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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 281

JAMES E. SWANN, *et al.*,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON THE MERITS

The National Education Association hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief *amicus curiae* on the merits in the above-entitled cause. Consent to the filing of the brief has been sought from the petitioners, from the Charlotte-Mecklenburg Board of Education and members thereof, from the Governor and other officials of the State of North Carolina and from the Concerned Parents Association, respondents. Petitioners, the Charlotte-Mecklenburg Board of Education and the State of North Carolina have consented.[1] No response has been received to date to the other requests for consent.

[1]The written consent of the petitioners, of the Charlotte-Mecklenburg Board of Education and of the State of North Carolina have been filed with the Clerk.

The National Education Association (hereinafter NEA) is an independent, voluntary organization of educators open to all professional teachers, supervisors and administrators. It presently has over one million regular members, and is the largest professional organization in the nation. NEA was first organized in 1857 and was chartered by a special act of Congress in 1906. Its statutory purpose is (34 Stat. 805)

> to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States.

The overall policies of NEA are determined by its Representative Assembly, a body composed of approximately 7,000 delegates representing affiliated local and state education associations.

NEA has conducted detailed studies of the educational implications of the maintenance of dual school systems based upon race. It has long been convinced that racial segregation in education adversely affects the quality of the education received by black students, and is harmful to white students as well, at least insofar as it instills false notions of superiority and denies such students knowledge of the multiracial society in which they must live and work. Reflecting this belief, the NEA Representative Assembly at the June 1969 Convention adopted a formal continuing resolution providing in part (NEA, *Handbook* 1969-70, p. 66):

> The Association endorses the decision of the U.S. Supreme Court in Brown v. Board of Education and urges compliance with subsequent federal laws and regulations in this area . . . .

At the 1970 Convention, the Representative Assembly adopted a more specific resolution on desegregation in the public schools, which provided in part:

> The National Education Association believes it is imperative that desegregation of the nation's schools be effected. Policies and guidelines for school desegregation in all parts of the nation must be strength-

> ened and must comply with Brown v. Board of Education; Alexander v. Holmes County Board of Education, Mississippi; other judicial decisions and with civil rights legislation.
>
> The Association recognizes that acceptable desegregation plans will include a variety of devices such as geographical realignment, pairing of schools, grade pairing and satellite schools. These arrangements may require that some students be bussed in order to implement desegregation plans which comply with established guidelines adhering to the letter and the spirit of the law. The Association urges that all laws of this nation apply equally to all persons without regard to race or geographic location.

Complete disestablishment of formerly *de jure* segregated school systems is required by the Constitution. This case presents important issues concerning a school board's responsibility to convert from a dual to a unitary school system and the steps which it may be required to take to accomplish that conversion. As the principal association of educators in this country, NEA can draw upon a breadth of experience to inform the Court as to the reasonableness of the requirements for desegregation framed by the district court in this case, when judged from the standpoint of educational considerations as well as the practices and expenditures of other school systems. Pursuant to leave granted by the court of appeals, NEA filed a brief *amicus curiae* in the proceedings below (see, *e.g.*, Appendix to Petition for Certiorari, pp. 194a, 211a) and, upon invitation, presented oral argument.[2] Pursuant to leave granted by this Court on June 29, 1970, NEA filed a brief *amicus curiae* in support of the petition for certiorari herein.

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[2]The NEA and its State associations have participated as *amicus curiae* in other major proceedings involving issues of education and race. See *Alexander v. Holmes County Board of Education,* 396 U.S. 19 (1969); *Carter v. West Feliciana Parish School Board,* No. 29745 (5th Cir. 1970); *Smuck v. Hobson,* 408 F.2d 175 (D.C. Cir. 1969); *Lee v. Macon County Board of Education,* 283 F. Supp. 194 (M.D. Ala. 1968).

Accordingly, the National Education Association respectfully requests that this Court grant leave to file the attached brief *amicus curiae* on the merits urging reversal of the judgment of the court of appeals.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1970

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE NATIONAL EDUCATION ASSOCIATION

The National Education Association (hereinafter NEA) is an independent, voluntary organization of professional educators. It has over one million members, including teachers, supervisors, and administrators. As stated in the Association's Charter, its purpose is "to elevate the character and advance the interests of the profession of teachers and to promote the cause of education in the United States." Both the NEA and its members have a deep interest in the quality of education received by children of all races. NEA considers it imperative that pursuant to *Brown v. Board of Ed-*

ucation, 347 U.S. 483 (1954), desegregation of the nation's schools be complete and effective. NEA has recently conducted investigations of the problems of race and education in the school systems of Wilcox County, Alabama; Baltimore, Maryland; some 22 counties in Louisiana; Detroit, Michigan; some 30 counties in Mississippi; Hyde County, North Carolina; and the region of East Texas. NEA has also participated as a party or as *amicus curiae* in several school desegregation cases, including the proceedings in the instant case before the Fourth Circuit and before this Court on the petition for certiorari, and in numerous others has actively supported efforts to secure judicial relief.

STATEMENT

This case is before the Court on certiorari to review the judgment of the court of appeals insofar as it vacated the order of the district court requiring implementation of that court's desegregation plan for the Charlotte-Mecklenburg School District. The court of appeals affirmed the district court's order to the extent that it required implementation of the desegregation plan for senior and junior high schools. That part of the court of appeals judgment is not challenged in this case. It is attacked in a cross-petition for certiorari (No. 349) that was filed by respondents herein on July 2, 1970. To date, the cross-petition has not been granted.

