Vanderbilt Law Review

Volume 25
Issue 4 *Issue 4 - May 1972*

Article 4

5-1972

Recent Developments

Law Review Staff

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Civil Rights—Judicial Consolidation of Public School Districts To Achieve Racial Balance

I. INTRODUCTION

Since the landmark decision of *Brown v. Board of Education*[1] in 1954, the Supreme Court, in a long sequence of cases, has forged increasingly stringent guidelines governing the desegregation of public schools. The Court, however, has reserved the task of implementing its desegregation orders for the lower courts. As a consequence, a variety of remedial devices has been developed by the federal courts to dismantle dual school systems. In the recent decision of *Bradley v. School Board*,[2] a Virginia federal court ordered the consolidation of the predominantly black Richmond school district with the surrounding all-white suburban school districts of Henrico and Chesterfield Counties. This decision marks the first time that a court has consolidated two or more autonomous school districts for the purpose of achieving a racial balance in the schools that reflects the racial composition of the consolidated areas as a whole. While Judge Merhige in *Bradley* punctiliously followed the principles enunciated by the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*[3] and its earlier desegregation cases, his decision, which called for the busing of suburban children to inner city schools, was a primary factor contributing to the storm of national protest against the use of busing to achieve racial balance. The implications of this controversy are grave. It could lead to serious conflict between public opinion and the will of Congress on the one hand and the duty of federal courts to uphold the Constitution on the other. Focusing on the *Bradley* decision, this comment will review the major Supreme Court decisions setting forth the constitutional standards for dismantling dual school systems. The *Bradley* court's use of this authority in reaching the controversial school consolidation order will be discussed in detail and the decision will be analyzed both in terms of the soundness of legal reasoning and the validity of its basic policy premises.

1. 347 U.S. 483 (1954).
2. 338 F. Supp. 67 (E.D. Va., Jan. 5, 1972).
3. 402 U.S. 1 (1971).

Finally, the comment will discuss briefly the future of court-ordered school desegregation in light of the current, vociferous opposition to the approach adopted by the *Bradley* court in its attempt to deal with the serious national problem of achieving equal educational opportunity for all.

II. Evolution of Remedial Devices for Desegregation Purposes

A. The Influence of Brown

In *Brown v. Board of Education*[4] (*Brown I*) the Supreme Court established the legal foundation for the multitude of public school desegregation cases that have inundated the federal courts since 1954. In this landmark decision, the Court held that segregation on the basis of race in the public schools was unconstitutional because it denied equal protection of the law to black school children.[5] In order to effectuate the principles enunciated in *Brown I*, the Court, in *Brown II*,[6] vested in local school authorities the full responsibility for desegregation and empowered the lower federal courts to hear all disputes related to school administration, physical plant conditions, and pupil transportation.[7] Because of its sweeping generality, the rationale of *Brown I* has been the source of considerable dispute.[8] Nevertheless, the majority of school boards concluded that *Brown I* prohibits a school system from using race as the criterion for assigning pupils to schools. This interpretation was apparently endorsed by numerous per curiam Supreme Court decisions that cited *Brown I* as standing for the proposition that the equal protection clause prohibits, as inherently arbitrary, classifications that are based upon race.[9]

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

5. *Id.* at 494-95.

6. Brown v. Board of Educ., 349 U.S. 294 (1955).

7. *Id.* at 300.

8. At least one commentator has argued that instead of holding that race is an inherently arbitrary classification, *Brown I* held only that segregated schools deny black students an equal educational opportunity. He suggests that this choice was deliberate because American institutions had been based upon racial classifications for over 200 years. Also, he thought that the equal educational opportunity rationale was consistent with Sweatt v. Painter, 339 U.S. 629 (1950), and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950). Fiss, *Racial Imbalance in the Public Schools: the Constitutional Concepts*, 78 HARV. L. REV. 564, 588-95 (1965). *But see* Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U.L. REV. 157, 171-74 (1963); Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

9. Schiro v. Bynum, 375 U.S. 395 (1964) (invalidated municipal ordinance requiring segregation in city auditorium); Johnson v. Virginia, 373 U.S. 61 (1963) (invalidated segregated courtroom seating); Turner v. Memphis, 369 U.S. 350 (1962) (desegregated public restaurant); State Athletic

In attempting to comply with *Brown I*, the school systems refrained from overt racial discrimination during the late 1950's and early 1960's. They were not, however, under an affirmative duty to restructure segregated school attendance zones that resulted from segregated housing patterns or other private causes. Because black housing was usually clustered within a particular area, integration could be achieved only in those schools located on the periphery of the black residential areas. In this context, the desegregation plan most commonly adopted by the schools was the freedom-of-choice plan. Under this plan members of a majority race were allowed to transfer outside their assigned attendance zone to schools in which their race was in the minority. Despite its racial neutrality, freedom-of-choice failed to achieve fully integrated school systems because, in almost all cases, few whites were willing to transfer to previously all-black schools. Contributing greatly to this lack of progress was the government's limited enforcement of the *Brown I* decision, which was confined primarily to preventing the drawing of school attendance zones on a racial basis. As a result, by the late 1960's, even though all the legal barriers preventing blacks from attending white schools had been removed, the vast majority of public schools in the South were still all white or all black.[10]

