TABLE OF CONTENTS

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 281

JAMES E. SWANN, et al.,
Petitioners and Cross Respondents,

vs.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, et al.,
Respondents and Cross Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE

By consent of the petitioners and the respondents and as authorized by the City Attorney of the City of Chattanooga, Tennessee, a political subdivision of the State of Tennessee, The Board of Education for the City of Chattanooga, created in 1941 by Act of the General Assembly of the State of Tennessee, files this brief, *Amicus Curiae.*

INTEREST OF THE AMICUS CURIAE

The *Amicus Curiae,* Chattanooga Board of Education, has an interest in this case in that said Board now has pending motions for further relief in the United States

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District Court for the Eastern District of Tennessee, Southern Division in which racial proportions as to students in schools and classrooms, and as to faculties, are proposed as a required application of the Fourteenth Amendment of the Constitution of the United States, as interpreted in *Brown I and II* and later decisions of the Supreme Court of the United States.

A Charlotte-Mecklenburg type decision made applicable to the Chattanooga schools would have a drastic effect upon the quality of support that the voters would provide public education and upon the quality of the educational opportunity in the Chattanooga system — the only setting where the constitutional rights are given their ultimate reality — where the remedy is provided. That such would be detrimental, and substantial, is a certainty. An even more extreme prognosis cannot be rejected summarily. We prefer to err in the direction of understatement.

If the concepts reflected in Judge McMillan's opinion in Charlotte-Mecklenburg are adopted by the Supreme Court as proper constitutional principles, the Chattanooga Board can expect, based upon prior actions, that a Motion for Further Relief will be filed promptly in the District Court in Chattanooga, by plaintiffs demanding that the Charlotte-Mecklenburg concepts be implemented instanter. The Chattanooga Board can expect plaintiffs' attorneys (understandably) to give the broadest possible interpretation to a decision of the Supreme Court reflecting these concepts. The substantial factual differences between the two school systems will be ignored and any effort to explain upon such ground will be deprecated as irrelevant and suspect. It may well be impossible for the Board thereafter to defend its integrity to a substantial portion of its constituency. In a sense the Board may well have been condemned without a fair trial, and with no effective remedy.

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The facts are different. Our judicial system is based upon each case being determined upon its own unique factual situations. The educational opportunity of 27,000 students is at risk.

SUMMARY OF ARGUMENT

A Charlotte-Mecklenburg type interpretation of the Fourteenth Amendment compels affirmative action by School Boards and individuals and thus threatens to exceed the capacity of judicial power (governmental power) to enforce its decisions so that the efficacy of the judiciary may suffer to the detriment of civilization. This exposure is a reality. Wisdom demands judicial restraint in the national interest.

The right involved is an equal educational opportunity. Desegregation, a unitary system, a concept expressed in varying language, only attains reality in an educational environment. Thus the former presupposes the latter. The quality of an educational opportunity is outside the ambit of judicial training, experience and competence. Thus the evaluation of factors, both beneficial and detrimental, bearing upon educational quality must repose with the duly constituted authorities selected by the citizens to perform this governmental function. School Boards exist and function (as does the Supreme Court) with the continuing consent of the governed. The judgment of a School Board arrived at in good faith should be afforded a presumption of validity where subjective judgment based upon imprecise facts is involved. Any interpretation of the reasonable limits of a constitutional right, or remedy for such right must be consistent with this basic fundamental, practical reality.

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Diversity and freedom are interdependent for only when diversity exists is there a choice. And only when a choice exists, can individual freedom become more than an abstraction. Diversity is in the national interest. Diversity is essential to our way of life — the American way. Equal treatment does not mean the termination of diversity. For equal treatment does not mean the same, identical treatment for the reason that needs are met in a diversity of remedies. Communities have their similarities and their dissimilar aspects. School Boards reflect their communities. They are responsive to their communities, their constituency, their source of power. A two-school Kent County is not Charlotte. A rural system is not an urban system. An arbitrary solution capable of mathematical evaluation may be judicially feasible but it ignores our national interest in diversity. Reasonableness, rationality, judgment — all must exist and be supported.

THE CHATTANOOGA STORY

A brief summary of the Chattanooga situation is necessary to illustrate how school systems vary and pose unique factual situations.

