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## I.

## INTRODUCTION

The Commonwealth of Virginia, because of the immediate effect that the decision in this case will have on many thousands of its citizens, requests the Court to consider its views outlined in this brief. It seeks modification of the opinions of both of the courts below and an expression of principles that will guide all courts throughout the nation in this most difficult area of basic human relationships.

## II.

## THE INTEREST OF VIRGINIA

In Virginia, segregation by race in the public schools was required by constitution and statute prior to 1954. In fact, one of the cases decided here under the style of *Brown* v. *Board of Education*[1] came to this Court from a Virginia locality.[2]

It would be erroneous to assert that Virginia localities welcomed *Brown I* and began at once to put into effect the remedial steps required by *Brown II*[3]; in most places they did not. There was, instead, intense public opposition and much delay. As a result, litigation arose in many communities.[4] The march toward what more recently has been termed

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

[2] *Davis* v. *County School Bd.*, 103 F. Supp. 337 (E.D.Va. 1952), reversed by the *Brown* decisions.

[3] 349 U.S. 294 (1955).

[4] *See, e.g., Thompson* v. *County School Bd.*, 144 F. Supp. 239 (1956), *aff'd sub. nom School Bd.* v. *Allen*, 240 F.2d 59 (1956), *cert. denied*, 353 U.S. 910, 911 (1957), *opinion supplemented*, 159 F. Supp. 567 (1957), *aff'd* 252 F.2d 929 (1958), *cert. denied*, 356 U.S. 958 (1958), *injunction dissolved*, 204 F. Supp. 620 (1962); *Daniels* v. *School Bd.*, 145 F. Supp. 261 (1956); *Atkins* v. *School Bd.* 148 F. Supp. 430 (1957), *aff'd* 246 F.2d 325 (1957), *cert. denied*, 355 U.S. 855 (1957); *James* v. *Almond*, 170 F.Supp. 331 (1959), *appeal dismissed*, 359 U.S. 1006 (1959).

a "unitary" system of public schools proceeded inexorably in Virginia but, for a decade, it was an unwilling march prodded by the courts of the United States.

It is now fair to say that Virginia localities[5] are attempting in good faith to comply with the mandate of the Equal Protection Clause. But the courts have failed to make it clear exactly what compliance entails. The dual system must be replaced by a unitary school system,[6] but how this is to be accomplished is still far from apparent.

The result has been a chaotic condition in several of Virginia's school systems. Two of its largest school divisions, as the local systems are called, are located in Richmond and Norfolk, Virginia's two largest cities. Litigation affecting both of these cities has produced orders in August of this year substantially rearranging school attendance areas and inevitably requiring extensive pupil busing.[7] This has resulted in major disruption of public education and confusion among white and black parents, students, faculty and staff; it often has led to resentment and even fear.

The educational process is difficult enough without such disruption. The time has come to think first of education and the whole body of children to be educated. That, in our view, can be accomplished only by the establishment by this Court of the parameters within which school officials are to act and by which their action is to be judged by the courts.

The factual situation existing in Charlotte, North Carolina, presents certain striking similarities to the situations presented by Norfolk and Richmond. All three cities are

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[5] In Virginia local school boards, pursuant to the State constitution, have the primary responsibility to operate the public schools.

[6] *Green* v. *County School Bd.*, 391 U.S. 430, 438 (1968); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19, 21 (1968).

[7] *Bradley* v. *School Bd.*, Civil Action No. 3353 (E.D. Va., Aug. 17, 1970) (Richmond); *Beckett* v. *School Bd.*, Civil Action No. 2214 (E.D. Va., Aug. 27, 1970) (Norfolk).

localities where, prior to 1954, segregation by race was required by law. In all three, the percentage of black students in the school population is significant, the 70% white and 30% black ratio of Charlotte becoming 60% white and 40% black in Norfolk and reversing to less than 40% white and more than 60% black in Richmond.

Plans proposed by HEW and others presented by the Norfolk and Richmond School Boards were rejected because, the courts said, racial imbalance was not eliminated in sufficient degree.[8] That result obtains equally in this case from Charlotte. In each of these cases the court's solution was to require greater racial balance and, inevitably, massive compulsory busing of students.

The question in those cases, as here, was whether racial balance is an end in itself; if substantial racial balance must be achieved, regardless of other educational factors that are of significance in the situation presented, then the District Courts were right in Charlotte and Richmond and the Court of Appeals was right in Norfolk. If, as we urge, other factors are also relevant, those courts were in error.

What will be decided here is, therefore, entirely relevant in the two most critical Virginia situations. For that reason, the decision here may be determinative in Virginia. Therein lies Virginia's interest.