The Supreme Court's response to this impasse in the desegregation of schools came in *Green v. New Kent County School Board.*[11] The Court struck down as constitutionally impermissible a freedom-of-choice plan under which only a few black students attended formerly all-white schools. The vast majority of blacks had elected to remain in attendance at the all-black schools. The school board contended that it had complied with the constitutional mandate enunciated in *Brown I* by terminating all racially discriminatory practices and by permitting black students to attend formerly all-white schools if they desired to do so.[12] On the basis of those changes, it was the board's position that black students were afforded an equal educational opportunity. The Court found, nevertheless, that a dual school system still existed and, in defining "desegregation,"[13] it stated for the first time that a school board

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Comm'n v. Dorsey, 359 U.S. 533 (1959) (ordered integration of segregated athletic contests); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses integrated); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (integrated municipal golf course); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bath houses integrated).

10. *See generally* U.S. COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-66 (1966).

11. 391 U.S. 430 (1968).

12. Brief for Respondents at 8-13, Green v. County School Bd., 391 U.S. 430 (1968).

13. The crucial issue in *Green* was the definition of "desegregation" that was required by *Brown I*. *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 63, 113 (1968).

has an affirmative duty to establish a "unitary, nonracial system of public education."[14] In setting forth the requirements of a unitary system, the Court construed the equal protection clause expansively and rejected the notion that the clause was merely a prohibition against the use of race as a basis for classification.[15] Less than a year later, in *Alexander v. Holmes County Board of Education*[16] the Court reviewed the *Green* affirmative duty requirement for the first time. In a decision reflecting the urgency of the school desegregation problem, the Court ordered the immediate termination of the dual school system in 33 Mississippi school districts. The immediate effect of the decision was to place more pressure than before on local school officials to devise desegregation plans that would comply with the unitary school concept.[17] Unfortunately, given the Supreme Court's failure to establish satisfactory guidelines for implementing the concept, local school officials as well as the lower courts were faced with a complex and difficult task. With varying degrees of success, a number of remedial devices were attempted in an effort to dismantle dual school systems.[18] The lower courts and the school boards were still uncertain about how far they could go in restructuring the schools to comply with the Supreme Court's desegregation rulings.

B. The Doctrinal Advances of Swann

In the wake of *Alexander* and *Green*, pressure mounted on the Supreme Court to rule on the constitutionality of several of the remedial desegregation devices that were being utilized in the lower courts. Finally, in *Swann v. Charlotte-Mecklenburg Board of Education*,[19] the Court ruled on two of the more controversial of these devices—busing and pupil assignment based on racial quotas.[20] The Court held that the two devices are within the remedial powers of the district court under

14. 391 U.S. 430, 436 (1968).

15. Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 699 (1971); *cf.* 21 VAND. L. REV. 1093, 1098 (1968). *See generally* 82 HARV. L. REV., *supra* note 13.

16. 396 U.S. 19 (1969).

17. *See generally*, Dimond, *Reform of the Government of Education: A Resolution of The Conflict Between "Integration" and "Community Control"*, 16 WAYNE L. REV. 1005 (1970).

18. Some of the remedial devices employed during this period to effectuate a unitary, nonracial school system were pairing of schools, rezoning, closing older schools to force consolidation, and busing. 24 VAND. L. REV. 1243, 1247 (1971).

19. 402 U.S. 1 (1971).

20. Swann v. Charlotte-Mecklenburg Bd. of Educ., 311 F. Supp. 265 (W.D.N.C. 1970). The adopted desegregation proposal, called the "Finger Plan," required extensive busing only at the elementary level. 24 VAND. L. REV. 1243, 1243 n.4, 1244 (1971).

the equal protection clause.[21] It also held that school systems containing one-race schools will be found violative of equal protection unless local school officials make an affirmative showing that these schools are not the result of past or present discriminatory practices.[22]

In the *Swann* opinion, the Supreme Court made three significant doctrinal advances toward the ultimate objective of disestablishing the dual school system. First, the Court stated that whenever a dual school system exists, a school board's primary responsibility is to eliminate the distinction between the white and black schools. Prior to *Swann*, a school board's duty was merely to consider the possible racial implications of its policies and practices.[23] *Swann*, however, accorded school integration precedence over most coexisting eduational values, and therefore required that every school board decision be consistent with the duty to eliminate the dual school system.[24] Secondly, the Supreme Court held that the existence of all-white or all-black schools is not a violation per se of the equal protection clause. Instead, it declared that the presence of such schools creates a presumption that there is an equal protection violation which can be overcome[25] only if the school board can show that no relationship exists between its past or present actions and the creation or perpetuation of racial imbalance.[26] The Court suggested that a variety of indicia, such as the location of schools, school building capacities, and faculty assignments, be examined in determining whether this prohibited relationship exists. A school board's failure to explain the presence of one-race schools was viewed as sufficient to justify a finding of state involvement in the discrimination and hence, a violation of the equal protection clause.[27] *Swann's* emphasis on past

21. 402 U.S. at 22-25, 29-31; 24 VAND. L. REV. 1243, 1245 (1971). The school assignment method held inadequate was the geographic proximity plan—the assignments of pupils to schools nearest their homes. The geographic proximity method is the plan used predominantly in the North. Fiss, *supra* note 15, at 699.

