least the minimally sufficient legal backdrop necessary for an appreciation of the more substantive works that follow in this symposium issue.

I

THE TWO *BROWN* DECISIONS: A CLARION CALL

The decision in *Brown I* had been foreshadowed by several Supreme Court decisions involving institutions of higher education. These cases were bound by the dictates of *Plessy v. Ferguson,*[3] the 1896 case which declared constitutional a Louisiana statute requiring "separate but equal" public facilities for blacks and whites. However, these higher education cases established the principle that in determining whether the facilities were equal, a court could also consider whether *intangible* educational benefits were equally provided to both races. The litany of doom played for segregation at the college and professional school level by such cases as *Missouri* ex rel. *Gaines v. Canada,*[4] *Sipuel v. Board of Regents of the University of Oklahoma,*[5] and *Sweatt v. Painter*[6] should have been a warning that the apartheid structure of public school education in the South, so carefully nurtured since the Civil War, could not long survive further legal scrutiny.

A. *Brown I*: What Did the Supreme Court Actually Hold?

Four separate cases from the states of Kansas, South Carolina, Virginia, and Delaware were consolidated for argument in *Brown I.* In each of the four cases the plaintiff black children sought the aid of the federal courts in obtaining admission to the public schools of their community on a non-segregated basis. In each case, except the Delaware case, a three-judge district court had refused their requests on the basis of the "separate but equal" doctrine of *Plessy v. Ferguson.* On direct appeal to the Supreme Court, Chief Justice Warren, speaking for a unanimous Court, phrased the legal issue to be decided: "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?"[7] The Court answered that question in the affirma-

3. 163 U.S. 537 (1896).

4. 305 U.S. 337 (1938) (holding that a Missouri law providing tuition grants to its Negro residents for a legal education out-of-state did not satisfy the state's obligation to provide equivalent educational opportunity).

5. 332 U.S. 631 (1948) (holding that a Negro applicant had to be admitted to the University of Oklahoma School of Law even though the state legislature had ordered the establishment of a separate law school within the state for Negroes).

6. 339 U.S. 629 (1949) (holding that a separate law school established in Texas for Negroes did not satisfy the "separate but equal" requirement of *Plessy v. Ferguson,* and that a Negro applicant was therefore entitled to admission to the University of Texas Law School).

7. 347 U.S. at 493.

tive. In a much quoted paragraph, the Supreme Court interpreted the equal protection clause of the fourteenth amendment as flatly prohibiting state-imposed segregation of the races in the public schools: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[8]

In holding that the equal protection clause prohibited state-imposed segregation of the races in public schools, the Supreme Court took judicial notice of the fact that separation of Negro children, solely because of their race, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[9] In its now-famous footnote eleven, the *Brown I* opinion cited the findings of several prominent social scientists, including Kenneth B. Clark and Gunnar Myrdal, as "modern authority" which "amply supported" the finding that segregation was damaging to black children.[10] That footnote constituted a source of irritation for many jurists and fueled the segregationists' fires ignited by the Supreme Court's new ruling; they erroneously read footnote eleven as an essential underpinning to the Court's holding. In fact, the opinion in *Brown I* is, at its essence, a straight-forward legal interpretation of the equal protection clause, recognizing that state-required segregation by race is an invidious classification, and for that reason unconstitutional. *Brown I* is supportable without citation to the works of the footnote eleven social scientists.[11]

Having decided that the states must provide educational opportunities to all on equal terms, the Supreme Court then faced the immense problem of implementing its decision. Proceeding cautiously, the Court ordered the parties to prepare for a reargument of the case at the next term, and, at that reargument, to focus their attention on the problem of implementation.

B. *Brown II*

On May 31, 1955 (one full year after *Brown I*), *Brown II*, the implementation decision, was handed down—again by a unanimous Court.[12] Sensing the enormous impact of their decision in *Brown I*, the Supreme Court Justices

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8. 347 U.S. at 495.
9. 347 U.S. at 494.
10. 347 U.S. at 494-95 n.11.
11. See the discussion by Judge John Minor Wisdom in United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 871 n.75 (5th Cir. 1966), and Comment, *HEW Guidelines Constitutionally Require School Boards to Affirmatively Abolish the Existing Effects of De Jure Segregation*, 21 RUTGERS L. REV. 753, 759-63 (1967). *See also* T. EMERSON, D. HABER, & N. DORSEN, POLITICAL AND CIVIL RIGHTS 1625-29 (3d ed. 1967); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 590-98 (1965); Kaplan, *Segregation Litigation and the Schools—Part I: The New Rochelle Experience*, 58 NW. U.L. REV. 1, 21 (1963); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
12. Brown v. Board of Educ., 349 U.S. 294 (1955).

proceeded gingerly in *Brown II*. Put simply, in *Brown II* the Court remanded the combined cases of *Brown I* to the federal district courts wherein the cases had originated to take steps consistent with the opinion in *Brown I*. The Supreme Court made several noteworthy points, however, to guide its lower federal courts:

1. Local school authorities have the primary responsibility for implementation.[13]
2. The function of the federal court is to decide whether a local school board's response constitutes good faith implementation.[14]
3. The district court is to be guided by equitable principles "characterized by practical flexibility" in shaping remedies, with the pointed reminder that the principle of equal educational opportunity espoused in *Brown I* is not to yield simply because of disagreement with that principle.[15]
4. Although the district court should take into account the practical problems of implementation, the local school authorities must make a "prompt and reasonable start," and thereafter the court should insure that desegregation proceeds "with all deliberate speed."[16]

In retrospect the Supreme Court's heavy reliance on local school authorities and federal district court judges seems to have been misplaced; and this misplaced confidence exerted enormous influence on the course of desegregation, especially in the early years following *Brown II*.

II

IMPLEMENTATION OF THE *BROWN I* MANDATE

A discussion of the implementation of the *Brown I* mandate by the federal courts in the twenty years that have passed since that landmark holding can perhaps best be divided into four historical periods. The first period covers the time frame between *Brown II* in 1955 and the James Meredith affair in 1963. It is characterized by a series of pitched judicial battles over token desegregation. The second period, covering the years between 1963 and 1967, is typified by the struggles of the lower federal courts, without Supreme Court guidance, to evolve desegregation standards and to break down entrenched local resistance. The third period, from 1968 through 1972, is the period of judicial revolution in the Deep South; federal courts, stung by Supreme Court impatience, issued decrees mandating massive

13. *Id.* at 299.
14. *Id.*
15. 349 U.S. at 300.
16. 349 U.S. at 300-01.

integration. The fourth period, from the Supreme Court's holding in *Swann v. Charlotte-Mecklenburg Board of Education*[17] in 1971 to date, is characterized by confusion over the future of integration, attempts to move integration activity from the South to the ghettos and barrios of the East and West, and litigation over a host of second-generation integration problems. Each of the four great integration periods will be discussed in order.

A. The Muted Response to *Brown I*: 1955-1963

1. *The Public*

While there was an intense, immediate reaction to *Brown I* among white southerners and America's black population, the rest of the nation looked on from the sidelines, more concerned about other matters. America was emerging from the aftermath of the police action in Korea; the Army-McCarthy hearings were getting under way; and the disastrous French experience in Indochina was grinding to an end in the ruins of Dien Bien Phu.

To black Americans, *Brown v. Board of Education* signaled the start of a rising tide of hope. It fueled the spirit of a civil rights movement that was to reach its zenith in the early and mid-sixties. To white southerners the decision on Black Monday was received by most with deep resentment or bitter anger, by some with quiet resignation, and by very few with rejoicing. Most southern editorial writers vowed an eternal fight to preserve the southern way of life and prevent the mongrelization of the races. Segregationist organizations flourished: moribund Ku Klux Klan Klaverns gained new life and White Citizens' Councils mushroomed. Opposition leaders were encouraged by strong statements of southern Congressmen vowing to fight to the finish for segregation,[18] and by the deafening silence from the White House, where President Eisenhower refused to make any public comment on the Supreme Court decision and was rumored to be personally opposed to school integration. Although there were some faint indications that the

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17. 402 U.S. 1 (1971).

18. On March 12, 1956, ninety-six southern Congressmen issued the "Southern Manifesto." It denounced the school desegregation decisions as a "clear abuse of judicial power [which] climaxes a trend in the Federal judiciary undertaking to legislate in derogation of the authority of Congress and to encroach upon the reserved rights of the states and the people." R. SARRATT, THE ORDEAL OF DESEGREGATION 41 (1966). This much heralded pro-segregation white paper did more than simply champion the doctrine of interposition and "states rights" defenses; psychologically, it lent the patina of moral rectitude to resistance. The signatories, including almost all elected representatives in the southern states, pledged to use "all lawful means" to maintain segregation and "commended those states which have declared their intention to resist." J. PELTASON, FIFTY-EIGHT LONELY MEN 41-42 (1961). In the more colorful vernacular of the southern politician "down home," Georgia's Congressman Jack Flynt termed the Supreme Court's desegregation mandate "a hydraheaded, five-fanged, cloven-hooved, and fork-tailed combination of polecat, dog, and rattlesnake." 47 NEWSWEEK, Feb. 6, 1956, at 25-26.

South might acquiesce in the *Brown* decision,[19] months passed without any noticeable progress in implementation.

Parallel with the growth of overt white resistance was the gradual, but perceptible, change in Negro attitudes from passivity to organization to activism. The success of concerted Negro economic action, which began in Montgomery, Alabama, one December afternoon in 1955 with the refusal of Mrs. Rosa Parks to take the accustomed seat in the back of the bus,[20] was contagious and quickly spread to the younger generation of southern Negroes. The Negro sit-in movement began quite innocuously in Greensboro, North Carolina, in February, 1960, when four black freshmen at a state Negro college requested and were refused service at a dime-store lunch counter.[21] However, despite the growth and viability of the civil rights movement, if implementation of school integration was to occur, it was clear that it would have to be accomplished through the federal judiciary, the weakest of the three governmental branches, since Congress was controlled by southern committee chairmen and paralyzed by threats of southern filibusters, while the President remained silently aloof.

2. *The Courts*

The federal courts in the South, staffed for the most part with native white southerners, were encamped after 1954 in a no-man's land; the litigants in desegregation cases were rarely satisfied by these courts' decisions, no matter what was ordered. For the Negroes, the crucial word in the *Brown* mandate was "speed," while the southern school boards accentuated "deliberate." Furthermore, federal district judges began their quest for desegregation with very little guidance from the Supreme Court (and, for the most part, with little stomach for the battles ahead). Although the second *Brown* decision in 1955 listed specific factors of adjustment which were to be considered by local school boards, the only direction given reviewing federal courts was the nebulous observation that these cases "call for the exercise of the traditional attributes of equity power."[22] The pace of desegregation was apparently to be determined on a case-by-case basis by striking a balance between individual and community interests. The United States Supreme Court did not speak again in amplification of this cryptic mandate until four

19. The day after the decision, the Greensboro, North Carolina, Board of Education publicly pledged that it would obey the law. *See* Greensboro Daily News, May 19, 1954, at 1, col. 7.

20. 47 NEWSWEEK, Mar. 5, 1956, at 24; R. SARRATT, *supra* note 18, at 323. Under the leadership of young Martin Luther King, Jr., an estimated 95 per cent of the Negroes in Montgomery honored the boycott and quit riding the buses. As approximately 65 per cent of the transit company's patrons were Negro passengers, fares had to be raised from 10 cents to 15 cents in an effort to stave off economic ruin. 47 NEWSWEEK, Mar. 5, 1956, at 24-25.

21. R. SARRATT, *supra* note 18, at 327.

22. 349 U.S. at 305.

years later,[23] and thereafter it only rarely intervened in the evolution of desegregation litigation.

The most important early decision after *Brown II* occurred in one of the original five school segregation cases remanded to a federal district court for implementation. That case was *Briggs v. Elliott.*[24] There a three-judge federal district court in South Carolina very narrowly interpreted the *Brown II* decision:[25]

> [I]t is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. *The Constitution, in other words, does not require integration. It merely forbids discrimination.*

The *Briggs* case was a major stumbling block to the development of desegregation law after *Brown II* until it was finally repudiated in 1966 in light of the subsequent evolution of desegregation implementation.[26] The two most famous sentences of *Briggs* (the italicized portion in the quotation above) became known as the "*Briggs v. Elliott* dictum" and were shortened even further to the shibboleth "desegregation not integration." Most federal court judges were convinced, in the early years following *Brown II*, that the two words—"integration" and "desegregation"—were in fact descriptive of two concepts that could be differentiated. Unfortunately the *Briggs* decision, including its famous dictum, was not appealed and, therefore, the Supreme Court was not afforded the opportunity of either approving or disapproving the *Briggs* interpretation of its holding in *Brown II.*

3. *Delays and Obstruction*

Hampered by adoption of the *Briggs* interpretation of *Brown II* and faced in many areas of the South with massive resistance to even the idea of token desegregation, the federal courts accomplished little in the way of integration in the South in the early years after 1955. While significant desegrega-

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23. Cooper v. Aaron, 358 U.S. 1 (1958).
24. 132 F. Supp. 776 (E.D.S.C. 1955) (three-judge court).
25. *Id.* at 777 (emphasis added).
26. The Fifth Circuit, for example, adopted the *Briggs* rationale in Avery v. Wichita Falls Independent School Dist., 241 F.2d 230, 233-34 (5th Cir. 1957). It was not until 1965 that it rescinded its approval of *Briggs* in Singleton v. Jackson Municipal Separate School Dist., 348 F.2d 729 (5th Cir. 1965). *Briggs* was finally destroyed in the carefully reasoned opinion of Judge John Minor Wisdom in United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966).

tion did occur voluntarily or with a minimum of resistance in some border states, in the eleven states of the Confederacy school integration cases became mired in delaying tactics and obstructionism at the federal district court level.

