WAITING ON THE PROMISE OF *BROWN*

DERRICK A. BELL, JR.*

Black Parents Equal Educational Opportunity Committee
Delta County, Southland

Dear Friend,

We have always been concerned about good schools for our children. When the Supreme Court said, more than twenty years ago, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," we felt that the Court understood our concern. We placed our faith in the Brown *decision. There have been many changes for the better in the last two decades, but we are still waiting for the promise of* Brown *to be realized in our public schools.*

Several years ago, the black community in Delta County formed the Black Parents Educational Opportunity Committee. This Committee has worked to desegregate our schools in order to obtain the equal educational opportunity to which the Court said our children were entitled. In 1963 the Delta County School Board was taken to court; during the long years of litigation many favorable court rulings were obtained, but most succeeded only in stopping school board action intended to maintain segregated schools.

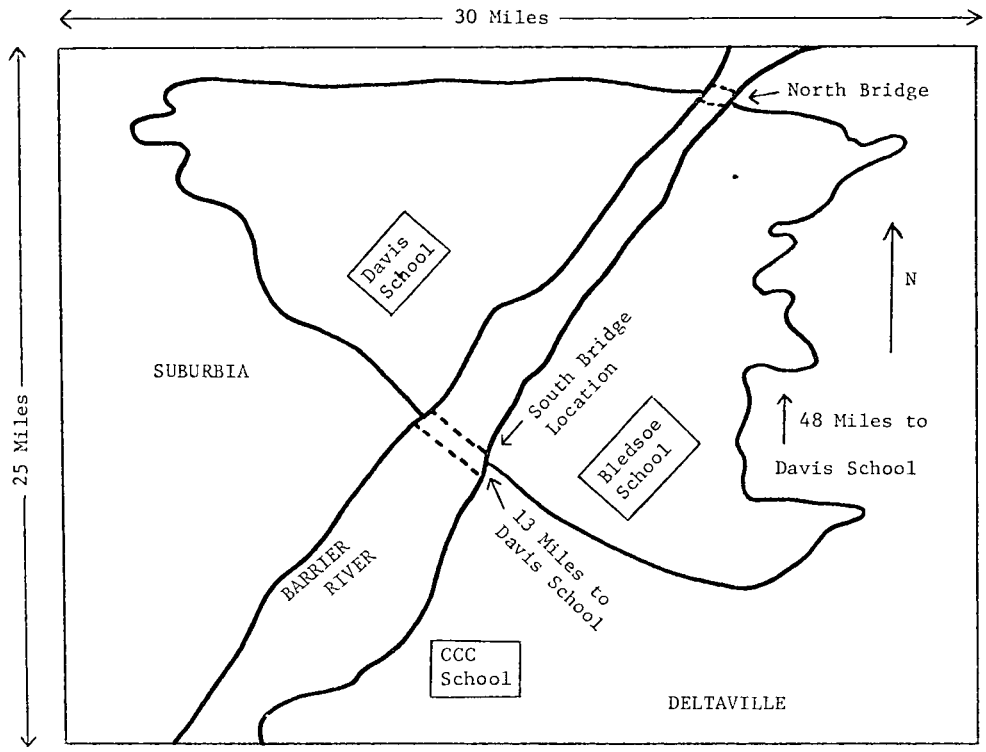
Delta County, located in a hilly area, is bisected by the scenic, but virtually non-navigable Barrier River, as shown on the enclosed map. In the mid-1940's, when public schools were segregated by law, the county schools were consolidated into one school system. That system, controlled by an all-white board—selected every four years on an at-large basis—serves the children of the roughly 5,000 white and 3,000 black residents of the county. There are approximately 1,000 black and 2,000 white children of public school age eligible to attend the county's two schools, each of which serves grades one through twelve.

The district contains only two schools: Jefferson Davis School, located in Suburbville, a middle-class residential area in the northwestern portion of the county, where most of the white population of the county lives; and Booker T. Bledsoe School, located in Deltaville in the southeastern part of the county, where most of the blacks live —either in Deltaville itself or on small farms in the outlying areas. Black families in the county earn little, but in recent years a few dozen of the more affluent blacks have moved to Suburbville.

In 1968, five years after suit was filed to halt the assignment of all black children to Bledsoe School and all white children to Davis School, the federal court ordered a "freedom of choice" plan for the county. Despite harassment and economic pressures

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by certain elements of the white community, about 100 black children were enrolled in the Davis School under this plan. In 1972, however, the court ruled that the freedom-of-choice plan was inadequate to disestablish the dual school system and ordered the board to pair the two schools so that Davis would serve all students in grades one through six while Bledsoe would serve all students in grades seven through twelve. Under this "pairing" plan, 1,500 students would be transported across South Bridge each school day.

There was tremendous opposition in the white community to this plan, and the board exhausted all available judicial appeals. In September 1974, on the night before the plan was to go into effect, South Bridge—the only crossing over Barrier River in the proximity of the two schools—was mysteriously blown up. Despite continued requests from the black community, neither state nor federal officials have been able to finance reconstruction of the bridge. Both have concluded that the cost, estimated at ten million dollars, cannot be appropriated before late 1976. Even when funding is obtained, engineers expect that because of construction difficulties, the new bridge will not be completed until 1979.

Destruction of South Bridge did not seriously disrupt business, most of which flows to neighboring counties. But the loss of the bridge has greatly affected the county's school integration plans:

a. When South Bridge was destroyed, the school board petitioned the district court

to delay the pairing plan. Attorneys for the plaintiffs countered with the suggestion of implementing the plan using North Bridge, but the school board objected, claiming transportation of students from one side of the county to the other by way of North Bridge would require bus rides averaging three hours per day. (We have verified that, for most children, the ride over rough, hilly roads would total three to four hours.)

The board suggested, and the court approved, an "emergency proximity plan' that assigned each child to the school closest to his or her home. The board is now seeking judicial approval of its emergency plan until South Bridge is replaced. Under the "proximity" plan, as it operated during the 1974-75 school year, there were 1,500 white and 50 black students (all of whom reside in Suburbville) enrolled and attending Davis School. There were 950 black and 500 white students assigned to Bledsoe School.

b. None of the white students assigned to Bledsoe School enrolled. Some white families moved to the west side of Barrier River; the remainder, mostly low-income families, placed their 500 school-age children in the new Deltaville private school, Caucasian Children's Choice (CCC). Enrollment in CCC is limited to the descendants of those residents who attended, or were eligible to attend, Davis School prior to 1954. Some of us would like to desegregate or at least lessen its attractiveness to white parents as a haven from desegregation. As far as we know, it receives no government money or supplies.

c. Booker T. Bledsoe II, the principal of Bledsoe School, is the son of the founder for whom the school was named. He has held this position since the school was built. Dr. Bledsoe is not an effective educator and cares little for the concerns and needs of the black community. He refuses to permit courses or even class discussion of black history, civil rights, or other subjects which he feels will "stir up" the students. More importantly, he resists implementing special teaching techniques needed by many black youngsters who come from culturally different homes. Scholastic achievement scores at Bledsoe School are low and drop-out rates are high. The faculties at both schools have been desegregated by court order, but Dr. Bledsoe has hired teachers—black and white—who reflect his antiquated and conservative approach to teaching.

d. School board members have approached leaders in the black community about a possible "final settlement" of the school question. Their proposal is the following: they will appoint any qualified person the black community designates to replace Dr. Bledsoe, who retires at the end of the current school year. They promise not to limit the new principal in his selection of teachers, curriculum, or teaching techniques and to make extra funds available with which to implement these programs. In return, the black community is to accept the emergency proximity pupil-assignment plan as permanent.

The national civil rights organization which has been handling the school litigation for the plaintiffs since the first suit was filed in 1963, has condemned the plan as an "unconscionable compromise" of school integration goals. I estimate, though, that about half of the black community favors acceptance of this plan, providing it is legal. We are not impressed by the way in which black children are treated at Davis

School and schools in other counties where desegregation has taken place; we increasingly wonder whether further integration efforts will benefit our children. Some of the black residents, however, still favor busing students over North Bridge; others are undecided.

As you can see, we are faced with serious difficulties. We hope you will soon send us your recommendations as to the legally permissible solutions to these problems. We need to hear from you; please do not fail us in this difficult time.

Sincerely yours,
Faith-Ann Courage
Chairperson

Dear Ms. Courage:

The Supreme Court's decision in *Brown v. Board of Education*[1] was less a promise than an opportunity. By withdrawing Constitutional approval of segregated schools, the Court did not guarantee racially integrated schools. Rather, the judicial acknowledgment of the social and psychological harm done black children under the never-realized "separate but *equal* standard," provided black Americans with an opportunity to seek a non-coerced, non-racial foundation on which to structure public school policies. Because the Court denounced official segregation, it followed—or at the time seemed to follow—that the *Brown* decision sanctioned desegregation as *the* remedy to which black children were entitled.

Resistance to school desegregation was so great and some of the methods of evasion so insidiously deceptive that civil rights proponents and, later, courts were forced to measure compliance with desegregation court orders by the extent to which the school system actually interspersed black and white children in the same schools.[2] Somewhere in the struggle to overcome the fierce resistance to desegregation,[3] civil rights lawyers and others, and particularly the courts, began to equate the elimination of the dual school system with the attainment of equal educational opportunity.

Your letter reflects the justifiable fear that these two aims are not the same. Former NAACP General Counsel, now Federal District Judge Robert L. Carter wrote: "[F]ew in the country, black or white, understood in 1954 that racial segregation was merely a symptom, not the disease; that the real

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1. 347 U.S. 483 (1954).

2. *See, e.g.*, Read, *Judicial Evolution of the Law of School Integration Since* Brown v. Board of Education, 39 LAW & CONTEMP. PROB. no. 1, at 7 (1975).

3. *See* Fairman, *The Supreme Court, 1955 Term—Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83 (1956); Knowles, *School Desegregation*, 42 N.C.L. REV. 67 (1963); Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA. L. REV. 517 (1959); Powe, *The Road to* Swann: *Mobile County Crawls to the Bus*, 51 TEX. L. REV. 505 (1973); Comment, *State Efforts to Circumvent Desegregation: Private Schools, Pupil Placement, and Geographic Segregation*, 54 NW. U.L. REV. 354 (1959).

sickness is that our society in all of its manifestations is geared to the maintenance of white superiority."[4]

Thus, the dilemma you face in Delta County does not result, as some legal scholars would suggest, from analytical inadequacies in the *Brown* opinion,[5] or from the Court's unfortunate failure to require immediate compliance with its mandate.[6] Full implementation of *Brown* remains an uncertain future prospect because of the continuing resistance of many whites who fear that the realization of "equal educational opportunities" for blacks will mean the loss of economic and status benefits that they and their children now enjoy solely on the basis of race.

The essence of the advice contained in this response is that white resistance in Delta County, and elsewhere, may be neutralized by utilizing the right to school desegregation as a valuable lever with which to achieve community-designated educational goals otherwise unavailable to an economically and politically powerless minority. But this leverage should be applied in ways other than, or in addition to, the enrollment of black children in predominantly white schools.

Conditions in Delta County require discussion of the following points: the legal and educational inappropriateness of placing total reliance on immediate integration of the Delta County schools; the considerations involved in accepting the school board's settlement offer; and a reexamination of what the *Brown* decision has meant to blacks, including suggestions on how to restore its waning vigor.