There are, of course, substantial points of difference between Charlotte and the Virginia cities. The difference in the racial mix has already been mentioned. This results primarily from the fact that, by and large, the Norfolk and Richmond school divisions are entirely urban rather than both rural and urban as is the case in Charlotte. Norfolk is

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[8] *Bradley* v. *School,* Civil Action No. 3353 (E.D. Va., Aug. 17, 1970) (memorandum opinion); *Brewer* v. *School Bd.,* No. 14,544 (4th Cir., June 22, 1970), *cert. denied,* 38 U.S.L.W. 3522 (U.S. June 29, 1970) (No. 1753).

adjoined by two cities, Chesapeake and Virginia Beach; in them the percentage of black students is relatively small. Richmond is bounded by two counties, Chesterfield and Henrico; again their black student percentages are drastically lower than is that of Richmond. As urban systems, the two Virginia cities do not normally provide transportation for pupils. The transportation problem presented by the racial balance requirement is therefore more acute because of the lack of facilities.

A brief word may be relevant as to the Norfolk and Richmond plans that were rejected by the United States courts. In both cities, the rejected plans provide for the effective integration of all senior high schools and all junior high schools or middle schools. In both plans, the respective school boards go far beyond neutral or objective zoning plans, gerrymandering natural attendance zones in a manner designed to increase the degree of integration in the systems and to overcome the segregative effects of racial residential patterns. Both plans include a majority-to-minority transfer provision. The Richmond plan calls for "learning centers" where weekly or bi-weekly interracial educational experiences are to be provided for each child in the system who attends a school with a population 90% or more of the same race. Principles of the Norfolk plan were explicitly based on the best available social science data, including the highly regarded research projects sponsored by the U.S. Office of Education[9] and the U.S. Commission on Civil Rights.[10]

In sum, both plans adopt a neighborhood or community concept in the sense that attendance areas for elementary

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[9] *Equality of Educational Opportunity,* Office of Education, U.S. Dept. of Health, Education and Welfare (1966).

[10] *Racial Isolation in the Public Schools,* U.S. Comm'n on Civil Rights (1967).

schools are served by one or several schools and the advantages of convenience and close school-family relationships are retained where practical. Overlaying this concept, however, is the use in each plan of all feasible alternatives to maximize integration. A number of subsidiary concepts, such as pairing, consolidation and closing of schools, are incorporated in the plans. No alternative plan was offered at any hearing which would have the effect of increasing the amount of desegregation that would result from the school board plans, short of a plan which would require compulsory massive busing to attain racial balance throughout each system.

The question before the Virginia federal courts was, accordingly, much the same as that presented in Charlotte: is racial balance a constitutional requirement? The difficulties of busing in an urban system were presented to the courts in both Virginia cases. The expense of initiation of school transportation systems, a factor not present in Charlotte, and the inadequacy of existing public transportation systems were explored. The plaintiffs nevertheless sought approval of plans requiring cross-busing, even of the youngest children. Those plans, in essence, received ultimate judicial confirmation.

Virginia opposes racial balance as a constitutional requirement. It believes that such balance must be considered; but it should not be the controlling consideration. It seems to us that racial balance alone was the determining factor in Charlotte, Norfolk and Richmond. We suggest to the Court that racial balance is not a desideratum in itself and that this Court should declare the constitutional mandate to be the best available quality of education for *all* regardless of race or color.

## III.

## THE ISSUE BEFORE THE COURT

The central issue before the Court is whether racial balance is an end in itself, required by the Constitution without regard to other educational considerations or other values.

## IV.

## SUMMARY OF ARGUMENT

### A.

### The Origin Of Racial Segregation Is Irrelevant

The proposition that one set of rules applies where the origin of racial segregation was *de jure* and another where the origin was *de facto* is without substance. History is irrelevant to the enforcement of a constitutional right. Racial segregation has almost everywhere received State support. Thus no racial segregation is purely *de facto.* Because the State maintains public schools, a segregated system constitutes State action. Its existence, without regard to its origin, thus raises a substantial constitutional question. The same rules must apply to non-unitary systems wherever found.

### B.

### Racial Balance Is Not Required

Racial balance in the schools is not a constitutional imperative. No decision of this Court has established such a mandate. It is effective neither to accomplish integration nor to improve education. Racial balance once prescribed may be outdated by population shifts before it becomes effective. The effort to attain racial balance promotes resegre-

gation and movement to suburbia. These results defeat the goal of racial balancing, adversely affect education and contribute to urban deterioration.

### C.

### The Highest Quality Of Education Must Be The Goal

The goal of the desegregation movement must be to achieve the highest quality of education. That has been the thrust of previous decisions of this Court. Equal opportunity is not to be measured purely by equality of resource application and racial balance; that system best conforms to the constitutional mandate that provides, through equal opportunity for every student, the highest level of achievement for all students of every race, compensating appropriately for any deficiencies that may have resulted from previous racial segregation. The court below failed to recognize that the best educational achievement for all is what the Constitution demands.