The incredibly difficult and complex legal battles that developed provided the incentive for the courts to devise and refine equitable remedies to adequately cope with the ingenuity of die-hard segregationists. The use of the temporary restraining order, the injunction pending appeal, and the ultimate threat of contempt citations became much-used tools in the struggle to realize the promise of *Brown I*.

The State of Texas best typifies the various reactions to *Brown II* in the early years after 1955. There was voluntary desegregation in much of West Texas,[27] organized opposition groups in East Texas that attempted to rally public support to block desegregation,[28] bitterly contested litigation and court ordered desegregation in Dallas[29] and Houston,[30] and mob violence in Mansfield, Texas.[31]

In stark contrast to the grudging, though peaceful, acceptance of the inevitable progress of desegregation in Dallas and Houston stands the record in New Orleans. The New Orleans litigation is, complete unto itself, an encyclopedia of every tactic of resistance ever employed by all other states combined. Over the relatively short span of time between 1952 and 1962, that one case consumed thousands of hours of lawyers' and judges' time: it required forty-one separate judicial decisions involving ultimately the energies of every Fifth Circuit judge, two district court judges, and the consideration of the United States Supreme Court on eleven separate decisions.[32] By the end of the decade, backed by the Fifth Circuit and in the face

27. At least sixty Texas school boards (primarily in West Texas where the Negro population was low) voluntarily decided to open with biracial classes at the beginning of the school term in the fall of 1955. SOUTHERN SCHOOL NEWS, Sept. 1955, at 9.

28. For example, in a referendum taken during the Democratic primary elections of July, 1956, Texas voters indicated by a margin of 3.5 to 1 that they favored continued segregation of public schools. SOUTHERN SCHOOL NEWS, Aug. 1956, at 14.

29. The Dallas litigation was a wearying process that involved six years, twelve court hearings, and the energies of eighteen different judges, including the members of the Supreme Court in their consideration of the writ of certiorari, and yet managed to achieve only token desegregation. The full chain of decisions in the Dallas litigation is as follows: Bell v. Rippy, 133 F. Supp. 811 (N.D. Tex. 1955), *rev'd sub nom.* Brown v. Rippy, 233 F.2d 796 (5th Cir.), *cert. denied,* 352 U.S. 878 (1956); Bell v. Rippy, 146 F. Supp. 485 (N.D. Tex. 1956), *rev'd sub nom.* Borders v. Rippy, 247 F.2d 268 (5th Cir. 1957); Dallas Independent School Dist. v. Edgar, 255 F.2d 455 (5th Cir. 1958); Boson v. Rippy, 275 F.2d 850 (5th Cir. 1960); Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960).

30. The Houston litigation, adroitly handled behind the scenes by Federal Judge Ben C. Connally, surfaced only once in the reported decisions; but even *token* desegregation was not accomplished until 1961.

31. For a description of the difficulties in Mansfield, see J. PELTASON, *supra* note 18, at 144-46.

32. Following is a complete list of reported decisions in *Bush v. Orleans Parish School Bd.,* from its inception through 1962: 138 F. Supp. 336 (E.D. La.) (three-judge court), *motion for leave to file petition for writ of mandamus denied,* 351 U.S. 948 (1956); 138 F. Supp. 337 (E.D. La.

of attacks from all flanks, Federal District Judges J. Skelly Wright and Herbert Christenberry had invalidated a total of forty-four statutes enacted by the Louisiana legislature; had cited and convicted two state officials for contempt of court; and had issued injunctions forbidding the continued flouting of their orders against a state court, all state executives, and the entire membership of the Louisiana legislature. By 1963, both the federal district court in New Orleans and to a lesser extent the United States Court of Appeals for the Fifth Circuit had triumphed in their legal struggle with the State of Louisiana, though some may wonder if it were not a hollow victory. When measured by the pitifully few black children actually integrated, the battle hardly seems worth the price, but before integration could commence in earnest, token desegregation had first to be achieved.[33]

The New Orleans strife is significant not only because the federal courts fully manifested their flexibility, resiliency, and enduring vitality in crisis, but also because the course of action to be taken by other states of the Deep South hung in the balance. Southerners bent on opposition watched with flagging hopes as, one by one, Louisiana legislative strategems were nullified by the courts. Most importantly, however, it tested the strength of the linchpin of the Constitution: the supremacy of federal law. In the final outcome, the federal courts survived and the Supreme Court's mandate was enforced in Louisiana.

4. *Catalysts for Action*

Two important events of this period firmed the resolve of the federal courts and nudged them into the second period of desegregation adjudication: the attempt by Governor Faubus of Arkansas in 1957 to block the token desegregation of Central High School in Little Rock, Arkansas; and the matriculation of James Meredith to the University of Mississippi in 1962. In the mind of every southern federal judge those events etched an indelible impression of the absolute intransigence of some state authorities and the necessity to rely, however reluctantly, on the ultimate might of the executive branch of the federal government to enforce their mandates.

1956), *aff'd*, 242 F.2d 156 (5th Cir. 1957), *cert. denied*, 354 U.S. 921 (1957); 252 F.2d 253 (5th Cir.), *cert. denied*, 356 U.S. 969 (1958); 163 F. Supp. 701 (E.D. La. 1958), *aff'd*, 268 F.2d 78 (5th Cir. 1959); 187 F. Supp. 42 (E.D. La.) (three-judge court), *motion for stay denied*, 364 U.S. 803 (1960), *aff'd*, 365 U.S. 569 (1961); 188 F. Supp. 916 (E.D. La.) (three-judge court), *motion for stay denied*, 364 U.S. 500 (1960), *aff'd*, 365 U.S. 569 (1961); 190 F. Supp. 861 (E.D. La. 1960) (three-judge court), *aff'd*, 366 U.S. 212 (1961); 191 F. Supp. 871 (E.D. La.) (three-judge court), *aff'd sub nom.* Denny v. Bush 367 U.S. 908 (1961); 194 F. Supp. 182 (E.D. La.) (three-judge court), *aff'd sub nom.* Tugwell v. Bush 367 U.S. 907 (1961); *aff'd sub nom.* Gremillion v. United States, 368 U.S. 11 (1961); 204 F. Supp. 568 (E.D. La. 1962); 205 F. Supp. 893 (E.D. La. 1962), *aff'd in part and rev'd in part*, 308 F.2d 491 (5th Cir. 1962).

Although the Supreme Court consistently affirmed decisions of its lower federal courts in the Fifth Circuit, it never issued a full written opinion during the course of the litigation.

33. For a concise, well-written summary of the political history of New Orleans, see M. INGER, POLITICS AND REALITY IN AN AMERICAN CITY: THE NEW ORLEANS SCHOOL CRISIS OF 1960, at 9-16 (1969).

The sad history of the Little Rock crisis is chronicled in the Supreme Court's opinion in *Cooper v. Aaron.*[34] Federal troops and federalized National Guardsmen were assigned to Central High School for the entire school year to protect eight Negro students from "repeated incidents of . . . violence."[35] The Supreme Court Justices cut short their summer recess to hear the case. In perhaps the only opinion ever to be signed personally by all nine members, the Court unequivocally announced to the nation and, perhaps more importantly, to the inferior federal judges in the South, that opposition to the *Brown* mandate, however intense or violent, would not be allowed to stay implementation of the constitutional rights of black children to equal educational opportunities.

The efforts of the United States Court of Appeals for the Fifth Circuit to enforce the enrollment of James Meredith at the University of Mississippi jolted that court from its traditionally reflective appellate role and ultimately required the use of federal troops to put down the most serious federal-state confrontation since the bombardment of Fort Sumter one hundred years earlier.[36] In retrospect, the trauma of Ole Miss seems to have stiffened the resolve of many federal judges to adopt harsh new measures to carry out their *Brown II* marching orders, and propelled the federal courts in the South to search for new methods of implementation and for uniformity in their own decisions.

B. The Search for Standards: 1963-1967

1. *Climate*

The kaleidoscope of events in 1963 provides the setting for the beginning of the second period of public school integration. This was the penultimate year of the civil rights movement. With the abatement of the Cold War, Americans were treated to a daily news fare of triumph and tragedy on the domestic civil rights scene. Across the South black and white citizens or-

34. 358 U.S. 1 (1958).

35. *Id.* at 12-13.

36. For more complete accounts of James Meredith's fight to enter the University of Mississippi, see R. BARRETT, INTEGRATION AT OLE MISS (1965); W. LORD, THE PAST THAT WOULD NOT DIE (1965); J. MEREDITH, THREE YEARS IN MISSISSIPPI (1966); Silver, *Mississippi: The Closed Society,* 30 J. So. HIST. 3 (1964). *See also* V. NAVASKY, KENNEDY JUSTICE (1971); Leonard, Harris, & Wren, *How a Secret Deal Prevented a Massacre at Ole Miss,* 26 LOOK, Dec. 31, 1962, at 18.

Before federal force finally prevailed in the showdown at Oxford between Mississippi Governor Ross Barnett and President John F. Kennedy, terrible damage had been done to property, to human life, and to the reputation of the University. Two men were dead: Paul Guihard, a French newspaperman representing Agence France-Presse, who was shot in the back, and Ray Gunter, an Oxford workman, who was shot in the forehead while watching the riots. At least 160 marshalls were injured, 38 per cent of those sent to Ole Miss. W. LORD, *supra* at 231. Sixteen of the Mississippi National Guardsmen first led into the riot scene were injured. No one can be sure of the extent of injuries among rioters, but they were much less extensive —a cold indication of where the balance of force lay. Federal forces took over 200 prisoners, only 24 of whom were Ole Miss students. No convictions resulted from the rioting.

ganized, marched, sang, and sat-in. The Student Non-Violent Coordinating Committee (SNCC) initiated its first direct action voter registration drive in Selma, Alabama. President Kennedy sent a voting rights act to Congress; Congress did not respond. Using school children as marchers under the leadership of Reverend Fred Shuttlesworth, the Southern Christian Leadership Conference (SCLC) organized demonstrations in Birmingham, America's most segregated city; Police Commissioner Eugene "Bull" Conner's police over-reacted.[37] President Kennedy sponsored new civil rights legislation desegregating public accommodations, giving expanded powers to the Attorney General to initiate school integration, and setting stringent standards of nondiscrimination in federally financed or assisted programs. Again, Congress did not respond. Governor George Wallace stood in the schoolhouse door to block the enrollment of Vivian Malone to the University of Alabama. He closed the Tuskegee High School to prevent public school integration. Four little girls were killed in the bombing of a Birmingham church, and two Negro boys were shot in the violent aftermath. Medgar Evers was assassinated at his home in Jackson, Mississippi. Race rioting began at Cambridge, Maryland, and Danville, Virginia. The Department of Justice reported that during the ten-week period after the Birmingham demonstrations in 1963, over 186 cities in the South underwent 758 demonstrations[38] resulting in almost 5,000 arrests.[39]

While marked by stark tragedy, 1963 was also the year of the most compelling moment of the civil rights movement: The March on Washington. On one sweltering August day, 1,512 chartered buses and 40 special trains brought over 200,000 civil rights "pilgrims" to the nation's Capitol.[40] "[A]n unprecedented and unpredictable confluence of black leaders, white liberals, movie stars, bishops and tens upon tens of thousands of ordinary citizens [came] to the Capitol to bear peaceful witness to the black American's petition for something called Freedom—Now. It may have been the most romantic single event of twentieth-century America."[41]

2. *The Recalcitrant Bench*

Spurred by the quickening pace of the civil rights movement and the passage of the Civil Rights Act of 1964,[42] new plaintiffs embarked on the

37. *See* A. WASKOW, FROM RACE RIOT TO SIT IN 234 (1966).
38. F. POWLEDGE, BLACK POWER, WHITE RESISTANCE 79 (1967).
39. P. BERGMAN, THE CHRONOLOGICAL HISTORY OF THE NEGRO IN AMERICA 579 (1969).
40. 82 NEWSWEEK, Sept. 10, 1973, at 24.
41. *Id.*
42. Title IV of the Act required the Commissioner of Education of the Department of Health, Education, and Welfare (HEW) to render technical assistance to local school boards in their preparation of school desegregation plans. 42 U.S.C. § 2000c-2 (1970). Title IV also authorized the Attorney General to bring desegregation suits on behalf of complainants unable to sue on their own behalf. *Id.* § 2000c-6. Title VI of that same Act proscribed discrimination in any program or activity receiving federal financial assistance, under threat of loss of

choppy seas of desegregation litigation, with new case filings increasing almost geometrically. The greatest burden came to rest on the United States Court of Appeals for the Fifth Circuit. Finding its appellate calendar clogged with school appeals, it granted priority treatment to school cases and accelerated experimentation with new and expanding forms of extraordinary equitable relief. Despite their efforts, the Fifth Circuit judges found that—unlike the normal appeals case where the appellate decision is generally accepted as final—school cases were never finished. The same case would return again and again, exacting an enormous toll in judicial time and patience. Each time a case came back inevitably greater integration was demanded or new mechanisms of delay had to be struck down.

