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from 1954 to 1979

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In 1954, the Supreme Court of the United States decided the landmark case of Brown v. Board of Education of Topeka.

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? ¹

According to Chief Justice Warren, it was this question that the members of the Court had to answer if the case of Brown v. Board of Education of Topeka was to be decided. A unanimous Court answered in the affirmative and in so doing they ushered in a new era in school desegregation.

The Brown case was decided nearly twenty-five years ago, but it appears that stability and clarity in education has yet to have been achieved. The decision is still being redefined and altered by the courts, legislatures, and chief executives of our federal and state governments. But it is the school authorities, district judges and other individuals who must really decide the true meaning of Brown. Did Brown mean that the Constitution prevented all types of school segregation or did Brown mean that the Constitution had placed an affirmative duty to integrate all public facilities? The true distinction is between the Brown ruling and the rationale associated with the Brown decision. The Brown ruling, that legally segregated dual school systems must be
abolished, looks to desegregation. The Brown rationale, that blacks educated in all-black classrooms receive inherently unequal education, looks to integration. It is the distinction between desegregation and integration that has forced the Supreme Court over the last twenty-five years to expound and clarify its position concerning equality in education. Two basic concepts are associated with the Brown decision. The first is that Brown requires only desegregation and not integration, and therefore, once the state-imposed segregation has been eliminated, the jurisdiction of courts ends. The second concept is that the Brown decision means equal educational opportunities for all. This concept can be defined in terms of tangible items, such as facilities and equipment, or in terms of intangible items, such as teaching abilities and aesthetic values.

The purpose of this thesis is multifold: to trace the history of school desegregation from 1954 to the present as presented through the workings of the Supreme Court; to examine the developments of legal doctrines and principles in the field of school desegregation as seen in the decisions handed down by the Supreme Court; to determine what the applicable legal principles formulated by the Supreme Court are today; and to examine the true meaning of Brown.

One of the major problems in discussing the history of school desegregation is to decide what constitutes equality in education. Equality can be defined through the words of Donald B. King:
The goal of equality is that each individual be viewed as an individual; that he be appreciated for what he is—with all his attributes of character, personality, and person—be they good or bad; that he be considered as a person with his particular intelligence, his culture, his identity, his self-realization and his potential; that he be viewed as a person without the negativness of discrimination and with all the positiveness which surrounds human dignity; that he be looked to as a like human being and as a like individual participating in life on this earth, a child of the creature of man.4

Adapting this definition to education, one can conclude that the government has an affirmative duty to eliminate inequalities in the public school system and perhaps to provide opportunities for the exercise of other fundamental human rights.5 Thus, equality in education should mean that, there being no difference between a black student and a white student, there should be no difference in the education they receive.

The Supreme Court has formulated desegregation decisions over the last twenty-five years on the basis of this concept, classifying various cases under equal protection remedies. Thus, the goal of an equal protection remedy, according to the Supreme Court, is to approximate as closely as possible those conditions which would have prevailed if there had been no constitutional violation.6 It is this principle, combined with the basic goal of equality in education, which must be remembered in evaluating the Supreme Court in school desegregation from 1954 to the present.

Before proceeding to the background cases prior to the Brown decision, it is appropriate to discuss the role of the
Supreme Court and its position in our society. The Supreme Court derives its power from Article III of the Constitution and can only decide cases which deal in law and equity matters. The Supreme Court has original jurisdiction in only a few types of cases, so that most of its cases come to the Court under its appellate jurisdiction. The Court cannot decide a case until it has been brought to its attention, and the Congress has the power to restrict certain types of cases from reaching the Court under the Court's appellate jurisdiction. The Supreme Court's power is relatively insignificant compared to that of the two other branches of the Federal government and it is dependent on the other two branches as well as the lower courts and the states to implement and enforce its rulings. The Court's real power comes from its ability to choose the cases it wishes to hear; the manner in which the Court will decide the case (i.e., per curium decision, summary judgment, or oral argument followed by full deliberations and opinions); and, of course, the decision itself. The Supreme Court will not decide any cases in which it would be giving an advisory opinion; its decision would not be final; the questions are political; there was no adversarial relationship between the two parties; or there was no real controversy to be decided. The Court can rely on three basic methods when deciding a case: the principle of Stare Decisis; statutory interpretation; or constitutional interpretations. The third method will be used only when the
other two do not meet the requirements of the case. The Supreme Court can also employ certain strategies, including: docket manipulation; procrastinating, reduction or expansion of the issue; incremental decision making; and the choice of a colleague to write the opinion. The Court is composed of nine individuals who have all been nominated by the President and confirmed by two-thirds of the Senate. A justice can serve on the Court as long as he wishes unless he is impeached by the Congress. There are no prerequisites for sitting on the Court, but most of the Justices have had some judicial experience. The most powerful member of the Supreme Court is the Chief Justice who presides over the secret conferences where the cases are debated and who can decide: how much time should be given for debate; when the votes should be taken; and who will write the opinions for a unanimous Court. Finally, there are two terms which must be defined if one is to understand the workings of the Supreme Court. The two terms are "judicial activism" and "judicial restraint." Judicial activism is the tendency by the Court to decide cases that are normally considered taboo and not to base its decisions on the principle of Stare Decisis. Judicial restraint is the tendency by the Court to decide cases which will have no foreseeable future reprisals, are considered justiciable, and are based on the principle of Stare Decisis. A justice advocating judicial restraint will defer issues to other governmental bodies and construe issues narrowly. A
justice advocating judicial activism will decide any issue and views the role of the Court in the broadest sense.
The school desegregation cases prior to Brown v.
Board of Education of Topeka should be briefly summarized. It is only against the background of these decisions that one can understand the basis for recent decisions and the degree to which the Supreme Court as an institution has advanced or hindered the establishment of equality in education.

The first case of major importance was Plessy v. Ferguson (1896). The state of Louisiana had a statute requiring the railroads to provide separate but equal accommodations for whites and Negroes. There were criminal penalties for the individual and the railroad officials if a violation occurred. Plessy violated the Louisiana statute and argued that the law was unconstitutional on Thirteenth and Fourteenth Amendment grounds and that he was being deprived of his right to "property." The Supreme Court ruled that Plessy had not been denied equal protection of the law as stated in the Fourteenth Amendment. Justice Brown wrote the majority opinion for the Court and made two astute observations. Using the reasonable man test, Justice Brown felt that the "laws requiring racial separation did not necessarily imply the inferiority of either race;" therefore, it was within the police power of the state or Tenth Amendment powers to enact the statute or statutes like this as long as the laws were reasonable and "good faith attempts to promote the public good
and not designed to oppress a particular class." He then proceeded to point out that:

The failing of the plaintiff's argument is that it insists in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. Justice Harlan dissented stating that the Constitution is "color blind" and, thus, equal protection of the laws had been denied Plessy. The significance of Plessy v. Ferguson is that if transportation facilities could be separated based on race then school facilities could be separated by race as long as they were equal.

For fifty-eight years, the Supreme Court's ruling in Plessy v. Ferguson provided the states the constitutional authority for segregation by race in separate but equal schools. However, until the 1930's, the "separate but equal" doctrine was a facade since the Supreme Court had not looked beyond lower court decisions to find out whether the segregated school facilities in question were, in fact, equal. The National Association for the Advancement of Colored People (N.A.A.C.P.) moved to test this doctrine in the late 1930's by attacking Southern segregation on the higher educational levels. The leaders of the N.A.A.C.P. correctly reasoned that an assault at this level, compared to one at the primary or secondary levels would be perceived as less threatening to the South. They also felt that their chances for success were
better there, since facilities for blacks in higher education were unquestionably unequal.12

The Court's first attempt to clarify the "separate but equal" doctrine came in the case of Missouri ex. rel. Gaines v. Canada (1938). Gaines applied to the Law School of the University of Missouri, and although he was admittedly qualified for admissions, he was denied entrance solely because of his race. Because there were no law schools for Negroes in Missouri, the state sought to fulfill its requirement to provide blacks with an education that was "substantially equal" by passing a statute that provided for the payment of tuition charges for Negro residents of Missouri at law schools in adjacent states. The Court ruled that if facilities were being provided for the legal education of white students within the state, equal facilities should also be provided for Negro students within the state.13 Chief Justice Hughes, delivering the majority opinion for the Court, concluded that a privilege had been created for white law students which was being denied to Negro law students because of their race and that it was "the obligation of the state to assure that equal protection of the laws was performed within its own jurisdiction."14

The next major triumph for the N.A.A.C.P. came in Sipuel v. Board of Regents (1948). Miss Sipuel, a Negro, was refused admission to the University of Oklahoma Law School, which was the only law school in the state, solely because of
her race. In a per curiam opinion, the Court ruled that Miss Sipuel was to receive a legal education provided by the state and that the Fourteenth Amendment precluded the state from denying her a legal education while it was being provided for others under the equal protection clause.\textsuperscript{15}

In 1950, the Court decided two cases which would culminate the school desegregation cases until 1954. In \textit{Sweatt v. Painter}, a Negro man had applied for admission to the University of Texas Law School and was rejected solely due to his race. The state court which tried the case allowed time for the Texas school authorities to set up a law school for Negroes in order to satisfy the "separate but equal" doctrine. After the authorities had fulfilled the requirements, the state court refused admission to Mr. Sweatt. The Supreme Court reversed the state court's decision on appeal. The Supreme Court ruled that the newly established law school was not substantially equal and, therefore, violated the equal protection clause of the Fourteenth Amendment. Chief Justice Vinson concluded, for a unanimous Court, that equality among law schools involves not only the physical facilities but the "intangibles" as well (i.e., quality of education, environment, personal connections, activities, reputation of the faculty, influence of alumni, etc.).\textsuperscript{16} In a companion case, \textit{McLaurin v. Oklahoma State Regents for Higher Education}, a different aspect of the same general question was decided. McLaurin was admitted to graduate school at the University of
Oklahoma after a state court had ruled in his favor. However, special restrictions attended his admission: when attending class, McLaurin had to sit at a special desk designated for "colored's only"; in the library, McLaurin had to sit in a special section of the building; and McLaurin had to eat his meals at a special time at a special table. The Supreme Court ruled that such restrictions, based solely upon race, produced inequality in educational opportunities violating the "separate but equal" doctrine. Chief Justice Vinson concluded for a unanimous Court that:

McLaurin's ability to study, to engage in discussion and exchange views with the other students, and, in general, to learn his profession, impairs McLaurin so that appellant is handicapped in his pursuit of effective graduate instructions . . . [and thus] . . . state-imposed restrictions which produce such inequalities cannot be sustained.

The Supreme Court had not upset the "separate but equal" doctrine in Plessy v. Ferguson, but it had opened a path toward future litigation involving school desegregation in the elementary and secondary school system. The Court would now accept the principle of "intangibles" in considering school desegregation cases. Thus, in the late 1940's and early '50's, there was a great volume of discussion, and even action on the path toward desegregation. It was a path that led toward Brown v. Board of Education of Topeka.
The fact that Brown v. Board of Education of Topeka was decided by a unanimous Court in 1954 seemed to many a remarkable accomplishment. What is even more remarkable is that the nine men who decided the case had come from a wide variety of backgrounds, under dissimilar circumstances, and had been nominated by three different Presidents over a fifteen year time span.

