AN EVALUATION OF PAST AND CURRENT LEGAL APPROACHES TO VINDICATION OF THE FOURTEENTH AMENDMENT'S GUARANTEE OF EQUAL EDUCATIONAL OPPORTUNITY

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FORWARD

As this paper is being written, the Senate and the House have enacted bills restricting busing and court authority to order it as a means of securing equal educational opportunity for black children.** While the Senate bill is somewhat less repressing than that enacted by the House, national legislative disapproval of the use of busing as a technique to enforce the fourteenth amendment's mandate of equal educational opportunity is manifest. The President has made a televised address to the nation scoring busing for integration and has sent to both houses a proposal for (1) a moratorium on the federal courts requiring busing for the purposes of integration, (2) a prohibition on court power to order busing for purposes of integrated schooling, and has ordered the Department of Justice to intervene in pending cases before the federal

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** Since the writing of this article there have been two significant developments pertaining to school desegregation. First, in reversing the district court opinion in Bradley v. School Bd. of Richmond, 338 F. Supp. 67 (E.D. Va. 1972) the court of appeals stated:

> Because we are unable to discern any constitutional violation in the establishment and maintenance of these three school districts, nor any unconstitutional consequence of such maintenance, we hold that it was not within the district judge's authority to order the consolidation of these three separate political subdivisions of the Commonwealth of Virginia. When it became "clear that state-imposed segregation . . . [had] been completely removed," . . . within the school district of the City of Richmond, as adjudged by the district court, further intervention by the district court was neither necessary nor justifiable.

Bradley v. School Bd. of Richmond, No. 72-1058-60, 72-1150, slip opinion at 29 (4th Cir., June 5, 1972). Secondly, H.R. 13915, 92d Cong., 2d Sess. (1972) pertaining to limitations on school busing, was passed by the House. *See* N.Y. Times, Aug. 18, 1972, § 1, at 1, col. 8. The Senate has not taken final action on the bill. *See* N.Y. Times, Aug. 19, 1972, at 9, col. 1. *See also* Pub. L. No. 92-318, § 801 et seq. (June 23, 1972), 86 Stat. 235. [Editor's note]

courts where busing has been ordered by lower court ruling. Numerous factions are advocating a constitutional amendment to bar busing to achieve equal educational opportunity for black children insofar as that fourteenth amendment right requires a classroom mix of black and white children for school purposes.

The specifics of the legal implications of this recent flurry of Congressional action and presidential intervention in this field are not altogether clear. What seems clear enough, however, is that school districts that have not integrated their schools will not be placed under federal order to do so through the use of busing for some time to come; that school districts that have completed the process of school integration through busing will be under pressure to roll back the clock; and that the remedy through interdistrict mergers to effectuate school integration, such as ordered in *Bradley v. School Board of Richmond*,[1] will gain few federal court adherents, at least until the legal implications and constitutionality of whatever law Congress is certain to enact on this issue has been determined by the United States Supreme Court. As a consequence, in the short run, and perhaps in the long run as well, civil rights advocates will be forced to give careful scrutiny to those trends in the law which propose to eliminate the black child's constitutional deprivations by means of a modernized version of the discarded *Plessy v. Ferguson*[2] formula for guaranteeing equal educational opportunity.

Reform of state funding formulae to equalize per capita funding for school purposes,[3] will probably come under increased court pressure. Community control, or decentralization, at least to the extent that it now exists in New York City—local school districts within the city are given a limited amount of say about school affairs in the district but with ultimate control of the school system remaining in the hands of a centralized authority—will probably become more widespread. Ten years hence whether we will be any closer to quality education or equal education for black children is, of course, highly problematical. Unhappily, the fierce resistance to the implementation of *Brown v. Board of Education*[4] in the South and to its application to de facto school

1. 2338 F. Supp. 67 (E.D. Va. 1972), *rev'd*, Nos. 72-1058-60, 72-1150, (4th Cir. June 5, 1972).

2. 163 U.S. 537 (1896).

3. *See* Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280 (W.D. Tex. 1971); Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

4. 347 U.S. 483 (1954).

segregation in the North, the widespread and often hysterical opposition to busing and to the development of metropolitan school districts to eliminate school segregation, particularly in urban areas North and South, suggest that the white community in this country is at the present time prepared only to give lip service to the fourteenth amendment mandate guaranteeing equal educational opportunity.

INTRODUCTION

Not long ago, the noneducated man could rise to fame and fortune in the United States through the use of ingenuity and industry. Today, that era has ended. We now live not only in a highly mechanized society but in one rapidly approaching cybernetics where economic success is functionally related to education. Our economy is increasingly service-oriented. Employment in the skilled trades frequently requires knowledge obtainable only through a fairly rigorous academic program, or to put it more precisely perhaps, the gateway to a skilled job is thorough learning in rudimentary academics—the higher the skill, the greater the necessary academic grasp. Thus, today, as never before, education is the key to employability, and meaningful employment is the passport to the bounty of our society.

A good education, therefore, is nothing short of critical for black Americans because of the very real correlation between academic skills and employment, income and anti-social conduct.[5] Black people recognize that education has traditionally been the avenue of upward mobility in American life. Thus, their rightful demand for equal educational opportunities for blacks is now so economically essential that it is not amiss to classify it as one of the "basic" civil rights.[6]

Moreover, education bears a close relationship to other public noneconomic needs of a democratic society. Without it there can be no intelligent use of the franchise, and reliance cannot be placed on the first amendment to insure effective public influence on the decision-making process. In short, the United States will not be able to hold itself out as either a free or a democratic society without an educated

5. J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); UNITED STATES COMM'N ON CIVIL RIGHTS, ON RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967).

6. Skinner v. Oklahoma, 316 U.S. 535 (1942). Certainly if the "right" to have children is a basic civil right, then the "right" of a parent to support those children must assume equal dimensions.

citizenry. Due to the correlation between education and democratic institutions, the right to equal educational opportunities is, in truth, "a fundamental political right, because preservative of all rights."[7] As such, it should be accorded a preferred status and given substantial, not minimal, protection. In ordering the Department of Health, Education and Welfare to conduct a survey of educational opportunity because "of the fundamental significance of educational opportunity to many social issues today . . . ." Congress recognized the essentiality of equal educational opportunity for the underprivileged.[8]

Yet, it is distressingly evident that the nation's public school system is not providing a large percentage of blacks with even rudimentary skills in reading, writing and arithmetic. Many persons in the black community view the public school failure to provide its youth with the necessary educational tools for upward social and economic mobility as an aspect of the conscious and callous suppression to which blacks are subjected by the white majority in this supposedly free and democratic society.

This widely held conviction helps feed the flames of black discontent and disaffection and increases black distrust of white institutions and individuals—all of which, of course, furthers black-white polarization. Blacks are losing faith in the efficacy of the law as well, since, according to the law, they are entitled to the very educational opportunities and advantages they seek and have thus far been unable to obtain. Although firmly established under law that educational inequality is prohibited, the law has been violated, evaded, or frustrated with virtual impunity, and now evasions and violations seem to have the support of the highest offices in government.

