May 1971

Swann v. Charlotte-Mecklenburg Board of Education: Roadblocks to the Implementation of Brown

J. W. Montgomery III

Follow this and additional works at: https://scholarship.law.wm.edu/wmlr

Part of the Civil Rights and Discrimination Commons

Repository Citation

Copyright © 1971 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository. https://scholarship.law.wm.edu/wmlr
NOTES

SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION:
ROADBLOCKS TO THE IMPLEMENTATION OF BROWN

A sextet of cases currently before the Supreme Court of the United States presents for decision the question, "Does the Constitution require racial balance in the public schools?" The answer to this question may place the Charlotte-Mecklenburg Board of Education case in a position of social and historical importance equal to that of its harbinger, Brown v. Board of Education.²

Brown found forced segregation in public education to be a denial of the fourteenth amendment right to equal protection of the laws,³ and therefore struck down the "separate but equal" doctrine of Plessy v. Ferguson.⁴ In a companion case, the Supreme Court eliminated the application of "separate but equal" in the District of Columbia public school system as a violation of the due process clause of the fifth amendment.⁵ The Court emphasized in Brown that it is the affirmative duty of the states to end forced segregation as a matter of official policy, but failed to comment on whether the fourteenth amendment additionally commands integration.⁶ Therefore, imbalance caused by racially moti-


[As this Note went to press, the Supreme Court announced its decision in the case. Swann v. Charlotte-Mecklenburg Board of Education, 39 U.S.L.W. 4437 (U.S. April 20, 1971). Chief Justice Burger's opinion for the Court did not resolve all of the issues raised by the case and discussed herein. Swann, at best, has heightened the confusion as to the applicability of constitutional requirements in the area of school desegregation nationwide. See note 99, infra.]


4. 163 U.S. 537 (1895). This case involved transportation facilities. The Court held the doctrine of "separate but equal" not to be a violation of the "due process" clause of the fourteenth amendment.


vated public policy is clearly impermissible, while there has been no concomitant duty to alleviate fortuitous racial discrimination. The distinction between segregation which must be eliminated and segregation which will be tolerated is traditionally made by an examination of its origins. De facto segregation resulting from good faith school zoning is permissible, but de jure segregation, resulting from past or present public policy, is impermissible.

When the courts find impermissible racial imbalance to exist, there is a panoply of available remedies including: gerrymandering of school zones, freedom of choice, pairing, grouping and school consolidation, and transportation of pupils. It is this last remedy, the transportation of pupils, popularly known as cross-busing, which has caused the greatest public debate and is the central issue in the Charlotte-Mecklenburg case. In discussing the availability of busing as a remedy for segregation, this note will be concerned only with the legal issues presented by the question and will leave for the courts the determination of the priorities to be given the sociological factors involved.

THE CONGRESSIONAL INTERPRETATION

Brown, and the desegregation cases which followed, were based upon the equal protection clause of the fourteenth amendment, which provides in pertinent part "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Congress is given the power of implementing the fourteenth amendment by virtue of section 5 thereof which provides, "... the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." In the exercise of its section 5 powers, Congress enacted the Civil Rights Act of 1964. Section 401(b) of that Act purports to define desegregation. "As used in this title ... (b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin,

---

10. Id. § 5.
but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."  

Section 407(a) further provides:

Whenever the Attorney General receives a complaint in writing ... to the effect that ... minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws ... the Attorney General is authorized ... to institute for or in the name of the United States a civil action ... for such relief as may be appropriate ... provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.  

The interpretation to be given the language in these two sections is crucial to the busing issue. It appears from a literal reading of them that Congress intended to preclude the possibility of massive cross-busing as a means of achieving desegregation. This position has been rejected in at least two circuits as well as by the United States Department of Justice. In the amicus curiae memorandum filed by the United States in McDaniel v. Barresi, the Government asserted the position that "... Sections 401(b) and 407(a) of the Civil Rights Act of 1964 ... [apply] only to federal courts and officials, [and] do not purport to be prohibitions but are simply disclaimers of granting new power to federal authorities to deal with purely adventitious, de facto segregation." Listed as authority for this proposition were the Fourth Circuit Court of Appeals decision in Swann v. Charlotte-Mecklenburg Board of Edu-

12. Id. § 2000c-6(a).
16. Id.
cation, and the Fifth Circuit Court of Appeals decision in United States v. Jefferson County Board of Education.

