence, for the death penalty, with all its aspects of physical distress and fear and morals of judgment exercised by finite minds; and found that 'capitol punishment serves no useful purpose that can be demonstrated, and violates childhood training and life's experiences.' As a legislator, he said, he would sponsor legislation and vote to repeal the penalty and might as a governor,

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[115]Kluger, p. 764.

[116]Woodward and Armstrong, p. 106.

> use the pardon power. But he said, 'There--on the Legislative Branch of the State or Federal Government, and secondarily, on the Executive Branch--is where the authority and responsibility for this kind of action lies'. not on the federal judiciary. Despite the clarity of this stance, Blackmun did not use it in the abortion cases, where he wrote for the majority in invalidating anti-abortion laws. Off the bench, freed somewhat of his institutional responsibilities, Blackmun has spoken out on Watergate, calling for the removal of the 'taint and corruption in our public life' and citing the 'misplaced loyalties . . . strange measures of the unethical, . . . unusual doings in high places, and by lawyer, after lawyer, after lawyer,' as a result of which 'The very glue of our ship of state seems about to become unstuck.'[117]

Associate Justice Lewis F. Powell

Born: 1907, Suffolk, Va.
Education: B.S., Washington and Lee University, Phi Beta Kappa, 1929; LL. B., Washington and Lee University Law School, 1931; LL. M., Harvard Law School, 1932

Justice Lewis F. Powell is viewed as a moderate or a careful conservative.[118] Editor Elder Witt wrote the following about Justice Lewis Powell:

> Following his appointment to the Supreme Court in 1971 by President Richard Nixon, Justice Lewis Powell continued to build a reputation as a moderate and according to observers, quickly rose to a position of influence among the other eight justices, disproportionate to his low seniority on the court.
>
> Powell's reputation as a moderate stemmed from his work as president from 1952-61 of the Richmond School Board, and later as a member of the State

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[117]Wasby, pp. 22-23.

[118]Witt, The Supreme Court Justice p.

> Board of Education. According to civil rights advocates in Richmond, Powell, in the face of intense pressure to 'massively' resist desegregation, consistently advocated keeping the city schools open.
>
> . . . On the liberal side, Powell spoke out against inadequate legal services for the poor and worked to create the legal services program of the Office of Economic Opportunity. A more conservative tone characterized his pronouncements against 'excessive tolerance' by parents and stern denunciation of civil disobedience and other forms of civil demonstrations. As a member of President Johnson's 1966 Crime Commission, Powell participated in a minority statement criticizing Supreme Court rulings upholding the right of criminal suspects to remain silent. Powell was the only Democrat among President Nixon's Supreme Court appointees.[119]

Associate Justice William H. Rehnquist

> Born: 1929, Milwaukee, Wis.
> Education: A.B., Stanford University, Phi Beta Kappa, 1948, M.A., Harvard University in Political science, 1950; LL. B., Stanford University Law School, 1952

President Nixon wanted a judicial conservative who would not twist or bend the Constitution in order to perpetuate his personal, political, and social values.[120] Justice William Rehnquist, who was Assistant Attorney General at the time of his nomination, was well known for his strong conservative ideological position.[121]

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[119]Ibid.

[120]Wasby, p. 31.

[121]Ibid.

President Nixon's had certain concerns about nominating Rehnquist:

> It would look like an in-house appointment, and Rehnquist was relatively unknown in establishment legal circles. A former clerk to Justice Robert Jackson in 1952, Rehnquist had practiced law for sixteen years in Phoenix where he was part of Goldwater wing of the Republican Party. He had joined the Justice Department to head the Office of Legal Counsel as an Assistant Attorney General in 1969. He had been, in effect, Attorney General Mitchell's lawyer.
>
> . . . Nixon had some trouble remembering Rehniquist's name. He once called him 'Renchburg'. He was also taken aback by the easygoing lawyer's appearance, once referring to him as 'that clown', because of his long sideburns and pink shirts. But Rehnquist was very bright and extremely conservative, and at forty-seven, he could be expected to serve many years.[122]

Richard Kluger wrote that a memo written 19 years earlier by William Rehnquist nearly cost the Justice his Senate confirmation.[123] Rehnquist had written the memo during the Brown I case at Justice Robert Jackson's request to reflect that Justice's views. Justice William O. Douglas stated to his clerks, that the memo did indeed express former Justice Robert Jackson's views.[124]

Associate Justice William Rehnquist's voting record thus far indicates that he can be depended upon to cast a conservative vote in school desegregation cases.

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[122]Woodward and Armstrong, p. 161.

[123]Kluger, p. 604.

[124]Woodward and Armstrong, p. 163.

Associate Justice John Paul Stevens

Born: 1920, Chicago, Ill.
Education: B.A., University of Chicago, Phi Beta Kappa, 1941; J.D., Northwestern University School of Law, magna cum laude, 1947

John Paul Stevens was nominated by President Gerald Ford in 1975, to replace Justice William O. Douglas on the Supreme Court. He was described as a small, modest man from the Midwest, solid, with a subtle humor.[125] He was also described as follows:

> Blunt, down to earth and possessed of an open judicial mind, Stevens has displayed a faculty for constitutional line-drawing.[126]

Author Bob Woodward and Scott Armstrong rendered this account of Justice Stevens:

> . . . He was pleased to be nominated to succeed Douglas. After graduating first in his class from Northwestern Law School, Stevens had clerked at the Supreme Court for Justice Wiley Rutledge in 1947. Douglas had, at that point, already been a Supreme Court Justice for eight years. Stevens greatly admired Douglas.
>
> Stevens' nomination was well received in Washington. The Senate Judiciary Committee quickly requested voluminous information about his personal, financial, academic, legal and judicial background. 'I've gone through discovery in antitrust hearings,' Stevens told his clerks as he compiled his records, 'but never anything like this'. His net worth was $170,000 including a $125,000 house, two cars, and one airplane.

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[125]Woodward and Armstrong, p. 401.

[126]Witt, The Supreme Court Justice, p. 59.

> The hearing on his nomination opened uneventfully on December 8. The Committee consensus held that Stevens was an obscure, scholarly, thoughtful lawyer and judge. Two days later, he was confirmed by the full Senate 98 to 0[127]

Justice John Paul Stevens is said to be a member of the liberal wing of the Supreme Court.

Associate Justice Sandra Day O'Connor

> Born: 1930,
> Education: B.A., Stanford University, magna cum laude, 1950; LL. B., Stanford University Law School, 1952

President Ronald Regan's appointment of Justice Sandra O'Connor was the first woman in the 191-year history of the Supreme Court. Justice O'Connor was serving at the time as a judge of the Arizona Court of Appeals and had earlier been a Superior Court judge in Phoenix and before that a member of the Arizona Senate.[128]

The Current Biography Yearbook of 1982 stated the following about Justice Sandra O'Connor:

> As an exponent of judicial restraint, Mrs. O'Connor is not expected to be an instrument of social change on the Supreme Court bench. Her prominence, however, as a role for women, especially for women lawyers, and as a symbol of women's improving status is itself an encouragement of social change. Linda Greenhouse of the New York Times (October 9, 1981) looked at her appointment from another angle: 'Of the ways in which Sandra O'Connor is different from the other Justices, her political savvy, relative youth, and continued openness to the world at large are at least

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[127]Woodward and Armstrong, pp. 401-402.

[128]Charles Moritz, ed., Current Biography Yearbook, (New York: The H.W. Wilson Company, 1982), p. 298.

as significant as gender. Sex may turn out to be the least important difference of all'.

. . . Discrimination against women was to be a major concern of Mrs. O'Connor as a state legislator and judge, although she has said that she had personally experienced little of it. She did, however, encounter prejudice when she applied for a job after leaving law school. 'I interviewed with law firms in Los Angeles and San Francisco', she related in the Times interview, 'but none had ever hired a woman before as a lawyer, and they were not prepared to do'. One Los Angeles firm, of which William French Smith, now Attorney General, was a partner, offered to hire her as a legal secretary.

. . . On September 15, all but one of the eighteen members of the Judiciary Committee voted in her favor. Senator Jeremiah Dewton, Republican of Alabama, voted 'present'. Although he did not oppose her nomination, he hesitated to endorse it because she declined to criticize the 1973 decision on the Supreme Court that legalized abortions.

. . . In an opening statement to the Senate Judiciary Committee on the first day of her confirmation hearings, September 9, Mrs. O'Connor assured her inquisitors that she was an advocate of judicial restraint: 'Judges are not only authorized to engage in executive or legislative functions, they are also ill-equipped to do so,'

. . . She has had little opportunity in her written opinions to make known her views on the important controversial social issues that had occupied the Supreme Court in recent years.

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[129]Ibid.

United States Supreme Court's Vote in Landmark desegregation cases

(Eleven Cases)

The following cases present the United States Supreme Court's majority vote in landmark desegregation cases over a span of 28 years. The division of the court on school desegregation cases can be noted with the passing of time.

TABLE 4

The United States Supreme Court - 1954

Brown et al. v. Board of Education of Topeka et al.
347 U.S. 483 (1954)

Separate but equal schools held unconstitutional
(de jure segregation)

Name	Appointed	Nominated by	Vote
Earl Warren (4)	1954	Eisenhower	C
Hugo L. Black	1937	F. Roosevelt	C
Stanley F. Reed	1938	F. Roosevelt	C
Felix Frankfurter	1939	F. Roosevelt	C
William O. Douglas	1939	F. Roosevelt	C
Robert H. Jackson	1941	F. Roosevelt	C
Harold H. Burton	1945	Truman	C
Tom C. Clark	1949	Truman	C
Sherman Minton	1949	Truman	C

Legend: C - Concur D - Dissent
Total Concurring Votes - 9

TABLE 5

The United States Supreme Court - 1969

Alexander v. Holmes County Board of Education
396 U.S. 976 (1969)

Implementation ordered of Mississippi desegregation plans on October 29, 1969
(de jure segregation)

Name	Appointed	Nominated by	Vote
Warren E. Burger (4)	1969	Nixon	C
Hugo L. Black	1937	F. Roosevelt	C
William O. Douglas	1939	F. Roosevelt	C
John M. Harlan	1955	Eisenhower	C
William J. Brennan, Jr.	1956	Eisenhower	C
Potter Stewart	1958	Eisenhower	C
Byron R. White	1962	Kennedy	C
Thurgood Marshall	1967	Johnson	C
Harry A. Blackmun	1970	Nixon	X

Legend: C - Concur D - Dissent X - Not Yet Seated

Total Concurring Votes - 8

TABLE 6

The United States Supreme Court - 1969

Dowell v. Board of Education of Oklahoma City Public Schools
396 U.S. (1969)

Boundary changes for desegregation approved

Name	Appointed	Nominated by	Vote
Warren E. Burger	1969	Nixon	C
Hugo L. Black	1937	F. Roosevelt	C
William O. Douglas	1939	F. Roosevelt	C
John M. Harlen	1955	Eisenhower	C
William J. Brennan	1956	Eisenhower	C
Potter Stewart	1958	Eisenhower	C
Byron R. White	1962	Kennedy	C
Thurgood Marshall	1967	Johnson	C
Harry Blackmun	1970	Nixon	X

Legend: C - Concur D - Dissent X - Not Yet Seated

Total Concurring Votes - 8

TABLE 7

The United States Supreme Court - 1971

Swann v. Charlotte-Mecklenburg Board of Education
403 U.S. 912 (1971)

Required implementation of desegregation plan involving extensive busing (de jure segregation)

Name	Appointed	Nominated by	Vote
Warren E. Burger	1969	Nixon	C
Hugo L. Black	1937	F. Roosevelt	C
William O. Douglas	1939	F. Roosevelt	C
John M. Harlan	1955	Eisenhower	C
William J. Brennan	1956	Eisenhower	C
Potter Stewart	1958	Eisenhower	C
Byron R. White	1962	Kennedy	C
Thurgood Marshall	1967	Johnson	C
Lewis F. Powell	1970	Nixon	C

Legend: C - Concur D - Dissent

Total Concurring Votes - 9

TABLE 8

The United States Supreme Court - 1973

Wilfred Keyes v. School District No. 1
413 U.S. 189 (1973)

Suit to compel desegregation of Denver City Schools. Recommended when plaintiffs failed to prove de jure segregation

Name	Appointed	Nominated by	Vote
Warren E. Burger (4)	1969	Nixon	C
William O. Douglas	1939	F. Roosevelt	C
William J. Brennan	1956	Eisenhower	C
Potter Stewart	1958	Eisenhower	C
Byron R. White	1962	Kennedy	N
Thurgood Marshall	1967	Johnson	C
Harry A. Blackmun	1970	Nixon	C
Lewis F. Powell	1972	Nixon	C/D
William H. Rehnquist	1972	Nixon	D

Legend: C - Concur D - Dissent C/D - Concur in Part
N - Nonparticipant

Total Concurring Votes - 7

TABLE 9

The United States Supreme Court - 1974

Milliken v. Bradley (Milliken I)
418 U.S. 717 (1974)

Interdistrict desegregation plan disapproved
(de facto segregation)

Name	Appointed	Nominated by	Vote
Warren E. Burger (4)	1969	Nixon	C
William O. Douglas	1939	F. Roosevelt	D
William J. Brennan	1956	Eisenhower	D
Potter Stewart	1958	Eisenhower	C
Byron R. White	1962	Kennedy	D
Thurgood Marshall	1967	Johnson	D
Harry A. Blackmun	1970	Nixon	C
Lewis F. Powell	1972	Nixon	C
William H. Rehnquist	1972	Nixon	C

