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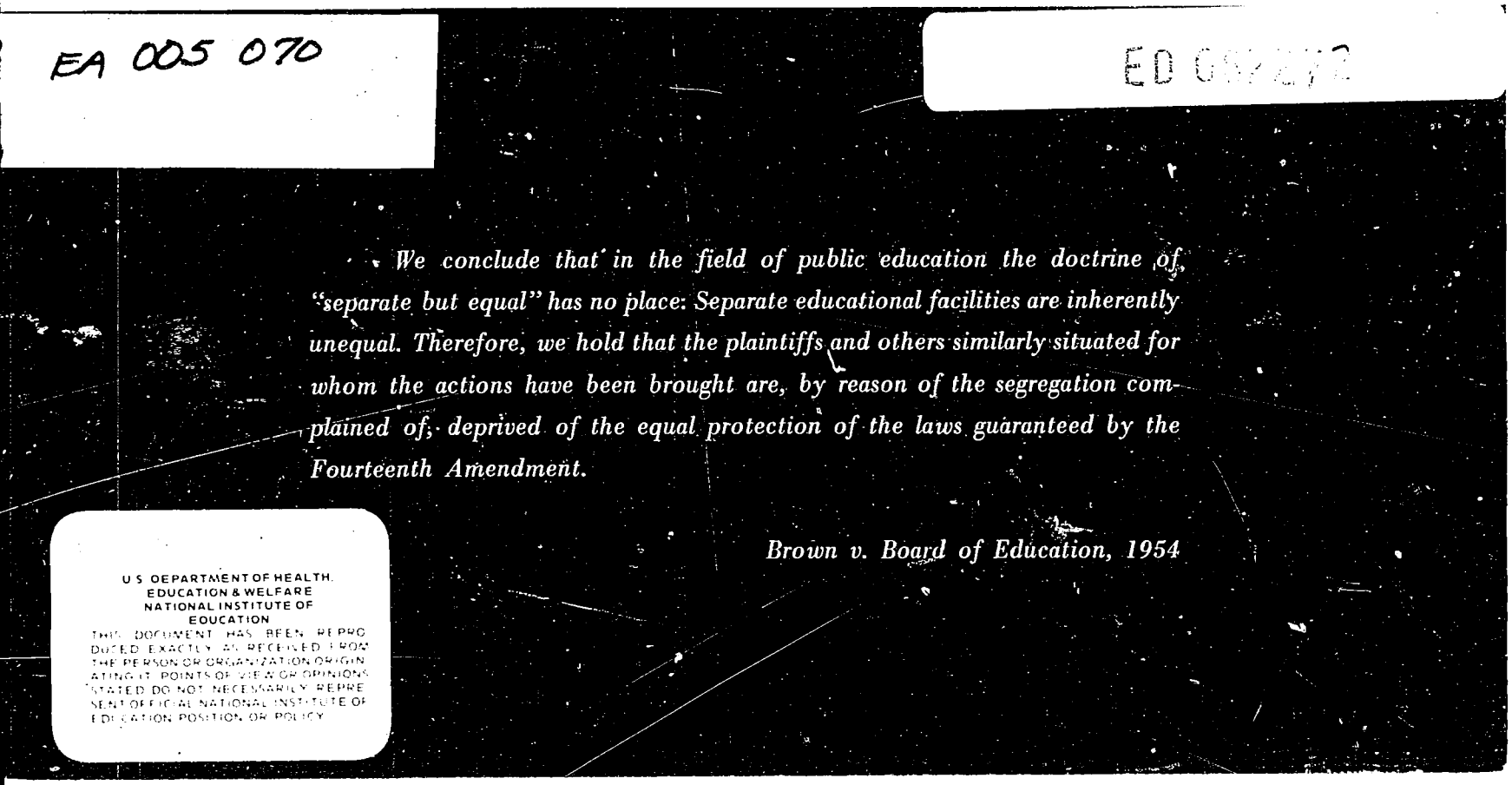
ABSTRACT

In this monograph, the author presents a history of court decisions that outlawed public school segregation, reviews these decisions, and examines the problems of decision implementation that followed. The texts of some of the opinions delivered by the various courts are presented. Various relevant concepts are also set out in the context of their legal/historical settings, such as tracking, separation-within-the-school, de facto and de jure segregation, zoning, busing, freedom of choice, transferring, grade-a-year and option plans, faculty desegregation, and affirmative powers. The landmark Brown vs Board of Education of Topeka decision is studied with regard to impact, along with other historical segregation rulings. Regarding the problems of court segregation ruling implementation, the author discusses delays, the role of private and neighborhood schools, zoning, and assignment within schools. Judicial restraints and the courts' occasional "get tough" rulings concerning zoning strategies are examined. The author also reviews the courts' relationship to the freedom of choice plans, presenting early decisions, opinions of the plans, and the development of further court "tests." The court's review and eventual disallowance of the "grade-a-year" desegregation plans and the construction and pairing of schools are also discussed in some detail. (Editor/EA)

Public School Desegregation: Legal Issues and Judicial Decisions

H. C. Hudgins, Jr.
with
Research Assistance of
Marshall B. Gorodetzer

No. 3 in the NOLPE Monograph
Series on Legal Aspects
of School Administration



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Public School Desegregation: Legal Issues and Judical Decisions

by

H. C. Hudgins, Jr.

with the research assistance of
Marshall B. Gorodetzer

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DISCLAIMER

ERIC/CEM State-of-the-Knowledge Series, Number Twenty-four
NOLPE SECOND MONOGRAPH SERIES ON LEGAL ASPECTS OF SCHOOL ADMINISTRATION, Number Three

FOREWORD

This monograph by H. C. Hudgins, Jr., is one of a series of state-of-the-knowledge papers on the legal aspects of school administration. The papers were prepared through a cooperative arrangement between the ERIC Clearinghouse on Educational Management and the National Organization on Legal Problems of Education (NOLPE). Under this arrangement, the Clearinghouse provided the guidelines for the organization of the papers, commissioned the authors, and edited the papers for content and style. NOLPE selected the topics and authors for the papers and is publishing them as part of a monograph series.

"One of the two most important decisions" reached during his term on the Supreme Court is how former Chief Justice Earl Warren evaluates *Brown v. Board of Education of Topeka*. Dr. Hudgins skillfully guides his readers through the flood of litigation that followed the Supreme Court's landmark 1954 decision. He reviews in detail numerous court decisions dealing with the problem of implementing the desegregation order.

Dr. Hudgins is an associate professor of education at Temple University, specializing in school law and secondary school administration. He has served as a teacher and principal in the public schools of North Carolina, and from 1966 to 1969 was Director of the Piedmont Association for School Studies and Services at the University of North Carolina at Greensboro. He holds a bachelor's degree from High Point College, a master's degree from the University of North Carolina, and a doctor's degree from Duke University.

Among Dr. Hudgins' publications is a book, *The Warren Court and Public Schools*, published in 1970. He has also contributed to school policies for the National School Boards Association.

Dr. Hudgins was assisted in this project by Marshall B. Gorodetzer, a doctoral student in educational administration at Temple University. A native of Philadelphia, Mr. Gorodetzer graduated from Penn State University in 1967 with a major in business education. He earned the Master of Education degree from Temple University in 1971 and subsequently enrolled in the Ed.D. program. He is currently in his fifth year of teaching at the Taggart Elementary School, Philadelphia.

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Executive Secretary
NOLPE

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The ERIC Clearinghouse on Educational Management, one of several such units in the system, was established at the University of Oregon in 1966. The Clearinghouse and its companion units process research reports and journal articles for announcement in ERIC's index and abstract bulletins.

Research reports are announced in *Research in Education (RIE)*, available in many libraries and by subscription for $38 a year from the United States Government Printing Office, Washington, D.C. 20402.

Journal articles are announced in *Current Index to Journals in Education*. *CIJE* is also available in many libraries and can be ordered for $44 a year from Macmillan Information, 866 Third Avenue, Room 1126, New York, New York 10022.

Besides processing documents and journal articles, the Clearinghouse prepares bibliographies, literature reviews, monographs, and other interpretive research studies on topics in its educational area.

NOLPE

The National Organization on Legal Problems of Education (NOLPE) was organized in 1954 to provide an avenue for the study of school law problems. NOLPE does not take official positions on any policy questions, does not lobby either for or against any position on school law questions, nor does it attempt in other ways to influence the direction of legislative policy with respect to public education. Rather it is a forum through which individuals interested in school law can study the legal issues involved in the operation of schools.

The membership of NOLPE represents a wide variety of viewpoints—school board attorneys, professors of educational administration, professors of law, state officials, local school administrators, executives and legal counsel for education-related organizations.

Other publications of NOLPE include the NOLPE SCHOOL LAW REPORTER, NOLPE NOTES, NOLPE SCHOOL LAW JOURNAL, YEARBOOK OF SCHOOL LAW, and the ANNUAL CONVENTION REPORT.

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I. THE PROBLEM IN PERSPECTIVE

Few court decisions have so profoundly affected people and institutions as the one outlawing public school segregation. In an interview with the *New York Times*, former Chief Justice Earl Warren reflected that the *Brown* decision was one of the two most important decisions reached during his term on the Supreme Court.

Upsetting legal precedent, changing the lives of millions of school children, and altering school administration in hundreds of school districts, this one decision created almost as many problems as it solved. In the nineteen years since the opinion was handed down, there have been a multitude of court cases growing out of the original *Brown* decision, and the problem is still unresolved. Whereas segregation was originally thought to be a problem unique to the South, it has been found to be just as pervasive in northern school districts.

This report is written to put public school desegregation in proper focus by raising issues surrounding the problem and by relating how the courts have disposed of these issues. Unresolved tangential questions will also be raised.

Before turning to cases bearing on school desegregation it should be noted that, at one time, public school segregation had a legal justification. Although separation of the races had been practiced for many years before then, it was in 1896 with *Plessy v. Ferguson*[1] that the Supreme Court of the United States first looked with favor on keeping schools segregated. The dicta of the court's decision stated:

> The most common instance of this (laws requiring separation of the races) is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.[2]

The United States Supreme Court heard surprisingly few cases challenging this position; thus it had the effect of law. The Court seemed reluctant to overturn any form of state action. Two cases are illustrative.

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1. Plessy v. Ferguson, 163 U.S. 537 (1896).
2. *Id.* at 544.

An 1899 case, *Cumming v. Richmond County*,[3] was concerned with an all-black school that closed for lack of funds while an all-white school remained open. Plaintiffs sought to force the closing of the white school. The Court would not grant the remedy and, instead, suggested that the complainants had sought the wrong relief. No consideration was given to the denial of equal protection.

Twenty-eight years later, in *Gong Lum v. Rice*,[4] the Court refused to overturn a state statute designed to classify children as "white" and "non-white." When a Chinese girl was required to attend an all-black school, she objected and, through her parents, brought suit. The state statute was upheld without even being questioned.

The first inroads against legally sanctioned segregation were made at the graduate school level. To a great extent, these inroads were accomplished because of the carefully laid plans of the National Association for the Advancement of Colored People (NAACP). The NAACP assumed that desegregation would be more easily accomplished in a graduate school than elsewhere and that a law school would be a suitable target. Furthermore, it decided that a suit brought against a school outside the deep South would have the best chance of winning a favorable ruling.

Based on these criteria, Missouri offered a natural target. Instead of admitting blacks to its law school, Missouri paid the tuition of Missouri blacks enrolled in out-of-state law schools. In 1938 Lloyd Gaines applied to the University of Missouri Law School but was rejected because he was black. The United States Supreme Court ordered the University of Missouri to either admit him or build a law school for him and others of his race.[5] This decision represents the beginning of the breakdown of the separation doctrine in the schools.

Three more graduate school cases resulted in favorable decisions for blacks. A similar situation prevailed ten years later in Oklahoma when the Court held that the plaintiff, Sipuel, was entitled to enroll in law school at the University of Oklahoma.[6]

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3. Cumming v. Board of Education of Richmond County, 175 U.S. 528 (1899).
4. Gong Lum v. Rice, 275 U.S. 78 (1927).
5. Missouri ex rel. Gaines v. Canada, Registrar of the University of Missouri, 305 U.S. 337 (1938).
6. Sipuel v. Board of Regents of the University of Oklahoma, 332 U.S. 631 (1948).

Following Sipuel's matriculation at Oklahoma, the University of Oklahoma imposed segregation policies within the institution. It separated students by race in the classrooms, library, and dining halls. The 1950 *McLaurin* decision[7] held that this was unconstitutional.

The same day the Court handed down the *McLaurin* decision it also handed down the *Sweatt* decision,[8] holding that separate law schools for blacks and whites are unequal. The Court determined that such tangible factors as number of students, number and quality of professors, and number of books in the library as well as such intangible factors as opportunity to engage in debate, discussion, and practice favored the white schools to such an extent that the schools were not equal.

After these favorable rulings in cases at the graduate school level, prointegration forces began to focus their energies on the public schools. The litigation that began in the early 1950s culminated in 1954 with the *Brown v. Board of Education* decision.[9] Actually, the *Brown* decision was an aggregate of four separate cases that arose in Kansas,[10] South Carolina,[11] Virginia,[12] and Delaware.[13] These four states were among twenty-one that had constitutional or statutory provisions requiring or permitting segregation.[14]

The Supreme Court judged that it was impossible to ascertain the intention of the framers of the Constitution with respect to education. Reargument before the Court left the matter undecided. However, based on the evidence they had, the justices declared unanimously that "separate but equal . . . facilities are inherently unequal."

In a separate opinion on May 17, 1954, the Supreme Court held that segregation of schools in the District of Columbia was likewise

7. McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950).
8. Sweatt v. Painter, 339 U.S. 629 (1950).
9. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
10. Brown v. Board of Education of Topeka, 98 F. Supp. 797 (1951).
11. Briggs v. Elliott, 103 F. Supp. 920 (1952).
12. Davis v. County School Board of Prince Edward County, 103 F. Supp. 337 (1952).
13. Gebhart v. Belton, 91 A. 2d 137 (1952)
14. The following states required segregation, either by constitutional or statutory law, as of 1954: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Under the terms of permissive legislation, segregation was allowed in Arizona, Kansas, New Mexico, and Wyoming.

unconstitutional.[15] This decision was based on the due process clause of the Fifth Amendment, which was applicable to Congress.

Acknowledging that the *Brown* decision would have a monumental effect on schools, indeed on the whole fabric of society, the Court delayed in fashioning the implementation decree. In the meantime, the justices invited the attorneys general of the affected states to offer plans for desegregating the schools.

The Court's second *Brown* decision,[16] in 1955, set forth the implementation plan. The unanimous opinion directed that local school officials should assume the major responsibility for desegregating the schools. These officials were to be guided by "good faith compliance" in considering a number of local problems: (1) condition of the school plant, (2) transportation system, (3) personnel, (4) school district and attendance area boundaries, and (5) local laws.[17] Local federal district courts were to retain original jurisdiction and to act on any charges of noncompliance.

The constitutional standard for the pace at which desegregation was to take place was "with all deliberate speed."

In the two *Brown* decisions the Supreme Court declared unconstitutional a social system as well as an educational system. The Court's earlier endorsement of separate but equal schools in *Plessy* had given way to the doctrine that separate but equal facilities are, in fact, unequal. Without directly overturning *Plessy*, *Brown* stated that "[a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected."[18]

Having announced the edict and having directed local school personnel to begin desegregating schools in the affected states, the Court waited for the task to begin. In general, however, the response to the Court's edict was massive resistance to the two decisions. The justices were collectively and individually villified, and a number of persons demanded that the justices either resign or be impeached. The halls of Congress and state legislatures rang

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15. Bolling v. Sharpe, 347 U.S. 497 (1954).
16. Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).
17. Id. at 300.
18. Brown, supra note 9, at 494.

with abusive language heaped on the Court. Opponents maintained that the decisions were based on sociology, not the law.

Amid the outcry, local boards of education were still faced with the burden of effecting compliance. Boards desiring to implement desegregation encountered heated opposition from state legislators who began to devise means of circumventing the decision. Several states did away with compulsory attendance laws, while others considered setting up a system of private schools on a tuition basis. Many state legislatures interpreted "with all deliberate speed" to mean no speed, or no speed until the courts forced action.

A similar situation prevailed at the local school district level. Citizens and influential politicians united to resist any change in pupil assignments.

Despite opposition at the state and local level, a number of local boards of education did begin to act in good faith. Their efforts received little publicity, however, until the time that desegregation became effective in a district.

II. THE PROBLEM OF IMPLEMENTATION

Delays

For several years after the *Brown* doctrine was handed down, school boards took, or were given, considerable time to effectuate plans for desegregating their school systems. The mandate—"with all deliberate speed"—in itself suggested no specific number of years within which the transition from a biracial to a unitary school system had to be started or completed.