Accordingly, we deal in this brief with the part of the court of appeals judgment challenged by petitioners, *i.e.*, that part vacating the district court's order insofar as it provided for the assignment of elementary school pupils and remanding that aspect of the case to the district court for further proceedings. The district court has now held hearings upon the remand and on August 3, 1970, issued a new order directing the School Board to put the court's elementary school desegregation order here involved into effect at the opening of the 1970 fall term unless the Board chooses to prepare a pupil assignment plan for use with the deseg-

regation plan recently proposed by a minority of the Board or to implement portions of both the court's plan and the minority plan so as to achieve the requisite desegregation of the schools. (Memorandum of Decision and Order, August 3, 1970, pp. 32-33).[3]

[3]In pertinent part, the court's August 3 order provided:

> As to the elementary schools:
>
> (a) The order entered by this court on February 5, 1970 having been subjected to three weeks of review under the reasonableness test is expressly found to be reasonable, and the School Board are directed to put the court ordered plan of desegregation into effect at the opening of school in the fall of 1970, *unless* they avail themselves of some of the options indicated herein.
>
> (b) The plan for elementary school desegregation proposed by a 4/5 minority of the School Board (the Watkins plan) has been examined and is found to be reasonable, as far as it goes. It is, however, incomplete because it contains no plan for pupil assignment. The School Board are authorized to prepare an appropriate pupil assignment plan and use the minority plan for elementary school desegregation instead of the comparable portions of the plan previously ordered by the court, if they so elect.
>
> (c) The School Board, if they so elect, may use portions of the minority plan and portions of the court ordered plan, bearing in mind that the most important single element in the order of this court on February 5, 1970 is paragraph 16, reading as follows:
>
> > 16. The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger, Jr., are *illustrations of means or partial means to that end.* The defendants are encouraged to use their full 'know-how' and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results.*
>
> (d) The Board are free to incorporate into any plan they may make whatever portions of the work of the Department of Health, Education and Welfare staff, or such parts of the original partial Finger plan (Plaintiffs' Exhibit 10), which are consistent with their duty to carry out the order to desegregate the schools.

We understand that the entire Memorandum of Decision and Order will be printed as an Appendix to the Brief for Petitioners.

The court of appeals opinion lays down several general principles (189a):[4] First, contrary to the view of the district court, a unitary school system does not require that each and every school within the system be integrated. Second, even so, the school board "must use all reasonable means to integrate" the schools within its jurisdiction. Third, if black residential areas are so large that not all schools can be integrated by using "reasonable means," the school board "must take further steps to assure that pupils are not excluded from integrated schools on the basis of race." Specifically, the school board should make available to children in identifiably black schools (that cannot be integrated by "reasonable means") integrated special classes, functions and programs, the right to transfer, with free transportation, from a school with a majority of black students to a school with a black minority, and assignment to integrated schools as these children come up the educational ladder.

The court of appeals explained its "reasonable means" test as requiring a school board to make "every reasonable effort" to integrate each school (189a-190a). Efforts that are not "reasonable" would apparently not be required so long as the school board takes the "further steps" noted above.

"Every reasonable effort" to desegregate is all that is required under the court of appeals opinion even though the black residential areas in Charlotte that are "so large" as to defy desegregation through the use of "reasonable means" are attributable to federal, state and local governmental action (189a). The court of appeals accepted as supported by the evidence the district court's findings that the existing residential separation of the races in Charlotte had been produced in part by governmental action and that the superimposition of neighborhood school lines upon governmen-

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[4]Citations are to pages in the "Appendix to Petition for Certiorari, Opinions Below."

tally fostered segregated neighborhoods resulted in the creation by the School Board of segregated neighborhood schools (186a-187a).

The court of appeals reviewed the different estimates of the district court and of the Charlotte-Mecklenburg School Board concerning the costs of the additional bussing required by the district court's order and affirmed the district court's findings on the issue, as well as on all other issues, as not clearly erroneous (191a-194a). This is the only discussion of bussing costs set out in the opinion. The court of appeals did observe that bussing is a permissible tool for achieving integration, that it is not new or unusual, that 54.9% of all North Carolina pupils are bussed an average daily round trip of 24 miles at an annual cost of over $14 million, and that the Charlotte-Mecklenburg School District currently busses approximately 23,600 pupils and another 5,000 ride common carriers (194a).

The court of appeals asserted that a school board should view the desirability of bussing to achieve integration in the same light as bussing is viewed in connection with other "legitimate improvements" in the school system, such as consolidating schools and locating new school facilities (194a). Specifically, the court listed five considerations that a school board should take into account in utilizing bussing as a tool for achieving integration: (1) the age of the pupils involved, (2) the distance they must be bussed, (3) the time required to bus them, (4) the effect on traffic and (5) the cost in relation to the school board's resources (194a).

Finally, the court of appeals held that the district court's order insofar as it dealt with elementary school pupils would require the respondent School Board to undertake additional bussing so extensive as to constitute an unreasonable means of desegregating the schools. In support of this holding the court of appeals reasoned that the district court's elementary school plan would require 9300 pupils to be bussed in 90 additional busses, that most of the bussed children

would be blacks in grades 1 through 4 and whites in grades 5 and 6, that the average round trip would be 15 miles through central city and suburban traffic, that the district court's plan would involve a 39% increase in the number of bussed children and a 32% increase in the size of the School Board's fleet of busses, and that the number of children bussed would be increased by 56% and the bus fleet by 49% if the additional bussing for junior and senior high school students approved by the court of appeals were included in the calculations (198a).

SUMMARY OF ARGUMENT

1. Even if the "reasonable means" test formulated by the court of appeals were an appropriate standard for review of district court desegregation orders, the court of appeals should have concluded in this case that the additional bussing required by the district court was a reasonable means to desegregate the Charlotte-Mecklenburg elementary schools. The cost of the additional bussing would be very small as compared to the resources available to the School Board, and the educational benefits that would be realized by black school children would far outweigh the relatively minor financial costs. The bussing of elementary school students is not rendered unreasonable because of their age. In North Carolina 70.9% of all bussed pupils attend elementary schools. Furthermore, the younger a black child is when he begins attending desegregated schools, the greater the substantial educational benefits arising from a desegregated education will be. The average distance that the students would be bussed under the district court's order is less than half the average distance that students are now bussed to school by the School Board. The time that would be spent on the bus is well within generally recommended limits. The effects of the additional bussing on traffic would be negligible. Finally, the percentage increase in students bussed and busses needed is directly attributable to the failure of the School Board to proceed sixteen years ago to desegregate the schools with all deliberate speed. Had the appro-

priate steps been initiated then to achieve desegregation within the school system, the increment in bussing at this time would be modest indeed.

2. The "reasonable means" test is an inappropriate standard for review of a district court desegregation order. The test, at least as conceived by the court of appeals, suggests that bussing should be considered as a tool for achieving school desegregation in the same light that it is considered "for other legitimate improvements, such as school consolidation. . . ." This approach fails to recognize that the constitutional rights of Negro school children are at stake, and that school boards are charged with the duty to take "whatever steps might be necessary" to desegregate dual school systems. *Green v. School Board of New Kent County,* 391 U.S. 430, 437-38 (1968). *Green* calls for a somewhat different standard of review, one that emphasizes the "heavy burden" upon the proponent of the less effective desegregation plan before the court. This burden should be at least as heavy as the "compelling governmental interest" test applied in other equal protection cases involving fundamental constitutional rights. *E.g., Shapiro v. Thompson,* 394 U.S. 618, 634 (1969). The rights involved in this case are no less fundamental and should not be denied by rejection or modification of the most effective desegregation plan before the court unless a compelling governmental interest necessitates such rejection or modification. No compelling governmental interest was shown here.