I

TOTAL RELIANCE ON IMMEDIATE INTEGRATION

School desegregation statistics show that the *Brown* decision has done much of what it was intended to do—eliminate the dual school system based on race—and in precisely that area of the country where the Court intended its mandate to have effect—the South.[7] But the impact of *Brown* has been weakened, and its very existence as legal precedent endangered by the effort to apply its holding rigorously and inflexibly in large urban areas of the country, North and South, where public schools today are more racially seg-

4. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 247 (1968).

5. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959). *See also Note: Rights Under* Brown *and the Associational Dilemma*, in D. BELL, RACE, RACISM AND AMERICAN LAW 452 (1973).

6. *Compare* the broad, flexible standards of compliance in Brown v. Board of Educ., 349 U.S. 294 (1955), *with* the more precise judicial guidelines set out sixteen years later in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

7. U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT —1974: A REPORT 49-51 & nn. 116-28 (1975).

regated than they were in 1954,[8] and where the barriers to desegregation, for all practical purposes, are virtually insurmountable.

In Delta County, geographic conditions compounded by community resistance have generated school desegregation problems quite similar to those found in large urban areas of both North and South. This is highly unusual in rural areas where, as the Supreme Court has noted, consolidated school systems implemented by bus transportation have enabled school adjustments "more readily than [in] metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns."[9]

That the rights of black children under the *Brown* decision must encompass more than the entitlement to attend desegregated schools is evidenced by the suggestion in several recent Supreme Court decisions that there are limits to the extent to which school desegregation need be carried out. "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."[10] Even after the demise of the "all deliberate speed" standard as justification for delay,[11] a plan will not necessarily be enforced under any and all circumstances.[12]

For at least the following reasons, it is doubtful that the courts will require implementation of a pairing plan in Delta County before South Bridge is restored:[13]

a. *Busing is a limited remedy* because the majority of white parents do not perceive it as a means of obtaining a better education for their children than

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8. STAFF OF SENATE SELECT COMM. ON EQUAL EDUC. OPPORTUNITY, 92D CONG., 2D SESS., REPORT: TOWARD EQUAL EDUCATIONAL OPPORTUNITY 102-04 (Comm. Print 1972). In the period 1968-1971, the percentage of black students in the 11 southern states attending 80 to 100 per cent minority schools was reduced from 78.8 per cent to 32.2 per cent; the change in the remaining states during that time was negligible. *Id.* at 110-11. In many large urban areas, racial isolation increased. "About half the Nation's black students, 3.4 million, are located in the 100 largest school districts." *Id.* at 114. In 1971, 73.4 per cent of them attended 80 to 100 per cent minority schools, and 59 per cent were in 95 to 100 per cent minority schools. *Id.*

9. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 14 (1971).

10. 402 U.S. at 28.

11. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969).

12. In Milliken v. Bradley, 418 U.S. 717, 744, 745 (1974), despite the fact that the only effective desegregation plan was a metropolitan area plan, the Court held that desegregation stops at the city limits, unless it can be shown that deliberately segregative actions were taken in the surrounding school districts contributing to the segregation of the city's school system or that district lines were deliberately drawn on the basis of race. *But see* Newburg Area Council v. Board of Educ. of Jefferson County, 510 F.2d 1358 (6th Cir. 1974) (consolidated with Haycraft v. Board of Educ. of Louisville). Similarly in *Swann*, the Court indicates that even if busing were the only tool which could produce effective desegregation in a particular school district, it need not be utilized "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30-31.

13. Milliken v. Bradley, 418 U.S. 717 (1974), eliminated the possibility of federal courts ordering the consolidation of the hypothetical Delta County schools with those in neighboring counties for purposes of desegregation in the absence of proof that "the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race." 418 U.S. at 745. *Milliken* was followed by the Sixth Circuit which reversed a metropolitan desegregation order

would be possible otherwise. Where school desegregation is not an issue, the school bus has become an accepted and generally welcome component of American public education.[14] But federal courts, aware of the resistance to busing over long distances as a means of effecting an end to segregated schools, have, in effect, legitimized this resistance "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process."[15]

Chief Justice Burger has indicated that he personally would stay a school desegregation order involving average daily travel times of three hours.[16] Other members of the Supreme Court have indicated that busing, and integration in general, must be balanced against its disruptive effects on public education and "the rights and interests of children affected by a desegregation program . . . ."[17] And although unlike the Delta County situation, *Swann* involved busing across noncontiguous geographic school attendance zones, the majority of the Court suggested that had there been "no history of discrimination, it might well be desirable to assign pupils nearest their homes."[18]

Lower courts have rejected plans as not "feasible" where pupils would have been required to travel up to 2 1/2 hours a day,[19] where the location

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in United States v. Board of School Comm'rs of Indianapolis, Ind., 503 F.2d 68 (1974). *Milliken* was distinguished, however, by that same circuit in a case involving the possible consolidation of the city of Louisville and Jefferson County school districts. Newburg Area Council v. Board of Educ. of Jefferson County, 510 F.2d 1358 (6th Cir. 1974) (consolidated with Haycraft v. Board of Educ. of Louisville).

14. NAACP Legal Defense and Educational Fund, *It's Not the Distance, 'It's the Niggers,'* in THE GREAT SCHOOL BUS CONTROVERSY 322 (N. Mills ed. 1973). In 1972 HEW estimated that "43.5% of the total public school enrollment or 18,975,939 pupils are transported to school daily." *Id.* at 324. "The National Highway Traffic Safety Administration reports that the total cost, including capital outlay for pupil transportation for 1971-72 is $1.7 billion." *Id.* Of the 256,000 buses that travel 2.2 billion miles, *id.*, only a small percentage were bused to achieve school desegregation.

Judge Winter, dissenting in Thompson v. School Bd., 498 F.2d 195 (4th Cir. 1973), charged that the district court had relied on expert testimony which measured the effect of busing on children's physical and mental health on "whether he is happy which, in turn, depends upon whether he is transported to a school 'of his choice or his parents' choice.' " *Id.* at 198.

15. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 30-31 (1971). *See also* Davis v. Board of School Comm'rs of Mobile County, 402 U.S. 33 (1971), requiring "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Id.* at 37.

16. Winston-Salem/Forsyth Bd. of Educ. v. Scott, 404 U.S. 1221, 1227 n. 1 (1971).

17. Keyes v. School Dist. No. 1, 413 U.S. 189, 247 (1973) (Powell, J., concurring in part and dissenting in part).

18. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 28. Even so, the plan subsequently approved by the district court in Charlotte required the transportation of 46,667 students. 334 F. Supp. 623, 626-27 (W.D.N.C. 1971).

However, *apropos* the Delta County situation, the Fourth Circuit has rejected a desegregation plan which retained racially identifiable schools because it did not encompass transfer of students across a river which divided the city. Medley v. School Bd. of City of Danville, 482 F.2d 1061 (4th Cir. 1973), *cert. denied*, 418 U.S. 1172 (1974); Gaines v. Dougherty County Bd. of Educ., 465 F.2d 363 (5th Cir. 1972).

19. Thompson v. School Bd., 498 F.2d 195, 196-97 & n. 1 (4th Cir. 1971). It should be

of highways and railroad yards posed serious obstacles to the required transportation,[20] and where the age of students to be bused "lengthy" distances would have a "probable adverse effect upon the physical health and mental processes of the children."[21]

Applying the above standards to Delta County, the court's 1972 pairing plan requiring the use of bus transportation was clearly appropriate when ordered.[22] With the destruction of South Bridge and no more feasible means than North Bridge available for crossing Barrier River, implementation would require bus rides of three to four hours—substantially greater than those in other plans which courts have refused to approve.[23]

b. *Violent opposition to school desegregation* does not constitute a valid basis

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noted, however, that this finding of infeasibility was based almost entirely on the testimony of a pediatrician, Dr. Hogge, who testified as an expert witness on behalf of defendants and whose testimony was confined to the effect on school children in grades kindergarten through two. The issue relating to grades three through seven was disposed of on entirely different grounds. *Id.*

20. *See* Thompson v. School Bd., 363 F. Supp. 458 (E.D. Va. 1973). *But see* Keyes v. School Dist. No. 1, 413 U.S. 189, 204-05 (1973) (six lane highway not a significant barrier to integration).

21. Thompson v. School Bd., 363 F. Supp. 458, 459 (E.D. Va. 1973).

22. The continued existence of Bledsoe as a "one-race" school does not per se invalidate the Board's proximity plan; it merely

> warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such assignments are genuinely nondiscriminatory.

Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. at 26. Arguendo, then, if there is no reasonable means by which Bledsoe can be desegregated, the burden could be assumed to have been met.

23. For limitations on busing notwithstanding the fact that the result substantially reduced potential desegregation see Northcross v. Board of Educ. of Memphis City Schools, 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974); Mapp v. Board of Educ., 477 F.2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1974); Goss v. Knoxville Bd. of Educ., 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

In *Northcross* the court had three plans from which to choose. Plans one and three would assure 100 per cent desegregation, but 80 per cent of those bused would ride 31 to 45 minutes each way while 20 per cent (mostly elementary school students) would ride 46 to 60 minutes each way. Plan two would only accomplish 83 per cent desegregation, but 100 per cent of those bused would ride 31 to 45 minutes each way. The court was influenced—perhaps decisively—by the "practical considerations set forth in *Swann*" as outlined by the district court. 489 F.2d at 17.

In both *Mapp* and *Goss* the Sixth Circuit Court of Appeals affirmed the decisions of the district court which approved plans requiring no busing: *Mapp*, because of the disruptive effect on the educational program that busing would have and the substantial amounts of capital outlay it would entail; *Goss*, because a unitary system already existed and the busing was proposed in order to improve the racial mix; both, because endemic geographic concentrations of blacks were responsible for the racial patterns of the school population.

In Carr v. Montgomery County Bd. of Educ., 377 F. Supp. 1123 (M.D. Ala. 1974), *aff'd per curiam*, 511 F.2d 1374 (5th Cir. 1975), the Fifth Circuit approved (two-to-one) a plan in which 55 per cent of the black elementary school pupils were enrolled at schools 87 per cent or more black, and nearly 40 per cent of the junior high school students are enrolled in schools 80 per cent or more black. District Judge Frank Johnson rejected plaintiffs' plan for greater desegregation. He found it was designed "for the sole purpose of attaining a strict racial balance

for noncompliance or delay.[24] But where, as in Delta County, violent opposition has rendered implementation very difficult, there appears to be little by way of judicial precedent to justify a desegregation order which would exceed the *Swann* standards for busing, if done in retaliation against the violent acts which made the excessive busing necessary. Violent interference with school desegregation orders violates the federal criminal code;[25] it may also justify civil relief.[26] But future remedies provide little comfort to parents understandably concerned about the immediate danger of having their children transported over long stretches of country roads in a community where fanatics are willing—in order to prevent busing—to destroy bridges with evident impunity. Civil rights policies that limit the scope of *Brown* to rights obtainable only on pain of daily fear of physical harm should no longer be accepted without question by black parents in Delta County, or anywhere else.

c. *New school construction* in a location near North Bridge is an expensive alternative to reconstructing South Bridge—which the school board will not undertake voluntarily and which, because of the great cost involved, courts are not likely to require. School boards have been ordered to select "the construction sites of future schools so that desegregation will be enhanced."[27] The purchase of new buses to enable the transportation of school children has also been required,[28] even in a school system which had never before operated a transportation system and which did not promote a dual system by using buses.[29] And, where the selected site would perpetuate the dual school system,[30] at least one court ordered a halt to new construction until

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in each elementary school. . . . [T]he plaintiffs' plan would be disruptive to the educational processes and would place an excessive and unnecessarily heavy administrative burden on the school system." 377 F. Supp. at 1129.