Just what did "with all deliberate speed" mean? At first, lower courts generally agreed that the phrase was intended to give school boards time to consider the multitude of problems involved in desegregating the schools and to decide which plan or combination of plans would be most appropriate. As it turned out, the reluctance of lower courts to direct school boards to speed up the desegregation process served to intensify delays. Nearly fifteen years passed before the courts began to interpret "all deliberate speed" as "now."

The early mood of the courts is reflected in a 1959 decision handed down by Judge Layton of the District Court of Delaware. Judge Layton noted a number of problems—building capacity, construction costs, social upheaval, transportation patterns, administrative changes, and so forth—that would call for less than full and immediate desegregation. He concluded:

> To summarize, a careful examination of all the material factors involved in effecting an orderly desegregation of the school system convinces me that any plan calling for the immediate desegregation of all the State schools of of any large segment of the system, such as the high schools, or the first six grades would be wholly impossible.[19]

Judge Layton foresaw, however, the potential evil of granting delays. He observed that "the power of delay, resting in unfriendly hands, is tantamount to the power to defer interminably or to defeat altogether."[20]

Three years later the Court of Appeals for the Second Circuit took a firmer position when it required the school board in New Rochelle, New York, to desegregate faster.[21] The court's decision came after findings of fact indicated that the district had deliberately created and maintained a racially segregated school system.

In *Griffin*, a 1964 decision, Justice Hugo Black observed that "[t]he time for mere 'deliberate speed' has run out."[22] A similar position was taken by the Court of Appeals for the Eighth Circuit when it ruled in 1965 that a desegregation plan did not work fast enough. The court determined that the plan, requiring a three-year transition period in which to completely desegregate a school system, did not move with the required "deliberate speed." It was pointed out that some students enrolled in school at that time would not have the opportunity to attend an integrated school.[23]

Despite these examples, the trend in the early and middle sixties was not always toward increasing the speed at which integration was being accomplished. Three cases from 1963 and 1964

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19. Evans v. Buchanan, 172 F. Supp. 508 (1959).
20. *Id.* at 516.
21. Taylor v. Board of Education of the City School District of the City of New Rochelle, 294 F. 2d 36 (1962).
22. Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 234 (1964).
23. Kemp v. Beasley, 352 F. 2d 14 (1965).

illustrate a softer approach than that taken by Black and the eighth circuit court. In *Stell*,[24] the Court of Appeals for the Fifth Circuit ordered the district court to issue an injunction to the local board of education. The injunction included the following:

> . . . and they are hereby restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed.[25]

In *Watson*,[26] a case growing out of the desegregation of municipal parks and other city-owned or city-operated recreational facilities, Judge Goldberg made an important generalization:

> Given the extended time which has elapsed, it is far from clear that the mandate of the second Brown decision requiring that desegregation proceed "with all deliberate speed" would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have seemed sufficient.[27]

A timetable for interpretation was also deliberated in *Nesbit v. Statesville*.[28] Because he felt that the school board was conscientiously doing its duty, Judge Craven did not determine that desegregation was proceeding too slowly. Instead, he commented:

> Inordinate delay, or even deliberate speed can no longer be justified but neither have we come so far that a one year delay for a quarter of the pupils and a 2 year delay for another may be characterized as unreasonable.[29]

The court then directed the school board to get started with its desegregation program.

After Justice Black's dictum in *Griffin*, a more concerted effort was made to speed up the desegregation process. In the 1965 *Price*[30] decision, Judge Tuttle observed that the standards in desegregation constantly change and that school boards should be cognizant of these changes. He then ordered full desegregation of the schools to be completed within two years.

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24. Stell v. Savannah-Chatham County Board of Education, 318 F. 2d 425 (1963).
25. Id. at 428.
26. Watson v. City of Memphis, 83 S. Ct. 1314 (1963).
27. Id. at 1317.
28. Nesbit v. Statesville City Board of Education, 232 F. Supp. 288 (1964).
29. Id. at 293.
30. Price v. Denison Independent School District Board of Education, 348 F.2d 1010 (1965).

In *Green v. New Kent County* [31] Justice Brennan ordered the school board to make a prompt and reasonable start "at the earliest practicable date" to dismantle the state-imposed dual school system. This stand was taken after the Court observed that some districts had taken ten and eleven years to make a "prompt and reasonable start."

Adams [32] quoted the timetable of *Green* with favor and directed that school boards "have the affirmative duty to come forward with a plan that promises realistically to work and promises realistically to work now." However, the court stopped short of being dogmatic in its direction "to take forthwith such steps toward full desegregation *as may be practicable*." [33]

On appeal to the same court, the judges were less explicit:

> To this timely end the board should take appropriate action which, without unduly disrupting the administration of the school system, will end the racial isolation of Carver High School and erase the operation and image of Carver as an all-Negro school.[34]

The growing impatience with school board delays was indicated in an opinion from the Court of Appeals for the Fifth Circuit. On July 3, 1969, the court directed the Hinds County, Mississippi, school board to develop an acceptable desegregation plan by August 11, 1969, and to avoid any devious plans for circumventing the spirit and the letter of the law. If the board failed to respond, the court said, the United States Office of Education would draw up a plan. [35]

Also in 1969, the same circuit court ordered the Jackson School District to "*desegregate now*" [emphasis added]. The court recognized that the district had taken too long to effectively desegregate the school system and that no further delays were warranted. Desegregation was ordered to take place in two phases, in February and in the fall of 1970.[36] The order followed by a month the United States Supreme Court decision that "all

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31. Green v. County School Board of New Kent County, Virginia, 391 U.S. 430 (1968). The Court reached similar conclusions the same day in two related cases, Raney v. Board of Education of the Gould School District, 391 U.S. 443 (1968), and Monroe v. Board of Commissioners of the City of Jackson, 391 U.S. 450 (1968.

32. Adams v. Matthews, 403 F.2d 181 (1968).

33. *Id.* at 188.

34. *Id.* at 190.

35. United States v. Hinds County School Board, 417 F. 2d 852 (1969).

36. Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (1969).

deliberate speed" had run out. In a *per curiam* opinion, the Court stated that

> continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.[37]

The above was the first school desegregation opinion of the Supreme Court since Warren Burger replaced Earl Warren as chief justice, and it foreshadowed the continuing resolve of the Court to bring about immediate desegregation.

This resolve was soon affirmed in a December 1969 brief order to the West Feliciana Parish School District. The Supreme Court ordered the school board to "take such preliminary steps as may be necessary to prepare for complete student desegregation by February 1, 1970."[38]

Further, "the respondent school boards are directed to take no steps which are inconsistent with or which delay, a schedule to implement on or before February 1, 1970, desegregation plans submitted by the Department of Health, Education, and Welfare."[39] A motion for emergency consideration of granting an injunctive order was denied by the Supreme Court.[40]

These and other cases indicate the recent position of the courts that delays in desegregating the schools are unacceptable. Rather, it is the duty of local school officials to take appropriate affirmative action in creating a unitary school system.

Private Schools

Ever since the Supreme Court of the United States held that private schools may exist[41] the right to establish a nonpublic school has not been questioned. Recently, however, the issue has been reexamined in a different context. Whereas *Pierce* treated the right of the private school to exist, more recently courts have

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37. Alexander v. Holmes County Board of Education, 396 U.S. 19, 20 (1969).
38. Carter v. West Feliciana Parish School Board, 90 S. Ct. 467 (1969).
39. Id. at 469.
40. Id. at 496.
41. Pierce v. Society of Sisters (and Hill Military Academy), 268 U.S. 510 (1925).

examined the *purpose* of the school. Specifically, the courts have questioned the status of schools whose purpose, or effect, is to perpetuate segregation.

Soon after the *Brown* decisions, a case was heard testing the legality of a private school operating for "poor white male orphans."[42] Girard College, created in 1831 by the will of Stephen Girard, had never accepted black students. Following *Brown*, however, two black pupils petitioned for admission and were refused.

When the case reached the United States Supreme Court, the justices, in a *per curiam* decision, ruled that Girard College was not a totally private school. The Court decided that the school was included under the Fourteenth Amendment umbrella because its trustees were appointed by the city of Philadelphia. The method of selecting trustees was subsequently altered; however, Girard did enroll its first black students in the fall of 1968.

Of greater constitutional import was the question whether states could circumvent *Brown* by either closing public schools or establishing a system of private schools. Several states considered such alternatives. Arkansas enacted legislation empowering the governor to close any or all schools in a district and, in such an event, to call a special election to ascertain the voters' preference for segregated or desgregated schools. A complementary act authorized the use of state funds to help parents meet the costs of any nonprofit private school accredited by the state.

The United States Supreme Court reaffirmed its earlier holding that

> State support of segregated schools through any arrangement, management, funds or property cannot be squared with the [Fourteenth] Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws.[43]

Again, the judge quoted with approval from the *Brown* decision:

> In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by

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42. Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, 353 U.S. 230 (1957).
43. Cooper et al., Members of the Board of Directors of the Little Rock, Arkansas, Independent School District v. Aaron, 358 U.S. 1, 19 (1958).

state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."[44]

Louisiana tried a different method. It attempted to sell or lease public school buildings to private persons who would then establish a program of private education. The effect was, naturally, to continue segregated public education. The *per curiam* opinion in *Hall v. St. Helena*[45] was a stinging denunciation of the state's plot. The judges held the plan violated the Fourteenth Amendment's equal protection clause on two counts: it was designed to withstand segregation, and it was discriminatory in its application since different parishes would be treated differently.

The court reminded the state legislature that acts generally lawful become unlawful when enforced to achieve an unlawful end.

The court's rebuke was reflected in the opinion:

> One of the purposes of the Constitution of the United States was to protect minorities from the occasional tyranny of majorities.
>
> This is not the moment in history for a state to experiment with ignorance. When it does, it must expect close scrutiny of the experiment.[46]

Virginia had a plan somewhat different from Louisiana's. The state's law had been amended and refined a number of times after being attacked in the courts. The instant case arose in Surry County where in 1954 the local school board had adopted a resolution upholding the principle of segregation but committing itself to equalizing the separate schools.

In 1963, seven black students were assigned to a previously all-white school. As an aftermath of bitter opposition from white parents, a private school corporation—Surry County Educational Foundation—was established. The teachers at the integrated school resigned and were employed by the private school. The state and county cooperated to provide scholarship and transportation grants to pupils.

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44. *Id.* at 17.
45. Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (1961).
46. *Id.* at 659.

When the case reached the courts, the federal district court reaffirmed the right of private schools to exist.[47] The court noted, however, that this case raised a question different from that of *Pierce:* here the schools were being created to perpetuate racial segregation. Furthermore, the state was at the center of the discrimination because it had closed the white public schools and replaced them with all-white private schools that were supported directly or indirectly by state and county funds. The plan worked to deny black students equal protection under the law, even though the all-black schools in the county remained open.

The court enjoined the school board from paying tuition grants and giving tax credits on the ground that "those grants and tax credits have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia."

Virginia's massive resistance to desegregation reached a peak in the Prince Edward County case.[48] In 1956 the county board of supervisors decided not to levy taxes or appropriate funds for desegregated schools. As a result, beginning in 1959 the Prince Edward Foundation, a private corporation, operated the county's schools. Subsequently, for a five-year period, no blacks in the county attended school, though the Prince Edward Foundation did offer the blacks a school for their race.

At first the private schools were supported entirely by nonstate funds. Beginning in 1960, however, the state gave tuition grants of up to $150 per pupil. Locally, the county board of supervisors provided $100 for each pupil and granted tax deductions for contributions to the school.

Justice Black, speaking for the United States Supreme Court, stated:

> Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.[49]

47. Pettaway v. County School Board of Surry County, 230 F. Supp. 480 (1964.)
48. Griffin, supra note 22.
49. Id. at 231.

The courts have made it clear that private schools are legal. However, the establishment of a private school may well violate the law if the school's purpose is perpetuation of segregation. The state cannot use its force to circumvent the Supreme Court decree that each state must take positive action in desegregating its schools.

Assignment within a School

Forced to desegregate schools and faced with opposition from parents, pupils, and faculty, local school officials sought a means of easing the transition to integration. A number of school administrators felt that the goals of education could best be achieved by selective assignments of students (determining which students will be assigned to specific classes) within a school. In due time this practice was questioned by the courts.

The 1950 *McLaurin v. Oklahoma State Regents*[50] case mentioned earlier set a precedent at the higher education level. After a great deal of effort McLaurin was admitted to the University of Oklahoma to pursue a doctoral program. Once admitted, however, he was segregated from the rest of the students by being assigned to specific seats in classrooms and to a specific table in the dining hall. Earlier he had also been given a designated seat in the library, but that restriction was removed after the plaintiff filed suit.

Chief Justice Vinson handed down the decision that overturned segregation within the school:

> [A]ppellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and in general to learn his profession.[51]

The chief justice realized that when he limited his opinion to colleges and professional and graduate schools, the holding would not resolve the social facets of desegregation.

> The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices, and choices. But at the very least the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merit.[52]

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50. McLaurin v. Oklahoma State Regents for Higher Education, 70 S. Ct. 851 (1950).
51. *Id.* at 853.
52. *Id.* at 854.

A widely publicized court decision affecting student assignment within a school was handed down in 1967 by Judge Wright while he was sitting as a trial judge by designation for the federal district court of the District of Columbia.[53] The case itself dealt with a multiplicity of issues including the assignment of pupils. The school system operated a so-called track system in which pupils were assigned to classes according to scores on ability and aptitude tests. The plaintiffs charged that the tests discriminated against disadvantaged children; that is, children assigned to the lower tracks had very little chance of advancing to higher tracks because remedial instruction was absent and the curriculum was limited. They charged further that children in the lower tracks were stigmatized and unable to obtain an education comparable to that of children in other tracks.

The court ordered an end to the track system in the District of Columbia. Judge Wright did indicate, however, that schools may offer different kinds of education to different kinds of students. The result of this may or may not differ from tracking, finally. What is crucial is whether the school's plan results in more segregation of students.

A somewhat different situation obtained in Tangipahoa Parish, Louisiana, where the schools were desegregated but not the classrooms. In other words, there were all-white and all-black classes. The separation-within-the-school plan was the school board's method of compliance and, according to the superintendent, met the court's test of desegregation. The court disagreed:

> A school composed of white classes and black classes is not desegregated. Students must be assigned to schools in a racially nondiscriminatory fashion and no classes may be racially identifiable.[54]

The court added that "this does not of course prevent the classification of students by any criteria that are not racially discriminatory."[55]

Singleton v. Jackson[56] was a consolidation of a number of cases and treated a number of issues. Regarding pupil placement, the

53. Hobson v. Hansen, 269 F. Supp. 401 (1967).
54. Moore v. Tangipahoa Parish School Board, 304 F. Supp. 244 (1969).
55. *Id.* at 249.
56. Singleton, *supra* note 36.

court holding was that students cannot be assigned on the basis of achievement test scores until a unitary system has been established.

Jackson v. Marvell[57] also involved a number of questions relative to desegregation, one of them being assignments within a school. Although the plaintiffs in the case had, in effect, accepted the school board's desegregation plan, they had been unaware that the local superintendent had discretely notified parents that, where possible, students would remain with the same teachers they had before the desegregation order. The effect of this strategy was to keep the races separate within the school.

The appeals court held that the district court's decision was in error.

> We hold the court [district] fell into sanctioning the district's ingenious effort to circumvent the plain meaning of our decision. It is settled doctrine that segregation of the races in classrooms constitutes invidious discrimination in violation of the Fourteenth Amendment to the Constitution.[58]

That same year, 1970, the Court of Appeals for the Fifth Circuit heard a similar case in which allegedly desegregated schools remained segregated by class.[59] When the desegregation plan went into effect, all-white classes with white teachers remained intact and all-black classes with black teachers were transferred into the white schools. The court ordered classes within the school to be integrated and directed that the dual system be dismantled. The *per curiam* opinion stated: "We think that it was manifestly clear that the decisions of the Supreme Court and this court required the elimination of not only segregated schools, but also segregated classes within the school."[60]

Neighborhood Schools

Traditionally, school buildings have been located in the center of a population cluster. Often persons living in the population cluster, the school's attendance area, identify with the school because it is the one institution that binds a majority of the

57. Jackson v. Marvell School District No. 22, 425 F.2d 211 (1970).
58. *Id.* at 212.
59. Johnson v. Jackson Parish School Board, 423 F.2d 1055 (1970).
60. *Id.* at 1056.

residents. In such cases a school is usually referred to as a neighborhood school, in that it serves people in the area immediately surrounding it. This holds true particularly with elementary schools.

The community surrounding a neighborhood school often has distinguishing population characteristics; for instance, it may be composed of persons of only one race. On occasion, when pupil assignments have reflected the racial composition of a neighborhood to the extent that schools have remained segregated, the courts have been asked to rule on the legitimacy of the neighborhood school.

There is evidence that in the beginning the courts preferred not to face the issue. *Clemons*,[61] a 1956 case, is an example. The Court of Appeals for the Sixth Circuit gave the district court license to permit more delay in desegregating the Hillsboro schools. One of the appeals judges, Judge Allen, clearly indicated his desire to give the school board more direction in its desegregation plan; however, he observed that Judges Stewart and Miller did not concur on the relief to be granted. The agreement reached by all three was to refer the case back to the district court while granting that court wide discretion in which to frame a decree.