Five of the justices who took part in the deliberations on the Brown case were nominated by Franklin Delano Roosevelt. President Roosevelt's first nomination to the Court was Hugo Black, who would serve on the Court for over thirty-three years. Hugo Black's past record indicated that he would support segregation on the Court and was a pro-New Dealer. Hitherto a senator from Alabama and would develop into one of the more liberal justices ever to sit on the Court. Roosevelt next nominated his Solicitor General, Stanley Reed. Reed was also a pro-New Dealer and had argued the New Deal cases in front of the Supreme Court for President Roosevelt. Reed came from a more liberal background than Justice Black. In 1939, the Supreme Court lost two of the greatest Justices ever to sit on the Court. Roosevelt responded by nominating two men who would eventually represent opposing judicial philosophies. The first to resign was Justice Benjamin N. Cardozo who was replaced by Harvard Law
School professor Felix Frankfurter. Justice Cardozo's resignation was followed by the resignation of Justice Louis D. Brandeis, who was replaced by former Yale Law School professor, William O. Douglas. Justice Frankfurter emerged in time as one of the Court's leading members and believed in the principle of judicial restraint. In contrast to Frankfurter, Douglas emerged in time as one of the Court's leading liberal members and believed in the principle of judicial activism. In time, Douglas would make the liberal Black seem like a conservative. The last nomination submitted by President Roosevelt was Robert H. Jackson. Jackson had been President Roosevelt's Attorney General prior to his nomination.19

The only similarity among Roosevelt's nominations was that they had all supported New Deal policies. Two of the Justices had prior judicial experience since they were connected with the Justice Department. Two others came from the academic world. Justice Black was the only one of the five who had been directly involved with party politics and the Democratic party in particular. None of the five had ever served as a judge. Roosevelt contradicted himself, somewhat, by nominating Frankfurter who belonged to a heavily oppressed minority group, the Jews, and Black, who had been among the "oppressors," i.e., his membership in the Ku Klux Klan. Finally, only one of the five, Justice Frankfurter, would adhere to the philosophy of judicial restraint.
President Harry Truman nominated three justices who would eventually serve on the Court during the Brown decision. All three came from more conservative backgrounds than Roosevelt's nominees. Many Supreme Court observers suggest that Truman feared that the Court was becoming too liberal and, thus, he attempted to make it more moderate. Truman first nominated Harold H. Burton. Justice Burton was a bipartisan selection for prior to his nomination he was a Republican senator from Ohio. President Truman then nominated Tom C. Clark. Justice Clark was a conservative Texas Democrat and Truman's Attorney General. President Truman's last nomination to the "Brown Court" was Sherman Minton, a conservative Democrat who had been a U.S. senator from Indiana.20

In 1953, Chief Justice Vinson resigned from the Supreme Court and left behind a Court which was basically composed of two Southerners, a Jew, a doctrinaire liberal, a political workhorse, a Republican, two able bureaucrats and a conservative Republican president named Dwight D. Eisenhower. President Eisenhower nominated Earl Warren to succeed Chief Justice Vinson. Chief Justice Warren had been a moderate-liberal Republican Governor of California who once ran for Vice-President with Thomas Dewey. As it turned out, Eisenhower nominated someone who possessed judicial philosophies which were totally opposite to the President's opinions. Chief Justice Warren became one of the strongest libertarian
activists ever to sit on the bench as the Chief Justice and thus surprised everyone, including Eisenhower. 21

The nine men who heard the oral arguments, deliberated and eventually decided Brown v. Board of Education of Topeka: were nominated by three different presidents; had come from every geographical region in the United States; and were composed of three former senators, one former governor, two former college professors, and three former members of the Justice Department. The new chief justice was to preside over a Supreme Court with a combined total of ninety-six years of Court experience and write an opinion for a unanimous Court which would begin a new era in school desegregation in America.

In 1952, seventeen states and the District of Columbia had laws which required segregated school systems. Four additional states had statutes which allowed for segregated school systems at the discretion of the local communities. From the figures just mentioned, it was calculated that four percent of the students who attended schools in the United States in 1952 were attending school systems which were segregated by law. 22 It was in this year that the Supreme Court granted writs of certiorari to four cases dealing with the topic of school desegregation.

In this new cluster of cases, the validity of the "separate but equal" doctrine in Plessy v. Ferguson was itself under challenge. Although the four cases were of equal
importance, it was Brown v. Board of Education of Topeka which would be remembered. In Brown, Negro residents of Topeka had protested the policy adopted by the Topeka school board requiring that all the schools in the city be segregated according to race, above the sixth grade. A Kansas statute had authorized such action and it was the Kansas statute which was contested by the Negro residents. The Negro residents asserted that the statute deprived Negro children of equal educational opportunities which was in violation of the Fourteenth Amendment. The major constitutional question posed by the litigation was whether local governments could conduct school systems which segregated students by race. It was the plaintiff's contention that segregated schools were not equal and could never be equal as long as they were segregated.

The Court heard two rounds of oral arguments in the Brown case and it was the second round in which the new chief justice participated. In the second round of arguments, the litigants debated the meaning of the Fourteenth Amendment and the primary intent of its authors. Was the Amendment intended to abolish segregation in public schools at once or was its basic principle that Congress or the Supreme Court might abolish segregation when either branch saw fit to do so? Did the authors ever have school segregation in mind? According to John W. Davis, who represented the Southern states in the litigation, there was no relationship between the framers writing the Fourteenth Amendment and the intent of the framers
to abolish segregation in the public schools. It was Davis's contention that the power to segregate public schools was reserved to the states by the Tenth Amendment. Thurgood Marshall, who was representing the N.A.A.C.P., disagreed with Davis, arguing that it was the intent of the framers of the Fourteenth Amendment to abolish all forms of public segregation including education.²⁴

On May 17, 1954, the Supreme Court decided that segregation of public schools which was legally compelled by the state was unconstitutional and violated the equal protection clause of the Fourteenth Amendment. Chief Justice Warren wrote the opinion for a unanimous Court. He stated that the Court was not directly overruling the doctrine of "separate but equal" announced in Plessy v. Ferguson, but was advocating that the doctrine had no place in public education since "segregated educational facilities are inherently unequal."²⁵ Chief Justice Warren declared that:

To separate [children] from others of similar age and qualifications, solely because of their race, generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.²⁶

According to Warren, the minority race was no longer responsible for the feelings of being inferior, thus, rejecting the dictum of Justice Brown in Plessy v. Ferguson. The Chief Justice based his conclusion on evidence derived from the social sciences (i.e., sociology, anthropology, psychology, etc.).²⁷
In his opinion, Warren concluded that the legislative history of the Fourteenth Amendment was inconclusive. Therefore, it was up to the Court to interpret Constitutional principles in the context of modern society. The Supreme Court could "not turn the clock back" to a different era. The Chief Justice devoted a large portion of his opinion to tracing the history of the "separate but equal" doctrine and concluded that the "intangibles" would always prevent segregated schools from being equal (Sweatt v. Painter). 28

Employing a sociological rather than a constitutionally analytical argument, Warren also concluded that black students learn better when they are exposed to white students, "that separate facilities are likely to be tangibly unequal, despite appearances because only the presence of white children can persuade prejudiced school authorities to provide equal education," 29 and that racial practices can produce a strong stigma and perpetuate the feeling of racial inferiority. 30

Although the opinion in Brown did not follow the exact principle of Stare Decisis, it did evolve from earlier cases decided by the Court. These cases laid the groundwork for the Brown decision and had shown a national consciousness which would earmark the Warren Court as a leader of social change. In the historical context, the opinion written by the Chief Justice was very disappointing. Many persons faulted the opinion for lack of clarity, for its legal and historical arguments, for its alleged legislative rather
than judicial qualities, and for neglecting the important question of implementation.\textsuperscript{31} The last point was the most hotly debated and most Court observers concluded that implementation was postponed in order to temper public hostility. The Court's failure to establish implementation guidelines gave the South time to adjust to the revolutionary concept of \textit{Brown} and instead of reducing public hostility, increased it.\textsuperscript{32}

One final and perhaps unique interpretation of the \textit{Brown} decision came from Professor Weschler. Weschler concluded that the real, undeclared meaning of \textit{Brown} was that black children could attend the same schools as white children under the First Amendment and the right to association. Weschler contended that the state could not deny such freedom of association.\textsuperscript{33} It seems, however, the decision rested upon the Court's conclusion that equality was a basic human right which legally compelled school segregation violated and that for the first time in a class action suit dealing with the principle of equality in education, the Supreme Court considered not only the tangibles but the "intangibles."

In \textit{Bolling v. Sharpe}, decided the same day as \textit{Brown}, the Supreme Court ruled that segregated schools in Washington, D.C., were unconstitutional. The decision was not based on the Fourteenth Amendment, which applies only to the states, but on the due process clause of the Fifth Amendment. T
Court decided that the government could not show a satisfactory justification for segregation which therefore constituted a deprivation of liberty. Equal educational opportunities were thus required by both "due process" and "equal protection." But, whether "due process" and "equal protection" were interchangeable principles in such cases remained undetermined.

In the period between the decision in Brown v. Board of Education of Topeka and Brown v. Board of Education (Brown II), the membership of the Court changed, following Justice Jackson's death. President Eisenhower nominated John Marshal Harlan, who had previously worked as a New York lawyer. In his career on the high court, Justice Harlan would be classified as a consistent moderate conservative by most Supreme Court observers.

Justice Harlan joined the Court in time to participate in the oral arguments dealing with the question of implementation as related to the Brown decision. The Southern position in this debate was that the Supreme Court should not require a decree demanding immediate desegregation. It was felt that such a decree would provoke much Southern resistance, jeopardizing the public school system in the South and thus preventing desegregation. The N.A.A.C.P. retorted that "if the South says, 'Never', there is no need [for the Supreme Court to adopt] gradualism,″ urged the Court to set a
deadline for desegregation. It was felt by many that if the Court chose a flexible decree to implement desegregation it would bring about an enormous number of appeals, resulting not only in delays, but "uncertainties inherent in the bringing of a law suit." The Southern position also contended that the lower courts should be in charge of implementing desegregation since the lower courts would be in a better position to combat community pressure and initiate changes in local attitude. But the N.A.A.C.P. thought that the lower court judges should not be subjected to the responsibility of handling school desegregation because it was felt that this was a political issue.

Writing the decree was far more difficult for the Court than writing Brown I. The Supreme Court had to take judicial notice that desegregation of public school children involved in the class action suit of Brown was likely to create considerable problems, which would assume enormous proportions if the decision in Brown required the elimination of segregated public education throughout the South. It is understandable that the Supreme Court sought to facilitate the transition involving the uprooting of local customs, by avoiding the requirement of immediate desegregation since the Court, among other things, was concerned with its position as a judicial institution.

The decree in Brown II was written by Chief Justice Warren and he concluded that owing to their "proximity to
local conditions and the possible need for future hearings" the federal district courts would have the primary responsibility of supervising the transition from a dual public school system "to a system of public education freed of racial discrimination." The district courts would have at their disposal the "traditional equitable principles" and could consider the public interest when eliminating the obstacles to desegregation in a systematic and effective manner. The decree also required that the public school authorities make a "prompt and reasonable start toward full compliance" with Brown I and that the burden of proof is on the school authorities to justify any delay in school desegregation plans. The Court also declared that the district courts and the school authorities had the ultimate responsibility to ensure that the transition occur "with all deliberate speed."

