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Hugh Scott

UNIVERSITY OF RICHMOND

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BUSING TO DESEGREGATE SCHOOLS: THE PERSPECTIVE FROM CONGRESS

*Hugh Scott**

> In the end, I expect that the courts will solve the problem—not Congress.[1]

The controversy over transporting pupils to desegregate schools or "busing" as the issue popularly is known, is the narrowest and perhaps most limited aspect of school desegregation. Yet, it threatens to undo school desegregation completely unless the issue is resolved in a way which will permit continued desegregation of schools accompanied by the understanding and support of the majority of people of all races.

A year ago it seemed virtually assured that Congress would pass a major anti-busing law. That event was averted in the Senate when the anti-busing forces were unable to force cloture of the debate on the "Equal Educational Opportunities Act of 1972"[2] and failed to defeat a subsequent motion to proceed to other business.[3]

*United States Senator from Pennsylvania; Member of the Senate Judiciary Committee; LL.B., University of Virginia, 1922.

1. Birmingham News, Feb. 21, 1972, at 8, col. 8.

2. H.R. 13915, 92d Cong., 2d Sess., introduced on March 20, 1972; reported from the General Subcommittee on Education of the Committee on Education and Labor, July 25, 1972; reported from Committee on August 14, 1972, H.R. Rep. No. 92-1335; considered and passed the House of Representatives with amendment, August 17 and 18, 1972.

H.R. 13915 and the accompanying measure, the Student Transportation Moratorium Act of 1972, H.R. 13916, were the subjects of extensive hearings in both the House Committee on the Judiciary and the Committee on Education and Labor.

3. 118 CONG. REC. at S17053, S17169, S17232, S17304, S17497, S17597 (daily eds. October 5, 6, 9, 10, 11 and 12, 1972).

This turn of events resulted from several factors. First, Congress earlier in the year had enacted important guidelines on the use of pupil transportation as a means of school desegregation.[4] Second, many members of Congress had confidence in the discretion of the Supreme Court to limit excessive busing on a case by case basis, while at the same time formulating well-reasoned and appropriate guidelines for the lower courts to follow in asserting decrees. Third, the legislative proposals to limit busing went far beyond what was reasonable or necessary. Instead, the proposed "Equal Educational Opportunity Act," as passed by the House of Representatives, virtually repealed substantial portions of the Civil Rights Acts and guaranteed that desegregation would never occur in some metropolitan areas.[5] The bill actually made possible re-segregation in those cities and towns found to have racially segregated neighborhoods. Fourth, many of the members of Congress were convinced that anti-

4. Pub. L. No. 92-318, 86 Stat. 372.

Title VIII of the General Education Amendments of 1972 provides essentially:

Section 801 states that no provision of the Act "shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance."

Section 802(a) prohibits the use of federal funds

—to transport students or to buy buses in order to overcome racial imbalance;

—for busing to carry out a plan of desegregation "except on the express written voluntary request of appropriate local school officials;"

—to provide for transportation if the time or distance is so great as to threaten the health or impinge on the educational process of children;

—to provide transportation, if such transportation would result in children being assigned to a school substantially inferior to the one they would be assigned to under a non-discriminatory geographic zone assignment plan.

Section 802 (b) prohibits Federal officials from requiring the use of non-federal funds for busing to correct racial imbalance or achieve desegregation or to condition a grant of Federal funds on student transportation plans "unless constitutionally required."

Section 803 postpones the effectiveness of any district court order "which requires the transfer or transportation of any student or students . . . for the purpose of achieving a balance among students with respect to race, sex, religion, or socioeconomic status" until all appeals have been exhausted or until January 1, 1974.

Section 804 gives parents the right to intervene in desegregation suits if busing standards violate Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971).

Section 805 requires rules of evidence in desegregation cases to be uniform throughout the United States.

Section 806 expresses the intent that Section 407(a) of the Civil Rights Act of 1964 shall be applied uniformly.

5. H.R. 13915, as passed by the House of Representatives, August 18, 1972, Senate Calendar No. 1042.

busing legislation was not only unwise but unconstitutional as well.

In this article it is suggested that we now have established principles, through legislation by Congress and decisions of the courts, within which we can resolve the complexities of limiting pupil transportation in a fair and practical manner without resegregating schools.