### D.

### The Court Below Misapplied Its Rule Of Reason

The court below unduly emphasized racial balance. It also failed to recognize the relevance of the neighborhood school and the disadvantages for all races of extensive compulsory busing. The neighborhood school has obvious social and educational advantages, particularly at the elementary level. It can be used with a number of related techniques reasonably applied, without destroying neighborhood advantages. Modern social scientists have developed many considerations that ought to be taken into account in devising the plan that, giving weight to all relevant disparities, best promotes the educational achievement of students of all races.

## V.

## ARGUMENT

### A.

### The Origin Of Racial Segregation Is Irrelevant

In its consideration of the question presented here, the Court of Appeals, in the plurality opinion, went to some lengths to determine that the segregated pattern of housing in Charlotte results from governmental action. We consider this investigation irrelevant. We consider it more than irrelevant; it may be pernicious. It could lead to one set of rules applying in one area of our nation and another set applying in another. The constitutional right at issue here should be available to all citizens without regard to the fortuitous circumstance of the racial history of the places in which they live.

*An Unsound Distinction*

Such an investigation presupposes that one set of rules applies where the origin of racial segregation was *de jure* and another set where the origin was *de facto*. As an example of this distinction, reference is made to *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967). There, the Sixth Circuit held that the school board has no duty to bus students ". . . for the sole purpose of alleviating racial imbalance that it did not cause . . . ." (369 F.2d at 61).[11]

First, the question is not whether the State action is limited to schools; it is a matter of State action in all phases of race relationships such as public housing and zoning. In this context, it is probable that all racial segregation in the

[11] See also *Bell* v. *School City,* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964).

United States, wherever occurring, has at some time been maintained or supported by governmental action.[12] Thus there is no such thing as *de facto* segregation that is not of *de jure* origin in some degree. The distinction purportedly made in *Deal* cannot, then, be factually supported.[13]

*State Action is Inevitable*

But the vice lies deeper. Public schools are creatures of the State, and a State may not continue to operate through its local school boards or otherwise a system which denies a constitutional right. Thus, a school system which denies equal educational opportunity infringes protected rights. Whether such a system was State created or State assisted or merely State perpetuated is beside the point. If it deprives children of equal educational opportunity, the Equal Protection Clause is infringed.

*Uniformity of Constitutional Rights*

This conclusion is not only sound doctrine but desirable public policy. If non-unitary school systems must be eliminated because they perpetuate racial segregation, they must be extirpated everywhere and not just in the former Confederate states. A constitutional right ought not to be en-

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[12] In Appendix C to his opinion, Judge Hoffman complied a summary of governmental action in the various states. *Beckett* v. *School Bd.*, 308 F. Supp. 1274, 1304, 1311-15. See also *Racial Isolation in The Public Schools,* U.S. Comm'n on Civil Rights 245, 254-59 (1967); M. Weinberg, *Race and Place,* Office of Education, U.S. Dept. of Health, Education and Welfare (1967).

[13] See Freund, *Civil Rights and the Limits of Law,* 14 Buffalo L. Rev. 199, 205 (1964). On July 7, 1970, Ramsey Clark, former Attorney General of the United States, testifying before the Senate Select Committee on Equal Educational Opportunity, said:

> "In fact, there is no *de facto* segregation. All segregation reflects some past actions of our governments."

forced in Virginia and denied enforcement in Ohio or Indiana because of the vagaries of history.

Professor Bickel has commented on this double standard. As he points out: "Outside the South . . . school segregation is massive, and has, indeed, increased substantially in recent years . . . caused mainly by residential patterns. Nevertheless, very few federal courts have tried to intervene [and] none has done so without qualification."[14]

In commenting on the incongruity of different rules issuing "out of the same federal judiciary" Professor Bickel spoke of "one binding rule of constitutional law for Manhasset, New York" and "a different rule of constitutional law for New York City."[15]

Such a situation, without precedent in constitutional doctrine, cannot be tolerated. Citizens are entitled to enforcement of constitutional rights evenly and consistently throughout the United States. The Constitution requires no less.[16]

**B.**

**Racial Balance Is Not Required**

Opponents of the school board plans insist upon substantial racial balancing in *each* school in a system. If, as in

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[14] A. Bickel, *The Supreme Court and the Idea of Progress* 131 (1970). See also *Racial Isolation in the Public Schools, supra,* at 2-10.

[15] *Id.* at p. 133. The Manhasset decision is found in *Blocker* v. *Board of Educ.,* 229 F. Supp. 709 (E.D.N.Y. 1964).

[16] This is, among other things, the purpose of S. 4167, 91st Cong., 2d Sess. (1970), introduced by Senator William B. Spong of Virginia (and a similar bill introduced in the House of Representatives). Hearings on these bills have been held before appropriate committees in both houses. See also Sobeloff and Winter, JJ., concurring specially in *Brewer* v. *School Bd.,* No. 14,544 (4th Cir., June 22, 1970) (Norfolk).