I. THE DEVELOPMENT OF THE LAW TO *Brown v. Board of Education*

Up to now the United States Supreme Court's interpretation of the Constitution's guarantee of equal educational opportunity could be read as an open-ended proscription against all forms of invidious discrimination which deprive blacks as a group of those educational ad-

7. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). Like the Supreme Court, "we must consider public education in the light of its full development and its present place in American life throughout the nation." Brown v. Board of Educ., 347 U.S. 483, 492-93 (1954).

8. J. COLEMAN, *supra* note 5, at 1.

vantages and opportunities made available to whites at public expense. This approach of the Court is now approximately twenty years old and evolved out of its unsuccessful attempt to make the "separate but equal" doctrine serve the cause of equal treatment.

The "separate but equal" concept predates the fourteenth amendment. It had its origin in a decision by the Massachusetts Supreme Court in *Roberts v. City of Boston.*[9] The doctrine was adopted by the United States Supreme Court in 1896 in *Plessy v. Ferguson,* as properly defining the scope and meaning of the fourteenth amendment's equal treatment requirement with respect to black citizens. With that decision, apartheid, with its implicit justification for grossly disparate allocation of resources and facilities between whites and blacks, was afforded constitutional sanction on a national scale. A typical example of how southern states operated under this standard is found in the per-pupil expenditure for black and white school children in several states during the 1949-50 school term: Alabama, $130.09 for whites, $92.69 for blacks; Arkansas, $123.60 for whites, $73.03 for blacks; Florida, $196.42 for whites, $136.71 for blacks; Georgia, $145.15 for whites, $79.73 for blacks; Maryland, $217.41 for whites, $198.76 for blacks; Mississippi, $122.93 for whites, $32.55 for blacks; North Carolina, $148.21 for whites, $122.90 for blacks; South Carolina, $154.62 for whites, $79.82 for blacks; District of Columbia, $289.68 for whites, $220.74 for blacks.[10]

Although *Plessy v. Ferguson* involved the validity of racial segregation in railroad cars, and in 1917 the Court explicitly repudiated *Plessy*'s application to housing,[11] it was assumed until *Brown v. Board of Education* was decided that "separate but equal" was the appropriate constitutional yardstick in considering claims of educational deprivation based upon race or color.

In 1938, in *Missouri ex rel. Gaines v. Canada,*[12] the Supreme Court for the first time sought to place strictures upon the application of the "separate but equal" concept by insisting that equal facilities in fact

9. 59 Mass. (5 Cush.) 198 (1850).

10. Blose & Jaracz, *State School Systems: Statistical Summary for 1949-50,* Table 43 at 105, in DEP'T. OF HEW, BIENNIAL SURVEY OF EDUCATION IN THE UNITED STATES, 1948-50 (1954).

11. Buchanan v. Warley, 245 U.S. 60, 81 (1917).

12. 305 U.S. 337 (1938).

be provided as a precondition to constitutional sanction of racial segregation.

Gaines made inevitable the Court's decision in *Brown v. Board of Education* in 1954, outlawing racial segregation in the Nation's public schools. Sixteen years intervened between the two decisions, but in reformulating the "separate but equal" doctrine by making the threshold requirement the assurance that equal facilities were being provided, the Court laid the basis for the doctrine's ultimate rejection. The certainty of this development is crystal-clear only in retrospect, but part of the legal strategy that underlay *Gaines* was to secure a stone-for-stone, book-for-book "separate but equal" constitutional yardstick in the hope that the maintenance of segregated educational facilities might be rendered so burdensome and expensive as to cause the voluntary abandonment of the practice.

In 1950, with *Sweatt v. Painter*[13] and *McLaurin v. Oklahoma State Regents*,[14] "separate but equal" was virtually abandoned, but the Court refused to accede to the request of the complaining parties to overrule *Plessy v. Ferguson.*

In *Sweatt* the question was whether a recently established law school for blacks was the substantial equivalent of the University of Texas Law School. The question was answered in the negative. "Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."[15] Here the Court's commitment to the elimination of constitutional support for segregation was made manifest.

That commitment was even more clearly shown in the *McLaurin* case, decided the same day. McLaurin received the same courses of instruction as his fellow white students, but he was kept separate and apart from others pursuant to restrictions imposed. The Court concluded that the university regulations handicapped McLaurin in his pursuit of graduate instruction by inhibiting and impairing his ability to study, to engage in discussion and the exchange of views with fellow students, and "in general, to learn his profession."[16] The convic-

13. 339 U.S. 629 (1950).
14. 339 U.S. 637 (1950).
15. 339 U.S. at 634.
16. 339 U.S. at 641.

tion that racial restrictions personally interfere with the individual's ability to learn, first articulated in this case, was to become the Court's central thesis four years later in *Brown v. Board of Education.*

In the latter case, the Court took the final step of eviscerating *Plessy v. Ferguson*, holding that "separate but equal" had no place in the field of education and that racial segregation constituted a denial of equal educational opportunity within the meaning of the Constitution's proscription.

In subsequent holdings, *Brown* was interpreted as requiring not only desegregation in pupil enrollment but desegregation in faculty assignment as well.[17] Moreover, *Brown* became the precedent for the Court's outlawing of enforced racial segregation in virtually all aspects of American life.[18]

Sweatt, *McLaurin*, and *Brown* struck down specific racial restrictions: the segregated law school, regulations designed to keep black and white students separate and apart on the university campus, and the dual public school system, respectively. Yet there is a common thread that makes these three cases one: an attempt to give definition in real-life terms to those practices that in fact deny equality of educational opportunity to blacks and thus should become subject to constitutional prohibition.

Brown was the culmination of this effort. Although a milestone in achievement, *Brown* could not be regarded as the final word—indeed, what the Court had promised in *Gaines* to *Sweatt*, through *McLaurin* and to *Brown* was a continuing realism, which would require appraisal and evaluation of every substantial claim by blacks of educational deprivation, to decide whether and the extent to which such denial was a violation of the Constitution's guarantee of equal education.

But the promise has not been kept. The Court has not moved beyond *Brown* in its substantive determinations of what constitutes a denial of equal education in its constitutional dimensions. Indeed the promise, limited by the terms of "all deliberate speed," has not yet been enforced to abolish completely the dual school system in the

17. Rogers v. Paul, 382 U.S. 198 (1965); Bradley v. School Bd., 382 U.S. 103 (1965).

18. *See, e.g.*, Watson v. City of Memphis, 373 U.S. 526 (1963); Johnson v. Virginia, 373 U.S. 61 (1963); Turner v. City of Memphis, 369 U.S. 350 (1962); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); State Comm'n v. Dorsey, 359 U.S. 533 (1959).

South where *Brown* is directly applicable under its most restrictive interpretation.