Legend: C - Concur D - Dissent

Total Concurring Votes - 5

TABLE 10

The United States Supreme Court - 1976

Pasadena City Board of Education v. Nancy Anne Spangler
427 U.S. 424 (1976)
(de facto segregation)

Name	Appointed	Nominated by	Vote
Warren E. Burger (4)	1969	Nixon	C
William Brennan	1956	Eisenhower	D
Potter Stewart	1958	Eisenhower	C
Byron R. White	1962	Kennedy	C
Thurgood Marshall	1967	Johnson	D
Harry A. Blackmun	1970	Nixon	C
Lewis F. Powell	1972	Nixon	C
William H. Rehnquist	1972	Nixon	C
John P. Stevens	1975	Ford	N

Legend: C - Concur D - Dissent N - Nonparticipant

Total Concurring Votes - 6

TABLE 11

The United States Supreme Court - 1977

Milliken v. Bradley (Milliken II)
433 U.S. 627 (1977)

State must bear half of cost of remedial education to overcome effects of de jure segregation

Name	Appointed	Nominated by	Vote
Warren E. Burger (4)	1969	Nixon	C
William J. Brennan	1956	Eisenhower	C
Potter Stewart	1958	Eisenhower	C
Byron White	1962	Kennedy	C
Thurgood Marshall	1967	Johnson	C
Harry Blackmun	1970	Nixon	C
Lewis F. Powell	1972	Nixon	C
William H. Rehnquist	1972	Nixon	C
John P. Stevens	1975	Ford	C

Legend: C - Concur D - Dissent

Total Concurring Vote - 9

TABLE 12

The United States Supreme Court - 1977

Dayton Board of Education v. Brinkman (Dayton I)
433 U.S. 406 (1977)

Plan to correct racial balance by busing - Disapproved

Name	Appointed	Nominated by	Vote
Warren E. Burger (4)	1969	Nixon	C
William J. Brennan	1956	Eisenhower	C
Potter Stewart	1958	Eisenhower	C
Byron White	1962	Kennedy	C
Thurgood Marshall	1967	Johnson	N
Harry Blackmun	1970	Nixon	C
Lewis F. Powell	1972	Nixon	C
William H. Rehnquist	1972	Nixon	C
John P. Stevens	1975	Ford	C

Legend: C - Concur D - Dissent N - Nonparticipant

Total Concurring Votes - 8

TABLE 13

The United States Supreme Court - 1982

Crawford v. Board of Education of the City of Los Angeles
No. 81-38 (Slip Opinion) (1982)

Statewide voter ratification of Proposition I to prevent state courts from mandating reassignment of pupils and busing for racial and ethnic purpose held constitutional

Name	Appointed	Nominated by	Vote
Warren E. Burger (4)	1969	Nixon	C
William J. Brennan	1956	Eisenhower	C
Byron White	1962	Kennedy	C
Thurgood Marshall	1967	Johnson	D
Harry Blackmun	1970	Nixon	C
Lewis F. Powell	1972	Nixon	C
William H. Rehnquist	1972	Nixon	C
John P. Stevens	1975	Ford	C
Sandra O'Connor	1981	Reagan	C

Legend: C - Concur D - Dissent

Total Concurring Votes - 8

TABLE 14

The United States Supreme Court - 1982

Washington v. Seattle School District No. 1
No. 81-9 (Slip Opinion) 1982

Statewide voter-approved Initiative 350 to terminate involuntary busing for racial intergration held unconstitutional

Name	Appointed	Nominated by	Vote
Warren E. Burger (4)	1969	Nixon	D
William J. Brennan	1956	Eisenhower	C
Byron White	1962	Kennedy	C
Thurgood Marshall	1967	Johnson	C
Harry Blackmun	1970	Nixon	C
Lewis F. Powell	1972	Nixon	D
William H. Rehnquist	1972	Nixon	D
John P. Stevens	1975	Ford	C
Sandra O'Connor	1981	Reagan	C

Legend: C - Concur D - Dissent

Total Concurring Votes - 5

Congressional Mandates Pertaining to Busing and School Desegregation

Introduction

Congressional activities, like recent United States Supreme Court decisions, are not of a single philosophy. Federal laws pertaining to the busing of children for school desegregation normally fall within one of three categories. First, the Civil Rights Act of 1964 provides legislative authority upon which, many busing orders and plans have been based. Second, some legislation provides financial support for desegregating school districts. Third, legislation has been enacted to limit the use of school busing as a remedy for segregation.[130]

Arguments For and Against Busing

James B. stedman outlined the general arguments made by proponents and opponents of busing with the following annotations:

Arguments in favor of busing:

1. Busing is in most districts the only remedy that can successfully desegregate schools. Desegregated housing that would permit neighborhood school assignments is unlikely to be a reality in the near future.

2. The furor over busing is out of proportion to the amount of busing that actually takes place.

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[130]James B. Stedman, Busing for School Desegregation, Issue Brief No. IB81010. (Washington, D.C.: The Library of Congress Congressional Research Service, 1982), p. 7.

The majority of all public school children ride buses to school, but only a small fraction are bused to desegregate.

3. The academic achievement of black students generally improves in desegregated classrooms, and that of white students rarely. The academic risks involved in busing are minimal and the possible gains are significant.

4. Although the movement of white students out of desegreating school systems ('white flight') may be exacerbated by busing, busing is not the cause of this flight and the increase is only temporary.

5. At its heart, the opposition to busing is largely racist in nature and reflects opposition to desegregation of this country's schools. Attacks on school busing merely mask this more fundamental position. Busing to maintain segregated schools elicited no public outcry that the bus ride itself might in some way be harmful to the children. Only when the bus ride ended at desegregated schools has there been opposition to busing per se.

Arguments against busing:

1. The polarizing effects of busing plans and their requisite expense deflect attention, energy and resources from critically important efforts to improve the educational quality of the school.

2. Public opinion polls have shown substantial opposition to school busing for desegregation. At the same time, support for desegregated schooling has been growing. The opposition to busing is, thus, focused on the means being used, not the end to be achieved.

3. The costs, not only the financial ones, of busing for desegregation appear far in excess of any educational gains experienced by black students. The record is confused about the actual impact of desegregated schooling on black achievement. Desegregated schooling is not necessary for black students' achievement.

4. The busing of students for desegregation can generate 'white flight', ironically leading to resegregation of the school systems.

5. Busing is no longer being used to desegregate schools; rather it is being used to bring about racial balance in the schools. As a result, the shifting of students to satisfy numerical racial quotas dominates other, more important, concerns such as the potentially negative impact of long distance bus rides on children's health and educational progress, and the degree to which the segregation being remedied can be attributed to things beyond the control of school officials, such as housing patterns.[131]

Both proponents and opponents of busing provide thoughtful postulations to support their contentions. The logic offered for either position on busing is often persuasive and factual.

Federal Statutes

The Congress of the United States has amended several existing Federal statutes in the area of school busing. These laws have been changed to have an opposite effect since the Brown era when de jure segregation was a reality in most southern states. The basis of many legal cases on school desegregation has been the Civil Rights Act of 1964, of which Section 601 states:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

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[131]Ibid., pp. 10-11.

> under any program or activity receiving Federal financial assistance.[132]

Section 602 of the same Act dissects each Federal department and agency which is empowered to extend Federal financial assistance to "effectuate the provisions of Section 601 with respect to . . . issuing rules, regulations or orders . . . consistent with achievement of the objectives".[133]

Title VII of the Educational Amendments of 1972 (P.L. 92-318), the Emergency School Aid Act, was established by Congress to assist communities with desegregation. Section 703 (b) of this Act states:

> It is the policy of the United States that guidelines and criteria established pursuant to Title VI of the Civil Rights Act of 1964 and Section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regimes of the United States in dealing with conditions of segregation by race whether de jure or de facto in the school educational agencies of any state without regard to the origin or cause of such segregation.[134]

Under the privisions of the Emergency School Aid Act, school districts attempting to desegregate their schools were eligible for Federal financial assistance.

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[132]Civil Rights Act of 1964, Pub L. 88-352, 78 Stat. 252 (1965)

[133]Ibid.

[134]Education Amendments of 1972 P.L. 92-318. 86 Stat 354 (1973).

The grants could be used for a variety of school administration endeavors such as staff training, hiring, and community relations.

However, Title VIII of the same Emergency School Aid Act provided a prohibition against assignment or transportation of students to overcome racial imbalance. Section 801 of the Act states, "No provision of this Act shall be constred to require the assignment or transportation of students or teachers in order to overcome racial imbalance".[135] Section 802 (a) of Title VIII entitled, "Prohibition Against Use of Appropriated Funds for Busing"; clearly states that no funds appropriated for the purpose of carrying out any applicable program may be used for busing to overcome racial imbalance in any school or school system.[136]

Section 215 (a) (Title II) of the Education Amendments of 1974 (P.L. 93-380) states:

> No court, department or agency of the United States shall, pursuant to Section 214, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such students.[137]

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[135]Ibid., p. 371.

[136]Ibid.

[137]The Education Amendments of 1974, Pub L. 93-380 88 Stat 517 (1976).

Title II of the same Education Amendment, Subpart 2 - states in Section 204 that the denial of equal educational opportunity is prohibited, while Section 205 states that racial balance is not required and that it does not constitute a denial of equal educational opportunity.[138]

Section 205 of the same Amendment states that assignment on a neighborhood basis is not a denial of equal educational opportunity.[139] In the more recent public laws, the thrust has been to curb mandatory busing as the main requirement for the implementation of school integration. It seems likely that public officials are acting on behalf of the populace whom they represent.

While Title VI of the 1964 Civil Rights Act authorized the termination of federal funding for failure to comply with its requirements, the Byrd amendment to the Labor-HEW Appropriation Acts of the 1970's (P.L. 94-206 and P.L. 94-439) prohibited the use of appropriated funds to require, directly or indirectly, the busing of students to any school other than the one nearest their home. Congress was indeed taking a reverse position on the issue of busing for school integration.[140]

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[138]Ibid., p. 515

[139]Ibid.

[140]Stedman, p. 9.

Legislative Activities of the 97th Congress

The issue of school busing for desegregation was a prominent topic during the 97th Congress in both the Senate and the House of Representatives. A selection of the bills and resolutions which were introduced in the 97th Congress is presented below to illustrate the impact the issue had on public officials.

H. R. 869 (Crane)

A bill to limit the jurisdiction of the Supreme Court and of the district courts in certain cases. This bill would amend the United States Code to prevent the Supreme Court from having review jurisdiction on any case which relates to assignment of a student to a public school on the basis of race, creed, color, or sex; to the Committee on the Judiciary.[141]

H. R. 761 (McDonald)

A bill to insure the equal protection of the laws and to protect the liberty of the citizens as guaranteed by the Fourteenth Amendment, by eliminating Federal court jurisdiction over forced school attendance; to the Committee on the Judiciary.[142]

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[141]H. Res. 869, 97th Cong. 1st. sess., 16 January 1981, Congressional Record, p. H116.

[142]H. Res. 761, 97th Cong. 1st. sess., 6 January 1981, Congressional Record, p. H73.

H. J. R. 91 (Volkmer)

A joint resolution proposing an amendment to the Constitution of the United States prohibiting Federal courts from entering orders requiring the attendance of any student at a particular school; to the Committee on the Judiciary.[143]

S. 528 (Johnston, Laxalt, Thurmond, Hollings, DeConcini, Exon and McClure)

A bill (Neighborhood School Act of 1981) to establish limits on the power of courts of the United States in the imposition of injuctive relief in suits to protect the constitutional rights of individuals in public education and to authorize the Attorney General to institute suits to enforce such limits; to the Committee on the Judiciary.[144]

S. 1005 (Helms)

A bill (Student Freedom of Choice Act) to amend the Civil Rights Act of 1964 (Title XII) to provide for freedom of choice in student assignment in public schools; to the committee on the Judiciary. Upon enactment, this bill would provide that no department, agency, office or employee of the United States empowered to extend Federal financial assistance . . . shall withhold, or threaten to withhold, any such Federal Assistance . . . (1) on account of the

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[143]H. J. Res. 91, 97th Cong. 1st sess. 19 January 1981, Congressional Record, p. H130.

[144]S. 528, 97th Cong. 1st sess. 24 February 1981, Congressional Record, p. S1481

racial composition of the student body, or (2) to coerce or induce the school board operating such public school to ransport students or (3) to coerce or induce any school board to close any public school, or (4) to coerce or induce any school board to transfer any member of any public school faculty.[145]

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[145]S. 1005, 97th Cong. 1st sess. 27 April 1981, Congressional Record, p. S3955.

CHAPTER III

THE LEGAL ASPECTS OF BUSING FOR DESEGREGATION IN DE FACTO SEGREGATED SCHOOL DISTRICTS

Introduction

After 1971, the Swann decision mandated country-wide racial quotas by busing, if necessary, requiring all schools to eliminate de jure segregation. The legal battle then transferred to non-Southern school districts where the issue was de facto segregation. Proof of discrimination was far more difficult to assess, because the absence of state-imposed segregation laws confounded the plaintiffs' attorneys who often argued proof of segregative intent on behalf of school boards in addititon to the actual segregation.

