enrollments furnished by the school district, school construction, assignment of principals to schools, the changing of boundaries, setting of boundaries, optional attendance areas, all of the matters in that respect that you have examined, many of which you have testified to here today, and I believe the second part of the question was considering the concentrations of minority population in the Columbus School District, . . . [have] the actions and policies of the Columbus Board of Education contributed in any substantial way to the maintenance of racial separation in black and white in the Columbus School System over the years?

. . .

A. My answer is: In my opinion they have, and I would add to the actions, the inactions or the lack of action.

Q. Can you describe in some general way how this has worked with respect to the various concentrations of black population in the city as they expanded?

A. I think I have done this off and on in my testimony in treating various aspects that I made analyses of, but in the western part of the Columbus District, within the Highland's area, in my opinion the blacks in that area have been compacted and the white areas maintained because of actions or lack of action by the Board.

In the south portion of the Columbus District about which I testified earlier this afternoon, my opinion is that the actions and inactions or lack of action by the Board definitely has kept the blacks, the black community, helped to keep the black community, particularly the schools is what I am referring to, northeast of the Chesapeake Railway and the whites in isolation to the southwest of that dividing line.

> As the black residential areas moved south from the center of Columbus, and north and northeast, in my opinion actions and inactions of the Board have contributed in various ways to allowing whites, while that transition was taking place, to remove themselves to whiter schools and has generally had the effect of compacting the black pupils and schools as the movement went along toward the center of the city in both instances.

(A. 526-27.)

Second, as we have noted in the recitation of the facts, many of the segregative actions taken over the years can be directly shown to have had continuing effects on the racial composition of affected schools as of the time of trial (*see, e.g.,* pp. 31-32, 48, 53, 55, 71, 73, 79-80 *supra; see also,* Pet. App. 68).

Third, there was substantial agreement among the witnesses on both sides that school site selection and attendance zoning have a considerable impact on the residential composition of a school district; as one witness said, when the boundary has been determined, "[t]hat would then become the—the school neighborhood, the school community" (A. 323). If some schools are constructed or zoned to be predominantly black while other schools are constructed or zoned to be predominantly white, residential movement is likely to be prompted (*see* A. 240-41). The Columbus system also purchased school sites for future use well in advance of residential development, irrespective of the commonly known existence of discrimination against black persons seeking to buy or rent housing in such areas—and even though the "neighborhood school" policy meant that schools in such areas would be racially isolated (A. 197-202, 250-51, 562, 602; *see* A. 243-47). The impact of school construction and zoning was not limited to the existing

population; as plaintiffs' expert witnesses testified, persons relocating to an area for the first time use school boundaries as defining points for neighborhoods, and consider predominantly black schools as indicators of areas to be avoided (A. 294-96, 310-11, 328-19, 341-42, 346, 255-56). As the district court stated (Pet. App. 58):

> The Court has received considerable evidence that the nature of the schools in an important consideration in real estate transactions, and the Court finds that the defendants were aware of this fact. The defendants argue, and the Court finds, that the school authorities do not *control* the housing segregation in Columbus, but the Court also finds that the actions of the school authorities have had a significant impact upon the housing patterns. The interaction of housing and the schools operates to promote segregation in each. It is not now possible to isolate these factors and draw a picture of what the Columbus schools or housing would have looked like today without the other's influence. I do not believe that such an attempt is required. (emphasis in original.)

Petitioners attack this finding of the district court by challenging the probative value of one witness' testimony (Pet. Br. 16-17, 76-77)[119] and misrepresenting another's (Pet. Br. 15-16, 76). Plaintiffs' claims that school system segregative practices had an impact upon residential patterns did not rest solely on the testimony of Mr. Sloane (*compare* Pet. Br. 16, 76). Moreover, Petitioners' sug-

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[119] The questions of a witness' credibility and the probative value of his testimony are matters for the trial court. Petitioners failed to overturn the district court's finding in the Court of Appeals and apparently now seek to upset it before this Court by arguing about credibility and qualifications. Surely, if the "two-court" rule has any meaning, it is applicable here. *See* note 3 *supra*.

gestion that Mr. Sloane's views were inconsistent with those of another witness for plaintiffs (Pet. Br. 76) rests upon a misrepresentation of Dr. Taeuber's testimony. Petitioners' counsel interrogated Dr. Taeuber on cross-examination about the causes of racial residential segregation (A. 300-07)[120] and referred to a law review article written by the witness. Counsel for Petitioners asked numerous questions about a listing of discriminatory housing practices contained in the article, but Dr. Taeuber never stated that the list included "all of the discriminatory practices he considered responsible for residential segregation" (Pet. Br. 16). Indeed, in response to an inquiry which is as close as counsel ever came to asking whether the listing was inclusive in that sense, Dr. Taeuber stated:

> Unity, I intended to refer not primarily to any focus on residential segregation, but *the common linkage between the economic discrimination and housing discrimination and educational discrimination,* labor market discrimination, social discrimination.

(A. 300) (emphasis supplied.) At trial, although not in the Brief, counsel for Petitioners responded, "that's what I meant to say, too" (*id.*).

The article about which Dr. Taeuber was questioned did include a discussion of the contribution to residential segregation made by segregative school system actions and decisions, as counsel for plaintiffs showed on Dr. Taeuber's redirect examination; Dr. Taeuber's views were the same as Mr. Sloane's (A. 310-11). Petitioners also do not address the testimony of Dr. Green (A. 355), reporting

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[120] In his very first response on this subject, Dr. Taeuber substituted "racial discrimination" for "discrimination in housing" as one among the "three general categories of causes" of residential segregation (A. 300).

research which supports the conclusions of Dr. Taeuber and Mr. Sloane. Nor did they introduce any evidence of their own on the subject.[121]

Furthermore, this Court recognized the relationship between school and housing segregation in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971), and refused to excuse school authorities *who are found to have engaged in intentional segregation* from the obligation of "actual desegregation" even though residential patterns may require the use of pairing or pupil transportation (*compare* Pet. Br. 78-79). Hence, there was ample basis for the district court's conclusion on this record that acts of Columbus school officials which it found to be intentionally segregative influenced the development of segregated residential patterns.

Fourth, the Columbus school authorities practiced segregation in faculty assignments on a systemwide basis until 1973, when they were required by a conciliation agreement with the Ohio Civil Rights Commission to modify that

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[121] In their Brief Petitioners refer to a recent article which they claim refutes any notion that school segregation influences housing patterns (Pet. Br. 77 n.41). Yet they made no effort to establish this proposition before the trial court. It is simply inconceivable that this case is to be decided, and the carefully considered teachings of *Swann* and *Keyes* discarded, on the basis of the SUPREME COURT REVIEW rather than the record evidence in this case. Whatever Dr. Wolf's article says, it is hardly representative of prevailing opinion among sociologists and demographers, *see* Appendix, *infra*.

Nor is the board's argument about Southmoor Junior High School (Pet. Br. 77-78) compelling. Plaintiffs have never contended that school segregation is alone responsible for housing segregation. Elimination of school segregation on a systemwide basis (much less for a single school) thus could not be expected to change long-entrenched, segregated residential patterns dramatically; it would simply remove the contributing factor of school officials' discriminatory practices, exactly as Dr. Taeuber stated (A. 311).

policy (*see* p. 31 *supra*); and systemwide segregation in the assignment of school site administrative personnel continued through the time of trial (*id.*). The Court of Appeals' observation on this score is trenchant (Pet. App. 174):

> Obviously it was no "neutral" neighborhood school concept which occasioned generations of black teachers to be assigned almost exclusively to black schools until the Ohio Civil Rights Commission complaint was settled in July of 1974.

The school board's claim that it used a neutral neighborhood school policy, and housing segregation unrelated to its own actions caused the current pattern of racial imbalance in the district was simply belied by the evidence of massive manipulation of pupil assignment devices and racial assignment of staff over the years. Based on all of the evidence, the district court came to the eminently sound conclusion that:

> . . . The evidence in this case and the factual determinations made earlier in this opinion support the finding that those elementary, junior, and senior high schools in the Columbus school district which *presently* have a predominantly black student enrollment have been substantially and directly affected by the intentional acts and omissions of the defendant local and state school boards.