Since *Clemons*, other courts have faced the neighborhood school issue more squarely but not with any uniformity of opinion. Two cases from 1964 illustrate one direction the courts have taken. In both cases the courts upheld the concept of neighborhood schools while modifying the manner in which the concept was applied in specific situations.

In *Blocker v. Board*,[62] plaintiffs sought an injunction prohibiting the board of education of Manhasset, New York, from continuing a policy of alleged segregation in the elementary schools. Within the district there were three elementary schools having a total enrollment of 1,340. By schools the racial composition was 10 white and 156 black; 600 white; and 574 white. Thus only one school, which was geographically apart from the other two schools, contained students of both races. The district court stated:

61. Clemons v. Board of Education of Hillsboro, 228 F.2d 853 (1956).
62. Blocker v. Board of Education of Manhasset, 226 F. Supp. 208 (1964).

> The defendants deny that the continuance of the rigid neighborhood school policy, permitting no transfers under any circumstances, discriminates against the Negro elementary school student population. They hark back to the original, innocent delineation of the Valley area in 19[illegible] as justification for its continuance. They contend that, because the original delineation of the lines of the area was not racially motivated, it must follow that its continuance is beyond the scrutiny of the Fourteenth Amendment; in other words, what they are doing in the 1960's must be tested in the light of what they or their predecessors did in 1929.[63]

Judge Zavatt then spoke out strongly against the district's application of the neighborhood school concept, holding that it violated the equal protection clause of the Fourteenth Amendment.

Aware of impending suits, Judge Zavatt pointed out the court's position on the neighborhood school: "The court does not hold that the neighborhood school policy per se is unconstitutional; it does hold that this policy is not immutable."[64]

In upholding what was in essence the desegregation plan of the Kansas City board of education, the Court of Appeals for the Tenth Circuit defended the neighborhood school policy.[65] The only part of the board's plan not meeting with court approval was its transfer policy.

The outcome of the board's plan was that certain elementary schools were of one race, a junior high school and a senior high school were virtually all-black, and faculties were black in black schools and white in white schools. Judge Hill pointed out, however, that previously all-white schools had been integrated and that since 1955 many blacks had been attending previously all-white schools.

Junior high school boundary lines were changed. The superintendent testified that the change was made to equalize the student load in the two buildings; the board concurred that the change was made totally without racial consideration.

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63. *Id.* at 226.
64. *Id.* at 230.
65. Downs v. Board of Education of Kansas City, 336 F.2d 988 (1964).

Judge Hill supported the board's position and concluded:

> [T]he decisions in *Brown* and the many cases following it do not require a school board to destroy or abandon a school system, developed on the neighborhood school plan, even though it results in a racial imbalance in the schools, where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation. [66]

A different challenge to the neighborhood school was offered in *Olson*. [67] In this case the courts held that the New York commissioner of education had the authority to redraw certain elementary attendance areas in order to eliminate racial imbalance.

The district operated three elementary schools that were 91 percent, 21 percent, and 18 percent black. In upholding the action taken by the commissioner, the district court held that

> The test for arbitrariness in relation to the educational policies of New York is not necessarily the same as the test for arbitrariness in determining whether there has been a violation of the Fourteenth Amendment. [68]

Addabbo [69] and *Steinberg* [70] came close to saying that the school board must redraw attendance lines in order to balance the *de facto* segregated New York school system involved in both cases. The cases held that it is within the school board's authority to reassign students outside their immediate neighborhood area. In the former case the board of education plan calling for the pairing of schools brought opposition from parents who feared the demise of neighborhood schools. Judge Beldock indicated that "The issue before the court is not whether the Board of Education must or is constitutionally required to act, but rather whether the Board of Education may be prohibited from acting." [71]

Similarly in *Steinberg*, Judge Holtzman held that the plan requiring certain children to attend schools outside their neighborhood was not illegal even though based on racial consideration.

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66. *Id.* at 998.
67. Olson v. Board of Education of Union Free School District No. 12, Malverne, New York, 250 F. Supp. 1000 (1966).
68. *Id.* at 1010.
69. Addabbo v. Donovan, 256 N.Y.S.2d 178 (1965).
70. Steinberg v. Donovan, 257 N.Y.S.2d 306 (1965).
71. Addabbo, *supra* note 69, at 183.

A slightly different situation occurred in *Fuller*.[72] White parents alleged that a modification of the neighborhood attendance boundaries would result in constitutional discrimination against them. The district court disagreed on this count as well as on the contention that taxpayers' money was being spent for an invalid purpose.

Two neighborhood school cases that have drawn much attention and been frequently cited are *Taylor*[73] (1961) and *Bell*[74] (1963). The former originated in New Rochelle, New York, and the latter in Gary, Indiana.

Taylor developed against a background of segregation based on gerrymandered school districts. Specifically, the case arose in opposition to a desegregation plan that continued segregation under the guise of maintaining neighborhood schools. In condemning the plan, the court could

> see no basis to draw a distinction, legal or moral, between segregation established by the formality of dual system of education as in Brown, and that created by gerrymandering of school district lines and transferring of white children as in the instant case.[75]

The following year *Taylor* was before the Court of Appeals for the Second Circuit.[76] The circuit court upheld the district court's decision, pointing out that since 1944 the school board had allowed no transfers under a neighborhood school policy. Both courts recognized that "race was made the basis for school districting with the purpose and effect of producing a substantially segregated school."[77]

A different factual situation occurred in *Bell*. The court held that school officials had not purposely or deliberately drawn school boundary lines to segregate the races, though the school district attendance plan was based on the neighborhood school. Here the court viewed the problem as being segregated housing, not segregated schools. This situation was premature for the courts to consider in 1963.

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72. Fuller v. Volk, 230 F. Supp. 25 (1964).
73. Taylor v. Board of Education of the City School District of the City of New Rochelle, 191 F. Supp. 181 (1961).
74. Bell v. School Board of the City of Gary, 213 F. Supp. 819 (1963).
75. Taylor, supra note 73, at 192.
76. Taylor, supra note 21.
77. *Id.* at 827.

A distinction was made between *Bell* and *Taylor:*

> The facts here are entirely different than in the Taylor case . . . . and in the Court's opinion the decision in Taylor does not apply because of lack of intent or purpose on the part of the defendant here to segregate the races in different schools.[78]

Judge Beamer stopped short, however, of requiring that school districts assume the initiative in redrawing attendance lines.

> I have seen nothing in the many cases dealing with the segregation problem which leads me to believe that the law requires that a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, must be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools by Negroes and whites.[79]

> These instructions [*Brown* 1955] clearly indicate that the Supreme Court intended that the desegregation policy was to be carried out within the framework of "school districts and attendance areas."[80]

Other cases have followed and supported *Bell* in its strong plea for the preservation of the neighborhood school.

In *Swann v. Charlotte-Mecklenburg*,[81] Judge Craven also upheld the neighborhood school plan. He ruled that in adopting a desegregation plan a school board is not required to gerrymander for the purpose of racial mixing.

> The question before this court, even within its equitable jurisdiction, is *not* what is best for all concerned but simply what are the plaintiffs entitled to have as a matter of constitutional law. What *can* be done in a school district is different from what *must* be done.[82]

The Charlotte-Mecklenburg plan provided that children would be assigned to schools by "geographical zones" in 99 of the 109 attendance areas in the district. Attendance areas were essentially—though not entirely—based on proximity to the schools. Any child could, however, freely transfer to any school of his choice.

The ten schools exempt from the zoning plan were all-black. Their exemption stemmed from the fact that ten new schools were being built to replace the old structures.

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78. Bell, *supra* note 74, at 828.
79. *Id.* at 829.
80. *Id.* at 830.
81. Swann v. Charlotte-Mecklenburg Board of Education, 243 F. Supp. 667 (1965).
82. *Id.* at 668.

In treating the legality of the neighborhood attendance plan, Judge Craven stated:

> The question is not whether zones can be gerrymandered for the assumed good purpose of racial mixing but whether gerrymandering occurred for the unconstitutional purposes of preventing the mixing of the races.
>
> Thus far it has not been held unconstitutional to assign children to a school on the basis of their residences in a cohesive and contiguous geographical area.[83]

The United States Supreme Court overturned Judge Craven's decision in its ruling of April 20, 1971.[84] With respect to the neighborhood school plan, the Court recognized:

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.[85]

Prior to the Supreme Court's holding, lower courts were loath to rule that the neighborhood school concept was without constitutional merits. For instance, in the 1965 *Gilliam*[86] case, Judge Haynsworth held that "[t]he constitution does not require the abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools."[87] Haynsworth held that the boundaries the school board used in making assignments were in accordance with natural geographic features and were not grounded on racial factors.

In 1966 an Ohio statute permitting neighborhood schools was challenged in *Deal*.[88] The Court of Appeals for the Sixth Circuit upheld the district court's decision that the school board involved had not intentionally created racial imbalance in the schools. It observed that the neighborhood school concept does not share the arbitrary, invidious characteristics of a racially restrictive system.

83. *Id.* at 670.
84. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).
85. *Id.* at 28.
86. Gilliam v. School Board of the City of Hopewell, 345 F. 2d 325 (1965).
87. *Id.* at 328.
88. Deal v. Cincinnati Board of Education, 369 F.2d 55 (1966).

Also in 1966, Judge Hannay held that the neighborhood school plan of Houston, Texas, was valid. He held: "It is clear that the neighborhood school system is based upon a host of reasonable and compelling practices." [89] Hannay ruled out the application of *Taylor* to this situation on the grounds that the Houston school board had been acting in good faith.

Zoning

Closely associated with the neighborhood school question is the matter of zoning. Under the terms of local board of education policy, attendance areas (zones) are drawn and children living within those areas are assigned to a designated school.

Zoning plans have two major purposes. One is essentially administrative—facilitating the assignment of children to schools according to a plan that is most desirable for the school system. Such a plan usually considers the proximity of a population to a school, the size of the population to be served, and the availability of transportation.

The other purpose of zoning may be more devious. It can involve designing attendance areas to avoid desegregation; that is, drawing boundaries that include as many persons of one race as possible. It is for this reason that the courts have been forced to consider the legality of zoning procedures. The cases treated here reflect the courts' two periods of thought: the first involving judicial restraint and the more recent "get-tough" policy.

Judicial Restraint

The early position of the courts is reflected in three decisions, each of which avoided meeting the question directly. It was very clear that the courts preferred not to determine whether geographic zones for pupil placement were constitutionally permissible under the equal protection clause.

In *Clemons v. Board*, [90] a 1956 decision, the school board sought to justify its desegregation stance on the basis of a zoning system. The Court of Appeals for the Sixth Circuit, though it recognized

89. Broussard v. Houston Independent School District, 262 F. Supp. 266 (1966).
90. Clemons, *supra* note 61.

obvious discrimination based on residential zoning, nonetheless equivocated and referred the matter back to the district court.

In *Avery* [91] (1957), the Court of Appeals for the Fifth Circuit upheld the district court in refusing to order that black children be allowed to attend the school nearest their residence. The facts indicated that the school system was totally segregated except for fewer than two dozen blacks who attended an integrated school at the nearby air force base. Again, however, the courts were not disposed to upset zoning patterns.

A more positive action on the part of another school board resulted in the redrawing of attendance zones so that, as nearly as possible, children attended the school closest their home. In *Fuller v. Volk*, [92] the district court upheld this plan in spite of challenges by whites that it was discrimination in reverse.

Cases decided in the late 1960s reflected a slight change in the courts. Whereas early decisions indicated that the courts preferred to avoid taking a position on zoning, the later decisions seemed to take a position, though a moderate one. The tenor of the decisions suggested to the schools that a defensible zoning plan might provide a method for achieving school desegregation. Three 1965 cases illustrate the range of positions the courts took on zoning litigation.

In *Wheeler v. Durham* [93] the Court of Appeals for the Fourth Circuit overturned a zone assignment plan because the zones were gerrymandered along racial lines. Under the plan, first-grade students were assigned to schools according to an attendance area map. A transfer system was to be initiated, with requests being honored until the maximum size in each class was reached. Other elementary school students were to be assigned to schools they had previously attended. Junior high school students would be assigned according to a new attendance area map. And secondary school students would be assigned to the school they had been attending.

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91. Avery v. Wichita Falls Independent School District, 241 F.2d 230 (1957).
92. Fuller, *supra* note 72.
93. Wheeler v. Durham City Board of Education, 346 F.2d 768 (1965).

In the second 1965 case, *Swann v. Charlotte-Mecklenburg*[94] (which was later heard by the U.S. Supreme Court in 1971), Judge Craven held that a school board is not required to gerrymander for the assumed good purpose of racial mixing.[95] According to the school board plan, students in 99 of the district's 109 schools would be assigned according to geographical zones, though any child in any of the 109 schools might freely transfer to another school of his choice.

The ten schools excepted from geographic zoning were all-black. Students in these schools were to be reassigned until ten new schools could be constructed to replace the older buildings.

Judge Craven upheld the plan and treated the question of gerrymandered zoning:

> The question is not whether zones can be gerrymandered for the assumed good purpose of racial mixing but whether gerrymandering occurred for the unconstitutional purpose of preventing the mixing of the races.
>
> Thus far it has not been held unconstitutional to assign children to a school on the basis of their residences in a cohesive and contiguous geographical area.[96]

In reaching this decision the court accepted the school board's testimony that the zones were determined on the basis of school locations and housing patterns and that this was done without regard to race.

Judge Haynsworth rendered the third decision under consideration here.[97] He upheld the district court's finding that the contested zoning boundaries were made in accordance with natural geographic features, rather than racial features. He stated:

> In approving a geographic zoning plan, indeed, any other plan for the assignment of pupils, a District Court has a large measure of discretion in imposing such conditions or exceptions as fairness and justice seem to require.[98]

By 1966 the trend began to shift toward reorganization of attendance zones as school districts either took affirmative action

94. Swann, supra note 81.

95. See the brief treatment of Swann in the section on neighborhood schools (pages 20 and 21). Part of the text of that decision is reproduced in both sections because the topics are similar and the court's statement is applicable to both problems (neighborhood schools and zoning).

96. Swann, supra note 81, at 670.

97. Gilliam, supra note 86.

98. *Id. at 328.*

or were given greater direction by the courts. In *Olson v. Board,*[99] a reorganization of attendance zones by the New York commissioner of education was upheld. The court held that the commissioner's determination to redraw the zone lines for the elementary schools in order to eliminate racial imbalance was not constitutionally arbitrary.

The courts' growing desire to see that school systems were desegregated is reflected in *Adams v. Matthews.*[100] Here the courts stated that the acceptable desegregation plan is one that works. The case was remanded to the district court with highest priority and with the suggestion that assignment based on geographic attendance zones be considered. The district courts were to "take forthwith such steps toward full desegregation *as may be practicable.*"[101]

A New Orleans assignment plan approved in 1969 eliminated six all-black schools, provided that no school would be predominately black, and indicated that only two schools would be expected to have a majority of blacks.[102] Although the plan included continuation of two all-white schools, the court accepted this because it resulted from residential housing patterns, not from discrimination per se. The overall plan of assigning students to neighborhood schools was upheld.

"Get Tough" Policy

Beginning in 1969 and continuing to the present, the courts have taken a firmer stance favoring rezoning as a desegregation device. Judges have begun to look beyond a zoning plan itself to ascertain if it will work.

Cato v. Parham[103] is illustrative of the degree to which courts have begun to become involved in ascertaining if a plan will actually result in desegregation. *Cato* arose in Arkansas when black parents objected to a 1969-70 desegregation plan, contending that the proposal, based on residential attendance zones, would not in fact integrate the schools.

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99. Olson, *supra* note 67.
100. Adams, *supra* note 32.
101. *Id.* at 188.
102. Smith v. St Tammany Parish School Board, 302 F. Supp. 106 (1969).
103. Cato v. Parham, 297 F. Supp. 403 (1969).

The major natural boundary in the school district was a highway. On either side of the highway and approximately one mile apart were two school complexes that included grades one through twelve. The district also had one elementary school that was not connected to either school complex. The population west of the highway was mostly white; the population east of the highway was mostly black. The school board's plan was to use the highway to divide the district into two attendance zones. Students outside the two major zones were to attend the separate elementary school for grades one through five and the white complex on the west side of the highway after that. As a result of this plan one complex would be 94.2 percent black, while the other would be 81.6 percent white.

In refusing to accept the plan, the district court determined that the schools were not really desegregated and observed that the use of a zoning plan was the board's choice, not that of the court.

Black petitioners urged that the school complexes house students according to grade divisions; that is, one complex house elementary students, the other secondary. The petitioners suggested that the isolated third building should house special education students. The superintendent countered by pleading that funds necessary to effect the conversion were not available. The court found the superintendent's point legally indefensible and ordered that a new plan be presented to the court within five weeks.