The seven members of the Board of Education of the City of Chattanooga, Chattanooga, Tennessee have been selected by the people of the City of Chattanooga to operate their public school system. On the 10th day of the school year 1969-70, there were 27,024 students enrolled in the Chattanooga Public Schools. Of this number 12,880 or 47.7% were Negro and 14,144 or 52.3% were white. There are 48 separate schools in different locations. There are 9 junior high schools, grades 7-9; there are 5 high schools, one of which is a part of a 1-12 grade school. There are 33 elementary schools covering grades 1-6. In ad-

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dition, there is one school covering grades 1-4, and one school covering grades 1-9.

There are 1322 staff members assigned to these schools, and to the central office administrative staff. Of this number 532 are black and 774 are white. 252 black or white teachers are now assigned to teaching positions where they are a minority with reference to race on the staff of the school to which they are assigned. Each teaching staff is desegregated and only one school, a junior high school, has as little as one teacher of the minority group. Nine schools have 2 teachers of the minority race on the faculty. All of the assignments have been on a voluntary basis under a policy established by the Board 4 years ago. In essence, this policy was that in filling vacancies in schools with either formerly all black faculties or formerly all white faculties, preference would be given to the employment of teachers of the minority race assuming substantially equivalent educational qualifications.

With reference to desegregation in terms of numbers of pupils, 17 of the formerly all-white elementary schools are desegregated in the sense that there is at least one black child in each such elementary school. The number of Negro children in formerly all-white elementary schools ranges from one to 672. All of the formerly all-white junior high schools with one exception have black children enrolled. Five elementary schools remain all white. All three of the formerly all-white high schools are desegregated with one school having 64 black students, one 83 black students and one 170 black students.

With reference to the formerly all-black elementary schools, 4 now have white pupils, although 5 remain composed entirely of black students. Neither of the two formerly all-black high schools have any white pupils. Two formerly all-black junior high schools have white

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students and one formerly all-black junior high school remains all black at the present time.

The elementary schools and the junior high schools are zoned and transfers are and have been restricted to unusual circumstances. Transfers infiuenced by race have not been allowed for a number of years. There are no zones with reference to the high schools and such has been historical, and primarily because of the fact that the curriculum in each one of the 5 high schools vary from a technical high school education with no college preparatory aspect to a high school predominantly designed to prepare students for admission to college level work.

In the combined judgment of the Chattanooga Board of Education, the Chattanooga System is operated as "a unitary school system." No person has been "effectively excluded from any school because of race or color" within the Chattanooga system in the last 4 years. The defendant School Board has specifically requested legal counsel for the plaintiffs in the litigation continuing in the Federal District Court in Chattanooga to provide the School Board with any instances where any decision with reference to exclusion has been made on the basis of race. The Chattanooga School Board does not make decisions based upon race alone with the sole exception where vacancies exist in either formerly all-white faculties or formerly all-black faculties. In this instance, race is recognized and must be recognized and is in some instances the deciding factor in the employment and assignment of teachers.

The Chattanooga Board of Education authorized the filing of this brief Amicus Curiae because in its unanimous opinion, if the principles reflected in the *Mecklenburg* case become the law of the land, such will have an impact upon the quality of the educational process in the Chattanooga School System of an extreme and detrimental

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nature. The Chattanooga Board is well aware of the fact that the precise and exact nature of the impact of the *Mecklenburg* principles upon the Chattanooga system requires the exercise of judgment and is subjective; impossible of precise approximation in advance.

Nevertheless, the Chattanooga Board of Education composed of 7 individuals is the only body legally responsible for the on-going educational process in the school system of the City of Chattanooga. Therefore, they must make this decision recognizing while making the decision that its joint judgment is at best an approximation and an educated guess. The Chattanooga Board does not see any alternative. It must exercise its best judgment for otherwise it will be abdicating its responsibility to the citizens and children of the Chattanooga Public School System.

If, given the opportunity, the Chattanooga Board could detail the basis of this judgment in a careful manner in order to give a court an opportunity to determine whether or not the 7 members of the Chattanooga Board of Education have acted in such a manner as to equate a good faith discharge of their responsibility as the appointed representative of the people of the City of Chattanooga. The Board does not insist that its decision is necessarily correct nor that its prediction or its fears will come true; the Chattanooga Board of Education merely represents that it has done its best to discharge its responsibility — and that no Board could do any more.