(Pet. App. 73) (emphasis added.)[122] Reviewing the evidence and its findings again in light of this Court's ruling in *Dayton Bd. of Educ.* v. *Brinkman, supra,* the court reiterated this conclusion:

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[122] *See* note 7 *supra.*

> Systemwide liability is the law of this case pending review by the appellate courts. 429 F. Supp. at 266. Defendants had ample opportunity at trial to show, if they could, that the admitted racial imbalance of the Columbus Public Schools is the result of social dynamics or of the acts of others for which defendants owe no responsibility. This they did not do, 429 F. Supp. at 260.

(Pet. App. 95.)

D. The Remedy Proceedings.

Having found systemwide liability, the trial court directed the board to submit a remedial plan "to eradicate unlawful segregation from the Columbus school system root and branch" (Pet. App. 73), cautioning, however, that not every school need be brought within a particular statistical pattern, and might remain virtually one-race if "defendant school authorities . . . satisfy the Court that their racial composition is not the result of present or past discriminatory action or omissions of defendant public officials or their predecessors in office" (Pet. App. 75). On June 10, 1977 Petitioners filed a proposed plan (Pet. App. 2) and hearings were scheduled to commence July 11 (Pet. App. 95 n. 1). On July 1, following this Court's ruling in *Dayton Bd. of Educ.* v. *Brinkman, supra,* Petitioners moved for leave to file an amended plan, which was submitted on July 8 pursuant to approval of the district court (Pet. App. 96). Both these plans, as well as one submitted by the State defendants (*see* note 7 *supra*) were the subject of testimony and evidence at the July hearings. The trial court also heard evidence concerning another proposal prepared by the Board of Education staff which was not submitted formally by the board (*see* Pet. App. 104-05).

Because the court concluded that *Dayton* did not require modification of its prior systemwide liability findings (Pet. App. 90-96),[123] the various submissions were evaluated in light of their practicality and according to the standards enunciated by this Court in *Swann, supra.* The "amended plan" filed on July 8 by the Petitioners was designed to alter the racial composition only of those predominantly black schools identified by name in the district court's liability opinion (A. 742); the plan was rejected by the court because it "falls far short of providing a reasonable means of remedying the systemwide ills" (Pet. App. 100) and because "the Columbus defendants did not shoulder the burden of showing that the amended plan's remaining one-race schools are not the result of present or past discriminatory action on their part as required by *Swann, supra,* 402 U.S. at 26. The pupil reassignment component of the July 8 amended plan, then, is constitutionally unacceptable." (Pet. App. 102.) The State board's plan was found to be constitutional, although the court noted some reservations about its feasibility for implementation (Pet. App. 106-07). The June 10 plan submitted by Petitioners proposed the retention of 22 heavily white schools as to which the trial court found "there ha[d] been no showing by defendants that the reasons for this aspect of this plan are genuinely non-discriminatory" (Pet. App. 105).[124] In comparison to the alternative staff proposal which was also placed in evidence, the June 10 plan left potential areas of "white flight" from desegregation within the system (*see* A. 214), and it called for transportation of more pupils (Pet. App.

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[123] This determination is discussed in Argument III, *infra.*

[124] Indeed, no evidence whatsoever on this subject was introduced by Petitioners at the remedy hearings, which consisted largely of descriptions of the mechanics of the various plans before the court.

105). The district court concluded from a comparison of the two that "the June 10 plan's proposed omission of 22 identifiably white elementary schools from the remedy is not required by sound logistical or educational concerns. The pupil reassignment component of the original June 10 plan is constitutionally unacceptable" (*id.*).

The court did not, however, order the staff-prepared alternative plan into effect, because it "seemingly has not been thoroughly considered and documented by the total planning group. Although its numerical face is satisfactory, its feasibility is not a matter about which the Court can be certain" (Pet. App. 107). Instead, the Petitioners were afforded yet another opportunity to devise a plan meeting constitutional standards (Pet. App. 111-12). Their subsequent proposal was approved by the district court on October 4, 1977 (Pet. App. 125-37).

Summary of Argument

As we have earlier reiterated, Petitioners controvert both the conclusion of the courts below that they practiced segregation throughout the Columbus school district (systemwide liability) and the appropriateness of the remedy ordered to correct that constitutional violation (systemwide desegregation). We address these broad contentions in sequence.

I

The district court correctly concluded from the evidence that Columbus school authorities followed a virtually unswerving course of segregation throughout the school district, both before and after *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), and the Court of Appeals properly affirmed that judgment.

A. The trial court did not need, and did not rely upon, evidentiary presumptions in reaching its judgment. Rather, the court viewed and weighed all of the evidence presented at the lengthy hearings, and determined that it "clearly and convincingly" portrayed an unbroken history of intentionally segregative conduct by Columbus school officials continuing through the time of trial. That evidence was overwhelming; it was limited neither by time nor by geography.

B. The trial judge gave appropriate consideration to the school board's repeated claim that it had done nothing but adhere to a racially neutral "neighborhood school" policy. He found that the claim could not be squared with the numerous and substantially segregative exceptions to the "neighborhood school" principles which were espoused by Petitioners. He also concluded that on those occasions when the school board did choose to adhere to what it termed "neighborhood schools," the clearly foreseeable and often known or acknowledged result was racial segregation. Furthermore, the board's decisions were made in the context of an historical background of deliberate segregation. Hence, the court concluded that the board's knowing choice in these circumstances could properly be considered an element supporting an inference that the segregation was intentional. This reasoning is sound and consistent with *Washington* v. *Davis,* 426 U.S. 229 (1976) and *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977), each of which involved a finding of *effect only,* without any history of departure from usual practice, or of a series of discriminatory actions, or of any other evidentiary factors identified in *Arlington Heights.*

C. The judgments below are also supported by the principles enunciated in *Keyes* v. *School Dist. No. 1, Denver,* 413 U.S. 189 (1973). Although the evidence did not concern

every school in the system, unlike *Keyes* this case was not tried in separate geographical components and there has never been a contention that any area of the system is "a separate, identifiable and unrelated unit," *id.* at 205. Hence, the district court correctly proceeded from its finding of continuous segregative conduct based upon the evidence before it to a determination that this conduct rendered Columbus a "dual school system," *id.* at 213. Petitioners' contention that this case somehow involves an impermissibly "retroactive" application of *Keyes* is devoid of any merit; not only did Columbus do nothing after 1954 to alleviate the results of its prior intentional segregation, but thereafter the school system engaged in precisely the same sort of segregative conduct which in *Keyes* was held to justify an evidentiary presumption of responsibility for all segregation in the district.

II

Having reached the conclusion that Columbus practiced systemwide segregation, the courts below properly required a systemwide remedy.

A. Under *Green* v. *County School Bd. of New Kent County,* 391 U.S. 430 (1968) and companion cases; *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1 (1971); and *Keyes, supra,* the courts below properly considered the continued existence of segregated schools created by official action to be an important indication that there was still a dual school system. The district court correctly put the burden on Petitioners to prove that schools which their remedial plans did not propose to desegregate were not affected by the segregative actions which the court had found. Petitioners made no attempt to meet that burden except to assert without evidentiary foundation that the racial composition of all schools resulted only from the

"neighborhood school" system—a claim properly rejected on this record.

B. The district court did not require racial balance; rather, it rejected remedy plans proposing the continued existence of substantial numbers of one-race schools by faithfully applying the standards of *Green* and *Swann.*

III

None of the legal principles upon which the trial court earlier relied was explicitly altered by *Dayton Bd. of Educ.* v. *Brinkman,* 433 U.S. 406 (1977) or the cases remanded for reconsideration in light of that decision.

A. The holding of *Dayton I* does not indicate any modification of the judgments below because the evidence reveals (and the courts below properly found) a dual school system in Columbus, unless *Dayton I* overruled *Keyes sub silentio.* But even putting the dual school system finding to one side, plaintiffs were entitled to the relief ordered by the district court because Petitioners failed to rebut the *prima facie* case of systemwide segregation established by plaintiffs' affirmative evidence.