24. Cooper v. Aaron, 358 U.S. 1 (1958); *cf.* Brown v. Board of Educ., 349 U.S. 294 (1955) ("the vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them").

The violent measures resorted to in the fictitious Delta County situation appear extreme; however, there are recent reports of law enforcement officials in Boston indicating that an alleged terrorist campaign has been initiated by a group of anti-busing activists who reportedly plotted to destroy five to seven bridges which provide access to South Boston where the blue-collar white community has mounted a continuing protest against school desegregation ordered by federal courts. Boston Evening Globe, Dec. 20, 1974, at 34.

25. 18 U.S.C. § 245 (1970). *See also id.* §§ 241-242; Hayes v. United States, 464 F.2d 1252 (5th Cir. 1972) (denying post-conviction relief to defendants convicted under 18 U.S.C. § 241 for bombing school buses used to transport black students to desegregated schools).

26. *See Note: Private "Self-Help" Efforts by Whites*, in D. BELL, RACE, RACISM AND AMERICAN LAW 318 (1973).

27. Dandridge v. Jefferson Parish School Bd., 332 F. Supp. 590, 594 (E.D. La. 1971), *aff'd*, 456 F.2d 552 (5th Cir. 1972). *See also* Clark v. Board of Educ. of Little Rock School Dist., 449 F.2d 493 (8th Cir. 1971); Trahan v. Lafayette Parish School Bd., 362 F. Supp. 503 (W.D. La. 1973).

28. *See* United States v. Greenwood Municipal Separate School Dist., 460 F.2d 1205 (5th Cir. 1972). *See also* Henry v. Clarksdale Municipal School Dist., 480 F.2d 583 (5th Cir. 1973).

29. *See* Brown v. Board of Educ. of City of Bessemer, 464 F.2d 382 (5th Cir. 1972).

30. *See* United States v. Board of Pub. Instruction of Polk County, 395 F.2d 66 (5th Cir. 1968).

the school board took action to ameliorate the situation. Ordering construction of a new school, even in the unique Delta County situation, would exceed judicial limits for equitable relief in school desegregation cases.[31]

d. *The emergency plan* adopted by the Delta County School Board after the destruction of South Bridge will likely be approved by appellate courts even though the effect of assigning each child to the closest school perpetuates the dual school system. The Supreme Court has suggested that "the effect —not the purpose or motivation of a school board's action" is the crucial determinant in weighing the validity of a school desegregation plan,[32] and, by its decision in *Green v. County School Board*,[33] implicitly endorsed the statement that "[t]he only school desegregation plan that meets constitutional standards is one that works."[34] But, as I've just indicated, no other, more effective desegregation plan can meet the Court's tests of "reasonableness" and "feasibility."[35] The addition of a "freedom-of-choice" provision to the emergency plan might be sought in order to accommodate parents wishing to voluntarily transport their children to Davis School.[36] The school board might even be required to provide buses for these students.[37] Regardless of whether this relief is obtained, the relatively small number of black children who chose Davis School under the pre-1972 plan suggests that no more are likely to do so now that the distances to be traveled are so much greater and the enthusiasm for integration in the black community is greatly diminished.

e. *The private school*, Causasian Children's Choice (CCC), by offering a segregated sanctuary to white families wishing to avoid integrated schools, poses

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31. A court might require construction of temporary classrooms at a midway point between the two schools for special integrated classes which all students might attend on a rotating basis perhaps once each week.

32. Wright v. Council of City of Emporia, 407 U.S. 451, 462 (1972).

33. 391 U.S. 430 (1968).

34. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

35. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 31. "[A school board is] under an obligation to exercise every reasonable effort to remedy the violation, once it [is] identified . . . ." A plan that is "reasonable, feasible and workable" is within "the scope of [equitable] remedial power," although in defining "the limits on remedial power of courts, . . . [s]ubstance, not semantics, must govern . . . ." 402 U.S. at 24 n.8, 31.

36. In *Green v. County School Board*, the Court struck down the freedom-of-choice plan under which the school district had operated, but in doing so, it did not condemn freedom-of-choice plans per se.

> Where a "freedom of choice" plan offers real promise of achieving a unitary, nonracial system there might be no objection to allowing it to prove itself in operation, but where there are reasonably available other ways, such as zoning, promising speedier and more effective conversion to a unitary school system, "freedom of choice" is not acceptable.

391 U.S. at 439-41.

37. *Swann* indicates, that, in order to be approved, a majority-to-minority "transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move." 402 U.S. at 26-27. *Cf.* Northcross v. Board of Educ. of Memphis City Schools, 489 F.2d 18 (6th Cir. 1973) (approving orders requiring the city to provide funds and necessary gasoline needed for court-ordered busing).

a serious obstacle to the elimination of the dual school system in Delta County, and thus is an appropriate target for legal challenge. CCC's discriminatory admissions policy is barely concealed by the ingenuous device of limiting admission to the children of residents who attended or were eligible to attend Davis School at a time prior to 1954 when it was segregated by law.[38]

Private schools, which, as "segregation academies" to which white anti-integrationists escape, making school desegregation efforts futile, are barred from receiving any state aid in the form of tuition grants,[39] tax exemptions,[40] books and other school supplies,[41] school buildings, either by purchase[42] or lease,[43] and even the exclusive use of publicly-owned facilities.[44]

In addition, there is some judicial authority indicating that a post-Civil War federal civil rights law[45] may require admission of black children even to a wholly private school, when their rejection is based solely on race.[46] In order to challenge CCC's policy which now offers shelter for whites who don't wish to send their children to school with blacks, some Delta County black parents may be willing to apply for their children to be admitted. However, litigation to achieve this result is likely to be prolonged, as it affects the whole range of exemptions from civil rights laws that private clubs presently enjoy.[47]

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38. *Cf.* Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939).

39. Poindexter v. Louisiana Financial Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968); Coffey v. State Educ. Finance Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969); Griffin v. State Bd. of Educ., 296 F. Supp. 1178 (E.D. Va. 1969); Brown v. South Carolina State Bd. of Educ., 296 F. Supp. 199 (D.S.C. 1968), *aff'd per curiam*, 393 U.S. 222 (1968).

Earlier private school cases are cited in T. EMERSON, D. HABER, & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 1280-82 (student ed. 1967).

40. Green v. Connolly, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971); Bob Jones University v. Connally, 472 F.2d 903 (4th Cir. 1973), *aff'd*, 416 U.S. 725 (1974); Crenshaw County Private School Foundation v. Connally, 474 F.2d 1185 (5th Cir. 1973); *cf.* Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971) (denying a state tax exemption to a segregated fraternal order).

41. Norwood v. Harrison, 413 U.S. 455 (1973); Graham v. Evangeline Parish School Bd., 484 F.2d 649 (5th Cir. 1973).

42. Wright v. Baker County Bd. of Educ., 501 F.2d 131 (5th Cir. 1972); McNeal v. Tate County School Dist., 460 F.2d 568 (5th Cir. 1972); Wright v. City of Brighton, 441 F.2d 447 (5th Cir. 1971).

43. United States v. Mississippi, 499 F.2d 425 (5th Cir. 1974).

44. Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

45. 42 U.S.C. § 1981 (1970).

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

Id.

46. *Compare* Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973), *with* Riley v. Adirondack Southern School for Girls, 368 F. Supp. 392 (M.D. Fla. 1973) (holding that a private school did not violate 42 U.S.C. § 1981 where a black applicant was denied admission "although race was one of the factors along with age, level of maturity, and family background.")

47. 42 U.S.C. § 2000a(e) (1970) exempts "a private club or other establishment not in

Moreover, litigation intended to send black children to a school like CCC would be difficult to justify on educational grounds. And it could backfire as a tactic with which to undermine private schools: CCC officials might admit the few black children who applied, both as a defense against integration litigation and as a means of obtaining tax-exempt status and other governmental benefits from which they are now excluded.

Rather than risk unintentionally assisting CCC—by having black children apply and thereby test the school's admission policies—it may be tactically wiser, given the limited nature of resources in the black community, to focus efforts on improving Bledsoe School. Without government support or the morale boost of defending against a desegregation suit, CCC may well fail on its own, as do large numbers of private, segregated academies and schools each year. The low income status of the parents who must finance CCC makes failure a good possibility. Indications that Bledsoe is functioning effectively could increase that possibility to a virtual certainty.[48]

II

THE SETTLEMENT OFFER

Assuming the Delta County School Board's emergency plan is upheld until South Bridge is replaced, the immediate question for the black community is whether the *Brown* precedent offers alternative relief for the educationally unsatisfactory conditions in all-black Bledsoe School. An assessment of the availability and value of such relief is necessary in order to determine the relative merit of the settlement plan offered by the board.

If black parents in Delta County share the educational priorities of blacks in other sections of the country, they are less concerned that Bledsoe School remains all-black than that its academic record is poor and that the community it serves is unable to influence basic decisions concerning personnel, curriculum, and teaching philosophy. These are the concerns that have motivated efforts by black parents to improve their children's public schools across the country in recent times, as well as for 150 years before the *Brown* decision.[49]

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fact open to the public . . . ."

See also Note, *Desegregation of Private Schools: Section 1981 as an Alternative to State Action*, 62 GEO. L.J. 1363 (1974); Note, *Private Schools: A Limitation on Racially Motivated Refusal to Contract*, 11 HOUSTON L. REV. 691 (1974); Note, *The Desegregation of Private Schools: Is Section 1981 the Answer?*, 48 N.Y.U.L. REV. 1147 (1973); Comment, Jones v. Alfred H. Mayer Co. *Extended to Private Education:* Gonzales v. Fairfax-Brewster School, Inc., 122 U. PA. L. REV. 471 (1973).

48. For reasons more fully discussed in Part III of this article, white opposition to school desegregation is based, in part, on the conviction—strengthened by the over-stated condemnations of integrationists—that black schools are bad schools.

49. Bell, *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 WISC. L. REV. 257, 259-67.

A number of approaches may be considered:

a. *The "separate but equal" doctrine* of *Plessy v. Ferguson*[50] may have been reoriented rather than overruled by *Brown.*[51] The evil of "separate but equal" is less that its promise of equality was never achieved than that, as Judge J. Skelly Wright has observed: "the doctrine itself, imposed by a white society, unconstitutionally stigmatizes Negroes in that society."[52] The demand in *Brown* that school "segregation" be replaced by "integration" may "merely be semantic if the underlying reality of black powerlessness does not change."[53] If *Brown* was intended to renew the nation's languished commitment to blacks made when the fourteenth amendment was adopted, then the separate-but-equal standard may serve as a point of departure in measuring the validity of school policies, particularly in those situations where integration is not feasible.

Justice Douglas implies as much in a case where several factors contributed to the racial isolation of a predominantly black high school.[54] Even if the causes of racial isolation in the schools did not constitute segregation for which the school board could be held responsible under *Brown*, Justice Douglas felt that the problem was not resolved unless the school facilities provided for blacks and whites were equal as required by the *Plessy* doctrine.[55]

In other contexts, some courts have recognized that minority-group children are entitled not only to a desegregated education, but to a school program that is tailored to their educational needs. For example, an educational program tailored to the middle class child from an English-speaking family

50. 163 U.S. 537 (1896).

51. In neither *Brown* nor the immediate post-*Brown* decisions is the *Plessy* decision itself expressly overruled.

52. Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 18 (1968).

53. Brown, *Busing and the Search for Equal Educational Opportunity*, 1 J. LAW & ED. 251, 266 (1972).

54. *See* Gomperts v. Chase, 404 U.S. 1237 (1971). *See also* Hobson v. Hansen, 269 F. Supp. 401 (1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (1969).