In refining the Court's decree in Brown II, Chief Justice Warren defined equitable principles as being "characterized by practical flexibility and facility for balancing public and private needs." He also stated that acceptable reasons for delays would include:

... problems related to administration, arising from the physical conditions of the school plant, the school transportation system, personnel, revising of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools as a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

But the Chief Justice warned the school authorities and district courts that "the vitality of these constitutional principles
cannot be allowed to yield simply because of disagreement with them."46

Brown I had granted Negro school children the right to attend racially nonsegregated schools under the Fourteenth Amendment, but by resorting to principles of equity law, Chief Justice Warren had denied those children immediate relief by remanding the cases to the lower courts.47 Generally when a Court finds that there has been a constitutional violation, it will order an immediate end to the unconstitutional practice. But in Brown II, due to the complexities the Court anticipated would occur nationwide in the transition period, the Supreme Court required only that school authorities make a start toward strict compliance.48 It was thought that they needed additional time to protect the "public interest" but in protecting the public interest the school authorities had to be "consistent with good faith compliance at the earliest possible date."49 The effect of Brown II was to leave the enforcement of the judgment to private initiative, and failure of private initiative to materialize would result in having no one under any affirmative obligation to carry out the rule of constitutional law connected with Brown II. Therefore, success was equivalent to successful litigation and the attaining of a decree from a lower court upon the initiative of private individuals.50 But, whether "public interest" was in direct contradiction to private initiative and individual rights remained unclear.
Criticism of the Court's decree in Brown II was not long in coming. The most severe criticism came from Alfred Kelly:

The Court's resort to equity principles to enforce the Brown decision was both self contradictory and precedent breaking. On the one hand the Court had found that the plaintiff school children had a categorical right under the Fourteenth Amendment to attendance at racially nonsegregated schools. At the same time, the Court had done what it had never done before—by implication denied these same children a full and instant implementation of this constitutional right.\footnote{51}

Kelly did concede that, although in a legal sense the Brown decree was a bad opinion, in a pragmatic sense it was necessary and proper.\footnote{52} The Court was also criticized for its failure to define for the lower courts the scope of their duty to desegregate and for not dictating specific guidelines for implementing its decision.\footnote{53} Additional criticism came from constitutional historian Paul Murphy when he stated that the Brown II decree was a "masterpiece of legal contradiction" but concluded that the guidelines were an "acknowledgment of the cold fact that the cases called for a social revolution in the South and unless implemented carefully, it would produce massive retaliation against the very Negroes the decision was trying to benefit."\footnote{54} Robert L. Carter believed that the ratio decendendi of the Court's implementation qualification was compromised. Instead of there being major overall efforts to understand the Court's decision and to search rationally for implementation of the goal of equality, irresponsible and irrational resistance gained ascendency.\footnote{55}

But according to Donald King, "the Supreme Court could have cited other decisions which unequivocally affirmed the right
of the Courts of equity to withhold or deny relief if the public interest so demands.\textsuperscript{56}

But the real ramification of \textit{Brown II} was summarized by Richard Kluger and Jack Peltason when they concluded that:

\begin{quote}
The Supreme Court administers only the lower courts in the national judicial system, and it had given responsibility for the implementation of the ruling to them. The task of accomplishing the vast social change thus fell upon district courts and circuit courts of appeal. It fell upon "Fifty-eight lone\textsubscript{i} men," the federal judges in the South—"perhaps not since pre-revolutionary years when royal governors imposed imperial orders on colonels, have any American officials been placed in the center of such cross fire, a cross fire of such intensity that even the dignity of high office offers little protection."\textsuperscript{57}
\end{quote}

It was these men who, for the next ten years, would be in the center of the public's attention.
The Supreme Court in 1955 had hoped for gradual school desegregation. However, people living in the South and other parts of the country responded to the Brown I and Brown II decisions with a policy referred to as "massive resistance." From 1954 to 1968, the main task for the N.A.A.C.P. and other anti-segregation forces was to combat the various roadblocks set up by segregationists to maintain segregated schools. The basic question facing the Supreme Court during this time period was how the federal courts in the South would react to and interpret the Brown decisions. A southern district judge in 1955 answered the Supreme Court's question.

In the case of Briggs v. Elliot (1955), Judge Parker, the dean of U.S. District Court Judges, interpreted the Brown decisions to mean that school boards could not use race as a criterion for assigning students to public schools. According to Judge Parker, "the Brown holding simply was that a pupil who wishes to attend a public school cannot be denied admission on account of his race or color." Parker asserted that the Constitution "does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of government power to enforce segregation." These statements amounted to a shifting of the burden of proof for school desegregation to the blacks, who
would now have to prove that a refusal to admit a black student to a public school was a race-oriented decision. Parker is really voicing the distinction between desegregation and integration, a distinction the Supreme Court had vaguely made in Brown. Many people thought that desegregation was the only problem up until 1968. Where litigation was needed, this resulted inevitably from the fact that change depended on judicial action. If desegregation had been a legislative policy, perhaps, suitable administrative machinery could have managed the reforms. Thus, according to Judge Parker, there are limits to the judiciary's capacity to govern.

Judge Parker's opinion lends support to the conclusion that a major fault in the Brown decisions was that the Court's directions were not clear or explicit. How were the school authorities to determine how and when schools should be integrated? What constitutes a "prompt and reasonable start"? After an initial start has been made, how much additional time should be allowed to complete the task? What constituted a "good faith" start towards compliance? How much discretion did the district courts have, and what role should these courts play in the desegregation process? The answers to these questions would determine the result of desegregation in education.

Normally, after the Supreme Court decides a constitutional question dealing with a function reserved to the states, most states and litigants will put their houses in order
instead of waiting for additional litigation. But "the states of the old Confederacy have never pursued any such policy in the area of . . . [school desegregation]. . . . They have always depended on obstruction and defiance to preserve their old ways." The superintendent of the Topeka school system admitted that the school desegregation plan for Topeka "did not accomplish desegregation for the 1955-56 school years, but the judges were satisfied merely because a 'good faith' start had been made." The judges in the South, accustomed to trying individuals," now had to try an "entire white community for violation of a broad but unspecific constitutional interpretation." It is no surprise that the judges in Topeka were satisfied!

In 1956, pupil placement statistics showed the positive and negative effects of the Brown decisions. Washington, D.C. was completely desegregated. In West Virginia, Maryland, Missouri, Oklahoma, and Kentucky, desegregation had taken place in 40 percent of the schools. In Delaware, 25 percent of the public schools were desegregated, while in Texas 17 percent of the students were attending desegregated schools. In Arkansas and Tennessee only a small percentage of the schools were integrated. In the remainder of the Southern states there had not been one attempt to desegregate. In fact, only 700 school districts out of the 3,000 below the Mason-Dixon line had been desegregated. In contrast, "seven hundred school districts in the border and Northern states had taken steps toward integration . . . with only 2 percent doing so under court order."
These statistics were a good indication of the success of the "massive resistance" policy adhered to by the southern segregationists in their adherence to a segregated school system. The policy of "massive resistance" included various devices. Pupil-placement laws which were intended to enable local school boards to shuffle children among school districts so as to maintain segregation was one device. Repealing of compulsory school attendance acts which would allow parents to withdraw children from integrated public schools and acts which provided for indirect support of segregated-private schools through tuition payments to parents were other devices. "Freedom of choice" plans, defiance by political leaders and elected officials, defensive action by state legislatures, including attempts to punish civil rights attorneys (N.A.A.C.P. v. Button) were still other devices. Formulating of state sovereignty commissions to protect the sovereignty of the state from encroachment by the federal government, interposition doctrines which allowed a state to reject any mandate of the federal government deemed to be unconstitutional or beyond the scope of the delegated power due to its sovereignty, and nullification resolutions were the final devices.68

The N.A.A.C.P. and other advocates of desegregation were able to combat the policy of "massive resistance" by filing desegregation suits in the South. By 1956, the N.A.A.C.P. had filed more than fifty such suits.69 The
Supreme Court was unable to successfully combat "massive resistance" since the Court had become completely isolated as a political branch. The Congress and President Eisenhower had refused to endorse or systematically back up the decisions in Brown I and Brown II. As a result, school boards were under almost no legal or political pressure to desegregate. Southern blacks were themselves reluctant to pressure local officials for their constitutional rights for fear of physical violence or economic coercion. When private pressure failed, most Southern blacks could not afford to hire an attorney to represent them or endure the long delays which were inherent in these types of litigation.  

The policy of "massive resistance" achieved greater popularity and support through the "Southern Manifesto": a document published on March 12, 1956. One hundred and one representatives, including U.S. Senators and Congressmen and state representatives, from eleven southern states presented to Congress a statement which criticized the Supreme Court for the Brown decisions. The Brown decision, the Manifesto declared, was a "clear abuse of judicial power" with "no logical basis." The representatives went on to give notice that:

We pledge ourselves to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in the implementation. In this trying period, as we settle to right this wrong, we appeal to our people not to be provoked by the agitators and trouble makers invading our states and to scrupulously refrain from disorder and lawless acts.
It appeared that the scapegoat for the southern segregationists would now be the N.A.A.C.P. and the liberals from the North since they were the agitators and troublemakers.

In response to the "Southern Manifesto" and the overall situation in the South, Congress passed the Civil Rights Act of 1957. This law allowed for the establishment of a special Civil Rights Division within the Department of Justice, and the creation of a Federal Civil Rights Commission equipped with subpoena powers to compel witnesses to testify and produce records. The Department of Justice now had the authority to intervene in the name of the United States on the behalf of individuals in instances of actual or threatened violations of civil rights, such as the right to attend integrated schools. Federal district judges would now be empowered to issue injunctions against such real or threatened violations on the motion of federal prosecutors. Persons disobeying these injunctions could be fined or imprisoned for contempt by federal judges without jury trials. In reality, the 1957 Civil Rights Act allowed the federal government to have an equitable remedy in civil procedures.

Before the decision in Cooper v. Aaron (1958), three new members joined the Court, replacing Justices Minton, Reed and Burton. President Eisenhower nominated William Brennan who was an Associate Justice of the New Jersey Supreme Court and a Democrat with a reputation as a moderate-liberal. Eisenhower then nominated Charles E. Whittaker who was a Kansas City
lawyer who had sat briefly on the U.S. Court of Appeals. He was also a Republican with a moderate viewpoint. Potter Stewart was Eisenhower's last nomination and had previously sat on the U.S. Court of Appeals for the Sixth Circuit and was from Ohio. 74

A new and interesting policy had developed in the field of school desegregation by 1958. Basically, the policy was in line with the Supreme Court's new interpretation of the equal protection clause and resulted in dozens of suits being filed, largely in federal district courts, attacking specific aspects of the legal structure of school segregation. 75 It was this procedure that led to the first major challenge to the Brown decisions for the Supreme Court.

Events in Little Rock, Arkansas, dramatically illustrated the uses of massive resistance. Legislators in Arkansas responded to the Brown decision by engaging in a program to perpetuate segregation. The legislators passed an amendment to the state constitution requiring the General Assembly to oppose "in every constitutional manner the unconstitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the U.S. Supreme Court." 76 The legislature also passed a pupil assignment law relieving school children from compulsory attendance at racially mixed schools and laws creating state sovereignty commissions. Meanwhile, the Little Rock school
authorities had developed a plan for integrating the Little Rock public school system which was approved by a federal district court for the 1957 school term. The Arkansas Chancery Court responded by issuing an injunction barring the school board from desegregating the schools in Little Rock. The federal district court thereupon issued a writ barring the state court from issuing the injunction. This action provoked Governor Orval Faubus to order the state national guard to Little Rock to prevent desegregation.

President Eisenhower, upon hearing of the governor's action, commanded his Attorney General to obtain an injunction ordering Faubus to evacuate the state national guard from Little Rock. The federal district court granted the injunction and Eisenhower ordered federal troops into Little Rock to enforce the district court's ruling.

Meanwhile, the school board had appealed to the federal district court for postponement of the court-approved desegregation plan for two to two and a half years because of the "extreme public hostility" towards desegregation. Governor Faubus supported this action by dispatching units of the Arkansas National Guard to block the desegregation of local high schools. The school board contended that the actions of the governor and the legislature made it impossible to maintain a sound educational program with the black students in attendance. The board was granted a thirty-month postponement on the ground that "conditions of chaos, bedlam and turmoil" made
this action necessary. The Court of Appeals then reversed the district court’s ruling stating that no court could grant a delay once a desegregation plan had been approved.79

The Supreme Court, on appeal, denied the school authorities of Little Rock additional time for compliance. In an opinion signed separately by all nine justices, the Supreme Court concluded that the school authorities were not to be blamed for the disturbances since the school board had acted in "good faith." The Court concurred in the belief that "the educational progress of all students would suffer if the prevailing conditions of the previous year continued."80 But the Court also decided that the "constitutional rights of black children were not to be sacrificed to violence and disorder engendered by the actions of a state official."81 According to the Court, the recent disturbances were "directly traceable" to actions of Arkansas officials which only reflect "their own determination to resist the Court’s decision in the Brown case."82 The Court warned that the constitutional rights of Negro children:

... can neither be nullified openly and directly by state legislatures or state executives or judicial officers nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously" ... No state official can war on the Constitution without violating his oath to support it ... the Constitution becomes a solemn mockery.83

The final result was that black children went to school under the protection of federal troops.
The episode was a major event in the history of desegregation in education. For the first time, all three branches of the federal government had participated in actions which would directly or indirectly enforce desegregation. The Supreme Court had decided three major cases (Brown I, Brown II, and Cooper v. Aaron). Congress had passed the Civil Rights Act of 1957 to further the cause, and President Eisenhower had sent federal troops into Little Rock to support the Brown decisions.