The Chattanooga Board sees the present conflict as one between two or more basic constitutional principles or national values. The obvious national commitment to the existence of public education, and to the ongoing effort to continually improve its quality cannot be questioned. As was said by this court in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) "Public education is perhaps

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the most important single function of local government." The Chattanooga Board agrees with and is committed to this basic principle. Consequently, all factors that will support the ongoing improvement of public education should be identified and placed into operation if at all possible. On the other hand, all factors having a possible destructive effect upon the cause of public education should similarly be identified and should be avoided if at all possible. Anything less than the foregoing would amount to a shoddy performance by any of the selected Board of Education. This is the cause of public education.

There is an equivalent major principle — compliance with the Constitution of the United States. We are now directing our attention to what facts in a particular school situation will be held to be compliance with the Constitution of the United States.

It is apparent that there is a conflict among the learned judges of the Federal Bench both at the district court level and at the circuit court level with reference to the exact meaning or application of the language of the Supreme Court of the United States in this particular area in interpreting the Fourteenth Amendment as the same has a bearing upon public education in the United States. Based upon the assumption that others preparing briefs in this particular litigation will more than adequately cover the degree, nature, and extent of the variances among the various districts with reference to the specific application of the constitutional principles originally enunciated in *Brown* to the various factual situations presented, no repetition of this analysis will be reflected herein. Suffice it to say that the conflict in interpretation exists and is substantial.

The seven members of the Chattanooga Board of Education each have taken an oath to uphold the Constitution of the United States. This obligation can be met only as

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the members of the Board comprehend the exact meaning of the Constitution within their own judgment and intelligence and as they are advised by legal counsel and particularly where courts cannot agree. Whether or not this oath is being honored and whether or not the community believes that this oath is being honored by the Board of Education has a direct bearing upon the kind and quality of support that the community gives to the Board of Education and, through it, to the quality of the educational program in Chattanooga.

The Chattanooga Board of Education, shortly after the second *Brown* decision on May 31, 1955, met to consider an appropriate policy statement with reference to the Board's response to the decision by the Supreme Court of the United States. Under date of July 22, 1955, the Board issued a public statement in which the first two paragraphs read as follows:

> "The Chattanooga Board of Education will comply with the decision of the United States Supreme Court on the matter of integration in the public schools.
>
> "We have come to this decision after careful deliberation, believing that respect for the law of the land is essentially vital to each and every individual and to the welfare and happiness of all."

Since that date, the Board of Education has been conscientiously and honestly attempting to comply with the Constitution of the United States as elaborated upon in *Brown* to the best of their ability and within the limits of their understanding, while at the same time continuing to meet and discharge the major obligation that they have assumed as Board members, with the maintenance of the highest quality of educational opportunity in the City of Chattanooga as is possible within the means afforded to

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the Chattanooga Board, the Superintendent, his staff, and the teachers.

The Chattanooga Board made an early determination that the entire community would be involved in this decision. In its statement of July 22, 1955, the following is pertinent:

> "As we seek a solution we will make every effort to acquaint the entire community in conferences and through other media of communication of the various aspects involved. This is not your Board's decision alone. It is a community decision. Although the Board will officially make the decision, each individual in our community must accept his responsibility in solving this question.
>
> "Our decision will have its influence and impact upon ever phase of our community life. It is of the utmost importance that the great majority of the people accept our decision when finally made. This will be difficult for some — we fully realize this. The thoughtless action of a few could well present situations filled with danger. We know the community hopes and prays that such can be avoided. We know our people will make every effort to see that such is avoided. It has taken more than seventy-five years to bring our public school system to its present degree of service to the children and the community. It is of the utmost importance that the public school system continue to make progress. It is important that we proceed to a solution of this problem in such a manner that the strength of the public school system is not weakened. In this endeavor we must always be mindful of each and every family, and ever protect the rights of those citizens.
>
> "We earnestly request and hope that the community will proceed in its thinking and its actions in a spirit guided by a sense of justice, respect for the law, awareness of the difficulties involved and guided by recogni-

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tion of the necessity of reaching a fair and just solution. With God's help, this can be accomplished."

The Board undertook to involve the community in the process of compliance utilizing an Interrracial Advisory Committee to assist in the elucidation phase of the Board's effort to comply. A systematic in depth approach to the community was undertaken.