The most disheartening aspect of the school cases was the refusal of many federal district judges to enforce the law at the local level without constant supervision. Cajoling, scolding, complimenting, and preemptorily reversing unevenly performing federal district judges frequently unraveled the patience of the appeals court and stretched the ingenuity of its judges to the breaking point. There were disappointingly few district judges courageous enough to mandate compliance with *Brown II*.[43] Most federal district judges could be classified as passive; they were either unsympathetic, unresponsive, timid, or fearful of community reaction and had to be pushed into taking each step designed to increase the pace of integration.[44] *Brown II* did

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funding. *Id.* § 2000d. When combined with the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 236 *et seq.*, 241 *et seq.*, 331 *et seq.*, 821 *et seq.* (1970), which greatly increased the amount of federal money available for the nation's public schools—particularly schools in low income areas such as the Deep South—Title VI of the Civil Rights Act of 1964 provided federal officials with both a powerful club and a tempting carrot. With one hand they could offer generous amounts of federal aid to recalcitrant school districts and with the other they could demand that desegregation efforts begin at the risk of the district losing all of those new-found dollars.

43. Two such courageous judges, Frank M. Johnson of Alabama and Bryan Simpson of Florida, were vilified, cursed, and threatened for their stern insistence on enforcing the Supreme Court's mandate in *Brown*. As to Judge Johnson, see 89 TIME, May 12, 1967, at 72-74, 77-78; 86 TIME, Aug. 13, 1965, at 15A; 85 TIME, Mar. 19, 1965, at 25; 83 TIME, Feb. 21, 1964, at 76. Regarding Judge Simpson's efforts in Florida, see SOUTHERN JUSTICE 193-213 (2d ed. L. Friedman 1966).

44. Federal District Judge Frank M. Scarlett of Georgia is a prime example of an obstructionist federal district judge bent on frustrating the *Brown* mandate. His persistent efforts to thwart Negro plaintiffs in school cases in Savannah, Augusta, and Brunswick effectively blocked integration in the Southern District of Georgia long past the time when most other school districts in the Fifth Circuit had begun obeying court-approved integration plans. Seizing on the Supreme Court's citation in footnote 11 of the works of social scientists to support its thesis that segregation was injurious to black children, Judge Scarlett allowed white intervenors to introduce "similar evidence" to disprove the Court's thesis. *See* Stell v. Savannah-Chatham County Bd. of Educ., 220 F. Supp. 667, 668-76 (S.D. Ga. 1963). Judge Scarlett then held that new evidence adduced in his court had proved that Negro children were inherently inferior and therefore segregation did not violate the equal protection clause of the fourteenth amendment. The Fifth Circuit, on appeal, sternly reversed Judge Scarlett's holding with the following rebuke: "We reiterate that no inferior federal court may refrain from acting as required by [the decision in *Brown I*] even if such a court should conclude that the Supreme Court erred either as to its facts or as to the law." 333 F.2d 55, 61 (5th Cir. 1964).

not envision the primary enforcement role as resting on the federal appellate courts—but that is precisely where it landed in most cases.

The United States Supreme Court was not helpful in those middle years. Other than urging its inferior federal courts in the South to move more rapidly—with sharp reminders that the time the courts were to allow for transition from segregated to desegregated schools was decreasing with the passage of years since *Brown*[45]—the Supreme Court did not attempt to give advice on the mechanics of the desegregation process.

3. *Stirrings*

Left adrift by the Supreme Court and faced with the prospect of having to decide each case on its individual facts, the Fifth Circuit began to develop uniform enforcement standards which, it was hoped, would shift the burden of implementation back to the district courts. In 1964 four major cases (involving Birmingham and Mobile, Alabama, and Savannah, Brunswick, and Albany, Georgia) ordered previously approved grade-a-year plans rapidly stepped up.[46] Desegregation was started in the first and second grades and also in the twelfth, in order that no student would graduate without a desegregated education. The cases, while stressing that no inflexible standard was intended, did indicate the importance of uniformity.[47]

In addition to speeding up the grade-a-year plans, the Fifth Circuit moved away from "transfer plans" which had required black students to brave a complex procedural morass to initiate their own transfer to white schools. The Supreme Court's decision in *Shuttlesworth*,[48] approving on its face the Alabama Pupil Placement Act, had acted to retard significant levels of desegregation for years. Finally, it became clear that the sole purpose of such statutes was to frustrate desegregation. Thereafter their application was enjoined. Pupil assignment plans were replaced by freedom-of-choice plans, thereby theoretically[49] allowing every pupil to attend a school based solely on personal choice and the physical capacity of the school. In addition

45. *See, e.g.*, Goss v. Board of Educ., 373 U.S. 683 (1963); Watson v. City of Memphis, 373 U.S. 526 (1963).

46. Gaines v. Dougherty County Bd. of Educ., 334 F.2d 983 (5th Cir. 1964); Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55 (5th Cir. 1964); Davis v. Board of School Comm'rs, 333 F.2d 53 (5th Cir. 1964); Armstrong v. Board of Educ., 333 F.2d 47 (5th Cir. 1964).

47. The 1965 case of Lockett v. Board of Educ., 342 F.2d 225 (5th Cir. 1965), is evidence of the court's desperate push for uniform standards. A target date for the desegregation of all grades was set at September, 1968. That date was picked up and applied to later cases as well. *See* Price v. Denison Independent School Dist., 348 F.2d 1010 (5th Cir. 1965). Note that the court leaves open whether it will use September of 1967 or "as in our recent Court decisions, [September of 1968]." *Id.* at 1014.

48. Shuttlesworth v. Birmingham Bd. of Educ., 358 U.S. 101, *aff'g* 162 F. Supp. 372 (N.D. Ala. 1958).

49. Countless subterfuges to prevent unfettered free choice prevented any significant amount of desegregation under such plans. HEW guidelines approved later by the Fifth Circuit in the *Singleton* and *Jefferson* cases, discussed *infra*, were an attempt to apply rigorous standards to guarantee the workability of freedom-of-choice.

to approving freedom-of-choice plans in the period between 1964 and 1966, the Fifth Circuit also began to require contemporaneous abolition of dual attendance zones—separate school attendance zones for black and white children to which they were initially assigned. The general impatience of the Fifth Circuit is succinctly summarized by Judge Griffin B. Bell's terse statement that "the rule has become: the later the start, the shorter the time allowed for transition."[50]

4. Singleton *and* Jefferson

The groping of the federal courts of appeals for uniform standards that could be utilized in all school cases culminated in four famous Fifth Circuit cases decided between 1965 and 1967: *Singleton v. Jackson Municipal Separate School District (Singleton I*[51] and *Singleton II*[52]) and *United States v. Jefferson County Board of Education (Jefferson I*[53] and *Jefferson II*[54]). Those cases mark the most important doctrinal change in interpretation of the equal protection clause, as applied to public education, since *Brown* itself. They mark the end of the middle turbulent years of school desegregation and presage the era of massive integration. Their importance cannot be overemphasized. The *Singleton* and *Jefferson* decisions did not just bring state policy into line with national policy, as indicated by Judge John Minor Wisdom, the architect of the four decisions. Rather they created *new* policy by reinterpreting settled school desegregation law.

Singleton I and *II* and *Jefferson I* and *II* were the logical result of the Fifth Circuit's mounting frustration with tokenism and delay by school boards and federal district courts in the name of "deliberate speed." Each successive opinion from the court of appeals had brought only more appeals, more questions, and more litigation. In the urgent search for uniform standards which would remove the court of appeals from day-to-day supervision of district court decrees, the Fifth Circuit began to consider the "guidelines" established by the HEW Office of Education pursuant to the provisions of section 2000d of the Civil Rights Act of 1964,[55] as perhaps the answer to its problems in fully implementing the *Brown* mandate. The "guidelines" included minimum standards for use in determining whether a local school board's desegregation plan would qualify that local school board for federal financial assistance.[56] Could these administrative "guidelines" be adopted as uniform legal standards?

50. Lockett v. Board of Educ., 342 F.2d 225, 228 (5th Cir. 1965).
51. 348 F.2d 729 (5th Cir. 1965).
52. 355 F.2d 855 (5th Cir. 1966).
53. 372 F.2d 836 (5th Cir. 1966).
54. 380 F.2d 385 (5th Cir. 1967).
55. 42 U.S.C. § 2000d-1 (1970). *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 856 (5th Cir. 1966).
56. *See* note 42 *supra*.

The momentum toward the key *Jefferson I* holding was forecast by Judge Wisdom's opinion in *Singleton I*,[57] decided on June 22, 1965. The case began with the following explicit warning: "The time has come for footdragging public school boards to move with celerity toward desegregation . . . ."[58] Judge Wisdom stated that the Fifth Circuit would "attach great weight" to the HEW guidelines.[59] While recognizing that HEW and the judiciary have different functions, Judge Wisdom asserted that all three branches of government were united by a common objective: the elimination of segregated education. It was important that there be a "close correlation . . . between the judiciary's standards . . . and the executive department's standards in administering [the] policy [on desegregation]."[60] Judge Wisdom stated that HEW was better equipped than the courts to weigh alleged administrative difficulties in various desegregation plans, and warned that judicial requirements in desegregation cases should not be "less burdensome than HEW guides" lest school boards flood the courts with desegregation questions in order to avoid HEW's more rigorous guidelines.[61] The court then ordered the local board in *Singleton I* to "be guided" in the preparation of the details of its plan by the new HEW guidelines.[62]

In an extremely important footnote, Judge Wisdom provided the philosophic underpinnings for his favorable recommendation of HEW guidelines to local school boards. He frontally attacked the venerable *Briggs v. Elliott* dictum, the first such attack in a Fifth Circuit opinion, as inconsistent with *Brown I* and *II*:[63]

> In retrospect, the second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well-known dictum ("The Constitution, in other words, does not require integration. It merely forbids discrimination".) in Briggs v. Elliott . . . should be laid to rest. It is inconsistent with Brown and the later development of decisional and statutory law in the area of civil rights.

Brown v. Board of Education, he reasoned, implied an affirmative interpretation of the fourteenth amendment, positively requiring a state to pro-

57. Singleton v. Jackson Municipal Separate School Dist., 348 F.2d 729 (5th Cir. 1965). *Singleton I* and *II* and *Jefferson I* were all decided by three-judge panels, with Judge Wisdom the author of all three opinions.

58. *Id.* at 729.

59. 348 F.2d at 731.

60. *Id.*

61. *See* note 77 *infra*.

62. 348 F.2d at 731.

63. 348 F.2d at 730 n.5. Judge Wisdom's footnote observation that the *Briggs v. Elliott* dictum "should be laid to rest" provoked a storm of internal controversy among his brothers on the court. An impressive string of cases, all tracing back to *Briggs*, had interpreted the equal protection clause application to school cases as essentially negative. Those cases focused on the "proscriptive" effect of the second sentence of the fourteenth amendment: "No State shall . . . deny to any person . . . the equal protection of the laws." The negative *Briggs* interpretation of *Brown I* said that decision merely forbade states from mandatorily segregating public schools and at most required that artificial legal barriers to desegregation be removed.

vide unitary school systems that were not racially identifiable. He read *Brown I* and *II* as breathing new life into the three Civil War amendments to the Constitution: the thirteenth, fourteenth, and fifteenth amendments.[64] Judge Wisdom placed emphasis on the first positive sentence of the fourteenth amendment that "All persons born . . . in the United States . . . are citizens." He read the thirteenth amendment as not only abolishing slavery but "all badges and indicia of slavery" and he viewed segregated education as an indicium of slavery and racial inferiority. States that had erected legal impediments to full citizenship by creating "badges of slavery," that is, segregated schools, did not satisfy their obligations by removing segregationist laws. It was not enough to retreat to a neutral corner and place on individual Negro citizens the full burden of initiating desegregation. The states that had segregated Negroes in the first place had the primary responsibility for desegregating them.[65]

Seven months after *Singleton I*, *Singleton II*[66] was announced. Although the case had become snarled in extremely complex procedural problems, Wisdom brushed aside the "tangled web" and judged that the only pertinent matter was the "judicial approval of a lawful and effective desegregation plan for schools in Jackson, Mississippi."[67] In noting the weaknesses of freedom-of-choice plans,[68] he again pointed out that the court attached "great weight"[69] to the HEW guidelines and attempted to add teeth to freedom-of-choice plans.[70] Continuing, Wisdom at last held that the *Briggs v. Elliott* dictum could not bar the right of any Negro child to transfer to a white school.[71]

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64. *See* Comment, *supra* note 11, at 761.