55. 404 U.S. at 1240-41. The *Plessy* doctrine, according to Justice Douglas, might require a plan under which white as well as black students are required to use the inferior high school unless inequalities in the black school were removed through upgrading. *Id. But see* Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899), where the court rejected black petitioners' contention that the "separate but equal" standard required the closing of a white high school until a black high school closed by the school board was reopened. *Id.* at 544.

Lower courts during the *Plessy* era were no more willing than the Supreme Court to degrade the quality of white schools in order to improve black schools, particularly when the board claimed financial problems limited its ability to equalize school facilities. *See* Leflar & Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 395-96 & n.67 (1954).

But it was the "separate but equal" standard that led to desegregation of graduate schools in several pre-*Brown* cases, where the alternative, according to the Court, could never be made "equal." Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948), Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). Even during the "all deliberate speed era" of *Brown v. Board of Educ.*, courts frequently ordered immediate desegregation where serious inequalities in facilities existed. *See, e.g.*, Rogers v. Paul, 382 U.S. 198 (1965).

has been held to deny an equal educational opportunity to children from Spanish-speaking homes.[56] Rejecting school board contentions that the failure to provide bilingual-bicultural programs did not constitute racially-motivated discrimination barred by the fourteenth amendment, the district court, noting the low achievement levels in predominantly Mexican-American schools, ordered the school board to reassess and enlarge its program directed to the specialized needs of its Spanish-speaking students.[57] The Supreme Court, moreover, has reflected a similar view regarding a school system's failure to provide English language instruction to students of Chinese ancestry who speak no English.[58] A unanimous Court held that the refusal to provide language instruction denied the Chinese children a meaningful opportunity to participate in the public educational program in violation of Title VI of the Civil Rights Act of 1964 and the HEW regulations.[59] It would seem only a short step to extend judicial recognition of the special educational needs of Mexican and Chinese children who do not speak English to that of black children whose preschool contact with standard English may be so minimal as to also constitute an educational barrier.[60]

While educationally-oriented relief is considered appropriate as part of a court-ordered desegregation plan, there is no reason why courts should not hold that it is absolutely essential in situations like Delta County where desegregation is not "feasible or reasonable." Relief of this character would

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56. Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N. Mex. 1972), *aff'd on other grounds* (Title VI rather than fourteenth amendment), 499 F.2d 1147 (10th Cir. 1974); *cf.* Hobson v. Hansen, 269 F. Supp. 401 (1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (1969).

57. 351 F. Supp. at 1282-83. *Cf.* United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972); Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142 (5th Cir. 1972); Arvizu v. Waco Independent School Dist., 373 F. Supp. 1264 (W.D. Tex. 1973), *rev'd on other grounds*, 495 F.2d 499 (5th Cir. 1974); Rangel & Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 307 (1972).

58. Lau v. Nichols, 414 U.S. 563 (1974).

59. Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

35 Fed. Reg. 11595.

60. J. DILLARD, BLACK ENGLISH: ITS HISTORY AND USAGE IN THE UNITED STATES (1972); M. COLE, J. GAY, J. GLICK, & D. SHARP, THE CULTURAL CONTEXT OF LEARNING AND THINKING: AN EXPLORATION IN EXPERIMENTAL ANTHROPOLOGY (1971); van Geel, *The Right to be Taught Standard English: Exploring the Implications of* Lau v. Nichols *for Black Americans*, 25 SYRACUSE L. REV. 863 (1974).

The Supreme Court's refusal (by five-to-four vote) to require equalization of school funding formulas in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), does not seriously impair the ability of black children to require educational facilities to respond to their special needs. The concept of equalizing school funding formulas is not inherently defective, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), but such contentions may be better raised in litigation designed to show that unequal school funding, whether intradistrict or interdistrict, adversely affects the school's ability to respond effectively to its obligation to remedy the effects of past discrimination.

cover equalization of physical plant, teacher quality, and curriculum. But real equality and educational effectiveness demand that public schools be responsive and responsible to those they serve.

Courts must recognize that groups long denied participation in school policy-making, and ill-equipped to monitor their children's educational progress, must have at least the judicial support and protection that have made current levels of desegregation possible. Perhaps paradoxically, separate schools which, through the implementation of alternative remedies, first become (in the educational sense) quality schools, may stand a better chance of eventually becoming integrated schools as well.[61]

At least one district court has recognized the necessity and possible value of alternative remedies.[62] Approving a school board's authority to both establish and later disestablish a community control experiment, the court indicated that a school system could experiment "to see how the effectiveness of the educational structure may be improved." And therefore, it could "not be prevented from ending one experiment and trying others, if the action is taken in good faith, without discriminatory intent or result."[63]

b. *School board representation* is an important element of an equal educational opportunity. Understandably, the Delta County board's settlement plan did not include representation of the black community on its five-person school board. Furthermore, since members are elected on an "at-large" basis, it will be quite difficult for the black community to elect a representative who will assert their special interests and needs.[64] But the argument can be made that *Brown* requires such representation or, at least, bars election processes which serve as discriminatory barriers to fair representation.

The Supreme Court has required that electoral districts be apportioned so as to equalize the value of each citizen's vote.[65] The principles of equal representation have also been applied to elected school trustees.[66] The Court

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61. *See* K. CLARK, A POSSIBLE REALITY: A DESIGN FOR THE ATTAINMENT OF HIGH ACADEMIC ACHIEVEMENT FOR INNER-CITY STUDENTS (1972). This alternative remedy to integration for past discriminatory school policies, if vigorously enforced by the courts, might avoid the dire situation contained in Justice Douglas' warning that the court's rulings in *San Antonio Independent School Dist.* and *Milliken v. Bradley*, will return the problems of blacks and the society to the "separate but unequal" period. 418 U.S. at 759.

62. *See* Oliver v. Donovan, 293 F. Supp. 958 (E.D.N.Y. 1968).

63. *Id.* at 972. Thus the court held that there was no constitutional right to community controlled schools. Unlike segregation, which was "inherently unconstitutional," and called for the only alternative, desegregation, even if the court found "centralization" to be unconstitutional, "decentralization is [not] the only constitutional alternative." *Id.* at 968. The litigation involved the black community's futile effort to prevent the ending of New York City's Ocean Hill-Brownsville local control school experiment and illustrates that meaningful black participation in school policy-making can result in as much white resistance—from teacher's unions, school suppliers, and the like—as does school integration. *See* CONFRONTATION AT OCEAN HILL-BROWNSVILLE (M. Berube & M. Gittell eds. 1969).

64. *See* Owens v. School Comm. of Boston, 304 F. Supp. 1327 (D. Mass. 1969).

65. Reynolds v. Sims, 377 U.S. 533 (1964).

66. Hadley v. Junior College Dist., 397 U.S. 50 (1970).

has long recognized that at-large districts operate "to minimize or cancel out the voting strength of racial or political elements of the voting population,"[67] and has warned that a multi-member district would be found unconstitutional as invidiously discriminatory if it could be shown that it operated "designedly or otherwise . . . under the circumstances of a particular case . . . to minimize or cancel out the voting strength of racial or political elements of the voting population."[68]

Multimember districts in Dallas and Bexar Counties in Texas have been voided on a record that included proof of: a long history of official racial discrimination in Texas, particularly in voting; specific provisions of Texas primaries that disadvantage minority candidates; the total domination of the Democratic Party in selecting candidates for the legislature from Dallas County; the fact that only two blacks have been selected by the party and elected to the legislature since reconstruction days; and the fact that the party did not need black votes to win, and consequently did not "exhibit good-faith concern for the political and other needs and aspirations of the black community."[69]

In Delta County no blacks have ever been elected to the school board, and the board's long-term refusal to comply with *Brown* reflects an antipathy to black concerns that justifies a legal challenge to the present election system, either under the pending school desegregation litigation or in a separate suit.[70] The record of long-term evasion of existing law already established in the school desegregation litigation should enable the black com-

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67. Dusch v. Davis, 387 U.S. 112, 117 (1967).

68. Fortson v. Dorsey, 379 U.S. 433, 439 (1965). *See* White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971).

69. White v. Regester, 412 U.S. at 766-67. The Court found the black community was "generally not permitted to enter into the political process in a *reliable and meaningful* manner." 412 U.S. at 767 (emphasis added). This decision's potential is discussed in Comment, *Reapportionment and Minority Politics*, 6 COLUM. HUMAN RIGHTS L. REV. 107 (1974).

See also Seals v. Quarterly Counts Court of Madison County, Tenn., 496 F.2d 76 (6th Cir. 1974); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973); Beer v. United States, 374 F. Supp. 363 (D.D.C. 1974); Yelverton v. Driggers, 370 F. Supp. 612 (M.D. Ala. 1974); Moore v. Leflore County Bd. of Election Comm'rs, 361 F. Supp. 603 (N.D. Miss. 1972).

70. A number of suits have been filed challenging the validity of school boards elected on a multi-member basis. *See, e.g.*, Calderon v. Waco Independent School Dist., Civil No. W-74-CA-21 (D. Tex. Apr. 16, 1974); LULAC v. Corpus Christi Independent School Dist., Civil No. CA-74-C-95 (S.D. Tex. Aug. 14, 1974); Mendoza v. Hafley, Civil No. 74-51 (D. Ariz. Mar. 28, 1974).

Each of these suits was filed on behalf of Chicano plaintiffs by lawyers with the Mexican-American Legal Defense Fund. Mexican-American civil rights groups have been far more sensitive than those serving blacks to the importance of giving priority to educational components in relief sought for past discrimination in public schools. *See, e.g.*, Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974).

But black civil rights groups have not opposed such suits, either. *See, e.g.*, Jolley v. McDonough, Civil No. CA-75-812-T (D. Mass. Mar. 4, 1975), a challenge to the at-large election procedure of the Boston School Committee.

munity to succeed with this issue where black plaintiffs in Boston failed.[71]

c. *Community control* as an addition to desegregation, or as a substitute when desegregation is not available, is a worthy aim and, at least within the black community, an uncontroversial one;[72] but serious legal and political problems are created by the suggestion that control over black schools by black parents can serve as an alternative to the desegregation to which they are entitled under post-*Brown* standards.

There are some blacks—although a minority—who reject school integration as worthless educationally and dangerous politically.[73] Others, including many civil rights leaders, believe that *Brown* intended school *integration*, and no other remedy is conceivable.[74] A majority, however, probably share the

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71. Owens v. School Comm. of Boston, 304 F. Supp. 1327 (D. Mass. 1969). Black plaintiffs sought only a few weeks before a school board election and without an evidentiary hearing, to enjoin the at-large election of a five-person Boston School Committee. The court, in denying plaintiffs' motion, held that a school system is not constitutionally compelled to adopt a district system in order to better the minority group's chances of securing representation of their particular interests. *Id.* at 1330.

Black voters have had more success in striking down discriminatory electoral schemes in the South where the long history of racial segregation and discrimination ease the difficulty of meeting the heavy burden of showing that the scheme was intended to discriminate against black voters. *Compare* Whitcomb v. Chavis, 403 U.S. 124 (1971), *with* White v. Regester 412 U.S. 755 (1973).

Even if the at-large system is struck down, election officials may attempt to gerrymander the single member districts so as to make black voters a minority in each such district. *See* 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 472 (1970).

In districts where school boards are appointed, the principles interpreting *Brown* to require desegregation of school faculties, Rogers v. Paul, 382 U.S. 198 (1965); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969), should be broadened to include effective representation of minority interests on the school board. Whatever the entitlement of blacks to representation under general equal protection principles, *cf.* Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Ferrell v. Oklahoma, 339 F. Supp. 73 (W.D. Okla. 1972), this remedy is essential where a school system is ordered to eliminate the effects of past racial discrimination.