School desegregation and racial balances were particularity difficult to accomplish in metropoliton school districts because of the continuous exodus of white pupils. Table 15 represents changes in racial percentages of pupils over an eight-year period in twelve of the largest non-Southern school districts.[1] The percentages are shown rather than the actual numerical figures. For example,

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[1]Adam Yarmolinsky, Lance Liebman, and Corine S. Schelling ed. Race and Schooling in the City, (Cambridge: Harvard University Press, 1981), pp. 18-19.

in 1968, Los Angeles had 653,549 total students; 350,909 (or 53.7 percent) were white students and 302,640 (or 46.3 percent) were "minorities", i.e., Black, Asian, Hispanic, etc. In 1976, the total student count was 592,931 or 219,359, 37.0 percent, white pupils and 373,572 or 63.0 percent, "minorities". The white pupil loss was 131,550 or 37.5 percent of the 1968 white student count. The total loss of students from 1968 to 1976 was only 60,618 or just 9.3. The term "loss" of white pupils should be interpreted as "moving from the large inter-city school districts into surrounding smaller school districts and/or into private schools.

An authentic obstacle to a feasible desegregation policy has been the heavy concentration of black pupils in segregated areas within central cities, such as the city of Detroit, Michigan, where 53 smaller predominantly white school districts surround this one city.[2] The percentage of blacks living in suburbs of central cities was lower in 1970 than in 1900.[3] Although the number of blacks in the suburbs has increased fairly rapidly, the base from which they began was so small that they still constitute

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

[3]Gary Orfield, Must We Bus? (Washington, D.C.: The Brooking Institution, 1978), p. 50.

TABLE 15

Racial Change in Non-Southern Urban Public Schools; 1968 to 1976

City	Year	White(%)	Minorities[b](%)	White Loss	Total Loss
New York	1968	43.9	56.1		
	1976	30.5	69.5	29.8	
Los Angeles	1968	53.7	46.3		
	1976	37.0	63.0	37.50	9.3
Chicago	1968	37.7	62.3		
	1976	25.0	75.0	40.4	10.0
Detroit	1968	39.3	60.7		
	1976	18.7	81.3	61.6	19.2
Philadelphia	1968	38.7	61.3		
	1976	31.8	68.2	25.1	8.7
St. Louis	1968	36.5	63.5		
	1976	28.5	71.5	45.0	29.5
Columbus, Ohio	1968	73.8	26.2		
	1976	67.1	32.9	20.8	12.9
Denver	1968	65.6	34.4		
	1976	48.6	51.4	18.3	5.8
Boston	1968	68.0	31.5		
	1976	45.0	55.0	46.4	18.4
San Francisco	1968	41.2	58.8		
	1976	22.9	77.1	61.5	30.7
Seatle	1968	82.2	17.8		
	1976	67.3	32.7	46.1	34.3
Cincinnati	1968	56.7	43.3		
	1976	46.8	53.2	37.6	24.4

[b]"Minorities include Blacks, Hispanics, Asians, and Native Americans

Source: Race and Schooling in the City, pp. 18-19.

an insignificant fraction of suburban residents.[4]

The legal process to desegregate the de facto segregated school districts began in several school systems at approximately the same time. The Pontiac, Michigan school system became one of the first to be litigated in 1969. That year, the 1500-member Pontiac chapter of the National Association for the Advancement of Colored People filed a class-action suit against the Pontiac school system on behalf of Mrs. Sadie Davis and her son Donald.[5] The suit charged that the Pontiac schools were segregated in violation of the Brown I United States Supreme Court dicision of 1954, which held that segregated schools were inherently unequal.[6]

Although the NAACP did not think the case could be won and therefore offered little support, the United States District Court ruled that the schools were segregated and ordered the school board to institute a busing system to achieve integration.[7] The United States Sixth Circuit Court of Appeals waited until the United States Supreme Court expressed its position on busing in Swann[8] and then the Circuit

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[4]Ibid., p. 51.

[5]William Serrin, "They Don't Burn Buses Anymore in Pontiac", Saturday Review 55 (24 June 1972): 8.

[6]Ibid. [7]Ibid.

[8]Swann v. Charlotte-Mecklenburg Board of Education 403 U.S. 912 (1971)

Court upheld the busing order.[9] Thus, even though Michigan was not a de jure segregation state, it was a state with de facto segregation and school litigation had arrived.

De facto segregation and busing became inseparable issues. The decade of the seventies produced numerous cases concerning school segregation. However, unlike prior de jure in which the United States Supreme Court always decided with unanimity, de facto cases brought forth diverse opinions. De facto segregation cases received a different constitutional review with each justice. For either political or personal reasons, the litigations received thorough examinations.

One of the most notable non-Supreme Court de facto segregation cases remains that of the Boston Morgan v. Hennigan school desegregation case. While Boston had always been characterized as a city of libertarianism, another image of the city became known during the early 1970's.

Federal District Judge W. Arthur Garrity, Jr. explained that the Boston school desegregation issue was a clear violation of the Fourteenth Amendment to the Constitution.[10] Judge Garity provided the following opinion in this case:

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[9]Serrin, p. 8.

[10]Leon Jones, From Brown to Boston, 2 Vols. (Metuchen, New Jersey: Scarecrow Press Inc., 1979), p. 18.

> The Court concludes that the defendants have knowingly carried out a systematic program of segregation affecting all of the city's students, teachers, and school facilities and have intentionally brought about and maintained a dual school system. Therefore, the entire school system of Boston is unconstitutionally segregated.[11]

"Boston was found by both the Federal District Court and the Circuit Court of Appeals to be as much of de jure school segregation as in any school district in the South," according to Author Leon Jones.[12]

In attempting to alleviate overcrowding at white Cleveland Junior High School, the Boston School Committee had chosen not to assign students to the closer and underutilized black schools, but rather to crowd further already overutilized South Boston High.[13] Deputy Superintendent of Schools Thomas Meagler testified that assigning white students to black schools to alleviate overcrowding was not considered because white parents would protest.[14] The violent reaction to the decision has raised the question whether the law will withstand the pressure to turn away from the national commitment to an integrated society.[15]

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[11]Ibid.

[12]Ibid.

[13]Roger I. Abrams, "Not One Judge's Opinion: Morgan v. Hennigan and the Boston Schools", Harvard Educational Review 45 (February 1975).

[14]Ibid. [15]Ibid., p. 6.

Intent to Segregate

After Swann, two years passed before the United States Supreme Court returned with the decision in Keyes which became the first de facto segregation case.

The significance of the Keyes decision was that the United States Supreme Court extended the definition of de jure segregation to include systems intentionally segregating even if not by state statute.

In Keyes, the petitioners first sought desegregation of the Park Hill area schools in Denver; then, after the District Court ordered desegregation in these schools, the petitioners expanded the suit to secure desegregation of the remaining schools in the Denver school district.[16] The District Court denied the additional relief sought by the petitioners by proclaiming that the deliberate racial segregation of the Park Hill schools was not proof enough that a similar segregation policy addressed specifically to the core city schools existed and demanded that the petitioners prove de jure segregation existed for each area that they sought to desegregate.

The District Court found that the "white" schools in other parts of the district were superior to the segregated core city schools and relied on Plessy v. Ferguson, 163

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

U.S. 537, to order the school district to provide substantially equal facilities for the core city schools. This latter relief was reversed by the Tenth Circuit Court of Appeals even though that court affirmed that, although the Park Hill schools were deliberately segregated, there was no overall school board activity that established a policy of system-wide segregation.

On appeal, the United States Supreme Court modified and remaned the case. Justice William Brennan delivered the opinion of the Court, in which Justices William Douglas, Potter Stewart, Thurgood Marshall, and Harry Blackmun joined. Justice William Douglas filed a separate opinion. Chief Justice Warren Burger concurred in the results. Justice Lewis Powell concurred in part and dissented in part. Justice William Rehnquist dissented. Justice Byron White did not take part in the decision.

Justice William Brennan conceded that this Denver case did not meet the "segregation by stature" as was decided upon in Brown I, Brown II, and Swann; then he added:

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

Justice Brennan insisted that the District Court had erred in not placing Negroes and Hispanics in the same category for the purposes of defining a "segregated" core city

school. Both groups suffered the same educational inequities when compared with the treatment afforded Anglo students.[17] Justice Brannan acknowledged that:

> Denver is a tri-ethnic, and distinguished from a biracial, community. The overall racial and ethnic composition of the Denver public schools is 66% Anglo, 14% Negro, and 20% Hispano. The District Court, in assessing the question of de jure segregation in the core city schools, preliminarily resolved that Negroes and Hispanos should not be placed in the same category to establish the segregated character of a school (313 F. Supp. at 69). Later in determining the schools that were likely to produce an inferior educational opportunity, the court concluded that a school would be considered inferior only if it had "a concentration of either Negro or Hispano students in the general area of 70% to 75%! (Id., at 77(.

Concerning the concept of racial percentages, Justice Brennan insisted that:

> We intimate not opinion whether the District Court used those figures to singify educationally inferior schools and there is not suggestion in the record that those same figures were or would be used to define a 'segregated' school in the de jure context. What is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration. The District Court has recognized these specific factors as elements of a 'segregated' school (id., at 74), and we may, therefore, infer that the Court will consider them on remand.
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> We conclude, however that the District Court erred in separating Negroes and Hispanos for purposes

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[17]Ibid.

> of defining a "Segregated" school. We have held that Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment. Hermandez v. Texas 347 U.S. 475, 98 L Ed 866, 74 S Ct 667 (1954).

Moreover, Justice Brennan pointed out that the "lower courts applied an incorrect legal standard" concerningthe petitioners' contention that the Denver School Board had adopted a policy of deliberately segreating the core city schools. Continuing, Justice Brennan maintained, "Our conclusion is that those courts did not apply the current standard in addressing that contention". He further observed:

> Indeed, the District Court found that between 1960 and 1969 the Board's policies with respect to these Northeast Denver schools show an undeviating purpose to isolate Negro students in segregated schools "while preserving the Anglo character of other schools".[18]

Justice Brennan had initially pointed out in the written opinion that the Colorado Constitution prohibited "classification of pupils . . . on account of race or color".[19] But the Justice stated further in his opinion:

> This finding did not relate to an insubstantial or trivial fragment of the school system. On the contrary, respondent School Board was found guilty of following a deliberate segregation policy of schools attended, in 1969, by 37.69% of Denver's total Negro school population, including one-fourth of the Negro elementary pupils, over two-thirds of the Negro Junior high pupils, and over two-fifths of the Negro high school pupils.

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[18]Ibid.

[19]Colorado, Constitution, art. IX, sec. 8.

> . . . Respondent argues, however, that a finding of state-imposed segregation as to a substantial portion of the school system can be viewed in isolation from the rest of the district, and even if a state-imposed segregation does exist in a substantial part of the Denver School System, it does not follow that the District Court could predicate on that fact a finding that the entire school system in a dual system. We do not agree.

The third major point to be noted by Justice Brennan that a policy of intentional segregation had been proven with respect to a significant portion of the school system. To remedy the problem of intentional segregation Justice Brennan maintained that:

> . . . The burden is on the school authorities [regardless of claims that their 'neighborhood school policy' was racially neutral] to prove that their actions as to other segregated schools in the system were not likewise motivated by a segregation intent.

On remand, Justice Brennan directed the District Court to provide the school board an opportunity to establish that the Park Hill area was a separate, identifiable, and unrelated section of the school district. If the Denver School Board failed, then the District Court must determine whether the school board policy mandated deliberate segregation in the Park Hill Schools. He pointed out once again that the school board had the affirmative duty to desegregate the entire school system if the District Court determined that it was a dual system. If the entire school system was not a dual system, then the District Court must allow the school board the opportunity to rebut petitioners <u>prima</u>

facie case of intentional segregation. The school board would have to show that policies and practices concerning school sites, school size, school renovations and additions, student attendance zones, student assignments and transfers, mobil classroom units, transportation of students, and assignment of faculty and staff did not create or maintain segregation in the core city schools. If the school board failed to rebut petitioners' prima facie case, then the District Court would decree all-out desegregation of the core city schools.

Finally, Justice Brannan would not dismiss the argument that the school authorities had been bound not to produce de jure segregation by the manipulation of the neighborhood school issue "simply because it appears to be neutral".[20]

School systems thoughout the nation were disappointed that the Keyes decision did not decide the neighborhood school questions.[21] However, Justice Brennan clearly made the point that school boards carried the burden of proof that school segregation was not a result of intentional board actions.

Although Justice William Douglas concurred with the majority opinion, he went along with Justice Powell and

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[20]Keyes v. School District No. 1, 413 U.S. 189.

[21]James Bolner, Busing: The Political and Judicial Process (New York: Praeger, 1974), p. 36.

for the purpose of the Equal Protection Clause of the Fourteenth Amendment, that there was no difference between de facto and de jure segregation.[22]

Justice Douglas wrote in his opinion:

> The school board is a state agency and the lines that it draws, the location it selects for school sites, the allocation it makes of students, the budgets if prepares are state action for Fourteenth Amendment purposes.
>
> . . . I think it is time to state that there is no constitutional difference between de jure and de facto segregation, for each is the product of state actions or policies. If a 'neighborhood' or 'geographical' unit has been created along racial lines by reason of the play of restrictive covenants that restrict certain areas to 'the elite', leaving the 'undesirables' to move elsewhere, there is state action in the constitutional sense because the force of law is placed behind those convenants.
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> There is state action in the constitutional sense when public funds are dispersed by urban development agencies to build racial ghettos.[23]

Justice Lewis Powell maintained that a state is barred from creating by any device, including mandated pupil assignment plans, human ghettoes.[24] As already pointed out, Justice Powell agreed with Justice Douglas that there should be no distinction between de facto and de jure segregated school systems. Moreover, Justice Powell insisted that the distinction should be abolished in favor of a single constitutional

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[22]Ibid., p. 567

[23]Keyes, p. 189 ff.