II. The Implementation of *Brown* in the South

A. *The Pace of Desegregation*

Southern resistance to the mandate of *Brown* is so well chronicled that it requires only brief mention in this paper. Southern officialdom initially responded to *Brown* with a program of "massive resistance" which relied on such tactics as the use of the National Guard and the closing of public schools in order to prevent blacks from going to school with whites.[19] After the Court declared these blatant practices unlawful, school boards utilized a variety of tactics to prevent integration on anything more than a token basis, including pupil placement and assignment laws, state supported private schools, and freedom of choice. Each of the delaying tactics was ultimately declared unlawful; and in *Griffin v. County School Board*[20] the Court even declared that the time for all deliberate speed had passed. Nevertheless, very little integration of students was achieved during the first decade and a half following *Brown*. By the 1963-1964 school term, the eleven states of the old confederacy had only 1.17 percent of their black children in schools with white children.[21] That figure had only grown to approximately twenty-five percent by September 1969, chiefly as a result of the Civil Rights Act of 1964 and the enforcement activities of the Department of Health, Education and Welfare.

In *Green v. County School Board*,[22] the Court finally made clear that its ruling in *Brown* actually required integration of students. The Court rejected a freedom of choice plan under which only fifteen percent of black children received an integrated education and required school boards "to come forward with a plan that promises realistically to work; and promises realistically to work *now*."[23] The Court specifically instructed the district court to take into account the techniques of geographic zoning and school consolidation (or pairing) which in

19. *See* Griffin v. County School Bd., 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958).

20. 377 U.S. 218 (1964).

21. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 854 n.36 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

22. 391 U.S. 430 (1968).

23. *Id.* at 439 (emphasis original).

New Kent County would have the effect of requiring that all students attend school on an integrated basis.

It is recognized that in large part success in frustrating effective implementation of *Brown* in the South was the Supreme Court's failure to require school authorities to make a total reorganization of school districts. Instead they were allowed to assign children to school on the same basis as had existed under the dual school system, with black children being forced, therefore, to seek reassignment if any desegregation was to occur. The Court explained in *Green* that its policy had been decided upon deliberately, and that it had been designed to enable black children courageous enough to break with tradition to obtain a position in the white school. Ironically this reasoning reveals precisely why the policy was flawed. Because it would take personal courage for black children to assert themselves in vindication of what had been declared to be their rights, the Court should have devised a policy for the transformation from a segregated to a nonsegregated school system which would not have made it necessary for black children and their parents to carry the burden virtually alone. *Brown* imposed an obligation of compliance on the state; school authorities should have been required at the outset to reassign all children, black and white, to schools within the school district pursuant to the prerequisites of the *Brown* decision. In the long run, perhaps no difference in result of consequence would have occurred, but the Court might have realized sooner than it did that a new approach was needed if the constitutional objectives *Brown* established were to be realized. Moreover, it is unseemly to suggest that declared constitutional guarantees of equality must stand or fall on the mettle and tenacity of individual blacks; on the contrary, implementation of these fundamental rights are more properly the business of the society.

At any rate, *Green* quickened the pace of desegregation in the South. Plaintiffs in school desegregation cases throughout the South sought new court orders which would immediately integrate their schools. In August of 1969, thirty-three of these cases were brought before the Fifth Circuit Court of Appeals, all presenting the question of whether the court should grant a delay or order immediate implementation of desegregation plans.[24] The Fifth Circuit granted the delay and the

24. Many of these desegregation plans were prepared by officials of the Department of Health, Education and Welfare. However, the Secretary of the Department wrote a letter to the court in support of the request for a delay.

Supreme Court reversed in *Alexander v. Holmes County Board of Education.*[25] In *Alexander* the Supreme Court not only requested immediate implementation of a desegregation plan, but also ordered that such a plan be put into effect prior to any court hearing on objections or modifications to the plan. In short, school boards were required, at last, to integrate and then litigate.

On remand, the Fifth Circuit ordered that faculties be integrated in the middle of the school year; but again delayed student integration until the following September. Again, the Supreme Court ordered expedited proceedings, reversed the Fifth Circuit's decision, and required that students also be integrated in the middle of the school year.[26]

Following *Green, Alexander* and *Carter,* the most important school desegregation cases have dealt with issues concerning the appropriate techniques for achieving equal educational opportunity. The two techniques which have produced the greatest controversy are, of course, busing and metropolitanism (redrawing school district lines to include the central city and its surrounding suburbs). Given the degree to which blacks are increasingly becoming concentrated in the central cores of large southern cities, it would appear that both busing and metropolitanism must be utilized in order to fully implement the basic principles of *Brown.*

The Supreme Court approved use of busing in *Swann v. Charlotte-Mecklenberg Board of Education.*[27] The significance of this case lies in its objective and realistic treatment of the question. From the cacophony of anti-busing hysteria one would be led to believe that busing is an altogether new phenomenon, utilized only to accomplish desegregation. The Court through Mr. Chief Justice Burger put the issue in its proper perspective. He said:

> Bus transportation has been an integral part of the public educational system for years, and was perhaps the single most important factor in the transition from the one room schoolhouse to the consolidated school. Eighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969-1970 in all parts of the country.[28]

This statement makes unmistakably clear, of course, that the trans-

25. 396 U.S. 19 (1969).
26. Carter v. West Feliciana School Bd., 396 U.S. 226 (1969).
27. 402 U.S. 1 (1971).
28. *Id.* at 29.

portation of children to school by bus cannot be and is not objected to per se. The real outcry is against the desegregation process at the end of the bus ride. There is no great objection, it should be added, when black children are taken by bus to segregated schools, which was, of course, in the pre-*Brown* era, standard operating procedure in the South.

The Court ruled out the impractical and irrational in court-ordered busing. The opinion continues:

> An objection to transportation of students may have validity when the time and distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan . . . . It hardly needs stating that the limits on travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.[29]

This attempt to bring sanity and rationality to all questions that had been distorted by emotionalism unhappily did not have the desired effect. The President chose to seek whatever political mileage he might secure in an anti-busing stand. He helped keep the heat by statements which sought to picture advocates of busing for desegregation as wild-eyed zealots intent on transporting children all over the lot to insure school integration. He threatened with dismissal any member of HEW's staff who sought to force school districts to desegregate through extensive use of busing. The Chief Justice helped abet Presidential politics by taking the occasion, in denying a stay of court-ordered busing, to explain—where no clarification was needed—that *Swann* had not been intended to require court-ordered busing and to set forth the limits of court discretion in mandating busing to achieve effective desegregation.[30] This explanation was mailed to every United States District Court and federal judge in the South.

Since then has come the clamor for a constitutional amendment, the House and Senate bills, and the President's speech and proposed moratorium. As noted above, the outcome of these attempts to bar busing

29. *Id.* at 30-31.

30. Winston-Salem Bd. of Educ. v. Scott, 404 U.S. 1221, 1227-31 (1971). A rehearing in *Swann* had already been denied, 403 U.S. 912 (1971).

by statutes or constitutional amendment remains in doubt; but a statute, if passed, will certainly require litigation to determine its constitutionality. It would seem doubtful that lower courts will order desegregation plans based on busing until the constitutionality of such legislation has been determined.