The Fourth Circuit rejected the argument that sections 401(b) and 407(a) forbid busing on the grounds that "... this argument misreads the legislative history of the statute. Those provisions are not limitations on the power of ... courts to remedy unconstitutional segregation. They were designed to remove any implication that the Civil Rights Act conferred new jurisdiction on courts to deal with the question of whether school boards were obligated to overcome de facto segregation." But, in place of an analysis of the legislative history of the Act which purportedly supports this position, the Fourth Circuit of Appeals relied on the Fifth Circuit's analysis in Jefferson. Thus, the origin of this interpretation can be traced to that circuit. The court in Jefferson, after reproducing the definition of desegregation found in section 401(b), explained that the affirmative portion of the definition "down to the 'but' clause" describes the assignment provision necessary in a plan for conversion of a de jure dual system to a unitary, integrated system. "The negative portion, starting with 'but', excludes assignment to overcome racial imbalance, that is, acts to overcome de facto segregation."

The court justified this division and reconstruction of the language of section 401(b) on the grounds that an in-depth examination of the congressional hearings and debates disclosed that Congress equated the term "racial imbalance" with de facto segregation. If this interpretation is correct, the courts are justified in decreeing mass-busing to end de jure segregation. If, however, Congress did not intend to exclude de jure segregation from the protection of section 401(b), the effect would be to foreclose the use of mass-busing altogether.

The Government Position is Unjustified—Congress Intended No De Facto-De Jure Distinction

The Jefferson decision involved an extensive search of the legislative background of the 1964 Civil Rights Act; however, several controlling

17. 431 F.2d 138 (4th Cir. 1970).
20. Id.
21. 372 F.2d 836, 878 (5th Cir. 1966).
22. Id.
sections of dialogue were omitted and therefore the court's conclusion as to the meaning of section 401(b) appears erroneous. In order to properly understand the meaning of section 401(b) a complete examination of the legislative background is in order.

The measure that became the Civil Rights Act of 1964 was recommended to Congress by President Kennedy. He requested Congress to "... assert its specific constitutional authority to implement the 14th amendment" with respect to achieving desegregation in the public schools, first by accelerating the litigation process, and second by a program of technical and financial assistance to school districts "engaged in the process of meeting the educational problems flowing from desegregation or racial imbalance. . . ."

The first round of bills in the House and Senate introduced in response to the presidential request contained identical provisions. Title II of each, entitled "Desegregation of Public Education," contained five sections involved with the correction of racial imbalance. The Senate version floundered almost immediately, while the House bill was completely rewritten in committee. Finally, an entirely new measure was reported out of committee in which Title II was renumbered Title IV and in which every mention of "racial imbalance" was deleted. The justification for this deletion was that "[t]he committee failed to extend this assistance to problems frequently referred to as 'racial imbalance' as no adequate definition of this concept was put forward." Thus, at this point the committee was certainly not intending racial imbalance to mean de facto segregation.

On November 20, 1963 the Senate Judiciary Committee reported out section 401(b) which provided, "'Desegregation' means the assignment of students to public schools without regard to their race, color, religion, or national origin." On February 6, 1964, an amendment to the bill was proposed on the ground that the bill as rewritten by the Judiciary Committee had failed to eliminate racial balancing from its proposals for desegregation. The amendment, which provided that "'desegregation' shall not mean the assignment of students to public schools in order

24. Id.
26. Id.
29. Id. at 5.
to overcome racial imbalance...,” was accepted and section 401 (b) was adopted by the House.31

The Senate leadership rewrote the House bill and added a new proviso to section 407 (a),32 similar to the addition to section 401 (b). It has been argued that this new proviso was drafted to allay the fears of numerous opponents of the measure as a whole who had earlier suggested that, as it passed the House, it would permit the transportation of school children back and forth to achieve racial balance.33

Senator Russell of Georgia adopted a contrary position and moved to strike the newly added parts of sections 401 (b) and 407 (a) which provided that desegregation was not to mean overcoming racial imbalance. He argued that the deletion would eliminate the sectional aspects of the bill and would give the Attorney General authority to integrate outside the South. He asserted that the questioned proviso, if included, would render the courts powerless to deal with de facto segregation in the North.34 Two days later, Senator Humphrey attempted to explain Title IV so as to assuage Senator Russell’s doubt and to “soothe fears that Title IV might be read to empower the Federal Government to order the busing of children around a city in order to achieve a certain racial balance or mix in schools.”35

31. Id. at 2280, 2285.
32. 110 Cong. Rec. 11926 (1964):

[P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

35. Id. at 12714:

Next, changes are made to resolve doubts that have been expressed about the impact of the bill on the problem of correcting alleged racial imbalance in public schools. The version enacted by the House was not intended to permit the Attorney General to bring suits to correct such a situation, and, indeed, said as much in section 401 (b). However, to make this doubly clear, two amendments dealing with this matter are proposed.