The new plan provided for a single senior high school on the previously all-white campus but did not provide for any other attendance shifts. Although the senior high portion of the plan was approved, the balance was not.

The next plan [104] for assigning junior high and elementary students used railroad tracks that ran parallel and east of the highway as the major zoning boundary. Pupils living east of the railroad tracks would attend the predominately black school and pupils living west of the highway would attend the predominately white school. Those living between the highway and the railroad tracks could choose which school to attend.

104. Cato v. Parham. 302 F. Supp. 129 (1969).

When it saw that this plan would increase the black enrollment at the predominately white school to 71 percent but not materially affect the racial percentage at the other school, the court disallowed the proposal.

The court suggested an alternative plan in which all junior high students (grades seven through nine) would be assigned to the predominately white school. The court did, however, allow the school board to postpone making this change because of financial difficulties.

The court also determined that the district's elementary schools could not be desegregated by redesigning attendance zones. It ordered that 200 pupils from the white school be transported to the predominately black school. The exact system or formula for determining who these students would be was left to the board of education. Otherwise, the board was directed to look beyond the 1969-70 school year and devise a permanent plan for desegregating the elementary schools.

Another Arkansas case [105] also reflected the "get tough" attitude of the courts. The North Little Rock school district's plan to assign junior and senior high school students according to geographic zones was approved by the court. The court found that the zones were laid out according to natural boundaries, school locations, and pupil residencies.

The district's zoning plan for twenty elementary schools, however, was disallowed because it did not produce desegregation even though it did provide free choice in transfers. In its place, the court recommended a different zoning plan with provision for majority-to-minority transfer. The school board was directed to submit an amended plan within approximately two weeks.

The amended plan provided for attendance zones that would produce ten all-white schools, one all-black school, and substantial desegregation in only one of the remaining nine schools. The court would not accept this plan, [106] because it clearly did not integrate

105. Graves v. Board of Education of the North Little Rock, Arkansas, School District, 299 F. Supp. 843 (1969).

106. Graves v. Board of Education of the North Little Rock, Arkansas, School District, 302 F. Supp. 136 (1969).

the schools. The court did hold, however, that not every school in a school system had to be integrated. Since complete integration could be achieved only through mass busing and since the school system had no buses—the city had very few—busing did not seem to be the answer. The court then allowed the district to maintain its original elementary attendance zones for another year.

A Clarksdale, Mississippi, zoning plan drawn up in good faith according to natural barriers was overturned.[107] The plan was such that no student would have to cross a railroad track to get to school. The Court of Appeals for the Fifth Circuit overturned the plan because it did not achieve its purpose of desegrating the schools. The court ruled that the school board's neutral position on desegregation was not enough; the board must take corrective action to achieve a unitary, nonracial school system. The school board was directed to consider several remedies, among them a redrawing of attendance zones.

In 1970 the fifth circuit court handed down another decision involving zoning. This case grew out of an Indianola, Mississippi,[108] desegregation plan that was on appeal by both the school board and the federal government. In the plan approved by the district court, the city was divided into two geographic zones. These two zones, however, were based on residential population patterns that reflected the distribution of the races within the city. Outside the city a free-choice system was in effect. Under this plan, no child had attended an integrated school during the 1968-69 school year.

Despite the board's claims that it had considered such factors as safety, distance to be traveled, and maximum utilization of facilities in constructing its zones, the circuit court disallowed the plan on the grounds that it failed to desegregate the schools. Although the court did not order a specific plan, it did remand the case to the district court with directions to the school board to formulate a workable plan.

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107. Henry v. Clarksdale Municipal Separate School District, 409 F.2d 682 (1969).
108. United States v. Indianola Municipal Separate School District, 410 F.2d 626 (1969).

Also in 1970, the fifth circuit court overturned another desegregation plan—that of the Bessemer, Alabama, school system.[109] Even though the Department of Health, Education, and Welfare had approved the plan whereby school attendance was to be based on geographic zones, the court disallowed it. Because the plan had not desegregated the schools, the court ordered a different plan and suggested that the school board consider pairing.

As recently as 1971 the Supreme Court of the United States was still deciding the legality of a zoning system. The *Davis* case involved Mobile County, Alabama,[110] which embraces 1,248 square miles. In 1969, the school system had 73,500 pupils in 91 schools, 42 percent of whom were black.

As the case appeared before the Supreme Court, the district was under order from an appellate court to change the racial composition of seven all-black junior and senior high schools that would result from the county's desegregation plan. The county was also under order to reduce the number of its all-black elementary schools. The elementary schools were to be desegregated through pairing, rezoning, and adjusting grade structures within the predominately black attendance areas.

Without precisely overturning the decision of the appellate court, Chief Justice Burger, speaking for the Supreme Court, stated:

> As we have held, "neighborhood school zoning" whether based on home to school district or on unified geographic zones is not the only constitutionally permissible remedy; nor is it *per se* adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation . . . . The measure of any desegregation plan is its effectiveness.[111]

As the *Davis* decision makes clear, the courts are currently saying that the test of a desegregation plan is its effectiveness. Zoning may be used if it results in the dismantling of a dual school system. If zoning does not achieve this purpose, then an alternative means should be sought.

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109. Brown v. Board of Education of the City of Bessemer, 432 F.2d 21 (1970).
110. Davis v. Board of School Commissioners of Mobile County, 91 S. Ct. 1289 (1971).
111. *Id.* at 1292.

On the same day the Supreme Court handed down the *Davis* decision, it made greater impact with the *Swann* opinion.[112] Although *Swann* is concerned primarily with transportation of students, in attempting to resolve that question the Court also considered four problem areas of student assignment, including attendance zones. The Court's position as it spoke through Chief Justice Burger was:

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.
>
> No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.
>
> We hold that the pairing and grouping of non-contiguous school zones is a permissible tool . . . . Maps do not tell the whole story since non-contiguous school zones may be more accessible to each other in terms of the critical travel time, because of traffic patterns and good highways, than schools geographically closer together. Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations.[113]

Freedom of Choice

Another method of pupil assignment adopted by numerous boards of education is the freedom-of-choice plan. Although the specifics of the plan may vary, two elements are usually present: (1) allowing a child to designate the school he wishes to attend, and (2) allowing transfers from one school to another.

112. Swann, supra note 84.
113. *Id.* at 28.

On the surface it would seem that a choice plan would meet the court's requirement that local school officials act in good faith. However, soon after some school boards adopted such plans, various parties began to question the legality of some practices associated with the scheme.

Among the questions raised were the following: (1) What criteria are followed in determining if a student will be allowed to attend a school different from the one he attended the previous year? (2) What effect might economic reprisals have on persons electing to make a choice? (3) What effect do school capacity and class load have on granting approval of the request? (4) What effect does proximity to a school have on choice? (5) What effect does racial balance in a particular school have on approving requests?

Early Decisions

In the first years of the 1960s, the courts rather consistently upheld various freedom-of-choice plans. The disposition of the courts was that choice plans seemed to be a reasonable mechanism for desegregating schools.

Some early court decisions were characterized by ambivalent holdings. *Kelley* is one case in point.[114] In 1959 the Court of Appeals for the Sixth Circuit upheld a district court decision providing for a freedom-of-choice plan. The plan required the integration of formerly all-white and all-black schools but otherwise allowed freedom of choice. Part of the plan provided that any student could transfer from a school if the majority of the students in that school were of a different race.

The court of appeals held that this plan met the "all deliberate speed" requirement of *Brown*. It held that

> the Supreme Court has not decided that the states must deprive persons of the right of choosing what schools they attend, but that all 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.[115]

The court went on to reflect on the desirability of the plan:

> If the child is free to attend an integrated school - and his parents voluntarily choose a school where only one race attends, he is not being

114. Kelley v. Board of Education of the City of Nashville, 270 F.2d 209 (1959).
115. *Id.* at 228.

deprived of constitutional rights. It is conceivable that the parent may have made the choice from a variety of reasons - concern that his child might otherwise not be treated in a kindly way: personal fear of some kind of economic reprisal: or a feeling that the child's life will be more harmonious with members of his own race.[116]

The court then issued a warning to the school board:

[I]f it should appear. upon a showing that there are impediments to the exercise of a free choice, and that a change should be made in the plan to carry out, in good faith, and with every safeguard to the children's rights . . . the district court . . . shall make such modifications in this decree as is good and proper.[117]

As early as 1960 some courts were beginning to question the validity of freedom-of-choice plans that included transfer provisions. Two illustrative cases are *Boson*,[118] decided in 1960, and *Jackson*, decided in 1963.[119]

In *Boson* the Court of Appeals for the Fifth Circuit invalidated a plan that provided for transfers based on race. The school board had established the following conditions under which a transfer request would be approved.

(1) When a white student would otherwise be required to attend a school previously serving colored students only:
(2) When a colored student would otherwise be required to attend a school previously serving white students only;
(3) When a student would otherwise be required to attend a school where the majority of students in that school or in his or her grade are of a different race.[120]

The court would not accept these conditions. Similarly, in *Jackson*, the same court overruled a choice plan providing for automatic transfer on request of any child in a racial minority within his school or class. The court cited Justice Clark's opinion in *Goss*: "It is readily apparent that the transfer system proposed lends itself to perpetuation of segregation."[121]

Just prior to the *Jackson* decision, the United States Supreme Court had, in *Goss*, invalidated a transfer plan in Knoxville, Tennessee.[122] Under provisions of that plan a student would be permitted

116. Id. at 229.
117. Id. at 230.
118. Boson v. Rippy, 285 F.2d 43 (1960).
119. Jackson v. School Board of the City of Lynchburg, 321 F.2d 230 (1963).
120. Boson, supra note 118, at 47.
121. Goss v. Board of Education of Knoxville, Tennesse, 373 U.S. 683 (1963).
122. Id.

> solely on the basis of his own race and the racial composition of the school to which he has been assigned by virtue of rezoning, to transfer from such school, where he would be in the racial minority, back to his former segregated school where his race would be in the majority.[123]

Speaking for a unanimous Court, Justice Clark overturned the plan because it operated on racial factors. He saw that the actual implementation of the plan would continue rather than reduce segregation.

> The recognition of race as an absolute criterion for granting transfers which operate only in the direction of schools in which the transferee's race is in the majority is no less unconstitutional than its use for original admission or subsequent assignment to public schools.[124]

On the same day the Court handed down the Goss decision, it rendered another opinion on transfers. In *McNeese* the Court questioned the legality of a plan that transferred by grades from one school to another.[125] The reassignment grew out of an overcrowding at one of the predominately white schools. Two classes of students were reassigned to an all-black school where they were segregated by race in classes. The racial mix of the entire school was balanced. Here the Court was more concerned with procedural than substantive questions; it reaffirmed that one has direct access to federal courts without first exhausting state remedies.

Testing and Transfers

After *Brown*, race became a factor in transfer requests. The legality of testing students as a part of freedom-of-choice and transfer plans soon came before the courts. Two cases—*Beckett* and *Calhoun*—are illustrative.[126] The courts upheld both plans because it was shown that the tests were applied uniformly and nondiscriminately.

In *Beckett* the Norfolk, Virginia, school board had for a number of years required tests of children who requested transfers when those requests came under unusual circumstances, such as personality or health; routine transfers were permitted without

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123. *Id.* at 684.

124. *Id.* at 688.

125. McNeese v. Board of Education for Community Unit School District 187, Cahokia, Illinios, 373 U.S. 668 (1963).

126. Beckett v. School Board of the City of Norfolk, 181 F. Supp. 870 (1959). Calhoun v. Latimer, 321 F.2d 302 (1963).

tests. Of 134 applications for transfers during the 1958-1959 school year, 126 were not honored for a variety of reasons—low scores, failure to take the test, and geographic factors. The eight students whose transfers were approved had to wait until the fall term for the transfer to be effected.

Judge Hoffman upheld the test requirement:

> The board has, for many years, required tests and interviews in "unusual circumstances." They have been required of children of all races and colors and will continue to be so required. The only reason the Board now desires to adopt written procedures limiting the tests and interviews to "unusual circumstances" is to avoid the expense and trouble of testing children seeking routine transfers or initial enrollment where there are no complications as to scholastic ability, geographic areas etc.[127]

> The constitutional right lies in the denial of admission because of race - not in the prerequisites leading up to such denial. Again, however, the procedures adopted must be reasonable and not so burdensome as to be tantamount to a denial of the constitutional right.[128]

The *Calhoun* case required the court to determine the legality of a desegregation plan that did not reassign pupils to different schools but did give the right to transfer. Of 266 students who requested a transfer during the 1962-63 school year, 44 were actually transferred. The previous year, 10 of 130 applications were approved. A scholastic ability and achievement test was one kind of evidence weighed in considering applications for transfer.

In upholding the plan the court pointed out that the board had demonstrated good faith and that substantial progress had been made in desegregating the schools.

Courts Uphold Plans

In *Vick*,[129] for example, the court held that a free-choice plan need not be invalidated even though it might impose economic pressures on blacks requesting a different school assignment, such as threats of job loss or boycotts of black business. The court also dismissed the complaint that ignorance would prevent people from understanding and exercising the option of selecting a school to attend:

127. Beckett, supra note 126, at 873.
128. *Id.* at 874.
129. Vick v. County Board of Education of Obion County, Tennessee, 205 F. Supp. 436 (1962).

> Assuming that the choice is free and unfettered, the existence of the choice is not unconstitutional unless the Constitution requires compulsory integration rather than only an abolition of discrimination.[130]

Here the court was relying on the holding of *Briggs v. Elliott* in which Judge Parker held that

> The Constitution . . . does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.[131]

The court warned school officials that it would be watching to see how the choice plan worked and that if economic sanctions were being used to prevent blacks from exercising freedom of choice, there are legal remedies.

Nesbit[132] challenged a choice plan in which pupils enrolled in grades one through six could transfer. Pupils enrolled in grades ten through twelve could transfer the following year and the rest could transfer a year later. The plan was to go into effect in the fall of 1964 and be completed in the 1966-67 school year. Judge Craven approved the plan, provided the promise of free choice was kept.

The case was appealed to the circuit court where Judge Haynsworth sent it back to the district court.[133] He could not determine if the plan was good because it referred inconsistently to dual attendance zones. Judge Haynsworth also felt the plan was indefinite about assignment of new pupils coming into the school.

The same day Judge Haynsworth ruled in *Nesbit* he handed down a decision in *Bradley v. Board.*[134] Here he upheld the freedom-of-choice plan for Richmond, Virginia. He held that a plan giving every student an unrestricted right to attend the school of his or his parents' choice is constitutionally permissible, provided the only limits were a time requirement for transfer applications and the school's capacity.

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130. *Id.* at 439.
131. Briggs v. Elliott, 132 F. Supp. 776 (1955).
132. Nesbit, *supra* note 28.
133. Nesbit v. Statesville City Board of Education, 345 F.2d 333 (1965).
134. Bradley v. School Board of the City of Richmond, 345 F.2d 310 (1965).

Plans Are Scrutinized

Beginning in the mid-1960s the courts began to examine freedom-of-choice plans more closely. In *Thompson*,[135] a 1966 decision, the court disallowed a plan that had the following provisions: (1)First-grade pupils could preregister for any school in the district until a school reached its capacity. (2) No transfers would be allowed during the year except in instances where families changed residence. (3) Transportation would be provided for each student but only to the nearest school having a place for him and to which he had been assigned.

The plan failed in that the busing arrangement tended to foster segregation. The court also overturned a provision of the plan that would have given students only a two-week period in which to effect a choice. In addition, choices were limited to the nearest white school and the nearest black school. The court felt that the period came too early in the year and was too short to allow for completion of the necessary paperwork.

Also in 1966, the Court of Appeals for the Fifth Circuit invalidated a freedom-of-choice plan that tended to work only to the advantage of white students.[136] The Mobile County school board sought to create two school attendance zones that coincided with the racial distribution in the district. Under this plan white pupils could transfer from their zone to another; blacks could not. The system was actually designed to foster segregation in that it allowed whites to transfer from the few racially mixed neighborhoods in the county. The circuit court ordered:

> Regardless of the number of grades which beginning next fall, are under the plan of desegregation, the appellee Board must grant to any child whose original attendance at his present school was dictated by the policy of segregating children by race (as was done uniformly prior to September 1963), the right at his request, to attend the school which he would have been permitted to attend but for such racial policy.[137]

The court held that black pupils must be given the right either to remain in their all-black school or to transfer to the nearest white school. Should, however, the white schools become overcrowded, then pupils living nearest the school would be given first choice.

135. Thompson v. County School Board of Hanover County, Virginia, 252 F. Supp. 546 (1966).
136. Davis v. Board of School Commissioners of Mobile County, 364 F.2d 896 (1966).
137. Id. at 903.