In *Bradley v. School Board of Richmond,*[31] the Eastern District of Virginia recently required that three school boards in the Richmond area be operated on a metropolitan or merged basis. The case is presently being appealed to the Fourth Circuit. Many believe that this is the only approach to effective desegregation that will work in urban areas. Because of segregated housing patterns, blacks are increasingly clustered in central cities in an urban complex. In such cases whites move to surrounding suburbs which effectively prevents black penetration. The schools in the central city became increasingly black, while those in the surrounding suburbs are largely white. If equal educational opportunity requires a classroom mix, the merger of the city school districts with those in the suburbs for school organization purposes will produce such an intermixture. However, the vitality of metropolitanism, of course, will in large part depend on the busing controversy.

B. *Problems Arising in the Wake of Desegregation*

While the actual enforcement of *Brown* is only in its beginning stages—and whether it will ever be fully enforced remains in doubt—black students and teachers residing in recently desegregated districts have not been accorded equal treatment. Black teachers and principals have been discriminatorily discharged and demoted on a large scale; black schools have been closed without regard to their fitness as educational institutions; schools named after famous blacks have been renamed and black students have been discriminatorily subjected to arbitrary and unfair discipline.

In addition to declaring unlawful the segregation of pupils, *Brown v. Board of Education,* also held unconstitutional segregation of teachers, principals and other personnel. However, in the first decade after *Brown,* southern school boards made even fewer efforts at desegregation of teachers and administrative personnel than of pupils. Courts permitted this inaction with respect to teachers and administrative per-

31. 338 F. Supp. 67 (E.D. Va. 1972), *rev'd,* Nos. 72-1058-60, 72-1150, (4th Cir., June 5, 1972).

sonnel without granting a hearing "until the desegregation of pupils has been accomplished or had made substantial progress."[32] The Supreme Court reversed this practice of refusing to grant hearings on claims by black students for desegregated teachers and administrative personnel in *Bradley v. School Board of Richmond.* The Court ruled that:

> There is no merit to the suggestion that the relationship between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative. Nor can we perceive any reasons for postponing these hearings . . . .[33]

Following *Bradley*, the lower courts began to require that school boards make at least some effort toward desegregation of faculty and administrative personnel. Some courts focused on the specific results to be obtained by reassignment of teachers;[34] other courts focused on the mechanics of faculty integration without detailing the specific number of teachers to be assigned each school;[35] and still others merely emphasized the need to undo the effects of past discriminatory assignments without mentioning specific results or mechanics. These cases are summarized in the Fifth Circuit's comprehensive decision in *United States v. Jefferson County Board of Education.*[36]

The different approaches to faculty integration were made irrelevant by the Supreme Court's decision in *United States v. Montgomery County Board of Education.*[37] In the *Montgomery County* case the Court reversed the Fifth Circuit and reinstated as within its discretion a district court's ruling requiring that the school board, insofar as practicable, assign teachers so that "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system."[38]

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32. Augustus v. Board of Pub. Instruction, 306 F.2d 862, 869 (5th Cir. 1962).

33. 382 U.S. 103, 105 (1965).

34. Kier v. County School Bd., 249 F. Supp. 239 (W.D. Va. 1966); Dowell v. School Bd., 244 F. Supp. 971 (W.D. Okla. 1965), *modified,* 375 F.2d 158 (10th Cir.), *cert. denied,* 387 U.S. 931 (1967).

35. Gilliam v. School Bd. of Hopewell, 11 RACE REL. L. REP. 1297 (E.D. Va. 1966); Beckett v. School Bd. of Norfolk, 185 F. Supp. 459 (E.D. Va. 1959), *aff'd sub nom.* Hill v. School Bd. of Norfolk, 282 F.2d 473 (5th Cir. 1960).

36. 372 F.2d 836 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967).

37. 395 U.S. 225 (1969).

38. Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647, 654 (M.D. Ala. 1968).

The courts of appeals interpreted *Montgomery County* to require that school boards racially balance their faculties according to blacks and whites in the district, and decisions ordering faculty desegregation, like orders requiring pupil desegregation, were required to be implemented immediately.[39]

As courts began to require that school boards actually desegregate faculties and administrative personnel, the black teachers and administrators quickly lost the job security which inheres in the dual system; school boards reacted to the requirement that faculty and administrative staff be integrated, in part, by discharging or demoting large numbers of black teachers and principals. The school boards' inclination to dismiss or demote black teachers and administrators increased, it seems, proportionately with the Court's requirement that they, in fact, desegregate faculty and administrative staff. Discharge and demotion of teachers and administrators increased dramatically in the period immediately following the cases enforcing the Supreme Court's decision in *Montgomery County*.

A 1970 report on the status of school desegregation in the South, based on monitoring 400 desegregating school districts, reveals startling facts.[40] The report indicates that in at least thirty-four cases, black principals were discriminatorily dismissed, and that in 194, or sixty-three percent, of the districts being monitored, at least 386 black principals were demoted. Many of the demoted principals were made "assistant principals" and given trivial or undefined duties despite the fact that they frequently had better credentials and greater experience than the white principals they were assigned to work under. A large number of the black principals were simply made classroom teachers. The same report shows that 127 of the monitored districts discharged or refused to renew contracts for at least 462 black teachers. School boards gave a variety of reasons for terminating black teachers, including a reduction in the number of students ("white flight"); the elimination of duplicate courses and facilities; and the "incompetency" or lack of qualification of the black teachers, many of whom had taught black children for many years in these same school systems. The report further indicated that 103 of the districts studied had demoted

39. *See* Singleton v. Jackson Mun. School Dist., 419 F.2d 1211 (5th Cir. 1970).

40. AMERICAN FRIENDS SERVICE COMMITTEE, THE STATUS OF SCHOOL DESEGREGATION IN THE SOUTH (1970).

black teachers by reassigning them to subjects outside the field for which they had training or experience; reducing them from the high school to the junior high or elementary school levels. In many instances, black teachers were reassigned as assistants or teacher aides to white teachers, or were assigned to federally funded special programs, such as the Head Start Program. Still other black teachers were reassigned to nonteaching jobs, such as bus drivers, or given study hall duty. Black coaches and band directors were the hardest hit group, frequently being demoted to assistant coach, physical education teacher, or playground director.

The National Education Association has carefully collected the statistics showing discharge and demotion of black teachers and principals in the desegregating school districts which file reports with the Department of Health, Education and Welfare in the years 1968, 1969 and 1970.[41] The statistics indicate that the report cited above only shows the tip of the iceberg and that the ranks of black teachers and administrators have been practically decimated during the desegregation process.