22. *See* 82 HARV. L. REV., *supra* note 15, at 115.

23. Fiss, *supra* note 15, at 701.

24. 402 U.S. at 18-19; Fiss, *supra* note 15, at 701-02.

25. "[I]t should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law . . . . [T]he burden upon school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." 402 U.S. at 26.

26. Fiss, *supra* note 15, at 700. Fiss found 2 types of connections suggested by the Court: (1) past discriminatory conduct by school board members that served to create or perpetuate a segregated attendance pattern; (2) administrative decisions by board members that served to create one-race schools.

27. Evan v. Newton, 382 U.S. 296 (1966); Lombard v. Louisiana, 373 U.S. 267 (1963) (Harlan, J., dissenting); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961);

discriminatory practices in finding de jure segregation reflects the Court's broad construction of the state action requirement in school desegregation cases. By determining the causes of racial imbalance from essentially a hindsight point of view, a court can more easily perceive a connection between school board action and the dual school system. From the school board's standpoint, a more lenient state action test would have been a determination of whether at the time of the allegedly discriminatory action the school board could reasonably have foreseen, as a direct consequence, the establishment of a dual school system. In practice, the second test would have meant that a causal relationship between state action and segregated schools would be more difficult to show than under the hindsight approach. As a consequence, courts would have placed more emphasis on the maintenance of strict racial neutrality in the future than upon remedying the effects of the segregation of the past. Since that was the approach found to be so ineffective in integrating the schools in the years preceding *Green*, the Supreme Court in *Swann* had no alternative but to prefer the broader state action test. Thirdly, before *Swann*, the argument had been advanced that any assignment of pupils based upon race is a violation of the equal protection clause. Proponents of this position pointed out that pupil assignment policy based upon race would subject white students to compensatory discrimination,[28] a prospect that has been opposed bitterly by white parents who do not want their children to attend inferior schools to atone for the de jure segregation of the past.[29] Nevertheless, since *Green* rejected the notion that the equal protection clause is merely a prohibition against the use of race as a criterion for classification, the validity of compensatory discrimination has been an open question. In *Swann*, the Supreme Court had its first opportunity to deal with the issue[30] and the Court upheld the assignment of students on the basis of race as within the remedial powers of the district courts.

As a result of the doctrinal advances in *Swann*, most metropolitan

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Wellington, *The Constitution, The Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961).

28. McAuliffe, *School Desegregation: The Problem of Compensatory Discrimination*, 57 VA. L. REV. 65, 87 (1971); *see* Bickel, *Desegregation: Where Do We Go From Here?*, THE NEW REPUBLIC, Feb. 7, 1970, at 20.

29. McAuliffe, *supra* note 28, at 83-91. The author uses the vivid example of 2 student neighbors, one black and the other white. By refusing to allow the white student to enter the same neighborhood school that his black neighbor attends, the courts are said to have unjustly discriminated on the basis of race, which is a denial of equal protection of the laws.

30. The result was presaged in United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969), in which the Court upheld a district court order establishing a racial ratio of faculty members throughout the entire school system.

school systems in the country were subject to more sweeping desegregation orders than ever before.[31] Unfortunately, it appears that the Supreme Court in *Swann* handled the problem of implementation guidelines for the lower courts in the same ineffective fashion that it did in the *Green* and *Alexander* decisions. While the Court was commendably attentive to the school children's safety requirements and the desirability of avoiding unreasonably long bus trips to and from school, it failed to appreciate the possible economic burden that a massive busing order could create or the intense political opposition it could arouse, both of which could make implementation much more difficult. Another consideration that the *Swann* Court seemed to have overlooked stems from the situation in many larger cities, in which the public school system is predominantly black while the surrounding suburban school systems are almost all white. Under those particular circumstances, a busing order applicable to the separate school systems could not succeed in eliminating the racial imbalance unless some way could be found to bus students in the all-white suburban schools to schools in the inner city and vice versa.

III. The Bradley Decision

Bradley v. School Board,[32] a 1972 decision by the federal district court situated in Richmond, Virginia, is the most recent attempt to apply the *Swann* principles to a metropolitan area encompassing more than one school district. Judge Merhige's task was particularly difficult in this case, since the predominantly black Richmond school system presented remedial difficulties not encountered in *Swann*. Therefore, in arriving at a decision the court had the double problem of deciding what the *Swann* decision in fact had held and then of extending its rationale to questions that, for all practical purposes, were still open. A brief summary of the facts will illustrate what the Court faced. In 1969 the population of the public school system of Richmond was 70.5 percent black. In September of 1970, the Richmond school system annexed an almost all-white area, thereby lowering the black population ratio to 64.2 percent. Prior to the annexation, the enrollment of white students in the Richmond school system had decreased from 20,259 in 1954, the

31. The impact of the *Swann* decision was felt greatly in the metropolitan areas. The school boards were then under a duty to undo the attendance zones created by segregated housing by transporting large numbers of students to create racially balanced schools. *Swann* indicated that the neighborhood school attendance patterns used by many Northern schools would have to be ahandoned if the dual school system in the metropolitan areas was the result of past or present discriminatory practices.