3. Under *Green v. School Board of New Kent County, supra,* the "heavy burden" or, as we suggest, "compelling governmental interest" standard applies in all cases, without exception, where a district court has before it a more effective plan to desegregate a dual system than that proposed by the local school board. *A fortiori,* the test should apply in cases such as the one at bar. Here, as both of the lower courts found, the neighborhood schools that would remain black absent the additional bussing required by the district court are black as a result, in part, of governmentally caused residential segregation. When the School Board, under these

circumstances, insists on a "neighborhood school" system, it effectively classifies pupils on the basis of race, and racial classifications can stand, if at all, only where they are justified by a "compelling governmental interest."

ARGUMENT

I

The Additional Bussing Required by the District Court's Order Constituted a "Reasonable Means" of Desegregating the Charlotte-Mecklenburg Elementary Schools.

The "reasonable means" test applied by the court of appeals was not in our view an appropriate standard for review of the district court's order, but we shall assume that it was for the purposes of this Part I of our Argument. We deal in Parts II and III, *infra,* with what we believe the School Board's minimum burden should have been to justify reversal of the district court's ruling.

It is not at all clear from the court of appeals opinion why the court found the additional bussing required by the district court's order to impose an unreasonable burden upon the School Board. Presumably, the court applied the five factors that it said a school board should take into consideration in determining who should be bussed where. The only alternative analysis that may be made of the court of appeals opinion is that the court found the additional bussing unreasonable simply because it constituted too great a relative increase in the number of children bussed and in the number of busses needed to transport them. In either event, in the judgment of NEA based upon the analysis below, the additional bussing called for by the district court is a "reasonable means" of desegregating the schools.

A. *Costs.* Perhaps the most significant among the factors enumerated by the court of appeals is the cost of bussing in relation to a school board's resources. In this connection, the court appears to have concentrated more upon

the dollars involved than upon the sufficiency of the Board's resources to absorb their expenditure.

The district court found that the additional cost to the School Board would amount to $672,000 during the first year ($186,000 of operating expense and $486,000 in capital outlay to purchase new busses) and $186,000 for each year thereafter (156a-157a), that the School Board now spends approximately $500,000 on bussing annually, out of a total operating budget of $51 million, and that local sources (as opposed to federal and State sources) now provide about $25 million a year to the school system. (138a-139a). Thus, the cost of the existing and additional bussing would be about 1.3% of the School Board's total operating budget and about 2.7% of the local funds provided annually to the Board. Nationally, schools devote approximately 4.3% of net current expenditures to transportation. O. Furno, *et al.*, "Cost of Education Index 1969-70," *School Management* 42-43 (January, 1970).

On remand, the district court found that the School Board already had 107 of the 138 busses that would be needed to provide the additional transportation required by the court's desegregation plan for all grades, that the State of North Carolina had 400 second-hand busses that it had offered to lend without cost to school boards for use in 1970-71, that the School Board would face no immediate need to invest in new busses, that the School Board's total budget for 1970-71 was $8 million higher than for 1969-70 and provided that $21.9 million was available for unrestricted use, and that the State, which has regular budgetary surpluses, pays almost all of the costs of operating the Charlotte-Mecklenburg school busses (Memorandum of Decision and Order, August 3, 1970, pp. 18-23). In short, the additional costs involved were found well within the capability of State and local governments to bear them. See, also, the discussion at pp. 23-24, *infra.*

The reasonableness of the costs here involved must also be measured against the value of what is being purchased.

These expenditures are not made just for transportation. They also buy increased educational opportunities, particularly for the black child.

Among educators there is virtually no question that the quality of schooling for ghetto younsters should be upgraded and efforts should be made to overcome the effects of racial isolation. The value of desegregation in this connection was demonstrated in an extensive study prepared for the Office of Education (HEW). That study showed that the achievement of Negro children is strongly influenced by the "educational backgrounds and aspirations of the other students in the school." The study further found that the principal difference in the school environments of white and black students is "the composition of their student bodies." J. Coleman, *Equality of Education Opportunity* 22 (1966).

The data collected by the Office of Education were reanalyzed for the United States Commission on Civil Rights. This re-examination confirmed the "importance of the student environment of the school" and showed that "segregated Negro students are most likely attending class with other students of a very low social class." Furthermore, the study showed that even when the social class of the student and his school are held constant, there still is "an upward trend in average achievement level as the proportion of white classmates increases." Thus, improved "social class level of the school . . . may not be the only source of benefit for Negro students in desegregated situations. There is also evidence that the racial composition, as distinguished from the social class composition of the school, has an important influence." U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* Appendices 40 (1967). This, in general, may be attributable to the better educational atmosphere produced when "the majority of the children . . . do not have problems of self confidence due to race and the schools are not stigmitized as inferior." Id. at 105.

The most comprehensive compilation to date of the educational effects of desegregation concluded:

> 1. Academic achievement rises as the minority child learns more while the advantaged majority child continues to learn at his accustomed rate. Thus, the achievement gap narrows.
>
> * * * *
>
> 2. Negro aspirations, already high, are positively affected; self-esteem rises; and self-acceptance as a Negro grows.
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> * * * *
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> 7. Virtually none of the negative predictions by anti-desegregationists finds support in studies of actual desegregation.
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> M. Weinberg, *Desegregation Research: An Appraisal* 378-379 (2d ed. 1970).

These conclusions rest on a study of about 300 surveys of school desegregation. See, also, the findings of the district court in this case indicating that in Charlotte blacks in desegregated schools perform better than blacks in all-Negro schools (97a-98a).

The cost of additional bussing to achieve desegregation should also be measured against the cost of compensatory education programs that may be utilized in an effort to make up for the disadvantages of a segregated school. A review of several such programs by the U.S. Commission on Civil Rights indicates that they are quite expensive. A New York City experimental project cost $80 per junior high school student and up to $250 for a student in senior high school. U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 123 (1967). When the program was broadened to include more children, the cost ranged from $50 to $60 per child. *Id.* at 124. A Syracuse, N. Y., program experienced expenses of $100 per child for elementary and junior high students. *Id.* at 128. The lowest cost mentioned among the programs reviewed by the Commission was $35 per student in Philadelphia. *Id.* at 132. These

costs are substantially higher than the $20 per pupil cost for the additional bussing required by the district court in this case. Moreover, the results of the programs reviewed, insofar as achievement is concerned, were far less encouraging than those that can be expected from desegregated classes. *Id.* 128-140.