The courts and the Department of Health, Education and Welfare, perhaps in anticipation of mass dismissal and demotion of black teachers and administrators, articulated fairly strong protections for the job security of black teachers and administrators. HEW and the courts required that teachers and staff displaced by the desegregation process be given a priority for re-employment over those coming from outside the system. They also required that school boards which reduced the size of their staff as a result of the desegregation process make a comparative evaluation of all teachers and/or administrators in the system and eliminate the least qualified, irrespective of race.[42]

However, HEW and the courts are either unable or unwilling effectively to enforce their protective rulings as is attested by the statistical

41. *See* Brief for The National Education Ass'n as Amicus Curiae, United States v. Georgia, 445 F.2d 303 (5th Cir. 1971), *reprinted in Hearings on Equal Educational Opportunity Before the Senate Select Committee on Educational Equal Opportunity*, 92d Cong., 1st Sess., pt. 10, at 5025-5119 (1971).

42. Singleton v. Jackson Mun. School Dist., 348 F.2d 729 (5th Cir. 1965); Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964, 45 C.F.R. § 181.13 (1968). *See also* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied sub nom.* Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967).

evidence compiled above. The magnitude of the problem would seem to indicate that a judicial approach could not effectively address itself to the problem since the judicial process proceeds on a case by case basis, and requires substantial resources far beyond the means of individual or small groups of teachers and administrators. HEW on the other hand utilizes administrative procedures which are typically more expeditious and less expensive. We are unable to locate any evidence that HEW has terminated federal funds from a single school district for discriminatory practices against black teachers and principals; however, in December, 1970 the Office of Education announced a program of training and retraining to assist teachers and administrators displaced by the desegregation process.

Despite their overall ineffectiveness, courts have continued to increase the stringency of their protection to black teachers and administrators. In *Chambers v. Hendersonville Board of Education*,[43] and more recently in *Singleton v. Jackson Municipal Separate School District*,[44] attempts to make a wholesale reduction in the number of black teachers were held unlawful. "Objective standards" for the employment and retention of teachers to be applied to black and white teachers alike were ordered effectuated.

In *Singleton* "demotion" was defined to include any reassignment that yields less pay or responsibility, requires a lesser degree of skill, or requires a staff member to teach a subject or grade outside his area of certification or in which he has not had experience within five years. This definition is particularly important in the face of charges, which appear credible, that many school boards reassigned black teachers outside their area of certification or experience and, based upon their performance in that assignment, discharged the black teacher on the grounds of "incompetency."

McFerren v. County Board of Education of Fayette County,[45] involved the school board's attempt, as part of the desegregation process, to discharge a disproportionate number of black teachers (15-7), allegedly on the grounds that they had failed to meet the state's law governing tenure and were thus not qualified. Most of the blacks serving in the system's predominately black schools had worked for many

43. 364 F.2d 189 (4th Cir. 1966).
44. 419 F.2d 1211 (5th Cir. 1970).
45. McFerren v. County Bd. of Educ., 455 F.2d 199 (6th Cir. 1972).

years, whereas only one of the whites had more than two years service. The court observed that the board had obviously considered the teachers good enough teachers to teach black students, but suddenly determined in the face of the desegregation order that they were not good enough to teach white students; it required the board to shoulder the burden of proving that the discharges were based on definite nondiscriminatory, objective standards.

The court in *Lee v. Macon County Board of Education*[46] also adopted the doctrine that school boards have the burden of proving the lack of qualifications of a principal who was regarded as qualified prior to the desegregation order. The court stated:

> The Board must show the former principal to be independently unqualified to assume the new opening. And in order to fulfill that burden the Board would have to establish quite clearly why one who was qualified prior to a desegregation order suddenly became unqualified after the order.[47]

The court required the school board to appoint the plaintiff, who had been demoted to the position of director of a Head Start program, as principal at one of the integrated schools where a vacancy had occurred. Perhaps more importantly, the court articulated the relationship between the right of black students to equal educational opportunities and nondiscriminatory employment opportunities for black teachers and administrators. The court declared:

> . . . We find it impossible not to conclude that the same feeling of inferiority inevitably results among the students when the leaders of the educational processes—the principals, the teachers, and the administrators—are likewise separated from principals, administrators, teachers and students of other races.
>
> . . . The entire rationale of desegregation would be seriously if not fatally undermined if faculties and principalships remained segregated even in fully integrated classrooms.[48]

That trend seems to have slowed if not stopped. Urban school districts at least appear to be actively recruiting black faculty and administrators and one can interpret *McFerren* and *Lee v. Macon County* as indicating a greater awareness by the courts of their responsibility to prevent the massive discriminatory elimination of black faculty and

46. 453 F.2d 1104 (5th Cir. 1971).
47. *Id.* at 1110.
48. *Id.*

staff. This is not to suggest, however, that the need to insure equal employment opportunity for black educators is merely a transitory problem. Like other aspects of the racial relations syndrome in this country, it would appear that this question with greater or lesser intensity will remain a problem with us for years to come.

III. THE RESPONSE TO *Brown* IN THE NORTH

A. *Equal Educational Opportunity in the North*

Before the *Brown* decision the assurances of northern educators that public schools were offering all children appropriate access to equal educational opportunity was not seriously challenged. The attack on the denial of equal educational opportunity in the North, however, followed close on the heels of *Brown.*

In 1955 the New York City Board of Education, which had been assuring the public that quality education was being offered in the city's schools of high black and Puerto Rican concentration on a par with that being afforded in the city's white middle class schools, was prodded into authorizing a study by the Public Education Association to settle the question. The study, of course, revealed what common sense had long perceived, that the predominantly black and Puerto Rican schools of the city were not in parity in respect of quality. The PEA study compared the schools on the basis of the composite scores made in standardized city-wide achievement tests. These scores revealed that the schools populated largely by black and Puerto Rican children were roughly one half year behind the predominantly white schools in reading, writing and arithmetic at the fourth grade, one and one half years behind at the sixth grade, and a staggering two and one half years behind at the eighth grade.[49]

Today this is generally conceded to be an accurate profile of the educational gap between blacks and whites in the public school systems of the North and West where black-white school separation exists. This northern phenomenon of black-white school separation has been called de facto school segregation, or racial imbalance. Although the inevitable consequence of correlating a neighborhood school policy to a pattern of housing segregation, unless the court found school board

49. PUBLIC EDUCATION ASSOCIATION, STATUS OF PUBLIC SCHOOL EDUCATION OF NEGRO AND PUERTO RICAN CHILDREN (1955).

contrivance in maintaining or perpetuating the pattern, the resulting separation was considered adventitious when attack on the northern problem reached the courts in the early 1960's.