72. *But see, e.g.*, critical comments made by Dr. Kenneth B. Clark, originally a strong proponent of the school decentralization movement. N.Y. Times, May 8, 1972, at 1, col. 3. *See also* Alberbach & Walker, *Citizen Desires, Policy Outcomes, and Community Control*, 8 URBAN AFFAIRS Q. 55, 64 (1972) (in general, black residents of Detroit more opposed to community control than whites); Sussman & Speck, *Community Participation in Schools: The Boston Case*, 7 URBAN ED. 341, 343 (1973) (84 per cent of black parents interviewed preferred traditional forms of parent involvement—*e.g.*, PTA, talking individually with teachers).

73. At the March 1972 National Black Political Convention in Gary, Indiana, CORE director Roy Innis authored a resolution that, as adopted, condemned both busing and school integration as a "bankrupt, suicidal method . . . based on the false notion that black children are unable to learn unless they are in the same setting as white children." N.Y. Times, Mar. 13, 1972, at 30, col. 4.

74. Typical is NAACP Executive Director Roy Wilken's comment: "We have suffered too many heartaches and shed too much blood in fighting the evil of racial segregation to return . . . to the lonely and dispiriting confines of its demeaning prison." *Voices of the Elder Statesmen*, SATURDAY REVIEW, June 21, 1969, at 70. And in 1974, NAACP General Counsel Nathaniel R. Jones criticized the Atlanta Compromise as follows: "The Atlanta Compromise of 1973 would have left 83 schools more than 90 percent black. It was a trade-off of pupil desegregation for ad-

view of the well-known black educator, Dr. Benjamin E. Mays, who favors continuing to work for school integration, but who recognizes the barrier to this goal posed by white flight:[75]

> Black people must not resign themselves to the pessimistic view that a non-integrated school cannot provide Black children with an excellent educational setting. Instead, Black people, while working to implement *Brown*, should recognize that integration alone does not provide a quality education, and that much of the substance of quality education can be provided to Black children in the interim.

In at least two cases—Atlanta and Forth Worth—district courts have approved plans that gave black parents a larger measure of control over school policy-making in exchange for less integration than would otherwise have been ordered. In Atlanta, school litigation was protracted more than a decade through innumerable court orders and several appeals.[76] A group of plaintiffs, discouraged by the prospect of achieving meaningful desegregation in a district which was becoming increasingly all-black,[77] worked out a compromise plan with the Atlanta School Board calling for full faculty and staff desegregation and limited pupil desegregation.[78] In exchange, the board promised to hire a number of blacks in administrative positions, including a black superintendent of schools.[79] In approving the plan, the court was undoubtedly influenced by petitions favoring its adoption signed by "[s]everal thousand of the plaintiff class."[80] However, some of the plain-

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ministrative jobs, which would have, if the NAACP had not taken decisive action, doomed the Association's commitment to desegregation." Jones, Brown—*20 Years Later*, 81 THE CRISIS 152, 154 (May 1974).

75. Mays, Comment: *Atlanta—Living With* Brown *Twenty Years Later*, 3 BLACK L.J. 184, 191-92 (1974). On the surface, this view departs more in emphasis than principle from NAACP policy. A staff member of that group reports "The 1969 NAACP Annual Convention gave its blessing to the concept of community control with the caveat that it must aid in advancing desegregation and quality education while fulfilling its basic aim of providing parents with a greater voice in running their schools." Watson, *The Detroit School Challenge*, 81 THE CRISIS 188, 189 (June-July 1974). But on closer inspection, it becomes apparent that the NAACP caveat swallows up the concept. Black children may or may not get a better education if they are bused to the suburbs, but it is highly unlikely that their parents will have more than a token input into policy decisions at the "receiving schools."

76. *See* Mays, *supra* note 75 for a review of the history of the Atlanta school litigation.

77. In 1952 32 per cent of Atlanta's public school enrollment was black; by 1974 the figure was more than 82 per cent. *Id.* at 185-86.

78. *See* Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga. 1973). The district court found that the plan, which provided that no school would contain less than 30 per cent blacks (or less than 20 per cent in already integrated "stablized" schools) was reasonable "considering the small percentage of white children (21%) now remaining in the system . . . ." *Id.* at 1251 & n.7.

79. The court pointed out that it "could not on its own order any hiring or firing except on the basis of merit. . . . Only by settlement could specific jobs be designated as 'black' or 'white,' even for initial appointment." 362 F. Supp. at 1251 n.6. *Cf.* Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), approving the Newark, New Jersey, school board's decision to appoint blacks as principals over some white applicants on the promotion list in order to better integrate administrative staffs and upgrade the public schools.

80. 362 F. Supp. at 1251 n. 5.

tiffs disagreed, termed the compromise a "sell out,"[81] and appealed. The appeal was burdened by a number of procedural issues concerning the lack of notice and the refusal of the district court to grant hearings on the compromise plan. This enabled the Fifth Circuit Court of Appeals to remand the case to the district court without deciding the merits of the settlement agreement.[82]

In Fort Worth, Texas, a district court approved continuance of a predominantly black high school and middle school located in a black neighborhood on a finding that black parents wanted to maintain a community school in which "the self concept of the blacks would be enhanced by giving them an opportunity to show their pride in their race and what they could do if given an opportunity."[83] In approving the plan which—in addition to the regular school program—would also provide educational and vocational programs for adults, the court found nothing unconstitutional about the concept where it comes at the plaintiffs' request. As did the court in Atlanta, this court cited no cases to support its conclusions, stating only that "it is beyond [our] comprehension to presume that the blacks are being denied equal rights with other races when they know what their rights are and they are getting something they requested."[84]

The Atlanta and Forth Worth settlement decisions are valuable as examples of arrangements deemed reasonable alternatives to full desegregation. In each case the plan was either supported or not strongly opposed by representative numbers of the class.

Somewhat similar issues were posed in *Newburg Area Council v. Board of Education of Jefferson County, Kentucky*.[85] Relying on its decision in the Detroit

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81. Trillin, *U.S. Journal: Atlanta Settlement*, NEW YORKER 101, 103 (Mar. 17, 1973).

82. Calhoun v. Cook, 487 F.2d 680 (5th Cir. 1973). Significantly, the court—consisting of two liberals on school desegregation, Wisdom and Thornberry, and one conservative, Clark—permitted the district-court-approved settlement plan to take effect for the 1973-74 school year, pending further hearings on the plan. *Id.* at 683-84.

83. Flax v. Potts, Civil No. 4205 at 21 (N.D. Tex. Aug. 23, 1973). The court's statements in this unpublished opinion that Dunbar High School and Dunbar Middle School could be combined into the "Dunbar Complex," and that while "the schools will be desegregated," the "makeup of the neighborhood . . . [is such] that the attendance will be predominately black"—must be seen in the context of the entire plan adopted by the court in that case which effectively desegregated more than one hundred schools in the Fort Worth system. One of the attorneys for the plaintiff, Norman J. Chachkin, has stated that the case was not appealed by the plaintiffs in view of the success that the litigation had achieved with respect to the rest of the school system. Statement made at The Courts, Social Science, and School Desegregation Conference, Hilton Head Island, S.C., Aug. 20, 1974, on file at *Law and Contemporary Problems* office. *See also* note 84 *infra*.

84. Flax v. Potts, Civil No. 4205 at 21 (N.D. Tex. Aug. 23, 1973). Norman J. Chachkin, a Legal Defense Fund attorney, denied that plaintiffs had offered the compromise nor agreed to it; rather, the idea originated with the school board without approval of the plaintiffs. Statement made at The Courts, Social Science, and School Desegregation Conference, Hilton Head Island, S.C., Aug. 20, 1974, on file at *Law and Contemporary Problems* office.

85. 510 F.2d 1358 (6th Cir. 1974).

school case,[86] the Sixth Circuit Court of Appeals had ordered the Louisville City School District (50 percent black) and the surrounding Jefferson County School District (4 percent black) to desegregate their schools "[b]y whatever means the district court deems appropriate in the exercise of its equity powers . . . ."[87] When the Supreme Court set strict standards for metropolitan desegregation plans in *Milliken*, it also remanded the Louisville case to the Sixth Circuit[88] where the Louisville board argued: (1) that residential patterns and not an unwillingness to desegregate have caused racial isolation in its schools; (2) that a simple desegregation order will increase the already rapid rate of "white flight"; and, (3) that it is willing to merge with the predominantly white Jefferson County system, but only providing it could preserve the parental influence on policy-making and educational program that has enabled their elementary-level children in the lower grades to read on the national level. Forty percent of the pupils are from poverty-level families; 80 per cent of those families are black.[89]

The Louisville system attributes its educational gains to an "innovative superintendent" and to a program of shared decision-making power under which each of the fifty schools has a separate board, composed of patrons and educators, which participates in staff and curriculum selection and financial allocation. The local boards, according to the Louisville brief, "have been viable and their decisions responsible."[90] Community hostility toward particular schools has been reduced. But a simple merger, it is feared, will result in subordination of the poverty-level interests of Louisville's pupils in favor of the predominantly middle class white interests of Jefferson County. Nevertheless, upon remand of the case by the Supreme Court, the Sixth Circuit found the Louisville situation different from that in *Milliken*, concluding that the problem in *Milliken* was that the remedy "was broader than the constitutional violation" but that in this case "the situation presented is that of two districts in the same county of the state being equally guilty in failing to eliminate all vestiges of segregation . . . ." Accordingly, the Sixth Circuit noted that the district court's order could include an interdistrict remedy.[91]

Community-control plans have not received much judicial recognition, in part because relief of this type seldom has been sought in a school deseg-

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86. Bradley v. Milliken, 484 F.2d 215 (6th Cir. 1973).

87. Newburg Area Council v. Board of Educ. of Jefferson County, 489 F.2d 925, 932 (1973).

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

89. Supplemental Brief of Board of Education of Louisville at 6-9, Haycraft v. Board of Educ. of Louisville, Civil No. 73-1408 (6th Cir. Dec. 11, 1974).

90. *Id.* at 28-29.

91. Haycraft v. Board of Educ. of Louisville, 510 F.2d 1358, 1361 (6th Cir. 1974).

School Board Attorney Triplett had advised the author that the Louisville Board was willing to merge unconditionally with the Jefferson County systemn but feared the educational

regation case.[92] However, the Congress of Racial Equality (CORE) has intervened with somewhat similar arguments in a number of school cases.[93] In *Swann*, for example, CORE argued that integration was not the only method of eliminating segregation in the system and that the establishment of two nondiscriminatory and nonracially exclusive unitary school districts to replace the former segregated system would be an appropriate means of implementing the edict of *Brown*.[94] Under the now-invalidated dual school system, CORE said, one white board of education maintained control over two school systems characterized by racial exclusivity and arbitrarily imposed without choice or consent in a manner that: (1) stigmatized blacks, (2) excluded them from any meaningful participation in policy-making, and (3) systematically denied them equal school resources.[95]

Furthermore, CORE pointed out that school integration usually perpetuates the worst aspects of segregation. Therefore, it suggested that dual school-district lines be drawn to serve "communities of educational interest": Each student would be permitted to attend schools in either district; each district would elect its own school board and set its own school policy. Given these criteria, CORE argued, there is no constitutional requirement of racial dispersal in these unitary systems.[96] An inflexible requirement of racial dispersal, CORE contended, can be educationally destructive of "the desire of local Black communities to develop their own means of achieving the constitutionally mandated ends."[97]

At first glance, the CORE argument, ignored by the Supreme Court in the *Swann* decision, would seem attractive to the majority in *Milliken v. Brad-*

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consequences of that merger. Moreover, he reported that the Jefferson County system opposed merger. Telephone conversation with Mr. Henry A. Triplett, Louisville School Board Attorney, November 22, 1974.