[24]Ibid.

rule requiring genuinely integrated school systems. Finally, Justice Powell maintained that:

> There is segregation in the schools of many of these cities fully as pervasive as that in southern cities prior to the desegregation decrees of the past decade and a half.
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> . . . We must recognize that the evil of operating separate schools is no less in Denver than in Atlanta.[26]

Justice William Rehnquist's dissenting opinion suggested that the doctrine of compulsory integration deviated from the established doctrine in Brown I and Brown II. Continuing, Justice Rehnquist maintained that:

> Underlying the Court's entire opinion is its apparent thesis that a district judge is at least permitted to find if a single attendance zone between two individual schools in the large metropolitan district is found by him to have been 'gerrymandered', the school district is guilty of operating a 'dual' school system, and is apparently a candidate for what is in practice a federal receivership.[27]

From the 1954 Brown I to the 1971 Swann, in every de jure desegregation cases the Supreme Court presented a unified opinion. Beginning with Keyes in 1973, the Supreme Court was to be divided with de facto cases. Keyes was the beginning of landmark Supreme Court school desegregation cases in which the justices would develop both legal and social philosophies on both sides of the issue.

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[25]Americo D. Lapati, Education and the Federal Government: A Historical Record (New York: Mason/Charger, 1975), p. 302.

[26]Keyes v. School District No. 1 413 U.S. 189 ff.

[27]Ibid.

Rejection of Multi-District Remedy

In 1971, a suit was filed in the United States District Court for the Eastern District of Michigan against certain state officials and the Board of Education of the city of Detroit, seeking desegregation of Detroit public schools. The District Court concluded that the defendants had engaged in unconstitutional activities for which the state was responsible and that these unconstitutional activities resulted in de jure segregation in the city school district. Therefore, the District Court ordered the submission of desegregation plans for the city alone, and for the three-county metropolitan area, even though the suburban school districts had no relationship to the Detroit School System and otherwise had not committed any constitutional violations.[28]

The District Court later insisted that the proposed "Detroit-only" plans were inadequate, and desegregation plans limited only to the city schools would not produce a racial balance reflecting the racial composition of the entire metropolitan area; moreover, such plans would only accentuate the racial identification of the city school system where some of the schools would be up to 90 percent black.[29]

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[28]Milliken v. Bradley 418 U.S. 717, 41 L Ed 2d 1069, 94 S Ct. 3112. (1974).

[29]Ibid.

The District Court developed a metropolitan plan that included the fifty-three suburban school districts plus Detroit. Finally, the District Court demanded that a specified number of school buses be obtained to provide intersystem transportation under an interim plan which was to be developed for the coming year.[30]

The Sixth Circuit Court of Appeals affirmed that part of the finding opinion concerning de jure segregation in the Detroit School District and the need of a metropolitan desegregation plan; however, it remanded for joinder as parties to the case, all suburban districts that might be affected by any metropolitan plan. The District Court's order for the acquisition of school buses was vacated

On certiorari, July 25, 1974, the United States Supreme Court reversed and remanded the case for the development of a plan restricted to the city of Detroit. Chief Justice Warren Burger delivered the Court's opinion with Justices Stewart, Blackmun, Powell and Rehnquist concurring. Justice Douglas filed a dissenting separate opinion of desent. Justice White filed a dissenting opinion in which Justices Douglas, Brennan, and Marshall joined.

The lower courts had found that the Detroit School Board, much like the Denver School Board, had adopted or

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[30]Ibid.

sanctioned policies that intensified segregation.[31] This Milliken case, according to Bob Woodward and Scott Armstrong, presented the same fundamental question that the Court had faced in the Richmond, Virginia case: Could a federal judge order interdistrict school desegregation?[32]

Chief Justice Warren Burger in writing the Courts majority opinion held that:

1. In the exercise of its equity powers in a school case, a federal court could not properly impose a multidistrict, areawide remedy to a single district de jure segregation problem unless it was first established that unconstitutional racially discriminatory acts of other districts had caused interdistrict segregation, or that lines---which could not be considered as mere arbitrary lines drawn for political convenience---had been deliberately drawn on the basis of race.

2. Thus, the remedy in the case at bar must be limited to the Detroit School District even though desegregation of only the city schools would not reflect the racial composition of the metropolitan areas as a whole, because:

   a) The record established de jure segregation in the city schools only, and did not establish any significant constitutional violations by the 53 suburban school districts or any significant interdistrict violation producing an interdistrict segregative effect.

   b) A metropolitan remedy might seriously disrupt the state's structure of public education involving a large measure of local control, and would give rise to many problems as to large-

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[31]Richard Kluger, Simple Justice, (New York: Vintage Books, 1977), p. 771.

[32]Bob Woodward and Scott Armstrong, The Brethren (New York: Simon and Schuster, 1979), p. 283.

> scale busing of students, financing, and administration.[33]

Justice Potter Stewart filed a concurring opinion in Milliken maintaining that unconstitutional racial segregation was found only within Detroit in this case. Therefore, the plans could not properly include other school districts where there was no showing of unlawful segregation.

Justice Stewart concluded his opinion with the following statement:

> . . . By approving a remedy that would reach beyond the limits of the city of Detroit to correct a constitutional violation found to have occurred solely within that city, the Court of Appeals thus went beyond the governing equitable principles established in this Court's decision.[34]

Justice William Douglas dissented from the majority opinion by stating that the Court of Appeals had acted responsibly and that metropolitan treatment of metropolitan problems is commonplace. Justice Douglas insisted that if the case had involved a metropolitan water, sewage, or energy problem, the state of Michigan would be within federally constitutional bounds to seek a metropolitan remedy. There were two additional elements to Justice Douglas' dissenting opinion.

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[33]Milliken v. Bradley, 418 U.S. 717, 41 L Ed 2d 1069, S. Ct. 3112.

[34]Ibid.

1. In view of the obligation of school districts to pay their own way, the Court's ruling against a metropolitan remedy meant that there could be no violation of the equal protection clause even though schools were segregated by race and black schools were not only 'separate' but also 'inferior'.

2. There was no difference between de facto and de jure segregation, and that the creation of school districts in metropolitan Detroit either maintained existing segregation or caused additional segregation.[35]

Justice Douglas pointed out that, given the San Antonio School district v. Rodriguez decision, the poor were not only required to pay their way, but also were allowed to attend not only "separate" but "inferior" schools. Finally, Justice Douglas insisted that the decision was a dramatic retreat from the 7-to-1 decision in 1896 that blacks could be segregated in public facilities, but that they had to receive equal treatment.

Justice Byron White, joined by Justices Douglas, Brennan, and Marshall, wrote the following:

1. Under the Court's holding, deliberate acts of segregation and their consequences would go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the court considered to be undue administrative inconvenience to the state, but the Court did not challenge the District Court's conclusion that a plan including the suburbs would be physically easier and more practical than a Detroit-only plan.

2. The constitutional violations, even if occurring locally, were committed by governmental entities for which the state was responsible.

3. The federal courts should be free to devise workable remedies, an interdistrict remedy being necessary

> in the case at bar, and there being no acceptable reason for permitting the state, as the responsible party to restrict the federal court's remedial powers.

Finally, a disappointed Justice Marshall offered a passionate dissenting conclusion:

> 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, or 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, the other black---but it is a course, I predict, our people will ultimately regret. I dissent.[35]

The Supreme Court had dealt difinitively for the first time in Milliken with de facto segregation by housing patterns and economic conditions. The four holdovers from the Warren Court voted in the minority and to these four justices, the decision represented a major retreat in school desegregation decisions.

The Detroit case was considered a landmark case in that the United States Supreme Court had, in a 5-4 vote, placed a damper on court-ordered busing. The Richmond case

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[35]Kluger, p. 773.

had been considered a case comparable to Milliken but because Justice Powell had served on Virginia school boards for a number of years, he refused to take part in the case. Thus, the 4-to-4 deadlock in the Richmond case had not left lower courts with any law of the subject.[36]

The Richmond Times-Dispatch printed the following comments on July 26, 1974, the day after the Milliken decision:

> Yesterday's decision has the gratifying impact locally of removing the last shred of uncertainity surrounding the Richmond School Board's effort to consolidate city schools with those of Henrico and Chesterfield counties for the purpose of seeking a white majority in every school. Consolidation is dead. All the area school systems are independently operating on a racially-unitary basis. Some schools will continue to be heavily black but that does not mean that such schools ought to be regarded as inferior. Local officials and citizens ought now to shift from their preoccupation with race to a whole-hearted concentration on teaching children, wherever they are, the skills they need to survive and preferably to excel in a complex age.

The Richmond, Virginia school desegregation case had first begun in 1961 and the current phase of the case began on March 10, 1970. The black plaintiffs filed a motion for further relief. The United States District Court for the Eastern District of Virginia, Richmond Division, ordered

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[36]Woodward and Armstrong, p. 266.

[37]Judith F. Buncher, ed., The School Busing Controversy: 1970-75 (New York: Facts on File, 1975), p. 79.

the integration of schools in the city with those of Herico and Chesterfield counties.[38]

The Court of Appeals, with Circuit Judge Braxton Craven writing the opinion, held that when state-imposed segregation had been removed intervention by the District Court was neither necessary nor justifiable. This case which began as Bradley v. School Board of the City of Richmond, had now become broadened to include the school boards of both Henrico and Chesterfield Counties. Judge Craven's opinion stated that District Court Judge Robert R. Merhige, Jr. did not have the authority to order consolidation of such separate political subdivisions of the commonwealth.

Upon reaching the Supreme Court city-suburban busing was struck down with a 4-to-4 vote deadlock. Justice Lewis Powell did not take part because of his 19 years of service on school boards.

The Detroit decision, along with the Richmond decision left little doubt as to the philosophy of the United States Supreme Court toward school desegregation when there is absence of proven de jure segregation. The distinction between simpe de facto segregation and segregative intent had become a critical issue to the legal purists serving on the United States Supreme Court. But to the more liberal

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[38]Bradley v. School Board of the City of Richmond, 412 U.S. 92 (1973).

justices and to Justice Marshall in particular, the Detroit and Richmond cases as with most school desegregation cases, were of greater significance than the concept of fine technicalities.

Acceptance of Interdistrict Remedy

In contrast to the Detroit and Richmond cases, a Delaware case in which de jure segregation was confirmed resulted in the acceptance of interdistrict remedy. The United States Supreme Court ruled on Buchanan v. Evans on November 19, 1975 and affirmed the District Court's decision which required interdistrict busing in a 6-to-3 vote.[39] The Supreme Court had found the suburban districts of the Detroit areas not to have been party to any segregative policies or practices which constituted a case of de facto segregation. However, in this Delaware case, the District Court had determined that the city of Wilmington and the entire state of Delaware were involved in segregative policies because Wilmington was excluded in a statewide school-district consolidation effort. This action was to constitute de jure segregation. It should be noted that Delaware had once been a de jure segregated state and had been one of the four states involved in Brown I. The state legislature had pased an Educational Advancement Act in June 1968 which

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

was to provide the framework for an effective and orderly reorganization of existing school districts and the combination of other existing school districts. The state statute read that the district of Wilmington should be "the city of Wilmington with the territory within its limits".[40]

The District Court contended that this exception for the city of Wilmington discriminated against blacks.[41] Therefore, a three-judge District Court declared that the portion of the Educational Advancement Act which excluded Wilmington from consideration for consolidation was unconstitutional and requested a desegregation plan to include Wilmington and other areas of New Castle county.[42] Moreover, the District Court enjoined the State Board from relying on the Educational Advancement Act in the drafting of plans.

The case was appealed directly from the District Courts to the United States Supreme Court. The United States Court affirmed the District Court's ruling. Justices Powell, Rehnquist and Chief Justice Burger dissented with Justice Rehnquist writing the dissenting opinion.[43] The dissenting argument stated that the enjoining of the enforcement of

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[40]Delaware Code Annotated, Title 14, Section 1001 (1975).

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

[42]Ibid.

[43]Ibid.

the state stature was not an issue in the Milliken case on which the Supreme Court based this case and that the District Court could not enjoin the implementation of a stature which had expired on July 1, 1969.[44]

The case was returned to the District Court, where it was ruled that an interdistrict remedy was necessary in order to desegregate the Wilmington schools. The District Court then requested plans to be drawn to this effect. The District Court did not accept the argument that the suburban districts operated a unitary system and, in turn, were not committing any constitutional violation as was the issue in Milliken.[45] The District Court ruled that local school boards were created by the state and the state through de jure segregation caused racial disparity.

When none of the proposed plans were found acceptable to the District Court, a representative board from existing boards was charged with the task of designing an acceptable plan. A consolidated school district of eighty thousand students was thereby created because of past state-supported acts of de jure segregation.

The Wilmington Board of Education then appealed the case to the United States Court of Appeals, Third Circuit. The Court of Appeals sitting en blanc modified and affirmed

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[44]Ibid.

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

the District Court's ruling in a 4-to-3 vote.[46]

The Court of Appeals held:

1. The Supreme Court's summary affirmance of the District Court's 1975 order would appear to be binding on this court under the law of the case principle.

2. The reviewing court (Court of Appeals) defers to a trial court's exercise of remedial discretion when it has applied proper legal precepts and remained within determined legal boundaries.

3. The fashioning of an interdistrict remedy was not abuse of discretion.

4. That although no definitive racial quota was intended, the 10-35% enrollment criterion was expressly disapproved.[47]

In this comparison case, the United States Supreme Court gave split-vote approval to interdistrict consolidation for the purpose of school integration when de jure segregation had been established.