65. Later, in *Jefferson I*, Judge Wisdom expanded his argument to attack "the popular myth," that *Brown I* fundamentally rested on sociological studies that asserted that segregation caused psychological harm to Negro children. Rather, Judge Wisdom argued that the *Brown* holdings were directly premised on the mandatory language of the fourteenth amendment which prohibited unreasonable classification by a state of its citizens. States which had classified school children by race had not only a duty to *proscribe* past segregation laws, but they also had an affirmative duty to *prescribe* an integrated education for all their children where race was not a factor. *See id.* at 760-61.

66. Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966).

67. *Id.* at 868.

68. 355 F.2d at 871.

69. 355 F.2d at 869.

70. To assuage rising criticism over his *Singleton I* comments about HEW's guidelines, he made it clear that "we do not abdicate our judicial responsibility for determining whether a school desegregation plan violates federally guaranteed rights." *Id.*

71. The Constitution forbids unconstitutional state action in the form of segregated facilities, including segregated public schools. . . . The school children in still-segregated grades in Negro schools are there by assignment based on their race. . . . They have an absolute right, as individuals, to transfer to schools from which they were excluded because of their race.

This has been the law since Brown v. Board of Education, 1954 . . . . Misunderstanding of this principle is perhaps due to the popularity of an over-simplified dictum that the constitution [sic] "does not require integration," [citing *Briggs v. Elliott*]. But there should be no misunderstanding now as to the right of any child in a segregated

United States v. Jefferson County Board of Education (Jefferson I)[72] is, with *Brown v. Board of Education, Green v. County School Board,*[73] and *Swann v. Charlotte-Mecklenburg Board of Education,*[74] one of the four most important school desegregation cases yet decided. Consolidating seven cases from Alabama and Louisiana, where not one of the school districts involved had made a start toward desegregation until 1965, eleven years after *Brown,* the opinion has had enormous impact on both the law and the pace of desegregation. An understanding of *Jefferson I* is necessary for an appreciation of: (1) how the federal courts turned the corner from token desegregation to massive integration, and (2) how the de jure/de facto distinction became imbedded in desegregation law.[75]

Judge Wisdom's *Jefferson I* opinion is divided into seven parts. In the preamble section he sadly noted that in the years since *Brown,* the Negro child's ". . . 'personal and present' right to equal educational opportunities with white children in a racially nondiscriminatory public school system . . . has been 'of such stuff as dreams are made on.' "[76] The new standards by which courts were to judge the constitutionality of school board desegregation plans were explained:[77]

> *The only school desegregation plan that meets constitutional standards is one that works.* By helping public schools to meet that test, by assisting the courts in their independent evaluation of school desegregation plans, and by accelerating the progress but simplifying the process of desegregation the HEW Guidelines offer new hope to Negro school children long denied their constitutional rights. A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. *The courts acting alone have failed.*

After the preamble of his opinion indicating that the HEW guidelines were being mandated circuit-wide, Judge Wisdom—having urged in *Singleton II*

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class to transfer to a formerly all "white" class, regardless of the slow pace of systematic desegregation by classes.

355 F.2d at 869-70. *See also* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 n.5 (5th Cir. 1966).

72. 372 F.2d 836 (5th Cir. 1966).

73. 391 U.S. 430 (1968).

74. 402 U.S. 1 (1971).

75. *Jefferson I* is particularly important to the most recent period of judicial activity because it provided the philosophical underpinnings for the de jure/de facto distinction which has perplexed and confounded scholar and layman alike. That distinction is discussed later. *See* text at pp. 24-25 *infra.*

76. 372 F.2d at 845.

77. 372 F.2d at 847. Judge Wisdom emphasized that the new HEW standards were substantially the same as those that had evolved in the difficult middle years from the court's own cases. 372 F.2d at 848. By mandating the standards as new *minimum* constitutional requirements for racial integration, the Fifth Circuit attempted to block school boards from seeking court orders that were less rigorous. The issuance of HEW's new guidelines had already caused a number of recalcitrant school boards, "that had not moved an inch toward desegregation," to seek weak court orders so that the Commissioner of Education would not cut off their federal funding. Judge Wisdom noted:

that school boards "grasp the nettle" and begin real desegregation—stated: "We grasp the nettle."[78] He then plunged into the seven parts of his opinion, justifying his abrupt departure from past precedent, both as to the pace and method of desegregation, with the comment that " '[n]o army is stronger than an idea whose time has come.' "[79]

Space and time do not permit a section-by-section analysis of *Jefferson I*.[80]

The following statement appeared in the Shreveport Journal for July 1, 1965: "The local school boards prefer a court order over the voluntary plan because HEW regulations governing the voluntary plans or compliance agreements demand complete desegregation of the entire system, including students, faculty, staff, lunch workers, bus drivers, and administrators, whereas the court-ordered plans can be more or less negotiated with the judge."

372 F.2d at 859 n.49. This was not news to the court.

78. 372 F.2d at 849.

79. *Id.* Judge Wisdom was quoting a statement made famous by Senator Everett Dirksen on May 19, 1964, at a press conference concerning passage of the Civil Rights Act of 1964, but more properly attributable to Victor Hugo.

80. The importance of Titles IV and VI of the Civil Rights Act of 1964 was discussed in Part I of the opinion. Judge Wisdom asserted that a new national policy had emerged from the 1964 Civil Rights Act: *"The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary, nonracial systems—with or without federal funds."* 372 F.2d at 850.

Part II of Judge Wisdom's opinion reviewed in detail the slow pace of desegregation, 372 F.2d at 853-56, and issued a call for a change in both the speed and manner of desegregation in the Deep South. 372 F.2d at 856-61. Part II also dealt at length with the burden placed on the federal courts by school litigation; it is clear that Judge Wisdom viewed the new HEW guidelines as a way of getting the courts out of the endless business of administering local school desegregation plans.

Finally, Judge Wisdom noted that "the lack of uniform standards has retarded the development of local responsibility for the administration of schools without regard to race or color." 372 F.2d at 860. But relief was not to come. The *Jefferson* decree was not self-executing; over 100 school boards were already under court orders not as rigorous as the HEW guidelines. The plaintiffs in those cases, therefore, had to gear up to reopen all of those cases—causing more litigation. *See* Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 338 (1967). Furthermore, as soon as HEW finally seemed ready for a vigorous push toward desegregation, Richard Nixon was elected President. The federal judiciary then began to sense that its newly found HEW and Justice Department allies were beginning to falter.

Part III of *Jefferson I* is a brillant and scholarly excursion into the meaning of the *Brown* mandate, the Civil War amendments to the Constitution, and evolving school case law. Part III is also the burying ground for the *Briggs v. Elliott* dictum. *See* notes 63 & 71 *supra* and accompanying text. The strength of the Wisdom assault on *Briggs* is seen in the following compelling passages:

> The central vice in a formerly de jure segregated public school system is apartheid by dual zoning: in the past by law, the use of one set of attendance zones for white children and another for Negro children, and the compulsory initial assignment of a Negro to the Negro school in his zone. Dual zoning persists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. Acceptance of an individual's application for transfer, therefore, may satisfy that particular individual; it will not satisfy the class. The class is all Negro children in a school district attending, by definition, inherently unequal schools and wearing the badge of slavery separation displays. Relief to the class requires school boards to desegregate the school from which a transferee comes as well as the school to which he goes. It requires conversion of the dual zones into a single system. Faculties, facilities, and activities as well as student bodies must be integrated.

The opinion, however, is well worth reading, and it will stand as a monument to the innovative leadership of Judge Wisdom. His concluding paragraph portended brighter days for Negro plaintiffs throughout the South:[81]

> Now after twelve years of snail's pace progress toward school desegregation, courts are entering a new era. The question to be resolved in each case is: How far have formerly de jure segregated schools progressed in performing their affirmative constitutional duty to furnish equal edu-

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No matter what view is taken of the rationale in *Brown I, Brown II* envisaged the remedy following the wrong, the state's correcting its discrimination against Negroes as a class, through separate schools, by initiating and operating a unitary integrated school system. The gradual transition the Supreme Court authorized was to allow the states time to solve the administrative problems inherent in that change-over. *No delay would have been necessary if the right at issue in* Brown *had been only the right of individual Negro plaintiffs to admission to a white school. Moreover, the delay of one year in deciding* Brown II *and the gradual remedy* Brown II *fashioned can be justified only on the ground that the "personal and present" right of the individual plaintiffs must yield to the overriding right of Negroes as a class to a completely integrated public education.*

. . . .

The position we take in these consolidated cases is that *the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration.*

372 F.2d at 867-69 (emphasis in original).

Judge Wisdom carefully restricted his opinion to de jure segregation—fully aware that *Jefferson I* would be reconsidered by the entire Fifth Circuit sitting en banc because of its sweeping changes—to persuade other members of his court to adopt his view. He recognized the strength in the argument that the states within the Fifth Circuit in particular had an obligation to affirmatively correct the vestiges of a segregated school system that had been imposed by law. Thus the issue of the applicability of the fourteenth amendment to de facto segregation, caused by housing patterns in urban areas and typical of the kind of segregation existing in the North and West, was not reached in *Jefferson I.* Ironically, therefore, while destroying one distinction (integration/desegregation) that had plagued the progress of integration for years, Judge Wisdom in distinguishing between de facto and de jure segregation helped foster another distinction that would be used to justify different treatment for the South and North. And it is that distinction which still retards integration in the North.

Part IV of the *Jefferson I* opinion was devoted to demonstrating that a specific provision in the Civil Rights Act prohibiting assignment of children to schools "to overcome racial imbalance," 372 F.2d at 878, was meant to apply to de facto, but not to de jure, segregation—further entrenching the new distinction. Judge Wisdom also interpreted the Civil Rights Act not to prohibit teacher desegregation. He said: "As long as a school has a Negro faculty it will always have a Negro student body." 372 F.2d at 883.

Part V of the *Jefferson I* opinion upheld the HEW guidelines' use of percentages as legitimate goals by which the efficiency of desegregation plans could be evaluated.

Part VI of the opinion discussed at length the serious shortcomings present in most freedom-of-choice plans. It then proceeded to detail the elements necessary to make a free choice plan work. The discussion focused on such items as speed of desegregation, mandatory annual free choice, notice, transfers, services, facilities, activities, programs, school equalization, scheduled compliance reports, and desegregation of faculty and staff.

Part VII of the opinion attached a detailed decree to be entered with respect to each of the school boards consolidated before the court in *Jefferson I.* The court then indicated that "the provisions of the decree are intended, as far as possible, to apply uniformly throughout this circuit in cases involving plans based on free choice of schools." 372 F.2d at 894. Then Judge Wisdom pointedly added: "As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result—the performance." *Id.*

81. 372 F.2d at 896.

> cational opportunities to all public school children? The clock has ticked the last tick for tokenism and delay in the name of "deliberate speed".

The reaction to *Jefferson I* was immediate and intense. Praised by most legal commentators in the North,[82] it was roundly condemned by politicians, school boards, some federal judges, and most of the white populace in the South.

The second installment of *Jefferson (Jefferson II)* came shortly.[83] Because of the revolutionary nature of the opinion, an en banc rehearing was granted, requiring all twelve judges of the Fifth Circuit to sit on the rehearing. The per curiam opinion of the court, published March 29, 1967, adopted as its own the full opinion in *Jefferson I*.[84] However, the *Jefferson II* per curiam opinion seemed to go even further than *Jefferson I* in one important respect: Not only were the currently issued HEW guidelines mandated for circuit-wide use, but district courts were also told to give "great weight" to future guidelines, "when such guidelines are applicable to this circuit and are within lawful limits."[85]

Three of the twelve Fifth Circuit judges—Gewin, Bell, and Godbold—vigorously dissented; Judge Coleman wrote a concurring opinion. Judge Gewin, joined by Judge Bell was particularly disturbed by the de jure/de facto distinction. "[T]he opinion and the decree are couched in divisive terms and proceed to dichotomize the union of states into two separate and distinct parts."[86] He could not understand how the Constitution could apply differently in different parts of the country. He eloquently protested:[87]

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82. *See, e.g.*, Comment, *supra* note 80, at 364-65; Comment, *supra* note 11, at 777. *But cf.* Comment, *Freedom of Choice in the South: A Constitutional Perspective*, 28 LA. L. REV. 455, 468 (1968).

83. United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967).

84. The Fifth Circuit per curiam opinion succinctly summarized the *Jefferson I* holding:

> Freedom of choice is not a goal in itself. It is a means to an end. A schoolchild has no inalienable right to choose his school. A freedom of choice plan is but one of the tools available to school officials *at this stage* of the process of converting the dual system of separate schools for Negroes and whites into a unitary system. The governmental objective of this conversion is—educational opportunities on equal terms to all. The criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing this objective.

380 F.2d at 390.

85. *Id.* However, the per curiam opinion expressly reserved decision on whether the HEW guidelines were applicable to de facto situations.

86. 380 F.2d at 397.