The first provides that nothing in title IV “shall empower any court or official of the United States to issue “any order” seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.” This addition seeks simply to preclude an inference that the title confers new authority
Shortly thereafter, Senator Byrd of West Virginia undertook to question Senator Humphrey further concerning Title IV. It is this section of the Congressional Record upon which the Jefferson court relied most heavily in justifying its interpretation of Title IV; but portions of this section which were omitted by the Jefferson court render its conclusion suspect. The Record discloses the following colloquy:

Mr. Byrd of West Virginia: Can the Senator from Minnesota assure the Senator from West Virginia that under Title VI [sic] school children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?

Mr. Humphrey: I do. I should like to make one further reference to the Gary case. . . .36

At this point the Jefferson court quotes Mr. Humphrey as saying, "...[I]t was decided to write the court's opinion into the proposed substitute." 37 The court then undertook a discussion of the holding in the Gary case to which Mr. Humphrey had referred. "The thrust of the Gary case was that if school districts were drawn without regard to race . . . those districts are valid even if there is racial imbalance caused by discriminatory practices in housing." 38 Jefferson then rejoins the Byrd-Humphrey colloquy with Mr. Humphrey saying,

The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the schools. The natural factors, to deal with "racial imbalance" in schools, and should serve to soothe fears that title IV might be read to empower the Federal Government to order the bussing of children around a city in order to achieve a certain racial balance or mix in schools.

Furthermore, a new section 410 would explicitly declare that "nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not be affected by title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws.

Id.

38. Id.
such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of Section 4.80

Thus, the Record appears to support the Jefferson version of sections 401(b) and 407(a); however, the court omitted a portion of the dialogue which immediately followed Mr. Humphrey's statement, "I should like to make one further reference to the Gary case," and immediately preceded the quoted portion beginning with "The bill does not attempt. . . ." This omitted portion which goes directly to the heart of the Jefferson argument, reads:

This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race.40

It therefore is clear that Congress considered busing to be unconstitutional because it would require a classification based upon race. The salient points in Mr. Humphrey's analysis were that the Constitution prohibits segregation but does not require integration, that busing would effect integration by requiring a classification based on race, and that therefore busing was prohibited. Congress may or may not have intended to condone de facto segregation, but it clearly considered busing to achieve a racial balance, whether the imbalance was caused by a de facto or de jure situation, to be impermissible. Congress simply did not discuss the relevancy of the origin of the imbalance, and the allusion to Gary was not intended to introduce that issue; rather, Congress intended to eliminate the use of busing as a weapon against segregation from whatever source derived. Thus, when courts decree mass-busing

89. Id. See also 110 Cong. Rec. 12717 (1964).
40. 110 Cong. Rec. 12717 (1964). While Senator Humphrey's view that classification based upon race is impermissible may no longer be valid, it is clear that he understood all busing to be impermissible.
to achieve desegregation, they contravene the solemn declaration of Congress.

However, the argument that sections 401(b) and 407(a) of the Civil Rights Act of 1964 apply only to de facto segregation is also untenable for reasons other than those discussed above.

A DE FACTO-DE JURE DISTINCTION IS ILLUSORY

Segregation required by law is commonly referred to as de jure, while segregation which occurs fortuitously is termed de facto. In *Taylor v. Board of Education,* the court stated that one distinction between de facto and de jure school segregation was whether "race was [being] made the basis for school districting with the purpose and effect of producing a substantially segregated school." Under this definition, de jure segregation would be determined only with reference to actions of the school board, and therefore the definition is apparently more limited than the Second Circuit intended. The more traditional definition was given in *Moses v. Washington Parish School,* where the court said that "... de jure segregation means simply segregation... that is forced, purposeful separation of the races." The court defined de facto segregation as "the mere chance of fortuitous concentration of those of a particular race in a particular class or school... not accomplished in any way by the action of state officials," but added, "[M]ost situations of so-called 'de facto segregation' are, in reality, the result of intentional discrimination by state officials."

It is this last comment by the court in *Moses* which is worthy of further scrutiny. When, if ever, can segregation be found to occur without some form of state action?