32. 338 F. Supp. 67 (E.D. Va. 1972).

year of the *Brown* decision, to 12,622 in 1969. The surrounding counties of Chesterfield and Henrico had increased their white student population during this same period by a figure corresponding to the total white student decline in Richmond. After the annexation, instead of a projected enrollment of 20,259 white students, only 17,259 actually enrolled. The following year, white enrollment fell further to 13,500. In contrast to the sharp decline in enrollment among whites, black enrollment in the Richmond school system doubled from 15,598 in 1954 to 30,785 in 1971.[33] As a result, the Richmond school system became predominantly black while the suburban schools in Henrico and Chesterfield counties became over 90 percent white.[34] In explanation of the school attendance figures, demographic studies of Richmond indicate that the all-black inner city is encircled by transitional neighborhoods from which whites are moving and into which blacks are moving.[35] While the population shifts between the city and suburban counties during the past ten years have been striking, it is important to note that the racial composition of the three jurisdictions viewed as a whole has remained constant—67 percent white and 33 percent black.[36] Indeed, the white-black ratio of the three jurisdictions has not changed since 1920. Taken together, these facts suggest that what has occurred in the Richmond metropolitan area, which includes the adjacent counties of Henrico and Chesterfield, is the realignment of a basically stable population group. There is apparently no evidence to suggest either an exodus of whites or a massive infusion of blacks.

The instant desegregation suit, involving numerous issues,[37] had been before the court for several years. Plaintiffs'[38] theory of action was

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33. *Id.* at 185.

34. *Id.* For the school year 1970-71, the Henrico County School system was 91.87% white with a total pupil population of 34,470. The Chesterfield County system for the same period was 90.5% white with a total student population of 23,754.

35. *Id.* at 72-74, 212-14.

36. *Id.* at 185. This constant racial proportion takes into account the total student population increase from 82,761 to 106,521.

37. Previously reported matters in the instant case can be found in 325 F. Supp. 828 (E.D. Va. 1971) (adoption of desegregation plan for Richmond utilizing busing); 53 F.R.D. 28 (E.D. Va. 1971) (motion for counsel fees denied); 324 F. Supp. 456 (E.D. Va. 1971) (motion denied to prevent school construction during pendency of the suit and denial of plaintiffs' motion to implement plan at mid-year); 324 F. Supp. 439 (E.D. Va. 1971) (motion to recuse denied); 324 F. Supp. 401 (E.D. Va. 1971) (motion to dismiss denied); 324 F. Supp. 396 (E.D. Va. 1971) (motion for 3-judge district court denied); 317 F. Supp. 555 (E.D. Va. 1970) (court approved a freedom-of-choice plan primarily to ensure the opening of school for the fall semester).

38. Plaintiffs, black students in the Richmond school system and the School Board of Richmond, made almost identical motions for the consolidation of the Richmond, Henrico County, and Chesterfield County school systems. The procedural approach taken by the City School Board in making this motion was the filing of a cross-claim against the state and county defendants. In

composed of three main contentions: first, that the pupils of the city of Richmond were attending a racially identifiable school system when examined in conjunction with the entire Richmond metropolitan area, which includes the counties of Henrico and Chesterfield;[39] secondly, that past discriminatory acts by state and local officials[40] created and helped to perpetuate a dual school system that has denied members of plaintiffs' class an equal educational opportunity;[41] and thirdly, that the continued maintenance of the dual school system is a violation of the equal protection clause of the fourteenth amendment.[42] Accordingly, plaintiffs moved to consolidate the public schools of Richmond, Henrico County, and Chesterfield County in order to create a unitary, nonracial school system. In response to that motion, the court declared that the duty to take all reasonable steps to meet the unitary standard was not to be limited by school district boundaries if they were being maintained by state and local authorities for the perpetuation of a dual school system. Therefore, by disregarding the divisional lines separating the school systems under attack, the court found that a dual school system existed within the Richmond metropolitan area and ordered the consolidation of the Richmond, Henrico County, and Chesterfield County school districts for the purpose of providing the metropolitan area with a nonracial, unitary school system.