In short, NEA's position is that bussing costs, when incurred as part of a plan for desegregating schools, cannot be written off as mere transportation expenses. They provide real educational benefits to the disadvantaged youngsters in the ghetto, and those children, generally speaking, sorely need special attention in order to mitigate the adverse effects of racial isolation. The financial costs anticipated here are reasonable enough when viewed in connection with the financial resources available to bear them. They are more reasonable still when one considers what they will buy in the way of educational benefits for those children who have yet to realize the promise of desegregated schools, and the greater cost of less satisfactory compensatory education alternatives.

Finally, that it may cost money to vindicate the constitutional rights of black children in Charlotte's elementary schools is no reason to leave those rights in limbo. In *Shapiro v. Thompson,* 394 U.S. 618, 633 (1969), this Court held that the "saving of welfare costs" could not justify what would otherwise amount to a deprivation of an individual's right to equal protection of the laws. The costs there involved were far greater than those here in issue. And in *Griffin v. County School Board,* 377 U.S. 218, 233 (1964), the Court declared that in fashioning relief from continuing racial discrimination in connection with public education in Prince Edward County, Virginia, the district court might require the local authorities "to levy taxes to raise funds" to operate desegregated schools.

B. *Age.* Another factor considered by the court of appeals is the age of the students to be bussed. Among the findings of the district court, which were accepted by

the court of appeals, were that 9,300 additional children in grades 1 through 6 would be transported (155a) and that travel by school bus is safer than walking to school or riding there in private vehicles (140a). The district court had earlier noted that first graders "may be the largest group" among the 23,600 students that are currently being bussed by the School Board (22a). Judge Winter, concurring in part and dissenting in part in the court of appeals, observed (221a-222a) that the Charlotte-Mecklenburg School Board busses a far lower percentage (21%) of students than does North Carolina as a whole (54.9%). Statewide, 38.7% of all enrolled students (70.9% of all bussed students) are bussed to elementary schools (137a). Under the district court's order, a total of 43.6% of all Charlotte-Mecklenburg students will be bussed, and this figure includes substantial numbers of students bussed to junior and senior high schools. (186a, 138a, 157a) Thus, the percentage of elementary school students that will be bussed under the district court's order compares favorably with the percentage of elementary school students bussed statewide.

The district court's subsequent decision on August 3 included findings that currently more elementary school children than high schoolers are bussed in Charlotte-Mecklenburg and that four- and five-year olds are transported on the longest bus routes in the system (Memorandum of Decision and Order, August 3, 1970, pp. 23-24).

School children of all ages can be and are bussed to schools throughout the nation every day. During the 1969-70 school year some 18 million children were bussed to public schools in America. NEA, National Commission on Safety Education, *1968-1969 Statistics on Pupil Transportation* (1970). This amounted to approximately 39% of the estimated 45.5 million total public school population. NEA Research Division, *Estimates of School Statistics, 1969-70* (1969).

On the other hand, the age of the child probably has a crucial influence on the effectiveness of school desegrega-

tion. There is widespread, if not universal, recognition among educators that the critical years in the educational process are the early school years. In this formative period, the school system has the greatest opportunity to help the child develop mental discipline, appropriate social attitudes and fundamental skills, such as reading. See, for example, B. Bloom, *Stability and Change in Human Characteristics* 215-16 (1964).

For children from whom educational opportunity has historically been withheld, the early years are probably even more important. These children, as they progress through school, show a cumulative deficit. They often begin school with inadequate language skills, insufficient perceptual skills, shorter attention spans, and poorer motivation. With age, the child's linguistic patterns harden. The gap between his reading skills and those of his middle class peers enlarges. By the time the child reaches the eighth grade he is about three years behind the grade norms for reading, arithmetic and a variety of other subjects. B. Bloom, *et al., Compensatory Education for Cultural Deprivation* 73-74 (1965).[5]

As one would expect, then, the beneficial effects of desegregation are likely to be greatest in the lower grades. In Charlotte, as the district court found on remand, achievement test scores demonstrate that the higher the grade at which schools are first desegregated, the greater are the academic penalties that black children will incur (Memorandum

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[5] Compare the results of a survey made by the U.S. Office of Education reported in U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 14 (1967): "Negro and white students in metropolitan areas begin school with a noticeable difference in verbal ability. At sixth grade, the average Negro student is about one and one-half grade levels behind the average white student in verbal achievement. By the time 12th grade is reached, the average white student performs at or slightly below the 12th-grade level, but the average Negro student performs below the 9th-grade level. Thus, years of school completed has an entirely different meaning for Negroes and whites."

of Decision and Order, August 3, 1970, pp. 7-8, 16). More generally, "those [black] students who first entered desegregated schools in the early grades do generally show slightly higher average scores [on achievement tests] than the students who first came to desegregated schools in later grades." J. Coleman, *op. cit. supra,* at p. 331. To the same effect, see M. Weinberg, *op. cit. supra,* at p. 58; Report to the Board of Regents of the University of the State of New York, *Racial and Social Class Isolation in the Schools* 18, 238 (1969). Thus, if the optimum educational advantages of desegregation are to be obtained, desegregation should begin with the youngest pupils in the system.

In short, to the extent that the age of the children to be bussed to achieve desegregation is weighed in evaluating the "reasonableness" of the bussing, the younger the black child, the more he will benefit from the bussing. The added educational benefits of desegregation in the early grades more than outweigh the disadvantages, if any, that bussing might entail.

C. *Distance.* A third factor cited by the court of appeals is the distance that the children would be bussed. The district court found that the average length of a one-way bus trip in the school system was over 15 miles, while the average one-way trip for elementary school students under the court's plan would be less than 7 miles, which distance was obtained by the method used by the county school bus superintendent, *i.e.,* taking the straight line mileage and adding 25% (153a, 183a). On remand, the district court found that four- and five-year-olds today travel from 7 to 39 miles, one way, on the School Board's busses (Memorandum of Decision and Order, August 3, 1970, at p. 17).