Residential segregation emanating from legislative requirements was legal until 1917. Thus the inherently segregated nature of the older downtown areas of many of our larger cities can be traced to segregationist legislation of the past century. Private residential segregation was held constitutional by the Supreme Court as recently as 1926. It was not until 1948 that private residential segregation was declared ille-
gal in *Shelley v. Kramer*. History has shown that once housing patterns are established they are more or less permanent, and therefore, many pockets of segregation can be said to be products of private segregational practices prior to 1948. It is significant to note that the companion case to *Shelley* arose in Michigan. Therefore these segregationist policies existed in both the North and the South.

On July 7, 1970, Ramsey Clark, former Attorney General of the United States, testifying before the Senate Select Committee on Equal Educational Opportunities, said: "In fact, there is no *de facto* segregation. All segregation reflects some past action of our governments." This conclusion appears justified if one considers that practically every state outside the South at some point in history had either (1) mandatory segregation of public schools, (2) permissive segregation, (3) anti-negro voting laws, (4) miscegenation statutes, or (5) local practices reflecting racial distinctions as revealed by judicial decisions or statutes, regardless of state laws. Whether such state action required or merely permitted school segregation should be irrelevant if the result was segregation of the races. Even where the statutes were repealed prior to 1954, the pattern of segregation may have been so well established that its continued existence could only be classified as *de jure*.

Anti-black voting laws removed a large block of votes which potentially could have been mustered to push for desegregation statutes such as open housing and mandatory school integration. While miscegenation laws had no direct effect on school segregation, they evinced a state policy of "white supremacy." Viewed in this manner, it is difficult to conceive of any segregation which can be classified as purely *de facto*. Therefore, when the courts and the Justice Department make a distinction between the "types" of segregation and apply a congressional mandate to one type, but not to the other, they do so, it would appear, on untenable and fallacious grounds. The application of section 401(b) and section 407(a) should not rest on such unsound hypotheses.

47. 334 U.S. 1 (1948).
51. Id. at 1311-15. See also Freund, *Civil Rights and the Limits of Law*, 14 Buffalo L. Rev. 199, 205 (1964).
The Unequal Adherence to the Constitutional Duty

As stated above, Brown held state-enforced segregation in the public schools to be a denial of equal protection of the law. The rationale behind this decision involved the realization that "... segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law. ..." Thus the reasoning behind the Brown decision applies to all segregation, whether classified as de facto or de jure. In simple terms, this position is that Brown holds all segregated education to be unequal, and since education is provided and maintained by the state, its maintenance is a violation of the fourteenth amendment. Brown made no de jure-de facto distinction.

A survey of the circuits discloses that this reasoning has not been accepted by the lower federal courts. On remand, the District Court of Kansas expressly interpreted the Supreme Court opinion in Brown as holding, "Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color." The most recent decision in this circuit is Downs v. Board of Education of Kansas City. Therein, the court found that the fourteenth amendment prohibits segregation but does not require integration, and that there is no constitutional duty to change innocently determined school attendance districts even though such districts result in racial imbalance. Thus the Tenth Circuit will not interfere with innocent (de facto) segregation, while purposeful (de jure) segregation will be eliminated. This is true even though, per Brown, the effects of both are harmful to the children.

Perhaps the most controversial statement on the subject was made by a federal district court in Briggs v. Elliott, where it was said that "the constitution... does not require integration. It merely forbids discrimination." This position has been specifically repudiated in the

53. "Id. at 494.
54. Hyman & Newhouse, Desegregation of the Schools: The Present Legal Situation, 14 BUFFALO L. REV. 208, 223 (1964). Therein the possibility of this argument was recognized.
56. 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914 (1965).
57. "Id. at 998.
59. "Id. at 777."
Fourth\textsuperscript{60} and Fifth Circuits,\textsuperscript{61} the two circuits encompassing the so-called "Deep South" states. Thus the incongruity in application of the constitutional principles enunciated in \textit{Brown} begins to emerge. The Tenth Circuit, the place of origin of \textit{Brown I} and \textit{II}, reads those decisions as merely prohibiting purposeful segregation not "innocently arrived at," de facto segregation. The antithesis of this position is found in the decisions of the two southern circuits wherein the greatest racial discrimination in public education was practiced prior to 1954. The Fifth Circuit goes so far as to find that the Constitution requires integration.\textsuperscript{62} This may also be the position of the Third Circuit as presented in \textit{Evans v. Ennis},\textsuperscript{63} where the court speaks of a duty to integrate. But the majority view apparently adhered to by six and perhaps seven of the circuits, is that segregated school attendance districts, if innocently arrived at, are constitutionally permissible.