Desegregation was far from completed, however. The President's backing was by no means assured, and so that a backward judge and a defiant school board might still set the pace of desegregation. Under grade-a-year plans a child in the second grade in 1960 might continue attending segregated schools until his completion of high school. The basic problem can be attributed to the southern federal judges who had shown no great desire to protect the Negro's right to desegregated schools, as exhibited in Shuttlesworth v. Alabama (1958). In this case, Alabama had a complex placement law for desegregation which was equivalent to a segregated school system. The district court held that the law was not void on its face and the issue could be determined only upon proof that the plan was administered in a discriminatory manner. The Supreme Court affirmed.

In 1960, Congress responded to the advocates of desegregation and the incident in Little Rock with the Civil
Rights Act of 1960. The key section in the act was a provision which called for a "$1,000 fine and a year's imprisonment for anyone convicted of obstructing the orders of a federal court."\textsuperscript{86} It was this provision which would deter many persons from defying school integration orders. The Supreme Court supported the Act of 1960 by prohibiting southern judges from dismissing complaints filed by attorneys representing the Department of Justice. The Court, acknowledging that desegregation litigation was inherently slow, felt that this action would force southern judges to find other reasons to refuse to act.\textsuperscript{87}

The Supreme Court also dealt with the complex question of interposition in 1960. The state legislature of Louisiana adopted a statute which "interposed" the sovereignty of the state against federally ordered desegregation. The legislature also passed statutes making desegregation a criminal act, placing control of the New Orleans schools under the jurisdiction of an eight man legislative committee, and denying accreditation, free textbooks, and financial aid to segregated schools.\textsuperscript{88} The Supreme Court in \underline{United States v. Louisiana} (1960), ruled per curiam that the Louisiana statutes were null and void in a one line decision.

By 1962, only 2.14 percent of the nearly three million Negro school children in the southern schools were receiving
anything approaching a desegregated education. Only thirty-three cases had been filed by the Department of Justice as of February 12, 1963, and only 59.2 percent of the Negroes in the border states were receiving a desegregated education. In summarizing the statistical data between 1955 and 1962, according to the cases reported in the Civil Liberties Docket and the Statistical Study of Constitutional Litigation, there was in the field of education only two cases challenging unequal facilities which were reported, while only one of these was officially reported and neither of these cases was concluded. Two hundred and twenty-eight cases dealt with the enforcement of integration and only 193 of those cases were officially reported and only 155 of them were concluded. Thirty-four cases dealt with the prevention of integration and only fourteen of them were officially reported and all of those were concluded. Three cases involved attempts to end segregation, and only two of those were officially reported and only one of these was concluded.

It was with these statistics in mind that the Supreme Court dealt with the desegregation cases occurring in 1963 and 1964. The Court decided these cases without Justices Frankfurter and Whittaker who had resigned. President Kennedy filled the vacancies on the Court by nominating Arthur J. Goldberg and Byron R. White.
In 1963 and 1964 the Supreme Court heard numerous cases dealing with school desegregation. The Court decided that desegregation should have been accomplished in most of the region. Observing that this was not the case, the Court agreed to hear certain cases dealing with school desegregation in order to clarify its position.

In 1963, the Supreme Court ruled, with one dissent, that "the doctrine requiring exhaustion of administrative remedies before relief could be sought in a federal court was not applicable in school desegregation cases" (McNeese v. Board of Education). In the same year the Court decided Goss v. Board of Education (1963). The school authorities of Knoxville, Tennessee, had a desegregation plan which allowed students who were initially assigned on the basis of school zone boundaries to transfer from a school where their race was in the minority to one where their race was in the majority. In a unanimous decision, the Court invalidated this procedure. In an opinion written by Justice Clark, the Court expressed its impatience at the pace at which Brown II was being enforced and declared that the Knoxville plan was working towards "perpetuation of segregation." Clark concluded that in the years since the first Brown decision, the context in which Brown was to be interpreted had been "significantly altered."

The Supreme Court further expressed its impatience at the pace of desegregation in Griffin v. County School Board (1964). Litigation to desegregate the public schools had begun
thirteen years earlier in Prince Edward County, Virginia. Rather than comply with Brown, the county school board had decided to close the public schools. At the same time, however, the county had granted public funds to white children who attended segregated private schools. Justice Black wrote the opinion for a nearly unanimous Court, stating that "there has been entirely too much deliberation and not enough speed" in enforcing the constitutional rights declared in Brown. The Court then ruled the county's scheme unconstitutional since its major intention was to avoid desegregation. According to Justice Black, "closing the Prince Edward schools while public schools in all the other counties of Virginia were being maintained, denied . . . Negro students . . . the equal protection of the laws guaranteed by the Fourteenth Amendment." Therefore, the Court ordered that the public schools reopen at once. In a mild surprise, Justices Clark and Harlan, while agreeing with the result, disagreed with the majority ruling that the federal courts could order Prince Edward County public schools to reopen. By the end of 1964, the Supreme Court had clearly voiced its displeasure at the speed with which desegregation was being accomplished. "Too much deliberation, not enough speed!"

Between the years 1964 and 1968 the Supreme Court did not decide one major case dealing with desegregation or
equality in education. But this does not mean that there was no progress.

By the end of 1963 there were 3,029 biracial districts in a previously-segregated seventeen state southern region. Of those 3,029 districts, 1,141 had been desegregated, 161 of these for the first time.97 Still, in the 1964-65 school year, only 2 percent of the black students in the eleven former Confederate states attended integrated schools.98 It is my belief that the latter statistic is a good indication of the success of "massive resistance" in the South and of the effect of the Supreme Court's decisions.

Attorney General William P. Rogers noted that one of the major problems in handling school desegregation cases was that "if the Department of Justice starts a lot of litigation it might harden resistance and thus set back the cause."99 It was his preference that compliance should come from the populace, "even if it takes a while."100 Rogers did not have to wait long. On July 2, 1964 Congress passed the Civil Rights Act of 1964, the most comprehensive civil rights legislation ever adopted. The act is significant because it indicated that Congress was now supporting the goals of the civil rights movement, including school desegregation. The act was also significant because it was based on Art. 1, Section 8 of the Constitution, referred to as the Commerce Clause. The act mandated that:
all federally sponsored programs and participants in such programs clearly state their compliance with the nondiscriminatory provision of Title VI. The Department of Health, Education, and Welfare was authorized to assist school districts, through funds and training institutes, with their desegregation problems.  

The act also allowed for a much more systematic attack on school desegregation, since a case-by-case strategy could be abandoned for a more uniform standard applied by the Department of H.E.W.  

Specifically, Title VI of the Civil Rights Act was "designed to help any school board . . . in preparing and implementing desegregation plans . . . and to make available personnel who were especially trained to assist in coping with desegregation problems." According to the Department of H.E.W., a "good faith" start meant that school districts were required to integrate "the first and any other lower grade, the first and last high school grades, and the lowest of junior high where schools were so organized." H.E.W. was authorized to cut all federal funds to the school districts that did not comply. The strategy of fund termination began as a strategy to obtain promises not to discriminate from the 2,000 hard-core districts that were still operating in open defiance of Brown I and Brown II in 1965. The principle method used by the H.E.W. in these cases was to obtain from the school district a commitment on paper that they would honor Brown and begin to desegregate. Seven hundred districts did lose federal funds between 1967 and 1969 for
Thus, Title VI was an affirmative tool for eliminating discrimination through fund termination.

The Civil Rights Act enacted by Congress was supported by President Johnson's Elementary and Secondary Education Act of 1965. The Act required that all "federal agencies administering any grant-in-aid programs must ensure that there will be no discrimination by way of exclusion, segregation, or otherwise in the activity of receiving federal assistance."

Thus as the Warren Court was about to enter its twilight years, it appeared that desegregated schools would at last become a reality, or as Everett Dirksen said, "stronger than all armies is an idea whose time has come. It will not be stayed. It will not be denied."

One underlying question deserves further discussion. Why did desegregation fail in the South in the late 1950's? One answer to this question can be found in the book by Jack W. Peltason entitled Fifty-Eight Lonely Men.

Peltason's answer is an elaboration of Justice Frankfurter's statement that "nothing could be worse than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks." The tricks included the practice of many southern federal district judges of permitting the evasion of the consequences of the Brown
decision. To support this statement, Peltason has shown that since 1957 "the judges have approved programs that will keep most Negroes in segregated institutions until long beyond the time when even those now starting first grade will have graduated." According to Peltason, the Supreme Court should not have allowed any plans which contradicted the principle of "'full compliance' 'at the earliest practical date' and complete desegregation 'with all deliberate speed'." The Court should also, he writes, have imposed rigid mandates to compel the southern district courts to act. Without rigid mandates, it was politically unrealistic to expect southern judges to take action against people hostile to segregation. The judges were given too much responsibility, especially when one considers that it was the southern district court judges who would be held accountable by the southern populace. The scapegoat should not have been the southern district judges but, rather the Supreme Court Justices, who were in a better position to withstand the public hostility. But Peltason also attributed part of the problem to the society at large. His major contention was that those favoring desegregation must fight as hard as those who oppose it; otherwise, they will be segregated regardless of the judges. The premise here is that justice comes from the public rather than from the courts! "In the long run, a nation gets the kind of judicial decisions it deserves." Peltason also contends that the Supreme Court was negligent when it delegated part of the
responsibility of desegregation to the school boards, which were primarily responsible to the white voters. But the key of the problem, according to Peltason, was that "as long as the state legislatures can legislate, there will be segregation." Thus, the real blame for the segregated schools in the late 1950's was shared by the Supreme Court, the distributors, the state legislatures, the school boards and society as a whole.

The period surrounding 1968 was a turning point for the Supreme Court and school desegregation. Chief Justice Warren would resign in a year and the so called "hey-day" of the Warren Court was nearing its end.

In 1968, 23.4 percent of the black pupils attended schools in the continental United States composed of 0-49.9 percent minority students, while 68 percent of the black pupils attended schools composed of 80-99.9 percent minority students, and 39.7 percent of the black pupils attended schools composed of 100 percent minority students. 27.6 percent of the black pupils attended schools in the thirty-two states in the North and West which were composed of 0-49.9 percent minority students, while 57.4 percent of the black pupils attended schools composed of 80-99.9 percent minority students and 12.5 percent of the black pupils attended schools composed of 100 percent minority students. 18.4 percent of
the black pupils attended schools in the eleven southern states which were composed of 0-49.9 percent minority students, while 78.8 percent of the black pupils attended schools composed of 80-99.9 percent minority students, and 68 percent of the black pupils attended schools composed of 100 percent minority students. 28.4 percent of the black pupils attended schools in the six border states and Washington, D.C. which were composed of 0.49.9 percent minority students, while 63.8 percent of the black pupils attended schools composed of 80-99.9 percent minority students, and 25.2 percent of the black pupils attended schools composed of 100 percent minority students. 115 How do these figures reflect the impact of the Supreme Court from 1954 to 1968?