The greatest single reason for the impasse between opposing groups in the debate over school desegregation has been the adamant and mutual refusal of both sides to recognize and respect what has been accomplished in school desegregation and the nature of the problems yet unresolved. Those who oppose pupil transportation to desegregate schools often give the impression that they have conveniently forgotten the recent history of schemes to evade Constitutional mandates. On the other hand, the proponents of busing often appear blind to the fact that desegregation is accepted today by an overwhelming majority of people, including many who once vehemently opposed it.[6]

The point has been reached where the issue of good faith should no longer be a major element of any debate about a remedy. Congress, the courts and the executive have demonstrated repeatedly that they find another era of segregation constitutionally unacceptable. Happily, there are indications that the country may be able to reason its way through some of the knotty and complex problems of desegregation without becoming embroiled in accusations of bad faith and the accompanying recriminations.

In devising remedies which will be fair and which will be supported by the majority of people, it must be kept in mind that we are no longer dealing with modest rural school districts, but with major school systems such as those in the metropolitan areas of Richmond, Atlanta, Denver and Detroit.[7] National policy must continue to be committed to integration, but the implementation of that policy must be fair and flexible and must have the broad based

6. An opinion poll analysed by the U.S. Commission on Civil Rights shows that sixty-seven percent of the public support integration as a national objective. U.S. COMMISSION ON CIVIL RIGHTS, PUBLIC KNOWLEDGE AND BUSING OPPOSITION: AN INTERPRETATION OF A NEW NATIONAL SURVEY (1973).

7. The analysis of the poll prepared by the Commission, *supra* note 6, indicates that among those who support integration as a national goal only twenty-seven percent support busing to achieve integration.

support of the people. The potential for devising a fair and flexible means of implementing desegregation is available, but building understanding and support among people generally appears to be the greatest challenge. This can be accomplished, however, if, as a first step, confrontations are avoided, and reasoned debate is employed in order to achieve the national goal of a desegregated society.

Twenty years ago this May 17 the Supreme Court announced its historic decision in *Brown v. Board of Education*.[8] It is a mark of the passage of time that only one justice who was a member of that Court, Justice William O. Douglas, is still a member of the Supreme Court; it is a mark of what we have accomplished that the man who argued the cause of the black plaintiffs in *Brown* sits today as the first black justice of the Court. That Justice is Justice Thurgood Marshall, who was appointed by a Southern President.

Shortly after the decision in *Brown*, the Commonwealth of Virginia vowed "massive resistance." Today, Virginia's schools for the most part are desegregated. A distinguished Virginian, Lewis F. Powell, Jr., is an Associate Justice of the Supreme Court, and has contributed valuable insights and great intellect to solving the problems of desegregation since his recent appointment to the Court.

The progress of the past twenty years has not been easy. Prior to *Brown*, racial segregation under law was the accepted way of life in the southern states. All schools and public facilities were segregated by race. Public transportation was segregated, and the law required the private businessman to operate segregated places of accommodation. The masses of black citizens were denied the right to vote. Where the law did not require segregation, racial discrimination and custom imposed an equal effect. Discrimination against blacks in employment and housing was the rule everywhere.

The legacy and effect of de jure segregation spilled over into the north where racial discrimination was practiced openly and often in defiance of state laws prohibiting discriminatory practices. In the year 1954, the black man, ninety years after Emancipation, was confronted with social policies that were in many respects as degrading as involuntary servitude. *Brown v. Board of Education* overruled this epitaph. Since that decision, this nation has been headed

8. 347 U.S. 483 (1954).

steadily on a course toward full equality of opportunity for every citizen and toward the elimination of the vestiges of segregation from every aspect of our lives. I doubt if there are many today who would vote to overturn *Brown* and return to a "separate but equal" society.

Ten years after *Brown* little progress had been made to desegregate schools except in the border states and the District of Columbia.[9] The spectacle of United States Army troops surrounding Central High School in Little Rock, Arkansas forced this country to realize that desegregation on a case by case basis would be a long term and tumultuous proposition. It was clear that unless voluntary compliance with the letter and spirit of *Brown* was forthcoming, and that did not appear to be likely, little was going to happen until Congress acted.