Annual Readjustments to Prevent Minority-Majority Schools Overruled

The argument of unconstitutional segregation was given a new impetus in the Pasadena v. Spangler case in 1968 with the consideration of evolving demographic trends. After several high school students and their parents brought a purported class action against school officials seeking judicial relief from allegedly unconstitutional segregation in the schools in Pasadena, California, the United States

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[46]Evans v. Buchanan, 555 F 2d 373 (1977).

[47]Ibid.

government intervened as an additional plaintiff on the basis of Section 902 of the Civil Rights Act of 1964.[48] This portion of the Civil Rights Act of 1964 stipulates that upon intervention the United States shall be entitled to the same relief as if it had instituted the action.

In 1970, the District Court held that the defendants' educational policies and practices violated the Fourteenth Amendment. The same court enjoined the school board from failing to adopt a desegregation plan and ordered the school board to submit a plan for desegregating the Pasadena schools which would provide that, beginning with the 1970-1971 school year, no school would have a majority of minority students. The District Court also retained the jurisdiction to see that the plan was implemented.

The defendant school board members submitted the "Pasadena Plan", which was accepted by the District Court, but the succeeding school board members filed a motion with the District Court in 1974. They sought to have the 1970 order modified by having the injunction dissolved and by having the District Court's jurisdiction terminated.

The motion was denied by the District Court on the basis that the school board allegedly had not complied with the 1970 order and that "literal" compliance with the "no majority" requirement and that the requirement was inflex-

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

ible and was to be applied anew annually even though the school board might not consider itself responsible for such factors as population shifts.

On appeal to the Ninth Circuit Court of Appeals, the District Court's opinion was affirmed, but with reservation, which the Court of Appeals felt the District Court would heed.

Certiorari was granted by the United States Supreme Court in order to answer the issue of a District Court exceeding its decision on June 28 of the same year. Justice William Rehnquist delivered the majority opinion of the Court in which he was joined by Justices Stewart, White, Blackmun and Powell in addition to Chief Justice Burger. Justice Thurgood Marshall filed a dissenting opinion in the case in which Justice Brennan joined. Justice Stevens did not participate in either the consideration or decision.[49]

The Supreme Court's majority opinion held that:

1. The United States' presence in the case pursuant to Section 902 of the Civil Rights Act of 1964 ensures that the case is not moot, although it is moot as to respondent students and parents who were the original named plaintiffs because these students have graduated from the school system and thus they and their parents no longer have any stake in the outcome of the litigation, and there has been no certification of a class of unnamed students still attending the Pasadena public schools.

2. Having adopted the "Pasadena Plan" in 1970 as establishing a racially neutral system

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[49]Ibid.

of student assignment in the school system, the District Court exceeded its authority 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.

a) Since the post-1971 shifts in the racial make-up of some of the schools resulted from changes in the demographics of Pasadena's residential pattern due to a normal pattern of people moving into, out of, and around the school system, and were not attributable to any segregative action on their part, neither the school officials nor the District Court was 'constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system'. Swann v. Board of Education, 402 U.S. 1, 32.

b) The fact that even if the 'no majority' requirement had been unambiguous it would be contrary to the decision in Swann, Supra, and that, being ambiguous, the parties interpreted it in a manner contrary to the District Court's ultimate interpretation are factors, which, taken together, support modification of the 1970 decree.

c) The Court of Appeals' disapproval of the District Court's view that it had a lifetime commitment to the 'no majority' requirement, and of the substance of that requirement, was not sufficient to remove the requirement from the case, since even though the Court of Appeals assumed that the District Court would heed such disapproval or remand, the fact remains that despite such disapproval the Court of Appeals affirmed the District Court's denial of the motion to amend the 1970 order, and thus subjected petitioners to contempt for violation of the injunctive decree. Notwithstanding that they might have reasonable and proper objections to the decree. On this phase of the case

> petitioners were entitled to reversal of the District Court with respect to its treatment of the 'no majority' requirement portion of the 1970 order.[50]

The Supreme Court vacated and remanded the case as its majority vote established that once a school board had implemented an attendance plan that was racially neutral, then the school board is not constitutionally required to annually adjust student assignments in order to maintain a specific racial balance in the student body of each school.

Justice William Rehnquist wrote that the normal pattern of human migration had resulted in changes in Pasadena's residential patterns and that these shifts were not attributed to any segregative actions on the part of the petitioners.[51] Moreover, Justice Rehnquist stated that a similar situation was foreseen in Swann and he offered the precise citation to support the Court's contention in this case.[52]

> It does not follow that the communities served by (unitary) systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official actions is eliminated from the system.[53]

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[50]Ibid., 427

[51]Ibid., p. 436.

[52]Ibid.

[53]Swann v. Board of Education, 402 U.S. 1, 31-32 (1971).

Finally, Justice Rehnquist wrote that because the case is to be returned to the Court of Appeals:

> The court will have an opportunity to reconsider its decision in light of our observations regarding the appropriate scope of equitable relief in this case.
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> . . . Accordingly the judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.[54]

Justice Marshall wrote in his dissenting opinion, in which Justice Brennan joined, that official racial discrimination has not been eradicated from the school system; therefore, he could not agree with the Court's ruling that the District Court refusal to modify the "no majority of any minority" provision of its order was erroneous.

Justice Marshall expressed that in his view, the ruling had unwarrantedly extended the Court's statement in Swann:

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial compostion of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimintion through official action is eliminated from the system.[55]

Justice Marshall asserted that in the Court's insisting upon the District Court to largely abandon its scrutiny of attendance patterns, the Court might be insuring that a unitary school system in Pasadena might never occur.

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[54]Pasadena v. Spangler, pp. 440-441.

[55]Ibid., p. 424.

At least, according to Justice Marshall, segregation might never be eliminated "root and branch" as was required in Green v. Country School Board, 391 U.S. 430, 438 (1968).

In concluding his opinion, Justice Marshall saw the following points as the pertinent issue in the case:

> We have held that 'once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies'. Swann v Board of Education.
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> . . . We should not compel the District Court to modify its order unless conditions have changed so much that 'dangers, once substantial, have become attenuated to a shadow'. United States v Swift and Company, 286 U.S. 106, 119 (1932).[56]

The Court was not specific in stating racial ratio requirements in Pasadena as the case was remanded for further proceedings, but once again the Court was not unamimous in an important school desegregation cases. The lack of segregative intent on behalf of the school board proved more important in this case than the actual segregated housing pattern which resulted in the racial ratios in the schools. By the time of this Pasadena case, segregation by intent, on behalf of school boards or state agencies, had become the overriding factor as to how a majority of the United State Supreme Court Justices would vote in school desegregation cases.

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[56]Ibid., p. 444.

District-Wide Busing Plan Upheld

The significance of the Columbus case was that the Supreme Court upheld the district-wide busing plan. Fourteen students in the school system brought a class action against the Columbus Board of Education during 1973.[57] The charge was that the Board pursued a policy that perpetuated racial segregation in the Columbus public schools in violation of the equal protection clause of the Fourteenth Amendment.[58] In 1976, the United States District Court for the Southern District of Ohio found that the pattern of segregation was the direct result of cognitive acts or omissions by school board members and administrators. The board had also been under obligation since 1954 to dismantle the dual school system and having failed to accomplish the task, the board actions and practices could not reasonably be explained without reference to racial concerns that it had intentionally aggravated racial isolation in the schools.

The District Court concluded that the segregation in the Columbus School System was the direct result of the Board's segregated acts and omissions in violation of the Equal Protection Clause under the Fourteenth Amendment and

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[57]Columbus Board of Education v Penick, 61 L Ed 2d 666 (1979).

[58]John L. Moore, ed., Historic Documents of 1979, (Washington, D.C.: Congressional Quarterly, Inc., 1980), p. 536.

enjoined continuing discrimination of the basis of race and ordered submission of a system-wide desegregation plan.

On appeal, the Sixth Circuit United States Court of Appeals affirmed the District Court's ruling and held that the District Court had not misunderstood or misapplied the Fourteenth Amendment nor relevant cases contruing it.

On certiorari, the United States Supreme Court affirmed the United States Court of Appeals decision in a 7-2 vote in which Justice Byron White wrote an opinion that was joined by Justices brennan, Marshall, Blackmun, and Stevens. Chief Justice Burger wrote a concurring opinion and Justice Potter Stewart wrote a separate concurring opinion in which Chief Justice Burger joined. Justice Lewis Powell wrote a dissenting opinion; Justice Rehnquist wrote a separate dissenting opinion in which Justice Powell joined.[59]

Justice White insisted that because the school had been segregated at the time of Brown I, the school board had an affirmative constitutional responsibility to end that segregation.[60] The Justice stated that the Columbus public schools of 96,000 students were highly segregated with 70% of all students attending schools at least 80% black or 80% white (429 F. Supp. 229, 240, SD Ohio 1977) and that half of the 172 schools were 90% black or 90% white,

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[59]Columbus Board of Education v Penick 61 L Ed 2d 666 (1979).

[60]Moore, p. 536.

583 F 2d 787, 800 (CA6 1978).

Justice White referred to Swann in determining whether a dual school system had been disestablished:

> Where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teacher and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facia case of violation of substantive constitutional rights under the Equal Protection Clause is shown[61]

In reference to student assignments, Justice White emphasized that the Court had said in Swann:

> No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory.[62]

The Columbus Board of Education's continuing "affirmative duty to disestablish the dual school system" is beyond question, Justice White stated.[63] But he insisted that the Board,

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[61]Swann v Charlotte-Mecklenburg Board of Education 402 U.S. 18 (1971).

[62]Ibid., p. 26

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

"never actively set out to dismantle this dual system."[64] The majority opinion in this Columbus case elucidated its support of the District Court ruling with the statement that since the Brown I decision, the Columbus defendants as their predecessors, were put on notice that action was required to correct and to prevent the increase of segregation, but that the Board failed to alleviate racial segregation in the schools.[65]

In support of the lower courts' rulings, Justice White set down these trenchant annotations:

> Against this background, we cannot fault the conclusion of the District Court and the Court of Appeal that at the time of trial there was system-wide segregation in the Columbus schools that was the result of recent and remote intentionally segregative actions of the Columbus Board. While appearing not to challenge most of the subsidiary findings of histroical fact, Tr. of Oral Arg. 7, petitioners dispute many of the factual inferences drawn from these facts by the two courts below. On this record, however, there is no apparent reason to disturb the factual findings and conclusions entered by the District Court and strongly affirmed by the Court of Appeal after its own examination of the record.
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> . . . In Dayton I, only a few apparently isolated discriminatory practices had been found; yet a system-wide remedy had been imposed without proof of a system-wide impact. Here, however, the District Court repeatedly emphasized that it had found purposefully segregative practices with current, system-wide impact 429 F. Supp., at 252, 259-260, 264, 266.[66]

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[64]Ibid.

[65]Ibid.

[66]Ibid.

In conclusion, Justice White declared that there had not been a misuse of the Keyes case, where it was held:

> That purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a system-wide discriminatory intent unless otherwise rebutted and that given the purpose to operate a dual school system one could infer a connection between such purpose and racial separation in other parts of the school system.[67]

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

Chief Justice Burger and Justice Stewart concurred with the results of the majority opinion, but the Chief Justice felt that it was wrong to hold the Board to an affirmative duty to desegregate because the school system was segregated in 1954. "Nothing in reason or our previous decisions provides foundation for this novel legal standard", the Chief Justice wrote in his opinion.[68] Justice Stewart offered in his opinion that the Court of Appeal had properly accepted the trial court's findings and that the District Court's system-wide remedy was proper.

Justice Powell's dissenting opinion characterized the Court's majority opinion with these conclusions:

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[67]Ibid., p. 450.

[68]Ibid., p. 469.

1. The federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country.

2. The Court's opinions condone the creation of bad constitutional law and will even be worse for public education--an element of American life that is essential, especially for minority children.[69]

In presenting a dissenting opinion laced with a challenging intellectual position, Justice Rehnquist wrote:

> Concepts such as 'discriminatory purpose' and system-wide violation' present highly mixed questions of law and fact. If district court discretion is not channelized by a clearly articulated methodology, the entire federal court system will experience the disaffection which accompanies violation of Cicero's maxim not to 'lay down one rule in Athens and another rule in Rome'.[70]
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> The majority general ruling in this Columbus case was that since the Board did not eliminate segregation in the schools, federal judges were justified in ordering large-scale busing for rebalancing the racial mix of students in the Columbus schools.

The Dayton case began in 1972 when several students, through their parents, brought this case into the District Court for the Southern District of Ohio, charging that the Dayton Board of Education and various officials as well as the State Board of Education were operating a segregated school system in violation of the Equal Protection clause of the Fourteenth Amendment.[71] In this Dayton I case, the

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[69]Moore, p. 537.

[70]Columbus v Penick, pp. 491-492.

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

District Court found:

1. The existence of racially imbalanced schools,

2. The use of optimal attendance zones,

3. A recent Dayton Board of Education rescission of resolutions passed by the previous Board, which resolutions had acknowledged a role played by the Board in creation of segregative racial patterns and had called for various types of remedial measures, there was cumulatively a violation of the equal protection clause in the operation of the Dayton schools.[72]

After rejecting two plans which had been approved by the District Court, the United States Sixth Circuit Court of Appeals approved a District Court plan involving district-wide racial distribvution of each school which was to be brought within 15 percent of the black-white ratio of Dayton.[73]

On certiorari, the United States Supreme Court vacated and remanded, because the Court held that the constitutional violations found by the District Court did not justify the broad district-wide remedy imposed and that the case must be remanded to the District Court for the making of more specific finding.[74] This decision seemed to increase the burden of demonstrating nonsegregative intent by school

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

[73]Ibid.