Another 1966 case, *Clark v. Board*,[138] decided by the Court of Appeals for the Eighth Circuit, displays the close scrutiny the courts began to give to freedom-of-choice plans. After abandoning its pupil assignment law, the Little Rock, Arkansas, school board adopted a freedom-of-choice plan. Black parents maintained that the plan was not working and objected to the plan on three grounds. Specifically, the black parents felt the provision for notice of the availability of choice was inadequate, the lateral transfer plan was unsatisfactory, and the staff integration plan was indefinite.

Although the judges were asked to declare the entire plan unconstitutional, they elected not to do so. After noting that the Department of Health, Education, and Welfare had given its approval to such a pupil assignment plan, the court evaluated specific criticisms of the plan.

In answer to the argument that freedom of choice was not working, the court replied: "The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools."[139] It was noted that although only 621 of 7,341 black children attended previously all-white schools in 1965, the number increased to 1,360 the following year. In the court's estimation, this represented substantial progress.

In the first year of the lateral transfer plan, students in grades one, seven, and ten could request a transfer to another school; the request would be honored provided the requested school was not overcrowded. Pupils not requesting a transfer would be assigned to the school they attended the previous year.

In answering the plaintiff's objection that all students should be required to make an annual choice, the court stated: "The Constitution imposes no duty upon the students to exercise an annual choice. We believe they are protected from discrimination as long as they have the absolute right to choose and are adequately informed of the right."[140]

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138. Clark v. Board of Education of the Little Rock School District, 369 F.2d 661 (1966).
139. *Id.* at 666.
140. *Id.* at 668.

The court did, however, agree with the contention that the plan did not provide for adequate notice of the availability of freedom-of-choice. It directed the school board to give adequate notice in a form preferable to allowing delivery of notice to students by the classroom teacher. The court also agreed with the plaintiffs that more definite steps needed to be taken to ensure staff desegregation.

A New Test Emerges

Beginning in 1967, the courts assumed a new stance toward freedom-of-choice plans: criticism began to be directed beyond the plan to its rationale and effect. The courts began to ask the same question of freedom-of-choice plans that they asked of zoning plans—do they actually accomplish desegregation of the schools?

The one exception to this trend is *Kelley*, decided in early 1967.[141] The opinion itself seemed to be a "throw-back" to the early 1960s. Under the plan in question students in all grades would choose a school each year. In the event a school was overcrowded or a student did not make a choice, he would be assigned to the school nearest his home. In the first year of the plan, only six blacks and no whites requested a change of schools.

Although the court noted some inequities arising from the plan, it did not strike the plan down.

> Where we have approved the "freedom of choice" plan, we have required (1) that students have the right to an annual choice and that if they fail to make a choice, they be assigned to a school on a non-racial basis, (2) that Boards of Education refrain from interfering with the students "freedom of choice" and (3) that facilities and operating staffs be desegregated.[142]

The court directed the school district to keep the freedom-of-choice plan until it proved to be ineffective.

After the exceptional decision in *Kelley*, the courts began to take a firmer position. The change in attitude was apparent two months later in *Stout*.[143] Here the court held that "[t]he criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing this objective."[144] In Stout the court expressed

141. *Kelley* v. Altheimer Arkansas Public School District No. 22, 378 F.2d 483 (1967).
142. Id. at 489.
143. United States and Linda Stout v. Jefferson County Board of Education, 380 F.2d 395 (1967).
144. Id. at 390.

concern with the lack of speed of desegregation, the lack of clarity as to who may exercise choice, the annual exercise of choice, the public notification of choice, and other factors related to the process of integration.

In *Moses v. Washington Parish School Board*,[145] the court ordered the school board to replace a freedom-of-choice plan with a single, nonracial, geographically zoned system on the grounds that the board could not show why it chose a freedom-of-choice desegregation plan. In reaching its decision, the court reviewed the history and development of freedom-of-choice plans. It stated that the reason the courts have formulated so many choice plans is because local school boards have failed to assume the initiative. Judge Heebe spoke forcefully:

> In most cases, the school boards have not done their duty—the duty they owe not only to Negro children, but to the white population and their electorate as a whole. They have escaped the inescapable burden of establishing nondiscriminatory systems by inaction which, although insufficient to provoke the courts to resort to punitive measures, has been significant enough to press those courts into the assumption of the burden themselves. The boards have let the courts, usually the federal district courts, bear their responsibility for them. But this federal court, as well as every court, and every school and every citizen, is bound by the law of the land. Prejudices and personal opinions, especially in the case of those who represent the people, are no excuse for avoiding legal responsibilities.
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> Upon investigation, it will be seen that the "free-choice" system, now deemed such an ordinary pupil-assignment device in the South and in Louisiana, evolved from four interrelated conditions: (1) the irresponsibility of local school officials and the consequent involvement of the courts in the creation and administration of the pupil-assignment systems, (2) the tendency of the courts in that situation to resort to the relatively simple procedure of ordering free choice of school by all pupils, (3) the very necessity of such free-choice procedures *as an interim measure* prior to full scale desegregation of all grades in each district, and (4) the realization by some school officials that what was intended by the courts as a quick and simple temporary solution to interim desegregation problems would in fact (a) aid long-range de *jure* segregation by allowing a good measure of flexibility for the boards and officials to exercise a larger influence in furthering segregation and (b) shift the school board's burden from their original mark, the courts, to a new scapegoat—the students themselves.[146]

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145. Moses v. Washington Parish School Board, 276 F. Supp. 834 (1967).
146. *Id.* at 849.

The court then reflected on the relative merit of freedom-of-choice plans.

> "Free choice" and "option" plans, although burdensome to school officials, were properly seen as an alternative vastly simpler than the immediate shift to geographic zoning of desegregated grades, an alternative to be applied during the process of desegregation and prior to full desegregation of all grades in a school system. The usefulness of free choice as an interim procedure had indeed been recognized by the Supreme Court, which required it on a purely individual request basis in grades not yet reached by the desegregation process.[147]

Teel[148] also overturned a freedom-of-choice plan. In this case the court found that the plan failed to increase substantially the number of black students attending desegregated schools. The complaint alleged that the school board had failed to encourage community support for its plan, to protect persons seeking to exercise their rights, and to issue assurances of protection.

Although the school board prepared a modified freedom-of-choice plan, the court directed the board to use geographic zoning without regard to race. Further, the court held that transportation routes should be geared to the schools served rather than to the races of the children being transported. Because school was to start three weeks after the court's decision was handed down, the court gave the school board a full year to desegregate.

In *Carr v. Montgomery County*,[149] the court recognized that by 1968 almost fourteen years had elapsed since school boards had been directed to undertake affirmative action to disestablish dual school systems based on race. Speaking for the court, Judge Johnson stated that no further delay would be tolerated.

> Affirmative action means more than telling those who have long been deprived of freedom of educational opportunity "You now have a choice." In many instances the choice will not be meaningful unless the administrators are willing to bestow extra effort and expense to bring the deprived pupils up to the level where they can avail themselves of the choice in fact as well as theory.[150]

The question of the legality of freedom-of-choice plans finally reached the United States Supreme Court. On May 27, 1968, the justices handed down three separate opinions, each written by

147. *Id.* at 840.
148. Teel v. Pitt County Board of Education, 272 F. Supp. 703 (1967).
149. Carr v. Montgomery County Board of Education, 320 F. Supp. 720 (1968).
150. *Id.* at 654.

Justice Brennan.[151] The cases were on appeal from the fourth, sixth, and eighth circuits.

Green, the most noteworthy of the cases, originated in Virginia. Half of rural New Kent County's 4,500 people were black. Although there was no residential segregation, until 1964 buses traveled overlapping routes to serve the county's two segregated schools. At that time, in order to qualify for federal aid, the school board adopted a freedom-of-choice plan. By 1967 no whites had transferred to the all-black school, and 85 percent of the blacks still attended the all-black school. The Supreme Court ordered the school board to adopt a new plan:

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief. Of course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith, and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method.[152]

The real test the justices applied to the plan was: Does it work? It could not be shown in this instance that any substantial progress had been made in desegregating the schools. The Court did not, however, overturn all freedom-of-choice plans. Justice Brennan held:

> We do not hold that "freedom of choice" can have no place in such a plan. We do not hold that a "freedom-of-choice" plan might of itself be unconstitutional although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself.[153]

The second of the cases before the Supreme Court, *Raney*, was similar to Green. The school district comprised eighty square miles and operated two totally segregated schools that were only two blocks apart in the county's largest town. As in the *Green* case, the

151. See note 31 *supra*.
152. Green, *supra* note 31, at 439.
153. *Id.*

school board adopted a freedom-of-choice plan in order to be eligible for federal aid. The results of these plans were the same—no whites requested to attend the all-black school, and only 15 percent of the blacks selected the white school. The Court overturned the plan and directed the board to operate a desegregated, nonracial school system.

Monroe, growing out of Jackson, Tennessee, involved the desegregation of thirteen schools. The principal feature of Jackson's desegregation plan was that it involved a free transfer option:

> Any child, after he has complied with the requirement that he register annually in his assigned school in his attendance zone, may freely transfer to another school of his choice if space is available, zone residents having priority in cases of overcrowding.[154]

As in *Green* and *Raney*, the Supreme Court disallowed the plan because it would result in further delay rather than in conversion to a unitary system.

Taking a cue from the Supreme Court's pragmatic stand, the lower courts responded by holding to a firmer position in scrutinizing choice plans. Just three months after the *Green* decision, the Court of Appeals for the Fifth Circuit exercised great care in an effort to close any loopholes that would tend to perpetuate segregation.[155] It ordered the disestablishment of the dual system in student and faculty assignments, bus routes, facilities, athletic and other extracurricular activities, and site selection and construction activities. Furthermore, the school board was ordered to present an acceptable plan within five weeks. Presumably this would allow sufficient time to get court approval prior to the opening of school in the fall of 1969. The procedures for appeal were very detailed and were designed to expedite rather than hinder the process.

In answer to the charge that there would be an exodus of white students from the system, the court indicated that in *Cooper v. Aaron*, in 1958, the Supreme Court justices did not see that this issue posed any real problem.

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154. Monroe, *supra* note 31, at 454.
155. Hinds, *supra* note 35.

Pairing of Schools

Pairing is another plan for desegregating the schools. Although the plan has a number of variations, it essentially involves taking an even number of schools--usually two—and redistributing their enrollments. For example, two schools, one black and one white, with six grades each might be desegregated by sending all students in grades one through three to one school and all students in grades four through six to the other. Presumably, the classes within each school would be integrated.

The constitutionality of pairing schools has been tested in a number of federal courts in both the North and South. Objections have centered on the intent of school boards, alleged increases in transportation hazards, interest in preserving the neighborhood school, and differences in curriculum offerings.

The courts have examined in considerable detail various data bearing on the necessity and desirability of pairing as a desegregation vehicle.

Some of the earlier cases treating this subject originated in northern school districts. Two exemplary cases arose in New Jersey during 1964. One case contested a Montclair board of education interim plan for pairing schools during a building program.[156] The district had four junior high schools with black enrollments as follows: Glenfield, 90 percent; Hillside, 60 percent; George Inness, 18 percent; and Mt. Hebron, 0 percent.

After several preliminary plans had met with opposition, a committee recommended that the four junior high schools should be replaced by one large central junior high school as soon as possible. In the meantime, all ninth graders would attend George Inness until the senior high school could be converted into a four-year secondary school. All seventh and eighth-grade students would alternately attend Hillside and Mt. Hebron. All Glenfield students would be assigned to the other schools by lottery and choice.

The school board accepted the committee's report and indicated the necessity of a four-year period to effect the change.

156. Morean v. Board of Education of the Town of Montclair, 200 A.2d 97 (1964).

The New Jersey Supreme Court affirmed the plan. The judges recognized that the purpose was to minimize segregation, not avoid it.

In Englewood, New Jersey,[157] parents of white students brought suit to enjoin interference with their children's attendance at neighborhood schools. Prior to the disputed reorganization plan, one of the city's three elementary schools was 98 percent black. The state commissioner of education had directed the school board to formulate a plan to reduce the extreme concentration of blacks in that school and to put that plan into effect at the beginning of 1963. Under the board's plan, schools in the district would have black populations ranging from 18.6 to 61 percent.

The parents objected to two parts of the plan. The first was sending all sixth-grade students to a junior high school building. The second was the using of multiple criteria, such as school-home distances, class loads, and personal preferences, in assigning other elementary students to schools.

The federal district court held that the plan to relieve the extreme concentration of blacks at one school was not constitutionally discriminatory or unreasonable in its application to whites.

In a New York City case,[158] parents sought to annul a board of education school-pairing plan whose primary purpose was to achieve racial balance. Secondary factors—the reduction of overcrowding and the improvement of facilities in both schools—were, however, taken into consideration.

Specifically, P.S. 92 was to maintain grades one and two while P.S. 149 was to maintain grades three, four, five, and six. A kindergarten was to be housed at both schools. Before the pairing, P.S. 92 had been 99.5 percent black; after the pairing it was 48 percent black. P.S. 149 had been 88 percent white; after the pairing it was 75 percent white.

Objecting parents alleged that the plan was motivated solely by racial considerations and that students would be transferred solely because of their race.

157. Fuller, *supra* note 72.
158. Addabbo, *supra* note 69.

Judge Beldock crystallized the question before the court:

> Thus, the issue before the court is not whether the Board of Education must or is constitutionally required to act, but rather whether the Board of Education may be prohibited from acting.[159]

Although the plan would not allow some children to attend the school nearest their home, this did not render the plan illegal or arbitrary in the opinion of the court. In upholding the proposal, Judge Beldock stated:

> [A] board of education is not constitutionally prohibited from taking affirmative action to reduce or eliminate de *facto* segregation in the public schools, or from taking race into consideration as one of the factors in the drawing or redrawing of school attendance lines in order to reduce the extreme concentration of Negro pupils in one of its public schools, where such concentration admittedly resulted, not from deliberate action of the state, but from *de facto* or adventitious segregation.[160]

A second case originating in New York state also sought to annul a pairing plan.[161] In the case, children in grades three through six had to attend a school outside the immediate community. Parents objected, citing increased travel and traffic hazards as well as a denial of the opportunity for their children to attend school near home.

In a very brief opinion the judge upheld the plan: "It is abundantly clear that the elimination of de facto segregation is the prime object of the pairing plan."[162] The judge also observed that the new plan would provide for better utilization of facilities, reduction of class size, and an increase in specialized instruction.

A third New York state case began in Malverne.[163] Although the district-wide population of blacks was between 42 and 51 percent, the district had three neighborhood elementary schools with black populations of 18, 21, and 91 percent. This discrepancy was attributed to residential housing patterns.

Based on a committee recommendation, the commissioner of education in 1963 ordered the board to (1) abandon the three elementary school attendance zones; (2) substitute two attendance zones for kindergarten through grade three, divide all students in

159. *Id.* at 182.
160. *Id.*
161. Steinberg, *supra* note 70.
162. *Id.* at 308.
163. Olson, *supra* note 67.

those grades equally, and send them to two schools; and (3) use a single attendance zone for all students in grades four and five. All students in grades six through twelve already attended one school.

The plaintiffs alleged that the commissioner had assumed too much authority in directing the reorganization plan. The court responded:

> The test for arbitrariness in relation to the educational policies of New York is not necessarily the same as the test for arbitrariness in determining whether there has been a violation of the Fourteenth Amendment.[164]

The commissioner had not acted arbitrarily or capriciously; he was functioning within the framework of the powers granted him by the state constitution.

More recently, cases involving pairing have been before judges in southern states. In Arkansas, the Court of Appeals for the Eighth Circuit directed Marvell School District to desegregate fully and effectively all facilities, faculties, and classes beginning with the 1970-71 school year.[165] The following implementation plan was approved: (1) All students in grades one through three will be assigned to Marvell Elementary School, (2) all students in grades four through nine will be assigned to Tate School, (3) all students in grades ten through twelve will be assigned to Marvell High School.

The Bessemer, Alabama, school district projected that in September 1970, the district's total student enrollment would be 7,757 students—4,729 black and 3,028 white. There were fifteen schools: eight elementary, four intermediate, two senior high, and one system-wide vocational school.

Under a plan approved by the Department of Health, Education, and Welfare and subsequently sanctioned by the district court, Bessemer school attendance was based on geographic zones designed to accommodate a four-four-four grade structure.[166] After reviewing the plan, the circuit court ordered the district court to consider the feasiblity of pairing. Although the district court found no insurmountable geographic hazards and no

164. *Id.* at 1010.
165. Jackson, *supra* note 57.
166. Brown, *supra* note 109.

appreciable increase in cost, it indicated that pairing would be educationally and administratively unsound because it would destroy the district's four-four-four plan. The circuit court rejected this claim and countered. "No particular grade structure can be considered inviolate when constitutional rights hang in the balance."[167] The court then ordered the district court to direct certain pairings or anything else that would achieve at least the same amount of desegregation as the proposed plan. Judge Ingraham identified six areas whose racial composition could be used in assessing the effectiveness of desegregation: student body, faculty, staff, transportation, extracurricular activities, and facilities.