Effective congressional action did not come easy. From Reconstruction until 1957 no general action had been taken by the Congress to require implementation of the fourteenth amendment. The first steps by Congress toward enacting guarantees of full and equal citizenship were taken during the Eisenhower-Nixon Administration in 1956 and 1957. The initial actions taken by Congress seemed timid to critics, but in reality they were precedent-shattering moves which cleared away several time-encrusted procedural obstacles to the passage of civil rights legislation. The first procedural move was the decision by Senate Majority Leader Lyndon B. Johnson to use a relatively weak civil rights bill as the vehicle for breaking the traditional southern filibuster against civil rights legislation. At that time, many did not realize the true proportions of this procedural victory, but without it, the great civil rights acts of the 1960's would have been virtually impossible to enact.

The 1957 Civil Rights Act,[10] modest in dimensions and ambitions,

9. The U.S. Commission on Civil Rights in its 1961 Report, Vol. 2, Education, reported that in May 1961, 775 out of 2,837 biracial school districts in 17 states and the District of Columbia had reported some desegregation. The overall increase since the Commission's 1959 report was said to be only 1.5 percent. 1961 U.S. COMMISSION ON CIVIL RIGHTS REPORT, EDUCATION BOOK 2, at 39, app. IV.

In 1964, only 2.25 percent of the Negro children in the 11 states of the old Confederacy and 10.9 percent in the entire region encompassing the southern and border states attended school with white children. Over 3 million Negro children in 1964 were attending segregared schools in the south. U.S. COMMISSION ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-1966, at 1 (1966).

10. Act of September 9, 1957, Pub. L. No. 85-315, 71 Stat. 634.

has proven to be the base on which a large part of the federal civil rights effort has been founded. The Act created the United States Commission on Civil Rights to study civil rights problems and to report to the nation, the Congress and the President. The Commission is still serving the nation and will continue to so serve through its current extension until 1978.

Title II of the Act of 1957 also created the Civil Rights Division of the Department of Justice. This is perhaps the most substantial achievement of the Act. Title IV authorized the Attorney General to go into court to enforce the right of all citizens to vote under the fifteenth amendment. This brought the federal government into court on the side of civil rights plaintiffs. No longer would the government be a powerless or neutral observer on the sidelines. It now was actively committed to securing the civil rights of all citizens.

Obviously, this development did not go unchallenged by those states and localities which felt threatened by the use of federal power to protect and secure the rights of citizens under the fourteenth and fifteenth amendments. "Massive resistance" in Virginia and elsewhere was the most organized challenge to federal authority. Violence and confrontation, often incited by demagoguery, occurred throughout the south while the north looked on, all too complacently, from the sidelines. During this period a growing awareness, sharpened by the reports of the United States Commission on Civil Rights, developed that desegregation of schools was only one part of a struggle for equal opportunity which was taking place on several fronts simultaneously. The first report of the Civil Rights Commission in 1959 dealt with voting, education and housing. The report made it clear that progress in each area was dependent upon progress being made in the other areas as well. To attempt to find a priority target was to search for the beginning of a circle. It was against such a background that Congress moved to consider the major civil rights acts of the 1960's.

Overall, the Civil Rights Act of 1960[11] was a disappointment.[12] The strong recommendations of the Civil Rights Commission, which had provided the impetus for the legislation, were systematically

11. Act of May 6, 1960, Pub. L. No. 86-449, 74 Stat. 86.

12. For an excellent account of the legislative history of the 1960 Civil Rights Bill, see BERMAN, HOW A BILL BECAME LAW (1962).

weakened and replaced until few of substance remained. The Act was generally viewed as a failure.

Despite increased national focus on the civil rights movement, the first two years of the Kennedy Administration passed without any civil rights action by Congress. Litigation became the chosen weapon of the Administration for achieving civil rights. Since the only source of effective civil authority possessed by the Attorney General was in the field of voting, the belief was that school desegregation and other gains would come about through an expansion of the political process resulting from greater enfranchisement of Negroes.

Despite heroic and dedicated efforts by outstanding lawyers in the Civil Rights Division, the Department of Justice was not successful in vindicating civil rights for Negro citizens through the judicial process. At the end of 1962, the additional number of black citizens who could vote as a result of cases brought by the Department was small.[13] Equally small was the amount of school desegregation achieved through private litigation.[14]

At the start of the 88th Congress, the Kennedy Administration had virtually no civil rights legislative program. The Administration's civil rights bill in early 1963 consisted of a modest proposal to extend the life of the Commission on Civil Rights and to expand the Commission's jurisdiction to provide clearinghouse services.[15] Liberal Republicans in the House and the Senate joined with Democrats in seizing the initiative with strong civil rights proposals pointing the way for major civil rights enactments. Elsewhere in the nation the civil rights movement increased its momentum.