Litigation was instigated against the Chattanooga Board of Education by a complaint filed on April 6, 1960. During the course of this litigation at the risk of over-simplification, but in the interest of brevity, the Chattanooga Board represents that it has consistently attempted to maintain a posture of compliance with the decisions in *Brown I and II* as it understood those decisions, and as the principles enunciated in these decisions seemed to be applicable to the particular factual situation existent in the school system of Chattanooga. During the course of litigation, contrary positions were taken by the plaintiffs and plaintiff's counsel. In accordance with established legal procedures, a clarification of the two contending viewpoints were evolved through the District Court and to the Circuit Court of Appeals for the Sixth Circuit. In every instance, the Chattanooga Board of Education has reacted to an interpretation by either the District judge or the judges of the Circuit Court of Appeals for the Sixth Circuit and performed in accordance with directives reflected in such decisions. In no instance and at no time has the Chattanooga Board of Education approached a posture of defiance with reference to the Federal Judiciary or the Constitution of the United States as interpreted by the Supreme Court of the United States.

As of the moment that this brief is being prepared, the Board of Education and its legal counsel are of the opinion that the Chattanooga Board of Education is in compliance

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with the Constitution of the United States and the Fourteenth Amendment, in particular, and as the *Brown* decisions and other cases have been interpreted by the judges of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

The basic issues before the court upon this writ arising out of *Mecklenburg* are the questions of racial balance with reference to students in schools and classrooms and racial balance in the makeup of faculties in individual schools.

No matter what is said or how this issue may be avoided and postponed for whatever reasons, this is the issue. The bussing aspect of the decision is only a means to an end and illustrates the extreme nature of the affirmative responsibility argued for by the plaintiffs as a constitutional requirement in order to comply with the Fourteenth Amendment.

There is no ambiguity with reference to what the Court of Appeals for the Sixth Circuit believes to be a correct, constitutional interpretation on these points. We refer to *Deal* v. *Cincinnati Board of Education,* 419 F.2d 1387 (1969) at page 1388.

> "* * * the Board of Education was not required by the Constitution to bus Negro or white children out of the neighborhoods, or to transfer classes, for the sole purpose of alleviating racial imbalance which was not caused by any act of discrimination on the part of the Board, but resulted from the racial concentrations in the neighborhoods in which the schools were located, and further, that the Board had no like duty to select new school sites solely in furtherance of such a purpose."

And again with reference to bussing at page 1390:

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> "It is the contention of the appellants that the Board owed them a duty to bus white and Negro children away from the districts of their residences in order that the racial complexion would be balanced in each of the many public schools in Cincinnati. It is submitted that the Constitution imposes no such duty. Appellants are not the only children who have constitutional rights. There are Negro, as well as white, children who may not want to be bussed away from the school districts of their residences, and they have just as much right to attend school in the area where they live. They ought not to be forced against their will to travel out of their neighborhoods in order to mix the races."

With reference to racial balance on teaching staffs, see page 1393 where the Court had the following to say:

> "Appellants further complain of discrimination in hiring and assigning of school personnel. As of 1964-65, Negroes comprised 626.5 or 21.20% of the teaching staff. We find no evidence of discrimination. There was no constitutional duty on the part of the Board to balance the races in teachers' employment and assignments. Teachers should be selected primarily on the basis of merit."

See also *Goss* v. *Board of Education, City of Knoxville, Tennessee,* 406 F.2d 1183 (6th Cir. 1969).

This brief reference to the evidence of the Sixth Circuit's interpretation of *Brown* should be sufficient to sustain the representation that the Chattanooga Board of Education at the present time is in compliance with the Constitution of the United States and as such has discharged its oath to support the Constitution of the United States. If the Chattanooga Board of Education had been situate within the Fourth Circuit or the Fifth Circuit, a contrary conclusion would probably have been required although the fac-

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tual distinctions should not be lightly cast aside and disregarded.

What are the alternatives available to this Court? One extreme is the philosophy set forth in *Mecklenburg* by District Judge McMillan. The Court could support the reasoning of the Sixth Circuit and that of decisions in the Seventh and Eighth Circuits. In the area in between, the Court could limit this decision to as narrow a ground as possible postponing further amplification of the constitutional principles to a later date and under differing and perhaps better developed factual situations.

In *Brown* v. *Board of Education of Topeka,* 347 U.S. at 493 the Court had this to say:

> "Today education is perhaps the most important function of state and local governments."

The Chattanooga Board of Education believes this statement to be true. The actual allocation of local financial resources to the cause of public education supports the commitment given by the community to the cause of public education.