[74]Ibid.

officials and to limit the extent of remedies.[75] The Court ordered the city's desegregation plan left in place and remanded the case to the District Court for more specific findings.[76]

In Dayton II, after protracted litigation at both the trial levels, the District Court dismissed the complaint.[77]

The District Court's view was that:

> Although the Dayton Schools concededly were highly segregated, the Dayton Board's failure to alleviate this condition was not actionable absent sufficient evidence that the racial separation has been caused by the Board's own purposeful discriminatory condut.
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> . . . Plaintiffs had failed to show either discriminatory purpose or segregative effect, or both, with respect to the Board's challenged practices and policies, which included faculty hiring and assignments, the use of optional attendance zones and transfer policies, and rescission of certain prior resolutions recognizing the Board's responsibility to eradicate racial separation in the public schools.[78]

The Court of Appeals reversed the District Court's decision, stating that at the time of Brown I in 1954, the Dayton Board had operated a racially segregated dual school system. Furthermore, the Court of Appeals held that the Board was constitutionally required to disestablish

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

[76]Moore, p. 535.

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

[78]Ibid.

that system and its effects, but that it had failed to discharge this duty. Finally, the Court of Appeals held that the consequences of the dual system together with the intentionally segregative impact of various practices since 1954 were system-wide and needed a system-wide remedy.[79]

On certiorari, the United States Supreme Court affirmed the United States Sixth Circuit Court of Appeals ruling. The Supreme Court on July 2, 1979 upheld desegregation orders for both the Columbus and the Dayton school systems in Ohio.[80] These decisions were the only two on school desegregation during a term that marked the 25th anniversary of the court's landmark ruling in Brown I.[81]

Justice White delivered the opinion in this Dayton II case, in which Justices Brennan, Marshall, Blackmun, and Stevens joined.[82] Justice Stewart filed a dissenting opinion in which Chief Justice Burger joined, while Justice Powell filed a separate dissenting opinion. Justice Rehnquist filed a dissenting opinion in which Justice Powell joined.

Justice White wrote that in the year the complaint was filed, 43% of the students in the Dayton system were

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[79]Ibid.

[80]Moore, p. 535

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

black, but 51 of the 69 schools in the system were virtually all white or all black.[83]

Justice White insisted that the District Court ordered the Board to take the necessary steps to assure that each school would roughly reflect the system-wide ratio of black and white students and the Sixth Circuit Court of Appeals then affirmed the decision. "We reversed the judgment of the Court of Appeals and ordered the case remanded to the District Court for further proceeding, Dayton I, Supra, Justice White declared.[84]

The following excerpts summarize Justice White's delivery of the 5-4 majority opinion in Dayton II on July 2, 1979:

> . . . As was clearly established in Keyes and Swann, the Board had to do more than abandon its prior discriminatory purpose . . . The Board has had an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices 'are not used and do not serve to perpetuate or restablish the dual school system' . . . and the Board has a 'heavy burden' of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends. Green v County School Board - 1968.
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> The Board has never seriously contended that it fulfilled its affirmative duty or the heavy burden of explaining its failure to do so. Though the Board was often put on notice of the effects of its acts or omission, the District Court found that 'with one (counter-productive) exception

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[83]Ibid., p. 529.

[84]Ibid., p. 531.

> to attempt was made to alter the racial characteristics of any of the schools'.
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> . . . The Court of Appeals held that far from performing its constitutional duty, the Board had engaged in 'post-1954 actions which have exacerbuted the racial separation existing at the time of Brown I' . . . The Court of Appeals found that intentional faculty segregation effectively continued into the 1970's . . . Likewise, the Board failed in its duty and perpetuated racial separation in the schools by its pattern of school construction and site selection, recited by the District Court . . . We see no reason to disturb the factual determination which conclusively show the breach of duty found by the Court of Appeals.[85]

Finally, Justice White concluded, "Because the Court of Appeals committed no prejudicial errors of fact or law, the judgment appealed from must be affirmed".

Justice Rehnquist, in his dissenting opinion, stated that the difference in the District Court opinions in Columbus and Dayton was form two different conceptions of the law and methodology that govern school desegregation litigation.[86]

Justice Rehnquist emphasized the following:

> The District Judge in Dayton did not employ a post-1954 'affirmative duty' test. Violations he did identify were found not to have any causal relationship to existing conditions of segregation in the Dayton School System. He did not employ a foreseeability test for residential segregation, or impugn the neighborhood school policy as an explanation for some existing one-race schools. In short, the Dayton and Columbus district judges had completely different ideas what the law required.[87]

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[85]Moore, pp. 550-551.

[86]Ibid., p. 552.

[87]Ibid.

Justice Rehnquist stated the Court of Appeals' heavy-handed approach in this case was explained by the perceived inequity of imposing a system-wide racial balance in Dayton. Finally, Justice Rehnquist contended that meeting out equal remedies was not "equal justice under law".[88]

The result of the two Ohio cases strengthened the doctrine established in the Keyes desision that federal courts were allowed to order a remedy where public school segregation was found to be the result of actions by school boards or other school-governing Unit.[89]

Anti-Busing Initiative Struck Down

The United States Supreme Court struck down the Washington state anti-busing initiative in the Seattle case. A state's authority to structure and regulate its own subordinate bodies was disapproved in the case. To desegregate its schools, Seattle School District No. 1 enacted a "Seattle Plan" in 1978 which required extensive use of mandatory busing.[90] Subsequently, a statewide initiative (number 350) was drafted by opponents of the Seattle Plan to terminate the use of mandatory busing for purposes of racial integration in Washington's public schools. This initiative prevented

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[88]Ibid.

[89]Ibid., p. 535.

[90]Washington v Seattle School District No. 1, No. 81-9 (1982) P.L.

school boards from requiring students to attend schools other than those nearest or next nearest their homes. Actually, the initiative allowed school boards to assign students to other schools for special education programs, overcrowdedness, unsafe conditions or problems with physical facilities in the two nearest schools, or for practically any nonintegrative purposes. The initiative passed in the 1978 November general election; in response, the Seattle School District, together with two other school districts, brought suit against the state of Washington in the Federal District Court. The suit challenged the constitutionally of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The District Court ruled that the initiative was unconstitutional on the ground, inter alia:

> . . . That it established an impermissible racial classification in violation of Hunter v Erickson, 393 U.S. 385 and Lee v Nyquist 318 F Supp. 710 (WDNY), summarity aff'd, 402 U.S. 935. 'Because it permits busing for non-racial reason but forbids it for racial reasons'.[91]

The District Court permanently enjoined implmentation of the initiative's restrictions and the United States Ninth Circuit Court of Appeals affirmed the District Court's decision.

On writ of certiorari, the United States Supreme Court affirmed the Court of Appeals judgment in a 5-4 decision.

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[91]Ibid.

Justice Blackmun delivered the opinion of the Court, in which Justice Brennan, White, Marshall, and Stevens joined. Justice Powell filed a dissenting opinion, in which Justices Rehnquist, O'Conner, and Chief Justice Burger joined.

Justice Blackmun began the majority opinion by stating that the Court was presented with the extraordinary question of whether an elected local school board may use the Fourteenth Amendment to defend its program of busing for integration attacked by the State.

The Seattle School District No. 1, is nearly coterminous with the borders of the city of Seattle, Washington, with 112 schools and 54,000 students. Nearly 37% of the students are of Negro, Asian, American Indian, or Hispanic ancestry who live in segregated housing patterns, but the District had allowed student transfers since 1963 to help alleviate the isolation of minority students.[92]

However, the school district came under pressure in 1977 to accelerate its program of desegregation, and in response, the School Board enacted a resolution defining racial imbalance as:

> When combined minority student enrollment in a school exceeds the district-wide combined average by 20 percentage points . . . provided that the single minority enrollment of no school will exceed 50 percent of the student body.[93]

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[92]Ibid., p. 2.

[93]Ibid.

In September of 1977, the school district implemented a magnet program to alleviate racial isolation and encourage voluntary student transfer. Another problem surfaced when a disaproportionate number of Negro students transferred and caused an even greater increase in the school's racial imbalances. The school district decided that mandatory reassignment of students was necessary if racial isolation in the school was to be eliminated. In March of 1978, the School Board enacted the so-called "Seattle Plan" for desegregation:

> The plan, which was to make extensive use of busing and mandatory reassignments, desegregate elementary schools by 'pairing' and 'triading' predominantly minority with predominantly white attendance areas, and by busing student assignments on attendance zones rather than on race.[94]

The plan was implemented in the 1978-1979 school year and was effective because it substantially reduced the number of racially imbalanced schools in the district; but in 1977, shortly before the plan was adopted by the school district, a number of Seattle residents who opposed the desegregation strategies being discussed formed an organization called Citizens for Voluntary Integration Committee (CiVIC). After failing in state court, CiVIC drafted the statewide initiative which was directed solely at desegregative busing in general and the Seattle Plan in particular.[95]

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[94]Ibid., p. 3.

[95]Ibid., p. 4.

After the initiative's statewide passage (66%), Seattle, Tacoma, and Pasco school districts initiated a suit against the State in the United States District Court for the Western District of Washington to challenge the constitution of Initiative 350. The District Court held that Initiative 350 was unconstitutional for these three independent reasons:

1. The initiative established an impermissible racial classification, in violation of Hunter v Erickson 393 U.S. 385 (1969) and Lee v Nyquist 318 F. Supp. 710 (WDNY 1970) (three-judge court), because it permits busing for non-racial reasons but forbids it for racial reasons.

2. A racially discriminatory purpose was one of the factors which motivated the conception and adoption of the initiative.

3. In the absence of a court order, Initiative 350 barred even school boards that had engaged in de jure segregation from taking steps to foster integration.[96]

A divided panel of the United States Ninth Circuit Court of Appeals affirmed the District Court's ruling by relying entirely on the District Court's first rationale.

The State then appealed to the United States Supreme Court where the Court's majority affirmed the Court of Appeals decision with the following----Initiative 350 was in violation of the Equal Protection Clause :

a) When a State allocates governmental power non-neutrally, by explicity using the racial nature of a decision to determine the decision making

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[96]Ibid., p. 6.

> process, its action 'places special burden on racial minorities within the governmental process', Hunter v Erickson, 393 U.S. at 391, thereby 'making it more difficult for certain racial minorities (than for other members of the community) to achieve legislation that is in their interest'. Id., at 395. Such a structuring of the political process is 'no more permissible than is denying members of a racial minority the vote, on an equal basis with others'. Id., at 391.
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> b) Initiative 350 must fall because it does 'not attempt to allocate governmental power on the basis of any general principle', Hunter v Erickson, 393 U.S. at 395, but instead uses the racial nature of an issue to define the governmental decision making structure, thus imposing substantial and unique burdens on racial minorities. The initiative worked a major recordering of the State's educational decision making process . . . After passage of Initiative 350, authority over all but one of a district's educational needs remained in the local board's hands. By placing power over desegregative busing at the state level, the initiative thus 'differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area'. Lee v Nyguist, 318 F. Supp., at 718. Hunter's principle---that meaningful and unjustified distinctions based on race are impermissible---is still vital.[97]

The Court's majority had reasoned that Initiative 350 removed the authority to address a racial problem, but not other problems, from the existing decision making body and those seeking to eliminate de facto school segregation would have to seek relief from the state legisalture or from the

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[97]Washington v Seattle (Slip Opinion).

statewide electrorate.[98]

Justice Powell dissented and stated that the adoption of a neighborhood school policy by local school districts was not unconstitutional, but that the Courts held that such a policy at the state level was in violation of the Equal Protection Clause. The Justice referred to the majority's opinion as unprecedented intrusion into the structure of a state government. The significant issue of the dissension in Justice Powell's argument was the following:

> The Fourteenth Amendment leaves the State free to distribute the powers of government as they will between their legislative judicial branches. Hughes v Superior Court, 339 U.S. 460, 467 (1950).[99]

Justice Powell wrote that in his view, "that amendment leaves the States equally free to decide matters of concern to the state at the state rather than local level of government. He wrote that Hunter was irrelevant and it was the Court through its majority decision in this case that disrupts the normal course of state government. Justice Powell insisted a neighborhood school policy does not offend the Fourteenth Amendment because the Court never held that there was an affirmative duty to integrate the schools where there was no unconstitutional segregation. Powell cited Swann v Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24 (1971):

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[98]Ibid., p. 16.

[99]Ibid., p. 2.

Dayton Board of Education v Brinkman, 443 U.S. 406, 417 (1977) to support the latter conclusion.[100]

The Court in applying Hunter had used a case that involved Akron, Ohio City Council's enactment of a fair housing ordinance. The local citizenry amended the city charted to read that ordinances regulatin real estate transactions on the basis of race, color, religion, national origin, or ancestry must first be approved by a majority of the electors. The Supreme Court ruled that this amendment was unconstitutional.[101]

The Lee v Nyquist case involved an effort to eliminate de facto segregation in the New York education system. The New York Legislature enacted a statute barring education officials and school boards from assigning students to any school on the account of race. A three-judge federal District Court held the stature unconstitutional.[102]

In this landmark case, the Supreme Court did not equate Initiative 350 as just a mere repeal of the "Seattle Plan", but held that the state legislature and voting populace were able to selectively enact laws to hinder the paths of minorities.

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[100]Ibid., p. 5.