Events in Birmingham, Alabama in April, 1963 suddenly ignited the conscience of the nation. Police Commissioner Eugene "Bull" Connor, his dogs and fire hoses, and the bombings, riotings and rage of the inner city shocked the people of America. On June 12, 1963 Medgar Evers was ambushed and killed in front of his home in Jackson, Mississippi. On June 19, the Kennedy Administration finally sent a major new civil rights bill to Congress. During a

13. U.S. COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION 10 (1968).

14. U.S. COMMISSION ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67, at 5 (1967).

15. Civil Rights Message of the President, Feb. 28, 1963.

summer-long consideration of the bill, the great march on Washington took place. There, Dr. Martin Luther King intoned his greatest speech, "I Have a Dream," but Congress did not act.

In the autumn of 1963, the President was assassinated in Dallas. The death of President Kennedy may not have been responsible for the Civil Rights Act of 1964, but it did cause many people to realize that the time for making the ideal of social justice a reality was long overdue. Against a somber, more responsible background, Congress duly considered and enacted that monumental charter of civil rights, the Civil Rights Act of 1964.[16]

The Act carried forward the concept of making basic gains in equal opportunity simultaneously on several fronts, notably in public accommodations, education, employment and nondiscrimination in federal programs. The work of the 1964 Act subsequently was completed by passage of the Voting Rights Act of 1965[17] and the Fair Housing Act of 1968.[18]

The 1964 Civil Rights Act also provided for double-barreled implementation of desegregation of schools and of federal programs in the states. One implementation was administrative sanctions imposed by the secretaries and heads of agencies charged with enforcing the nondiscriminatory requirements of Title VI.[19] The other implementation was the power of the Attorney General to bring suit to desegregate schools.[20] With the enactment of substantial assistance programs for education, school administrators and officials were faced with hard choices: to forego federal financial assistance only to face the Department of Justice in Court in the end, or to give assurances of nondiscrimination, follow desegregation guidelines and take the money. The majority of school boards decided to take steps toward compliance.

Education was not the only sector of society required to accept desegregation. The 1964 Act achieved quick desegregation of places of public accommodation, and other sectors of society also began to desegregate. Additionally, employers were required to eliminate discriminatory business practices. The pervasive impact of the Voting

16. Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241.
17. Act of August 6, 1965, Pub. L. No. 89-110, 79 Stat. 437.
18. Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 73.
19. 42 U.S.C. § 2000d (1970).
20. 42 U.S.C. § 2000c-6 (1970).

Rights Act of 1965 also made itself felt as black voters joined with white moderates to oust from office those public officials who had counseled and led resistance to desegregation.[21]

What had been accomplished through legislation was a complete reversal of the legalized segregation which had prevailed only ten years earlier. Yet, even at the height of the civil rights tide, when Congress was debating the Civil Rights Act of 1964, issues were arising which would turn congressional efforts away from implementing school desegregation toward directly opposing it.

In large part the development of these issues stemmed from the growing realization that school desegregation would be determined by the answers to definitional problems. What is school desegregation? For example, if the racially segregated schools that existed in the south had to be dismantled and replaced by "unitary" systems, what, in fact, constitutes a "unitary" system? Practical and mechanical problems also were involved: are we going to transport children to integrate schools if they live in racially segregated neighborhoods? Finally, while the Supreme Court in *Brown* was concerned with racially segregated school systems resulting from the enactment of laws requiring or expressly sanctioning them (de jure segregation) what of school segregation resulting from factors other than state or local laws?

What if school segregation results from administrative decisions of school officials such as the location of school attendance lines, selection sites for new schools and the size of particular schools, made with the purpose and effect of maintaining racial separation, but in the absence of any law requiring it?

What if school segregation results not from administrative decisions of school officials, but from residential segregation for which other state or local governmental bodies, such as local public housing authorities, urban renewal agencies, zoning boards and city councils are responsible?

And what of school segregation that results from fortuitous factors, such as population shifts and other changes, in which government officials have played no part? Does this form of de facto segregation violate the Constitution?

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21. POLITICAL PARTICIPATION, *supra* note 13.