Once we accept the validity of this basic commitment as a reflection of our national value system, it follows that all factors that support the continuing improvement in the quality of the educational process should be identified and implemented. It also follows that any factors that may have a detrimental effect upon the quality of public education should also be identified and avoided or excluded if at all possible.

And compliance with the Constitution of the United States at all levels of our national life is also of substantial and primary importance. *Brown I and II* are now a part of the Constitution of the United States, but the exact nature of the principles enunciated in these two cases have

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not finally been determined and are the subject of the presentations to the Court. To exclude any child from any part of the public educational process solely because of the color of that child's skin violates the Constitution of the United States.

The factual situation in *Brown* was magnificent in its simplicity.

The reason for the exclusion was evident and could not be contradicted. Once the court found that segregated schools were unequal, (in an obvious reference to quality) then the logical decision in *Brown I and II* followed in a simple, forthright manner.

The above represents a decision by the state, followed by the action by the state, followed by detriment as a result of this action. And the final fact is that the decision had only one basis and that was that a black child was involved.

It is a long way from the factual situation in *Brown I and II* (and the philosophy involved) to the arbitrary actions required under Judge McMillan's decision in *Mecklenburg* where race continues to be the deciding factor with reference to the assigning of new pupils and teachers and the bussing of pupils. Race was used to penalize and to deny in *Brown I and II*. If race is used as a basis for preference or apparent preference or preferred treatment, is such any less demeaning than the exclusion from an activity because of race? Does the fact that race brings forth a preferred reaction make the importance of race any less demeaning?

At one time the Constitution of the United States was said to be color blind. If the decision in *Mecklenburg* becomes a correct interpretation of the Constitution of the United States, then obviously the Constitution is no longer color blind for color becomes the key decision with reference to the school that you may attend or may not attend no matter what neighborhood your parents selected in which to live.

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If this court interprets the Constitution of the United States to mean in effect that it is color blind, then race cannot be recognized as a factor for the purpose of the creation of a category and thus the black-white ratios with reference to students and faculty as evidenced by the *Mecklenburg* decision are no longer constitutionally possible.

An in-between or temporary posture could be approved, such as that the color blind facet of the Constitution must be temporarily neutralized until the continuing result of dual school systems has been eliminated root and branch. If the Court decides that the color blind concept is still valid, but should be relaxed in order to alleviate the continuing evidences of an old wrong, then difficult areas of proof are created and they will demand resolution. In a sense, an additional Pandora's Box will be uncovered should the temporary exception to a constitutional principle be ratified and approved. What does the description of "vestigial remains of a dual school system" include? What do the vestiges of a dual system look like for this determination must be made before one can determine whether or not these vestiges have been removed. In many instances the fact of removal of a vestigial remain will be the determining factor when the Constitution can return to its color-blind attitude. The elimination of the vestigial remains of a dual school system will terminate the temporary period in which an unconstitutional principle is allowed to function.

Within a particular school system, the Board will have to determine at what day or under what circumstances the required vestigial remains have been removed from its system. Undoubtedly this judgment or factual decision will be disputed by one or more groups in the community. Should this dispute be substantial, then investigation and a final determination will be required. This will continue conflict and uncertainty.

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Again, a part of the Pandora's outpourings will be the recognition that certain constitutional principles are capable of temporary suspension under limited circumstances. What encouragement will this give to future efforts to undermine constitutional principles when the cause and facts are particularly appealing and a time in our national life when a particular situation appears to have persuasive justification.

Should the Court come to the conclusion that there is no constitutional requirement that governmental agencies be color blind, such would remove one objection to the necessity for creating certain racial balance in schools and classrooms with reference to students and in faculties with reference to teachers.

On the other hand, racial proportions in classrooms will require school boards to make decisions as to what individual students are to be removed from their normal neighborhood schools and placed in a school in a different area. This will call for certain students to be exposed to the additional burden of travel time both to and from a school while some of their neighbors will not have to spend time in such fashion since they will attend the neighborhood school. This is a form of unequal treatment.

In addition, such will require capital expenditures of a substantial amount by school systems with regard to buses. It will increase the annual operational costs of the school system. Given an adequate opportunity, it could be proven that the assignment of students outside of their neighborhood creates a resentment among the parents and the students. It could also be proven that this resentment reflects itself in a negative way with reference to the total support of public education in the community. It could also be proven that the time required in waiting for bus transportation and in being transported was time that could be used for more productive educational processes.