Northern educators argued that the real problem of outright educational denial and deprivation was a southern problem and were scandalized by the vehemence of the criticisms and charges of racism that were being made by blacks in respect of the quality of education being afforded black children in northern school systems. What was not understood is that *Brown* had fathered a major social upheaval in race relations in this country. Northern "good will" and "good intentions" evidenced in its various statutes and ordinances barring racial discrimination were no longer enough.[50] The basic question was whether discrimination was being effectively controlled or proscribed. Legal attacks soon began on northern style black-white separation.[51]

The attack did not fare as well as had the attack against formal segregation in the South. School separation in the North, unlike the formally mandated segregation in the South, gives the appearance of inevitability and school board innocence. On the surface there is no apparently discernable distinction between the black and white schools as to what is afforded and what is withheld. Moreover, invidious racial considerations influence educational practices only *sub silentio* and northern educators have succeeded in convincing the public that the policies underlying the choice of various educational policies or practices and forms of school administration are based solely on considerations of educational excellence. In truth such decisions are affected by a wide ranging variety of factors, fiscal and political considerations, tradition and race. These factors, judicial ignorance concerning possible alternatives to the school assignment policy under attack, and diffidence about the expertise of the professional educator, initially led to the courts' reluctance to intervene. An example, of course, is the neighborhood school policy, which northern educators are wont to defend as indispensable for quality education, it being, in their judgment, one of the best methods for producing a cooperative

50. *See* Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 246 *et seq.* (1968).

51. *See, e.g.*, Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y.), *appeal dismissed*, 288 F.2d 600 (2d Cir.), *aff'd and enforced*, 195 F. Supp. 231 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); Fisher v. Board of Educ., 8 RACE REL. L. REP. 730 (N.J. Comm'r of Educ. 1963).

school-home relationship conducive to the educational development of the child.

Yet in our mobile society, that contention will not withstand even cursory scrutiny. One of the chief consequences of the neighborhood school policy has been that the school reflects the socio-economic and racial characteristics of the neighborhood it serves. The result is schools of high and low quality, with a direct correlation between the quality of the educational product and the socio-economic status of the neighborhood served. The neighborhood school policy perpetuates in the classroom the socio-economic and racial stratification characteristic of the residential patterns of the community. Therefore, educators who defend and enforce this policy in our multiracial society, with its increasingly fixed socio-economic stratification, should be required to spell out with exactness the essential educational ingredients necessary to ensure equal educational opportunity for those attending a school serving a low socio-economic neighborhood as contrasted with a school serving a high socio-economic neighborhood—one serving blacks and one serving whites.

The argument for the neighborhood school policy may have abstract appeal, but the demonstrated operative effect of the policy itself is to provide the most and best in educational resources to affluent whites and the least and worst to poor blacks. Such a result can hardly be supportive of considerations of educational excellence. A southern judge put his finger squarely on the pulse of the real issue when he said:

> The system of assigning pupils by "neighborhoods" with "freedom of choice" for both pupils and faculty, superimposed upon an urban population pattern where Negro residents have become concentrated almost entirely in one quadrant of a city of 270,000, is racially discriminatory. This discrimination discourages initiative and makes quality education impossible. The quality of public education should not depend on the economic or racial accident of the neighborhood in which a child's parents have chosen to live—or find they must live—nor on the color of his skin. The neighborhood school concept never *prevented* statutory racial segregation; it may not now be validly used to *perpetuate* segregation.[52]

52. Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358, 1360 (W.D.N.C. 1969) (emphasis added).

The school district, another example, is supported on the grounds that decentralized authority is more practical for the administration of what is said to be an essentially local concern. Since a school district's principal benefit will be to the community it serves, it has been regarded as a matter of sound political judgment that the district itself should possess a significant degree of control over the administration and financing of the district's schools. On the shoulders of the local community is left the burden of weighing the benefits of more modern educational facilities against a smaller tax, or the need for imposing a heavier tax levy to keep an inadequate educational plant limping along. Moreover, furtherance of local concern for education, interest, and initiative is said to be the generating force behind the state funding formula that results in wide variations in the financial support for public education from district to district within each state. The degree of variation differs from state to state, but intrastate variation is even more pronounced, with the wealthiest school district within the state sometimes spending as much as five times more per pupil than the poorest district.

The reality is that a school district's size, its shape, and the quality of education it offers are more often than not determined on a haphazard basis without any acceptable rational underpinning. In the main, the once unstated but now increasingly open determinant is the protection of the interests of the white middle class. Here fiscal and political considerations carry far more weight than does concern for educational excellence for all. There have been some recent sporadic efforts to reduce the number of school districts in a state, but this activity has usually been ad hoc, without being linked to any state-wide plan to redesign school districts in an attempt to provide a reasonable basis for interdistrict educational equality.

In sum, at present, the implementation of a neighborhood school policy or the size of a school district is determined without a valid or rational educational basis and is not designed to produce equality of educational opportunity, either educationally or constitutionally.

In addition, the professional educator has fostered the belief that academic disparities evidenced in the predominantly black schools result from causes over which the public school system has no control: socio-economic factors and incidents of family life; that the massive academic failure of the black child is not the responsibility of the school, its methodology, administration, or personnel; that the black

child is uneducable because of background deprivations and disabilities, familial and environmental.

This somewhat crude and cruel rationalization, which is closely akin to the concept of genetic inferiority and gives the lie to the protestation that ours is an open society, has now fallen out of fashion. The current thesis is that the educational deprivations of blacks are the product of social-class factors; that blacks cannot improve their current depressed socio-economic status without the elimination of educational deficiencies, and since these are predetermined by class, little hope is held of the black underclass ever achieving equal educational opportunity.

Neither theory, however, gives a true or accurate picture. Public education, in quality and distribution, is the result in great part of political power. Since the dominant and controlling political power is in the hands of the white middle class, that class uses its strength to corner for itself a disproportionate share of available educational resources, thereby insuring the perpetuation of its dominant authority. Thus, while the disparities may not be indigenous to class or socio-economic status, that is what the reality is made to appear.

In view of the powerlessness of the black underclass, this current rationalization leaves one extremely pessimistic about blacks securing equal educational opportunities in the foreseeable future. There is a great difference, however, in focusing on the privileges and prerogatives of power as a link to education deprivation, rather than on the personal weaknesses of black children based upon a background of social and economic deprivation, for then one may conclude that much of the evil lies in the maldistribution of educational resources rather than in the innate character of the black poor. The fact that the public school system as it is now organized has evidenced little influence on the child's achievement, independent of background and social class, does not then conclusively demonstrate that social class determines educational achievement, but rather that social class—specifically, the white middle class—has determined the form and substance of school organization, orientation, and methodology, which just may not provide an accurate yardstick for determining the educational potential of non-white middle class groups.

As had been said, these factors and judicial ignorance concerning possible alternatives to the school assignment policy under attack, diffidence about intervening in what was regarded, not surprisingly, as

being the appropriate province of the professional educator, initially led to court reluctance to intervene. Moreover, until recently, courts seemed to look upon the neighborhood school policy and state funding formula which provides disparate per pupil expenditures within each state as sacrosanct. The Princeton Plan (assigning children to school by grade), school pairing, busing, redrawing zone lines, and the public school complex (locating all the elementary, junior and senior high schools in one location, thus eliminating school assignment on the basis of residence), are today far more familiar concepts to courts and the public in general than was true at the beginning of the attack on de facto segregation in the North. In addition, the judiciary was undoubtedly alarmed at assuming the reponsibility for so huge a task as seeking a remedy to de facto school segregation that results in effective school desegregation in a school district containing a black community of considerable geographic expanse and population, with its burdensome and apparently insoluble demographic and topographic problems.