The matter of distance, of course, involves for at least some children the question whether they are to be schooled in the "neighborhood" or at some more removed location. From the educator's viewpoint, the neighborhood school

has both advantages and disadvantages. See R. Havighurst, "The Neighborhood School: Status and Prospects," in Frazier ed., *A Curriculum for Children* 73-76 (1969) and R. Binswanger, *Address before the American Association of School Administrators,* February 13, 1967. Certainly, as the district court observed (22a), it is far from an unquestioned virtue. One of the foremost authorities in the field is of the view that "there cannot be a really good all-Negro neighborhood school in the United States today." Havighurst, *op. cit. supra,* at 82. See, also, M. Weinberg, *Race and Place* 89 n.5 (1967), and the discussion at pp. 14-15, *supra.*

It must be emphasized in this respect that the remedy fashioned by the district court is not much different than the remedy employed earlier by school authorities in the nation-wide effort to eliminate the educational deprivations of rural America. As a result of that effort the number of single-teacher schools was reduced from 156,066 in 1927-28 to 6,500 in 1965-66. NEA Research Division, *One Teacher Schools Today* 9 (1960); U.S. Office of Education, *Statistics of State School Systems, 1965-1966* 4. Similarly, the number of school systems was reduced from 127,422 in 1931-32, to 18,904 in 1969-70. NEA Research Division, *Estimates of School Statistics, 1969-70* 5-6 (1969). That consolidation eliminated nearby schools for many families and required extensive bussing of children to the villages. It involved costs and inconvenience and aroused resistance over the loss of locally-based schools. But in terms of the improved educational opportunity provided the students, it was worthwhile and constructive. In fact, the most important effect of school consolidations was the educational gains produced by bringing together laboring class children of the farms and middle-class children of the village. Swanson, "Contemporary Challenges: Monitoring Human Inputs into the Schools," *Fiscal Planning for Schools in Transition* in Proceedings of the Twelfth National Conference on School Finance 80-84 (1970).

D. *Time.* A fourth factor mentioned by the court of appeals is the time required to bus the students to and from school. The district court found that the average one-way bus trip under the district court's elementary school plan would take "not over 35 minutes at the most" whereas the average one-way bus trip in the Charlotte-Mecklenburg school system today takes "nearly an hour and a quarter" (153a).

The generally recognized limits on the amount of time that a student should be bussed were formulated in 1948 by the National Commission on School District Reorganization. That Commission laid down the minimum staff and enrollment levels which are consistent with the educational interests of the children. The Commission, however, counseled school planners that:

> In more sparsely populated areas, the need to transport children to and from school makes it desirable to modify these standards. It may be detrimental to the physical and emotional well-being of children to keep them on the road for long periods; thus, over-zealous efforts to set up desirable situations for the provisions of a good educational program may seriously undermine one of its most important elements. The best information available indicates that:
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> 1. The time spent by elementary children in going to and from school should not exceed 45 minutes each way.
> 2. The time spent by high school pupils in going to and from school should not exceed an hour each way.
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> NEA, Department of Rural Education, *Report of the National Commission on School Reorganization* 81-82 (1948).

No development since these standards were formulated suggests that they are outmoded. The bussing prescribed by the district court is well within them.

E. *Traffic.* Lastly, the court of appeals mentioned the effect of the bussing on traffic. The court noted that the bussing required by the district court would run through central city and suburban traffic and that (193a) "large numbers of school buses themselves generate traffic problems that only experience can measure." Judge Sobeloff, in his separate opinion dissenting in part and concurring in part, found in the record "no evidence of insurmountable traffic problems due to the increased bussing." He also doubted whether the additional busses would have very much of an impact in an area in which estimated automobile trips per day approximate 870,000. The district court found that the School Board already operates 279 busses within the school district and that the court's desegregation plan would involve "no serious extra load on downtown traffic because there will be no pickup and discharge of passengers in downtown traffic areas" (142a, 143a).[6]

F. *Percentage increase.* The additional bussing of elementary school pupils required by the district court's order

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[6]On remand, the district court made findings which clearly establish that the traffic problem is an unreal one (Memorandum of the Decision and Order, August 3, 1970, at pp. 24-25):

> The county has over 160,000 passenger vehicles and nearly 30,000 trucks registered in it. It is estimated that the total number of automobile trips in the county daily other than truck trips is over 869,000. Traffic is heavy in most part of the county. Since the so-called "cross-bussing" of the Finger plan or the minority plan will not contemplate pick up and discharge of pupils in the central business area, the busses added by the Finger plan or the minority Board plan will provide very little interference with normal flow of traffic. School busses are no wider than other busses (the law requires that this be so); they already use all the major streets and traffic arteries in the county and city every school morning of the year. There is no evidence to show that adding 138 school busses to the volume of existing traffic will provide any such impediment as should be measured against the constitutional rights of children. It would also appear that a school bus transporting 40 to 75 children should reduce traffic problems by cutting down on the number of automobiles that parents might otherwise be driving over the same roads.

does represent a substantial percentage increase in the total number of pupils bussed by the school board (39%) and in the total number of busses needed to transport them (32%). This increase is substantial, however, simply because the district court's order in one sweep invoked measures that in large part should have been taken over the last sixteen years. Had the school board begun in the 1954-55 school year to desegregate its elementary schools by providing each year 1/17th of the additional bussing called for by the district court, so that 100% of such bussing would be provided for the first time in the 1970-71 school year, the percentage increase from 1969-70 to 1970-71 in the number of students bussed and the number of busses needed for them would be only 1.69% and 1.45% respectively. The capital outlay for new busses during the period would have been only $28,000 per year, including 1970-71. The lump-sum capital outlay that would be required *now* by the district court's order if new busses had to be purchased approaches a half million dollars simply because outlays of capital to achieve desegregation as required by law were not forthcoming during the previous sixteen years.

The sizeable percentage increase in pupils bussed and busses needed resulting from the district court's order is thus directly attributable to the failure of the School Board to desegregate the schools during the years that have elapsed since 1954. Furthermore, "the actions of the present school board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods" (87a) have affirmatively added to the problem. To hold with the suggestion of the court of appeals that additional bussing may not be a "reasonable means" of achieving desegregation where it involves too "extensive" an increase is to reward school districts for delaying desegregation—and augmenting separate facilities in the interim—to the point where such extensive increases are necessary. The size of the percentage

increases in bussing simply does not warrant consideration in the "reasonableness" equation.