The general consensus is that the major mistake of the Warren Court was in allowing time for opposition to gather against the Brown decision. Professor H. H. Quint contends that "had the Court ordered immediate integration, compliance might have been forthcoming, since at the time there were no alternative courses of action." 116 But the overall philosophy adhered to by the Warren Court withstood this mistake and others. It was the philosophy of egalitarianism which had been the basic building block upon which the desegregation decisions were formed. Egalitarianism was spoken of by Archibald Cox as an affirmative duty - the government (i.e., the Supreme Court) "to eliminate inequalities and perhaps provide opportunities for the exercise of other fundamental
human rights."117 Thus, the Supreme Court expanded on its power at the expense of the state's power in order to champion a cause.

The attitude was changed, and the rules of judicial self-restraint that look to the avoidance of constitutional rulings have been eroded in opinions strongly suggesting that the Warren Court believed it had a responsibility to make its influence felt in support or check of other branches of government or in innovation, even though not coerced by the necessities of litigation.118

The Court was now committed to providing for desegregated schools within a constitutional framework. The resulting tension altered the process of constitutional adjudication, and profoundly influenced the recent course of constitutional history.119 Therefore, the dominant force for the Warren Court and constitutional development was the abstract principle of egalitarianism.

The Supreme Court, through its decisions in Brown I and Brown II had begun the battle for racial equality in education. The other two branches of the federal government stood for the most part silent until 1964. In 1964, Congress passed the Civil Rights Act of 1964 and President Johnson proceeded to write the Secondary Education Act. Until 1964, the Supreme Court stood alone and would stand alone again in the very near future. It had confronted the problem of legal segregation. The Court still had to address the question of de facto segregation. As long as de facto segregation was allowed to exist, Negroes would be removed from complete
integration into the American community and deprived of
equality in education. As Albert Blaustein commented:

Despite obvious advances towards interracial reform, the nation has come only part way. In many respects the situation of the Negro in America is deteriorating . . . due to the pattern of de facto segregation which characterizes so much of American life. . . . A vicious circle of . . . inferior education . . . will result in psychological damage that no executive order, court decision or piece of federal legislation can readily correct.¹²⁰

In 1968, the National Advisory Commission on Civil Disorder stated that "our nation was moving toward two societies, one black and one white,--separate and unequal."¹²¹ What, if anything, the Court would do about this situation remained to be seen.
By the time the Supreme Court decided *Green v. County School Board of New Kent County* (1968), two additional members had joined the Court. In 1965, President Johnson nominated Abe Fortas to the Court who replaced Justice Goldberg and then in 1967, Johnson nominated the first black ever to sit on the Supreme Court, Thurgood Marshall. Justice Marshall had been the chief counsel for the N.A.A.C.P. and had represented them in the *Brown* case.

From 1968 to the present, two terms have aided the Court in deciding desegregation issues. The law requires that the public schools should not be segregated. But, certain schools may not integrate because of a distinction between "de facto" and "de jure" segregation. "De jure ('by law') segregation is racial separation which is the product of some purposeful act by government authorities. De facto ('by the facts') segregation occurs because of housing and migration patterns and is unconnected to any purposeful governmental actions to racially segregated schools."122

In 1968, the Court dealt with the last viable southern school assignment plan in *Green v. County School Board of New Kent County*. The case signalled an end to the "massive resistance" policy adhered to by many southerners and was the last desegregation case in which Chief Justice Warren participated. In *Green*, the school authorities of New Kent
County had operated a de jure segregated school system. Until 1964, all the schools in the county were completely segregated. To remain eligible for federal funds under Title VI, the school board adopted a "freedom-of-choice" plan whereby students could decide which school they wanted to attend. Little change resulted. In 1968, the schools were composed of basically the same racial distribution as prior to the "freedom-of-choice" plan.123

The Court in Green unanimously held that freedom of choice plans, which relied on social custom and socio-economic sanctions to perpetuate segregation, were unacceptable since they allowed for the maintenance of a dual school system. The Court also held that, since only token desegregation had occurred in the three years following the implementation of the freedom of choice plan, this plan "fails to provide meaningful assurance of prompt and effective disestablishment of a dual system."124 The basic problem was that blacks chose to go to all black schools and whites chose to go to all white schools. Thus, the Court rejected New Kent County's freedom of choice plan.

Justice Brennan wrote the opinion for the Court and concluded that in order to decide whether a school board had achieved a unitary school system, the Court should measure the effectiveness of the desegregation plan. An effective plan, according to Justice Brennan, was one that dismantled the dual school system "at the earliest practical date."125
Justice Brennan shifted the burden to the school boards, as they now had an "affirmative duty to take whatever steps might be necessary to convert a unitary system in which racial discrimination would be eliminated root and branch."\textsuperscript{126} It was also decided by the Court that the district court would evaluate all desegregation plans and would "retain jurisdiction until it is clear that state-imposed segregation (de jure segregation) had been completely removed."\textsuperscript{127}

Many observers interpreted the Court's language as imposing a positive duty on the states to compel integration.\textsuperscript{128} However, at least one other court watcher had noted that the \textbf{Green} decision dealt only with racial balancing involved in student assignments.\textsuperscript{129} But the real importance of the Court's language was that it outlined definite guidelines in the area of desegregation, which it had failed to do thirteen years prior in \textbf{Brown} II. The Justices now expected immediate action by the local school authorities and required the district court to use their position to oversee the task, from beginning to end. Not all freedom of choice plans were held illegal however; only this one.

The following year, the Supreme Court again made clear its impatience at the rate at which de jure segregation was being eliminated and added support to its decision in \textbf{Green}. In a per curiam decision, the Court in \textbf{Alexander v. Holmes County Board of Education} (1969) declared that "'all deliberate speed' for desegregation is no longer constitutionally
permissible. ... The obligation of every school district is to ... operate no; and hereafter only unitary schools. It was with these words that the Warren Court came to an end.

In 1969, Chief Justice Earl Warren submitted his resignation to President Johnson after fifteen years of service. Johnson attempted to replace the Chief Justice by nominating justice Abe Fortas. This attempt failed owing to a Senate filibuster and widespread public criticism. The filibuster was initiated by southern senators who preferred that the new Chief Justice be nominated by the president-elect, Richard Nixon. The following year, Nixon nominated Judge Warren Earl Burger. Chief Justice Burger had served on the federal Court of Appeals for the Eighth Circuit and was a prominent Republican from Minnesota. One of the major reasons that President Nixon nominated Burger was his hard-line stance concerning law and order. In the same year, Justice Fortas was forced to resign by a minor scandal concerning a conflict of interest. After two unsuccessful attempts by Nixon to nominate persons from the South with judicial philosophies of strict constitutional construction, he nominated Judge Harry Blackmun from Minnesota. Justice Blackmun, like Chief Justice Burger, had served on the U.S. Court of Appeals for the Eighth Circuit. Blackmun was recommended by the Chief Justice and was a federal tax specialist.

With the change of personnel, the Court immediately found room to differ internally on the topic of desegregation
as exhibited in *Carter v. West Feliciana Parish School Board* (1970). A slim five man majority declared that the "at once" mandated by Alexander meant "at once" in regard to the implementation of the integration plan in question.132

The statistical data for 1970 had shown marked improvement for blacks in their quest for equality in education. In the Continental United States, 33.1 percent of the black pupils attended schools composed of 0-49.9 percent minority students, while 49.9 percent of the black pupils attended schools composed of 80-99.9 percent minority students and 14.9 percent of the black pupils attended schools composed of 100 percent minority students. In the thirty-two Northern and Western states, 27.5 percent of the black pupils attended schools composed of 0-49.9 percent minority students, while 57.6 percent of the black pupils attended schools composed of 80-99.9 percent minority students, and 11.9 percent of the black pupils attended schools composed of 100 percent minority students. In the eleven southern states, 39.1 percent of the black pupils attended schools composed of 0-49.9 percent minority students, while 39.4 percent of the black pupils attended schools composed of 80-99.9 percent minority students, and 14.1 percent of the black pupils attended schools composed of 100 percent minority students. In the six border states and the District of Columbia, 29.8 percent of the black pupils attended schools composed of 0-49.9 percent minority students, while 60.6 percent of the black pupils
attended schools composed of 80-99.9 percent minority students and 23.1 percent of the black pupils attended schools composed of 100 percent minority students.¹³²a

The first major desegregation case in which Chief Justice Burger participated, was **Swann v. Charlotte-Mecklenburg Board of Education** (1971). In 1969, the district court ordered the Charlotte-Mecklenburg school board to formulate a new desegregation plan to replace an existing, unsatisfactory one. The new plan submitted by the board was rejected by the district court. An expert in school desegregation was appointed by the court to formulate yet another plan. This plan, submitted by the expert, was approved by the district court. The court of appeals approved it except for one section involving the desegregation of elementary schools by busing.¹³³

The Supreme Court, for the final time in a desegregation case, was able to deliver a unanimous opinion. The Court reiterated its position that there was a positive duty to eliminate de jure violations, stating in its ruling the need "to eliminate from the public schools all vestiges of state-imposed segregation."¹³⁴ The Supreme Court went on to rule that if the school authorities default "their affirmative obligations to proffer acceptable remedies that will assure unitary school systems," then "the Constitution does not prohibit district courts from using their equity powers to remedy the violation."¹³⁵ In approving the North Carolina assignment plan, the Court outlined a series of remedial steps available
to the lower courts, including the use of racial ratios as a starting point, the temporary altering of attendance zones, and bus transportation. The Court also warned that future school construction and abandonment should not be used to perpetuate or reestablish a dual school system, and that the existence of a small number of one-race schools is allowable only if the school authorities could convince the court under "close scrutiny" that the racial composition did not result from present or past discriminatory action by the school board. The Court also ruled that year-by-year adjustments were not constitutionally required once a unitary school system had been achieved. This final point would haunt the Court in later decisions.

Speaking in Swann for the majority, Chief Justice Burger declared, that "once a right and violation have been shown, the scope of district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." However, the decision was not nearly as sweeping as this language might imply; for he went on to state that, "the nature of the constitutional violation defines the scope of the remedy . . . and that judicial powers may be exercised only on the basis of a constitutional violation." He also concluded that to demonstrate a prima facie case of an equal protection violation, one must identify a school as a white school or a black school by the racial composition of the faculty, the quality of the
facility, and/or the organization of sports activities. It was not necessary for each school in the community to reflect the racial composition of the school system as a whole since the location of the schools might influence the patterns of residential development of an area and, thus, have an important impact on the composition of the individual neighborhood.  

Burger had intended for the district courts to adjust the possible harm of a desegregation plan to the remedy involved, arranging busing, for example, so as not to endanger the health of children.

The case was especially significant in that the Court maintained the tenuous de facto-de jure distinction by declaring that no reassignment of students is needed if state actions were not responsible for the distribution. However, according to former Attorney General Ramsey Clark, "there is no de facto segregation. All segregation reflects some past action by our government." In fact, the decision did seem to present an important modification of the basic principles set forth in Brown. The Burger Court was adhering to the de facto-de jure distinction and thus, indicated that the Brown decision was only applicable to de jure violations. It is interesting to note that most of the northern schools in 1971 were segregated not because of de jure violations by the state, but for de facto reasons. Another departure by the Court concerned the obligations of the local school authorities. Whereas in Green it was the school board's responsibility "to
take whatever steps might be necessary for immediate progress
towards disestablishing state-imposed segregation," in Swann
it was the school board's responsibility only to adopt plans
which were "reasonable, feasible, and workable." Thus,
Swann opened the path toward de facto considerations.