87. 380 F.2d at 397-98. Judge Gewin continued:

> Although espousing the cause of uniformity and asserting there must not be one law for Athens and another for Rome, the opinion does not follow that thesis or principle. One of the chief difficulties which I encounter with the opinion is that it concludes that the Constitution means one thing in 17 states of the nation and something else in the remaining states. This is done by a rather ingenious though illogical distinction between the terms of de facto segregation and de jure segregation. While the opinion recognizes the evils common to both types, it relies heavily on background facts to justify the conclusion that the evil will be corrected in one area of the nation and not in the other. In my view the Constitution cannot be bent and twisted in such a man-

> The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because they were born into a de facto society, while the exact same racial make-up of the school system in the seventeen Southern and border states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area of the country, also violates such constitutional rights in another area. . . . Due process and equal protection will not tolerate a lower standard, and surely not a double standard. The problem is a national one.

After joining in Judge Gewin's dissent, Judge Bell wrote a dissent of his own, in which Judge Gewin joined. He agreed that the goal of *Brown* was a unitary system but did not agree with the "compulsory integration" language contained in *Jefferson I.* Calling Judge Wisdom's mandate of HEW guidelines on all school systems "new fuel in a field where the old fire has not been brought under control,"[88] Judge Bell argued for a freedom-of-choice plan superimposed on a strict neighborhood school zoning practice. He also argued that the new legal test of an integration plan—"one that works"—was unconstitutionally vague, that the de jure/de facto doctrine was unfair, and that the overruling of the *Briggs v. Elliott* dictum was unjustifiable.

Judge Coleman, in a separate opinion, worried about how "not [to] wreak irreparable injury upon public schools while executing the sentence of death against compulsory segregation."[89] Judge Coleman agreed with Judge Gewin that *Briggs v. Elliott* had been decided correctly and that all areas of the country should be treated the same.

In a separate dissent Judge Godbold expressed fear that the percentages suggested in the guidelines would become fixed requirements of mandatory mixing. And he was convinced that the Constitution did not require race-mixing if it was against the wishes of all concerned.[90]

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ner as to justify or support such an incongruous result. The very subject matter under consideration tends to nullify the assertion that the constitutional prohibition against segregation should be applied in 17 states and not in the rest of the nation.

380 F.2d at 398.

Judge Gewin then took strong issue with Judge Wisdom's conclusion that the 1964 Civil Rights Act provision that prohibited school assignment solely for the purpose of racial balancing applied only to de facto and not to de jure situations. Judge Gewin was further deeply disturbed that the *Jefferson I* opinion called for race-mixing even if against the express wishes of all parties involved:

> There must be a mixing of the races according to majority philosophy even if such mixing can only be achieved under the lash of compulsion. . . . Accordingly, while professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike.

380 F.2d at 404-05.

88. 380 F.2d at 412.

89. 380 F.2d at 417.

90. The collision is head-on between individual freedom and paternalistic authoritarian-

Finally, it must be noted that less than a year after *Jefferson II* mandated uniform HEW guidelines on all federal district courts in the Fifth Circuit, the Supreme Court changed the ground rules for school cases in *Green v. County School Board,*[91] and displaced much of the Fifth Circuit's work. However, the per curiam, concurring, and dissenting opinions in *Jefferson II* raised fundamental issues which were not to be decided for another four years or have never been decided: whether racial quotas are mandated by *Brown*; whether the de jure/de facto distinction is meaningless, or even harmful; and whether freedom of choice, where the choice is actually free, is a constitutionally protected civil right. The *Jefferson II* decision aptly demonstrated that some of the most puzzling school desegregation issues today—like still waters—run deep.

C. Massive Integration: 1968-1972

1. *The* Green *Case: Freedom-of-Choice's Death Sentence*

In the early years after *Brown II* the Supreme Court had appeared content to observe from the sidelines as the lower federal courts in the South evolved methods of desegregation under *Brown II's* "all deliberate speed" standard. During the sixties, however, the Supreme Court grew increasingly impatient with the slow pace of desegregation in the South, and there were signals that it would soon reexamine the "deliberate speed" language of *Brown II.* Finally, on May 27, 1968, the Supreme Court acted, through its decision in *Green v. County School Board.*[92] That case initiated a major new emphasis on immediate integration and marked the end of freedom-of-choice plans as a judicially sanctioned method of desegregation.

The *Green* case involved New Kent County, a small rural county in Eastern Virginia with little residential segregation and a student population divided almost equally between blacks and whites. There were only two schools in the entire system: the school on the east side of the county for whites and the school on the west side for blacks. There were no attendance zones. White students were bused to the white school; black students were bused to the black school. Since 1965, the system had operated under a court-imposed freedom-of-choice plan, but under that plan *no* white students had ever chosen to attend the Negro school and only 15 per cent of the county's Negro pupils had enrolled in the formerly all-white school. A unanimous Supreme Court, speaking through Justice Brennan, found that "[t]he pattern

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ism. No more invidious discrimination, or improper government objective, can be imagined than national power setting aside the valid exercise of choice by members of a class in the name of the constitutional objective for which the choice was granted to the class in the first place.

380 F.2d at 424.

91. 391 U.S. 430 (1968).

92. *Id.*

of separate 'white' and 'Negro' schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws."[93] The Court noted that during the first years after *Brown II* the principal focus of federal courts had been to require local school boards to provide a desegregated education for those few Negro children "courageous enough to break with tradition."[94] However, token desegregation was only the beginning step in the process toward unitary nonracial education. *Brown* had charged school authorities with "the *affirmative duty* to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated *root and branch.*"[95] Moreover, such steps could not be taken tomorrow or the day after tomorrow: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*"[96] The standard, therefore, was effectiveness. Applying this standard to the facts of the case, the Court held: " 'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end."[97] Thus, where freedom-of-choice offers *real* promise of achieving a unitary nonracial system there might be no objection to allowing it to be proved in action. But where, as in New Kent County, a freedom-of-choice plan offered no reasonable hope of achieving a unitary system, it was not acceptable. New Kent County had an obligation to use other "reasonably available" methods of desegregation that would be effective.[98]

Close scrutiny of *Green* indicates that the freedom-of-choice plan there was held ineffective essentially because it produced integration of only fifteen per cent of the Negro students into the all-white school. After *Green,* therefore, federal courts naturally focused their attention on the percentage of

93. 391 U.S. at 435.

94. 391 U.S. at 436.

95. 391 U.S. at 437-38 (emphasis added).

96. 391 U.S. at 439.

97. 391 U.S. at 440, *quoting* Bowman v. County School Bd., 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring). Judge Sobeloff, in drafting that well-known paragraph, borrowed heavily from Judge Wisdom's per curiam en banc opinion in *Jefferson II. See* 380 F.2d at 390.

98. 391 U.S. at 442. Two other school cases decided by the Supreme Court the same day as *Green* reemphasized the obligation of school boards to move forward with integration plans that promised "realistically to work now." A freedom-of-choice plan in Arkansas, similar to the New Kent County plan, was held ineffective, Raney v. Board of Educ., 391 U.S. 443 (1968), and a "free-transfer plan" in Jackson, Tennessee was also held ineffective. Monroe v. Board of Comm'rs, 391 U.S. 450 (1968). Under the free transfer plan, school zones were set up but any child not content with his assigned zone could transfer to another school. All white children residing in Negro school zones in Jackson had transferred to the nearest white school and only a very few Negro children in white zones stayed in white schools.

race-mixing achieved. That statistic became the prime indicator of whether a desegregation plan promised "realistically to work *now*." Therefore, the efforts of the Fifth Circuit in *Singleton* and *Jefferson,* as far as the applicability of HEW guidelines to freedom-of-choice plans was concerned, had a very short life indeed. After *Green,* it became clear to the Fifth Circuit that it had not freed itself from school cases as hoped; it was back in the school business under far more imperative requirements.

A new wave of litigation testing the continued viability of freedom-of-choice plans followed the *Green* decision. The Supreme Court had not defined what it meant when it said that a plan had to "work," nor had the term "unitary school district" been defined with particularity.[99] Any ambiguity that could be found which could conceivably justify further litigation and delay was exploited. Desegregation litigation activity realized new heights as the courts—vigorously pushing desegregation under the *Green* mandate—sought innovative new ways to force school districts to come forward with plans that promised "realistically to work *now*." More and more, attention was focused on the percentage of integration that would result if a particular school board plan were approved.[100]

2. Alexander v. Holmes County Board of Education *and* Carter v. West Feliciana Parish

On October 29, 1969, the Supreme Court issued a peremptory order in the case of *Alexander v. Holmes County Board of Education,* reversing a three-month delay in desegregation and ordering *immediate* action.[101]

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99. Lower federal courts did receive some enlightenment from the Supreme Court in United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969), as to one of the factors necessary in the establishment of a unitary school district: faculty desegregation. In that case the Supreme Court reviewed a desegregation order of Judge Frank Johnson affecting Montgomery County, Alabama. He had held, *inter alia,* that the faculty *of each school* in the district should reflect the racial composition of the district faculty as a whole. Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647, 654-55 (M.D. Ala. 1968). Judge Gewin, in a cautious opinion joined by District Judge Elliott, reversed Judge Johnson's order as to the required faculty ratio, holding that such a "quota" system was too explicit. 400 F.2d 1 (5th Cir. 1968). The Supreme Court reversed Judge Gewin's opinion and reinstated the district judge's faculty desegregation order in toto. 395 U.S. at 235-36. Thereafter, as far as faculty integration was concerned, it was clear that the Supreme Court approved of absolute racial balancing of a faculty as a valid desegregation step. The Fifth Circuit, chastened by its reversal, began mandating Judge Johnson-type faculty ratio desegregation orders throughout the circuit.

100. Chief Judge Brown, dissenting from the Fifth Circuit's refusal to rehear en banc Judge Gewin's reversal of Judge Johnson in Montgomery County Bd. of Educ. v. Carr, 400 F.2d 1 (5th Cir. 1968), stated succinctly what was to become the overriding concern of the circuit: "The result is in figures." Montgomery County Bd. of Educ. v. Carr, 402 F.2d 782, 786 (5th Cir. 1968).

101. 396 U.S. 19 (1969). Implementation of *Green* infuriated segregationists across the South. For the first time real integration of the public schools—as opposed to token desegregation—appeared as a distinct probability. Encouraged by lukewarm statements on civil rights by Richard Nixon during the presidential election of 1968, southern politicians prepared a last-ditch fight against integration by addressing their protests directly to the highest levels of the new administration. It is reported that to accommodate Senator Stennis of Mississippi, then

While *Alexander* was pending before the Supreme Court, the Fifth Circuit consolidated sixteen major school cases for en banc hearings under the already famous name of *Singleton v. Jackson Municipal Separate School District (Singleton III).*[102] *Alexander* was handed down by the Supreme Court during the en banc arguments. Despite its desire to implement *Alexander* without delay, the Fifth Circuit judges could not believe that the Supreme Court intended for them to issue orders that required the relocation of hundreds of thousands of school children in the middle of an on-going school year. The circuit therefore, in *Singleton III,* decided to divide the integration into a two-step process. Part one of the process required desegregation of faculties, facilities, activities, staff, and transportation no later than February 1, 1970; part two permitted postponement of massive integration of student bodies until the beginning of the new school year in September of 1970.[103]

NAACP lawyers immediately appealed the *Singleton III* holding to the Supreme Court, which again preemptorily reversed the Fifth Circuit, stating that the court had "misconstrued" the holding in *Alexander.*[104] The Fifth Circuit—which had been the most diligent court in America in desegregating public school facilities—was wrist-slapped for delaying massive student desegregation for a short four month period to avoid disruption in the midst of an on-going school year.[105]

Immediate massive desegregation orders had to be issued—in mid-school term—for all school boards in active litigation in the Fifth Circuit area. Legal questions were to be postponed for consideration until *after* institution of unitary school systems.[106] Thereafter, the Fifth Circuit adopted

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leading a floor fight on deployment of the ABM missle system, President Nixon brought pressure on Secretary Finch to delay the pending desegregation orders in Mississippi. *See* L. PANETTA & P. GALL, BRING US TOGETHER (1971). In any event, Secretary Finch wrote Chief Judge John R. Brown a letter requesting a delay in those counties, stating that implementation of the court orders would produce "chaos, confusion and a catastrophic educational setback" to the children involved. *Id.* at 255. Relying on the Finch letter, the Fifth Circuit approved the requested delay. The NAACP Legal Defense and Education Fund attorneys for the first time broke publicly with the Justice Department and appealed the delay holding to the Supreme Court in *Alexander v. Holmes County Bd. of Educ.*

102. 419 F.2d 1211 (5th Cir. 1969).

103. *Id.* at 1217.

104. Carter v. West Feliciana Parish School Bd., 396 U.S. 290, 291 (1970).

105. Because of the preemptory nature of the Supreme Court's reversal of the Fifth Circuit, Justices Harlan and White concurred separately in *Carter.* It was their view that, while desegregation was to commence immediately and unitary systems were to be immediately established *prior* to appeal of legal issues rather than awaiting appeal, the Fifth Circuit could follow a rule of thumb that their orders were to be implemented in approximately an eight-week time period. 396 U.S. at 293. Justices Black, Douglas, Brennan, and Marshall filed a short statement that the eight-week rule of thumb suggested by Justices Harlan and White was itself a retreat from *Alexander. Id.,* A short memorandum opinion of Chief Justice Burger and Justice Stewart indicated that they would not preemptorily reverse the judges of the Fifth Circuit because that court was more familiar with the facts of the individual cases than was the Supreme Court. 396 U.S. at 294.