These questions were present in some minds during the 1964 debates, but with only 2.25 percent of the Negro children in the deep South attending integrated schools (i.e., any school with less than 100 percent black enrollment), the focus of concern was on eliminating the blatant defiance of the Supreme Court which was evident in the continuation of dual and racially-separate school systems. This concern prepared the way for amendments to Title IV of the Civil Rights Act of 1964 which closed off federal efforts to deal with de facto and other forms of segregation brought about by means other than de jure (as narrowly defined).

The strategy of those opposed in fact to desegregation but who recognized the futility of a direct attack on the principles of *Brown v. Board of Education* has been built around the thesis that *Brown* merely commands racial neutrality in school admissions policies, no more and no less. Once the pupil by pupil, case by case approach fell, the opponents of desegregation recognized that the next line of defense was to prevent the courts from examining whether or not desegregation policies of school boards had in fact achieved any desegregation at all. Their principle hope was pinned on the "freedom of choice" plans for desegregating schools. Under such plans children were free to attend the school of their choice. Of course, no whites freely choose to go to black schools which were publicly acknowledged to be inferior. In many areas, only a handful of black families were willing to risk the very real dangers of retaliations involving loss of life, limb and employment of the breadwinner, to send a child to white schools.[22]

A strong buttress of this strategy was the firmly held belief by its champions in Congress that if northern school districts could be forced to deal with their de facto segregated school districts, the south would have a generous supply of allies who would assist in defeating efforts to implement school desegregation and eventually enact a rollback of desegregation altogether. The first fruit of this alliance was the famous racial balance language found in the definition of "desegregation"[23] and in the limitations on the power of the

22. For an excellent account of the experience under freedom of choice plans, see U.S. COMMISSION ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67, at 45-70 (1967).

23. 42 U.S.C. § 2000c (b) (1970):

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegrega-

Attorney General to bring suit to desegregate schools in Title IV.[24] This joinder of northern and southern concerns is explicit in the explanation of the amendment given by its sponsor in the House, Representative Cramer (R-Fla.):

> The purpose is to prevent any semblance of congressional acceptance or approval of the concept of "defacto" [*sic*] segregation or to include in the definition of "desegregation" any balancing of school attendance by moving students across school district lines to level off percentages where one race outweighs another.[25]

A series of incisive opinions by the courts have deprived the amendment's southern supporters of their hope that it would effectively bar desegregation of schools by plans other than freedom of choice plans and similar token efforts.[26] It is my view that these decisions were necessary in order to uphold the constitutionality of the racial balance language of Title IV. Had the language of Title IV been applied as Congressman Cramer had hoped it would, the Civil Rights Act of 1964 would have been rendered a nullity as far as school desegregation is concerned. Such a decision would have been a complete misreading of the hope and intent of Congress that the schools of the land be desegregated through the Act.

For a number of years, efforts were made in Congress to restate the limitations contained in Title IV in a way that would stop desegregation.[27] The legal effect of these efforts, and to a large extent their practical results, had little or no impact on school desegregation,

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tion" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

24. 42 U.S.C. § 2000c-6 (a) (1970):
Provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

25. 110 CONG. REC. 2280 (1964).

26. The key decision was United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, Caddo Parrish School Bd. v. United States, 389 U.S. 840 (1967).

27. These efforts were the so-called "Whitten Amendments" attached to appropriations bills in the House of Representatives and which forbade the use of federal funds to require assignment or transportation of pupils. These proposals inevitably would be amended in the Senate so that the limitations only prohibited officials from carrying out unconstitutional directives.

other than to encourage the north to continue to do nothing about segregation of schools caused by state action in its own precincts. The political effect, however, has been considerable.

The racial balance language of Title IV, the decisions limiting its application, futile efforts in Congress to undo what has been accomplished, have nourished an unfortunate myth in certain regions of the country that judges sitting in federal courthouses have cheated the people out of their legislative victories. This has kept alive sparks of resistance to desegregation in many pockets throughout the south, and, as unconstitutional aspects of school segregation in the north became increasingly apparent, it has fed flames of violent resistance in such communities as Pontiac and Denver. Far worse, it has prevented the possibility of rational discussion of how to achieve desegregation fairly, without unduly interrupting the education of young children. Instead, we seem to be wasting our time by debating whether we will have desegregation at all. Out of this ferment came the antibusing campaign of 1972.