Richmond, the overall student population ratio is 60% black and 40% white, these opponents contend that each school in the system must have substantially this ratio both of pupils and teachers.[17]

It is submitted that the racial balance concept is neither required by the Constitution nor is in the public interest. Indeed, if established as the "law of the land," its consequences could be disastrous to public education.

*The Decisions of This Court*

What *Brown I* required, to assure equal educational opportunity, was the elimination of racial segregation in the schools. Subsequent cases have added the affirmative mandate that dual school systems must be eliminated and unitary systems established.[18] These are the terms with which local school boards and lower courts have struggled. Some have construed them to require racial balancing; others, more perceptive we think, have recognized that this Court has never projected a mechanistic solution for a problem of such delicacy and diversity. *Brown I* states:

> ". . . because of the wide applicability of this decision, and because of the great variety of local conditions, the formulating of decrees in these cases presents problems of considerable complexity." 347 U.S. at 495.

When the Court came to the problem of formulating decrees, it provided substantial latitude:

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[17] *Beckett* v. *School Bd.*, 308 F. Supp. 1274, 1276 (E.D.Va. 1969), stating the position of the plaintiffs. See Winter and Sobeloff, JJ., concurring in part and dissenting in part, in the court below in this case.

[18] *Green* v. *County School Bd.*, 391 U.S. 430 (1968); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana School Bd.*, 396 U.S. 290 (1970).

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power." 349 U.S. at 300.

Further along in that opinion, Mr. Chief Justice Warren recognized that there were a number of areas of consideration. He said:

> "To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U.S. at 300-01.

The approach remains unchanged. In *Green* v. *County School Board,* 391 U.S. 430 (1968), Mr. Justice Brennan said, speaking for the Court:

> "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in the light of the circumstances present and the options available in each instance." 391 U.S. at 439.

See also *United States* v. *Montgomery Board of Education,* 395 U.S. 225, 235 (1969). And Mr. Chief Justice Burger has made clear his view that there are a number of areas other than (but including) transportation that must be given consideration. He said, concurring in the result in *Northcross* v. *Board of Education,* 397 U.S. 232 (1970):

> ". . . we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court." 397 U.S. at 237.

This Court could hardly have more clearly stated its refusal to enunciate a mechanistic rule of racial balance in every case.

*Racial Balance is Illusory*

The issue before this Court is whether such a rule should now be established. Those who support it argue that it has the virtue of exactitude; that it would be easy for courts to adopt and administer; and that it would put an end to the inevitable litigation resulting from the application of a less definitive rule.

We suggest that these views misconceive both the constitutional requirements and the realities of public education.

The racial mix varies widely among the cities and counties of this country. The range is from school districts which are perhaps 90% black (Washington, D. C. and Clarendon County, South Carolina[19]) to many districts which are nearly all white. The demography also constantly varies, especially within cities. The population ratio changes as citizens move to suburban areas, and white and black families

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[19] See *Brunson* v. *Board of Trustees,* No. 14,571 (4th Cir., June 5, 1970).

are constantly moving within cities. Racial balance established one year would rarely be valid two or three years later.

The City of Richmond is not atypical. In 1960 the school population ratio was 55% black and 45% white. Prior to the annexation of a portion of Chesterfield County on January 1, 1970, population shifts—some perhaps related to integration, but most to the normal desire to live in suburbia—had increased the ratio of black to 70%. Annexation temporarily reversed this trend, so that the black majority was reduced to about 60%. At the opening of the present school session, it has grown to 64%. No one believes it will remain there for as much as a year.

As shown in the Richmond case, population shifts *within* the city have been equally dramatic. Many previously white areas are now all black. But despite this shifting there are in Richmond—as in scores of cities in the North and South—large areas populated entirely by blacks, with the fringes populated by the poorer whites.[20]

To impose, as urged by plaintiffs, an arbitrary percentage mixing in every school in Richmond would be as unrealistic as to impose such a scheme upon New York, Chicago, Philadelphia or Pittsburgh. Yet, if racial balance is a constitutional imperative, it is applicable to all communities at all times.

*Racial Balance is Regressive*

One wonders why compulsory racial balancing is advocated. It would be difficult to conceive of a more certain way to assure a return, in countless communities, to essentially separate schools—if not for whites and blacks, certainly for those in the lower income levels of both races.

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[20] *Racial Isolation in the Public Schools, supra,* at 19-20, 31.