106. It was in this context that Chief Judge John R. Brown of the Fifth Circuit and members of his court came to a tacit agreement that no further en banc hearings would be held and

the practice of issuing opinion-orders and urgently sought innovative ideas to handle the new crisis in school desegregation.[107] While enormous progress had been made in desegregation in the Deep South between *Green* and *Carter,* it was the *Carter* reversal that precipitated another quantum leap in school desegregation activity. This frantic pace of school integration continued[108] until the Supreme Court took *Swann v. Charlotte-Mecklenburg Board of Education* on certiorari in June of 1970.

In retrospect, although *Green v. County School Board* marked the first doctrinal shift since *Brown,* the wheels of practical progress in desegregation were set in motion by *Alexander* and *Carter.* Until those two summary reversals unceremoniously sent the cases back to the Fifth Circuit, desegregation had at best been a process marked only by tokenism in the Deep South. But within the short time period during 1970 and 1971, the public schools of the Deep South were substantially integrated—despite wavering by the Departments of Justice and HEW—by court orders based almost exclusively on integration statistics.[109] After the Supreme Court's reversals of the Fifth Circuit in *Alexander* and *Carter,* the long-awaited revolution had arrived. Massive integration came to the public schools of the Deep South.

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opinion writing by three-judge panels would be avoided where possible. John Brown preached over and over to his judges, "All that can be said about school cases had been said; there is no point in writing further words." Interview with the Hon. John R. Brown, Chief Judge of the United States Court of Appeals for the Fifth Circuit, in Houston, Texas, Aug. 3, 1972.

107. For example, to expedite its school cases, the Fifth Circuit pioneered in developing new procedures to handle its docket: it established new screening and summary procedures that brought its calendar current but also provoked a storm of controversy among lawyers in the circuit. *See* Haworth, *Screening and Summary Procedures in the United States Court of Appeals,* 1973 WASH. U.L.Q. 257.

108. Under the procedures adopted by the Fifth Circuit Judicial Council on December 2, 1969, enormous progress in real integration of the public schools of the South was achieved. From that date to September 24, 1970, the Fifth Circuit handed down 109 opinion orders involving 89 separate school districts. Some of those school districts had two or three separate appeals in that same time period. It must be remembered that the burden of school cases on the judges of the Fifth Circuit was in addition to their regular case load. An example of the intransigence of recalcitrant school boards finally coming into head-on conflict with a determined Fifth Circuit can be seen in the Hinds-Alexander-Holmes County, Mississippi cases. The standing panel of Judges Bell, Thornberry, and Morgan may have set a judicial record that will never be topped. Those three judges handled an additional 57 opinion orders in those Mississippi cases alone (this is in addition to the 109 figure above). Therefore, the grand total for the Fifth Circuit from December 2, 1969 to September 24, 1970, was 166 opinion orders in school cases. Perhaps no court in history has responded with such alacrity and such monumental effort to a preemptory reversal. All of the opinion orders handled by the Fifth Circuit were on an expedited basis. The next closest circuit in school assignment case load was the Fourth Circuit which had 18 school cases during the same time period, only 3 of which were handled on an expedited basis. The above figures on the December 2, 1969 to September 24, 1970 time period were obtained from a letter of September 24, 1970, from Judge John R. Brown to Chief Justice Warren Burger.

109. It is interesting to note that the Fifth Circuit carefully avoided using loaded terms, such as "busing" and "racial balancing," while at the same time requiring extensive transportation and issuing reversals primarily on figures showing an insufficient amount of race-mixing in local schools.

D. *Swann* and the Uncertain Future of School Integration: 1972 to Date

1. Swann v. Charlotte-Mecklenburg Board of Education

On June 29, 1970, the Supreme Court granted certiorari to a case which directly raised—for the first time—questions about the "how" of the massive desegregation preemptorily ordered in *Alexander* and *Carter*.[110] Should courts order racial balancing? Is widespread busing permissible? In *Swann*, Federal District Judge James McMillan of Charlotte, North Carolina, had used a racial-balancing concept in formulating a desegregation plan which required widespread busing in metropolitan Charlotte and surrounding Mecklenburg County.[111] The Fourth Circuit had reversed the busing portion of Judge McMillan's plan as being overly harsh.[112] When the Supreme Court decided to review Judge McMillan's case, waves of anticipation and dread spread throughout the lower federal court system in the South.

Chief Judge John R. Brown of the Fifth Circuit reacted with alacrity. In the only press release he has ever issued, the Chief Judge indicated that the Fifth Circuit would freeze all but the most essential desegregation activity in the circuit until it had received instructions from the Supreme Court in *Swann*. The great integration revolution sweeping the South since *Carter* was suddenly halted in place as the federal courts waited for a definitive statement from the Supreme Court.

The Supreme Court took nine suspense-filled months to issue its opinion —an unconscionably long delay for the same Court which had, in *Alexander* and *Carter,* ordered preemptory reversals of the Fifth Circuit for three and four-month delays. On April 20, 1971, the long wait ended.[113] The opinion satisfied no one, dismayed almost all parties involved in the desegregation struggle, and seemed to raise more questions than it answered. Certiorari had been granted to review two important issues raised by Supreme Court desegregation mandates: "the duties of school authorities and the scope of powers of federal courts. . . ."[114] The Court's unanimous holding in an opinion by Chief Justice Burger was stated as applying, however, *only* to school systems with a background of de jure segregation (school systems that prior to *Brown I* had been mandatorily segregated by law).[115]

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

111. 311 F. Supp. 265, 268 (W.D.N.C.), *rev'd in part,* 431 F.2d 138 (4th Cir. 1970), *district court opinion reinstated,* 402 U.S. 1 (1971).

112. Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 128, 147 (4th Cir. 1970).

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

114. *Id.* at 5.

115. This case and those argued with it arose in states having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown v. Board of Education* was all about. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school

The Chief Justice examined the facts of the *Swann* dispute: The Charlotte-Mecklenburg school system—the forty-third largest in the nation—included the city of Charlotte, North Carolina and all of surrounding Mecklenburg County, an area of 550 square miles. The 107 schools served 84,000 pupils, 71 per cent of whom were white, and 29 per cent black. Two-thirds of those black students attended just 21 schools which were either totally or more than 99 per cent Negro (as of June, 1969).[116] After the Supreme Court's decision in *Green,* but before *Alexander* and *Carter,* Judge McMillan had held "numerous hearings and received voluminous evidence,"[117] and had ordered the school board to come forward with a plan for both faculty and student desegregation. The school board, after vigiorous prodding, came forth with only a partially completed plan. In light of the board's failure to comply with the court's mandate, Judge McMillan had appointed Dr. John Finger, an expert in educational administration, to prepare a desegregation plan for the court. The "Finger plan," as finally presented, was extremely controversial in the method by which it dealt with the desegregation of junior and senior high schools, and it aroused heated local debate. On February 5, 1970, after the Supreme Court's decision to accelerate desegregation in *Alexander* and *Carter,* Judge McMillan had adopted the board plan as modified by Dr. Finger's plan for the junior and senior high schools.[118] The final plan had required that as many schools as practicable reflect the 71/29 per cent white/black ratio then existing in the district as a whole. To achieve this balance, the approved plan required extensive busing in the secondary schools and employed the technique of pairing and grouping elementary schools. Fearing that the pairing and grouping of elementary schools would place an unreasonable burden on the board and the system's pupils, the Fourth Circuit Court of Appeals had remanded the district court's decision for reconsideration.[119]

After reviewing the facts, Chief Justice Burger emphasized that the Supreme Court would not retreat from the established principle that state-imposed racial segregation in public schools denied equal protection of the laws. He reaffirmed *Brown I* and *Brown II* and pointedly reminded school authorities that they carried the primary responsibility for desegregation. The Chief Justice further stated that federal courts were to act only after school boards had defaulted, and when forced to intervene, the courts were to be guided by equitable principles.[120] As to the Supreme Court's role in

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authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once.

402 U.S. at 5-6.

116. 402 U.S. at 7.

117. *Id.*

118. 311 F. Supp. at 266-67.

119. 431 F.2d at 147.

120. 402 U.S. at 15-16.

desegregation, Chief Justice Burger stated: "The problems encountered by the district courts and courts of appeals make plain that [the Court] should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts."[121]

The Court identified the touchstone for its guidelines: "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."[122] The task of the district court was to balance individual and collective interests and to develop a remedy that repaired the denial of constitutional rights. The power of school boards in desegregation matters was plenary, while the power of federal courts was limited to correcting constitutional violations where they existed.[123]

The Court then proceeded to define "with more particularity"[124] the elements of an acceptable school desegregation plan. School authorities were only required to eliminate existing invidious racial distinctions. In addition to student assignment plans, existing policy and practices with regard to faculty, staff, transportation, extracurricular activities, and facilities were important indicia of a segregated system.[125] School authorities had an immediate and nondelegable duty to eliminate invidious racial distinctions in *all* of those areas. The Court only briefly discussed desegregation of transportation, staff, and activities; implementation of a desegregation plan in those areas was ostensibly simple. The Supreme Court also recognized that school construction and abandonment policies should not be allowed to "perpetuate or re-establish [a] dual system."[126]

The Supreme Court then gingerly broached the central issue: the problem of student assignment. Again specifically confining its attention to situations involving a prior history of de jure segregation,[127] the Court turned

121. 402 U.S. at 14.

122. 402 U.S. at 15.

123. The Chief Justice quickly disposed of objections to busing based on Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c (1970). He pointed out that language in the Civil Rights Act, purporting to prohibit busing to overcome racial imbalance, "was enacted not to limit but to define the role of the Federal Government in the implementation of the *Brown I* decision." 402 U.S. at 16. Chief Justice Burger said that courts retained all of their existing powers to enforce the equal protection clause of the fourteenth amendment. Furthermore, the legislative history of that section in Title IV indicated that Congress had been concerned only with de facto segregation and not de jure segregation. 402 U.S. at 17-18.

124. 402 U.S. at 18.

125. *Id. See* Green v. County School Bd., 391 U.S. 430 (1968).

126. 402 U.S. at 21.

127. We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present the question and we therefore do not decide it.

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concen-

its attention to the explosive question of the appropriateness of racial balancing. The Court held that racial balancing was *not* required by the Constitution:[128]

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

However, almost immediately, the high Court qualified that holding:[129]

> We see . . . that the use made [by Judge McMillan] of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. . . . As we said in *Green*, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful *starting point* in shaping a remedy to correct past constitutional violations. In sum, the *very limited use* made of mathematical ratios was within the equitable remedial discretion of the District Court.

Did this mean that every school must reflect the district-wide black/white ratio? The Court held that there was a *presumption* against one-race schools, but it refused to hold that the existence of one-race schools constituted a per se violation of the Constitution.[130]

The Supreme Court then authorized as a valid remedy the altering of attendance zones. The following weapons were within the arsenal of the lower federal courts: "gerrymandering of school districts . . . [and] pairing, 'clustering,' or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and the transfer of white students to formerly all-Negro schools."[131]

The last issue that the Court faced was the most troubling, at least from a political standpoint: the busing issue. The Court specifically approved busing as a remedial tool for desegregation.[132] It pointed out that bus transportation

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trations in some schools.
402 U.S. at 23.

128. 402 U.S. at 24.

129. 402 U.S. at 25 (emphasis added).

130. [T]he existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. . . . The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.
402 U.S. at 26.

131. 402 U.S. at 27. The Court continued:
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.
402 U.S. at 28.

132. 402 U.S. at 29.

had been an "integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school."[133] The Court noted that in Charlotte, where there had been impassioned protests against busing, the school board had bused children for years to maintain a dual system of education.[134] Judge McMillan's busing order in Charlotte was reasonable, although there might be limits beyond which busing orders would become unreasonable.[135]

The Court held, in summary, that the district court's order was not unreasonable but was both feasible and workable.[136] Then, in a strange conclusion to an already perplexing holding, the Court seemed to indicate that there was a way out of school desegregation problems:[137]

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems would then be "unitary" in the sense required by our decisions in *Green* and *Alexander*.
>
> . . . 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

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133. *Id.*

134. 402 U.S. at 29-30.

135. An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan. . . . It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. 402 U.S. at 30-31.

136. 402 U.S. at 31.

137. 402 U.S. at 31-32. Three companion school desegregation cases were decided by the Supreme Court the same day as *Swann*. In another Fifth Circuit case, Davis v. Board of School Comm'rs, 402 U.S. 33 (1971), the Supreme Court reversed the Fifth Circuit for failing to achieve a sufficient amount of desegregation in Mobile County, Alabama. The Fifth Circuit had approved a desegregation order that did not require the busing of students across a major highway which divided Mobile into district zones. Davis v. Board of School Comm'rs, 430 F.2d 883 (5th Cir.), *modified*, 430 F.2d 889 (5th Cir. 1970). The Supreme Court's reversal implicitly indicated that the Fifth Circuit should have ordered more busing to achieve a greater degree of desegregation. The *Davis* case, when read with *Swann*, gave proponents of busing substantial authority to insist that this remedy had been judicially endorsed. Both decisions added fire to the busing controversy that dominated the 1972 presidential primaries.