92. *See* Oliver v. Donovan, 293 F. Supp. 958 (E.D.N.Y. 1968) for an unsuccessful attempt by black plaintiffs to urge that community control was an appropriate remedy for a violation of their thirteenth and fourteenth amendment rights.

93. *See, e.g.*, brief for CORE as Amicus Curiae, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Application for Intervention by CORE, Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga. 1973) (considered by the court on an amicus basis).

94. Brief for CORE as Amicus Curiae at 8-10, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

95. *Id.*

96. *Id.* at 11-14.

97. *Id.* at 22. This position is also set out in CORE, *A Proposal for Community School Districts*, in THE GREAT SCHOOL BUS CONTROVERSY 311 (N. Mills ed. 1973).

CORE arguments are distinguishable from the seemingly similar positions taken by anti-busing writers. *See, e.g.*, Glazer, *Is Busing Necessary?*, 53 COMMENTARY 39 (Mar. 1972). These writers recognize that large-scale busing and consolidation of school districts

> makes impossible one kind of organization that a democratic society may wish to choose for its schools: the kind of organization in which the schools are the expression of a geographically defined community of small scale and regulated in accordance with the democratically expressed views of that community.

Id. at 47. But they ignore the legal and political problems of how minority communities are to obtain control over policy-making and budgetary processes.

ley[98] which rejected the metropolitan school desegregation remedy approved by the lower courts because, among other things, such a plan would be destructive of the long tradition of local control and autonomy in American public school education.[99] It would also tend to support the argument of the circuit court judge who condemned what he considered excessive busing required to comply with desegregation standards in Memphis "merely because a child's skin is white or black . . . ," and who warned that:[100]

> [t]he elimination of neighborhood schools necessarily interferes with the interest and participation by parents in the operation of the schools through parent-teachers' associations, interferes with activities of children out of school, and interferes with their privilege of association, and it deprives them of walk-in schools. In can even lower the quality of education.

But it is doubtful if even these opponents of busing to achieve desegregation would accept the CORE alternative of two, perhaps overlapping, school districts which, in all likelihood, would be distinguishable by race.[101]

The CORE argument that racial dispersal may not be educationally sound or legally required is not without merit and might receive more serious judicial attention if the relief sought focused more on the legitimate interest of parental participation than on the politically threatening and constitu-

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98. 418 U.S. 717 (1974).

99. *Id.* at 741-42. Also see Justice Powell's opinion (concurring in part and dissenting in part) in *Keyes*, expressing concern that large-scale or long distance transportation of students disrupts public education, and ignores the practical and educational benefits achieved when children attend community schools near home. 413 U.S. at 238-52. *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 50 (1973).

On the other hand, the *Milliken* Court's reaffirmation of the *Swann* standards as the means for remedying intradistrict, de jure segregation, 418 U.S. at 744-45, raises some question as to the legal fate of an Atlanta-type settlement. But the question of alternative remedies was not, unfortunately, before the Court in *Milliken*.

100. Judge Weick dissenting in Northcross v. Board of Educ. of Memphis City Schools, 466 F.2d 890, 898 (6th Cir. 1972). Subsequently, the court (including Judge Weick) affirmed —in a *per curiam* opinion—approval of a plan for Memphis that left nineteen all-black or predominantly black schools, including some that were all-black at the inception of the litigation in 1960. It did not affect any all-white schools. Northcross v. Board of Educ. of Memphis City Schools, 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974).

101. The district court that approved the Atlanta compromise rejected CORE's motion to intervene on the ground "that the relief sought by that group [CORE] would be unconstitutional, *i.e.*, it would recreate a dual school system." Calhoun v. Cook, 487 F.2d 680, 682 (1973). However, it did consider the CORE views on an amicus basis. Calhoun v. Cook, 362 F. Supp. 1249, 1250 n. 2. On appeal the Fifth Circuit ruled the denial of CORE's intervention effort was improper at least partly because "further proceedings may have demonstrated that CORE would be entitled to some but not all of the relief it sought in a manner that would have kept its position from being patently unconstitutional." 487 F.2d at 683.

The Fifth Circuit has evolved a specific intervention procedure for use in school desegregation cases. It requires intervenors to set out in their petitions "the precise issues . . . [they] sought to present. . . . The district court could then determine whether these matters had been previously raised and resolved and/or whether the issues . . . were currently known to the court and parties in the initial suit. . . . If the court felt that the new group had a significant claim which it could best represent, intervention would be allowed." Hines v. Rapides Parish School Bd., 479 F.2d 762, 765 (5th Cir. 1973).

tionally questionable goal of racially identifiable school districts. Nevertheless, there is ample evidence available which indicates that many desegregation orders are destructive of precisely those elements which are essential to the effective functioning of the educational process[102] and that black schools can be educationally effective.[103] Even without a more detailed doctrinal argument, courts grown weary of enforcing busing orders favored by increasingly few might be amenable to Justice Powell's exhortation that the goal sought and often overlooked "is the best possible educational opportunity for all children" and that "[c]ommunities deserve the freedom and the incentive to turn their attention and energies to this goal of quality education, free from protracted and debilitating battles over court-ordered student transportation."[104]

Earlier, in his concurring-in-part, dissenting-in-part opinion in *Keyes*, Justice Powell had criticized the majority's requirement that, in order to establish "a prima facie case of unlawful segregative design," petitioners in a northern school desegregation case need only show "intentionally segregative school board actions in a meaningful portion of a school system."[105] Instead, he argued for an affirmative equal-protection right to an integrated education wherever public schools are segregated to a substantial degree and wherever school boards are substantially responsible.[106] Should such a standard be adopted, proof of school board obligation would be easier to show because Justice Powell's criteria would effectively abolish the de jure/de facto distinction.[107] Even so, the Powell formula would require school boards to take only "reasonable" steps to eliminate segregation, which would not include requiring school authorities to undertake "widespread student

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102. *See* notes 132-34 *infra*. This proof would not be offered to reverse *Brown*, Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425, 427 (5th Cir. 1963), but to broaden the scope of relief available under *Brown* to include plans where parental involvement rather than integration is given priority. 318 F.2d at 427-28.

103. N.Y. STATE OFFICE OF EDUCATION, PERFORMANCE REVIEW—SCHOOL FACTORS INFLUENCING READING ACHIEVEMENTS: A CASE STUDY OF TWO INNER CITY SCHOOLS (1974); G. WEBER, INNER-CITY CHILDREN CAN BE TAUGHT TO READ: FOUR SUCCESSFUL SCHOOLS (Council for Basic Educ. Occasional Paper No. 18, 1971); Meyers, *Schools: Morgan's Tentative Revolution*, 2 CITY 6 (Nov.-Dec. 1968); *Black Schools That Work*, NEWSWEEK, Jan. 1, 1973, at 47; D. BELL, *supra* note 5, at 579-81; Fantini, *Participation, Decentralization, Community Control, and Quality Education*, 71 THE TEACHERS COLLEGE RECORD 93 (1969).

104. Keyes v. School Dist. No. 1, 413 U.S. 189, 253 (1973).

105. 413 U.S. at 208.

106. 413 U.S. at 224-27.

107. 413 U.S. at 232. In a separate opinion Justice Douglas agreed with Justice Powell on this point. 413 U.S. at 214-17.

Legal scholars have recommended abolition of these distinctions for a decade. *See* Dimond, *School Segregation in the North: There is But One Constitution*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 1 (1972); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Goodman, *De Facto Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972); Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. REV. 285 (1965).

transportation solely for the sake of maximizing integration."[108] Assuming that he did not wish to create a basically empty right (he did recognize the difficulty of racially balancing the larger urban areas of the country),[109] Justice Powell's approach must be read to encompass acceptance of those school plans which recognize the residential realities and propose educationally-viable, judicially monitored alternatives by which the equal protection right created by pre-existent segregation may be approached even though the integration aspect of it may not immediately be achieved.

The legal and educational value of alternative schemes has been recognized by Dr. Kenneth Clark, a committed school integrationist, who provided much of the social science data cited in the first *Brown* decision.[110] Reviewing the patterns of institutionalized residential segregation which characterize the nation's large metropolitan areas, Dr. Clark stated:[111]

> Given the fact that public schools, so far, reflect the racial populations of cities, the goal of attaining high quality education through the democratic process of realistic and administratively feasible forms of desegregation appears to be, at least temporarily, abandoned and is being replaced by the need to concentrate on raising the quality of education without regard to the present racial composition of a city's public schools. This educational imperative must be met, for the present generation of students in the public schools of our cities is not expendable. If we continue to frustrate these students educationally, they will be, in fact, the ingredients of the "social dynamite" which threatens the stability of our cities, our economy, and the democratic form of government. It is conceivable, also, that a present emphasis on raising the quality of education for these children will eventually facilitate rather than block the continued struggle for a non-racial organization of the public schools in the United States.

Several commentators who have discussed the problem of alternative remedies to school integration have suggested arguments that might help close the gap between Justice Powell's affirmative equal protection right and the educationally sound, constitutionally cognizable and presently available remedy urged by Dr. Clark.[112] The discussions properly focus on the basic elements of the *Brown* decision seen by one writer as "integration, uncoerced association, and racially equal educational outcomes."[113] But the assumption in *Brown* that racial isolation causes racially different outcomes and that racial integration will

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108. 413 U.S. at 240.

109. 413 U.S. at 242 n. 21.

110. 347 U.S. 483, 494 n. 11.

111. K. CLARK, *supra* note 61, at 54. Significantly, Dr. Clark recognizes, albeit almost reluctantly, the value of improving the reputation for quality of "black schools" in order to "facilitate" his goal of truly integrated schools in this country. *See also* text at notes 125-27 *infra*.

112. *See, e.g.*, Brown, *Busing and the Search for Equal Educational Opportunity*, 1 J. LAW & ED. 251 (1972); Canby, *'Northern' School Segregation: Minority Rights to Integrate and Separate*, 1971 LAW & SOCIAL ORDER 489; Kirp, *Community Control, Public Policy, and the Limits of Law*, 68 MICH. L. REV. 1355 (1970); Comment, *Alternative Schools for Minority Students: The Constitution, the Civil Rights Act and the Berkeley Experiment*, 61 CALIF. L. REV. 858 (1973).

113. Kirp, *supra* note 112, at 1362. *See also* Canby, *supra* note 112, at 510-11.

yield racially identical results has been refuted by social science evidence.[114] An alternative remedy, sought by a substantial percentage of the discriminated class, should be judicially cognizable, particularly in those cases where integration is not "feasible." Such alternative plans would not contravene Supreme Court strictures on freedom-of-choice plans which result in racially-identifiable schools,[115] especially if minority parents who would prefer to have their children attend predominantly white schools are permitted to do so.[116]

Judicial approval of a community control plan, as an interim alternative to integration, does not raise the equal protection issues presented by efforts to make community control a constitutional right.[117] School systems which wish to correct for racial imbalance even in the absence of a constitutional requirement to do so,[118] may also adopt community-approved, interim, alternative remedies.