The shorthand term, often used critically, is "white flight." Concurring opinions below criticize this exercise of freedom.[21]

But the connotation of "white flight" misconceives the fundamentals. It is obviously true that since *Brown* the white exodus to suburbia has accelerated. It must be remembered, however, that the population movement from congested urban areas into suburban environments has long been characteristic of the American scene.[22] It antedated *Brown;* it exists throughout our country, and indeed abroad; in its genesis, it bore no relation whatever to school integration. Indeed, the desire to move upward economically and socially—so basic to the American ideal—reflects itself nowhere as strongly as in the urge for a better residential environment. Often access to a particular neighborhood school is a dominant factor in selecting a new home site.

These ambitions cannot be suppressed by court decrees. The movement from congested urban areas will continue regardless of how this case is decided. But few would doubt that it will accelerate geometrically if the concept of racial balance is enforced by law.[23] Examples of the inevitable

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[21] See Sobeloff and Winter, JJ., concurring in part and dissenting in part in this case and in *Brunson* v. *Board of Trustees, supra,* at n. 19. White flight is, of course, an erroneous term because middle income citizens of both races are seeking suburbia.

[22] *United States Census of Population: 1960, Standard Metropolitan Statistical Areas,* Bureau of the Census, U.S. Dept. of Commerce 1-257 (1963).

[23] The trend toward private schools, especially in the South, will also be accelerated. There are some who say that the "remedy" for this is the outlawing of private schools or withdrawing of their tax advantages. But this drastic solution would scarcely be acceptable to the public generally. In addition, it would require the overruling of *Pierce* v. *Society of Sisters,* 268 U.S. 511 (1925).

resegregation[24] process are numerous, but Washington, D. C. suffices.

It is thus evident that enforced racial balance is both regressive and unproductive. It frustrates the aspirations of *Brown,* namely, the promotion of equal education opportunity; it assures in time the resegregation of most of the blacks in many urban communities. This will result in deteriorating educational opportunities both for the poorer blacks and whites who cannot afford to move.

In short, the end result is precisely the opposite of that desired; it widens the disparities between the lower and the middle-income families of both races.

The adverse economic and social consequences of resegregation, however caused, also are disquieting. Property values deteriorate; sources of local taxation shrink; all municipal services—as well as education—suffer; and—worst of all—the quality of civic leadership erodes.[25]

The foregoing results, now known from experience to be predictable, are scarcely in the public interest. They suggest the need for careful rethinking of proposals such as enforced racial balance which accelerate the process of urban deterioration.[26]

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[24] "[A]t the critical point—whatever it is—a formerly stable state of integration tends to deteriorate, being reflected by the exodus of white pupils. At the same time that this process is going on in the schools, the exodus of white residents is also apparent in the turnover of housing to the Negroes at only a slightly slower pace." *Civil Rights U.S.A.: Public Schools North and West,* U.S. Comm'n on Civil Rights 185-86 (1962).

[25] Kerner et al., *Report of the National Advisory Commission on Civil Disorders* 220 (1968).

[26] Indeed, the integration of schools is only one aspect of the complex of problems associated with urban life. The courts are ill-equipped to deal with these problems, which lie primarily within the province of the legislative and executive branches. The time may have come, with respect to the schools, for greater reliance upon the Congress as contemplated by Section 5 of the Fourteenth Amendment.

*Restructuring of Governmental Relationships*

The results of enforced racial balance could be sufficiently serious to prompt demands for restructuring of federal and state relationships. The facile answer to population withdrawal from urban areas is to enlarge the boundaries of school districts.[27] But this cannot be done, either by judicial decree or federal legislation, without uprooting state constitutional and statutory provisions with respect to the autonomy and authority of local school boards and governmental subdivisions. And new and enlarged boundaries, wherever drawn, would not long contain a mobile and unwilling population.

## C.

### The Highest Quality Of Education Must Be The Goal

If not racial balance, what is the alternative that is compatible with the Constitution and the goal of quality education for all? We think there can be no single, inflexible rule. We start from principles settled by this Court: Racial discrimination is a denial of equal educational opportunity; dual or segregated school systems are proscribed; and school authorities have an affirmative duty to establish unitary systems. These principles must be observed and applied, not as ends in themselves but as means of achieving the educational goal. The alternative then, to simplistic racial mixing pursuant to formula, is to recognize that reasonable discretion must be allowed in the assignment of pupils and the administration of a school system so long as the foregoing principles are not contravened and the measures taken comport with the educational goal.

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[27] See *Hobson* v. *Hanson,* 269 F. Supp. 401, 515-16 (D.D.C. 1967), *aff'd sub nom., Smuck* v. *Hobson,* 408 F.2d 175 (D.C. Cir. 1969).

That education of the best quality is the goal was clearly recognized in *Brown I*:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. . . . " 347 U.S. at 493.

It seems clear that desegregation by race is only one step along the road toward equal educational opportunity—an equal chance to obtain the best education that the particular system can provide. The goal is the best education for all; racial segregation is an impediment to be removed in striving to achieve that goal.