In a case concerning a much larger school system—Mobile, Alabama—pairing was treated along with a number of other topics.[168] Mobile covers 1,248 square miles and enrolls 73,500 students in ninety-one schools. The district's ethnic composition is 42 percent black. Under a district court's plan, seven all-black schools would remain. In this case, the court of appeals reversed a district court desegregation plan that would have allowed the maintenance of seven all-black schools. The appellate court then directed the implementation of a plan that would eliminate the all-black schools through pairing and adjusting grade structures.

On appeal to the Supreme Court of the United States, the plan gained a large measure of approval from the justices. However, speaking through Chief Justice Burger, the Court did modify somewhat the circuit court holding.

A careful study was made of the population profile of the school district. In the elementary schools, 94 percent of the blacks in the metropolitan area lived on the east side of the city where student enrollment was 65 percent black. It was indicated that this area would be more difficult to integrate than the west side. However, the court of appeals had modified the plan so that it would reduce the totally or almost totally black schools from twelve to six. This would be accomplished by pairing. However, the enrollment figures of the circuit court were inaccurate.

Chief Justice Burger held that the court of appeals should have considered bus transportation and split zoning in constructing its

167. *Id.* at 23.
168. Davis, *supra* note 110.

desegregation plan. Although careful not to be overly authoritative in reversing the circuit court, the Chief Justice held:

> As we have held, "neighborhood school zoning" whether based strictly on home to school district or on unified geographic zones is not the only constitutionally permissible remedy; nor is it per se adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation . . . . The measure of any desegregation plan is its effectiveness.[169]

Construction

Site selection and building construction became a controversial issue as parents began to suspect that school boards were not acting in good faith under the *Brown* mandate. Although these questions did not get before the courts until a number of years after *Brown*, they eventually became intense.

Three issues were of paramount significance in the site selection and building construction cases: the degree of jurisdiction the courts had over the approval of school sites, the point in a construction program at which the courts could exert their authority, and the criteria the courts might impose in resolving the location of new schools.

One of the earliest construction cases to appear in court was decided according to the judicial mood prevailing at the time—flexibility in the implementation of desegregation plans and restraint when it was found that the school board was acting in good faith.[170] The year was 1957. The court held that the school board was both acting in good faith and making good progress in a three-phase desegregation program. The first phase was to begin that year on completion of a new senior high school building. By 1963, complete integration was to have occurred in two additional phases as the junior high and elementary schools were desegregated. The court held open the question of the need for subsequent review.

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169. *Id.* at 1292.
170. Aaron v. Cooper, 243 F.2d 361 (1957).

Later, it was demonstrated that many school boards were not acting in good faith. In *Taylor v. New Rochelle*[171] the board admitted what had been clear: prior to 1947 school attendance areas had been intentionally gerrymandered. New Rochelle was divided into twelve districts, each with a centrally located school. The case in question sought both to stop the school board and superintendent from building a new school on the site of an old one and to stop the administration from denying black students the right to transfer to other schools. In Lincoln School, 94 percent black, eleven black students sought transfers but were denied; white students had been allowed transfers.

Judge Kaufman sought to look beyond the motivation of the school board to see the desegregation process in its entirety. Although the voters of New Rochelle had overwhelmingly approved the bond issue that stipulated the new building would be constructed on the site of the established school, the voters within the school's attendance area had disapproved. Judge Kaufman observed that "[c]onstitutional rights can certainly never be made dependent upon public choice; the consequences if they were, need hardly be labored."[172] The school board was given three months to effect a plan that would be operative by the fall term. As this case indicates, gerrymandered school attendance zones are no legal defense against failure to desegregate.

In the mid-1960s the courts began to look more carefully at school construction as opposed to site selection. The court did not plow new constitutional ground in *Braxton*,[173] but it did assert that the court had legal authority to review "construction programs . . . designed to perpetuate, maintain, or support a school system operated on a racially segregated basis."[174]

In 1965 the fourth circuit court went one step further in holding that the courts have authority to review construction plans *before* the awarding of contracts.[175] Reminding the school board that the court had been assured that the district's school construction program would not "perpetuate, maintain, or support segregation," the judges found that an assignment plan did, in

171. Taylor, supra note 73.
172. *Id.* at 197.
173. Board of Public Instruction of Duval County, Florida v. Braxton, 362 F.2d 616 (1964).
174. *Id.* at 620.
175. Wheeler v. Durham City Board of Education, 346 F.2d 768 (1965).

fact, operate on gerrymandered boundary lines and encourage segregation.

In a 1966 case Judge Butzner took a position at variance with the prevailing decisions of the time when, in *Wright*,[176] he refused to enjoin new construction. He could find no permanent harm accruing from the construction and he felt that the school board could modify, if necessary, the use of the building after it was completed.

> A new school building in itself cannot defeat the plaintiff's choice of a desegregated education. The use, however, to which new facilities are put by the school board could cause a freedom of choice plan to become invalid. Then it will be necessary to modify the plan.[177]

Judge Butzner did not consider, however, that a building could be located on a site that would encourage integration.

In *Broussard*,[178] Judge Hannay defended the neighborhood school concept and pointed out that the district would completely eliminate de jure segregation by September 1967. Hannay distinguished *Broussard* from *Taylor* in holding that the school board had been acting in good faith:

> Clear present need and other relevant factors such as accessibility of the facility, the safety and physical convenience of the student, the minimal exposure of the younger students to non-supervision, the home and family and community advantages of a nearby school, a due regard for prevailing traffic arteries and patterns, and the general feasibility characterize the local school building project rather than the suggestion of intended racial discrimination.[179]

In *Thompson*,[180] as in *Wright*, the court refused to enjoin new school construction or the purchase of new sites. Judge Butzner held again that the effect of the construction could be reviewed and the plan modified, if necessary.

In 1967 the eighth circuit court dealt with an attempt to enjoin an Arkansas school board from building separate schools for blacks and whites.[181] *Kelley* arose after the school board passed a bond election to build a new school on the site of one of the

176. Wright v. County School Board of Greensville County, 252 F. Supp. 378 (1966).
177. *Id.* at 384.
178. Broussard, *supra* note 89.
179. *Id.* at 270.
180. Thompson, *supra* note 135.
181. Kelley, *supra* note 141.

district's two schools. The schools were, in essence, segregated, and duplicate bus routes were operated for each school. Although a freedom-of-choice plan had been put into operation, in two years no whites and only forty-seven blacks had requested transfers.

The court took a soft line by suggesting (not requiring) a number of remedies, including submitting a new construction plan to the district court.

The eighth circuit court's continued reluctance to force school boards to modify school construction plans is exemplified by another 1967 decision.[182] The court held that it would not enjoin construction of school buildings in districts that had voluntarily adopted a program for school integration. In this case it was shown that buildings already under construction would operate as integrated schools. Unlike *Kelley*, this school board had *voluntarily* started to desegregate.

The court was also asked if it could either tell the school board where to build or prohibit it from constructing a new building. The judges refused to consider the question. Instead, they reaffirmed the authority of local school officials:

> Primary responsibility for the operation of the public schools rests in the school board. Courts are not equipped to solve the everyday problems of school operation. The court interference with the Board's operation of its school is justified only upon a showing that the Board in its operation of its school is depriving pupils of rights guaranteed by the federal constitution.[183]

A much firmer position was taken by Judge Johnson in the District of Columbia:[184]

> The location of these schools and their proposed capacities cause the effect of this construction and the expansion to perpetuate the dual school system based upon race.[185]

Although *Carr* treated faculty desegregation more specifically than school construction, Judge Johnson and the court expressed dissatisfaction with a number of areas of school policies, construction being one of them.

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182. Raney v. Board of Education of the Gould School District, 381 F.2d 252 (1967).
183. *Id.* at 270.
184. Carr v. Montgomery County Board of Education, 289 F. Supp. 647 (1968).
185. *Id.* at 651.

The matter of site selection has actually been more crucial than construction itself. Boards of education must not only act to prevent the continuation of segregated schools; they must also actively seek sites that would best result in desegregated schools.

Similarly, in 1969, the fifth circuit court held that site selection and construction of buildings must not result in the recurrence of segregation.[186]

One Grade a Year

One of the plans various school boards devised to forestall desegregation amounted to gradual but minimum integration. It is referred to as the "grade-a-year" plan. At a designated point in time, one grade would be desegregated each year until complete integration would be accomplished twelve years in the future.

The grade-a-year plan presented the courts with two questions: Does the plan represent good faith, and does it meet the test of "with all deliberate speed"? The federal courts that have heard grade-a-year cases have disagreed over the reasonableness of the plan.

Courts Disagree

In 1969 the Court of Appeals for the Third Circuit upheld a grade-a-year plan. *Evans v. Ennis*, [187] originating in Delaware, was appealed from the district court. The court of appeals held that a modified plan should be submitted that would desegregate all grades beginning with the fall of 1961. The court rejected the notion that a more rapid rate of desegregation would result in disruption causing great harm to the school system. The plan originally approved by the district court went into effect in 1959, but the circuit court was not satisfied with the speed of implementation. The court also rejected the contention that overcrowding would result.

In dissent, Judge Goodrich pointed out that

> integration in the State of Delaware which already has integrated many of its schools, particularly in the Wilmington metropolitan area, should not be viewed, gauged, or judged by the more restrictive standards

186. Singleton, supra note 36.
187. Evans v. Ennis, 281 F.2d 385 (1960).

> reasonably applicable to communities which have not advanced as far upon the road toward full integration as has Delaware.[188]

The same year the fifth circuit court reversed a district court decision and approved a grade-a-year plan that would begin in 1961.[189] The court did, however, order the local school board to

> establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. . .They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system.[190]

Kelley,[191] a 1959 decision, also supported the grade-a-year concept. The plan in question was to begin in the fall of 1957 with the first grade. Thereafter, one additional grade would be desegregated each year until the process was completed in twelve years. The circuit court held that the plan was reasonable and met the Supreme Court test of deliberate speed.

In Texas, a similar plan was approved with slight modifications:[192] the circuit court directed that grades one and two be desegregated the first year and one grade per year thereafter. In showing restraint, the court indicated that a number of factors, including the welfare of all students, should be considered.

Plans Disallowed

One of the earliest cases to go against a grade-a-year plan was *Borders v. Rippy*.[193] First, the district court reminded the school board that it should throw no stumbling blocks in the way of integration of the schools. Then the court rejected the grade-a-year desegregation plan that was to start with grade one and continue through the upper grades.

Two 1962 decisions supported the *Borders* holding. In *Bush v. Orleans Parish School Board*,[194] the school board had adopted a grade-a-year plan in 1960. However, there was evidence that grades were not going to be desegregated at the upper levels. The court reminded the local board of education that a grade-a-year plan adopted six years after *Brown* would have been accepted.

188. *Id.* at 393.
189. Boson, *supra* note 118.
190. *Id.* at 47.
191. Kelley, *supra* note 114.
192. Miller v. Barnes, 328 F.2d 810 (1964).
193. Borders v. Rippy, 154 F. Supp. 402 (1960).
194. Bush v. Orleans Parish School Board, 308 F.2d 491 (1962).

The other 1962 decision, *Ross v. Dyer*,[195] concerned a "stair-step" desegregation plan that would require children in the elementary school to attend the same segregated school as their older brothers or sisters. The court of appeals disallowed the plan on the basis that it supported segregation.

In 1963 the fourth circuit court held that a grade-a-year plan was unconstitutional.[196] It was too slow, the judges indicated, violating both the spirit and specific requirements of the Supreme Court holdings. The court's view was that the plan would require too long to effect a totally desegregated system, being initially implemented eight years after the first *Brown* decision.

The Denison, Texas, school district voluntarily adopted a grade-a-year, stair-step plan of desegregation that was nine years in the making.[197] Adopted in 1963, the plan would reach the twelfth grade (top of the stairs) in 1975. The problem, the court said, was that this plan would adversely affect children:

> And for this constitutional right, time alone is of great moment. Already some of these children have graduated. For them delay has meant denial for all time. The time for reviewing or redeveloping the undulating administrative doctrines evolved by us for the implementation of Brown is over.[198]

Although the court noted that the Denison school board had voluntarily acted in good faith, the judges added, "The rights of Negro children come from the constitution, not the attitude, good or bad, of school administrators."[199]

The legality of the grade-a-year plan finally reached the United States Supreme Court in 1965.[200] The case was on appeal out of Arkansas, where a local school board had adopted the grade-a-year plan in 1957, starting with the lower elementary grades. However, by 1964, the senior high schools had not yet been integrated, and black petitioners brought a class action to speed up the desegregation plan. In a brief *per curiam* opinion, the justices ordered the immediate transfer of petitioners to the all-white high school.

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195. Ross v. Dyer, 312 F.2d 191 (1962).
196. Jackson, supra note 119.
197. Price, supra note 30.
198. *Id.* at 1012.
199. *Id.* at 1014.
200. Rogers v. Paul, 382 U.S. 198 (1965).

Faculty Desegregation

The problem of desegregating a faculty came before the courts much later than the question of student desegregation. Judge Carswell in 1962 heard one of the earliest cases, *Augustus v. Board.*[201] The case arose in Escambia County, Florida, where qualifications and salaries for white and black teachers were the same. An inconsistency was revealed, however. Since 1956, the board had annually adopted a resolution extending the state's pupil assignment law to faculty. White faculty were assigned to white schools; black faculty were assigned to black schools. Judge Carswell held that the plan for desegregating students should be implemented before the school board desegregated the faculty.

No new constitutional ground was broken by this decision. In fact, it did little more than serve notice that the courts would begin to entertain the question of faculty desegregation.

Judge Carswell's holding in *Augustus* had support in *Vick*, also decided in 1962.[202] This Tennessee case was actually more concerned with student desegregation than with faculty desegregation. The district court indicated that it would consider a plea for instituting relief for teachers and supporting personnel, pending the desegregation of students.

Two years later, in *Braxton*[203] the court of appeals held that the district court did not go too fast or too far in directing the substantive elements of desegregation. Among a number of areas considered was the question of assignment of teachers by race. The court reaffirmed its right to examine different aspects of the school, holding that it had not exceeded its jurisdiction in stopping assignment of teachers on this basis.

By 1966, the question had become more judicially ripe. A number of court decisions were rendered; those treated here are illustrative of the thinking of the courts at that time.

Smith[204] was litigated to ensure that black teachers were not to be employed or fired discriminatorily. In Arkansas a black school

201. Augustus v. Board of Public Instruction of Escambia County, Florida, 306 F.2d 862 (1962).
202. Vick, *supra* note 129.
203. Braxton, *supra* note 173.
204. Smith v. Board of Education of Morrilton School District No. 32, 365 F.2d 770 (1966).

had been closed, and the black teachers were released. The school board's defense was that in the past, when a school had been closed, teachers of that school had been absorbed into other schools or, if no openings existed, they were released. Since there were no openings in other schools, the school board said, the teachers were not reemployed. Twelve new whites were hired during that summer, however.

Although the district court dismissed the case, the Court of Appeals for the Eighth Circuit ruled otherwise. The judges held:

> It is our firm conclusion that the reach of the Brown decisions, although they specifically concerned only pupil discrimination, clearly extends to the proscription of the employment and assignment of public school teachers on a racial basis.[205]

The court concluded that the school board had not acted in good faith.

A school board plan in Greensville County, Virginia, was investigated when no faculty desegregation resulted.[206] The plan, however, had included provisions for the assignment of new teachers without regard to race. Further, any reduction in the faculty would also be without regard to race.

Consequently, the overall desegregation plan was upheld, but the faculty desegregation section was invalidated for failure to provide for integration. The school board advised that "[t]he plan must contain well-defined procedures which will be put into effect on definite dates."[207]

In 1966, Mobile County, Alabama, was still employing and assigning teachers on the basis of race until *Davis*[208] ended this practice. The court ordered that henceforth hiring and assigning of teachers be nondiscriminatory, beginning with the 1967-1968 school year.

In *Clark*, also a 1966 decision,[209] the court of appeals expressed the need for firmer guidelines in faculty desegregation:

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205. *Id.* at 779.
206. Wright, *supra* note 176.
207. *Id.* at 384.
208. Davis, *supra* note 136.
209. Clark, *supra* note 138.

> We are not content at this late date to approve a desegregation plan that contains only a statement of general good intention. We deem a positive commitment to a reasonable program aimed at ending the segregation of the teaching staff to be necessary for the final approval of a constitutionally adequate desegregation plan.[210]

Toward the end of 1966, courts were taking a stern view of school boards who dismissed black teachers while desegregating a school. The school board was subsequently required to show that it had not acted with racial motivation.

Chambers is a case in point.[211] In Hendersonville, North Carolina, reorganization of schools had resulted in a decrease in the teaching staff. Sixteen of the twenty-four black teachers were notified that they would not be reemployed. However, all the white teachers plus fourteen new, inexperienced ones were hired for the ensuing year. While the principals' evaluations of the white teachers were scant, their evaluations of the black teachers were very meticulous. The school board claimed that the teachers had been fired "as a result of the social progress of integration."