B. The evidentiary principles which support *Keyes' prima facie* case construction are logical and consistent with the Fourteenth Amendment; and they do not hold school authorities responsible for the discriminatory acts of others. *Keyes* and *Dayton I* should be reaffirmed and the judgments below sustained.

C. As a matter of equity and effectiveness, the remedy in a school desegregation case where the existence of a dual system has been proved must go beyond mere tinkering. It must also do more than just remove schools from the "virtually one-race" category. This was the basis for this Court's recognition in *Swann* that the racial composition of the system as a whole is a useful starting point, and in

Wright v. *Council of the City of Emporia,* 407 U.S. 451, 464-65 (1972) and *United States* v. *Scotland Neck City Bd. of Educ.,* 407 U.S. 484, 489-90 (1972) that district courts may consider, among other factors, the likelihood that plans of "desegregation" will lead to "resegregation." The rigid reading of some language in *Dayton I* proposed by Petitioners is inconsistent with these equitable principles.

ARGUMENT

I.

The Evidence Overwhelmingly Supports the District Court's Conclusion of Systemwide Constitutional Violations by Columbus School Authorities.

A. Plaintiffs Proved a Pattern and Practice of Segregation by Columbus Defendants and Their Predecessors in Office Which Fully Justified the Trial Court's Holding of Systemwide Liability, Irrespective of Any Evidentiary Presumptons Operating in Plaintiffs' Favor.

The recitation of the facts of this case is lengthy and complex, reflective of the multiplicity of acts and decisions which accompany the administration of a large school system. What clearly emerges from that recitation, however, is a pattern of deliberately segregative actions unlimited in its scope by considerations of time, geography or pedagogy. Before 1954, these actions were more flagrant and notorious (for example, the outright gerrymandering of zone lines for Pilgrim and Fair Elementary Schools and the sequential replacement of entire school faculties), though violative of state law. In the decades which followed *Brown,* zone lines may have been drawn in a less irregular fashion, but segregation was consistently entrenched through devices such as optional and discontiguous attendance areas, construction of new facilities and

additions to existing schools, and continuation of the pattern of faculty and administrative staff assignments which marked schools as "black" or "white." The district court appreciated the significance of the long chain of events revealed by the proof; it judged the evidence *as a whole,* and concluded that it "clearly and convincingly weighs in favor of the plaintiffs" (Pet. App. 2).

Petitioners' attack upon the basic conclusion of the trial judge (which was affirmed by the Court of Appeals)—that there was systemwide segregation in Columbus—is almost a pathetic one. Primarily, Petitioners argue that the courts below found, and could only have found, "remote and isolated" constitutional violations (*e.g.,* Pet. Br. 40-41, 62-66). This description of the lower court's decisions simply blinks reality. Both the district court and the Court of Appeals were confronted with the problem of organizing their findings about the mass of evidence in a systematic, lucid fashion. The district judge chose to separate events occurring before and after 1954, and for the latter period to describe the evidence largely according to functional areas of school system administration which plaintiffs claimed had been carried out in a segregative fashion, indicating broadly those areas as to which the court felt the proof was significant and those in which it was not. (*See* note 36 *supra.*) To avoid an unduly lengthy and detailed opinion, the district court also chose merely to describe *examples,* rather than every occurrence, of segregative activity by the school board and school employees (*see* pp. 28-29 *supra*). Its ultimate findings related to the intentionally segregative administration of the entire system (Pet. App. 61, 73).

But any doubt about the breadth of the trial court's holding was laid to rest in its July 7, 1977 Memorandum and Order (Pet. App. 90, 94) in which the court stated:

> Viewing the Court's March 8 findings *in their totality,* this case does not rest on three specific violations, or eleven, or any other specific number. It concerns a school board which since 1954 has by its official acts intentionally aggravated, rather than alleviated, the racial imbalance of the public schools it administers. (emphasis supplied.)

Incredibly, Petitioners continue to insist that the "findings" of the district court do not go beyond the schools identified by name in its March 8, 1977 opinion.[125] This claim disregards the explicit language of the district court, and it is ludicrous in the light of the extensive record supporting the ultimate conclusions of the trial judge. The circumstance that the district court's opinion was not as literally exhaustive as the recitation of facts, *supra,* or that the Court of Appeals chose to rely heavily on the district court's opinion after finding it to be supported by the record, should not distract attention from the adequacy of the evidence to sustain the judgments in this case.

We emphasize again the extensive period of time over which numerous and repeated moves toward segregation were made by Columbus school officials, and the evidence that in whatever sector of the Columbus system black school children appeared in significant numbers, they were subjected to discriminatory practices which confined them to specific, racially identified school facilities. Plaintiffs showed much more than simply a collection of discrete and unrelated incidents; they demonstrated a repetitive course of conduct by school authorities which compelled the con-

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[125] *See* A.742, where the current (then Acting) Superintendent of Schools described the school board's amended plan as one designed "to eliminate all racially identifiable black schools cited as *instances* of guilt in the [district] Court's opinion and order." (emphasis supplied.)

clusion that systemwide segregation had been and was being practiced.

The district court's ruling to this effect is similar to those of other courts which have evaluated the evidence in school desegregation cases. For example, in *Davis* v. *School Dist. of Pontiac,* 309 F. Supp. 734, 741 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir.), *cert. denied,* 404 U.S. 913 (1971), the court noted:

> If this Court's attention were directed and limited solely to the location of the Bethune School without being confronted by or concerned with the total pattern which was, at the time, developing in the construction of new schools in the system, the School Board may have succeeded in providing a persuasive argument here, as it did earlier, that the location of the Bethune School could be justified on the grounds of the existing criteria, namely nearness, capacity and safety of access routes. However, this Court's consideration is not limited or directed solely to the location of the Bethune School, but has been broadened to take into consideration the composition of the entire Pontiac School System.

In affirming that ruling, the Court of Appeals agreed with the approach taken by the lower court: "Although, as the District Court stated, each decision considered alone might not compel the conclusion that the Board of Education intended to foster segregation, taken together, they support the conclusion that a purposeful pattern of racial discrimination has existed in the Pontiac school system for at least 15 years." 443 F.2d 573, 576 (6th Cir.), *cert. denied,* 404 U.S. 913 (1971). *See also, e.g., Morgan* v. *Hennigan,* 379 F. Supp. 410, 479 (D. Mass.), *aff'd sub nom. Morgan* v. *Kerrigan,* 509 F.2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975); *Oliver* v. *Kalamazoo Bd. of Educ.,* 368

F. Supp. 143, 174 (W.D. Mich. 1973), *aff'd sub nom. Oliver* v. *Michigan State Bd. of Educ.*, 408 F.2d 178 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).[126] Although Petitioners point to occasional actions which they claim were not segregative (Pet. Br. 18, 27 n.12, 78, 89 n.47) the judgment of the courts below obviously was that these few acts did not invalidate nor offset the conclusion of overall, system-wide segregation.[127] Petitioners ignore the point that the courts below were not required to find, nor have plaintiffs maintained, that every action of the Columbus school authorities was violative of plaintiffs' rights.

Petitioners' next line of attack upon the findings below is a series of assertions that the district court was wrong in finding segregation even with respect to the occurrences it described in detail in its opinion (*e.g.,* Pet. Br. 23-29, 62-66). There are several responses to these contentions. First, Petitioners generally do *not* discuss the other evidence of occurrences similar to those detailed in the trial judge's opinion which reinforces the soundness of the conclusions therein.[128] Second, we again point out that the factual findings, including the inferences to be drawn from

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[126] *And see Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 21 (1971): "In ascertaining the existence of legally imposed school segregation, the existence of a *pattern* of school construction and abandonment is thus a factor of great weight." (emphasis supplied.)

[127] These incidents generally involved small numbers of black students; while most whites in Columbus were consistently "protected" from having to attend schools enrolling large numbers of blacks, most blacks were intentionally confined to black schools (*see, e.g.,* pp. 46-47, 52-55 *supra*).