[101]Hunter v Erickson, 393 U.S. 385; 89 S. Ct. 557; 21 L. Ed. 2d 616 (1969).

[102]Lee v Nyquist, 318 F. Supp. 710 (WDNY 1970).

In this landmark case, the Supreme Court did not equate Initiative 350 as just a mere repeal of the "Seattle Plan", but held that the state legislature and voting populace were able to selectively enact laws to hinder the paths of minorities.

Anti-Busing Initiative Approved

The Crawford and the Seattle cases which contained similar legal issues were before the Supreme Court at the same time, and were decided upon the same day. The significance of the Crawford case was that Proposition I[103] of the California Constitution was held not to be in violation of the Equal Protection Clause of the Fourteenth Amendment.[104] The first principle of Hunter[105] statutory racial classification was not in evidence because Proposition I neither stated or implied that neighborhood schooling should be made available to one because of his race.[106]

Justice Powell delivered the Court's majority opinion in which Chief Justice Burger, and Justice Blackmun filed a concurring opinion, in which Justice Brannan joined. Justice Marshall filed a dissenting opinion.

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[103]California, Constitution, art. 18, sec I.

[104]Crawford v Board of Education of the City of Los Angeles, No.81-38 Slip Opinion (1982).

[105]Hunter v Erickson, 393 U.S. 385, (1969).

[106]Crawford v Board of Education, p. 4.

Justice Powell saw the question for the Court to decide as being whether Proposition I in itself was in violation of the Fourteenth Amendment.

Proposition I as it is found in Article 1, Section 7 (a) of the Calfiornia Constitution reads:

> No court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, 1) except to remedy a specific violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and 2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[107]

While the United States Supreme Court answered the legality of Proposition I, litigation in this case began in 1963 when minority students in this Los Angeles Unified School District filed a class action in the state court to seek the desegregation of the District's schools.[108] In 1970, the trial court held that Los Angeles Unified School District was substantially in violation of the State and Federal Constitutions and ordered the District to prepare a desegregation plan for immediate implementation.

When the school district appealed to the California Supreme Court, the lower court decision was affirmed but on different basis. The trial court found de jure segregation

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[107]California, Constitution, art. I, sec 7 (a).

[108]Crawford v Board of Education, p. 1.

in violation of the Fourteenth Amendment of the United States Constitution, while the California Supreme Court based its affirmance on the Equal Protection Clause of the State Constitution.[109]

The California Supreme Court's opinion explained that under the California Constitution:

> State school boards . . . bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin.[110]

The California Supreme Court then remanded the case to the trial court for preparation of a reasonably feasible plan for school desegregation.[111] On remand, the trial court rejected the District's mostly voluntary desegregation plan but approved a second plan which required mandatory school reassignment and busing. The plan was implemented in the Fall of 1978, but because of dissatisfaction of all parties to the litigation the trial court considered alternatives to the plan in October of 1979. In November of 1979, the voters of California ratified Proposition I, an Amendment to the Due Process and Equal Protection Clauses of the State Constitution.

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[109]Crawford v Board of Education, 17 Cal. 3d 280, 551 p. 2d 28 (1976).

[110]Ibid., p. 34.

[111]Crawford v Board of Education of Los Angeles, U.S., No. 81-38 (1982), p. 2.

After the approval of Proposition I, the District sought to hold all mandatory reassignment and busing through the Superior Court, but on May 19, 1980, the Superior Court denied the District application and ordered the implementation of a revised desegregation plan. The California Court of Appeals reversed the Superior Court decision and the California Supreme Court denied a hearing of the case. The United States Supreme Court granted certiorari.

Justice Powell stated that the United States Supreme Court agreed with the California Court of Appeals in rejection of the contention that "once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede." The purposes of the Proposition are stated in its text and are legitimate, nondiscriminatory objectives, stated Justice Powell.

The United States Supreme Court held:

> Proposition I does not inhibit enforcement of any federal law or constitutional requirement; moreover, Proposition I does not violate the Fourteenth Amendment.
>
> a) Proposition I does not embody, expressly or implicitly, a racial classification.
>
> b) Proposition I cannot be characterized as something more than a mere repeal. Hunter v Erickson, 393 U.S. 385, distinguished.
>
> c) Even if it could be assumed that Proposition I had a disproportionate adverse effect on racial minorities, there is no reason to differ with the state appellate court's conclusion

> that Proposition I in fact was not enacted with a discriminatory purpose.[112]

Justice Marshall, the lone dissenter in this case, explained that he failed to see much difference between the Seattle and Washington cases. Moreover, Justice Marshall stated that, "As in Seattle, Hunter, and Reitman, Proposition I's repeal of the court's enforcement powers was the work of an independent governmental entity, and not of the state courts themselves."[113] Finally, Justice Marshall claimed that this repeal drastically altered the substantive rights granted by existing policy is patently obvious from the facts of this litigation.[114]

As a final point in this chapter it should be noted that in Reitman v. Mulkey, the California Supreme Court Considered the constitutionality of another California Proposition and ruled that it was unconstitutional because it (the proposition) gave the State's approval to private racial discrimination. The United States Supreme Court affirmed the decision of the California Supreme Court.[115]

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[112]Ibid., p. 7

[113]Crawford v. Board of Education U.S., (Slip opinion) (1982), p. 12.

[114]Ibid.

[115]Ibid.

CHAPTER IV

REVIEW OF COURT DECISIONS

Introduction

Although only a few landmark Court dicisions have been rendered that involve specific issues of de facto segregation and busing, the cases selected for review in this chapter are those delineating such issues as segregative intent, acceptance of district-wide busing plans, and acceptance of interdistrict remedy.

From the examination of the major decisions on de facto segregation, it can be observed that intent to segregate by school authorities and racial classification in school statutes were crucial aspects of the cases. While de facto segregation has been under challenge in the courts, the specific issues in each of these cases proceeded through strict judicial scrutiny.

Interestingly, where segregative intent was found, the concept of de jure segregation was broadened. Consequently, the remedy included extensive busing for the eradication of segregation.

Organization of Cases Selected for Review

Each case reviewed in this chapter was identified and selected because it complied with one or more of the following

criteria:[1]

(1) The case is considered to have been a landmark case in the broad constitutional areas of racial discrimination and due process of law.

(2) The case helped to establish precedent or "case law" in a particular area such as segregative intent, anti-busing initiatives, or interdistrict remedy.

(3) The issues in the case relate to one of the following subtopics:

a. segregative intent;

b. rejection of multi-district remedy and acceptance of interdistrict remedy;

c. denial of annual readadjustment of school zones to prevent "minority-majority" schools;

d. acceptance of district-wide busing plans;

e. acceptance and denial of anti-busing initiatives.

(4) The case is considered to have been important in the area of de facto segregation and was decided upon by the United States Supreme Court.

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[1]Joseph E. Bryson and Charles P. Bentley, Ability Grouping of Public School Students (Charlottesville, Virginia: The Michie Company, 1980), p. 92.

The first landmark case is the United States Supreme Court decision relating to the constitutional issue of segregative intent in a public school district. This following case is significant because it provides the legal precedents for any later litigation relating to the issues of segregative intent in school districts:

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

The secondary category of cases reviewed in this chapter consists of those United States Supreme Court cases that have significantly contributed to the establishment of legal precedents in the rejection of a multi-district remedy and the acceptance of an interdistrict remedy:

(1) Milliken v. Bradley (1974);

(2) Bradley v. School Board of the City of Richmond (1973);

(3) Buchanan v. Evans (1975).

In the third category is the United States Supreme Court landmark decision relating to the annual readjustment of attendance zones to prevent minority-majority schools:

Pasadena City Board of Education v. Spangler (1976)

In the fourth category are those cases relating to the acceptance of district-wide busing plans:

(1) Columbus Board of Education v. Penick (1979)

(2) Dayton Board of Eduycation v. Brinkman (1979)

The final category selected for review consists of two cases involving anti-busing initiatives:

(1) Washington v. Seattle School District No. 1 (1982)

(2) Crawford v. Los Angeles Board of Education (1982)

United States Supreme Court Landmark Decision-- Segregative Intent

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

Overview

Inasmuch as this was a distinct landmark decision involving the issue of deliberate segregation, it serves as the legal reference for almost all subsequent judicial decision relating to de facto segregation. Subsequent judicial decisions relative to de facto segregation have been based upon the legal tenets of this case.

Facts

The United States Supreme Court received the Keyes case on appeal from the Tenth Circuit Court of Appeals. The case involved segregation in the Park Hill area schools in the Denver school district. The plaintiffs sought the desegregation of all schools in the Denver school district, particularly those in the core city area. The significant question in this case was whether the entire district should be declared segregated because of the segregation problem in one portion of the district.

Decision

The Court affirmed that a policy of intentional segregation had been proved with respect to a significant portion of the school system, in a 7-1 decision. The Court held that the burden of proof lies with the school authority to show that their actions with the other segregated schools in the system were not likewise motivated by a segregated intent. Justice Brannan wrote the majority opinion.

Legal Precedents Established

The following legal principles established by this landmark decision are applicable to cases relating to classification of minority students and segregative intent:

(1) Negroes and Hispanos are to be placed in the same disadvantaged category since both groups suffer the same educational inequities when compared with the treatment afforded Anglo students.

(2) The proof that school authorities have pursued intentional segregative policy in a substantial portion of the school district will support a finding by the trial court of the existence of a dual system.

(3) The long-held distinction between de jure and de facto segregation was practically eliminated.

Cases Contributing Significantly to Rejection of a Multi-District Remedy and Acceptance an Inter-District Remedy

Milliken v. Bradley 418 U.S. 717 (1974)

Overview

The well publicized United States Supreme Court decision in Milliken v. Bradley became the legal foundation for the rejection of a multi-district remedy for a single district's segregation problem. The now famous case also provides the Court's viewpoint concerning the merger of school districts for the purpose of racial balance in school districts when only one of the school districts involved is responsible for the segregation problem.

Facts

The mother of Ronald and Richard Bradley initiated a class action in the United States District Court for the Eastern District of Michigan against certain state officials and the Board of Education of the City of Detroit, seeking the desegregation of the Detroit Public Schools. The District Court ultimately concluded that the defendants had engaged in unconstitutional activities for which the state was responsible and which had resulted in de jure segregation in the Detroit school district.

The United States Sixth Circuit Court of Appeals affirmed the District Court's findings of de jure segregation in the Detroit school district and the propriety and the necessity

of a metropolitan desegregation plan since the state was responsible. The Court of Appeals then remanded the case to have all suburban districts that might be affected by any metropolitan remedy included as parties to the case. The case was then appealed to the United State Supreme Court.

Decision

The United States Supreme Court reversed (5-4) and remanded the case for the formulation of a decree restricted to the city of Detroit. In writing the majority opinion for the Court, Chief Justice Warren Burger insisted:

> We conclude that the relief ordered by the District Court and affirmed by the Court of Appeals was based upon erroneous standards and was unsupported by record evidence that acts of the outlying districts affected the discrimination found to exist in the schools of Detroit.
>
> . . . The case is remanded for further proceeding consistent with the opinion leading to prompt formulation of a decree directed to eliminate the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970.

Legal Precedent Established

The major precedent established in this decision involved the Court's decision which states:

> Federal courts can not impose multi-district, area-wide remedies to a single district segregation problem unless discriminatory acts of other districts had caused inter-district segregation.

Bradley v. School Board of the City of Richmond, 412 U.S. 92 (1973)

Facts

The Richmond school desegregation case began in 1970 and involved the counties of Henrico and Chesterfield. Judge Braxton Craven of the United States Fourth Circuit Court of Appeals insisted that District Court Judge Robert Merhige, Jr. did not have the authority to consolidate the three school systems, and that when the state-imposed segregation had been removed, intervention by the District Court was not justifiable.

Decision

The United State Supreme Court affirmed the Court of Appeals decision to strike down interdistrict busing in a 4-to-4 deadlock vote.

Discussion

Because of Justice Powell's refusal to participate in the voting, the deadlock vote did not provide any legal guidelines for lower courts to follow. A later 5-to-4 decision to disallow multi-district busing (Milliken) provided the legal foundation for future district consolidated cases.

Buchanan v. Evans
423 U.S. 963 1975

Facts

When action was brought seeking the desegregation of the Wilmington, Delaware public schools, Judge Caleb Wright of the United States District Court for the District of Delaware

imposed an interdistrict remedy involving the reorganization or consolidation of the New Castle County school districts. A motion for a stay of implementatin of the order was made to the Third Circuit Court of Appeals. The motion was denied.

Decision

The United States Supreme Court affirmed (6-3) the District Court's decision calling for the implementation of an interdistrict busing plan. It was established that the state of Delaware and the city of Wilmington were party to segregative policies because Wilmington had been excluded in a statewide school district consolidation effort. The court ruled that act of omission constituted de jure segregation.

Discussion

This decision specifically illustrated that in cases involving state actions leading to school segregation, the concept of de jure segregation becomes apparent. The courts made a distinction in their decisions between this case and the Milliken decision. Furthermore, a comparison of this case to the Swann de jure segrgation case was noted by the courts.

A Case Contributing Significantly to the Problem of Evolving Demographic Trends

Pasadena City Board of Education v. Spangler
427 U.S. 424 (1976)

Facts

Several Pasadena, California high school students and their parents brought a purported class action against school officials seeking injuctive relief from allegedly unconsti-

tutional segregation in the Pasadena public schools. The District Court held that the defendants' educational policies and procedures violated the Fourteenth Amendment. The District Court then ordered the school district officials to submit a desegregation plan for the 1970-1971 school year, ordered that no school have a majority of any minority students, and retained jurisdiction over the school district. On appeal to the United States Ninth Circuit Court of Appeals, the District Court's decisions were affirmed, although the Court of Appeals indicated disapproval of the lifetime commitment to a "no minority-majority" requirement.