IV. Analysis of the Court's Reasoning and Impact of the Decision

A. The Court's Legal Reasoning

As in most desegregation cases, once the *Bradley* court had linked the action of the state to the perpetuation of the dual school system, the final result was inevitable. The court was under a duty to assert its broad equitable powers under the fourteenth amendment to fashion the appropriate remedy. In his findings of fact and conclusions of law, Judge

response to a motion to dismiss the cross-claim, the court upheld this cross-claim as within the constitutional obligation of the school board to provide its pupils equal educational opportunities. 338 F. Supp. at 229-30. *See also* Brewer v. Hoxie School Dist. No. 46, 238 F.2d 91 (8th Cir. 1956). At the time of this motion, the Richmond school system was operating under a court-ordered plan which required extensive busing but the system had a variation of racial composition from a high of 57% white to a low of 21% white in the high schools. Bradley v. School Bd., 325 F. Supp. 828, 835 (E.D. Va. 1971).

39. 338 F. Supp. at 79.

40. In the instant case, defendants are members of the Virginia State Board of Education, the State Superintendent of Public Instruction, members of the school boards of Henrico and Chesterfield counties, and the City Council and School Board of the City of Richmond.

41. 338 F. Supp. at 79-80.

42. *Id.*

Merhige carefully followed the approach employed in *Swann*. Two aspects of the opinion, however, set *Bradley* well apart from prior desegregation cases: its rationale for concluding that there was state involvement in making the school systems of the Richmond area predominantly one-race systems and its consolidation order affecting, as it did, the school systems of three traditionally separate governmental units.

Before *Bradley*, the duty to provide a nonracial, unitary school system had never been construed to require the invasion of a school district's autonomy. The difficulty facing the court in justifying the merger of the three school districts was artieulating its result in terms of the equal proteetion analysis adopted by the courts in most prior school cases. To hold that for school desegregation purposes the three political divisions were a single unit, the court could not look to the official acts of the loeal school boards even though the Supreme Court has specifically placed the duty to desegregate on them. The school boards could not be held accountable for the racial composition of schools outside their jurisdiction. Nor could they be held responsible for the existence or placement of the boundary lines separating their respective districts. Thus, the court was compelled to trace the responsibility for the predominantly one-race school systems to their origin at the state rather than the local level. Viewing the local school boards as administrative arms of the state government,[43] the court observed that state government at the state level had the power to determine the boundaries of the local school systems and to guide their operation. In the judgment of the *Bradley* court, the failure of the Richmond, Henrico County, and Chesterfield County school boards to achieve racial balance was, in reality, the failure of the state government to draw the school district boundaries in a manner consistent with its duty to create unitary, nonracial school systems. Thus, by taking into account the legal relationship between organs of local and state governments, Judge Merhige was able to isolate the prerequisite state action for ordering the consolidation of the school systems in the Richmond metropolitan area. The evidence clearly supports the court's findings on this point: the local operating funds of the public schools in Virginia were derived in large measure from the state;[44] the state board held separate conferences for black faculty members;[45] and the State Department of Education had

43. "[T]hey [political subdivisions] have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions . . . . and the 'number, nature, and duration of the powers conferred upon [them] . . . and the territory over which they should be exercised rests in the absolute discretion of the State.'" Reynolds v. Sims, 377 U.S. 533, 575 (1964).

44. 338 F. Supp. at 92.

45. *Id.* at 94.

the power, which had never been invoked for desegregation purposes, to consolidate school systems across county lines.

Aside from the court's novel state action analysis, the State Board of Education's statutory power[46] to consolidate into one school district areas comprising two or more political subdivisions provides an additional legal justification for disregarding the school district boundary lines—a justification that may reduce the significance of the decision itself. This power to consolidate two or more school districts could be exercised under the statute without local school board consent.[47] In essence, the consolidation of the school districts in *Bradley* was an action that had been expressly authorized by state law,[48] and it is accurate to suggest that the court went no further with its order than the State Board of Education could have gone.[49] Nevertheless, the presence of the statute can only cast doubt on the general applicability of the court's state action analysis. If a statute similar to that in *Bradley* is characterized as essential to a finding of state action by other courts, the *Bradley* decision would probably have substantial impact only in those states having similar enactments. In those cases, the state could circumvent *Bradley* easily by repealing its consolidation statute as the Virginia legislature did after state and county school officials were joined in the Richmond suit. In states having no law authorizing the consolidation of school districts, an order formulated on the *Bradley* prototype could be attacked as exceeding the court's fourteenth amendment remedial powers and, given the present political climate, such an attack could probably succeed. On the other hand, if the Virginia consolidation law is viewed as merely one of many factors that the *Bradley* court examined in arriving at its state action determination, the decision could well produce dramatic repercussions in many metropolitan areas.

As a final justification for the consolidation order, the court in *Bradley* advanced the proposition that under the equal protection clause the federal courts have always had the power to fashion such remedies even if exercise of the power necessitated judicial intervention into the workings of state and local government.[50] Hence, the court dismissed the argument raised by defendants that state subdivisional boundaries are

46. *Id.* at 92.

47. VA. CODE ANN. § 22-100.1, to -.2 (1950), *as amended* VA. CODE ANN. § 22-100.1, to -.2 (Supp. 1971).

48. In practice, however, no districts had been combined unless the districts involved had requested the consolidation.

49. The repealed Virginia statute had read as follows: "The State Board shall divide the State into appropriate school divisions, in the discretion of the Board, comprising not less than one county or city each, but no county or city shall be divided in the formation of such division." VA. CODE ANN. § 22-30 (1950).