[128] *But see,* Pet. Br. 27 n. 12 (optional zones: Franklin-Roosevelt, "Downtown" option, Central-North and East-Linden-McKinley, *compare* pp. 45-46, 57-58 *supra*); Pet. Br. 31 n. 17 (Barnett discontiguous area, *compare* pp. 67-69 *supra*); Pet. Br. 32 n. 17 (Arlington Park junior high students, *compare* pp. 54-55 *supra*).

the evidence,[129] were approved by the Court of Appeals and hence ought not be overturned here even if some members of the Court feel that they would not have drawn exactly the same conclusions if sitting as a trier of fact. *United States* v. *Commercial Credit Co.*, 286 U.S. 63 (1932); *Brainard* v. *Buck, supra.* Finally, Petitioners' sporadic quarrels over particular details represent little more than an attempt to relitigate the case in its entirety before this Court, an attempt which is particularly inappropriate given Petitioners' approach to this case at trial. The board made little effort to disprove plaintiffs' evidence of segregative activity and its effects, instead offering unconvincing general rationalizations—but not justifications—for cited practices (*see, e.g.,* p. 55, notes 68 and 121 *supra*). They then argued that plaintiffs had failed to establish a case for relief—again refusing to introduce proof of their own to demonstrate that their actions did not lead to segregation (Pet. App. 102-03). Petitioners continue to take that approach in their Brief, trying to create doubt about plaintiffs' proofs but not controverting the events. We set out just one example of this tactic in the note.[130] *See also*

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[129] We here refer to such inferences as the racial population characteristics of an area between 1960 and 1970, based upon census reports for those years and testimony as to "common knowledge" (L. Tr. 1513) about the residential location of the black population in Columbus, *compare, e.g.,* Pet. Br. 30 n. 15, 87. We deal separately with Petitioners' contentions that the courts below improperly inferred "segregative intent" solely from their claimed adherence to a "neighborhood school" policy or solely from evidence that segregation was the foreseeable impact of their decisions (*see* pp. 109-18 *infra*).

[130] Petitioners criticize Dr. Foster's use of census data to make judgments about the racial composition of an area (Pet. Br. 30 n. 15). However, his conclusions were supported by other evidence such as: the testimony of black realtors about the areas of the city in which blacks were permitted to reside (*see* p. 26 *supra*), the resultant school enrollments (in years after 1963, when figures were available) (as in the case of Gladstone Elementary School

note 5, *supra*. If this case is thus to be decided on the basis of the adequacy of plaintiffs' proof to survive a Rule 41(b), FED. R. CIV. P. motion for dismissal, there can be little doubt about the outcome.

It is also significant, we think, that the practices to which the district court referred have been identified and recognized in many other school cases as segregative devices. This judicial precedent supports the determination of the courts below that their longstanding and multiple use in this case was the mark of a systemwide policy of segregation. For example, creation of optional areas between schools of differing racial composition was found significant in, among other cases, *United States* v. *Board of School Comm'rs*, 332 F. Supp. 655, 666, 668 (S.D. Ind. 1971), *aff'd* 474 F.2d 81 (7th Cir. 1973); *Oliver* v. *Kalamazoo Bd. of Educ., supra*, 368 F. Supp. at 167; *Booker* v. *Special School Dist. No. 1*, 351 F. Supp. 799, 804 (D. Minn. 1972); *Bradley* v. *Miliken*, 338 F. Supp. 582, 587-88 (E.D.

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and Buckeye Junior High School, for example (*see* A. 778, 783, L. Tr. 3909)), contemporaneous expressions of concern about segregation from the black community (as in the case of Gladstone and Monroe, for example, *see* p. 35 *supra*). Significantly, Petitioners have never contended (either in the district court or in their Brief here) that Dr. Foster erred in describing the racial character of an area at the time an optional or discontiguous zone was created, a school constructed, or a boundary changed. Nor have they suggested that the evidence presented by plaintiffs was not the "best evidence" available as to the facts at issue, except in one instance when they produced better evidence from records and files within their custody and control. *See* note 5 *supra*. Moreover, Petitioners conveniently omit to mention that in the case of the Highland-West Broad option to which their footnote criticism is appended (Pet. Br. 29-30), they provided absolutely no capacity data or other educational justification for creation of the option; Dr. Foster, who was qualified as an expert witness in the areas of segregation and desegregation (L. Tr. 3383-84), concluded that lacking such justification the option was racial in nature (A. 475, 478). The trial court acted quite properly in deciding to credit Dr. Foster's testimony in light of *all* of the evidence.

Mich. 1971), *appeal dismissed,* 468 F.2d 902 (6th Cir.), *cert. denied,* 409 U.S. 844 (1972), *aff'd* 484 F.2d 215 (6th Cir. 1973) (*en banc*), *aff'd in pertinent part,* 418 U.S. 717 (1974); *see also, Taylor* v. *Board of Educ. of New Rochelle, supra,* 191 F. Supp. at 185 (whites allowed to transfer out of predominantly black school though living within "zone"); *United States* v. *School Dist. No. 151,* 286 F. Supp. 786, 795 (N.D. Ill. 1967), *aff'd* 404 F.2d 1125 (7th Cir. 1968) (same); *Spangler* v. *Pasadena City Bd. of Educ.,* 311 F. Supp. 501, 508 (C.D. Cal. 1970) (optional or "neutral" area maintained until 1954, then assigned to predominantly white schools, *cf.* Pet. App. 30-31).[131] Discontiguous assignments also played roles in many of these cases, *e.g., United States* v. *Board of School Comm'rs, supra,* 332 F. Supp. at 667-68; *Spangler* v. *Pasadena City Bd. of Educ., supra,* 311 F. Supp. at 508; *United States* v. *School Dist. No. 151, supra,* 286 F. Supp. at 793-94; *Clemons* v. *Board of Educ. of Hillsboro,* 228 F.2d 853, 855, 857 (6th

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[131] Petitioners' refrain that not every optional area created in the system was a racial one (Pet. Br. 26-27) is beside the point. Plaintiffs never attacked the use of optional areas, discontiguous zones, or any other method of school system administration as *per se* discriminatory. As we recognize in the statement of facts, *supra,* and as this Court itself recognized in *Swann, e.g.,* 402 U.S. at 20, school officials must take into account a wide variety of circumstances and employ many different techniques in operating the system. All that is proscribed by the Constitution is the use of devices or techniques for the purpose of segregating. The optional and discontiguous zones which plaintiffs demonstrated to have racial implications were instances in which no educational justification for their use could be proved.

The board's general defense that it was a growing system and had problems of overcrowding certainly could not justify decisions to solve those problems in a racially segregative way. *See United States* v. *Board of School Comm'rs, supra,* 332 F. Supp. at 666-67; *Spangler* v. *Pasadena City Bd. of Educ., supra,* 311 F. Supp. at 518-19; *NAACP* v. *Lansing Bd. of Educ.,* 429 F. Supp. 583, 593 (W.D. Mich. 1976), *aff'd* 559 F. 2d 1042 (6th Cir. 1977), *cert. denied,* 434 U.S. 1065 (1978) (all "growing" systems with "capacity" problems).

Cir. 1956). The construction of small schools which served limited, one-race areas or large facilities which "contained" increasing student populations of one race have been noted, in, *e.g., Bradley* v. *Milliken, supra,* 338 F. Supp. at 589; *United States* v. *Board of School Comm'rs, supra,* 332 F. Supp. at 667; *Booker* v. *Special School Dist. No. 1, supra,* 351 F. Supp. at 803-04; *Davis* v. *School Dist. of Pontiac, supra,* 309 F. Supp. at 741. Selective or inconsistent application of the "neighborhood school" policy on a racial basis signified intentional segregation to the courts in *Morgan* v. *Hennigan, supra,* 379 F. Supp. at 473; *United States* v. *Board of School Comm'rs, supra,* 332 F. Supp. at 665; *Oliver* v. *Kalamazoo Bd. of Educ., supra,* 368 F. Supp. at 164-66; and *Kelly* v. *Guinn,* 456 F.2d 100, 108 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973), among others. Finally, continued faculty segregation has been identified as a telling characteristic of systemwide discrimination in many, many rulings. *E.g., Kelly* v. *Guinn, supra,* 456 F.2d at 107; *Davis* v. *School Dist. of Pontiac, supra,* 309 F. Supp. at 742-45; *Morgan* v. *Hennigan, supra,* 379 F. Supp. at 456-61.