In the late 1960's and the early 1970's the Supreme
Court was searching for the correct strategy for issuing de-
segregation orders. The Court had two choices. It could
follow the dictates of Brown and impose a negative duty on
the states not to segregate their schools. Alternatively, it
could employ the rationale of Brown and declare a positive duty
on the states to integrate. The Court during this period ad-
hered to a strict interpretation of state action, citing a
positive duty to integrate in state-mandated segregation
cases, but allowing de facto segregation to exist. But,
whereas the South segregated openly, the North was far more
subtle. The fact that school boards and local governments in
the North could reorganize districts, change attendance bound-
daries, appropriate for school construction and assign teachers,
could have allowed the Court to construe de facto segregation
as de jure. The justices also had to consider the need for
integration and the desire to preserve neighborhood schools
and local control over those schools. Meanwhile, an even more
subtle problem came into view—the segregation resulting from
private and ostensibly voluntary choice of places of residence.
Legal discrimination was rapidly looming as only the lid on
Pandora's box.
After the Swann decision, President Nixon nominated two new members to the Supreme Court. By the end of 1971, Justices Black and Harlan had retired from the Court. Nixon nominated Louis Powell, who was a lawyer from Virginia, and William H. Rehnquist, a Republican from Arizona, to replace them.146

The only dramatic change between 1970 and 1972 in the racial make-up of the public schools, was seen in the basic eleven states in the South. Now, 44.1 percent of the black pupils attended schools composed of 0-49.9 percent minority students, while 31.6 percent of the black pupils attended schools composed of 50-99.9 percent minority students and only 9.2 percent of the black pupils attended schools composed of 100 percent minority students.146a

Thus, between the years 1968 and 1972 there had been a decrease in the number of schools segregated in the Continental United States. There was no dramatic change in the number of schools which were segregated by race in the thirty-two Northern and Western states; a phenomenal decrease in the number of segregated schools in the eleven Southern states and no change in the number of schools which were segregated in the six border states and the District of Columbia. The data for the thirty-two Northern and Western states, indicated the failure of the Supreme Court's distinction between de facto and de jure segregation in preventing segregation. However, the data in the eleven Southern states indicated
the success of the Court's policy of removing all forms of state-imposed segregation. The Court had sought to end legal segregation only, and it had succeeded. The Court had not foreseen or tried to deal with the subtler problems of integration that then emerged. This was the beginning of a new chapter in the history of desegregation.
With few exceptions, the Supreme Court had maintained a concensus on desegregation cases up to and including Swann. One of the main reasons for this was that most of the cases which the Court decided dealt with southern de jure segregation. In the following years the Court's unanimity would disappear. The case of Wright v. City of Emporia (1972) illustrates the change.

In Wright, a federal district judge had ordered a desegregation plan put into effect for Greenville County, North Carolina. This plan was formulated by the N.A.A.C.P. in order to remedy the de jure segregation violations. It would have resulted in schools composed of 66 percent black students and 33 percent whites. The school board of Emporia, North Carolina, attempted to withdraw from the Greenville County School District and establish its own district, in order to improve the quality of its education and to avoid the district court's decree. If this was permitted, the resulting compositions of the schools remaining would have been 52 percent black and 48 percent white. The Supreme Court, by a narrow five to four vote, held that the actions of the city of Emporia were unconstitutional. The majority in this decision consisted of the remaining five "Warren Court" justices, while the four dissenters were Chief Justice Burger and Justices Blackmun, Powell and Rehnquist, all of whom were appointed by Nixon.
Justice Stewart wrote the majority opinion, ruling that the effect of Emporia's action was to impede desegregation and that this was more important than the purpose of improving the quality of education. "The Courts will be guided, not by the motivation of the officials, but by the effect of their action" and in this case, the city's actions did "impede the process of dismantling the segregated school system." In a dissenting opinion, Chief Justice Burger concluded that the majority had given the district court the power to adopt "a pointless racial balancing approach" which was not within that court's equity powers.

A local school board plan that will eliminate dual schools, stop discrimination, and improve the quality of education ought not be cast aside because a judge can evolve some other plan that accomplishes the same result of what is considered a preferable result. Such an approach gives controlling weight to socio-logical theories, but not constitutional doctrines.

The issue had surfaced: was de jure segregation enough? The majority thought not.

In a similar case, United States v. Scotland Neck Board of Education (1972), the distribution before the split was 57 percent white students and 43 percent blacks. If the split within the county had been allowed, the ratios would have been 28 percent white students and 72 percent black students. In this case, the vote was nine to zero. The dissenting justices in Wright had changed their votes in this case because the discrepancy between these two sets of figures was too great.
The growing split in the Supreme Court became even more evident in the case of School Board of Richmond v. State Board of Education (1973). A four to four Supreme Court upheld, without opinion, a court of appeals reversal of a federal district court order which required that the predominantly black city of Richmond unite with two adjoining counties in an integration plan. Justice Powell abstained from the decision, while Justices White, Blackmun, Requiest and Chief Justice Burger were on one side and Justices Stewart, Marshall, Brennan and Douglas were on the other.

By 1973, most desegregation programs were eliminating southern de jure segregation. However, litigation was only beginning to reach the Court concerning northern de facto segregation. The most significant difference between the southern and northern cases was the much heavier burden of proof required in the northern litigations to establish a case of unlawful segregation. Robert Manley summarized that the

Plaintiff's burden of proof in cases where dual systems have been prescribed by law prior to 1954 is to show merely that "all vestiges of state-imposed segregation" have not been purged from the system or that school authorities have failed in their "affirmative duty" to eliminate racial discrimination "root and branch."151

Whereas, in the North, the burden of proof was much heavier; "purposeful state action" had to be shown to establish a constitutional violation.152
The first major northern desegregation case was *Keyes v. School District No. 1, Denver, Colorado* (1975). In *Keyes*, a desegregation order was sought which would cover all of the public schools in the Denver school district. The federal district court had found de jure segregation in the Park Hills school district in the northeast section of Denver and based its decision on actions of the Denver school board. Since de jure segregation was found in only one area of Denver, the court had refused to extend the remedy to the remaining schools in the district because the plaintiffs could not show that de jure segregation violations had occurred in them.\(^{153}\)

By a seven to two vote, the Supreme Court reversed the lower court's ruling and held that a determination of segregative intent in one portion of a school system leads to a presumption of de jure segregation in the whole system. Justice Brennan wrote the majority opinion and was joined by four other Justices. Chief Justice Burger concurred in the result. Justice Powell concurred in part and dissented in part, while Justice Rehnquist dissented. The Court was clearly in disarray over the new complexities of the problem. If proof is shown "that the school authorities have pursued an intentional segregative policy in a substantial portion of the school district, [this fact] will support a finding by the trial court of the existence of a dual system."\(^{154}\) The Court also held that once "a policy of intentional segregation has been proved with respect to a significant portion of the
school system, the burden is on the school authorities ... to prove that their actions as to other segregated schools in the system were not likewise motivated by a segregative intent.\textsuperscript{155}

Justice Brennan, in his opinion, concluded that "racially inspired school board actions have impact beyond the particular schools that are the subject of these actions";\textsuperscript{156} therefore, a district-wide remedy was appropriate. The burden, according to Justice Brennan, was on the school board to prove that segregative intent was not among its motives. The school board could only rebut the allegations by proving that the board’s past segregative actions did not contribute to or create the current conditions. Brennan also concluded that the only difference between de jure segregation and \textit{de facto} segregation was the purpose or intent to segregate.\textsuperscript{157} Justice Douglas wrote a brief concurrence in which he advocated the abandonment of the de jure-de facto distinction. His major premise was that many state policies contributed to neighborhood segregation.

In a powerful dissent, Justice Powell attacked the maintenance of any de facto-de jure distinction, declaring that "public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state perpetuated should be irrelevant to constitutional principle."\textsuperscript{158} Rather than maintaining the de jure-de facto distinction, Justice Powell would have preferred that the
Court formulate constitutional principles of national applica-
tion. According to Powell, a new national standard would in-
volve the following:

Where segregated public schools exist within a school district to a substantial degree, there is a prima facia case that duly constituted public authori-
ties [are] sufficiently responsible to warrant impos-
ing upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated system.159

Justice Powell also concluded that the primary causes of segregation were residential and migratory patterns. The main point in Justice Rehnquist's dissent was that one could now rightfully conclude that a whole school system was segregated merely because a couple of schools happened to be segregated. Justice Rehnquist felt that this was extremely danger-
ous and in contradiction to the principles cited in Swann.160

Thus while allowing a broader interpretation of state action in defining de jure segregation, the Supreme Court maintained the de facto-de jure distinction and cited the crucial distinguishing factor to be the proving of "purpose or intent to segregate."161

Stephen Kanner had outlined three presumptions made by the Supreme Court in the Keyes decision which allowed the Court to rule as it did. First, there was a reciprocal effect between segregation in one area and its presence in adjacent areas. Second, segregated schools in one area had a magnetizing effect that accentuated the differences in racial composition among the areas. Third, de jure
discrimination in one area had "probative value in assessing the school authorities intent with respect to other parts of the same school system," thus establishing that the segregation was brought on by the school board.\textsuperscript{162} Kanner also asserted that the basic rationale behind the presumptions was that "unless segregative effects in one area are caused directly by the school board or result indirectly from the board's action in other areas, a remedy may not extend to that area."\textsuperscript{163} Kanner went on to argue that nearly all of the Supreme Court cases on desegregation had rested on the "controlling principle" that "the goal of an equal protection remedy is to approximate as closely as possible those conditions which would have prevailed if there had been no constitutional violation."\textsuperscript{164} At first glance, this principle would seem to contradict the remedies expounded in \textit{Green} and \textit{Swann}. But Kanner maintained that there was no inconsistency between remedial maximum integration and the "controlling principle." He contended that such integrated steps were necessary to counteract the stigmatic labelling engendered by state-mandated segregation. Thus, although the exact limits of equal protection remedies were not formulated prior to northern desegregation cases, Kanner showed that the "controlling principle" "governs the scope of all equal protection remedies."\textsuperscript{165} The parameters of an equal protection remedy were not explored by the Court until the \textit{Keyes} decision for two reasons, he asserted. In the North, a whole district was
not implicated in the constitutional violation, as it was in the South. Secondly, the North differed from the South in its racial concentrations, which could only be rectified through instituting an interdistrict integrative remedy. Thus, the question of extending the remedy to districts not directly implicated was avoided. 166

Twenty years after Brown, the Supreme Court faced another complex desegregation question in Milliken v. Bradley (1974). Milliken involved a comprehensive multidistrict integration plan for the metropolitan Detroit area. The federal district court had found de jure violations in the Detroit school system. Both the school board and the Michigan legislature had perpetuated segregation by delaying a voluntary plan for desegregation conceived by the Detroit school board. A Detroit-only plan was submitted and found to be inadequate. Even though the city of Detroit was the sole party to the litigation, and without evidence of de jure segregation in the adjoining suburban school districts, the district court determined that the only way to fashion a remedy for the 70 percent black Detroit school system was to encompass the city of Detroit and forty-five of the fifty-eight suburban school districts in a three county area of metropolitan Detroit. A divided court of appeals upheld the remedial powers of the federal district court, the de jure violation with respect to
the Detroit school board and certain state officials, and the metropolitan desegregation plan. But the court of appeals remanded the case back to the district court so that the outlying school districts could have a voice in the implementation of the multidistrict remedy. The court of appeals did not require the district court to consider any alternative desegregation plans. After some minor litigation, the case went to Supreme Court.

In an explicit demonstration of the "controlling principle," the Supreme Court reversed the lower court's remedial decision by a five to four vote. Chief Justice Burger wrote the majority opinion and was joined by Justices Rehnquist, Powell, Blackmun and Stewart. Justice Stewart also filed a concurring opinion. Justices White and Marshall filed dissenting opinions which were joined by Justices Brennan and Douglas. The Court held that "a federal court may not impose a multidistrict, areawide remedy, for a single-district de jure school segregation violation where there is no finding that the other included school districts have failed to operate unitary school systems or have committed . . . other violations which constitute de jure segregation."167 Evoking memories of Swann with the declaration that "the scope of the remedy is determined by the nature and extent of the constitutional violation," the Court went on to cite two separate conditions which were necessary to justify an interdistrict remedy. First, if both jurisdictions had violated the
Constitution, then a remedial multidistrict plan would be permissible. Second, if there had been a constitutional violation within one district that had produced a significant segregative effect in another district, then a multidistrict plan would be acceptable.\textsuperscript{168} The Court also held that "de-segregation, in the sense of dismantling a dual school system, does not require any particular racial balance"\textsuperscript{169} and that "school district lines . . . (should not) be ignored . . . since substantial local control of public education in this country is a deeply rooted tradition."\textsuperscript{170} The Court assumed, arguendo, that the state was responsible for Detroit's segregated school condition.