The principal case espousing this position is \textit{Bell v. School City of Gary, Indiana}\textsuperscript{64} which arose in the Seventh Circuit. There the school district was 95.7 per cent white and 4.3 per cent black. To achieve racial balance would have required the busing of 6000 students daily. In specifically approving \textit{Briggs v. Elliott}, the \textit{Bell} court found "... no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts [even if] the resulting effect is to have a racial imbalance in certain schools."\textsuperscript{65} The primary emphasis appears to have been placed on the good faith of the school board. It should be noted that this is the case which Mr. Humphrey referred to in discussing Title IV of the Civil Rights Act of 1964.

The Sixth Circuit decisions in \textit{Deal v. Cincinnati Board of Education I}\textsuperscript{66} and \textit{II}\textsuperscript{66} appear to adopt an even more relaxed test than \textit{Bell} for determining what conduct by the school board will be acceptable. In \textit{Deal I}, the court found no duty on the part of the school board to end racial imbalance which it did not cause "... nor is there a like duty to select

\begin{itemize}
  \item \textsuperscript{60} Walker v. County School Board, 413 F.2d 53, 54 (4th Cir. 1969).
  \item \textsuperscript{61} United States v. Jefferson County Board of Education, 372 F.2d 836, 862 (5th Cir. 1965); Singleton v. Jackson Municipal Separate School District, 348 F.2d 729, 730 (5th Cir. 1965).
  \item \textsuperscript{62} 372 F.2d at 845-46. "The U. S. Constitution, as construed in \textit{Brown}, requires public school systems to integrate."
  \item \textsuperscript{63} 281 F.2d 385 (3rd Cir. 1960).
  \item \textsuperscript{64} 324 F.2d 209 (7th Cir.), \textit{cert. denied}, 377 U.S. 924 (1963).
  \item \textsuperscript{65} Id. at 213.
  \item \textsuperscript{66} Deal v. Cincinnati Board of Education I, 369 F.2d 55 (6th Cir. 1966); Deal v. Cincinnati Board of Education II, 419 F.2d 1387 (6th Cir. 1969).
\end{itemize}
new school sites solely in furtherance of such a purpose.\footnote{67}{369 F.2d at 60.} Thus it appears that the Deal I court would find a school board’s actions to be in “good faith” even when the board adopts a plan of selecting new school sites in such a manner as to continue segregation. Such activity, however, would probably not meet the Bell standard of “good faith.” Deal II\footnote{68}{419 F.2d at 1387.} reiterated this position by finding no abuse of discretion on the part of the school board in the location of schools and announced an intention not to tell the school board where to locate its new schools in the future.\footnote{69}{Id. at 1393.}

The posture of the Second Circuit is less clear, but it appears to favor the Bell view. In Offerman v. Nitkwoski,\footnote{70}{378 F.2d 22 (2nd Cir. 1967).} the court referred to both Bell and Deal in saying that courts generally agree that school boards have no constitutional duty to eliminate bona fide de facto segregation. But the court held that it would be constitutionally permissible to exorcise de facto segregation if a community so desired.\footnote{71}{Id. at 24.} However, there is one Second Circuit decision, Blocker v. Board of Education,\footnote{72}{229 F. Supp. 709 (ED.N.Y. 1964).} which at least one commentator has interpreted as requiring an affirmative duty to integrate.\footnote{73}{Note, supra note 6, at 641.} Other commentators feel that the court did not determine that racial imbalance alone was unconstitutional,\footnote{74}{Hyman & Newhouse, supra note 54. See also A. Bickel, The Supreme Court and the Idea of Progress 131, 133 (1970).} and this appears to be the better view. What the case does appear to hold is that strict adherence to a neighborhood school policy during a period of change in population patterns which results in an almost totally segregated school system is improper. The case therefore stands as a warning to school boards of de facto segregated districts within the second circuit that inaction in the face of such segregation is educationally harmful and therefore unconstitutional.\footnote{75}{Hyman & Newhouse, supra note 54, at 226.}

In Barksdale v. Springfield School Committee,\footnote{76}{237 F. Supp. 543 (D. Mass. 1965).} the United States District Court for Massachusetts stated that it could not accept the position in Bell that only forced segregation was unconstitutional, nor could
it accept the idea that the Constitution does not require integration. However, this holding was reversed by the court of appeals. Thus, the First Circuit appears to adopt a position similar to that of the Seventh.

The Eighth Circuit decision handed down by Judge Blackmun in Kemp v. Beasley III appears to agree that the achievement of "desegregation" does not necessitate a racial balance in every school in the system.