The best education, however, is not achieved *solely* through racial integration. In a recent article, Dr. David K. Cohen states that "three major criteria of equality seem to compete as policy alternatives: equal resource allocation, desegregation, and equality of educational outcome. . . ." Cohen, *Defining Racial Equality in Education,* 16 U.C.L.A. L. Rev. 255 (1969). But, as Dr. James Coleman, author of the famous Coleman Report,[28] has concluded, equal resource allocation plus desegregation does not necessarily result in improved educational output. He said that "[t]he result of

[28] *Equality of Educational Opportunity,* Office of Education, U.S. Dept. of Health, Education and Welfare (1966).

the first two approaches (tangible input to the school, and [de]segregation) can certainly be translated into policy, but there is no good evidence that these policies will improve education's effects. . . ." Coleman, *The Concept of Equality of Educational Opportunity,* 38 Harv. Educ. Rev. 7, 17 (1968). And the goal is, after all, the improvement of the effect of education.

This conclusion has received the concurrence of Dr. Cohen. He states:

> "The problem, however, is that although desegregation and equal resources are educationally salient, both seem a good deal less strategic than achievement. Judgments about the quality of students' education in America are certainly not made on a purely meritocratic basis, but students' achievement still weighs more heavily in the balance than either the degree of racial integration, or the quality of resources in their schools. The same thing is true of the standards presently employed in assessing schools' effectiveness. Equal achievement seems the most relevant standard of racial equality." Cohen, *Defining Racial Equality in Education,* 16 U.C.L.A. L. Rev. 255, 278 (1969).

Dr. Cohen concludes that the implicit assumption of *Brown I* that desegregation and proper resource allocation would result in equal achievement was an erroneous one:

> "Experience and knowledge gained since then have shown that the two standards cannot be met by the same measures." *Id.* at 280.

What, therefore, is the criterion? In Dr. Cohen's words, it is equal achievement; in Dr. Coleman's, it is educational output. What, in simpler terms, the school boards must seek and the courts must approve is the means to promote equal educational opportunity, regardness of race, in a system structured for the highest achievement.

It seems strange that this goal is not mentioned by the court below. It places no emphasis whatsoever on the quality of education. It seems mesmerized by race; it hardly seems to recognize that we are presented with an educational problem of which race is merely a facet.[29]

**D.**

**The Court Below Misapplied Its Rule Of Reason**

The Court of Appeals in the Charlotte case adopted a "test of reasonableness," saying:

> 1. "not every school in a unitary school system need be integrated."
>
> 2. "school boards must use all reasonable means to integrate the schools in their jurisdiction."
>
> 3. Where all schools cannot reasonably be integrated, "school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race."

These views, we think, are compatible with the opinions of this Court. They do not accept the mechanistic rule of racial balance.

But we believe the Court of Appeals misconceived the application of its own test. The focus, as is evident from the rejection of the school board plans in Charlotte, Norfolk and Richmond, was upon desegregation with little or no visible concern for the object of desegregation, namely, improved educational opportunity for all students. We think that the Court below departed from an appropriate test of reasonableness particularly with respect to (i) its emphasis on

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[29] The District Judge in the Norfolk case commented correctly that the word "education" does not even appear in the opinion of the Court of Appeals reversing his general approval of the Norfolk School Board's plan. *Beckett* v. *School Bd.*, Civil Action No. 2214 (E.D.Va., Aug. 14, 1970).

extensive compulsory busing and (ii) its misappreciation of the educational relevance of neighborhood or community schools.

*Compulsory Busing*

There is nothing inherently wrong with transporting school children where this is necessary. In every rural school district busing is a necessity. In such districts in the South it was used for decades to implement segregation. In the Charlotte case, involving a large urban-rural school district, there was substantial necessary busing before the District Court undertook in effect to impose racial balance by extensive cross busing.

Even in an urban district some busing may be appropriate, contributing both to integration and sound education. The problem, one so familiar in law, is one of degree and reasonableness. A notable example of unreasonable busing in pursuit of racial balance is that ordered in *Crawford* v. *Board of Education*.[30] In that case the Los Angeles school board was ordered to establish a rigorously uniform racial balance throughout its 711-square-mile district, with its 775,000 children in 561 schools. This order, if upheld on appeal, would require the busing of 240,000 students at a cost of $40 million for the first year and $20 million for each year thereafter with the result that the deficit of $34-54 million already confronting the school board would be increased by these amounts.[31]

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[30] No. 822, 854 (Cal. Super. Ct., Feb. 11, 1970).

[31] N.Y. Times, Feb. 12, 1970, at 1, col. 5 (city ed.). President Nixon, in his statement of March 24, 1970, aptly states that rulings of this character ". . . would divert such huge sums of money to non-educational purposes, and would create such severe disruption of public school systems, as to impair the primary function of providing a good education." *Desegregation of America's Elementary and Secondary Schools,* Weekly Compilation of Presidential Documents (March 30, 1970).