The record in this case, then, shows both a longstanding pattern and practice of intentionally segregative acts by Columbus school authorities and also the repeated use of a substantial variety of discriminatory techniques each of which has received frequent judicial recognition and identification as one of the tools of segregation. It was more than adequate to justify the district court's finding of systemwide violation.

B. The District Court's Consideration of Petitioners' Claimed Adherence to a "Neighborhood School" Policy, and of the Degree to Which Segregative Results of Their Actions Were Known or Foreseeable, in Reaching the Ultimate Conclusion That There Was a Systemwide Policy of Segregation in Columbus Was Not Inconsistent With *Washington* v. *Davis* or *Arlington Heights*.

As an independent ground for reversing the judgments below, Petitioners argue that in this case, the district court found intentional segregation "solely from evidence that the disproportionate impact of official action was foreseeable" (Pet. Br. 81) and solely "from adherence to a neighborhood school policy in a district with racially imbalanced residential patterns" (Pet. Br. 91). Such holdings, according to Petitioners, are inconsistent with *Washington* v. *Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) because they were the equivalent of dispensing with the constitutional requirement of intentional discrimination.

The situation in this case is far different from that in *Washington* v. *Davis*[132] or *Arlington Heights*.[133] No judg-

[132] *Washington* v. *Davis* reached this Court as a challenge to a single action by the defendant police department: "The validity of Test 21 was the sole issue before the court on the motions for summary judgment." 426 U.S. at 235. The test had a disproportionate racial impact, which the trial court accepted as one indication that its adoption and use was unconstitutionally discriminatory; however, the court found this factor to be outweighed by other circumstances. *Id.* at 235-36. On appeal, the "disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was held sufficient to establish a constitutional violation [unless analogous Title VII standards were met]." *Id.* at 237. This Court reversed, emphasizing that "a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is [not] unconstitutional *solely* because it has a racially disproportionate impact." *Id.* at 238 (emphasis in original).

[133] *Arlington Heights* similarly involved a single act, in this case the denial of an application for rezoning of a specific parcel. 429 U.S. at 255-57. After a trial, the district court specifically held that

ment was reached *solely* based on disproportionate impact. The district court found every kind of circumstance described by Mr. Justice Powell's opinion in Arlington Heights:[134] a pattern unexplainable on grounds other than

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the Village Board members "were not motivated by racial discrimination" and that there was no racially discriminatory effect from the denial. *Id.* at 259. The Court of Appeals found such an effect, however, and ruled that because of that effect, the decision could be upheld only if the non-racial justifications for the action amounted to compelling state interests. *Id.* at 260. Since the Court of Appeals also specifically ratified the trial court's finding that the decision was not racially motivated, this Court reversed under *Washington* v. *Davis, supra:*

> In sum, the evidence does not warrant overturning the concurrent findings of both courts below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance.

Id. at 270-71 (footnote omitted).

[134] In his opinion for the Court, Mr. Justice Powell offered several examples of evidence which *would* be probative of discriminatory intent:

> The impact of the official action — whether it "bears more heavily on one race than another," [citation omitted] may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. [citations omitted] The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo,* impact alone is not determinative, and the Court must look to other evidence.
>
> The historical background of the decision is one evidentiary source, *particularly if it reveals a series of official actions taken for invidious purposes.* [citations omitted] The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. [citations omitted] . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the de-

race (*e.g.*, "The Court can discern no other explanation than a racial one . . ." [Pet. App. 34]); a series of official actions taken for invidious purposes (*e.g.*, "the Court discussed in detail a variety of post-1954 Board decisions and practices . . ." [Pet. App. 94]); departures from normal procedures (*e.g.*, "Students living on three streets (Wilson, Bellview and Eagle Avenues) located near the center of the Heimandale attendance area were assigned to attend Fornof instead of Heimandale" [Pet. App. 35]); and substantive departures (*e.g.*, "The Court concludes that the Highland-West Broad optional zone was not created to alleviate overcrowding or because of a geographic barrier" [Pet. App. 30]).

In addition, the "foreseeable consequences" test approved by the Courts of Appeals is not a "sole effects" standard, no matter how many times Petitioners repeat that characterization; nor has the test been expressly disapproved in any opinion of this Court. Petitioners admit that the requirement of knowledge or foreseeability is something beyond mere effect (Pet. Br. 84); and they recognize that *Washington* v. *Davis* specifically disallowed a finding of unconstitutionality based *solely* on effect (*id.*). They insist, however, that the "foreseeable consequences" test has been rejected by this Court in *Austin Independent School Dist.* v. *United States*, 429 U.S. 990 (1976) and *Arlington Heights, supra. Austin* was a *per curiam* remand for reconsideration in light of *Washington* v. *Davis;* the opinion of the Court does not speak to the "foreseeable consequences" test. And Petitioners fail to note (Pet. Br. 85)

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cisionmaker strongly favor a decision contrary to the one reached.

Id. at 267-68 (emphasis supplied; footnotes omitted). *See also, Washington* v. *Davis, supra,* 426 U.S. at 253-54 (Stevens, J., concurring); *Dayton Bd. of Educ.* v. *Brinkman, supra,* 433 U.S. at 421 (Stevens, J., concurring).

that Mr. Justice Powell's concurring opinion (joined by the Chief Justice and Mr. Justice Rehnquist) explicitly expressed concern only about *sole* reliance on the test in circumstances where there was no other evidence of discrimination:

> Although in an earlier stage in this case other findings were made which evidenced segregative intent, *see, e.g., United States* v. *Texas Education Agency,* 467 F.2d 848, 864-869 (CA5 1972) (actions by school authorities contributing to segregation of Mexican-American students), the opinion below apparently gave controlling effect to the use of neighborhood schools: . . . .

429 U.S. at 991 n.1. Petitioners also seek support from *Arlington Heights* (Pet. Br. 85-86); but as noted, that case held only that where there was an explicit finding of no racial motivation, discriminatory effect alone would not justify a finding of unconstitutional discrimination. We believe that the evidence produced in this case fits within the categories identified in Mr. Justice Powell's opinion (*see* note 121 *supra*); to the extent that it does not, we observe that the opinion did not "purpor[t] to be exhaustive [in listing] subjects of proper inquiry in determining whether racially discriminatory intent existed." 429 U.S. at 268. *Compare* Pet. Br. 85.

Further, as we have previously emphasized, the judgments of the lower courts in this case do not rest upon a single segregative occurrence or a few isolated incidents; the proof showed a continuous, repeated pattern of such actions. Unquestionably, a finding of intentional discrimination may more easily be made when the court is confronted with a consistent series of decisions with predictable and avoidable segregative effects than from a single

such event. For example, in *Keyes* v. *School Dist. No. 1,* 303 F. Supp. 279, 286; 303 F. Supp. 289, 294 (D. Colo. 1969), the district court said:

> We do not find that the purpose here included malicious or odious intent. At the same time, it was action which was taken with knowledge of the consequences, and the consequences were not merely possible, they were substantially certain. Under such conditions, the action is unquestionably wilful.
>
> . . .
>
> Between 1960 and 1969 the Board's policies with respect to these northeast Denver schools show an undeviating purpose to isolate Negro students. . . .

These findings were relied upon in this Court's opinion, *Keyes* v. *School Dist. No. 1, supra,* 413 U.S. at 199, and that opinion in turn was favorably cited in *Washington* v. *Davis, supra,* 426 U.S. at 240, 243-44. *See also, Arlington Heights, supra,* 429 U.S. at 267.