In a third case, McDaniel v. Barresi, 402 U.S. 39 (1971), the Supreme Court reversed a foolish Georgia Supreme Court holding, Barresi v. Browne, 226 Ga. 456, 175 S.E.2d 649 (1970), that a desegregation plan violated equal protection because it treated students differently because of their race. The Supreme Court tartly commented that in compliance with its duty to convert to a unitary system, the local board of education of Clarke County, Georgia had properly taken race into account in fixing attendance lines in order to achieve desegregation mandated by *Brown I* and *II*.

In a fourth case, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971), the Supreme Court held unconstitutional North Carolina's antibusing law, which had attempted to forbid assignment or transportation of any student on the basis of race or for the purpose of creating a racial balance. The Court held that the North Carolina statute was an attempt to prevent implementation of desegregation plans required by the fourteenth amendment and was thus unconstitutional.

and racial discrimination through official action is eliminated from the system.

Swann was to be the last of a long line of unanimous decisions by the Supreme Court in the school integration area. The decision was not innovative; it restated much of the development of prior desegregation law. The pressing question of whether the Constitution applied in the de facto segregated ghettos of the North and the West was not answered. Precise guidelines on the permissible extent of busing were avoided. While racial balancing was not constitutionally required, it was a permissible "starting point"—thus obscuring rather than solving that volatile issue. Lastly, the opinion tantalized the lower courts by indicating that they could get out of the school business once school systems were unitary, without defining when or how that would be determined.

Swann was an opinion for all litigants. It provided language readily adaptable to the position of almost any party in a desegregation battle. And the decision added to the woes of the over-burdened lower federal courts by stimulating further controversy in an area already saturated with litigation.[138] The long-awaited decree from Mount Olympus was instead an ambiguous, two-sided Delphic pronouncement raising crucial issues which have yet to be decided.

2. *Desegregation Outside the South: Denver and Detroit*

Notwithstanding the Fifth Circuit's innovative work in bringing Mexican-American children under the protective cloak of *Brown* and *Swann,*[139] and in casting aside the increasingly meaningless distinction between de facto and de jure segregation,[140] the focus of attention after *Swann* shifted away from the South and came to rest on the ghettos and barrios in the North and West. Denver and Detroit, while only two of the scores of northern cities brought to task under the banner of *Brown,* were to become the centerpieces for the Supreme Court's next, and most recent decisions with nationwide impact. Both cases raised the issue of the district court's power to mandate desegregation in areas within or without a city where no de jure segregation had been proved. In Denver the plaintiffs succeeded; in Detroit

138. The most common reaction of lower federal judges was frustration and confusion. In the Fifth Circuit where activity had been held up nine months awaiting a definitive decision there was not only confusion but lingering bitterness. Now composed of fifteen members, the Fifth Circuit found itself divided as to the meaning of *Swann*. Unable to give any more direction to its lower courts than the vague generalities of *Swann*, the Fifth Circuit continued its practice of reversing lower courts primarily on statistics showing insufficient racial mixing, simply appending to its opinion orders the cryptic comment that the reversal was "in light of *Swann v. Charlotte-Mecklenburg Board of Education.*" Many federal district court judges who had been hopeful of receiving comprehensive guidance became bitter not only toward the Supreme Court but also toward the Fifth Circuit.

139. *See* Cisneros v. Corpus Christi Independent School Dist., 467 F.2d (5th Cir. 1972).

140. *See id.;* United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972).

they failed, establishing the first major retreat by the Supreme Court in the desegregation area in the twenty years since *Brown*.

a. Denver

Since *Brown II* in 1955, desegregation had been exclusively a southern problem. Unsympathetic to a region that had compelled the separation of the races in public schools by force of law, the rest of the nation ignored the existence of de facto segregated schools in the ghettos of most of its large cities. However, after the Supreme Court in *Green* articulated the right of every child to obtain an integrated education and placed the duty on school boards to come forward with plans that promised realistically to integrate the public schools, most prescient observers realized that a decision day for the North and West could not long be postponed. The day arrived for Denver, Colorado, on June 21, 1973, when the Supreme Court issued its opinon in *Keyes v. School District No. 1.*[141]

In early 1969, the Denver School Board had adopted three resolutions designed to desegregate the schools in the predominantly black Park Hill area of their city. After a local election which produced a school board majority opposed to the three integration resolutions, the plan was scrapped. At that point, Negro plaintiffs filed suit. Initially the plaintiffs in *Keyes* had sought a limited goal; they sued only to desegregate the schools in Park Hill. However, upon achieving success in that endeavor,[142] they expanded their suit to secure desegregation of all of the schools in the Denver school district. The federal district court, however, denied further relief,[143] holding that the fact of deliberate segregation in Park Hill by past school board action—which the court considered to have been proven—did not prove that the school board had followed a similar segregated school policy for the *rest* of Denver where the segregated pattern was of de facto origin.[144] The district court held that the plaintiffs had failed to prove de jure segregation for the other areas of Denver—particularly the core city that they sought to desegregate. The Tenth Circuit affirmed the decision.[145]

141. 413 U.S. 189 (1973).

142. 303 F. Supp. 279 (D. Colo. 1969).

143. 313 F. Supp. 61, 69 (D. Colo. 1970).

144. 313 F. Supp. at 73.

145. Denver was to some extent a tri-ethnic community. The district court did treat "Hispano" students as a separate minority group; but the lack of a finding of de jure segregation in the rest of Denver was held sufficient to block relief as to both blacks and "Hispanos." 313 F. Supp. at 69-75. In an unusual gesture, the district court did find that the core city schools were inferior to other schools; and on the theory that the *Brown I* and *II* holdings applied only to de jure segregation and were not applicable to the core city's de facto segregation, the court breathed new life into *Plessy v. Ferguson's* separate but equal doctrine by ordering that substantially equal facilities be provided to core city students. *Id.* at 77-84. The Tenth Circuit affirmed the holding denying relief based on the de jure/de facto distinction, but reversed the district court's order requiring that better facilities be provided the center city schools. 445 F.2d 990 (10th Cir. 1971).

When certiorari was granted in *Keyes*,[146] most observers believed that the Supreme Court would grapple with the de jure/de facto distinction, provide more explicit guidelines on the extent to which busing could be employed as a remedy, and formulate policy on whether district-wide remedies were required when only portions of a district had been de jure segregated. In fact, the Supreme Court in *Keyes* resolved only one of those issues, the last.

Justice Brennan authored the majority opinion in *Keyes*. Chief Justice Burger concurred in the result; Justice Powell filed a lengthy, but compelling, opinion, concurring in part and dissenting in part; and Justice Rehnquist dissented. Justice White, who is from Denver, did not participate.

Justice Brennan's opinion began by distinguishing *Keyes* from earlier decisions such as *Swann* or *Green*: "[The Denver school] system has never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education."[147] However, the black and Hispano plaintiffs alleged that the local school board had effectively segregated the district by manipulating attendance zones, by selecting school sites which would separate the races, and by superimposing a neighborhood school policy on existing residential segregation.[148] The Supreme Court found that the plaintiffs had successfully established that the school board engaged in de jure segregative acts in the Park Hills area of Denver. The school board argued, however, that a finding of state-imposed segregation in only one part of a district—even a substantial part—could not support a finding that the entire district was a dual, segregated system.

Justice Brennan, in response to the school board's argument, stated simply: "We do not agree. We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of de jure segregation as to each and every school or each and every student within the school system."[149] Rather, Justice Brennan asserted, "common sense" led to the conclusion that where systematic segregation had been practiced in one part of the district, it had also been practiced in all other parts of the same district. The logic was inescapable: if a black school is maintained in one part of the district, neighboring schools would necessarily have a higher ratio of white students than they would have otherwise, and vice versa. The Court concluded by stating that "common sense dictates that racially inspired school board actions have an impact beyond the particular schools that are the subject of these actions."[150] On remand the district court in Denver was

146. 404 U.S. 1036 (1972).

147. 413 U.S. at 191.

148. *Id.*

149. 413 U.S. at 200.

150. 413 U.S. at 203. The Court judicially noticed various school board actions whose effects spread into other parts of the districts:

> First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating "feeder" schools on the basis of race has the

ordered to determine whether the de jure segregation in the Park Hill area did in fact have a reciprocal effect on the racial composition of other schools in the district. If it did, desegregation could be ordered for the entire district.

Justice Brennan presented the plaintiffs with an alternative route to proving that de jure segregation infected the entire district. The school board had argued that the plaintiffs must prove all of the elements of de jure segregation for the core city schools before the Court could grant a district-wide remedy; that is, the plaintiffs must prove "a current condition of segregation resulting from intentional state action directed . . . to the core city schools."[151] The fact that the core city schools were segregated could not be denied, but the plaintiffs had not shown any actual segregative *intent* on the part of the school board regarding those schools. Such a showing was not necessary, Justice Brennan concluded. Rather, when the plaintiffs were able to show that de jure segregation was practiced in one part of the district—in this case, the Park Hill area—segregative intent with respect to other parts of the same district could be *inferred.*[152] Such burden shifting was not "new or novel," the majority opinion continued, but was "merely a question of policy and fairness based on experience in . . . different situations."[153] And the

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reciprocal effect of keeping other nearby schools predominantly white. Similarly, the practice of building a school—such as the Barrett Elementary School in this case—to a certain size and in a certain location, "with conscious knowledge that it would be a segregated school," . . . has a substantial reciprocal effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.

413 U.S. at 201-02.

Interestingly, while the Court did not reject the de jure/de facto distinction, it cited as authority a case which did, United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972): "Infection at one school infects all schools. To take the most simple example, in a two school system, all blacks at one school means all or almost all whites at the other." *Id.* at 888.

Justice Brennan also quoted a passage from *Swann* which may be picked up by litigants who hope to prove that school boards themselves had been responsible for much of the residential segregation in the nation's cities:

> They [school authorities] must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

413 U.S. at 202.

151. 413 U.S. at 205-06.

152. 413 U.S. at 208.

153. 413 U.S. at 209, *quoting* 9 J. WIGMORE, EVIDENCE § 2486, at 275 (3d ed. 1940).

experience with desegregation warranted requiring local school authorities to explain "actions or conditions which appear to be racially motivated."[154] What was the nature of the school board's burden? The board must produce evidence sufficient to show that "segregative intent was not among the factors that motivated their actions" with respect to the core city schools.[155]

The plaintiffs, in summary, had two choices: (1) they could show that the board's segregative actions with respect to the Park Hill area reciprocally affected the racial composition of other schools in the district, including the core city schools; or (2) they could merely show intentionally segregative school board actions in a "meaningful portion" of the school district and the existence of segregation in other parts of the district, in which case the burden of proof would then shift to the school board. In defense the school board must show either (1) that their segregative actions in Park Hill did not "infect" the rest of the district; or (2) that, in fact, "segregative intent was not among the factors that motivated their actions" in the rest of the district. In either case, after the *Keyes* decision, plaintiffs were much closer to solving the problem of chronic center city school segregation in northern cities. Moreover, although the Court maintained the de jure/de facto distinction, it extended the concept of de jure segregation to a point where it was distinguishable from de facto segregation only by requiring an additional "showing of intent to segregate."[156] After *Keyes* it appeared that plaintiffs across the nation could more easily show that a myriad of governmental actions, both related and unrelated to education, were the actual cause of racial imbalance in their schools.

However, cracks in the previous unanimity of the Supreme Court in school desegregation cases were evident in the Denver case. Justice Powell, in an opinion concurring in part and dissenting in part, first attacked the majority's perpetuation of the de jure/de facto rationale and then worried about the disruptive effects of busing as a remedy, urging that the divisive tool of transportation be used sparingly.[157] Justice Douglas, who had joined the majority opinion, also filed a separate opinion agreeing with Justice Powell's condemnation of the continuation of the de jure/de facto distinction, em-

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154. 413 U.S. at 209.

155. 413 U.S. at 210. The Court rejected

> any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

413 U.S. at 210-11.

156. The Court stated: "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate." 413 U.S. at 208. A close reading of *Keys* reveals, however, that the "*purpose* or *intent* to segregate" need not be shown by proof of actual and specific declarations of segregative intent, but may be *inferred* from the various actions of the school board.

157. 413 U.S. at 217-53.

phasizing the futility of requiring that lower federal courts seek out evidence of school board "intent" before protecting constitutional rights.[158] In a dissent that seemed to hark back to the discarded *Briggs v. Elliott* distinction between desegregation and integration, Justice Rehnquist urged that a remedy was warranted only in those particular schools in Denver where de jure segregation had been proven.[159]

b. Detroit

The other recent, crucial school desegregation case outside the South involved the Detroit metropolitan area school districts. That Detroit decision, *Milliken v. Bradley*,[160] had been awaited with trepidation by most metropolitan area school boards of the North and West. However, when it was finally released on July 25, 1974, it caused rejoicing by those who opposed massive integration in large metropolitan areas and drew an anguished response from civil rights advocates.