In sum, NEA believes the desegregation plan for elementary schools ordered by the district court was a reasonable and effective means of desegregating this portion of the school system. Since there was no more effective desegregation plan before the district court, its order should have been affirmed by the court of appeals. *Green v. School Board of New Kent County*, 391 U.S. 430 (1968). Accordingly, this Court should reverse the ruling of the court of appeals and reinstate the district court's order. However, in so doing the Court should not embrace the "reasonable means" test as a standard for review of desegregation orders. We turn now to a consideration of that issue.

II.

The Court of Appeals Should Have Reviewed the District Court's Order Not by the Standard of Whether It Provided for "Reasonable Means" for Effectuating Desegregation, but by Determining Whether Its Modification Was, at the Least, Necessary To Serve a Compelling Governmental Interest.

The court of appeals' opinion appears to draw a line beyond which a district court may not go in providing effective relief to remedy the established unconstitutional deficiencies of dual school system: A district court may require whatever desegregation may be achieved by "reasonable means," but where the remnants, no matter how large, of a dual school system cannot be disestablished by "reasonable means", they need not be disestablished at all. We have demonstrated above that the additional bussing of elementary school pupils required by the district court constituted a "reasonable means" of achieving desegregation and so met the new test formulated by the court of appeals. We argue here that that test itself is an improper one.

The obligation to desegregate a dual school system may well be an absolute duty that may not be avoided in any part on any ground. We do not, however, reach that question, nor need this Court in order to reverse the decision of the court of appeals. At the least, one who seeks to overturn or modify an effective desegregation plan ordered by a district court must demonstrate that such a reversal or modification is necessary to serve a compelling governmental interest. No such interest was shown here.

What are "reasonable means" to achieve desegregation and what are not may all too easily be determined without sufficient recognition that the fundamental and immediate rights of thousands of black school children to an education in desegregated public schools is at stake. *Alexander v. Holmes County Board of Education,* 396 U.S. 19, 20 (1969). The court of appeals in this very case made just such an error. It indicated that bussing, as a means of achieving desegregation, should be viewed "in the light" that it is viewed "for other legitimate improvements, such as school consolidation and the location of new schools" (194a). Although a school board may decide against a proposed school consolidation or particular location for a new school on the ground that the proposal would require additional bussing that the school board, rightly or wrongly, deems undesirable, the constitutional rights of a large minority of the school population to a desegregated education cannot be made to rise or fall on a similarly nice policy judgment. This Court in *Green v. School Board of New Kent County,* 391 U.S. 430, 436, 437-38, 442 (1968), asserted that to vindicate the "constitutional rights of Negro school children" school boards are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert a unitary system in which racial discrimination would be eliminated root and branch" and to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Green* did not limit this duty to taking only the action that a school board (or court) might

consider reasonable in order to obtain other legitimate educational improvements, such as consolidating old schools or locating new ones. *Green* called for "whatever" steps may be necessary.

In addition, the "reasonable means" standard is exceedingly vague and openly invites circumvention of the constitutional right of black children to equal educational opportunities. As Judge Sobeloff observed below (212a-213a):

> Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not "reasonably" eradicable. Even more pernicious, the new-born rule furnishes a powerful incentive to communities to perpetuate and deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome.

Green v. School Board of New Kent County, supra, establishes, or at least points to, a different standard by which the appropriateness of a desegregation plan ordered to be implemented by a district court should be measured. Where two plans for desegregation are before a district court, *Green* requires that the proponent of the plan that does the less effective job of desegregating the schools bear a "heavy burden" to justify its implementation. *A fortiori,* where a school board challenges a district court order requiring implementation of the more effective plan, that is, the plan that promises to work best now, it should bear a heavy burden to show why the more effective plan should not be carried out.

We read this language in *Green* as requiring a school board to carry a burden at least as heavy as this Court has imposed in equal protection cases involving fundamental constitutional rights arising in contexts other than racial discrimination, *i.e.,* rejection or modification of the more

effective desegregation plan must be shown to be necessary in order to serve a compelling governmental interest.

In *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969), this Court struck down a welfare benefit waiting period because it served to penalize the exercise of the constitutional right to travel among the several states and had not been "shown to be necessary to promote a compelling governmental interest." The Court recognized that the waiting-period provisions resulted in a considerable savings of welfare costs, but this interest was not sufficiently compelling to justify inhibiting the exercise of constitutional rights. In *Williams v. Rhodes,* 393 U.S. 23, 24, 31 (1968), Ohio election laws making it "virtually impossible" for a new political party to obtain a place on the ballot to choose electors for the Presidency and Vice Presidency of the United States were invalidated. The rights of individuals to join together to advance their political beliefs and effectively to cast their votes were adversely affected by the Ohio statutes. This Court, quoting *NAACP v. Button,* 371 U.S. 415, 438 (1963), held that only a compelling state interest, which Ohio had failed to show, could justify the infringement. *Sherbert v. Verner,* 374 U.S. 398, 406 (1963), held that a state could not disqualify a person for unemployment benefits because she was unavailable to work Saturday where her unavailability was due to the exercise of her religious beliefs. The Court considered "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right" and found none. See, also, *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942); *Carrington v. Rash,* 380 U.S. 89, 96 (1965); *Kramer v. Union School District,* 395 U.S. 621, 626-27 (1969); *Cipriano v. City of Houma,* 395 U.S. 701, 704 (1969); *Harper v. Virginia Board of Elections,* 383 U.S. 663, 670 (1966); *Bates v. Little Rock,* 361 U.S. 516, 524 (1960).

In this case the no less fundamental rights of Negro school children to be freed completely of the disabilities of a dual school system are in issue. *Alexander v. Holmes County Board of Education,* 396 U.S. 19, 20 (1969). These are rights that are personal to each black child assigned to a

segregated school. *Sweatt v. Painter,* 339 U.S. 629, 635 (1950). A black child assigned to a black school such as Double Oaks or Lincoln Heights (126a, 127a) is afforded little consolation—and no vindication of his personal and immediate constitutional rights—by the fact that the School Board may afford other students an integrated education. In these circumstances a compelling governmental interest must be shown to justify school assignments that would infringe upon such rights by failing to desegregate the Charlotte-Mecklenburg elementary schools as effectively as the district court's order.

The question is how far the School Board must go to see to it that the constitutional rights of black school children are in fact realized. The answer, in our view, is that the School Board must go as far as it is necessary for it to go to eliminate the racial identity of schools within the system. It may stop short, if at all, only where a compelling government interest so warrants. The governmental interests involved in this case, both educational and financial, have been reviewed in detail in Part I of this Argument. They may not fairly be described as "compelling."