Petitioners' claim that the teaching of *Washington* v. *Davis* and *Arlington Heights* was violated in this case rests ultimately on their assertions (Pet. Br. 87-88) that the decisions found segregative by the courts below "had no racial significance" and met "neutral criteria" (*id.* at 88). Petitioners simply fail to provide convincing argument, however, that the district court's contrary conclusions were clearly erroneous, or that (for example) their own capacity-enrollment figures, upon which the court relied and which showed no educational justification for optional zones and discontiguous areas between schools of differing racial composition, were wrong. Contrary to their assertions, the finding of systemwide segregation made by the district court and affirmed by the Court of Appeals does not rest "*solely*" on disproportionate impact; rather, the probative

value of each incident was confirmed and magnified by the systematic pattern which unfolded.[135]

Petitioners' "neighborhood school" argument rests upon no sounder footing. The district judge declared that the school system's determination to make racially homogeneous "neighborhoods"—which the system would itself define by setting boundaries (A. 323)[136]—the basis for pupil assignments, despite its *knowledge* that segregation would result, "is *one factor among many others* which may be considered by a court in determining whether an inference of segregative intent should be drawn" (Pet. App. 49) (emphasis supplied). There is a quantum leap between that statement and the assertion of Petitioners that "under the

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[135] Indeed, the reason why a number of the Courts of Appeals have specifically recognized, in school desegregation cases, that showing a pattern of foreseeably segregative consequences of board actions establishes part of plaintiffs' *prima facie* case of segregative intent, is that such cases almost invariably involve a long chain of segregative events affecting the racial composition of schools. Moreover, the "foreseeable consequences" test is designed only to assist in determining whether or not segregative intent was a motivating factor in such a pattern of segregative conduct, and usually plays no part even in shifting the burden of going forward with evidence on the issue of segregative intent (*see* note 141 *infra*). Under the "foreseeable consequences" test for determining segregative intent, school authorities are given every opportunity to explain by proof that such a pattern of segregative conduct is, in fact, motivated by nonracial factors. *E.g., Oliver* v. *Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir. 1978), *cert. denied*, 47 U.S.L.W. 3224 (Oct. 2, 1978); *United States* v. *School Dist. of Omaha*, 565 F.2d 127 (8th Cir.) (*en banc*), *cert. denied*, 434 U.S. 1064 (1977). In marked contrast, the Seventh Circuit in *Arlington Heights* and the D.C. Circuit in *Washington* v. *Davis* required the defendants to demonstrate that compelling governmental interests or business necessity, respectively, justified a single act with a disproportionate racial impact —without regard to whether or not race was a motivating factor in the decision. *See* notes 132 and 133 *supra*.

[136] *See* note 162 *infra* and pp. 43-44, 89-92 *supra*.

foreseeable effect test, the mere continuance of the neighborhood school policy in Columbus . . . became *the basis* of a finding of unlawful segregation by the school board" (Pet. Br. 91) (emphasis supplied). The difference is more than merely a semantic one, as indicated by the Court's discussion in *Arlington Heights, supra,* indicating that impact alone, while it could not be determinative, was probative, especially where supported by other evidence. *See* note 134 *supra.*[137]

Petitioners also gloss over the differences between what the record in this case reveals to have been their practice, on the one hand, and the concerns for the educational values of true "neighborhood schools" which are reflected in the opinions of this Court and of individual Justices, on the other hand.[138] In *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra,* 402 U.S. at 28, this Court recognized that:

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.

Similarly, and citing that language, the Court in *Keyes* wrote (413 U.S. at 212):

> . . . we hold that the mere assertion of such a [neighborhood school] policy is not dispositive where, as in this case, the school authorities have been found to have practiced *de jure* segregation in a meaningful

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[137] *See also Austin Independent School Dist.* v. *United States, supra,* 429 U.S. at 991 n. 1 (Powell, Rehnquist, JJ. and Burger, C.J., concurring), objecting to the "apparently . . . controlling effect" given the use of "neighborhood schools" by the Fifth Circuit in that case.

[138] The same concerns were recognized by the district judge. *See* Pet. App. 55.

> portion of the school system *by techniques that indicate that the "neighborhood school" concept has not been maintained free of manipulation.*

(emphasis supplied.) In the very passage upon which Petitioners rely (Pet. Br. 92), from a concurring and dissenting opinion in *Keyes, supra,* Mr. Justice Powell speaks of the worthwhile values of "Neighborhood school systems, *neutrally administered* . . . ." 413 U.S. at 246 (emphasis supplied).

These excerpts suggest the reason why the approach of the lower courts in this and other school desegregation cases is a correct one, with respect both to the foreseeability test and also to its application to the "neighborhood school" principle. As the Sixth Circuit formulated the applicable test in *Oliver* v. *Michigan State Bd. of Educ.,* 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975):

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. This presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.

(*See* Pet. App. 48 n. 3.) Even as applied to school authorities' use of "neighborhood school" assignments, this approach is consistent with the subsequent decisions of this Court in *Washington* v. *Davis* and *Arlington Heights.* If the "neighborhood school" concept is not shown to have been "neutrally administered," then its selective use and manipulation becomes corroborative evidence of segregative intent, beyond mere effect or even foreseeability. *See,*

e.g., Morgan v. *Hennigan, supra,* 379 F. Supp. at 470, 473. If, on the other hand, no such inconsistencies are revealed, then any conclusion of intentional segregation must rest on other bases. Thus, even accepting Petitioners' contention that the "foreseeability" test is an effects-only standard, the Sixth Circuit's version of that test is consistent with this Court's rulings. *A fortiori,* the ruling below, based as it is not just on foreseeability but upon actual knowledge as well as upon a persistent pattern of segregative departures from "neighborhood school" principles, is proper.

This record is replete with evidence that Columbus created wholesale exceptions to the "neighborhood school" principles which it claimed to follow[139] (*see, e.g.,* pp. 17-18, 37-44, 54-55, 63-64, 81-82 *supra*). This case does not involve a "neutrally administered" "neighborhood school" policy; hence, it does not raise the specific issue reserved in both *Swann,* 402 U.S. at 23, and *Keyes,* 413 U.S. at 212, and to which Petitioners so strenuously cling (Pet. Br. 91-95). The district court was faced with a system which freely abandoned "neighborhood school" postulates to bring about segregation, and just as readily embraced them when substantial racial mixing in the schools would not result.[140] In such circumstances, the trial judge was emi-

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[139] It should also be noted that Columbus has never sought to use the "neighborhood school" system sanctioned by 20 U.S.C. §1701 (*see* Pet. Br. 92)—assignment of all students to the closest school facility. *Compare Ellis* v. *Board of Public Instruction,* 423 F.2d 203 (5th Cir. 1970). Instead, like most districts, it has preferred to retain discretion to make other assignments so as to take into account a multiplicity of factors, including special programs, safety hazards, and the like (*see* pp. 32-34 *supra*)—and then it has exercised that discretion so as to entrench and exacerbate segregation.

[140] Another district court which made like findings in a school desegregation action concluded that the "neighborhood school" claim was "meaningless." *United States* v. *Board of School Comm'rs, supra,* 332 F. Supp. at 670 n. 71.

nently justified under this Court's prior rulings in considering the deliberate manipulation of pupil assignment, carried on behind a "neighborhood school" facade, as a factor relevant to the ultimate determination of an intentional segregation policy.

C. The Systemwide Violation Finding Also Is Consistent With the Procedures and Evidentiary Presumption Established by This Court in *Keyes*.

We have argued above that the proof in this case fully justified a finding of systemwide intentional segregation by the district judge without the use of any evidentiary presumptions, since it was so extensive in terms both of time and geography.[141] As this Court stated in *Keyes*, its earlier rulings "never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system." 413 U.S. at 200. *Keyes* establishes the correct use of presumptions in a school case, and we show below that the result reached here is precisely that which is authorized under the procedure enunciated in that ruling.