Thus, from the above survey of nine circuits, it is apparent that there is little uniformity of opinion among them as to the mandate of Brown. The Fifth and, perhaps, the Third Circuits openly require integration. The Fourth Circuit in Charlotte-Mecklenburg has required mass-busing to alleviate de jure segregation. The Sixth and Seventh Circuits differ as to what action will be required of a school board faced with a de facto segregation situation, and the remaining circuits appear to adopt a position similar to one or the other of the latter two.

The decision which probably best illustrates the confused state of the courts is that of Downs v. Board of Education. There the court was dealing with a situation which clearly involved traditional de jure segregation. Until 1951, a Kansas statute required separation of the races in public education. After Brown II, in 1955, the school board had moved quickly to desegregate the schools with the result that only a few remained racially un-balanced. After discussing the Bell decision, the court announced,

We conclude that the decisions in Brown . . . do not require a school board to destroy or abandon a school system developed on the neighborhood school plan, even though it results in a racial imbalance . . . where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation.

Thus in an historically de jure segregation jurisdiction, the courts applied the traditional justification for allowing a de facto situation to stand.

77. Id. at 546. See also United States v. Jefferson County Board of Education, 372 F.2d 836, 874 (5th Cir. 1966).
78. Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965).
79. 423 F.2d 851 (8th Cir. 1970).
80. Id. at 857.
81. 336 F.2d 988 (10th Cir. 1964).
82. Id. at 998.
The Court of Appeals for the Tenth Circuit has, therefore, come full cycle, and has arrived at a conclusion which is not consistent with the historical fact situation presented to it. This is not to say, however, that the conclusion is unjustified, for the situation there presented did resemble de facto segregation. Rather, it illustrates the fact that the Tenth Circuit has abandoned the traditional distinction between de jure and de facto segregation and is now willing to classify a "segregated" situation on the basis of the immediate cause, in this case good faith school zoning, rather than on the basis of past statutory history.

In the Charlotte-Mecklenburg case, the court said that "constitutional principles dealing with [segregation] should be applied nationally." This is not the case, however, as the survey of nine circuits indicates. The circuits divide along two principal lines—those faced primarily with de jure segregation have reacted most strongly, requiring mass-busing or, as in the Fifth Circuit, reading Brown as commanding integration. The other circuits are faced primarily by segregation which they classify as de facto and differ only as to the remedial measures they will require the school boards to effect in dealing with the segregation. For the most part, however, such segregation is allowed to continue.

Congress attempted to define "desegregation" but its definition has been given a sectional nature by an interpretation which finds its antibusing provision to apply only in the case of de facto segregation. This interpretation eliminates one of the most potent weapons for dealing with the de facto situation.

It therefore appears that before any attempt can be made to deal with the problems of segregation, one must first come to grips with the distinction between de facto and de jure segregation. The problem then becomes the illusory nature of de facto segregation, for as Mr. Clark said, "... [T]here is no de facto segregation. All segregation reflects some past action by our governments."

**Supreme Court Precedent**

When the Supreme Court announces its decision in Charlotte-Mecklenburg it will not be painting on a clean canvas. In the time period between Brown II in 1955 and the 1971 Spring Term, the Supreme Court has rendered at least three decisions dealing with the desegregation problem which must be considered.

84. Note 49 supra.
In *Green v. County School Board*\(^5\) the Court was presented with a classic de jure segregation fact situation.\(^8\) New Kent is a rural eastern Virginia county and in 1968 it has approximately 1300 public school pupils of which 740 were negro and 550 were white. The county maintained only two public schools, one of which was all black, the other all white. The county’s buses travelled over-lapping routes carrying the students to their respective schools. Five months after suit was instituted in 1965, the county adopted a “freedom-of-choice” plan which resulted in no white transfers and only 15 per cent negro transfers.

The Court noted that “*Brown II* was a call for the dismantling of well entrenched dual systems...” \(^8\) In determining whether the school board had met that command by adopting a “freedom-of-choice” plan, the Court saying that it was relevant to consider that the county’s first step did not come until eleven years after *Brown I*, and ten years after *Brown II* directed the making of a “prompt and reasonable start.” This delay was viewed as a deliberate perpetuation of the unconstitutional dual system.\(^8\) Upon this determination, the Court issued its often quoted instruction, “The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.” \(^8\) This language has provided the justification for the most recent round of attacks on de jure segregation.