The court held that the school board had acted with racial intent. The board's policy was

> too subjective to withstand scrutiny in the face of the long history of racial discrimination in the community and the failure of the public school system to desegregate in compliance with the mandate of *Brown* until forced to do so by litigation.[212]

Standards of dismissal were held not to be fair or objective.

It is not to be suggested that black teachers cannot be fired. *Wall* made this clear.[213] The case involved the dismissal of a black teacher in North Carolina. Two issues were involved: (1) alleged teacher incompetence and (2) firing on racial grounds. There was sufficient evidence to show that the principal had not acted unreasonably in firing the teacher. Two black principals had a number of documentations to substantiate the necessity for her contract termination, citing excessive absences, insubordination, poor peer relations, and failure to discharge duties.

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210. *Id.* at 670.
211. Chambers v. Hendersonville City Board of Education, 364 F.2d 189 (1966).
212. Id. at 192.
213. Wall v. Stanley County Board of Education, 259 F. Supp. 238 (1966).

On appeal to the fourth circuit court, the decision was reversed.[214] The court here pointed out that there had been a change in pupil population due to a freedom-of-choice desegregation plan. This materially affected the black enrollment at a previously all-black school. While the court conceded that a black teacher can be fired, the court maintained there was insufficient cause for discharging the teacher. Mrs. Wall was rehired and awarded damages. The school district, in turn, was chided for failure to prove the lack of discrimination. The court made it plain that the burden would be on the school district to prove that there was no discrimination in hiring and firing teachers in the future.

The move toward faculty desegregation accelerated the pace of 1966. *Mapp*,[215] a year later, held that faculty desegregation should have been treated at the same time as student desegregation. In this case, the Chattanooga school district had been under a six-year plan from 1962 to 1968, but a suit had been filed in April 1965 to expedite the desegregation process and complete it by September 1965. Among the provisions of the plan, faculty and other professional personnel were to be assigned without regard to race.

In 1968 the circuit court of Chicago dealt leniently with the question of racial considerations in the hiring of teachers.[216]

In the same year, however, a harder line was taken in *Carr v. Montgomery County*.[217] Evidence indicated that early in 1968, only thirty-two classroom teachers were teaching in schools of the opposite race. The student population totalled 15,000 blacks and 25,000 whites, but only 550 black students attended white schools. No whites attended black schools.

Further, no black had yet been a substitute teacher in a traditionally white school in the country. Only thirty-three of 2,000 white substitute teachers were used in black schools.

There was no desegregation of the night schools operated by the school system.

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214. Wall v. Stanley County Board of Education, 378 F.2d 275 (1967)
215. Mapp v. Board of Education of City of Chattanooga, 373 F.2d 75 (1967).
216. United States v. School District 151 of Cook County, Illinois, 404 F.2d 1125 (1968).
217. Carr v. Montgomery County Board of Education, 289 F. Supp. 647 (1968).

The court saw no obstacles to some of the solutions:

> The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school facilities and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year 1968-69.[218]

The court warned, however, that

> the defendants may not justify or excuse any further delay upon the ground that some of the teachers are reluctant to teach in the schools predominately of the opposite race.[219]

A standard was then set by the court. A specific ratio of two minority members was required for faculties of less than twelve. Faculties of twelve or more must have a ratio of one minority race to five majority race.

> If the school board is unable to achieve faculty desegregation by including voluntary transfers or by filling vacancies, then it will do so by the assignment and transfer from one school to another.[220]

This decision, slightly modified by the court of appeals, received approval in the United States Supreme Court.[221] In the majority opinion, Justice Black held that the district court ratio requirement was reasonable. It was not objectionable merely for containing mathematical ratios, he said. For ten years school officials had done nothing toward desegregating the faculty, looking to the court each year for guidance with respect to a desegregation plan, Justice Black noted.

Although the court of appeals regarded the faculty ratio as fixed mathematically, the Supreme Court saw the ratio, as determined by the district court, as a flexible and realistically workable plan.

An Asheboro, North Carolina, decision [222] makes a strong case that it is necessary for school boards to set up equal standards for the employment, evaluation, and retention of black and white teachers. The case grew out of the dismissal of black teachers during school district reorganization under a 1964-65 desegregation plan. Said Judge Sobeloff:

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218. Id. at 650.
219. Id. at 653.
220. Id. at 654.
221. United States v. Montgomery County Board of Education, 395 U.S. 225 (1969).
222. North Carolina Teachers Association v. Asheboro City Board of Education, 393 F.2d 736 (1968).

> In the face of the long history of racial discrimination...and the failure of the public school system to desegregate until forced to do so by litigation...the sudden disproportionate decimation in the ranks of Negro teachers raises an inference of discrimination which thrusts upon the School Board the burden of justifying its conduct by clear and convincing evidence.[223]

The message became clear for administrators: have good cause and adequate documentation in hiring and dismissing teachers.

In the fifth circuit, it was also clear that school boards would have to take affirmative action to desegregate faculties. To leave the matter to faculty volunteers is not enough, the court held.[224] Only 1 percent of the staff was desegregated in Bessemer, Alabama. Only twenty-one of 222 schools in three districts had any desegregation at all. Further, only teachers who volunteered were transferred.

Since the school board appeared to be taking very little action, the court had to decide what the role of the board should be. Because faculties were still largely segregated, the court held that the school board had an affirmative duty to integrate the faculty. The court further held that this must be accomplished within a stated time period. School desegregation encompassed everything, the court observed, adding that school boards must then do all within their power to bring about complete faculty desegregation.

Affirmative Duty and Powers

When the U.S. Supreme Court handed down the second *Brown* decision in 1955, it made clear that the primary leadership in school desegregation rested with local boards of education.

> School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.[225]

School officials were directed to begin "with all deliberate speed" to comply with the court order. Local federal district courts were to retain jurisdiction over cases in which it was alleged that school boards were not acting in good faith. Problem

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223. *Id.* at 746.
224. Brown v. Board of Education of City of Bessemer, 396 F.2d 44 (1968).
225. Brown, *supra* note 16.

areas that might necessitate granting more time for compliance were noted by the Supreme Court:

> administration arising from the physical condition of the school plant. the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools of a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.[226]

Many school systems did not begin the task of desegregation without further direction from courts. In addition some school boards deliberately devised plans to delay desegregation. Although some local schools did in good faith begin to comply with the desegregation order, the weight of litigation concerned those districts that sought to forestall the court's edict.

One of the earliest cases following the second *Brown* decision demonstrated the standards used by local school officials to assess the desirability of desegregation. The case occurred in the fifth circuit.

Curiously, the facts were similar to the first *Brown* decision: a child was forced to attend a school eighteen blocks from her home rather than a school four blocks away.

The superintendent was directed to make a detailed study in the following areas: (1) boundaries of individual schools in relation to the racial groups within them, (2) age distribution of students, (3) state of achievement and preparedness for grade level assignments of pupils, (4) relative I.Q. scores, (5) adaptation of curriculum, (6) overall scholastic impact on individual pupils, (7) appointment and assignment of principals, (8) preparedness, selection, and assignment of teachers, (9) social life of children at school, (10) problems of integrating the P.T.A. and the Dads' Club, (11) athletic program, and (12) fair methods of putting into effect the decrees of the Supreme Court.[227]

More than two years after the initial study was begun, the court ruled that the plaintiffs were entitled to attend a desegregated school with "all deliberate speed." During that time on at least two occasions the board had asked for more time to complete the study.

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226. Id. at 300.
227. Borders v. Rippy, 247 F.2d 268 (1957).

After a school board in Prince Edward County, Virginia, had delayed the start of a desegregation program for eighteen months, the fourth circuit court ruled that the district court had erred in not limiting the time for compliance.[228]

The court held: "This does not mean that the defendants should require mixing of white and Negro children in the schools but merely that they should abolish the requirements of discrimination."[229] Here the court was following the *dictum* of *Briggs v. Elliott*, which distinguished the fine line between segregation and integration:

> [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 is that a state may not deny to any person, on account of race, the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches.[230]

According to this *dictum*, school boards were required not to discriminate in assigning students to schools; however, they were under no overt compulsion to integrate completely. That is, growing out of this court holding was the feeling that schools are required to desegregate but not to integrate.

Cooper v. Aaron,[231] a 1958 decision of the U.S. Supreme Court, showed that local school officials had acted in good faith. Although the local school administration had sought to effect a compliance plan, the state had done otherwise.

On the other hand, *Evans v. Buchanan*[232] revealed a failure by the Delaware State Board of Education to effect a desirable attendance plan. Judge Layton, of the district court, admonished the state board:

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228. Allen v. County School Board of Prince Edward County, 249 F.2d 462 (1957).
229. Id. at 465.
230. Briggs, *supra* note 131.
231. Cooper, *supra* note 43.
232. Evans v. Buchanan, 173 F. Supp. 891 (1959).

> Surely it is within the wisdom and ingenuity of the members of the State Board to devise a regulation dealing with attendance areas which will prevent an immediate and unwarranted overcrowding of the facilities of the white schools and at the same time, upon the showing of good cause, permit a limited number of Negro students to transfer to a white school.[233]

The affirmative duty to desegregate was given a setback in *Bell*. In delivering the court's decision, the judge reaffirmed the *Briggs* doctrine that "[t]he Constitution, in other words does not require integration. It merely forbids discrimination."[234] Here the court held that there is no constitutional duty to change attendance districts formed because of shifts in population that altered the percentage of black or white students.

Downs[235] reaffirmed the judicial thinking of the late 1950s and early 1960s when the court refused to upset the Kansas City board of education plan.

> We conclude that the decisions in Brown and the many cases following it do not require a school board to destroy or abandon a school system . . . even though it results in a racial imbalance in the schools, where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation . . .[236]

In the mid-1960s, the courts began to exert more pressure on local school officials to achieve desegregation sooner. A typical case is *Davis*,[237] decided in 1964 by the Court of Appeals for the Fifth Circuit. The court emphasized

> that plans for desegregation must now proceed at a swifter pace in view of the ten-year period which has elapsed since the first Brown decision; the responsibility and duty resting on school boards to provide a constitutional plan of desegregation . . .[238]

One year later, in *Kemp v. Beasley*,[239] the Court of Appeals for the Eighth Circuit openly denounced the delay in school desegregation. A gradual plan for integration was rejected.

"The dictum in Briggs has not been followed or adopted by this Circuit and it is logically inconsistent with Brown and subsequent decisional law on subject,"[240] the court ruled.

233. *Id.* at 892.
234. *Briggs*, *supra* note 131, at 777.
235. *Downs*, *supra* note 65.
236. *Id.* at 998.
237. *Davis v. Board of School Commissioners of Mobile County*, 333 F.2d 53 (1964).
238. *Id.* at 54.
239. *Kemp*, *supra* note 23.
240. *Id.* at 21.

In 1968 the United States Supreme Court maintained its original position that local school boards take "affirmative action" in desegregation

> It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation . . . Where the Court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief.[241]

In 1969 the fifth circuit court decision in *Plaquemis* [242] held that the school board's responsibility for ending a dual school system is mandatory, rather than discretionary.

"Surely the dismantling of this long-entrenched system cannot take place if public officials actively are attempting to undermine the very existence of the public schools by word or deed," [243] the court stated.

Busing

Perhaps the most volatile legal area of school desegregation has centered on the recent question of busing students to achieve some racial balance. Many parents have fought to protect the neighborhood school program; others have argued that only through busing can some schools be actually desegregated and the "melting pot" idea be fully realized.

The question is not only a legal one but a political one as well. It became a key issue in the 1972 presidential primaries as well as in the general election.

For some time after the *Brown* decisions, the issue of busing was not considered in detail by the courts. References to it were usually made indirectly, in conjunction with some other major problem. For example, in *Willis v. Walker*, a 1955 decision by the western district in Kentucky, Judge Swinford stated:

> The defendants, by their answers, plead overcrowding of existing school buildings and the inadequacy of transportation facilities. I think that

241. Green, *supra* note 31.
242. Plaquemis Parish School Board v. United States, 415 F.2d 817 (1969).
243. *Id.* at 834.

> these conditions are to be taken into consideration by the court in fixing a date for integration, but I do not think either of them is a defense for unlimited delay.[244]

The courts were not yet ready to entertain the question of busing, and this was reflected in *Broussard*, a 1966 decision.[245] Under the school board plan in Houston, there were separate buses serving each neighborhood. One went to a predominately white school, the other to a black school. In approving the plan, the federal district court observed, "In this manner the children will be able to select the school they wish to attend by the bus they ride."[246]

The judge did not see evidence of racial discrimination in the school board plan. In addition, he cited with approval the factor under consideration in the assignment of students to given schools in 1966:

> Clear present need and other relevant factors such as accessibility of the facility, the safety and physical convenience of the student, the minimal exposure of the younger students to non-supervision, the home and family and community advantages of a nearby school, a due regard for prevailing traffic arteries and patterns, and the general feasibility characterize the local school building project rather than the suggestion of intended racial discrimination.[247]

In *Gilliam*, in 1965, the fourth circuit court had declared, "The constitution does not require the abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools."[248]

Two years after *Gilliam*, the seventh circuit court reached an opposite conclusion. A Cook County, Illinois, school board claimed that they were under no duty to bus pupils to achieve racial balance. In rendering its decision, the court turned the argument around, stating that it was undoing a discriminatory policy that segregated Negroes.[249] The court disputed the school board claim that segregation was *de facto*, holding that the separation of the races was intentional.

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244. Willis v. Walker, 136 F. Supp. 177, 181 (1955).
245. Broussard, *supra* note 89.
246. *Id.* at 269.
247. *Id.* at 270.
248. Gilliam, *supra* note 86.
249. Cook County, *supra* note 216.

More recently, in 1969, the Northern District Court in California ruled that a school district's plan was not in "good faith" after the court reviewed alternatives available to the board.[250] The district's original plan involved the closing of a Negro school and the one-way busing of those students. The virtually all-black student body was to be absorbed by three other schools, each of which formerly had less than an 8 percent black enrollment.

The legal battle over busing quickly escalated following the U.S. Supreme Court decision in *Swann v. Charlotte-Mecklenburg* in 1971.[251] The case was a challenge to a local school board's plan for desegregating the elementary, junior high, and secondary schools. (A year earlier, the fourth circuit court had upheld certain elements of the same plan.)[252]

The school district had a population of 600,000 persons in 1969. Some 84,500 pupils attended 106 schools in the 550 square-mile district. Potentially segregated residential patterns were augumented by urban renewal projects in the predominately black areas.

The school board had taken several measures to create a racially unitary district. It had (1) closed seven schools and reassigned pupils to increase racial mixing, (2) gerrymandered school zones to perpetuate integration, (3) created a single athletic league, (4) merged the black and white PTAs, (5) eliminated the bus system that had been operating on racial grounds, (6) modified the free transfer plan that had been operating on the basis of race, and (7) provided for integration of the faculty and administrative staff.

The district court disapproved of the desegregation plan, which left ten schools almost totally black, insisting that every school be integrated.

In the circuit court, however, Judge Butzner held that not every school in a unitary system needs to be integrated. The test hinged on a "reasonable effort" by the school board to integrate schools. If black areas were so large that reasonable means did not integrate the schools, school boards were then required to make

250. Brice v. Landis, 314 F. Supp. 974 (1969).
251. Swann, *supra* note 84.
252. 431 F.2d 138 (1970).

certain pupils were not excluded on the basis of race. But, Judge Butzner ruled, if a board has made "every reasonable effort" to desegregate, a remnant of segregation might be tolerated.

Using the test, the court ordered 300 black pupils in the secondary schools to be transported to an almost totally white school. The remaining high schools would have a black population varying from 17 to 36 percent.

The junior high school plan was rejected by the court. The twenty-one schools would have black enrollments ranging from 0 to 90 percent. The school board was given four options: (1) rezoning, (2) two-way transportation of pupils, (3) closing the predominately black school, or (4) combining zoning with satellite districts. The board reluctantly chose the last option.

For the seventy-six elementary schools, the board chose geographic zoning. Under this plan, more than half of the black students would be in nine schools 86-100 percent black. Nearly half of the elementary pupils would be in schools 86-100 percent white.

The court then approved a plan based on zoning, pairing, and grouping that would result in a 9 to 38 percent white enrollment. This plan would involve additional transportation. According to the school board, the outlay would be $3.5 million for the first year. The court's estimate for the same period was $1 million.

> Busing is a permissible tool for achieving integration, but it is not a panacea. In determining who should be bussed and where they should be bussed, a school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources.[253]

On this basis, the court accepted the plan for the secondary and junior high schools. The elementary school plan was rejected, however, because it would have involved cross-busing an average of fifteen miles round trip in central city and suburbia. The circuit court remanded the case for consideration of alternatives for desegregating the elementary school.

In 1971, a year after that decision, the case was before the U.S. Supreme Court for a decision. Here the justices unanimously overturned the circuit court's holding.[254]

253. *Id.* at 145.
254. Swann, *supra* note 84.

> Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation, by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings.[255]

Chief Justice Burger recounted the resistance since 1954 to various efforts to desegregate schools throughout the country. Nevertheless, Justice Burger said, "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."[256]

The chief justice held that school authorities might determine a prescribed ratio of black to white students, reflecting the school district's ratio. The Court did not require this standard, however, Chief Justice Burger said.

The Supreme Court stated:

> 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 schools, 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 considerations in some schools.[257]

The Court then declared the following principles: (1) The order to desegregate schools does not mean that every school in every community must always reflect the racial composition of the whole school system.[258] (2) The existence of a small number of one-race, or virtually one-race, schools within a district is not the mark of a system that still practices segregation of law.[259] (3) No fixed guidelines can be established as to how far a court can go, but limits must be recognized. The objective is to dismantle the dual school system.[260]

The Court considered the issue of transportation next. The justices recognized that operating school buses is a large enterprise since approximately 39 percent of the nation's school children used buses in 1969-70. Because of the complexity and

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255. *Id.* at 11.
256. *Id.* at 15.
257. *Id.* at 18.
258. *Id.* at 20.
259. *Id.* at 22.
260. *Id.* at 24.

diversity of school districts, no rigid guidelines were handed down by the U.S. Supreme Court.

> An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process.[261]

Carrying this one step further, the Court recognized that the racial composition of school communities will vary from year to year.

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.[262]

Implied, though not directly stated, in the Court's holding in *Swann* is that there is really no difference between *de facto* and *de jure* segregation. In other words, the source of discrimination—whether it be state imposed or not—is of less consequence than the actual existence of it. Where housing patterns tend to create uniracial neighborhoods (either all-black or all-white), the assignment of students to uniracial schools becomes suspicious.

The crux of the matter is that *Brown* is being applied, not only to the twenty-one states originally under its order, but also to any other state in which there are large concentrations of blacks, and, more specifically, to northern cities where there is *de facto* segregation.

The significance of *Swann* to districts outside the South became more apparent with a challenge to the Denver, Colorado, schools. It was the first time a large city outside the South had been sued for its pupil assignment plan.[263] Although Colorado had no laws requiring segregated educational facilities, there was some evidence of gerrymandered attendance zones that resulted in segregation.

The Denver school board had consistently adhered to the neighborhood school plan, attempting to locate a school as centrally as possible within each attendance zone. The attendance

261. *Id.* at 26.
262. Id. at 27.
263. Keyes v. School District No. 1, Denver, Colorado, 445 F.2d 990 (1971).

boundaries themselves were based on current and projected population, size of school, distance to be traveled, and natural boundaries.

Through the years, the school board had proposed a number of resolutions designed to achieve some degree of racial balance. The most significant one, proposed in 1968, provided for attendance boundaries to be redrawn. Under this resolution, the resulting black population in each school would be about 20 percent. In the meantime, however, a school board election changed the board membership and the resolution was rescinded. A "voluntary exchange" program between the northeast elementary schools and other elementary schools of the district was adopted in its place. A lawsuit was begun to challenge the exchange program. In considering the various aspects of the suit, the court observed:

> We can perceive no rational explanation why state imposed segregation of the sort condemned in Brown should be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student transfers. [264]

On this basis, the court insisted that school board attempts to perpetuate segregation through neighborhood school policy were illegal. The real test hinges on the effect of that policy.

> When a community experiences a steady and ascertainable expansion of Negro population resulting in a new and larger "Negro community," the school board must exercise extreme caution and diligence to prevent racial isolation in those schools. When new buildings are built, new classrooms added, attendance areas drawn, and teachers assigned, the board must guard against any acts which reflect anything less than absolutely neutral criteria for making the decisions.[265]

The court later found evidence that school districting was being done on a racial basis. Consequently, that portion of the policy was overturned.

Concerning busing and assignment of teachers, the court concluded that the plaintiffs had failed to show evidence of intentional racial imbalance by the school board.

This case was then appealed to and accepted for review by the Supreme Court of the United States. A decision is expected during the Court's 1973 term.

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264. Id. at 999.
265. Id. at 1002.

III. THE PROBLEM IN REVIEW

The problem of segregation in the public schools of this country is far from being resolved. Nearly two decades after the *Brown* decisions, many school districts have made considerable progress toward an integrated school system. Other school boards must be ordered by the courts to desegregate or desegregate further.

In Pontiac, Michigan, the Court of Appeals for the Sixth Circuit upheld a district court finding that the school board was accountable for the racial imbalance, which included faculty and administration as well as students.[266] Although the board had made some effort to integrate blacks, the court found the segregation to be deliberate and ruled that efforts toward improvement were inadequate.

A Richmond, Virginia, case, *Bradley*,[267] now on appeal to the U.S. Supreme Court, shows the complexity of both the problem and plans to improve it. Seeing that the city was approximately 70 percent black, while the counties were nearly 90 percent white, the federal district court ordered the merger of the school districts of the city of Richmond and the counties of Henrico and Chesterfield.

On appeal, the fourth circuit court reversed the lower court's decision.[268] The circuit court held that the school board cannot be held accountable for segregation of the community-at-large, even if that condition does affect the schools.

> The facts of this case do not establish, however, that state establishment and maintenance of school districts coterminous with the political subdivisions of the City of Richmond and the Counties of Chesterfield and Henrico have been intended to circumvent any federally protected right. Nor is there any evidence that the consequence of such state action impairs any federally protected right, for there is no right to racial balance within even a single school district . . . but only a right to attend a unitary school system.[269]

If the Supreme Court were to overturn the circuit court's holding, then it is conceivable that in due time federal courts could go further and order the crossing of state boundaries to achieve racial balance. The implications of the Richmond case are quite profound, particularly for large cities that have heavy

266. Davis v. School District of City of Pontiac, 443 F.2d 573 (1971). See also San Francisco Unified School District v. Johnson, 479 P.2d 669 (1971).

267. Bradley v. School Board of the City of Richmond, 338 F. Supp. 67 (1972).

268. Bradley v. School Board of the City of Richmond, 462 F.2d 1058 (1972).

269. *Id.* at 1069.

concentrations of Negro students and their suburbs that are largely white. Following the litigation in such cities as Denver and Pontiac, one surmises that the next decade of school segregation litigation will be concentrated more in northern areas and less in the South.

As of 1972, courts have held that any type of school segregation, whether in the North or South, is in violation of the equal protection clause of the Fourteenth Amendment. This is really an extension of the original public school desegregation decision, which dealt only with *de jure* separation of the races.

A Supreme Court overturning of the circuit court's holding would mark the first time federal courts have ordered the merger of school districts for racial balance. Until now, such a decision has rested with the state legislatures. The *Bradley* case is important because it involves the issue of the compulsory merging of school districts and the issue of busing.

Undoubtedly, with blacks concentrated in specific areas in Richmond, racial balance in the schools would require considerable busing between the central city and the suburbs. An order requiring this balance would set a precedent for a great deal of legal controversy in northern ghettos.

Two Supreme Court decisions in 1972 treated the reverse issue of the merger of school districts—the legality of separating a school district from an all-county system.

The small city of Emporia, Virginia, formed its own school system apart from the county of Greensville. The voting of the justices was almost as revealing as the decision: For the first time since the first *Brown* decision in 1954, the Court rendered less than a unanimous verdict in a school desegregation case.[270] Justices Burger, Blackmun, Powell, and Rehnquist, the four most recent appointees to the high bench, dissented. The majority upheld the district court ruling that a separate school system could be created only after a unitary district had been established. The facts revealed that this had not been done.

Before the creation of the special school district, the elementary and secondary schools in Emporia had served white students

270. Wright v. Council of the City of Emporia, 92 S. Ct. 2196 (1972).

almost exclusively. Negro students in the county were assigned to a single high school or one of four elementary schools, all but one located outside Emporia. After 1965, a freedom-of-choice plan was adopted, but less than 100 black students transferred to white schools. No white students transferred to black schools.

Emporia asserted that it had a constitutional right to have its own school system. Although the Court did not dispute this claim, it placed a condition on it. The school system would be permissible only where there was first evidence of a desegregated school system. The majority ruled that the city could attempt to set up its own district only after it was clear that segregation would be abolished.

The four dissenting justices based their argument on two essential points: (1) There was no evidence that segregation was the reason for the withdrawal. (2) There was a lack of evidence of a harmful psychological effect on students under the existing system.

The same day the Court handed down the *Emporia* decision, the justices ruled on a similar question involving Scotland Neck, North Carolina.[271] Here a unanimous Court, again speaking through Justice Stewart, overturned a circuit court holding that had allowed the creation of a separate school district. The minority in *Emporia* filed a concurring opinion. The key to the Court ruling was in determining whether the creation of a new district would help or hinder the process of desegregation. The Court noted an effort to provide a refuge for white students of the Halifax County school system.

The town of Scotland Neck sought and secured state legislation to create its own district of 695 students—399 white and 296 black. In addition, 360 white and 10 black students requested transfer to the city system. A total of 44 blacks sought to transfer to the county system, where over 75 percent of the population was black. The result of this was that a small segment of the county (the town) was over 50 percent white.

The Supreme Court saw that the Scotland Neck school would be a white majority while the formerly all-black Browley School, just outside the town, would be 91 percent black. It was clear to the

271. United States v. Scotland Neck Board of Education, 92 S. Ct. 2214 (1972).

justices that the purpose of the legislation was to maintain a white majority system.

Bradley will be crucial if it overturns the circuit court's holding, because it will give momentum to *de facto* segregation cases in a number of cities. If the circuit court's holding is sustained, it may well prompt a significant slowing of desegregation in school districts throughout the country.*

School officials in Detroit will undoubtedly follow *Bradley* with interest. Like Richmond, Detroit has a heavy concentration of black students within the city schools. The separate school districts in the suburbs are largely all-white. In 1971, Judge Roth found evidence of governmental action and inaction at the local, state, and federal levels that contributed to a racial imbalance in the city and suburbs.[272]

Judge Roth held that the segregation "is the result of past and present practices and customs of racial discrimination, both public and private, which have and do restrict the housing opportunities of black people."[273]

The following represent some of the forms of discrimination: (1) The school board bused black students away from closer white schools to black schools. (2) The board did not bus white students to predominately black schools, particularly those of the inner city. (3) Elementary schools were located in such places as to promote limited desegregation. (4) The state refused to provide money to bus students within the city.

Judge Roth delayed in effecting a remedy to allow parents of affected suburban children to be parties to the case.

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* Since the completion of this manuscript, the United States Supreme Court handed down its decision on the *Bradley* case. On May 1, 1973, the Court upheld, by a 4-4 vote, the decision of the fourth circuit court. The circuit court, in reversing the district court's order, had ruled that since the last vestiges of state-imposed segregation had been wiped out in the public schools of the three school districts and since it had not been established that the racial composition of the school was the result of invidious state action, there was no constitutional violation. Therefore, the district court had exceeded its power of intervention. Richmond School Board v. Virginia State Board of Education, 41 V.S.L.W. 42 (May 1, 1973).

In a decision consistent with the Supreme Court's ruling, the United States District Court for the Western District of Pennsylvania ruled on May 15, 1973, that a school district consolidation plan was invalid because it would "perpetuate, exacerbate and maximize segregation of school pupils." Hoots v. Commonwealth of Pennsylvania,—— F. Supp. ——.

272. Bradley v. Milliken, 338 F. Supp. 582 (1971).

273. Id. at 587.

More recently, the appeals court upheld the district court's finding that the city schools are unconstitutionally segregated and that the suburbs must be a part of the desegregation plan. A rehearing was scheduled for February 1973.

Some similarities of the above cases are evident in the Indianapolis, Indiana, desegregation suit.[274] At issue was whether the school board had overtly discriminated in redrawing the city and school district lines and merging with suburban areas.

The court traced, at length, the school system's desegregation policies for over two decades. After deliberating, the court concluded that racial discrimination still existed, in spite of 1949 state legislation in Indiana that abolished *de jure* segregation in the public schools.

The court offered the following evidence: (1) drawing of attendance lines with knowledge of residential patterns, (2) overcrowding of one-race schools, (3) having optional attendance zones, (4) constructing new schools, (5) transporting students from overcrowded schools of one race to schools of the same race, and (6) assigning special education classes.

Since 1968, the school board had requested (but later rejected) a desegregation plan from the Department of Health, Education, and Welfare. A community committee and a staff committee both recommended that a new black school be constructed to replace Attucks High School. The board adopted a majority-to-minority transfer plan in 1970 and approved a black history curriculum. The board also professed nondiscrimination in its policies for recruiting, employing, and promoting faculty and staff.

In addition, there were problems over which the school board had no control. One such problem was an increase in concentrated pockets of black population as a result of white migration to the suburbs. Low-rent housing, one of the appeals of established black housing areas, further concentrated urban blacks as they were attracted financially to black housing projects.

274. United States v. Board of Commissioners of the City of Indianapolis, 332 F. Supp. 655 (1971).

In 1969, the Indiana legislature, for municipal purposes, merged all the municipalities in Marion County into one government. The city of Indianapolis was included in the merger. School district boundaries in Marion County, however, were not changed by the formation of the county government. As a result, the Indianapolis school district boundaries were not as extensive as those of the county. All the suburban area in the county was consequently organized into school districts separate from the Indianapolis city school district.

In spite of a number of efforts by the school board to abolish segregation, it was still very evident that the policies failed. Segregation increased in the fourteen years following *Brown*. Part of the problem concerned matters over which the school board had no direct control; however, the court refused to dismiss the matter lightly. There is increasingly a burden on boards of education to take affirmative action regarding such matters as housing, zoning, and land acquisition.

The court recognized a fact of life here: when black pupils constitute as much as 40 percent of the school population, whites begin to leave and resegregation occurs.

Indirectly, however, the school board was still held partially accountable. The court finally concluded that the school district had been operating a segregated school system and ordered that efforts should be made to begin a desegregated program. An outright, exact racial balance was rejected as being unnecessary, consistent with prior holdings. The judges also questioned the desirability of creating a school district that would include the city, all of Marion County, plus parts of others.

Both plaintiffs and defendants were allowed to add to the case parties who had an interest that would be affected by the court's decision. In the meantime, the school board was restrained from practicing further segregation: (1) Faculty and students were to be assigned on a racially nondiscriminatory basis. (2) Attucks High School was to be desegregated and relocated. (3) The majority-to-minority transfer plan was to be amended to conform to *Swann*. (4) The new policy was to be publicized, and black students were to be transferred, if possible, to outlying schools in

other districts. The order was not as sweeping as the requirement of school districts merging, but the courts did indicate a thorough dissatisfaction with the present plan.

If the Supreme Court orders the merger of school districts for racial balancing, it is conceivable that federal courts could eventually go further and order the crossing of state boundaries for the same purpose. Although the matter has not been proposed yet, the increasing national interest in education may give legal support to this idea. As a practical matter, some students even now attend a school outside their state where it is more convenient in terms of transportation.

The next decade of school desegregation litigation will be concentrated more in northern areas and less in the South. The focal point will be on the large cities where *de facto* segregation has been practiced for decades. Courts will be asked to apply the first *Brown* decision's holdings to such areas.

Although public school segregation has not been eradicated in the South, real progress has been made. There will continue to be litigation but not on as massive a scale as previously and not as compelling as that which will be faced by the larger northern districts and their racial ghettos.

The Supreme Court originally saw a need for local school personnel to dismantle the dual system "with all deliberate speed." After a period of approximately ten years, that standard became no longer acceptable, and school boards receiving adverse court decisions were expected to desegregate immediately. There was also evidence that schools were to integrate prior to exhausting all court remedies.

Attempts to circumvent the court holdings will no longer be tolerated. In the future, judges will look not only at the desegregation plan but also at the motive behind it. What might otherwise be acceptable in a nondiscrimination case would be suspect where a racial issue is involved.

Any school board plan that attempts to separate the races within the district or inside a school will fail.

Desegregation plans may entail drastic changes in attendance boundaries—redrawing lines in a bizarre fashion, merging of

dissimilar school communities, or doing away with the neighborhood school. On the other hand, a racially integrated neighborhood school would currently win court approval. A nondiscriminatory school board plan will be one in which school officials have taken positive action in accomplishing a fully desegregated system.

Courts hearing desegregation cases will not place the burden of proof on complaining students to show that they have been discriminated against. The burden will, instead, be shifted to the board of education to demonstrate that it did not act discriminatorily.

Location of new school buildings will become increasingly important with a greater emphasis on mixture of the races. School board members will have to be cognizant of population trends and shifts in population as they select the sites.

Judicial pressure will continue to be brought to bear on limited desegregation plans. As a result, entire schools will be integrated totally, rather than by a few grades at a time.

Even the most diligent efforts to follow the *Brown* mandate will not eliminate legal problems in this area. The litigations will continue for years to come. In addition, new issues will be identified, different plans will be proposed, and standards of compliance will change.

The courts will continue to strive for resolution of the matter, weighing all the elements for consistency with the equal protection clause of the Fourteenth Amendment.

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