Preliminarily, we note that *Keyes* confirms the propriety of the district court's action. The proof of segregation in that case (as found by the trial court) concerned

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[141] While the Sixth Circuit's standard for determining whether to infer intent has been stated as a presumption, *Oliver* v. *Michigan State Bd. of Educ., supra,* the terminology is without significance in most school desegregation cases, including this one. Plaintiffs here affirmatively presented evidence to demonstrate the absence of a "neutrally administered" "neighborhood school" system in Columbus; they did not rely upon absence of contrary evidence from the board, or upon any expected failure of the board to come forward with evidence. Hence, the issue was joined without any reliance on presumptions and the district court's function was simply to determine what the preponderance of the evidence introduced by the parties showed.

schools in the Park Hill area of Denver, not every school in the system. In the instant proceeding, proof of segregative faculty and administrative assignments was system-wide; proof of manipulation of pupil assignment devices for segregative purposes was not limited to any particular geographic sector(s) of the district, but as in *Keyes* not every school in the system was covered in detail.[142] In these circumstances, *Keyes* teaches that absent a viable claim "that a finding of state-imposed segregation can be viewed in isolation from the rest of the district," 413 U.S. at 200, "there exists a predicate for a finding of the existence of a dual school system." *Id.* at 201. As the Court explained in that case, the intentional assignment of minority students to designated schools has an obvious, and often far-reaching, impact on the composition of other facilities in a system. *Id.* at 201-03. The proposition is particularly evident in a case such as the present one, in which school authorities through a variety of techniques moved to confine Negro children to largely separate schools in every area of the district. Absent "a determination [that "the geographical structure of, or the natural boundaries within" the Columbus "district may have the effect of dividing the district into separate, identifiable and unrelated units"], proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system." *Id.* at 203.

In *Keyes*, the Court remanded with instructions to make the factual determination respecting geographic separate-

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[142] There was evidence, for example, of some predominantly minority schools situated adjacent to predominantly white schools in addition to those about which Dr. Foster testified (*e.g.*, Pl. L. Ex. 477, L. Tr. 3917). And the boundaries for such schools over nearly a twenty-year period were in evidence, permitting an appraisal of their regularity and "neutrality" (Pl. L. Exs. 261-320, L. Tr. 3898).

ness, and the legal determination respecting a dual school system, since neither question had been explicitly answered in the trial court's prior rulings (*id.* at 204-05). Here, there has never been (nor could there be) a contention that any of the areas in which the district judge found intentional segregation are "separate, identifiable and unrelated units." [143] And the district court *did* hold that Columbus practiced systemwide segregation (Pet. App. 73, 94-95; *see also,* pp. 87-94 *supra*)—the legal equivalent of the statutory dual system, *see* 413 U.S. at 203. That determination justified the court's Order requiring that the board "desegregate the entire system 'root and branch.' " 413 U.S. at 213.

Even if this were not the case, plaintiffs were also entitled to the benefit of the evidentiary presumption elucidated in *Keyes*: that the proof of very substantial segregative activity at many Columbus schools which was credited by the trial judge[144] "create[d] a presumption that other segregated schooling within the system is not adventitious." 413 U.S. at 208.

> [W]here an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only "isolated and individual" unlawfully segregative actions. In that circumstance, it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent.

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[143] *Cf., e.g.,* notes 50, 52, 101 *supra.*

[144] *See* note 36 *supra.*

Id. at 208-09. Moreover, we need not speculate about whether Petitioners could meet that burden. At the conclusion of the liability phase of the case, the district judge noted that while the system would be required to formulate a plan to desegregate "root and branch" (Pet. App. 73), not all of the system's school facilities would have to be affected—or affected similarly—by an acceptable plan if "their racial composition is not the result of present or past discriminatory action" by school authorities (Pet. App. 74-75, quoting *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra,* 402 U.S. at 26), facts which it was the board's burden to establish.[145] Since the Petitioners proposed plans which would have left numerous virtually all-black and virtually all-white schools (*see, e.g.,* Pet. App. 100-01), their evidentiary burden with respect to such schools was to make a showing virtually identical to that which would have been required at the liability stage in the absence of the dual system finding. The district court explicitly held that Petitioners had utterly failed to carry this burden (Pet. App. 102-03, 105); and it is thus clear that the evidentiary presumption created by *Keyes* compels the same result.

Petitioners argue, however, that *Keyes* is inapplicable to this case because it cannot be applied "retroactively" (Pet. Br. 67-74). We confess to no small amount of difficulty in discerning how that term is being used. It is cer-

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> . . . in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. . . . [School authorities] have the burden of showing that such school assignments are genuinely nondiscriminatory.

402 U.S. at 26.

tainly true that the original "enclave" of black schools in Columbus did not, by the time of trial, enroll as substantial a proportion of Columbus' black students as it had in 1954 (*see* p. 19 *supra*). Yet the presumption of discrimination is strengthened by the fact that segregative techniques utilized prior to 1954, as well as other discriminatory devices, were used after that time to contain black students in black schools as the black population expanded into other areas of the system. The case for application of the evidentiary presumption would seem to be even stronger here than in *Keyes,* since in that case the presumption was held to flow backward from the Park Hill events of the 1960's to the earlier segregation of core city schools. Unlike the instant case, the segregation which Denver claimed was adventitious existed prior to the time of the Park Hill acts of deliberate segregation.

Petitioners' basic thrust appears to be a contention that since Columbus was residentially segregated at the time of trial, none of their own segregative conduct could form the basis for any evidentiary presumption or any finding of segregation. But this argument would prove too much. It would not only eliminate the possibility of using the *Keyes* presumption in the Columbus case, but in all cases (including *Keyes* itself). There, it was the eastward residential movement of blacks from the core city area into the Park Hill area, toward and eventually across Colorado Boulevard, which set the stage for the segregative decisions of the 1960's. *See* 303 F. Supp. at 290. This fact did not remove the predicate for a finding of a dual school system, 413 U.S. at 204, for reasons which to us seem fairly evident: lacking control over residential patterns (though substantially affecting them), and prevented by the Fourteenth Amendment from directly imposing segregation, school authorities following a policy of intentional

segregation may be expected consistently to respond to shifts in racial residential patterns in ways which maintain substantial racial separation in the schools, both during and after the residential transition of an area. (Both Park Hill in Denver and the Linden, or the southeastern, areas of Columbus illustrate the point well.) Against this background, the existence of residential racial segregation at any particular point in time no more relieves school authorities in such a system of their obligation to dismantle the dual structure than did residential segregation in Charlotte or Mobile relieve those school systems of the duty to terminate effectively and completely their dual school structures which had remained essentially intact over the years after this Court struck down compulsory segregation in *Brown*. *Swann, supra,* 402 U.S. at 14, 25-26; *Davis* v. *Board of School Comm'rs,* 402 U.S. 33, 37 (1971).[146]

Consistently since *Brown,* through its decisions in *Keyes* and *Dayton Bd. of Educ.* v. *Brinkman, supra,* this Court has held to the principle that school authorities may not escape liability for their actions which create or contribute to a condition of segregation by asserting that ostensibly "neutral" factors (segregated residential patterns and "neighborhood schools") would have caused the same result—unless they have previously implemented an adequate remedy, *Pasadena City Bd. of Educ.* v. *Spangler,*

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[146] Indeed, if Petitioners' argument is meritorious, then it could be applied as well to systems whose segregation was originally required by statute and has continued in unaltered form since the 1890s. Rather than a landmark in our constitutional history, *Brown* would be transmuted into an empty declaration that state actors may not directly segregate, but are free to achieve this result by indirect means. *Compare Cooper* v. *Aaron,* 358 U.S. 1 (1958); *North Carolina State Bd. of Educ.* v. *Swann,* 402 U.S. 43 (1971).

427 U.S. 424 (1976).[147] It should decline Petitioners' invitation to depart from that principle here.

II.

The District Court Acted Correctly in Requiring a Comprehensive, Systemwide Desegregation Plan Which Promised to "Achieve The Greatest Possible Degree Of Actual Desegregation, Taking Into Account The Practicalities Of The Situation." [148]

Once having concluded that the Petitioners' constitutional violations were systemwide in nature and scope, the trial judge proceeded in the remedy phase of the litigation on the same basis as if Columbus had been a statutory dual system. Since this approach was not barred by *Dayton Bd. of Educ.* v. *Brinkman, supra* (see Argument III below), this was unquestionably correct. *Keyes* v. *School Dist. No. 1, supra,* 413 U.S. at 213.

A. There Was No Error in Putting the Burden on Petitioners to Demonstrate That the Racial Composition of Schools Omitted From Their Proposed Remedial Plans Was Unaffected by Their Constitutional Violations.