Decision

The United States Supreme Court ruled (6-2) that the normal pattern of human migration had resulted in changes in Pasadena's residential patterns and that these shifts were not attributed to any segregative action on behalf of school officials. The Court then stated that the District Court's 1970 injunction should in all respects be dissolved, that the District Court's jurisdiction over the Pasadena Unified School District should be terminated, and that the suggested modifications of the Pasadena Plan should be accepted. Justice Rehnquist wrote the opinion.

Discussion

While this was a decisive ruling on a District Court's jurisdiction, the decision was opposite of a critical ruling

in Swann. In Swann, the Court ruled that "once a right and a violation have been shown the scope of a District Court's equitable powers to remedy past wrong is broad . . ." However, the Court reaffirmed a portion of Swann by stating that authorities are not required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate had been accomplished and racial discrimination had been eliminated.

Cases Related to the United States Supreme Court's Acceptance of District-Wide Busing Columbus Board of Education v. Penick 443 U.S. 449 (1979)

Facts

In 1973, students in the Columbus, Ohio school system brought a class action charging that the Columbus Board of Education and its officials pursued a policy that perpetuated racial segregation in the public schools, contrary to the Fourteenth Amendment. The District Court found that in the intervening years since 1954 there had been a series of Board actions and practices that could not be explained without reference to racial concerns.

Decision

The United States Sixth Circuit Court of Appeals affirmed the lower court's findings. The United States Supreme Court upheld the Court of Appeals' decision in a 7-2 vote with Justice White writing the majority opinion.

Discussion

Justice Byron White, in writing the majority opinion, stated that the District Court had found that in 1954 when Brown I was decided, the Columbus Board had operated a dual school system. Justice White further insisted:

> Proof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system itself is prima facie proof of a dual school system and supports a finding to this effect absent sufficient contrary proof by the Board, which was not forthcoming in this case.

The District Court emphasized that it had found purposefully segregative practices with current system-wide impact. Thus, the United States Supreme Court ruled that judges were justified in ordering large-scale busing of students.

Dayton Board of Education v. Brinkman
443 U.S. 526 (1979)

Facts

In 1972, several students and their parents brought action in the District Court by alleging that the Dayton Board of Education and various local and state officials were operating a racially segregated school system. The plaintiffs further charged that the action of the officials was in violation of the Fourteenth Amendment. When the case was brought before the United States Supreme Court, the decision was for a return of the case to the lower court because

of a lack of specific finding showing segregative intent on behalf of the school authorities.

Decision

When the case was returned to the United States Supreme Court following District Court and the United States Sixth Circuit Court of Appeals action, the Court ruled (5-4) in favor of the Court of Appeals decision for district-wide busing. Justice White wrote the opinion.

Discussion

An important factor to emerge from this decision was that the Court reversed the burden of proof requirement. The Court was now stating that the school authorities bore the responsiblity by considering the system's segregation status at the time of Brown I as relevant to the present case. Justice Potter Stewart, however, insisted that the party bearing the burden of proof was likely to determine who would prevail in the litigation. Justice Rehnquist responded by stating that the Columbus and Dayton District Court opinions point out the limitation of Justice Stewart's perception of the proper roles of the trial judge and reviewing courts.

Cases Involving Anti-Busing Initiatives

Washington v. Seattle School District No. 1

_____ U.S. _____

Facts

In 1978, the Seattle School District No. 1 enacted the so-called Seattle Plan for the Desegregation of its schools. The plan required the extensive use of mandatory busing. A statewide initiative was then drafted to terminate the utilization of buses for the purpose of racial integration in the public schools of Washington. After the passage of the initiative (Initiative 350) in the November, 1978 general election, the Seattle, Pasco and Tacoma school districts brought suit against the State in the Federal District Court. The suit challenged the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The District Court held the initiative unconstitutional on the grounds that it included an impermissible racial classification. On appeal, the United States Ninth Circuit Court of Appeals affirmed the decision on the District Court.

Decision

The United States Supreme Court Affirmed (6-4) the lower courts decision. The Court stated that when a state allocates governmental power in a non-neutral manner by using the racial nature of a decision to determine the decision-making process, it places special burdens on racial minorities within the governmental process. Justice Blackmum insisted that Initiative 350 must fall because it does not attempt to allocate governmental power on any general principle.

Crawford v. Board of Education of the City of Los

Facts

In 1970, a California state court found de jure segregation in the Los Angeles Unified School District which violated both State and Federal Constitutions. The state court then ordered the school district to prepare a desegregation plan. The California Supreme Court affirmed the decision, but based its decision on the Equal Protection Clause of the State Constitution which bars de facto as well as de jure segregation. On remand, the California District Court approved of a desegregation plan that included substantial mandatory reassignment and busing. The voters of California subsequently ratified an amendment (Proposition I) to the State Constitution which provided that state courts shall not order mandatory pupil assignment or transportation, unless a federal court would be permitted under federal decisional law to do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

The California Second Appellate District Court of Appeals reversed the California District Court's decision by ruling that Proposition I was constitutional under the Fourteenth Amendment and barred the requiring of mandatory student reassignment and busing.

Decision

On Certiorari, the United States Supreme Court affirmed (8-1) the California Court of Appeals' decision. The Court ruled that Proposition I does not violate the Fourteenth Amendment and that Proposition I does not embody, expressly or implicity, a racial classification.

Discussion

The Court, on the same day, decided on the two state constitutional amendments, each designed to curtail or eliminate the use of mandatory student assignment or transportation as a remedy for de facto desegregation. The Court decided that the Seattle initiative was unconstitutional because it used the racial nature of an issue to define the governmental process and the Initiative 350 placed unique burdens on racial minorities. In Crawford, the Court decided that Proposition I was constitutional because having gone beyond the requirements of the Federal Constitution, the state was free to return in part to the standard prevailing generally throughout the United States.

CHAPTER V

SUMMARY, CONCLUSIONS, AND CONCLUDING STATEMENT

Summary

De facto desegregation litigation gained prominence after many years of public school de jure desegregation litigation by the courts. The Brown I decision in 1954 began an era to rid all states of segregation imposed by laws. The final thrust to eradicate all facets of de jure segregation, "with all deliberate speed", "root and branch", and "immediately", largely culminated in the Swann case in which extensive busing was instituted in order to balance the races in the schools. In Swann, the Supreme Court presented the following opinion as the Constitutional requirement for de jure segregated school districts to eliminate state-imposed segregation in the public schools:

> All things being equal, with no history of discrimination it might well be desirable to assign pupils to schools nearest their homes. But things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.[1]

The era of de facto desegregation, a more elusive and complex form of school segregation with the same unpleasant result--

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[1]Swann v. Charlotte-Mechlenburg Board of Education 403 U.S. 912 (1971).

school segregation, was ushered in during the mid-1960's with a scattering of court cases across the nation. de facto segregation was often a non-Southern form of school segregation; indeed, the public had come to believe that school segregation was mainly a problem in the Southern states. A review of judicial records reveals that several de facto desegregation cases were appealed to the United States Supreme Court and then remanded back to the lower courts over a number of years prior to final decisions by the United States Supreme Court.

Keyes became a landmark de facto desegregation case in that the Court defined de jure segregation as including segregation resulting from intentionally segregative school board policies, even if the district had never been segregated by statute. Strategic issues to surface in de facto segregation cases were the concepts of interdistrict and multi-district remedies, busing to balance the racial ratios in the schools, annual redrawing of school attendance zones, racial classification of students written into public school statutes, intent versus extent, and the public's request for neighborhood schools.

The issue of busing surfaced in de facto desegregation cases as a focal point in a manner which had been rarely presented before in de jure desegregation cases. Although the use of buses for school integration has discretionary limitations in the Court's view, these limitations have never

been precisely demarcated by the Court. Therefore, in the Court's failure to make clear the extent of permissible busing, many members of the United States Congress have attempted to bridge the gap between the vague and the finite of busing limitations as an appropriate method to solve what many of them consider a much larger social matter.

As a guide to the legal research, five questions were designed and listed in the introductory chapter of this study. While the review of the literature concerning school desegregation litigation provided further insights into the questions, the answers to the questions are found in Chapters III and IV. School administrators and board members will find the responses to these questions helpful in assessing the issue of de facto segregation.

Research provided answers to the following questions:

1. What has been the trend in regard to court-ordered busing in de facto segregated school districts?

The selected United States Supreme Court cases in this study show that the Court might uphold busing in cases involving segregative intent and in cases of racial classification in state public-school statutes. De facto segregation litigation has reached the United States Supreme Court from cities across the nation. The most critical factors in de facto segregation cases have been the issues of segregative intent and busing for racial balance in the public schools.

2. How has the United States Supreme Court decided in cases involving de facto segregation?

The analysis of the judicial decisions in this study revealed that the Supreme Court developed a conservative posture in many de facto segregation cases. The busing of school children as the most effective means to correct the segregation problem in the public schools has not been unamimously decided.

3. What does the United States Supreme Court mean when the question of "intent to segregate" becomes the judicial issue in a de facto segregation case?

The United States Supreme Court has mandated that where segregative intent on the part of local or state officials is found, then the concept of de jure segregation is extended. Thus, the remedy in highly segregated school districts has included the implementation of district-wide and interdistrict busing.

4. What has the United States Supreme Court required in busing across school district boundaries in order to correct an inequity in segregated school systems?

The Supreme Court has ruled that a federal court could not properly impose a multi-district, area-wide remedy on a single-district de jure segregation problem unless it was first established that unconstitutional, racially discriminatory acts of other districts had caused interdistrict

segregation, or that district lines, not drawn for political convenience, had been deliberately drawn on the basis of race.

5. To what extent has the United States Supreme Court mandated remedial plans to desegregate de facto school systems?

The Court has ruled that the extent of any remedy should be proportional to the constitutional violations committed by the school officials.

Conclusions

The following conclusions are presented, based on the analysis of decisions rendered by the United States Supreme Court dealing with de facto desegregation and busing. The information serves as a foundation for understanding how future cases may be decided by lower courts, as well as by the United States Supreme Court.

1. The United States Supreme Court has ruled that the burden rests upon school officials to prove there are no segregative efforts on their behalf in the making of school policies or in their failure to act which would thereby hinder the elimination of school segregation.

2. The Court has ruled that "purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a system-wide discriminatory intent unless otherwise rebutted". The establishment

of the described discrimination will permit federal judges to order system-wide busing.

3. The Court has held that minority students such as Hispanos are to be placed in the same category as Black students if both groups suffer the same educational inequities compared with the treatment afforded Anglo students.

4. The United States Supreme Court has ruled that federal courts can not properly impose a multi-district, area-wide remedy to a single district's de jure segregation problem unless it was first established that unconstitutional discriminatory acts by the other districts had caused interdistrict segregation.

5. The United States Supreme Court will uphold an interdistrict remedy for proven de jure segregation when shown that there was a constitutional violation which affected the school disricts.

6. The Court has held that if a dual system existed in a district in 1954, then the school district had a continuing duty to eradicate the effects of the dual system.

7. The Court has held that a state is not immune to responsibility for policies and official acts that lead to constitutional violations resulting in school segregation.

8. The Court has held that proof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system is prima facie proof of a dual system.

9. The Court has held that once a school system had initiated a plan that would achieve a unitary system and has been declared a unitary school system by a federal court, then annual adjustments to the attendance zones are not required.
10. The Court will not support the contention that once a state chooses to do more than the Fourteenth Amendment requires, it may never recede.
11. The Court will not allow a constitutional amendment to the state constitution concerning school attendance which would embody a racial classification. The Court ruled that by using the racial nature of a decision to determine the decision-making process, the action then places special burdens on racial minorities within the governmental process.

Concluding Statement

The study was not designed to reach any opinions as to the advantages or disadvantages of the United States Supreme Court decisions in these de facto desegregation cases. Rather, the thrust of this study was to provide analyses and clarification of the selected United States Supreme Court decisions that shape some of the legal guidelines by which school officials must abide. Therefore, the interpretation of the legal decisions presented in this study will become valuable to school boards and school administrators in the study of de facto school desegregation and busing.

To that end, this study was designed (1) to review the specific and deciding factors of the selected United States Supreme Court cases concerning de facto school segregation; (2) to note the Congressional concerns of busing for racial purposes in the public schools; (3) to provide an overview of the nature and scope of the division of the justices of the United States Supreme Court in order to discern how they might vote in future de facto school desegregation cases; and (4) to provide responses to the five specific questions converning busing and de facto desegregation.

While the decisions which have been rendered by the United States Supreme Court provide only one decisive trend, it is apparent that the nine justices are not likely to reach a unanimous vote on any single de facto desegregation case.

De facto segregation is permissible before the law and does not require any specific action on behalf of the governing bodies to change or correct the situation, if it can be proven that state or local officials were not responsible for the segregation. Thus, the concept of segregative intent has become the most decisive factor in any desegregation case.

Recommendations for Future Research

Research studies that parallel this study should be undertaken in order to investigate

a) the legal aspects of busing using other United States Supreme Court de facto school desegregation cases comprehen-

sively;

b) the sociological impact that the United States Supreme Court de facto school desegregation decisions have on students, educators, parents, and communities;

c) the educational impact that the United States Supreme Court de facto school desegregation decisions have on the students.

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