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It could also be proven to the satisfaction of a court that most school systems have serious financial deficiencies and have seldom even approached having adequate facilities to implement current knowledge with reference to approved educational procedures and techniques. The amount of money that is required for the acquisition of buses, plus the amount of money that is required for the operation of the buses would often have to be diverted from other aspects of the school systems that have been believed to be of substantial importance. For example, an educable mentally retarded program which is more expensive than the ordinary classroom activity could well have to be curtailed or discontinued in order to achieve the necessary bussing to balance classrooms and schools. Certainly those parents whose children were in the category of educable mentally retarded would be convinced that the quality of the educational process for their children had approached zero — because of the necessity of achieving racial desegregation.

Although opportunity has not yet been provided for the orderly presentation of proof upon this particular matter, the Court should be aware of the fact that should racial balance in the classrooms, schools, and bussing along with racial balance in faculties be required in school systems throughout the country, there will be a resentment against public education of an intensity and breadth that no person would welcome. The Chattanooga Board of Education is fearful of the impact upon its school system should the *Mecklenburg* decision become the approved interpretation of the Fourteenth Amendment of the Constitution of the United States. Believing this to be a reasonable consequence of the interpretation of the Constitution, this Board was under an obligation to make the results of its

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joint judgment known to its constituency and to others that would listen.

The enunciation of the constitutional principle is the responsibility of the Supreme Court. The front line of implementation of these principles is the responsibility of the local school board. What degree of detriment to a public school system is acceptable in order to achieve a mathematical racial balance? Administratively, the use of racial balance and statistics make for a simple method of determining whether or not a particular school system is or is not in compliance with a constitutional principle. But is this administrative feasibility of sufficient importance to justify the exposure of the school system to substantial deterioration? And what body makes the assessment with reference to the degree of exposure? How does one determine in advance with any degree of accuracy the manner in which a community will express its resistence and the nature of the detrimental impact upon the school system as a result of this manner or method of expressing resentment? It would not seem to be wise to ignore this possibility. On the other hand, the possibility of a substantial negative reaction should not mean that the Constitution of the United States cannot be made applicable to a given situation, but the area in between these two postulates can be difficult, but important, particularly to the children whose daily educational opportunity is at stake.

It is true that the Supreme Court has said in *Brown II* ". . . the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." This same idea was expanded in *Cooper* v. *Aaron,* 358 U.S. 1 (1958). In this case the School Board relied upon the existence of "extreme public hostility, which . . . had been engendered largely by the official attitudes and actions of the Governor and the Legislature . . . ."

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The Court went on to say on page 6, "The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of State action." Later on, the Court used this language:

> "In short, the Constitutional rights of children not to be discriminated against in school admissions on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by State Legislators or State Executive or Judicial Officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' "

It has been recognized over a long period of time that there are limits to the effectiveness of judicial power. If the Court defines the constitutional duty under *Brown I and II* to require the racial balancing reflected in *Mecklenburg,* good judgment would indicate that consideration should be given to the various possible reactions that the Mecklenburg-Charlotte community might have to this ruling. To illustrate, assume that under state law in North Carolina a bond issue would be necessary in order to provide the three million dollars plus that were required to purchase the number of buses necessary to implement the District Judge's opinion. Assume that a referendum was also required. Next, assume that the referendum is defeated and thus the School Board does not have available to it the funds necessary to purchase the required buses. Under these circumstances, what does the Charlotte-Mecklenburg Board do? What action does it take? It cannot carry out the judicial mandate without the required buses. It cannot purchase the buses without money, and the source of the money, the electorate or the people, will not agree to tax themselves to provide such funds and

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the court mandate cannot be carried out without the availability of the buses. What happens next? Can the District Court order the people of Charlotte-Mecklenburg to pass a bond issue in order to carry out a mandate of the Federal District Court? How would the court carry out such an order?

We submit that the power of the Court, as the power of government, has its original source in the people. The consent of the governed remains an essential in our present day environment. This consent of the governed is not given at one time and for all time, but is given each passing day. In this particular instance the people of Charlotte-Mecklenburg would be withdrawing their consent in a limited way and as to a particular and peculiar aspect of government. When this happens, it would appear that the limits of judicial power have been reached. When and if the judiciary exceeds its judicial power and in a dramatic fashion, then the entire judicial framework has been weakened and undercut.