Reviewing the integration alternatives available to Delta County's black community, the equalization of school facilities and, possibly, school board representation may be sought through litigation. But the school board has offered more than equalization of facilities: it has promised to permit the Bledsoe School parents to select their next principal and to provide that person with wide authority in personnel selection, curriculum, and teaching approach. The details of this offer must be carefully drafted; they would include funding guarantees, the principal selection process, the mechanism for ongoing parental involvement, a process for monitoring pupil performance and teacher responsiveness, and, of course, the question of minority representation on the school board. It is essential that all aspects of the plan be judicially approved and supervised.

Assuming the board would agree to all these conditions—as it might in order to avoid integration of Davis School when South Bridge is rebuilt—the question of the constitutional validity of a permanent settlement, as in Atlanta, would almost certainly be raised. Realization of the points set forth

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114. For a summary of the findings of various studies, see Goodman, *supra* note 107, at 400-35 & nn. 356-465.

115. Green v. County School Bd., 391 U.S. 430, 439-42 (1968).

116. Kirp, *supra* note 112, at 1369-70.

117. Kirp, *supra* note 112, at 1374-84. But even if the remedial nature of the alternative to integration is ignored, there is ample basis for arguing that such alternatives meet even a strict scrutiny standard although they tend to give state sanction to racially identifiable schools. *See* Alternative Schools for Minority Students: The Constitution, the Civil Rights Act and the Berkeley Experiment, *supra* note 112.

Even proponents concede that community control does not guarantee educational quality, and although it has been promising where tried, the experience is far from problem-free. *See* M. ZIMET, DECENTRALIZATION: A CASE STUDY OF THE 1969 DECENTRALIZATION LAW IN NEW YORK CITY (1973); CONFRONTATION AT OCEAN HILL-BROWNSVILLE (M. Berube & M. Gittell eds. 1969); Cohen, *The Price of Community Control*, 48 COMMENTARY 23 (July 1969).

118. *See* Offermann v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Tometz v. Board of Educ., 39 Ill. 2d 593, 237 N.E.2d 498 (1968); Balsbaugh v. Rowland, 447 Pa. 423, 290 A.2d 85 (1972); State *ex rel.* Citizens Against Mandatory Busing v. Brooks, 80 Wash. 2d 121, 492 P.2d 536 (1972).

above would support an argument that the settlement plan is consistent with *Brown*.

These arguments will have greater impact if the board can be convinced to incorporate a review period, of five to ten years, after which it would automatically return to the courts for further consideration of the integration remedy. In support of this arrangement, its advocates could argue that: while *Brown* requires school desegregation, the courts gave whites fifteen years of "all deliberate speed" to get ready for racially-mixed schools;[119] most of this time was squandered in evasive tactics that further damaged black children. Now that desegregation has been ordered, many black parents recognize the need for a period during which they can choose schools where the priority is overcoming the dual image that black children cannot learn and that black schools are poor schools. Even if no educational benefit to black children occurs during the period, the principals of *Brown* are not affected; social science evidence has failed to reveal *any* educational strategy that is certain to equalize educational outcomes. By limiting the settlement plan, blacks also explicitly preserve their all-important right to attend schools with whites.

III

THE *Brown* DECISION REVISITED

Whether Delta County, or other blacks, should seek a settlement plan of the type described will depend on many factors which are unique to each individual community; but some general considerations should assist parents in reaching conclusions endemic to conditions in their area.

Although the *Brown* decision purported to give blacks the right to attend school with whites, it actually provides blacks with the means to achieve educational equality in black schools.[120] The power inherent in the right to school desegregation has been frequently worth more than the educational value of exercising that right. This apparent paradox conforms perfectly with a societal pattern in which minority rights are granted or withheld by the majority according to which action will serve majority interests best. Blacks were the gratuitous beneficiaries when the northern states abolished slavery in the post-Revolutionary War period because slavery was not eco-

119. Brown v. Board of Educ., 349 U.S. at 301.

120. Certainly *Brown* comprised associational, as well as educational, components. But having judicially condoned the continued existence of "one-race" schools in a desegregated school system, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 25-27; Northcross v. Board of Educ. of Memphis City Schools, 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974), and seemingly having consigned substantial numbers of inner-city black students to permanent assignment in all-black schools, Milliken v. Bradley, 418 U.S. 717 (1974), it is too late to argue the imperative in *Brown* of having black children actually attend school with whites.

nomically feasible and provided unwanted competition with white labor.[121] Southern slavery was prohibited by issuance of the Emancipation Proclamation less because it was morally reprehensible, than because such action was compelled by the need to disrupt the Confederate work force and the desire to win European support.[122] It is possible that history will show that the *Brown* decision also served the interests of white Americans more than black Americans.[123]

The multiple motivations that abolished slavery did not prevent blacks from obtaining their freedom; similarly, the progress made under *Brown* has been great, despite its ambivalent origins. But, further progress in the school area requires at least the basic recognition that there may be a distinction between what is offered and what can be obtained.

In accomplishing this cognitive process, some basic facts must be accepted:

a. *White opposition to school desegregation* is increasing. This is hardly a secret.[124] Most whites have never been enthusiastic about sending their children to school with more than a few blacks. The *Brown* decision won sympathy for the plight of black children, but it did not alter the steadfast opposition of white parents to enroll their children in predominately black schools. For all the reasons that a racist society could muster, most black schools were inferior to their white counterparts. But, in the course of arguing the need to admit black children to white schools, integrationists painted a far worse picture of the situation than even some pre-*Brown* black schools and their products deserved.[125] The appeals to white sympathy concerning the plight of black children gained support for desegregation in general, but increased the determination of white parents not to involve themselves and their children in what was presented as the only remedy.[126] As one writer put it:[127]

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121. *See* A. ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH (1967).

122. *See* J. FRANKLIN, THE EMANCIPATION PROCLAMATION (1963); Dillard, *The Emancipation Proclamation on the Perspective of Time*, 23 LAW IN TRANSITION 95 (1963).

123. *See* Steel, *A Critic's View of the Warren Court—Nine Men in Black Who Think White*, N.Y. TIMES, Oct. 13, 1968 (Magazine), at 56.

124. Dissenting in *Milliken v. Bradley*, Justice Marshall expressed the fear that the Court's refusal to affirm a metropolitan area remedy "is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law." 418 U.S. at 814.

125. *See* Sowell, *Black Excellence—the Case of Dunbar High School*, 35 PUB. INTEREST 3 (Spring 1974).

126. In one survey, two-thirds of those questioned approved of desegregated public schools in principle, but 69 per cent opposed busing as a means of achieving desegregation. *What the Gallup Poll Discovered About Busing*, NEWSWEEK, Mar. 13, 1972, at 24. There is every reason to believe that the opposition has increased substantially in the period since that poll was taken.

127. L. FEIN, THE ECOLOGY OF THE PUBLIC SCHOOLS: AN INQUIRY INTO COMMUNITY CONTROL 6 (1971).

> In effect, the liberal community, both black and white, was caught up in a wrenching dilemma. The only way, it appeared, to move a sluggish nation towards massive amelioration of the Negro condition was to show how terrifyingly debilitating were the effects of discrimination and bigotry. The more lurid the detail, the more guilt it would evoke, and the more guilt, the more readiness to act. Yet the same lurid detail that did, in the event, prompt large-scale federal programs, also reinforced white convictions that Negroes were undesirable objects of interaction.

The social scientists did not help matters. In an effort to prove the educational value of desegregation, studies were published which seemed to show that black pupil performance improved when they were placed in white schools.[128] The corollary to this interpretation was: " 'when you mix Negroes with Negroes, you get stupidity.' "[129] Later studies were inconclusive, tending to show, according to Ronald Edmonds, Harvard's Urban Studies Center Director, that "under court-ordered integration, some Black pupils do better, some Black pupils do about the same and some Black pupils do worse."[130] Faced with such inconclusive data and, already concerned about the enforcibility of long-distance busing orders, all but the most committed federal judges paused and almost beseechingly looked for help.[131]

b. *Integration strategies remain inflexible* despite the unimpressive reports of the educational effectiveness of integration, despite the increasing white opposition as school integration standards designed for southern rural areas are applied to large urban areas, and, most important of all, despite indications that black parents in large numbers have lost faith in the basic strategy of school desegregation litigation, *i.e.*, to get the same quality of education white children are receiving, you must enroll black children in the same schools as white children.

The key to the disenchantment of black parents can be found in the desegregation orders themselves. In an effort to make school desegregation

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128. *See, e.g.*, J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 29 (1966); U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967).

129. L. FEIN, *supra* note 127, at 9.

130. Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 BLACK L.J. 176, 177 (1974). *See also* Lines, *Race and Learning: A Perspective on the Research*, 11 INEQUALITY IN ED. 26 (Mar. 1972).

131. In an unpublished order subsequent to Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), requiring the Boston School Committee to file a desegregation plan for 1975, Judge Garrity, after setting out detailed instructions for a plan that shall provide for the greatest possible degree of actual desegregation of all grades in all parts of the city, gave all parties and other interested community groups until Jan. 20, 1975, to submit to the court alternative plans to all or any portion of the defendants' student desegregation plan.

As Professor Bickel has observed:

> [C]ourts confronted with racial isolation in a school district that is doing precious little on its own to attack its [educational] problems will order busing because there is not much else that a court can do that will have an impact.

Bickel, *Education in a Democracy: The Legal and Practical Problems of School Busing*, 3 HUMAN RIGHTS 53, 59-60 (1973).

as palatable for whites as possible, courts have permitted school boards to close black schools, often over the vigorous protests of the black communities they served,[132] and authorized "one-way" busing in which black children do most or all of the bus riding while whites continue to attend schools in their nieghborhoods.[133] Black teachers and administrators, the largest black professional class, have been decimated by the desegregation process despite herculean efforts by civil rights attorneys to protect their jobs.[134] Even the percentages of black students assigned to white schools are determined less by the percentage of black students in the school district than by the number of blacks white parents will tolerate before withdrawing their children.[135]

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132. *See* Allen v. Asheville City Bd. of Educ., 434 F.2d 902 (4th Cir. 1970); Norwalk CORE v. Norwalk Bd. of Educ., 423 F.2d 121 (2d Cir. 1970). Courts have said they will refuse to approve the closing of black schools based solely on school officials' fear that whites will not attend them. *See, e.g.*, Bell v. West Point Municipal Separate School Dist., 446 F.2d 1362 (5th Cir. 1971). But usually, closings are justified by school boards—and upheld by courts—where there are "non-racial reasons" for such closings. *See* Ellis v. Board of Pub. Instruction, 465 F.2d 878 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); Mims v. Duval County School Bd., 447, F.2d 1330 (5th Cir. 1971); Carr v. Montgomery County Bd. of Educ., 429 F.2d 382 (5th Cir. 1970).

133. *See* Davis v. Board of School Comm'rs of Mobile County, 483 F.2d 1017 (5th Cir. 1973); Norwalk CORE v. Norwalk Bd. of Educ., 423 F.2d 121 (2d Cir. 1970); Parris v. School Comm. of Medford, Mass., 305 F. Supp. 356 (D. Mass. 1969).

134. The courts have developed standards for protecting the positions of black faculty during the desegregation process, *see, e.g.*, Cornist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974); Smith v. Concordia Parish School Bd., 493 F.2d 8 (5th Cir. 1974); Davis v. School Dist. of Pontiac, Inc., 487 F.2d 890 (6th Cir. 1973); Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 1969).