The case arose after a plan for voluntary integration, adopted by the Detroit City School Board, was barred from implementation by a law passed by the Michigan legislature in 1970, Act 48.[161] Detroit school children and their parents subsequently went to federal court, seeking to enjoin enforcement of the new Michigan law and to implement the school board's voluntary integration plan. The district court, the late Judge Stephen J. Roth sitting, denied the request for a preliminary injunction,[162] but on appeal, the Sixth Circuit declared the state law null and void.[163] Then a complex series of legal events occurred. The district court ordered immediate implementation of a temporary plan.[164] Again, there was an appeal, but the Sixth Circuit upheld the decision and ordered the district court to proceed immediately to the merits of the case.[165]

Detroit did not have a history of statutory segregation. There was, however, a long history of public and private discrimination that, combined with other factors, had produced residential segregation. Detroit's neighborhood schools mirrored this residential racial imbalance. The plaintiffs in *Milliken* claimed, as had their counterparts in Denver, that imposition of school attendance zones over the existing segregated residential pattern had produced a dual school system. They cited the school board's policy in school construction, its approval of optional attendance zones, and other factors to urge that Detroit's school system was a de jure segregated system subject

158. 413 U.S. at 214-17.
159. 413 U.S. at 254-65.
160. 418 U.S. 717 (1974).
161. MICH. COMP. LAWS ANN. § 388.182 (Supp. 1974).
162. *See* 338 F. Supp. 582, 584 (E.D. Mich. 1971) (referring to the court's prior unreported opinion).
163. 433 F.2d 897 (6th Cir. 1970).
164. 338 F. Supp. at 584.
165. 438 F.2d 945, 947 (6th Cir. 1971).

to constitutional attack. Judge Roth agreed and found for the plaintiffs.[166] But instead of restricting his remedy to the Detroit city schools, Judge Roth found that heavy black concentrations doomed any intradistrict integration plan and ordered integration of the entire metropolitan area, holding that "[s]chool district lines are simply matters of political convenience and may not be used to deny constitutional rights."[167] Judge Roth ordered fifty-three suburban school districts in three counties surrounding the city to be joined with Detroit in order to accomplish an effective conversion to a unitary system.[168] The desegregation plan was based on fifteen clusters, each containing part of the Detroit system and two or more suburban districts.[169]

With visions of mass busing into and out of Detroit's violence-ridden ghettos, the defendants appealed immediately. The Sixth Circuit Court of Appeals, sitting en banc, held, however, that it was "within the equity powers of the District Court" to order an interdistrict remedy, even though the district court had received no evidence of de jure segregation in the suburban districts:[170]

> [A]ny less comprehensive . . . plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area.
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> . . . .
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> . . . [T]he only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan.[171]

Again the case was appealed, this time to the Supreme Court. On the last day of the 1973 term, after months of waiting, the Court handed down a five-to-four decision,[172] reversing the court of appeals and deciding that an interdistrict, metropolitan remedial order—at least in this case—was an unjustified expansion of the remedial power of the district court.[173]

Chief Justice Burger attempted to make it clear that the result in *Milliken* did not signal an abrogation of the principles of *Brown I*. He stated that the case involved only an interpretation of *Brown II*, simply clarifying the reach of the equity powers of the district courts in the area of school desegregation.

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166. 338 F. Supp. at 592-94.

167. Judge Roth's March 28, 1972 determination that Detroit-only desegregation plans were unacceptable is unpublished.

168. 345 F. Supp. 914 (E.D. Mich. 1972).

169. 418 U.S. at 733.

170. 484 F.2d 215, 250 (6th Cir. 1973).

171. 484 F.2d at 245-49.

172. 418 U.S. 717 (1974).

173. A definitive decision regarding the scope of metropolitan remedies was rendered necessary because of the Supreme Court's failure to resolve that issue in the Richmond case, Bradley v. School Bd. 338 F. Supp. 67 (E.D. Va.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973).

He then cited the *Swann* opinion as authority[174] for the "basic principle" that "the nature of the violation determines the scope of the remedy."[175]

Before proceeding to the application of this standard, the Court felt it necessary to deal with the district court's order, ignoring established school district lines as "simply matters of political convenience."[176] "[T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country."[177]

Chief Justice Burger stressed that "local control" is a deeply rooted American tradition and, that "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process."[178] He indicated that earlier language to the same effect in *Rodriguez*[179]—the school finance case—was more than just an idle rumination.

What, then, would justify a district court order ignoring school district lines? The answer to that question is the heart of the Supreme Court's decision in *Milliken*: the delineation of the remedial powers of the district court. After repeating the "controlling principle" that "the scope of the remedy is determined by the nature and extent of the constitutional violation," the Court stated:[180]

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. . . . In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

Under the facts of the Detroit case, the majority opinion thus held there could be no interdistrict remedy. The district court had not received evidence on segregation in the suburban districts and there was no evidence to show that the segregation in the Detroit city schools had been caused by actions originating outside of the district.[181] While brief and to the point, the significance of the majority opinion in *Milliken* can hardly be minimized. The black children of Detroit's core city were locked, constitutionally, into an

174. 402 U.S. at 15-16.
175. 418 U.S. at 738.
176. 418 U.S. at 739.
177. 418 U.S. at 741.
178. 418 U.S. at 741-42.
179. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 50 (1973).
180. 418 U.S. at 744-45.
181. 418 U.S. at 745.

increasingly black, de jure segregated school district, with no real hope of escape into the better financed, predominantly white schools of the affluent suburbs.[182]

The *Milliken* holding split the Supreme Court badly; four of the Warren Court justices—Douglas, Brennan, White, and Marshall—dissented and Justice Stewart, the other Warren Court member, in a concurring opinion, attempted to narrowly confine the Detroit holding to its facts.[183] Justice White, joined by Justices Douglas, Brennan, and Marshall, argued in his dissenting opinion that the State of Michigan was responsible for the segregative acts of the Detroit school district, that the plan of Judge Roth was administratively feasible, that only a multidistrict plan was likely to provide any effective integration, and that the outlying Detroit school districts were subdivisions of the State of Michigan whose boundaries could be ignored in devising a plan to rectify constitutional violations.[184]

In a separate dissent, Justice Douglas argued that *Milliken,* read with *San Antonio Independent School District v. Rodriquez*[185]—which basically held that poorer school districts had to "pay their own way"[186]—meant that not only would core city black children be left in segregated schools but also that they would be left in inferior schools: "So far as equal protection is concerned we are now in a dramatic retreat from the 7-to-1 decision in 1896 [*Plessy v. Ferguson*] that blacks could be segregated in public facilities, provided they received equal treatment."[187]

In addition, Justices Douglas, Brennan, and White joined Justice Marshall, who had been counsel for the plaintiffs before the Supreme Court in *Brown I* and *II,* in a strongly worded dissent. It began:[188]

> After 20 years of small, often difficult steps toward that great end, the Court today takes a giant step backwards. Notwithstanding a record showing widespread and pervasive racial segregation in the educational system provided by the State of Michigan for children in Detroit, this Court holds that the District Court was powerless to require the State to remedy its constitutional violation in any meaningful fashion. Ironically purporting to base its result on the principle that the scope of the remedy in a desegregation case should be determined by the nature and the extent of the constitutional violation, the Court's answer is to provide no remedy at all for the violation proved in this case, thereby guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past.

182. The decision may not be surprising, however, when viewed against the backdrop of *Keyes,* the Denver case, indicating the difficulties faced by plaintiffs in obtaining district-wide remedy when they have only proven the existence of segregative intent in part of the district. *See* note 150 *supra* and accompanying text.

183. 418 U.S. at 753-57.

184. 418 U.S. at 762, 767-81.

185. 411 U.S. 1 (1973).

186. 418 U.S. at 760.

187. 418 U.S. at 761.

188. 418 U.S. at 782.

Justice Marshall emphasized that restricting the remedy in the *Milliken* case to the Detroit city schools would not result in desegregation of those schools.[189] He argued that the State of Michigan, not just the Detroit school district, was responsible for the segregation in Detroit's schools, and therefore school district lines drawn by the state should not block an effective remedy.[190] Justice Marshall gloomily concluded:[191]

> 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.

CONCLUSION

The federal judiciary's desegregation efforts in the South are now largely complete. Appeals from district court school desegregation orders have dropped dramatically and most whites appear to have accepted the integration of their public schools, albeit reluctantly. Contemporary accounts indicate that there are very few differences now in race relations between such towns as Jackson, Mississippi, and Dayton, Ohio, except that, because of massive desegregation orders, Jackson's schools are probably now more integrated than Dayton's.[192] The school litigation that continues to trouble the federal courts in the South is confined primarily to methods of implementing existing desegregation orders in the region's large metropolitan areas. Most rural school districts, on the other hand, have ended their litigation, only reporting back periodically to district courts.

Controversy still rages over methods of implementing desegregation, however. Massive busing, particularly in large urban areas, provokes as much acrimony in the North as it ever did in the South. The major difference between the South and other regions may be that in the South the back of resistance has been broken, while elsewhere—because of the lack of federal judicial activity attributable in large part to the de jure/de facto distinction —resistance is still strong and unbowed. The recent violence in Pontiac, Michigan and Boston, Massachusetts is but the tip of the iceberg.

Moreover, following the recent Detroit case, *Milliken v. Bradley,* the out-

189. 418 U.S. at 783-84.

190. 418 U.S. at 786, 790-98.

191. 418 U.S. at 814-15.

192. Justice Powell, concurring in Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), states, for example:

> According to the 1971 Department of Health, Education, and Welfare (HEW) estimate, 43.9% of Negro pupils attended majority white schools in the South as opposed to only 27.8% who attended such schools in the North and West. Fifty-seven percent of all Negro pupils in the North and West attend schools with over 80% minority population as opposed to 32.2% who do so in the South.

Id. at 218 n.3.

look for the North and West is not bright for further desegregation efforts. Although it was carefully limited to its facts, *Milliken* nevertheless may become an effective deterrent to integration of northern ghettos and western barrios—just at a time when it appeared that the school integration effort was moving from the South to the rest of the nation.[193] Only time and further Supreme Court rulings will tell if *Milliken* is to mark the end of the second era of reconstruction, just as the Compromise of 1877 marked the end of the first reconstruction period. However, the parallels do seem striking.

What have been the results of the twenty-year effort to desegregate the public schools? Have the changes been worth the costs? Has there been a lasting transformation in the social fabric of southern life? Have educational opportunities for minorities actually been equalized? Has federal judicial desegregation of the public schools of the South been but a great experiment destined for eventual failure? It is too early to answer any such questions definitively. And the answers are becoming more elusive—and perhaps illusory—since the fragmentation of the civil rights movement in the late sixties. While some black groups—notably the NAACP—have continued to support integration efforts and have urged massive, metropolitan busing plans, others are now voicing many of the same complaints as whites about public school problems.[194] Negro parent groups have opposed busing their children out of neighborhood schools to achieve integration, complaining bitterly that the burden of busing has been one-sided, falling primarily on black children.[195] Other local black groups have supported neighborhood schools in order to maintain black control over all-black schools.[196]

Perhaps the *Milliken* holding is a simple recognition that the problem of providing equal educational opportunities to all defies a legal solution based solely on a race theory of equal protection. As long as "blackness" and poverty are inescapably linked, and as long as minority plaintiffs cannot themselves agree on the proper remedy, perhaps the twenty-year effort to implement the promise of *Brown* has, in fact, reached its logical conclusion. The problems of school segregation in the cities may be so intractible that one tool—the constitutional command of equal educational opportunity for all races articulated in *Brown*—cannot and should not be expected to solve alone the problem of segregated education. Until new tools are found and implemented—a negative income tax or experimentation with John Rawls' theories of distributive justice[197] or some other, yet unborn,

193. *But cf.* Newburg Area Council v. Board of Educ. of Jefferson County, 510 F.2d 1358 (6th Cir. 1974) (consolidated with Haycraft v. Board of Educ. of Louisville).

194. *See* Read, *The Southern Negro Fights for Quality Education,* N.Y. Times, Oct. 13, 1969, at 52, col. 4.

195. *See, e.g.*, Norwalk CORE v. Norwalk Bd. of Educ., 423 F.2d 121 (2d Cir. 1970).

196. *See* Oliver v. Donovan, 293 F. Supp. 958 (E.D.N.Y. 1968). *See also* CONFRONTATION AT OCEAN HILL-BROWNSVILLE (M. Berube & M. Gittell eds. 1969).

197. *See* J. RAWLS, A THEORY OF JUSTICE (1971). It is possible that, while the equal protection

idea—it is at least arguable that the limits have been reached in using the Constitution alone as a means for attaining school desegregation.

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clause of the fourteenth amendment may have been pushed as far as it will go in providing equal educational opportunity to black children as such, new and more neutral equal protection theories will develop based on economics and the problem of the poor generally—rather than being based on race alone.