At first, northern federal courts gave *Brown* a restricted rather than expansive application to claims of denial of equal educational opportunity. The leading case, which set the prevailing federal pattern until recently was *Bell v. School City of Gary*.[53] There the court took the view that school separation not shown to result from the deliberate or conscious action of school authorities could not be considered inconsistent with the fourteenth amendment's equal education guarantee. The court discussed evidence of academic disparity between schools for blacks and whites as throwing "little or no light on the quality of instruction unless there is a corresponding showing of ability to achieve."[54] And, it should be added, the professional educator's disclaimer of responsibility had been so widely accepted that neither *Bell*, nor the cases that adopted its approach, required school authorities to equalize the educational offerings between whites and blacks, despite a showing that measurable inequalities existed.

Some of the state courts at the outset took a more advanced view. The New Jersey Supreme Court held that school authorities are re-

53. 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). *See also* Deal v. Cincinnati Bd. of Educ., 244 F. Supp. 572 (S.D. Ohio 1965), *aff'd in part*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967). *But see* Dowell v. School Bd., 219 F. Supp. 427 (N.D. Okla. 1963), *aff'd in part*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967).

54. Bell v. School City of Gary, 213 F. Supp. 819, 828 (N.D. Ind. 1963).

quired to eliminate as much black-white school segregation as can be done consistently with sound educational practices.[55] The California Supreme Court seems to be of the same view.[56] In New York, the power of the State Commissioner of Education to order local boards to remove de facto segregation has been upheld as an appropriate exercise of the Commissioner's authority to determine educational policy for the state.[57] Illinois and Massachusetts have sought to ban the practice by statute. The United States Supreme Court has refused, thus far, to review a case dealing with the constitutional validity of de facto school segregation, denying certiorari in both the cases finding de facto segregation invalid and those finding that the issue raises no constitutional question. Obviously, the Court is seeking to keep its options open for as long as it can.

Recently, however, federal court decisions have shifted markedly. *Hobson v. Hansen*[58] may have started the trend away from *Bell.* In a searching and comprehensive examination of the policies and practices of a big city school district with a large black school population, Judge J. Skelly Wright sought in the *Hobson* case to secure (1) a practicable immediate remedy by ordering the equalization of tangible facilities on modern *Plessy v. Ferguson* terms; (2) a constitutional guarantee of equal educational opportunity not only for blacks on racial grounds but also for the poor and economically underprivileged as an economic equal protection guarantee; and (3) a constitutional proscription against de facto school segregation as an inevitable denial of equal educational opportunity. The underlying basis of his decision, however, was school board responsibility, without regard to considerations of intent or motive, to meet its constitutional obligation of providing equal educational opportunity to black children and the poor. If the result is unequal educational opportunity, school authorities have to undertake effective remedial action. The more recent cases where school authorities have been ordered to correct racial imbalance have been in line with this thesis.[59]

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55. Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965).

56. Jackson v. Pasadena School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

57. *In re* Vetere v. Allen, 15 N.Y.2d 259, 206 N.E.2d 174, 258 N.Y.S.2d 77, *cert. denied,* 382 U.S. 825 (1965).

58. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

59. Soria v. Oxnard School Dist., 328 F. Supp. 155 (C.D. Cal. 1971); Kelly v.

And, although decided in a southern city, *Bradley v. School Board of Richmond* was an acceptance of Judge Wright's concept of metropolitanism as a necessary formula to effectuate the Constitution's equal education guarantee where the predominantly black central city school population is surrounded by largely white suburban school population. The basic rationale is that a racially integrated school is an essential ingredient of equal educational opportunity.

B. *The State Funding Formula for Public Education*

The differences between the North and South with respect to equal educational opportunity are largely matters of degree. The South utilized the dual school system as a vehicle to achieve a differential in financial support for the education of blacks and whites. The North has accomplished the same result by use of the neighborhood school, the school districting process, and the state funding formula.

The idea of organizing a school system to serve particular areas within a district, dividing the state into a variety of local districts for school administration, and authorizing these districts to raise funds in their own communities for school purposes, these efforts being stimulated by supplements from the state treasury, is reasonable enough in the abstract and seems to be entirely neutral as to race. It is only when one looks at the practice in operation that the underlying racism becomes clearly illuminated.

In northern areas the black poor are concentrated more and more in the cities and middle-class whites in the suburbs. The central cities' schools thus have become increasingly black, while suburban school systems remain largely white. The state funding formula, pursuant to which local districts are allowed to levy a tax on real property for school purposes, has meant that wealthy suburban communities are far better able to support a first-rate school system than are the cities. This results in middle-class whites having more adequate educational facilities than can be made available to the black poor.

Nor is the matter solely limited to racial differentiation between city and suburban school systems. The Wyandanch school district in New

Brown, Civ. No. L8-1146 (D. Nev. 1970); Spangler v. Pasadena Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970); Davis v. School Dist. of Pontiac, 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); Johnson v. San Francisco School Dist., 3 Cal. 3d 937, 479 P.2d 669, 92 Cal. Rptr. 309 (1971).

York with its surrounding communities is an example of black and white school-district separation and fiscal-resource discrimination in the suburbs—a prototype in microcosm of the black-central-city-white-suburban-school picture. Wyandanch is a virtually all-black community and an independent, separate school district, surrounded by affluent white school districts. Although Wyandanch taxes itself at a far higher rate than its surrounding communities, it cannot, because of its poor tax base, maintain an adequate school system. Except that the school district is almost all black, its manifest inability to fund an adequate school system would have resulted long ago in the abolition of Wyandanch as a school district and its absorption by adjacent wealthier school districts. This is a situtaion that can be duplicated in nearly every state in the union.

State power to redistrict for school purposes appears to be absolute.[60] Moreover, where the district lines as drawn create poor districts unable to provide equal educational opportunity, the constitutional mandate would seem to compel the state to redistrict in order to comply with its basic obligations. The constitutional guarantee is addressed to the states and would seem to require that equal educational opportunity have state-wide application. It is not enough that there should be no educational disparity stemming from state misfeasance, malfeasance, or nonfeasance among groups or classes within each local district; the guarantee crosses district lines as well. The state cannot avoid its constitutional obligation by showing of a reasonable basis for the lines' placement; it must demonstrate a compelling necessity for the present districting in order to save it from condemnation as an unlawful racial grouping of persons for school purposes.[61]

At present, each state funding formula produces unequal per-pupil financial support for education among various districts within the state. This process and result must be at least constitutionally suspect, if not plainly illegal. Although a knowledgeable buyer may get more for his money than one less informed, the assumption must be that in the public realm, in the absence of proof to the contrary, unequal funds mean unequal school facilities.

Of course, this is not a complete answer. It may be true that a dollar in Harlem will buy less educationally than a dollar in Scarsdale.