50. *Cf.* Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963);

inviolable.[51] Crucial to the court's reasoning in this regard were the Supreme Court's voting rights cases of *Reynolds v. Sims*[52] and *Gomillion v. Lightfoot*,[53] both of which ordered changes in state governmental structures to remedy equal protection violations. In *Reynolds*, the Supreme Court upheld a federal district court's reapportionment of the Alabama legislature and in *Gomillion*, it invalidated a city's boundary lines because they had been drawn to exclude virtually all black voters. Both *Reynolds* and *Gomillion* stand for the principle that, once a state acts affirmatively, it must act fairly to provide equal protection of the laws. On this point, *Bradley* closely parallels *Reynolds* and *Gomillion*. In the latter cases, the states provided the franchise for its citizens but failed to accord them equal voting power; in *Bradley*, the state provided a system of public education but failed to assure blacks of equal educational opportunity. In *Baker v. Carr*,[54] another voting rights case, the *Bradley* court found further support for its decision. In *Baker*, the state's original action was constitutionally valid. After many years, however, population shifts in Tennessee made representation in the state legislature disproportionate to the distribution of population among the legislative districts. When the Tennessee legislature failed to correct this inequality, the Supreme Court intervened and ordered reapportionment. In *Bradley*, the court accomplished much the same result, since it issued the consolidation order to remedy the inaction by the State of Virginia in the face of population shifts in the Richmond area that jeopardized the maintenance of equal educational opportunities in the public schools.

B. The Court's Policy Premises

The keystone of the *Bradley* decision's reasoning is the sweeping and controversial principle that integration is a prerequisite to achieving equal educational opportunity.[55] This principle is also manifested in the

Baker v. Carr, 369 U.S. 186 (1962); Atleson, *The Aftermath of Baker v. Carr—An Adventure in Judicial Experimentation*, 51 CALIF. L. REV. 535 (1963); Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. Chi. L. Rev. 673 (1962); McCloskey, *The Reapportionment Case*, 76 HARV. L. REV. 54 (1962); Pollak, *Judicial Power and "The Politics of the People,"* 72 YALE L.J. 81 (1962).

51. The court pointed out that the state had previously disregarded county lines and school district boundaries for school assignment purposes. For example, Cumberland County had provided tuition for white students to attend school in Powhatan and Prince Edward counties to avoid integration. Also, until 1965, Greene County bused its black students to an adjoining county because there was no black school in Greene County. 338 F. Supp. at 159.

52. 377 U.S. 533 (1964).

53. 364 U.S. 339 (1960).

54. 369 U.S. 186 (1962).

55. "The overwhelming evidence before this Court is to the effect that in a bi-racial com-

Brown I decision, which was grounded upon the finding that all-black schools are inherently unequal. Although the *Bradley* court was aware that the all-black schools in Richmond suffered from physical infirmities, it resisted the conclusion that an equalization of per capita educational expenditures would achieve equal educational opportunity.[56] As beneficial as the implementation of a system of equal funding might be, Judge Merhige intimated that it still would not remove the stigma from all-black schools, which he characterized as unequal per se.[57] One of the overriding considerations in *Bradley* was the thesis that social interaction among children of different races constitutes an essential aspect of the educational process in our multiracial society. If implemented in the context of a truly unitary school system, the concept could well produce enduring benefits for the entire community. Greater contact between children of different races during the formative stages of their personal and social development could serve to reduce racial stereotyping and encourage attitudes of tolerance and understanding toward all individuals in society. A forum would exist for the exchange of values and ideas between members of different races. Studies have shown that black students in schools having a white majority tend to achieve higher grades and absorb the broader occupational aspirations of white students.[58] White students, on the other hand, could develop an appreciation for black culture and an empathy for black concerns. Hopefully, through this process, racial tensions will not be an insoluble problem for future generations. Despite the controversy that *Bradley* may arouse, suggesting as it does that racial interaction is an essential element of a minority child's equal educational opportunity, the decision, in reality, requires that the public schools do no more than they have always done. In that sense, *Bradley* contemplates no radical departures. Public schools have always been the institution through which the national traditions and fundamental values have been transmitted to the nation's

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munity, as here, meaningful integration is an essential element of securing equality of education." 338 F. Supp. at 114.

56. In Serrano v. Priest, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), the California Supreme Court held that a public school financing system based upon local property taxes violated the equal protection clause because of the resulting disparities in school revenue. If the instant court had grounded its decision solely upon the unequal financial structure of the school districts, Judge Merhige's order would have been merely the ordering of equal funding rather than the more drastic busing order.

57. "[T]he Court finds, that the educational harm to children from racially separated schools in the area involved herein, is to the black child similar if not identical to the harm incurred prior to the *Brown* decision of 1954." 338 F. Supp. at 210.