In his opinion, Chief Justice Burger relied heavily on his dictum in \textit{Swann}. The Chief Justice distinguished \textit{Swann} from \textit{Milliken} by concluding that a district was not equivalent to a metropolitan area and that there was a long standing tradition which stated that the people should have local control over their schools. He concluded that local control of the schools was maintained by the people through the election of representatives and that this principle prevented the district courts from serving as a "de facto legislative authority." If, however, one could show that the district lines had been deliberately drawn on the basis of race, then a multidistrict desegregation would be justified.\textsuperscript{172}

In a concurring opinion, Justice Stewart wrote that if one could show that the state of Michigan had something to
do with concentration of blacks in Detroit, then a prima facie case would exist. Justice White argued in his dissent that the state war responsible to the Fourteenth Amendment and that "there is no acceptable reason for permitting the parts responsible for the constitutional violation to contain the remedial powers of the federal court within the administrative boundaries over which the transgression itself has plenary power." Justice Marshall added that an all-Detroit plan would be an all Negro plan and that this resulted from de jure actions of the state. Marshall also maintained that the decision would accelerate "white flight" to the suburbs and "perpetuate for years to come the separation of races." Many observers concluded that the Detroit-only plan would make the Detroit school system a one-race system, with the suburban schools becoming the white school system.

In reversing the lower court's decision in Milliken, the Supreme Court somewhat refocused its inquiry away from a consideration of the possible constitutional culpability of the state officials, to the role of the school board officials. The Court dismissed the role played by the state of Michigan in educating its citizens and in setting the school district boundaries. In fact, as Howard Harrison has pointed out that the school districts, as local governmental units, "owe their existence to the state legislature." The majority in Milliken were of the opinion that the intrusion on local control of the schools and the disregard for the outlying
districts shown by the lower court justified the subordina-
tion of other governmental interests. This viewpoint was
reaffirmed two years later in *Hills v. Gautreaux* (1976):

The District Court's desegregation order in *Milliken* was held to be impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred, but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.176

The Court was trying to balance two principles: desegregation and local autonomy.

There had been questions raised as to the degree of coherence exhibited by *Milliken* in respect to the "controlling principle." Harrison suggested that the *Milliken* ruling restricted the remedy so that it did not comport with the violation. In other words, the right of black plaintiffs to attend a unitary school was abridged because they were forced to attend racially separate schools that were, according to *Brown*, inherently unequal.177 Kanner asserted that the only ramification of *Milliken* was that it "halted the *Keyes* presumption at the district lines."178 For although those presumptions led to a finding of de jure segregation within an entire district, the presumptions did not carry over and apply to the policies of a separate school board in a different district. *Milliken* clarified *Keyes* by placing *Keyes* into an interdistrict context and by establishing two prerequisites which were now applicable if one wished to include a second district in a remedial action.179
To say the least, the \textit{Milliken} decision put a severe strain on efforts to attain inter-district school desegregation. The school district lines became legal boundaries and prevented the use of traditional equity power by the district courts. Although "white flight" to the suburbs had many causes, of which school desegregation was only one (increase in crime, decline of city services, poor housing and decrease in job opportunities were other reasons), the pursuit of equality in education was hampered by the restriction on metropolital remedies stated in \textit{Milliken}. The Supreme Court has departed from its positions in \textit{Green} and \textit{Swann}. Implicit in them was a recognition that school segregation arose from a host of state-induced or perpetuated patterns, particularly residential segregation. But this was not implicit in \textit{Milliken}. As Justice White observed, "the rights of the individual involved do not equal the rights proclaimed by \textit{Brown}."\textsuperscript{180} Forbidden by \textit{Brown}, according to the \textit{Milliken} decision, "was any constitutional attack on inter-district school segregation arising from residential patterns."\textsuperscript{181}

The last addition to the present-day Supreme Court occurred in 1975 when Justice Douglas, the Court's foremost advocate of comprehensive desegregation, retired after thirty-six years of service on the high court. President Ford nominated John Paul Stevens from the University of Chicago to replace Douglas.
In 1975, the Supreme Court also decided the case of *Evans v. Buchanan*. Evans involved a per curiam decision by the Court upholding a judgment of the Third Circuit Court of Appeals, which decreed an inter-district remedy for Wilmington, Delaware, and surrounding districts. Delaware was one of the original seventeen states that had required segregated schools. The state had maintained segregated schools in the district of Wilmington until 1975. Specifically, the state legislature had provided for the reorganization of all of its school districts except for the Wilmington district, which had been excluded from any type of relief. The Third Circuit Court of Appeals did not base its decision on evidence that there was discriminatory purpose to segregate; instead, the court of appeals cited the disproportionate effect of the state's action.182

In 1976, the Supreme Court decided the case of *Hills v. Gautreaux* (1976). Although this was not a school desegregation case, it does relate to school desegregation, especially to *Milliken*. The Chicago Housing Authority (CHA) and the federal Department of Housing and Urban Development (HUD) were found guilty by the court of appeals of operating a discriminatory housing program in violation of federal statutes and the Fourteenth Amendment. Specifically, the CHA and HUD had failed to select public housing sites in white neighborhoods. Although found guilty by the court of appeals, the district court refused to grant metropolitan area relief because of the
precedent established in Milliken. Therefore, corrective action was limited to the city of Chicago.

The Supreme Court held that "a metropolitan area remedy in this case [was] not impermissible as a matter of law." Justice Stewart wrote the opinion for the unanimous Court. Justice Stevens took no part in the decision, while Justice Marshall filed a separate concurring statement.

Justice Stewart distinguished Milliken from Hills for two reasons. His first reason was that "HUD, in contrast to the suburban school districts in Milliken, committed violations of the Constitution and Federal statutes. Milliken imposes no per se rule that federal courts lack authority to order corrective action beyond the municipal boundaries where the violation occurred."
The second reason was that "the order would not impermissibly interfere with local governments and suburban housing authorities that were not implicated in HUD's unconstitutional conduct."

Another difference between Milliken and Hills was that Milliken involved a de facto violation and Hills a de jure violation. There was also a difference between HUD, which is an area-wide agency, and the Detroit School Board, which was not area-wide. Finally, the local governments affected by Hills, unlike those affected by Milliken, did have a voice in their future since they did retain the right to comment on specific proposals.
Another non-school desegregation case which had considerable impact on the history of school desegregation was Washington v. Davis (1976). Washington v. Davis involved an equal protection claim by police officers against a written test given to their prospective colleagues in the District of Columbia. Reversing the decision of the court of appeals, the Supreme Court held that the test was "value-neutral" and that a racially discriminatory purpose had to be shown to justify an equal protection remedy. Justice White wrote the majority opinion for a seven to two Court. Joining in Justice White's opinion were Chief Justice Burger and Justices Blackmun, Powell, Rehnquist and Stevens while Justice Stewart joined only in parts I and II of the opinion. Justice Brennan filed a dissenting opinion which was joined by Justice Marshall.

Justice White stated in his opinion that the Supreme Court's decision in Washington was applicable to the school desegregation cases. Although the purpose to discriminate did not have to appear on the face of the statute and could be inferred from the "totality of the facts" of which disproportionate impact is only one of the factors, White felt that disproportionate impact alone was not sufficient to prove a racially discriminatory purpose. Thus, Washington had answered the question that Keyes and Milliken had not; the segregative intent mandated by Keyes to establish de jure segregation cannot be inferred from an examination of the disproportionate impact of state action, but had to be explicitly shown.
The Supreme Court then proceeded to decide *Pasadena City Board of Education v. Spangler* (1976). In *Pasadena*, school board authorities were ordered to desegregate the public schools with no school having a majority of its students belonging to a minority group. This remedy was prescribed in 1970 because of violations under the Fourteenth Amendment. In 1974, the district court had refused to alter its order for the school district. The plan was successful in attacking "white flight" by providing for a yearly readjustment of attendance zones which satisfied the "no majority of any minority" requirement. The plan was then challenged by a newly elected school board which was not involved in the original de jure violation. The board lost and appealed to the Supreme Court.

The Supreme Court held that without a cause-effect relationship between the school authorities and the migrating population, there could be no annual shifting of attendance zones. Thus, "the district court exceeded its authority in enforcing its orders so as to require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school." The Court cited the dictum in *Swann* as precedent whereby the "district courts were not constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."
Justice Rehnquist wrote the majority opinion which was joined by Chief Justice Burger and Justices Stewart, White, Blackmun and Powell. Justices Marshall and Brennan dissented while Justice Stevens did not participate. In his opinion, Justice Rehnquist conceded that the Pasadena school board might not have achieved a unitary school system, but since a "racially neutral attendance pattern" had been drawn, the lower court's equity power had ceased, unless new de jure violations could be found. 189

Thus, deprived of an interdistrict remedy, the ability of the district court to fashion a remedial decree had become impaired. However, the decision was consistent with the "controlling principle," because the demographic movements in Pasadena would have occurred had there been no constitutional violation and because the adverse impact on the Pasadena schools could not be rectified. 190

I do not feel that I can conclude this paper without making one comment. I realize that this comment has no place in a historical piece, but just the same, I feel it is necessary. It is unfortunate for desegregation that we are such a mobile society and therefore, if we do not like the neutral policies adopted by our elected school authorities, we can pick up our belongings and move, thus negating the effect of the school board's plan without any fear of future reprisals.
It is this thought process which explains the "liberal's dilemma" since other constitutional values endorsed by contemporary judicial activists, is the "right to travel," and the right to choose where and how one lives.

The problem appears in another housing case which was pivotal in the fashioning of a new equal protection standard for school desegregation, *Village of Arlington Heights v. Metropolitan Housing Development Corporation* (1977). The Supreme Court, reversing the court of appeals decision, ruled that the refusal of the village of Arlington Heights to rezone land for a racially mixed housing development was not a violation of the equal protection of the Fourteenth Amendment since discriminatory purpose was not shown to be a motivating factor.

Justice Powell wrote the opinion for the Court which was joined in by Chief Justice Burger and Justices Stewart, Blackmun and Rehnquist. Justice Marshall filed an opinion concurring in part and dissenting in part which was joined in by Justice Brennan. Justice White filed a dissenting opinion while Justice Stevens did not participate in the decision.

In his majority opinion, Justice Powell cited five factors to examine in determining whether state action was tainted with a discriminatory purpose. First, the disproportionate effect of the action should be considered, although it is not dispositive. Second, a search for a clear pattern of discriminatory effect can take place. Third, a look at the historical
background of the case to decide if a discriminatory purpose from a series of state actions should be pursued. Fourth, the particular sequence of events in the official action should be scrutinized. Fifth and finally, a look at the legislative or administrative history could be helpful in discerning a discriminatory intent. If a prima facia case of discriminatory purpose is made out, the burden then falls on the school board to refute it. If the school board cannot refute the claim, then the school board must show that their past segregative acts "did not create or contribute to the current segregative condition of the core city schools." ¹⁹¹

The Supreme Court then decided Milliken v. Bradley II (1977). Milliken I had been remanded to the district court to fashion a remedial program for Detroit's school system. On appeal, the Supreme Court stated that remedial education programs could be mandated as part of an overall desegregation order and thus be paid for by the state. The Court maintained that the equity "remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution!'" ¹⁹²

The final school desegregation case prior to 1979 was Dayton Board of Education v. Brinkman (1977). Upon a finding of de jure segregation in the Dayton school district, perpetuated by the Dayton School Board, the court of appeals substituted a district-wide remedy for a more limited remedy. The new desegregation plan required that each school district
be brought within 15 percent of Dayton's 48 percent to 52 percent black-white population ratio.