*Alexander v. Holmes County Board of Education*\(^9\) echoed this command by stating that “. . . a standard of allowing ‘all deliberate speed’ for desegregation is no longer constitutionally permissible.” \(^9\) But the most important language in *Alexander* is that defining a unitary school system as one “within which no person is to be effectively excluded . . . because of race or color.” \(^9\) *Carter v. West Feliciana Parish School Board*\(^9\) reaffirmed this position by charging every school board with the duty to terminate dual systems at once and thereafter to operate only “unitary” school systems.

\(^85\) 391 U.S. 430 (1968).
\(^86\) By constitution and statute Virginia required segregation in the public schools. VA. CONST. art. IX, § 140 (1902); VA. CODE ANN. § 22-221 (1950).
\(^87\) 391 U.S. 430, 437 (1968).
\(^88\) Id. at 438-39.
\(^89\) Id. at 439.
\(^91\) Id. at 20.
\(^92\) Id.
In *Northcross v. Board of Education*, the Court of Appeals for the Sixth Circuit had found that a unitary system existed and therefore held *Alexander* to be inapplicable. The Supreme Court reversed, holding that the appellate court was premature in its judgment on the grounds that the school board had not complied with all of the district court directives. On remand, the district court found no constitutional obligation to transport pupils to overcome a racial imbalance, thus remaining in line with the traditional Sixth Circuit position represented by the *Deal* decision. Therefore, it would appear that the "work now" requirement of *Green* and the "unitary school" requirement of *Alexander* are primarily aimed at southern de jure segregation, and will not be applied to northern and western "de facto" segregation.

**Conclusion**

In its resolution of the *Charlotte-Mecklenburg* case, the Supreme Court will have to deal with the three issues discussed above: The intent of Congress, particularly the Civil Rights Act of 1964, sections 401(b) and 407(a); the meaning and validity of the terms de facto and de jure segregation; and the controlling precedents previously established by the Court itself. It appears the final determination will of necessity be a variation of one of the three following alternatives.

The Court may render a decision very similar to the opinion of the appellate court in *Charlotte-Mecklenburg*. This would require a finding that sections 401(b) and 407(a) of the Civil Rights Act of 1964 were designed to protect northern de facto segregation but were not intended to limit the power of the courts to deal with de jure segregation. The de jure-de facto distinction would necessarily have to be retained in order to support this interpretation of the Civil Rights Act. Correspondingly, *Brown* would have to be read as requiring an end only to state-enforced segregation thus preventing northern "de facto" segregation from falling within its ambit. By adopting these interpretations, the Court would be free to order massive busing in the South under the rationale of *Green* and *Alexander*. The only plans which could possibly meet these standards would be those which rely heavily on the massive busing of students. By the same token, de facto systems would be ex-

---

empt from such requirements as they have, by definition, already achieved “unitary” systems.

There are several conceptual weaknesses inherent in this position. Congress did not intend to exempt de jure segregation from its ban on busing. To say that it did, is to misread the record. This, however, need not be fatal. The Court may invalidate those portions of the Civil Rights Act of 1964 which attempt to prohibit busing on the ground that Congress's power under section five of the fourteenth amendment is limited to adopting measures to enforce the guarantees of the amendment but grants Congress no power to restrict, abrogate, or dilute them. To eliminate busing as a weapon is to restrict the guarantees of the fourteenth amendment.

The most objectionable premise in this alternative is the assertion that Brown intended to terminate only state-enforced segregation. As seen before, Brown said, “Segregation of white and colored children in public schools has a detrimental effect upon the colored children [and today] . . . education is perhaps the most important function of state and local governments.”