The preoccupation with "racial mixing of bodies"[32] has often caused the overlooking of the social and educational disadvantages of busing, especially at the elementary level.[33] It removes a child from a familiar environment and places him in a strange one; it separates the child from parental supervision for longer periods of time; it undermines the neighborhood or community school, so desirable at the elementary level; and it adds to already strained budgetary demands.

These are the considerations which have prompted the Congress, reflecting overwhelming public sentiment, three times to record its opposition to enforced busing merely to achieve racial balance.[34]

*The Neighborhood School*

We think that the Court below also largely ignored the educational advantages of the neighborhood school at the elementary level. The geographic neighborhood is the most common unit of organization of urban elementary public schools.[35] The neighborhood unit provides for ease of access to schools for students, minimizing costs and time of

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[32] In his memorandum decision of August 14, 1970, attempting to implement the mandate of the Circuit Court, Judge Hoffman commented "that the benefits of sound education have now been clearly subordinated to the requirement that racial bodies be mixed." See also *Beckett* v. *School Bd.*, 308 F. Supp. at 1302.

[33] A disturbing aspect of seeking racial balance at any cost is that children too often are treated as pawns to produce sociological changes that are related more to other factors, such as housing, than to education.

[34] Civil Rights Act of 1964, 42 U.S.C. § 2000c(b) (1964); Elementary and Secondary Education Act of 1965, 20 U.S.C. § 884 (1966), amending 20 U.S.C. § 884 (1965); Education Appropriations Act of 1971, P.L. 91-380, 91st Cong., 2d Sess., §§ 209, 210 (1970).

[35] New York City's current experiment in decentralization is further evidence of the vitality of the neighborhood or community concept. N.Y. Times, Sept. 13, 1970, at 1, col. 2.

travel to and from school, and thus maximizing the potential extracurricular role schools can play in the lives both of parents and children. These factors, along with the associational benefits of attending school with friends which, particularly for elementary school children, ease the psychological stress of initial adjustment to school, have led such a noted educator as James B. Conant, former President of Harvard University, to the conclusion that "[a]t the elementary school level the issue seems clear. To send young children day after day to distant schools seems out of the question."[36]

The quality of a community's education depends ultimately upon the level of public suport.[37] A willingness to pay increased taxes and to vote for bond issues can evaporate quickly in the face of enforced busing and dismantling of neighborhood schools where such actions do not contribute to improved education for all.

Educational effectiveness also is dependent on the attitude of parents toward their children's education, and rationally configured systems of neighborhood schools play a vital role. Parental support of their children's schooling normally reinforces the efforts of their children's teachers in substantial measure;[38] to the degree that schools can involve parents with their children's education as such,[39] or broaden the parents' own educational horizons,[40] this end is served. Community schools, when designed in such a way as to avoid the feelings of disaffection which attend systematic

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[36] J. Conant, *Slums and Suburbs* 29 (1961).

[37] A current dramatic example of the financial crisis in public education across the country is found in St. Louis, Missouri, where taxpayers in four suburban school districts north of the city have shut 46,000 pupils out of classes by consistently defeating school tax levies. N.Y. Times, Sept. 14, 1970, at 1, col. 3.

[38] M. Weinberg, *Desegregation Research: An Analysis* 140-41 (1968).

[39] Christian Science Monitor, Aug. 14, 1970, at 11, col. 1.

[40] C. Hansen, *Danger in Washington* 81 (1968).

ghettoization, whatever its origin, foster such an active parental role because of their very accessibility.

Further, the accessibility of community schools minimizes the cost of school transportation for students. Provision of substantial transportation at public cost solely for the purpose of attaining racial balance diverts resources which might otherwise be used, in a neighborhood scheme consistent with students' constitutional rights, for more directly constructive educational purposes. Where the cost of such transportation is borne privately by the families of students—assuming that public transportation facilities are adequate to cover the necessary specialized routes—it strikes regressively, imposing a heavier burden on the poor than on the affluent.

This Court in *Brown II*, in suggesting "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis"[41] as a means of complying with the equal-educational-opportunity requirement of *Brown I*, implicitly recognized the advantages of the community school system.[42]

The unique educational advantages of the neighborhood school system, where it is administered in a manner consistent with the Equal Protection Clause, result in the accomplishment of the ultimate goal of that clause: the best possible education for all children. Pursuit of absolute racial balance in major metropolitan areas through the use of extensive busing of students deprives the school system of the singular advantages of the neighborhood concept, and in at least this respect thwarts the attainment of equal educational opportunity.

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[41] 349 U.S. at 300-01.

[42] These advantages were well expressed in *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied* 359 U.S. 847 (1967).