The Supreme Court, with Justice Rehnquist writing the majority opinion, reversed the court of appeals decision. The Court maintained that a district-wide remedy was only justified if there was a district-wide impact. Justice Rehnquist noted that "the case for displacement of local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof." Rehnquist also took space in his opinion to comment on the "controlling principle."

Rather than presuming that all segregative effects are caused by violations, the district court must determine how much incremental segregative effect these violations have on the racial distribution of the Dayton school populations as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference.

Thus, with the Dayton decision, the "controlling principle" was not fully "applicable to interdistrict and intradistrict remedies alike."
The history of school desegregation began with the Fourteenth Amendment:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or 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. 196

The Supreme Court in Sweatt v. Painter ruled that the equal protection clause of the Fourteenth Amendment had been violated because the "intangibles" were not equal. The problem in the early 1950's was how to supply blacks with equal educational opportunities in accordance with the Fourteenth Amendment. By compelling its citizens to attend segregated schools, certain states were violating the Fourteenth Amendment and, thus, depriving blacks of this inherent right. Many individuals felt that the solution was to have Congress pass appropriate legislation. But Congress had refused to act.

In 1954, the Supreme Court decided that segregation which was legally compelled by the state was unconstitutional and violated the equal protection clause of the Fourteenth Amendment (Brown v. Board of Education of Topeka). However, due to the narrowness of the decision, it became unclear whether Brown only required desegregation where legal segregation had existed, or whether it mandated integration regardless of actions taken by the state--In other words, the distinction between the ruling in Brown and the rationale
associated with it. Were equal educational opportunities to be provided to all blacks or only those who were victims of overt actions?

The issues of desegregation and equal educational opportunities involved profound social changes which the Supreme Court was forced to handle because the Congress was afraid to act. The failure of the representatives, especially the southerners, to act was mainly due to the fear of losing their popularity among their constituents. The Court was ill-equipped to initiate the social change since it was a non-elected agency which lacked any real weapons of enforcement. Considering the position the Court was in and all of the criticism that was directed at it, it was amazing that any desegregation had occurred at all. Thus, any success in blacks attaining equal educational opportunities up until 1968 can only be attributed to the Court and the firmness of its decisions.

In Brown I, the Supreme Court allowed the district courts to have broad equitable powers. In Brown II, the Court, realizing that it was dealing with local customs which were hard to change and violations which occurred only in the South, decreed that only a "prompt and reasonable start" should be made towards desegregation. If the Court had demanded immediate desegregation or had demanded integration throughout the country, the reaction could have been devastating. Thus, it was not surprising that the Court "neglected" to clarify the meaning of Brown.
From 1954-1968, the meaning of Brown was unclear since the Supreme Court was only dealing with de jure segregation. The Court was committed to the principle of equal educational opportunities for blacks since almost all of its decisions were unanimous. This is even more remarkable when one considers the makeup of the Court. However, the Court was in a vulnerable position and hence for more legislation from Congress to handle the social reform. Thus by 1968, it was the school board’s responsibility to formulate desegregation plans and the district court’s obligation to ensure that state compelled segregation was abolished “at once.”

In studying the history of school desegregation, one is struck by the flexibility of the Supreme Court’s policy due to the reliance on equity powers to redress de jure segregation. Since 1968 the Court has relied heavily on the distinction between de facto and de jure segregation and the "controlling principle" which attempts to establish those conditions which would have existed if there had been no violation. The Court in Green and Swann gave the lower courts far reaching power and were the last cases in which the Court would deliver unanimous decisions. However, Swann did indicate that Brown was only applicable to legally compelled segregation.
From 1971 to the present, the Supreme Court has been unorganized in dealing with school desegregation. The disarray can partly be attributed to the four justices who were nominated by President Nixon. Many persons, including Nixon, felt that the Warren Court had gone too far in deciding social, political and procedural issues in the 60's. Responding to public opinion, Nixon nominated four individuals who believed in law and order and the philosophy of judicial restraint. The voting records of the new justices in desegregation cases indicated this philosophy. Wright best exemplifies this schism in the Court. The time was now appropriate for the Court to take a new direction. Although the Court ruled in Keyes that desegregation should occur throughout the city of Denver, the Court did place a heavy burden on the plaintiffs to show that state action was responsible for the racial imbalance. Milliken limited the Keyes decision by stopping multidistrict remedies at the school district line. Milliken also provided a devastating blow to anyone who believed that the Brown rationale was applicable to desegregation. The decision made it extremely difficult to prove that certain actions were state induced, causing many people, including Justice White, to wonder what the rights of the individual were as proclaimed by Brown. The goal of equal educational opportunities for blacks, as stated by the Vinson and Warren Courts, had been halted at the school district lines by the Burger Court: because of the tradition of local autonomy
over the schools. Washington v. Davis clarified Milliken, since a person now had to show explicitly what the state action was to prove de jure segregation. The Supreme Court in 1979 was not willing to adapt Brown to de facto segregation.

The major problem today is balancing the need for desegregation against the custom of local autonomy over the schools. How do you prevent "white flight"? How do you integrate neighborhoods so the blacks can attend integrated schools? The decision in Village of Arlington Heights has made it difficult for blacks to live in integrated neighborhoods. The Court must also clarify the relationship between a state run school system and actions taken by the state.

The Supreme Court is now advocating that any future social change come from the Congress. Chief Justice Burger warned:

These young people who decide to go into law primarily on the theory that they can change the world by litigation in the courts may be in for some disappointment. Litigation is not the route by which basic changes in a country like ours should be made. Legislation is the answer!

The constitutional harm imposed on subjects of de jure segregation in northern metropolitan cases could potentially be seen to be grievous enough to merit interdistrict integration if state discriminatory intent can be shown. The evolution of the "controlling principle" depends on how the courts balance the potential for abridgement of local autonomy
against the need to eliminate all effects of school segregation; which it has been increasingly argued can only be accomplished by following the rationale of Brown and charging the states with an affirmative duty to integrate the schools. If the Court were to interpret "state action" to mean "the state school system," that would solve the problem. Therefore, local autonomy would continue to receive attention through the maintenance of the de facto-de jure distinction. However, it seems doubtful from this perspective that the Court will extend a maximum remedy solely on the basis of equal protection clause of the Fourteenth Amendment. The next move is up to Congress.
NOTES


7Wasby, p. 27.


9Nowak, p. 552.


11Shapiro, p. 517.

13 Nowak, p. 555 and Shapiro, p. 518.
14 Wasby, p. 50.
15 Wasby, p. 51.
16 Nowak, p. 555.
17 Nowak, p. 555-556.
18 Kelly, p. 861.
19 Kelly, p. 721.
20 Kelly, p. 805.
21 Kelly, p. 805.
22 Shapiro, p. 519.
23 Wasby, p. 63.
24 Nowak, p. 559.
25 347 U.S. at 415.
26 347 U.S. at 414.
27 Nowak, p. 560.
28 Nowak, pp. 559-560.
30 Tribe, p. 1020.
31 Wasby, p. 63.
32 Kelly, p. 864.
33 Tribe, p. 1021.
34 Nowak, p. 560.
35 Kelly, p. 805.
37 Wasby, p. 109.


41 349 U.S. at 300.

42 349 U.S. at 301.

43 349 U.S. at 301.

44 349 U.S. at 300.

45 349 U.S. at 300-301.

46 349 U.S. at 301.


48 Nowak, p. 564.

49 349 U.S. at 300.


51 Kelly, p. 863.

52 Kelly, p. 863.


54 Murphy, p. 314.

55 King, p. 47.

56 King, p. 47.

58 Kelly, p. 865.


60 Ibid., at 777.


63 Miller, p. 353.

64 Wasby, p. 167.

65 Wasby, p. 167.

66 Kelly, p. 864.

67 King, p. 25.

68 Kelly, p. 865.

69 Kelly, p. 865.


71 Wasby, p. 167.

72 Wasby, p. 167.

73 Hamilton, p. 46.

74 Kelly, p. 806.

75 Murphy, p. 388.

76 Nowak, p. 565.

77 Nowak, p. 565.

78 Kelly, p. 866.

79 Tribe, p. 1034.

80 Nowak, p. 565.
81 Nowak, p. 565.
82 Kelly, p. 866.
83 Cooper v. Aaron, 358 U.S. 1, 1958 at 17.
84 King, p. 46.
85 Miller, pp. 358-359.
86 Kelly, p. 887.
87 Hamilton, p. 4.
88 Kelly, p. 868.
90 Hamilton, p. 85.
91 King, p. 225.
93 Tribe, p. 1034.
94 Tribe, p. 1035.
95 Miller, p. 362.
96 Kelly, p. 871.
98 Kelly, p. 864.
99 Hamilton, p. 74.
100 Hamilton, p. 74.
101 Blaustein, n. 525.
102 Rodgers, p. 755.
103 Bickel, Politics and the Warren Court, pp. 38-39.
104 Rodgers, p. 756.
105 Rodgers, p. 756.


107 Bickel, Politics and the Warren Court, p. 39.

108 Blaustein, p. 525.


110 Peltason, p. 244.

111 Peltason, p. 245.

112 Peltason, p. 250.

113 Peltason, p. 245.

114 Peltason, pp. 245-254.

115 Rodgers, p. 754.


117 Cox, p. 7.

118 Cox, p. 17.

119 Cox, pp. 24-25.

120 Blaustein, p. 470.

121 Murphy, p. 415.

122 Nowak, pp. 567-68.

123 Lockhart, pp. 1344-1345.


125 391 U.S. at 430.

126 391 U.S. at 437-438.

127 Lockhart, p. 1345.

128 Harrison, p. 43.

130 Shapiro, p. 522.

131 Kelly, pp. 982-983.

132 Shapiro, p. 522.

132a Rodgers, p. 754.

133 Nowak, p. 569.


135 402 U.S. at 2.

136 402 U.S. at 2-3.

137 402 U.S. at 2-3.

138 402 U.S. at 3.

139 402 U.S. at 15.

140 402 U.S. at 16.

141 402 U.S. at 16.

142 Lockhart, pp. 1346-1347.


144 Lockhart, p. 1350.

145 Shapiro, p. 524.

146 Kelly, p. 1005.

146a Rodgers, p. 754.


148 Kelly, p. 1005.

Kelly, p. 1005.


Manley, p. 591.


154 413 U.S. at 189.
155 413 U.S. at 190.
156 Lockhart, p. 1354.
157 Lockhart, pp. 1354-1355.
158 Lockhart, p. 936.
159 413 U.S. at 224.
160 Lockhart, p. 1357.
161 Harrison, p. 46.
162 Kanner, p. 387.
163 Kanner, p. 388.
164 Kanner, p. 382.
165 Kanner, p. 383.
166 Kanner, p. 383-384.
168 418 U.S. at 744-745.
169 418 U.S. at 718.
170 418 U.S. at 719.
171 No footnote
172418 U.S. at 743-745.
173Lockhart, p. 1364.
174Lockhart, p. 1365-66.
175Harrison, p. 48.
176Clyde, p. 427.
177Harrison, p. 48.
178Kanner, p. 391.
179Kanner, p. 384.
182Harrison, p. 54-55.
184425 U.S. at 297-300.
185425 U.S. at 285.
186Harrison, p. 59.
188402 U.S. at 15.
189427 U.S. at 426-427.
190Kanner, p. 399.
191Harrison, p. 67.
192Lockhart, p. 1363.
193Kanner, p. 404.
194Kanner, p. 404.
195Kanner, p. 385.
196 Teibe, p. 1412.
197 Barker, p. 767.
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Primary Material


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