It is submitted that if the above is a real possibility, certainly this Court will move in such a direction and expose the judiciary to this factual criticism only in a most unusual circumstance.

If substantial bussing is required, what will be the means available to a court to enforce the District Court order when the parents of the children concerned refuse to place these children in a position where they can ride the bus? Will a Federal marshal be designated to physically take small children into custody and physically and through force deliver them to a school out of their neighborhood?

What will happen if the children decide they will not remain in school? Will there be a policeman or a Federal marshal in each classroom? It is submitted that the decision in *Mecklenburg* could well result in a pushing of the limits of judicial power to the breaking point. And

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if this breaking point is actually reached, the entire society will suffer from the consequences.

But it will be said that this is not possible and thus it does not have to be considered. But what if it is possible? What if it happens? What kinds of remedies do we have to erase the dire consequences that may follow on this lack of judicial restraint? As was said by Justice Frankfurter in *Cooper* v. *Aaron,* page 21, "The use of force to further obedience to law is in any event the last resort and one not congenial to the spirit of our Nation."

In *Aaron,* Justice Frankfurter also had this to say. "Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society." But what if this resistance is not violent? And what if this resistance is reflected in an absolutely legal manner? To illustrate, there have been three bond issue referendums since the desegregation suit was initiated in Chattanooga in 1960. These were county-wide referenda. On November 3, 1964, with a $17,000,000 bond issue, the vote was overwhelmingly against with 40,261 voting against the bond issue and only 6,599 voting in favor of same. School construction was the sole basis for the bond issue. School construction and an addition and renovation was an issue in May 18, 1967, and the amount was $10,000,000. This was rejected by a vote of 10,217 to 8,913. In 1969 a $9,000,000 bond issue was rejected, 18,054 against and 12,591 for. The purpose of this was renovation and expansion of the existing school buildings and some new construction. In the typical, democratic fashion, the people of Hamilton County have spoken and said no.

With this background as to the will of the people expressed on school bond construction, coupled with many other facts available to the seven members of the Chattanooga Board of Education, what reaction could be expected

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from the community if a two million dollar bond issue were necessary immediately in order to provide the buses necessary to comply with the District Court decree in Chattanooga similar to that in *Mecklenburg*. True, this is guesswork, but it is typical of the kinds of judgments that local Board members must make and do make and on many issues. Their proximity, their being a part of the local environment, their responsiveness to the constituencies that they serve — all of these factors go to supporting judgments made by school boards when made in good faith and in an honest effort to discharge the responsibility which the School Board has accepted.

DESEGREGATION - INTEGRATION

There has been a continuing failure to recognize the distinction between desegregation and integration in referring to public school education. (See article by Dr. Kenneth B. Clark, Teachers College Record, October 1960.) The desire to have physically demonstrable evidence of the fact that a change has been made in a school has led to an emphasis upon the number of black students physically present within any educational setting. This is a part of the concept of the "numbers game" which is referred to frequently in writings relating to school desegregation. The number of black children physically present has come to be equated with the attainment of the ultimate objective. Judges and others have been searching for rules of conduct, a formula, or other yardsticks that could be applied in any given situation to determine whether or not a school district had met the minimum standards of the Fourteenth Amendment as interpretated by *Brown I and II*. The Courts have been placed under intense pressure with regard to desegregation, and in certain cir-

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cuits as a result have had an intense motivation to evolve and fabricate orders and procedures that can be easily understood, that are administratively feasible, and that can be evaluated by non-academic personnel. This has caused the remedy to be reflected in the "numbers game," in statistical information, with no regard for the educational environment or the classroom atmosphere essential to educational opportunity.

OBSESSION WITH NUMBERS

This obsession with numbers has brought about the racial balance concept which in turn has produced the necessity for affirmative action upon the parts of states such as is represented in bussing as a means of achieving some predetermined acceptable level of desegregation, or the numbers game again. This has introduced the concept of force upon the part of the state in order to create and maintain numerical balance in the classroom as continuing evidence of a school system operated in conformity with the Constitution of the United States.