60. *See, e.g.*, People v. Deatherage, 401 Ill. 25, 81 N.E.2d 581 (1948).

61. *See* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

But, at the very least, the Harlem child is entitled to have the same amount of dollars expended for his education as is spent on the education of a child in Scarsdale. When faced with the problem a court need not decide at once what the remedy should be, or be concerned as to whether a requirement that funding be equalized will produce the same educational result. What it may properly do is hold the present formula unconstitutional, and allow the legislature time to devise a new funding program in accordance with constitutional standards. If the legislature fails to act within the time allowed, the court could then undertake to devise a remedy of its own. This has been the approach to redistricting for political purposes, and there is little reason to believe that the same method cannot be utilized here. The first cases brought to test state funding formulae have been lost at the trial court and affirmed summarily by the United States Supreme Court.[62] Now, however, the matter is getting new consideration by the judiciary; *Serrano v. Priest*,[63] *Van Dusartz v. Hatfield*[64] and *Rodriguez v. San Antonio*[65] have struck down state funding formulae on much the same grounds set forth above. The matter awaits final determination by the Supreme Court of the United States.

C. *Community Control*

The feeling is growing that blacks will be educated equally only when they themselves have some say in the educational process. For this reason, community control has gained adherents in the black community. The basic problem with the community control proposals being offered at present is that only limited authority is delegated to the local community and the real power remains, as before, in the hands of the central board of education. Thus, there is little likelihood that the quality of education being offered to black children will show any marked improvement pursuant to such experiments, since they make no real break with the past. Yet, under present conditions no other avenue seems open if the present generation of black children who are being educationally short-changed are to be afforded better educational opportunities.

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62. *See* McInnis v. Shapiro, 293 F. Supp. 237 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

63. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

64. 334 F. Supp. 870 (D. Minn. 1971).

65. Rodriguez v. San Antonio School Dist., 337 F. Supp. 280 (W.D. Tex. 1971).

Although the chances seem slim, blacks may nonetheless be able to produce better educational results, because an all-pervasive rage surfacing in the black community, against the deprivations, limitations, and restrictions imposed on it, and against all things white, may generate the necessary drive and motivation. It is a somewhat romantic notion to believe that a disadvantaged minority, without full control and authority over the schools their children attend, without power over or control of school financing, will be able, under a so-called community control which grants the community little power or control in critical questions of school administration, to make black schools more educationally viable than are the old-style segregated schools now functioning North and South. Yet the politics of the situation leads to the conclusion that this may be the only avenue open. It must be remembered that this is not 1896 or even 1940. Black pride has surfaced. Blacks no longer feel incapable of effective action without white help. Indeed, the current trend is to attempt to galvanize black resources to get a needed job done in the black community. Whatever may be the long range prospects of school integration as the ultimate solution, hundreds of thousands of black children are presently being processed through an educational system which fails to teach them to read or to write.

IV. Implications for the Future

The more recent federal decisions were moving in the direction of requiring school authorities to correct racial imbalance without regard to the intent. Moreover, *Bradley* and *Serrano* evidenced the growing concept of state responsibility. If, as in *Bradley*, a classroom mix is considered critical to effectuate the constitutional guarantee, busing, metropolitanism, rezoning and various other methods for achieving this mix will be required as a matter of course. The requirement of equal funding to effectuate the equal educational guarantee does not necessarily require classroom mix, but merely equal per capita expenditure.

Some deplore *Serrano* and the concept of community control on the theory that this is conducive to rationalization of the separate but equal concept. It is true that these decisions and the idea of community control are amenable to interpretation which accentuates and fosters separate but equal. Yet integration alone is obviously not enough to close the gap between blacks and whites. School authority accountability

through community control is necessary to protect against discriminatory treatment or policy of school administration and lack of teacher concern or sensitivity which may chill the black child's interest, initiative and sense of worth. And if the concept that the guarantee of equal educational opportunity must remain a dynamic living force is kept alive, the move from a concept of "equal" funding for school purposes measured in terms of per capita expenditures to equal funding necessary to insure equal educational opportunity measured in terms of educational results achieved is not a long step.

Thus equal funding and a decentralized system of school accountability are not necessarily at odds with metropolitanism. Indeed all three of these current trends must be nurtured if the equal educational guarantee is to be given concrete and effective implementation in urban America.

Both metropolitanism and equal funding have a common rationale—that of an overriding state responsibility to meet its constitutional obligations of giving real life meaning to the equal educational opportunity guarantee. Placing responsibility on school authorities for the absence of equal education without regard to questions of fault or intent moves us towards a concept of a result oriented obligation. The community control adherents are of course chiefly concerned with school programs that will produce "quality education" for black children, quality education that will be perceived in the child's mastery of educational tools. Therefore, all three of these ideas can be given content which renders them consistent with one another.

After a hesitant start the federal judiciary has sought valiantly to grapple with the problem of how to effectuate the Constitution's mandate of equal education in an urban setting. It has chosen to continue the tradition of attempting to maintain the fourteenth amendment as an effective living guarantee of the minority rights.

Today, all is confusion. While the pervasiveness of racism is, of course, a fault, the professional educator must bear a large share of responsibility for the public confusion, misinformation and emotionalism centered around the issue of busing. The professional educator has failed us. It is his responsibility to give equal educational opportunity concreteness and specificity as educational policy. The contours of equal education as a constitutional requirement and its design as educational policy, practice or methodology should occupy roughly at least the same terrain. Where educational policy concludes that

equal education necessitates certain specific practices, a court should make those practices a part of the equal education guarantee. Educators have simply failed to inform us what equal education connotes as educational policy, and the courts have been forced to rely on their own judgment concerning what the equal education guarantee requires or prohibits.

If equal educational opportunity is a realistic possibility in a segregated setting, educators should say so and document their conclusion with explanatory professional data. If, as some believe, equal education means the complete elimination of policies which result in the racial isolation of black children in the public schools, educators should give a definitive explanation as to why school integration is educationally required, as distinguished from being socially desirable. They should also tell us what forms of school organization and practices will be needed and suggest methods that school districts should pursue to reach the desired goals.

It should be the responsibility of educators to inform the public whether equal educational opportunity is more readily obtained with or without integration, whether busing to achieve integration is more educationally harmful to the black or the white child than the status quo, and what are the real educational (as distinguished from social or political) benefits to be derived by children, black and white alike, from being educated together. There might then be greater public clarity and less hypocrisy.

The basic purpose and meaning of the fourteenth amendment are being threatened. The attack, although not direct, is nonetheless very real. There still is majority support for school integration but overwhelming support for legal restrictions on busing for integration. Yet realistically, integration without busing is impossible to achieve in urban America. Perhaps what we are seeing is another indicium of America's dilemma in the racial field.

Whichever strand of legal and constitutional development—integration or equal facilities with separation—prevails in the immediate future, I cannot believe the metropolitanism-integration concept can lie dormant for long. For that is the only course that will give this country domestic peace, unity and strength.