III.

In Any Event, Where a Black Residential Area Has Been Created in Part by State Action, a Compelling Governmental Interest, at the Least, Must Be Shown To Justify a Failure To Disestablish the Racial Identity of the Schools Within That Area.

Certainly, where a classification is based upon race, the need to show a compelling governmental interest is underscored. *Cooper v. Aaron,* 358 U.S. 1, 16 (1958), rejected the contention that school desegregation in Little Rock, Arkansas, be postponed because otherwise civil violence and disruption, albeit inspired by state officials, would ensue. The Court observed that as far back as *Buchanan v. Warley,* 245 U.S. 60, 81 (1917), it had ruled that a zoning ordinance separating residential areas by race

could not be defended on the grounds that it would promote public peace by preventing race conflicts. See, also, *Loving v. Virginia,* 388 U.S. 1, 11 (1967); *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964); *Korematsu v. United States,* 323 U.S. 214, 216 (1944); *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943). A classification based upon race is precisely what is in issue here.

Only additional bussing of the magnitude required by the district court can effectively eliminate the racial identity of the elementary schools in the Charlotte black ghetto (146a, 171a). The district court found (12a-14a, 86a-87a), and the court of appeals agreed (186a), that this segregated residential area was in part the work of federal, state and local governments. If only "reasonable means" need be used to desegregate the schools in the ghetto, and if the requisite additional bussing is not such "reasonable means", governmental authorities will be authorized to perpetuate a racially segregated dual school system by dividing neighborhoods by race and drawing geographic school zones upon those segregated neighborhoods. We contend that under these circumstances a compelling governmental interest, at the least, must assuredly be shown to justify use of a plan that will not desegregate the black neighborhood schools. Otherwise government would too readily be authorized to accomplish indirectly what it could not do directly, *i.e.,* separate students by race.

The district court found that (86a-87a):

> . . . [the] facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling

> the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods.

In more detail, the district court found that under the city's urban renewal program, thousands of Negroes were moved from the center of town west to the least-restrictively-zoned areas, that while this relocation involved many decisions by individuals and governments at various levels, it "occurred with heavy Federal financing and with active participation by the local governments, and it has further concentrated Negroes until 95% or so of the city's Negroes live west of the Tryon-railroad area, or on its immediate eastern fringes," and that the School Board located new schools so as separately to serve the black population relocated to the northwest and the white population moving generally south and east so that such schools became black or nearly black in the northwest and white or nearly white in the east and southeast (13a-14a).

Governmental involvement in Charlotte's residential segregation is also historically evident. After *Buchanan v. Warley*, 245 U.S. 60 (1917), outlawed compulsory residential segregation, a principal impetus to neighborhood segregation was legal recognition and judicial enforcement of racially restrictive covenants.[7] The United States has taken the position that these become "in effect a local zoning ordinance binding those in the area subject to the restric-

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[7] The Supreme Court of North Carolina held such covenants legally enforceable as late as 1946. *Vernon v. R. J. Reynolds Realty Co.*, 226 N.C. 58, 36 S.E. 2d 710 (1946); *Phillips v. Wearn*, 226 N.C. 290, 37 S.E. 2d 895 (1946); *Eason v. Buffaloe*, 198 N.C. 520, 152 S.E. 496 (1930). In *Phillips* the Court upheld a racial restriction in a deed to a tract of land covering 380 lots in the eastern section of Charlotte, which it described as providing "[p]roperty not to be owned or occupied by persons of the negro race." 37 S.E. 2d at 896. In 1948 this Court held such covenants unenforceable. *Shelley v. Kraemer*, 334 U.S. 1.

tion . . . ."[8] Also, policies followed by the Federal Housing Authority and by local government in connection with public housing projects hage fostered residential segregation.[9]

In sum, the findings of fact made by the district court as well as the historical record of governmental action requiring and supporting residential segregation in Mecklenburg County provide ample support for that court's conclusion (87a) that Charlotte's black residential areas are the result of "so much state action . . . that the resulting segregation is not innocent or 'de facto.'" It is well established that " . . . the involvement of the State need [not] be exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral or its action was only

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[8] Brief of the United States in *Bell v. Maryland*, 378 U.S. 226 (1964), as quoted at 329 n. 16. See, also, the discussion of the grounds for decision of *Shelley v. Kraemer, supra*, in *Bell v. Maryland, supra*, at 328 *et seq.* (dissenting opinion of Mr. Justice Black).

[9] The FHA was urging racially restricted neighborhoods as late as 1938 and continued to treat racial integration as a reason to deny an application for mortgage insurance even after *Shelley v. Kraemer, supra*. See U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 254-255 (1967). State and local governments likewise fostered residential segregation in their administration of public housing projects long after *Shelley*. Segregated projects in Philadelphia for Negroes and whites were approved in *Favors v. Randall*, 40 F. Supp. 743 (E.D. Pa. 1941) and in 1955, the constitutionality of segregated projects in Detroit was being contested in the courts. *Detroit Housing Commission v. Lewis*, 226 F.2d 180 (6th Cir.). Even as late as 1969, federal courts were finding cities such as Chicago and Lansing, Michigan, to have maintained racially discriminatory policies for *Gautreaux v. Chicago Housing Authority*, 196 F.Supp. 907 (N.D. Ill. 1969); *Ranjel v. City of Lansing*, 293 F. Supp. 301 (W.D. Mich. 1969), *reversed on other grounds*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970).

only one of several cooperative forces leading to the constitutional violation." *United States v. Guest,* 383 U.S. 745, 755-756 (1966). In *Evans v. Newton,* 382 U.S. 296, 299 (1966), the Court declared, "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." See, also, *Marsh v. Alabama,* 326 U.S. 501 (1946); *Terry v. Adams,* 345 U.S. 461 (1953); *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961).

Under these circumstances, the Fourteenth Amendment requires that the school board avoid freezing black students into racially identifiable neighborhood schools. A State may not locate people in particular residential areas because of their race and then put them in all-black schools because of where they live. To do so is simply to put black neighborhood children in black neighborhood schools because they are black. This, under *Brown,* violates the Fourteenth Amendment.