58. M. WEINBERG, DESEGREGATION RESEARCH: AN APPRAISAL 87 (1970). *See generally* U.S. COMM. ON CIVIL RIGHTS, EQUALITY OF EDUCATIONAL OPPORTUNITY (Coleman Report).

children. Given the multiracial character of our society, it scarcely can be doubted that the public schools should try to inculcate upon the young the value of racial tolerance. Indeed, in this era, a child's socialization experience in the schools would be incomplete without it.

Another important policy question dealt with in *Bradley* was whether the court should exercise its power to counteract the effects of the segregated housing patterns in the Richmond area. Statistics indicate that in cities where court-ordered integration has taken place many white families have refused to enroll their children in the public school system.[59] These families apparently have been willing to bear the additional expense of either sending their children to private schools or of moving outside the school system boundaries, which in most cases entails a move to the suburbs. The white exodus, unfortunately, is part of a vicious circle. As more whites join it, pressure mounts on the remaining white families to leave also, until formerly integrated schools and neighborhoods have become resegregated.[60] The *Bradley* court's grand strategy was to curb this flight and eliminate the suburbs as havens from school integration by consolidating the suburban school systems with that of Richmond. It reasoned that consolidation accompanied by a comprehensive busing plan would make the primary reason for leaving Richmond—escaping integration—a futile endeavor, and would therefore result in a higher level of integration in housing throughout the city. The validity of this reasoning is at best questionable.[61] It is superficial in the sense that the court simply does not account for all the possibilities. Today, housing patterns are a function of numerous factors, many of them economic.[62] School integration, or the lack of it, does not appear to be the overriding determinant of residential location. Although the suburbs can offer a broader range of amenities, including convenient shopping, lower property taxes, and tolerable levels of air

59. Following the busing order in Nashville, Tennessee, for the 1971-72 school year, 1,200 white students left the metropolitan school system for adjoining counties and 2,400 students enrolled in private schools. Out of a total enrollment of 87,928 over 6,000 students dropped out of the metropolitan system. In the Nashville busing order the 5th and 6th grades were bused more heavily than any other grades and the corresponding drop-out rate in the metropolitan system was highest among the 5th and 6th grade pupils. This trend plainly suggests that the decline in enrollment of white students in the urban schools is in large part attributable to the busing order. Because the total drop in enrollment exceeded 6,000, the metropolitan school system lost $2 million in equalizing funds from the state. Figures are available upon request in the Division of Pupil Accounting, Records, & Transfers of the Metropolitan Public School System of Nashville, Tennessee. *See also Nashville Tennessean*, Feb. 25, 1972, at 17, col. 8.

60. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 136-37 (1970); *Bumpy Road in Richmond*, Time, Feb. 28, 1972, at 15.

61. One author has suggested that segregated schools might lead to a higher level of housing integration than integrated schools. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 77 & n.21 (1971).

62. *Id.* at 77 & n.20.

and noise pollution, the move to the suburbs is precluded unless the financial capacity of the family qualifies it to undertake the shift. Since a much larger numbcr of white families than black can afford to leave the city for the suburbs, the suburbs are generally predominantly white.

Another motive prompting white families to emigrate to the all-white suburbs is grounded in racial prejudice. The white family often leaves to escape feared racial violence and the disturbingly high crime rates associated with the predominantly black inner city. Moreover, many white familics unjustifiably anticipate that the violence of the ghetto will accompany the influx of black residents into formerly all-white neighborhoods. Unscrupulous real estate dealers capitalize on and promote this sort of racial fear through block-busting and panic sale techniques. Consequently, the formerly all-white neighborhoods are transformed rather rapidly into all-black neighborhoods. Since these forces behind the isolation of blacks in thc ccntral city have little to do with public school integration, the court's policy argument that consolidation of school districts will effectively solve the problem of segregatcd housing patterns seems tenuous at best.

Can the courts realistically be expected to reverse the exodus to the suburbs or to alter the desire of many whites to live in all-white ncighborhoods? Clearly, they cannot. The courts gencrally have been ineffective in attempts to resolve immediately problems rooted in long standing social custom. At the same time, the individual in this country has always rcsisted governmental intrusion into his personal affairs. The Suprcme Court's eighteen-year struggle to desegregate the public schools is a lesson on the practical limitations of seeking immediate reform in the social order through judicial mandate. In *Bradley*, the court seemingly ignored these historical realities, and thus substantial doubt exists that the consolidation order will have any present impact in terms of housing descgregation. While it probably realized that it could not successfully cffect immediate demographic changes, the court felt that the consolidation order could have some future impact on housing patterns. The socialization process that the court deemed so essential to an equal cducational opportunity ultimately could result in greater economic powcr for blacks and in reduced racial tensions. If these steps are achieved, housing integration would be much more likely to succeed. While the consolidation order was clearly supported by the court's legal analysis of state action and of the voting rights cases, the court was apparently willing to accept the present inconvenienccs forced upon the school children as the necessary cost for the possible future impact of the consolidation order on the desegregation of housing pat-

terns. Thus the consolidation order represents only an interim step toward the ultimate goal of housing integration.