A CONFUSED OBJECTIVE

In other words, desegregation has become the end-all in the sense that there must be so many individual students of the white race and so many students of the black race physically present in a classroom or in a school in order for that school or that school system to be in compliance with the Constitution. The end result of the obsession with numbers could well achieve desegregation, and in so doing, make forever impossible the integration that is essential if the Fourteenth Amendment is to be effective. If a classroom can attain, and maintain, a desegregated

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condition only so long as the affirmative force of the State has entered into the picture and is constantly available, does not this continuing presence of force as an essential for desegregation prove that the classroom concerned is not integrated? What impact will there be upon black pupils if they are aware of the fact that the only reason why they are sitting along side white students is because of the presence of a governmental force in some form requiring them to remain where they are? If desegregation is only possible under these circumstances have we not allowed an obsession with the numbers game to steer us away from the basic constitutional right that got us here in the first place?

What the average Negro wants, as does every person, is to be accepted by his fellow human beings for what he is, and what he can be, without regard to the color of his skin, or any other condition outside of the responsibility of the person concerned.

If the State, acting through its school system is to treat black children fairly, it would appear to be the responsibility of the State (acting through its school board) to introduce a black student into a formerly all white classroom under such circumstances and conditions as to maximize the possibility that this child will be fully accepted by his peers in the classrooms. If this placing together in the classroom of whites and blacks is done through an excessive display of force, will there not be a tendency to create emotional and intellectual attitudes upon the part of the white students in the classroom of such a nature as to make it extraordinarily difficult for the black child to be accepted by his white peers? Acceptance as an individual is the goal of an integrated classroom. This acceptance flows from the other individuals in that classroom. It is beyond the power of the State. Consequently, it would seem good

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judgment to identify in advance any factors that might reasonably contribute to the creation of a hostile attitude upon the part of the students in the classroom, and then to take whatever steps appear to be available to avoid the existence or intensification of such hostile attitudes. Unless we keep our eyes upon the real objectives of equal treatment under the Fourteenth Amendment, it may well be that ill-chosen means of achieving an apparent goal may result in a polarization of intensity in our national life which would be the antithesis of the integration and equal acceptance envisioned by the Constitution.

THE RIGHT AND THE REMEDY

The Court has declared the existence of the Constitutional right to admission to public schools without regard to race in order to meet the concept of equal treatment under the law implicit in the Fourteenth Amendment. The declaration of the right and the effectuation of the remedy are not the same. The Court is now concerned with the practicalities involved in making the right a reality. It is desirable to have education *and* compliance with the Constitution. But the Constitution may be interpreted so as to bring about the virtual destruction of public education. The Court could reach a conclusion reflecting a decision that desegregation is more important than education. The Chattanooga Board remains convinced that education is primary. Desegregation cannot be allowed to assume a value greater than public education. Such a radical change in our national value system should not take place through an errosive process stimulated and made possible by confused thinking.

If the Charlotte Board had done absolutely nothing, then the District Court would have been compelled to direct

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affirmative steps to be taken. But such is not the case. The District Court has found in essence, that the Charlotte Board has not done enough. Its plan is inadequate, so the District Court says. Unless the Court can find that a local school board is acting in bad faith and is unreasonable, then the collective judgment of a local board should be presumed to be correct and the burden placed upon complainants to prove the Board's judgment to be incorrect.

COMMUNITIES DIFFER

Every school system is different. Each community is unique as is each individual. A rigid, inflexible, detailed plan for all school systems is impractical for it ignores the diversity existent within our land, a diversity that is a basic source of our national strength. Local school boards are responsible to this diversity and reflect this diversity in representing local voters as a school system is designed and administered, and re-designed from time to time. With reference to race and *Brown I and II,* if a school board has been recalcitrant, certain remedies such as racial balance may be demanded, but not as a constitutional principle.

The Court exercises judicial power under the Constitution having secured this power from the voters. School Board's exercise educational power conveyed to them from the same source. Certainly in areas filled with judgment factors, the local board's joint judgment should be given great weight so long as a Board has demonstrated good faith coupled with actions supporting such good faith.

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CONCLUSION

The Court is urged to —

redirect the attention of the Nation to the real objectives of equal treatment in public education under *Brown I and II,* and in so doing to discourage the rigid use of numbers as proof of the implementation of the Constitutional rights recognized by *Brown I and II.*

recognize the diversity in communities and provide support to School Board's acting in good faith, such as Charlotte-Mecklenburg, where progress is clearly evident.

give joint judgment at the local level a chance to use reason and sound judgment within flexible principles in response to their constituency but always subject to judicial scrutiny and approval.

Respectfully submitted,

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