7 To eliminate busing as a weapon is to restrict the guarantees of the fourteenth amendment.

99. [It appears that the Supreme Court decision in Swann v. Charlotte-Mecklenburg Board of Education, 39 U.S.L.W. 4437 (U.S. April 20, 1971), has roughly approximated this alternative. The Supreme Court announced that its “... objective today remains to eliminate from the public schools all vestiges of state-imposed segregation,” thus adopting by implication a de facto-de jure distinction. The underlying conceptual and theoretical weakness of this position is apparent in the sentence which followed, wherein the Court said, “Segregation was the evil struck down by Brown I as contrary to the equal protection guarantees of the Constitution.” Thus, the Court has correctly interpreted Brown I as finding all segregation intolerable, but has emasculated this interpretation by rendering a decision concerned only with “state-imposed segregation.” The meaning of “state-imposed segregation” was clear in 1954 because certain states by statute required separation of the races in public education; the term is viable today when the courts are confronted by recalcitrant school boards like that of New Kent County, Virginia, in the Green decision. But for the majority of school attendance districts, the term “state-imposed segregation” is without the specificity necessary to bring an effective end to the harm of segregation. Unfortunately, there-
The opposite position to the one hypothesized above would find the Supreme Court reading the Brown decisions in conformity with the Fifth Circuit view, that is, as requiring integration. Such a position would certainly by-pass any Court-Congress confrontation over the meaning of desegregation. Although Congress might interpret desegregation as not including busing, once the Court finds an affirmative duty to integrate, all concern for desegregation would become obsolete. The greatest obstacle to this position, aside from any political repercussions, would be that of enforcement. The school systems would be thrown into a state of confusion much like the present condition of many state legislatures over the voting rights issue. If integration were constitutionally required, the problem of the proper racial proportions would arise, and allowable percentages of deviation would have to be established. Thus if a particular school attendance district contained a racial percentage of 70-30 then all schools within that district would be required to reflect an approximately similar make-up. The problems of "white flight" and the general tendency toward racial migration would keep the racial make-up of any school district in a constant state of flux, and therefore zones would have to be continually redrawn. The logical solution to this problem would be to determine the racial make-up based upon the contiguous economic area, for example the Virginia cities of Norfolk, Newport News, Hampton, and Virginia Beach, and to use this ratio as the base rather than the percentage composition within each individual attendance district. This approach would discourage "white flight." Parents would be forced to realize that if they intend to live and work in any particular area and send their children to public schools in that area, then they could not, by relocating their residence within that area, escape the impact of integration. All schools in the Norfolk, Newport News, Hampton, Virginia Beach grouping

In justifying their concern with only those "system[s] with a history of segregation," the Court said

We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.

In reviewing the judicial history of the civil rights cases, it appears that the Court has never granted certiorari to a case which did present this question. In view of the admitted implication of Brown I, the end of all segregation, one can only wonder when the Court will grant certiorari to a case which does squarely present this issue.]
would have very nearly the same racial composition. This could be achieved by a plan of transferring students between the cities to facilitate the balancing. The major problem with this proposal, however, is readily apparent. Some states, like Virginia, have statutes allowing consolidation of school districts between counties, but other states do not. Therefore, where consolidation statutes do not exist such a requirement might infringe on the states' concept of sovereignty. Furthermore, contiguous economic areas are often multi-jurisdictional in composition, as in the Washington, D.C. area. A consolidation move here would pose serious constitutional problems.

The third alternative is more moderate, but it attempts to resolve the unanswered questions of the first alternative. Brown would be read as calling for an end to all types of segregation, whether it be of the southern de jure or northern de facto variety. No constitutional duty to achieve a uniform racial balance would be absolutely required, but the individual school boards would be required to racially balance to the maximum practicable extent. Section 401 (b) and 407 (a) of the Civil Rights Act of 1964 would be invalidated on the same grounds as described above—that they impermissibly limit the enforcement of the fourteenth amendment. Furthermore, the distinction between de jure and de facto segregation would be abandoned as illusory. In its place, a test of "good faith" would be adopted as a means of judging a school board's compliance with the mandate of Brown. This type of approach was foreshadowed by the concurring opinion of Chief Justice Burger in Northcross wherein he recognized that there are more than just two types of situations (de jure-de facto) with which the courts could be faced.

These school cases present widely varying factors: some records reveal plans for desegregating schools, others have no plans or only partial plans; some records reflect rezoning of school districts, others do not; some use traditional bus transportation such as began with consolidated schools where such transportation was imperative, others use school bus transportation for a different purpose and unrelated to the availability of a school as to which such transportation is not required.  

Therefore the remedies should be decided according to the fact situ-


ations presented. A “good faith” test was recognized to be workable in this area by Green. What was said therein will be directly applicable as a solution in Charlotte-Mecklenburg if the reference to “state imposed” is deleted.

There is no universal answer to complex problems of desegregation. There is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the system “at the earliest practicable date”, then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at least it places a heavy burden upon the board to explain its preference for an apparently less effective method.102

Extensive busing would be prima facie evidence of good faith, but the final determination of the degree of use of that remedy would remain in the hands of the individual school boards. If other effective means of compliance with Brown were available, the school board could rule out busing altogether. This approach would require the same test in all parts of the United States and would result in the uniform application of the constitutional duty, while simultaneously meeting the Alexander requirement of a “unitary” school system. The next step would then be the adoption of a “good faith” test for evaluating the movement toward a racial balance in the public schools.

J. W. MONTGOMERY, III