V. BRADLEY IN PERSPECTIVE: THE SEARCH FOR ALTERNATIVES

The furor engendered, both nationally and in Richmond,[63] by the *Bradley* decision has been clearly disproportionate to the impact that the consolidation order will have on the Richmond community. The consolidation order requires only an increased busing of 10,000 students over the 68,000 already being bused under the present system. It does not require the purchase of additional buses, nor does it require any further expenditures.[64] Through the administrative adjustments necessitated by the consolidation order are relatively minor, the national publicity that accompanied the decision has provided significant impetus for national antibusing forces to seek legislative relief from court-ordered busing. In response to this groundswell of opposition, Congress has recently considered both legislation and the passage of a constitutional amendment to prevent the use of busing as a remedial device for desegregating the schools.[65] The President also has reaffirmed his opposition to busing by calling for a national moratorium against the issuance of new busing orders.[66] Because of the nation's truculent mood on this question, the use of busing as a means of desegregating the public schools is seriously threatened.

Although no desegregation plan yet devised integrates the schools as effectively as busing, the pressure of political opposition to it suggests that alternatives should be considered. One alternative, which permits retention of neighborhood schools and offers relief for inner city schools, is the decentralization of school board control. Recently, many articles and commission studies have concluded that decentralization in large urban areas would upgrade the quality of education for the urban

63. *E.g., No Place to Hide*, TIME, Jan. 24, 1972, at 38.

64. *The Busing Issue Boils Over*, TIME, Feb. 28, 1972, at 14.

65. N.Y. Times, March 14, 1972, at 39, col. 4; *The Busing Issue Boils Over*, TIME, Feb. 28, 1972, at 14; *See A Step Backwards*, TIME, March 6, 1972, at 25; *The Basics of Integration*, Wall Street J., Jan. 26, 1972, at 14, col. 1. In the recent straw ballot in the Florida presidential primary, 74% of the voters favored banning busing. N.Y. Times, March 15, 1972, at 32, col. 7. The same question posed in the Tennessee and Texas primaries resulted in 80% and 77% of the vote, respectively, against busing. The Nashville Tennessean, May 5, 1972, at 1, col. 3; Nashville Banner, May 8, 1972, at 1, col. 5.

66. In response to mounting public sentiment against busing, President Nixon has apparently taken the position that busing will not be required if the impoverished inner city schools receive adequate funding to upgrade the quality of the education that they offer. N.Y. Times, March 17, 1972, at 1, col. 8.

student.[67] This approach would place greater control of the neighborhood school in the hands of the neighborhood itself, thereby placing the central metropolitan school board primarily in a supervisory capacity. The need for decentralization appears greatest in ghetto areas where residents have little if any influence over the institutions that regulate their lives.[68] A neighborhood school board could provide greater flexibility to meet the exigencies of the individual school, serve a cathartic function by allowing the airing of local grievances, and grant ghetto residents control over at least one institution that helps shape the lives of their children. A prerequisite for successful implementation of decentralization is the state-wide adoption of a system of equal funding that would eliminate the inequities of present school funding systems which are based substantially or entirely upon local property taxes.[69]

Already adopted by a few states, this equal funding system would require the state to appropriate funds for a school system's entire budget on the basis of its per capita enrollment. Thus, the distinction between schools in the wealthy and poor areas of a state could be minimized, if not eliminated.

Although equal funding and local control represent another method of achieving what *Brown I* contemplated—equal educational opportunity—they do not ensure racial balance in the public schools to the extent that busing and consolidation would. The approach that equal funding and local control embody is embarrassingly similar in effect to the doctrine of "separate but equal."[70] Nevertheless, if the programs are implemented in conjunction with the careful drawing of school attendance zones and the fair selection of school construction sites, some integration, with its attendant social benefits, can be achieved. The most significant advantage of basing the educational system on equal funding and decentralization is the potential for restoring political calm. Perhaps at this stage of the long and bitter battle for equal educational opportunity, such a compromise represents the best that can be managed.*

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67. Note, *Urban School Decentralization: The Problem of the One and the Many*, 5:1 COLUM. J.L. & SOC. PROB. 137 (1969); Note, *School Decentralization: Legal Paths to Local Control*, 57 GEO. L.J. 922 (1969); Note, *New York City School Decentralization*, 3 PROSPECTUS 228 (1969).

68. Note, *School Decentralization: Legal Paths to Local Control, supra* note 67, at 1055-57; Note, *New York City School Decentralization, supra* note 67, at 228-29.

69. *Cf.* note 56 *supra* and accompanying text.

70. Plessy v. Ferguson, 163 U.S. 537 (1896).

* Since this comment was prepared for publication, the United States Court of Appeal for the Fourth Circuit has reversed the *Bradley* decision. The court held that the district court had exceeded its remedial powers under the fourteenth amendment, and that, absent a finding that school district boundaries were drawn to further racial segregation, courts must defer to the reserved powers of the states. Bradley v. Richmond School Bd., 40 U.S.L.W. 2813 (June 5, 1972).