But, after desegregation is completed, a wider range of criteria supporting dismissals or refusals to rehire are condoned by the courts. *See, e.g.*, Thompson v. Madison County Board of Educ., 496 F.2d 682 (5th Cir. 1974); Lee v. Macon County Bd. of Educ., 482 F.2d 1253 (5th Cir. 1973); Pickens v. Okolona Municipal Separate School Dist., 380 F. Supp. 1036 (N.D. Miss. 1974); George v. Davis, 365 F. Supp. 446 (M.D. La. 1973); United States v. Coffeeville Consolidated School Dist., 365 F. Supp. 990 (N.D. Miss. 1973).

135. Professor Thomas Pettigrew of Harvard has urged a racial mixture of 30 per cent black to 70 per cent white pupils so as to achieve a high correlation between race and socio-economic class, thereby maximizing educational achievement. He also suggested that such a ratio would not precipitate middle class flight. Beckett v. School Bd. of Norfolk, 308 F. Supp. 1274, 1290-91 (E.D. Va. 1969). The district court agreed and approved a plan with this balance in some schools, but because of the high percentage of blacks in the system, 76 per cent of the elementary students would remain in one-race schools. Brewer v. School Bd. of Norfolk, 434 F.2d 408, 411 (4th Cir. 1970). Finding that the plan failed to establish a unitary school system, the Fourth Circuit reversed and remanded to the district court. 434 F.2d at 412.

In a subsequent school case in which the Pettigrew thesis was revived, Judge Sobeloff—in a separate concurring opinion—attacked it as "invidious, . . . a resurrection of the axiom of black inferiority, . . . and no less than a return to the spirit of *Dred Scott*." Brunson v. Board of Trustees of School Bd. No. 1, 429 F.2d 820, 826 (4th Cir. 1970). Undeterred by the threat of white flight, Judge Sobeloff stated that school desegregation "is not founded upon the concept that white children are a precious resource which should be fairly apportioned. . . . [S]chool segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive." *Id.*

Regrettably, treating white flight (and white opposition generally) as legally irrelevant serves the cause of logical debate better than it does the realities of actually desegregating schools.

Sensitivity to the concern of white parents for the quality of the desegregated school is, of necessity, acute. It is no surprise then that school policies regarding the use of standardized achievement test scores for assignment to tracks or special classes,[136] curriculum decisions, and disciplinary policies[137] seem designed to insure a high priority for the needs of white students.[138] If black students must go to court simply to secure the right to

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See, e.g., Craven, *The Impact of Social Science Evidence on the Judge: A Personal Comment*, 39 LAW & CONTEMP. PROB. no. 1, at 150 (1975).

136. The courts have generally held that when a formerly dual, segregated school system has just recently been, or is in the process of being, dismantled, pupil assignment by standardized test scores is prohibited when the intended and actual result is the perpetuation of the dual system through segregation within the system, Lemon v. Bossier Parish School Bd., 444 F.2d 1400 (5th Cir. 1971), within individual schools, Moses v. Washington Parish School Bd., 456 F.2d 1285 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972), within the individual classrooms, Acree v. County Bd. of Educ., 458 F.2d 486 (5th Cir.), *cert. denied*, 409 U.S. 1006 (1972), or with each student by faculty evaluation of past grades, McNeal v. Tate County School Dist., 508 F.2d 1017 (5th Cir. 1975).

Even when there is no overt discriminatory intent, the racial bias inherent in standardized tests should render their use as suspect in education cases as they now are in employment discrimination litigation. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The problems are discussed in Kagan, *The I.Q. Puzzle: What Are We Measuring?*, 14 INEQUALITY IN ED. 5 (July 1973). *See also* Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974) (placing black students in classes for the educable mentally retarded on the basis of I.Q. test scores); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (standard aptitude tests are biased against black and other low-income students).

137. *See* CHILDREN'S DEFENSE FUND OF THE WASHINGTON RESEARCH PROJECT, INC., CHILDREN OUT OF SCHOOL IN AMERICA 117-50 (1974).

In Hawkins v. Coleman, 376 F. Supp. 1330 (N.D. Tex. 1974), for example, the superintendent of the Dallas school system conceded that the disproportionate number of black students who received suspensions was because "we are a White controlled institution, institutional racism, racism among individuals." *Id.* at 1336. An expert witness for plaintiffs testified: "[i]nstitutional racism exists . . . when the standard operating procedures of an institution are prejudiced against, derogatory to, or unresponsive to the needs of a particular racial group." *Id.* The court accepted this testimony, but stated that "[n]o court can decree a change in attitude," and urged "everyone involved to accentuate the positive while at the same time eliminating the negative effects of 'white institutional racism.'" 376 F. Supp. at 1338. The court then directed the Dallas Independent School District (DISD) "to review its present program and to put into effect an affirmative program aimed at materially lessening 'white institutional racism' in the DISD." *Id.*

138. Kenneth Haskins, recalling his experience in an integrated school, said decisions were generally made to satisfy whites as though "the purpose of integration was to benefit the black children, and really the white community was doing them a favor, by allowing this to happen." Statement of Mr. Kenneth W. Haskins, *Hearings on Quality and Control of Public Schools Before the Senate Select Comm. on Equal Educ. Opportunity*, 92d Cong., 1st Sess., pt. 13, at 5873 (1971).

Professor Charles Hamilton describes an experience in which a white teacher of a desegregated class, comprised of middle class white children and lower-class blacks from a public housing project, led a discussion of winter vacations, for which many of the white children would soon be departing. According to Professor Hamilton:

> The discussion from the white students was spirited and full of exciting accounts of flight plans, hotel reservations, Florida beaches and play areas. The black students sat silently. When a visiting black parent, who had observed the session, spoke to the teacher afterwards, the teacher was quite elated over the lively discussion and enthusiasm of the students. The parent, however, complained that that session was pre-

participate in extracurricular activities[139] or to terminate the use of a racially insulting school song or cheer,[140] it is not hard to imagine the level of the priority accorded their academic needs in all too many "integrated" classrooms.

This type of damage is precisely what *Brown* intended to eliminate in the coerced segregated setting. It is a measure of the virulence of racism that the problem still persists in some schools restructured to eliminate its effects; the failure to recognize it further decreases the chances that thousands of black students will experience any benefit from the *Brown* decision during their school years, while increasing the very real risk that continued rigid pressure solely for school integration will seriously erode the progress already made, not only in schools, but in other important areas of civil rights as well.

Professor Charles Hamilton several years ago warned that "[i]t is absolutely crucial to understand that the society cannot continue to write reports accurately describing the failure of the educational institutions vis-a-vis black people without ultimately taking into account the impact those truths will have on black Americans."[141] But the predominant litigation strategy today in school desegregation suits is to advocate "all out" integration and to categorically oppose predominantly black schools—a philosophy which "has brought us to the advent of metropolitan desegregation without sufficient regard having been given to the probable instructional consequences of such a move for those Black children most numerously affected."[142] This is attributable in part to the fact that those who generally handle school desegregation litigation do not always have the ongoing close community contact with members of the class they represent which is required to ensure continuing sensitivity to client interests. As a result, the emphasis has been

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> cisely the kind of insensitive education to which she felt the black students should not be exposed. The teacher was puzzled and hurt; she saw or heard nothing wrong or offensive in the discussion at all. The parent explained that the black children were totally excluded because their parents could not afford to take them on expensive vacations. Their sense of inferiority was reinforced, and they were made to feel that watching television and running the halls of the housing project during the week while their parents worked could not match the glamour and thrills of a week's vacation in the Florida sun. The teacher explained that she was unaware of the race of those students who did and did not participate. This episode, to the parent, was an example not of the admirable trait of color-blindness but of the insensitivity of the educational system to the needs of the black children, and it was further evidence of the dubious benefits of integration on both racial and class bases.

Hamilton, *The Nationalist vs. The Integrationist*, in THE GREAT SCHOOL BUS CONTROVERSY 297, 308 (N. Mills ed. 1973).

139. LAWYERS REVIEW COMM. TO STUDY THE DEPT. OF JUSTICE, A REPORT 43 & n. 81 (1972).

140. *Cf.* Melton v. Young, 465 F.2d 1332 (6th Cir. 1972); Smith v. St. Tammany Parish School Bd., 448 F.2d 414 (5th Cir. 1971); Caldwell v. Craighead, 432 F.2d 213 (6th Cir. 1970), *cert. denied*, 402 U.S. 953 (1971).

141. Hamilton, *Race and Education: A Search for Legitimacy*, 38 HARV. ED. REV. 669, 671 (1968).

142. Edmonds, *supra* note 130, at 179.

on total desegregation, even when white flight is certain to void the victory of any meaning. Generally, no consideration is given to settlement, although such action might better serve the interests of the disadvantaged class.[143]

For example, in the Boston School case[144] the court, having found the school committee responsible for blatant and overt racial discrimination, granted the only relief sought—racial balance—even though this required the busing of hundreds of poor black children to blue collar white areas where, if anything, the schools were educationally inferior to those from which the black students came.[145] The violent response of the white Bostonians was indefensible, but predictable, given their conviction that black students will deteriorate already inferior schools and their knowledge that the well-to-do suburbs are exempt from the problems they face.[146]

It is difficult not to give wholehearted support to even the most unfortunate school desegregation order intended to obtain compliance with *Brown*. But in Boston and in many other school systems, poor white as well as black parents have been provided public schools that are far less than they should be. The black parents are able to translate the inadequacies of their schools into constitutional terms, for which remedies are available. To insist that courts can only remedy these constitutional violations by mixing black children with the most disadvantaged whites in poor schools reflects a poverty of innovation foreign to equity and is potentially disastrous to hopes for an integrated society.

CONCLUSION

Chief Justice Earl Warren, in trying to formulate a constitutional basis for the contention that segregated schools were legally invalid, wrote:[147]

> In approaching this problem, we cannot turn the clock back to 1868 when the [fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the

143. Bell, *supra* note 49, at 278. *See also* Justice Harlan's dissent in NAACP v. Button, 371 U.S. 415, 461-63 (1962).

144. Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974).

145. The two white high schools to which black students were assigned under the court order graduated a total of 865 students in the 1973 class. Only 173 (22 per cent) entered four year colleges. The two black high schools to which white students were assigned graduated 261 students during the same period, 74 of whom (28 per cent) entered four-year colleges. The state average is 32 per cent, and the city's two "elite" high schools (admission by tests and grades) sent 97.7 per cent of their graduates on to four-year colleges. MASSACHUSETTS DEPARTMENT OF EDUCATION, DISTRIBUTION OF HIGH SCHOOL GRADUATES (1973).

Both white high schools are overcrowded. The black schools are underutilized. South Boston High (no black students in 1971-72) was overenrolled by 676 students. Girls High (now Roxbury High, with 91.7 per cent black enrollment) was underenrolled by 532 places in the same year. Morgan v. Hennigan, 379 F. Supp. at 426.

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

147. Brown v. Board of Educ., 347 U.S. at 492-93.

> light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Similarly, black people cannot expect to find in the *Brown* precedent a full and complete answer to problems that twenty years ago either did not exist in their present form or were not recognizable without the hard-earned contemporary understanding that societal racism can disadvantage black children as effectively (although more subtly) in integrated as in segregated schools. With that knowledge and with the experience gained over the last two decades, effective arguments can be made in the courts and through the political process to gain those public school rights which the *Brown* decision categorized as an "equal educational opportunity." In this effort, flexibility of approach is crucial. The principles of *Plessy v. Ferguson* as well as *Brown v. Board of Education* can be used effectively. No approach should be discarded, and few should be universally embraced. The guiding principle must be that black leadership in Delta County, as elsewhere, must listen carefully to what black parents want from schools for their children and then design strategies that utilize constitutional rights and political leverage to achieve these educational goals.

Sincerely,

Derrick A. Bell, Jr.