A long line of lower court decisions holds that when residential racial segregation is caused in part by state action, a school board may not maintain neighborhood schools if to do so means perpetuation of all black schools. *Henry v. Clarksdale Munic. Sep. School District,* 409 F.2d 682, 689 (5th Cir. 1969), *cert. denied,* 396 U.S. 940 (1969); *United States v. Greenwood Munic. Sep. School District*, 406 F.2d 1086, 1093 (5th Cir. 1969), *cert. denied.* 395 U.S. 907 (1969); *Valley v. Rapides Parish School Bd.*, 423 F.2d 1132 (5th Cir. 1970); *United States v. Board of Education of Baldwin County, Ga.*, 423 F.2d 1013 (5th Cir. 1970); *Kemp v. Beasley*, 423 F.2d 851 (8th Cir. 1970). *United States v. School Dist. 151 of Cook County, Ill.*, 286 F.Supp. 786, 798 (N.D. Ill. 1968), *aff'd,* 404 F.2d 1125 (7th Cir. 1968); *Dowell v. School Board of Oklahoma City,* 244 F.Supp. 971 (W.D. Okla. 1965), *aff'd,* 375 F.2d 158 (10th Cir. 1967), *cert. denied,* 387 U.S. 931 (1967); *Spangler and United States v. Pasadena City Bd. of Ed.,* 311 F. Supp.

501 (C.D. Calif. 1970); *Keyes v. School District No. 1, Denver,* 303 F.Supp. 79, 289 (D. Colo. 1969); see *Cato v. Parham*, 302 F.Supp. 129 (E.D. Ark. 1969). But see *Deal v. Cincinnati Board of Education*, 419 F.2d 1387, 1391-92 (6th Cir. 1968).

These rulings represent an application of the accepted proposition that, by indulging in one unconstitutional act (the causing of residential segregation), a state is barred from engaging in action otherwise within its power (neighborhood student assignment) because such action would perpetuate the unconstitutionality. Thus, an otherwise valid voter qualification may not be applied where it would raise standards above those applicable at a time when Negroes were discriminatorily excluded from the franchise, at least where white persons registered during such time remain on the registration rolls. *Louisiana v. United States,* 380 U.S. 145 (1965); *United States v. Duke,* 332 F.2d 759 (5th Cir. 1964). See, also, *United States v. Ward,* 349 F.2d 795 (5th Cir. 1965) (requirement that voting applicant be identified by previously registered voters, who were all white); *United States v. Manning*, 205 F.Supp. 172, 173-174 (W.D. La. 1962) (same); *Ross v. Dyer,* 312 F.2d 191 (5th Cir. 1962) (requirement that siblings attend same school); *Board of Education Oklahoma City v. Dowell,* 375 F.2d 158 (10th Cir. 1967), *cert. denied,* 387 U.S. 931 (1967) (same); *Franklin v. Parker,* 223 F.Supp. 724 (M.D. Ala. 1963), *modified and aff'd adopting the opinion of the district court*, 331 F.2d 841 (5th Cir. 1964) (requirement that graduate student have graduated from accredited college where Negroes could not attend any accredited college in the State); *Meredith v. Fair,* 305 F.2d 343 (5th Cir. 1962), *cert. denied,* 371 U.S. 828 (1962) (requirement of alumni sponsorship where there are no black alumni); *Hunt v. Arnold,* 172 F.Supp. 847 (N.D. Ga. 1959) (same). This is also the rationale of cases like *Mapp v. Ohio,* 367 U.S. 643 (1961) and *Miranda v. Arizona,* 384 U.S. 436 (1966): Constitutional protection becomes meaningless unless courts are watchful to nullify otherwise unobjectionable actions that serve to perpetuate the constitutional wrong.

Additionally, there are cases, such as *Brewer v. School Board of City of Norfolk*, 397 F.2d 37 (4th Cir. 1968).[10] and *Spangler and United States v. Pasadena City Bd. of Ed.*, 311 F.Supp. 501 (C.D. Calif. 1970), which strongly suggest that a school board may not maintain neighborhood schools for neighborhoods that are segregated as a result of private racial discrimination. These are consistent with the cases holding that the government may not encourage, extend, build upon, or involve itself in private discrimination. *E.g., Pennsylvania v. Board of Directors of City Trusts,* 353 U.S. 230 (1957) (the State is forbidden by the Fourteenth Amendment from carrying out the racially discriminating provisions of a private will); *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Keyes v. School District No. 1, Denver,* 303 F.Supp. 279, 289 (D. Colo. 1969). Here the black residential area in Charlotte was found to be the result of government action. Accepting the suggestion in *Brewer* that proof of private racial discrimination is enough, this case, where government action is involved, is *a fortiori.*

Steps short of eliminating the racial identity of ghetto schools under such circumstances will not do. *Green v. School Board of New Kent County,* 391 U.S. 430 (1968), and *Monroe v. Board of Commissioners of the City of Jackson,* 391 U.S. 450 (1968), indicate the constitutional inadequacy of at least one of the alternatives suggested by the court of appeals–freedom of transfer with transportation. Negro students may not be assigned to all-black schools

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[10] In *Brewer*, the court instructed the district court to determine whether "the racial pattern of the districts results from racial discrimination with regard to housing" and concluded, "[a]ssignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to a Negro pupil solely on the ground of color." The court went further saying that it is immaterial that the residential patterns are the result of private discrimination: "The school board cannot build its exclusionary attendance upon private racial discrimination." 397 F.2d at 41-42.

and then asked to bear the burden of choosing a desegregated experience. *Ramey v. Board of Education of the Gould School District*. 391 U.S. 443, 447-48 (1968). The other alternatives suggested by the court of appeals are equally insufficient. Special integrated classes not only represent token desegregation that fails to comply with constitutional requirements, but they also may well be harmful to otherwise segregated blacks by reinforcing the feeling of inferiority that is so harmful to education. U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 128 (1967). Subsequent assignment to integrated classrooms is not only contrary to the dictates of *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969), that schools be desegregated now and that no black student be "effectively excluded" from a classroom because of race, but it also deprives that student of the full benefits of a desegregated education that may be realized only if he is assigned to an integrated school at an early age. See pp. 18-19, *supra*.

In sum, where there is neighborhood segregation in part caused by state action, at the very least a school board may not retain neighborhood zones which result in segregated schools absent a compelling governmental interest necessitating the retention of those boundaries. In this case no compelling governmental interest was shown to justify such racial classifications.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed and that part of the order of the district court vacated by the court of appeals reinstated.

Respectfully submitted,

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