Swann v. Charlotte-Mecklenberg Board of Education[28] is credited with feeding the emotional storm that swept many sections of the country concerning busing.[29] Yet, *Swann* also contained the formulation for the practical and common sense limitation of busing, even though few would, or could, listen to what the Court actually was saying.[30]

The formulation of Chief Justice Burger[31] became the basic building block in the pupil transportation amendments to the General Education Amendments of 1972 offered by myself and Senator Mansfield. Basically, the amendment states that Congress believes the objections to busing stated in *Swann* do have validity, indeed, that busing funds may not be awarded where effectiveness of the

28. 402 U.S. 1 (1971).

29. "Busing" meant only one thing, school desegregation, even though 20 million children were bused to school daily in 1971 and buses traveled 2.2 billion miles, virtually all of it totally unrelated to desegregation purposes. See U.S. COMMISSION ON CIVIL RIGHTS, YOUR CHILD AND BUSING (1972).

30. Eventually, the real meaning of *Swann* began to become apparent, and I believe helped to defeat the anti-busing bill in the 92d Congress.

31. The by-now classic statement reads:

> An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of children or significantly impinge on the educational process.

Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 30-31 (1971).

educational process would be impeded by the time or distance of travel.

In my view, Title VIII of the Education Amendments of 1972[32] sets the limits on how far Congress can responsibly go in placing restrictions on pupil transportation to desegregate schools. The simple scheme of the amendment ensures that federal officials cannot circumvent the reasonable standards for busing established by the Supreme Court in *Swann*. It is aimed at preventing the sort of extreme busing that critics fear can occur; it is not directed at limiting the powers of the Court. It leaves open the "flexibility" and "balance" necessary to implement desegregation in an equitable manner.

The defeat of the anti-busing legislation in the Senate in 1972 and the virtually complete disestablishment of the separate school systems of the south marks the entrance of the country into a new era in school desegregation which has been most clearly signalled by the Court's decisions in *Bradley v. School Board of City of Richmond*[33] and *Keyes v. School District No. 1, Denver, Colo.*.[34] The era we are in is the era of large city desegregation and of remedying segregation of schools brought about by unconstitutional state action.

The constitutional problems of finding state action in northern school de facto segregation are not difficult in my opinion, but devising a remedy is. In fact, it is the difficulty of developing an acceptable and effective remedy that may be staying the Court's hand more than the conceptual difficulties in defining the wrong.

Justice Powell's concurring opinion in *Keyes*[35] is interesting and hopeful, not because I necessarily agree with all of it, but because it demonstrates fresh and major innovative thinking on the Court about the problems of desegregation. Although the suspicious may find many pitfalls in Justice Powell's opinion, its significance is in the desegregation guidelines it establishes.

First, Justice Powell would obliterate the distinction between de jure and de facto segregation on the grounds that state action always is present in the operation of a segregated school system. In this view

32. Pub. L. No. 92-318, 86 Stat. 372.
33. 93 S. Ct. 2773 (1973).
34. 93 S. Ct. 2686 (1973).
35. *Id.* at 2701-20.

he has the distinguished company of Justice Douglas[36] and the United States Commission on Civil Rights.[37]

Second, Justice Powell defines the concept of "integrated school system" in a way which allows continuance of all-black and all-white schools under certain conditions. Presumably, we must look to previous opinions of the Court to determine under what conditions an all-white or an all-black school is constitutionally permissible.[38] But Justice Powell leaves no doubt that in his view the Constitution does not require the elimination of individual schools which have all-white or all-black or all-Chicano enrollments. An "integregated school system" is one in which the following conditions are present:

1) faculties and administrative staff are integrated;

2) equality of facilities and of education program exists;

3) school attendance zones have been drawn to promote integration;

4) new schools are located, old ones closed, and regrouped by size and grade categories to promote integration;

5) if a district transports pupils, transportation must be carried out with integration in mind.[39]

If a school district is found to be operating a segregated school system, then it has an affirmative duty to achieve the above with busing a possible remedy. In devising remedies courts would be guided by equitable principles. As Justice Powell stated:

> This would result . . . in no prohibition on court-ordered student transportation in futherance of desegregation. But it would also require that the legitimate community interests in neighborhood school systems be accorded far greater respect.[40]