It has frequently been pointed out that neighborhood school systems have, on occasion, come into existence for the purpose of fostering racial segregation.[43] But this fact should no more prejudice consideration of the intrinsic educational merits of a racially satisfactory neighborhood school system than should these merits justify it when it is administered in a fashion which entrenches unconstitutional racial imbalance.

*Other Considerations*

The community school concept is capable of flexible administration: zoning, pairing, clustering, and siting of school buildings all are techniques which may be used, consistent with its advantages, and should be, when reasonable, to fulfill constitutional requirements. In addition, a majority-to-minority transfer option and specialized learning centers may be provided to ameliorate the effect of residential segregation. Techniques which destroy the advantages of the community school in pursuit only of mechanistic racial balance in the name of the Fourteenth Amendment tend to negate the very educational values in whose service they are invoked.

But these are measures that are customarily used in the racial desegregation context; they are by no means all of the factors to be taken into account in devising a plan designed to promote educational achievement for all students to the utmost.

Modern social scientists have developed studies that take into account a number of other factors. These include a determination of the racial mix that will maximize educational achievement, development of plans that maximize use of physical facilities, teachers and staff, avoidance of

[43] See, *e.g., Racial Isolation in the Public Schools,* U.S. Comm'n on Civil Rights 252 (1967).

resegregation and "white flight," consideration of the desirable socio-economic mix, preservation of the cultural uniqueness and autonomy of the individual student, giving effect to positive and realistic educational and vocational aspirations and other relevant factors of equal importance.[44]

Such evidence is sound and available.[45] Plans based on such studies will result in greater educational achievement. Education is not based on race alone. That plan is the best plan that provides the best opportunity for educational achievement for all students. In the preparation of such a plan, racial imbalance is a consideration, but it is not the controlling factor.

It is in this light, we conceive, that the rule of reason postulated by the court below should be applied. The rule of reason makes little sense when it is couched in purely racial terms. The creation of racial balance by massive busing may eliminate racial segregation, but it may harm the general level of educational achievement. What schools need desperately is to improve that level. This Court should provide a more realistic approach to achieve that end.

## VI.

## CONCLUSION

The Court has the opportunity in this case to resolve the principal issues which have confused and divided the lower

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[44] See, *e.g.*, M. Weinberg, *Desegregation Research: An Analysis, supra; Equality of Educational Opportunity, supra.*

[45] Evidence of this nature was presented in the Norfolk case by Dr. Thomas F. Pettigrew and disregarded without mention by the Circuit Court. But Dr. Pettigrew's evidence in the Norfolk case is substantially the entire basis for the opinion of three of the judges in the *Clarendon* case. See Craven, J., concurring and dissenting in *Brunson* v. *Board of Trustees,* No. 14,571 (4th Cir., June 5, 1970). If testimony of this character may be used as a basis for decision in one case, it clearly deserves consideration in another.

courts and school authorities. We respectfully suggest, for the reasons that we have stated, the following:

(i) The purported distinction between *de jure* and *de facto* racial segregation should be rejected. It can be supported neither factually nor consistently with constitutional principles. The right to equal educational opportunity must be uniform throughout the United States.

(ii) The concept of racial balance is not a constitutional imperative. If pursued as an end in itself, rather than as a factor to be considered, this concept accelerates the process of resegregation and frustrates the attainment of sound educational goals.

(iii) The Constitution does not delineate the extent to which the transportation of pupils may or must be provided to achieve and maintain a unitary school system. Nor does the Constitution prescribe the extent to which school attendance zones may or must be altered for this purpose.

(iv) The principles settled by this Court must be observed: racial discrimination is a denial of equal educational opportunity; dual or segregated school systems are proscribed; and school authorities have an affirmative duty to maintain unitary systems. But these principles must be applied as the means of maximizing the educational opportunity for all students. A reasonable discretion must be allowed school authorities in assigning pupils and administering a school system so long as these principles are not contravened and the measures taken comport with the educational goal.

(v) School authorities should give appropriate weight to the educational advantages of the neighborhood or community schools and the disadvantages of extensive cross busing in urban areas, especially for young children.

(vi) In devising plans to assure a unitary school system, all relevant techniques may be considered, including the realignment of attendance zones, the flexible utilization of school facilities, and the assurance of opportunities for interracial learning experience.

(vii) Perhaps the overriding need is to shift the emphasis from a mechanistic approach of integration as an end in itself to the goal desired by every citizen: Equal educational opportunity in a school system structured for the highest achievement by all students.

It is not too much to say that public education is in a state of serious disarray, with increasing evidence of eroding public support. The problems and confusion relating to integration are a contributing though not the only cause. The time has come for a clarification of the principles to be applied by the courts. We respectfully submit that those outlined above are consistent both with constitutional requirements and the urgent need for improved education.

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