In developing remedies, courts would be asked to balance various competing considerations. Justice Powell pleads that courts

36. *Id.* at 2700.
37. U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967).
38. Keyes v. School Dist. No. 1, Denver, Colo., 93 S. Ct. 2686, 2706-07 (1973).
39. *Id.* at 2706.
40. *Id.* at 2718.

should give greater weight to the values of the neighborhood, to the parental interest in education of their children, to the rights of children and to the economic and social consequences of extensive pupil transportation plans.[41]

Justice Powell's suggestion that age per se should be a factor in limiting busing warrants careful review. Ironically, integrated education is more successful among the young, i.e., those under 12 years of age, than among children of high school age.[42] Experienced educators report that somewhere after the ninth grade, adolescents not only segregate themselves by race, but by class and social background as well, these latter factors perhaps being more determinative than race or color.

Special consideration is warranted where neighborhoods are already racially integrated. A priority exemption should be given to such neighborhoods from any plan of desegregation which required pupil transportation. Although neighborhoods are an integral part of our urban life, we should keep in mind that the neighborhood easily can be transmuted into "territory" or "turf" to be protected at all costs, some of them too horrible to contemplate. Not all of the best of our national character is expressed in the concept of "neighborhood." One example is the tragic burning of a young woman in Roxbury, Massachusetts, simply because she happened to be of the wrong color at the wrong place at the wrong time. However, Justice Powell's concurrence in *Keyes* strengthens my confidence that we can look to the courts to develop intelligent, fair and effective remedies for desegregating schools. Justice Powell sets forth our duty under the fourteenth amendment in positive terms —to operate integrated school systems.

It should be remembered that school desegregation has not yet reached the large numbers of minority group persons living in cities, North, West and South.[43] A new minority group, Mexican Ameri-

41. Keyes v. School Dist. No. 1, Denver, Colo., 93 S. Ct. 2686, 2711-19 (1973).

42. DENMARK, GUTTENTAG & RILEY, COMMUNICATION PATTERNS AND INTEGRATED CLASSROOMS AND PRE-INTEGRATION SUBJECT VARIABLES AS THEY AFFECT THE ACADEMIC ACHIEVEMENT AND SELF-CONCEPT OF PREVIOUSLY SEGREGATED CHILDREN (1967); U.S. COMMISSION ON CIVIL RIGHTS, THE DIMINISHING BARRIER, A STUDY OF SCHOOL DESEGREGATION IN TEN CITIES (1972).

43. The U.S. Bureau of the Census reports that nearly half the nation's population of blacks is concentrated in 50 cities and at least one third of the total is in 15 cities. The top 15 cities are New York City, Chicago, Detroit, Philadelphia, Washington, Los Angeles, Balti-

cans, is also involved as *Keyes* indicates. Its problems cannot be equated automatically with those of the black-white desegregation context of the south.[44] An enormous task is involved which, if it is not approached in a spirit of humility, will be overwhelming. Justice Powell suggests some manageable guidelines by which lasting desegregation standards may be evolved.

We have breached the "massive resistance" of the Old South. During the first Nixon Administration we completed the job of disestablishing the former dual and segregated school systems of the past. What we now face is the challenge of operating integrated school systems and of remedying school segregation wherever it exists.

While I may not agree with every particular in Justice Powell's opinion, I believe that it offers a path which will enable us to achieve desegregation without extreme social upheaval. If the movement toward integration begun twenty years ago is not to be lost or set back by reactionary backlash movements, then Justice Powell's counsel should be heeded:

> It is time to return to a more balanced evaluation of the recognized interests of our society in achieving desegregation with other educational and societal interests a community may legitimately assert. This will help assure that integrated school systems will be established and maintained by rational action, will be better understood and supported by parents and children of both races, and will promote the enduring qualities of an integrated society so essential to its genuine success.[45]

The progress that has been made toward the goal of a just and free society has been substantial. The tools for further advances in achieving social justice can be formulated to produce rational and flexible remedies to the complex problems that remain.

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more, Cleveland, New Orleans, Atlanta, St. Louis, Memphis, Dallas, Newark and Indianapolis.

44. On the subject of Mexican-American education see the five volume series of reports, U.S. COMMISSION ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATION (1972).

45. Keyes v. School Dist. No. 1, Denver, Colo., 93 S. Ct. 2686, 2719-20 (1973).