Where there has been a finding of systemwide segregation, this Court's decisions attach critical significance, in weighing proposed remedies, to the extent of actual desegregation which results. Thus in *Green* v. *County School Bd. of New Kent County,* 391 U.S. 430 (1968), the Court rejected a claim that prior dualism was eliminated by a

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[147] *See also, South Park Independent School Dist.* v. *United States,* 47 U.S.L.W. 3385 (December 4, 1978) (Rehnquist and Powell, JJ., dissenting from denial of certiorari and relying upon implementation of remedies originally approved as adequate by lower courts).

[148] *Davis* v. *Board of School Comm'rs, supra,* 402 U.S. at 37.

pupil assignment scheme which depended upon individual choice, and which resulted in a " 'white' school and a 'Negro' school" (*id.* at 442). *See also, Raney* v. *Board of Educ. of Gould,* 391 U.S. 443 (1968); *Monroe* v. *Board of Comm'rs of Jackson,* 391 U.S. 450 (1968). Three years later, in *Swann, supra,* the Court emphasized that in urban school systems,

> . . . with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition.

402 U.S. at 26. For purposes of remedying the constitutional violation of intentional pupil segregation, this Court said, "an assignment plan is not acceptable simply because it appears to be neutral." *Id.* at 28.

The trial judge in this case was faithful to the precepts embodied in these rulings. Although he had found system-wide segregation in 1954 (Pet. App. 10-11)[149] and continu-

[149] Despite the conclusory treatment of the pre-1954 period in their brief (Pet. Br. 39, 67-70), Petitioners cannot simply wish away either the conduct of their predecessors in office or its legal significance. *See* pp. 5-6, 19-22 *supra.* From May 17, 1954 onward, Petitioners' legal obligation was to undo the intentional segregation to which they had contributed. *Green, supra,* 391 U.S. at 437-38; *Swann, supra,* 402 U.S. at 15. Since Petitioners have never acknowledged the history of official, intentional segregation in the Columbus public school system, it is hardly surprising that they have never affirmatively undertaken to perform the obligation which became theirs once *Brown* was decided. Their "free choice" plan adopted in 1973 was not designed to satisfy that responsibility and has not achieved results which would pass muster under *Green. See* text *infra.* Hence, the continuing one-race character of schools established as "black" and "white" facilities before 1954 signifies something more than mere "foreseeable" effect. The importance of assessing Petitioners' conduct as

ing thereafter up to the eve of trial (Pet. App. 35-42, 61), the district judge nevertheless considered carefully Petitioners' claim that their "free-choice" type voluntary integration plan, the "Columbus Plan," had real promise of overcoming the board's segregative actions (Pet. App. 59-60). The lack of any significant change in the enrollments of Columbus' virtually all-black schools since 1973, when the "Columbus Plan" was adopted (*see* A. 776-86, L. Tr. 3909) fully supports the court's conclusion that it "fall[s] far short of providing the Court a basis to find that the defendants are solving the constitutional problems the evidence reveals" (Pet. App. 59-60).

Just as the continuing existence of one-race schools demonstrated the insufficiency of the "Columbus Plan," [150] so

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of the time of *Brown* and the standards for evaluating subsequent events are discussed in greater detail in the Brief for Respondents in No. 78-627, *Dayton Bd. of Educ.* v. *Brinkman,* so we do not elaborate upon them here. Since the evidence clearly established a continuing systemwide policy of segregation, the same obligation devolved upon Petitioners no matter at what particular moment after 1954 their conduct is measured.

[150] Petitioners graciously assert that they "are not asking this Court to authorize a retreat from the constitutional principle that equal educational opportunity may not be denied on the basis of race. . . . Rather, we are asking that decisions concerning the manner in which these goals are to be accomplished should be left to elected local school officials and to their constituents . . ." (Pet. Br. 51). In the context of this school desegregation action, the statement is disingenuous at best. There are some aspects of "equal educational opportunity" which this Court has held to be beyond the scope of the adjudicative process. *E.g., San Antonio Independent School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973). However, since *Brown* this Court has never "deviated in the slightest degree" from the principle that denials of equal educational opportunity through intentional racial segregation are remediable in federal court, and are not left to the electorate. *Swann, supra,* 402 U.S. at 11; *North Carolina State Bd. of Educ.* v. *Swann,* 402 U.S. 43 (1971); *see Milliken* v. *Bradley, supra,* 418 U.S. at 737-38; *Lee* v. *Nyquist,* 318 F. Supp. 710 (W.D.N.Y. 1970) (three-judge court), *aff'd* 402 U.S. 935 (1971). Respondents and the

it also properly formed the basis of a judgment that the effects of Petitioners' segregatory practices persisted in the Columbus public schools. *See Green, supra; Wright* v. *Council of the City of Emporia,* 407 U.S. 451, 471, 472-73 (1972) (Burger, C.J., dissenting); *United States* v. *Scotland Neck City Bd. of Educ.,* 407 U.S. 484, 489-90 (1972); *id.* at 491, 492 (Burger, C.J., concurring in the result); *see also, e.g., Brewer* v. *School Bd. of Norfolk,* 397 F.2d 37 (4th Cir. 1968); *Henry* v. *Clarksdale Municipal Separate School Dist.,* 409 F.2d 682 (5th Cir.), *cert. denied,* 396 U.S. 940 (1969); *Monroe* v. *Board of Comm'rs,* 427 F.2d 1005 (6th Cir. 1970); *Clark* v. *Board of Educ.,* 426 F.2d 1035 (8th Cir. 1970), *cert. denied,* 402 U.S. 952 (1971). Under *Green* and *Swann,* in order to establish otherwise, it is the *Petitioners'* obligation to show that the current racial composition of these one-race schools is unrelated to the prior history of unconstitutional action. *Accord, Keyes, supra,* 413 U.S. at 211 and n. 17.

This burden can hardly be said to be met by mere reference to testimony about discriminatory housing practices of public agencies, testimony not tied specifically to individual schools in Columbus (*see* Pet. Br. 16-17). Petitioners cannot have it both ways. If the testimony of plaintiffs' witnesses could not be credited by the district court to establish the proposition that intentional school segregation by public officials in Columbus was likely (based on scholarly research and expert opinion) to have *contributed* to residential segregation, then it certainly could not form the evidentiary predicate for Petitioners' claim that intervening forces had eradicated all vestiges of segregation originally created by school authorities' acts. On the other

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class they represent know precisely what to expect after pleas for equal educational opportunity from Petitioners. *See* pp. 35-36 *supra.*

hand, there is no inconsistency between plaintiffs' position that school officials' intentional segregation *contributed* to the exacerbation of residential segregation and the testimony of plaintiffs' expert witnesses that other forms of discrimination—but very little "free choice" or economic restriction—also *contributed* to racial residential segregation.

Nevertheless, the board's basic claim remains that because of residential segregation, there would have been the same one-race schools even in the absence of the board's intentionally discriminatory actions designed to bring about those conditions (*e.g.*, Pet. Br. 63). That claim was rightly refused below, both as a ground for finding less than systemwide liability (*see* Argument I. B. *supra*) and as a justification for failing to require the remedial steps necessary to bring about "actual desegregation." Some of the schools which Petitioners now claim "would still be overwhelmingly black today . . . [e]ven if a single act of discrimination on the part of school officials had never occurred" (Pet. Br. 63) might never even have been constructed but for the desire to maintain segregation. Champion Junior High School, for example, was intentionally built as an elementary school to contain black students living between two (then) predominantly white facilities (*see* pp. 14-15 *supra*). Monroe Junior High School might well not have been constructed had Linden-McKinley Junior High not been continued in operation for white students living north of Hudson Street after the opening in 1957 of Linmoor Junior High School (*see* pp. 52-54, 77-80, *supra*). Certainly the constantly changing, highly fluid "neighborhood school" concept purportedly followed by Petitioners (*see* note 29; pp. 32-44 *supra*) provides no reliable guide for determining when, where and to what size schools might have been built, or how pupils might

have been assigned (especially since Petitioners have always transported a large number of students, *see* note 20 *supra*) had segregation not been a motivating factor.

In any event, it was *Petitioners'* burden, and Petitioners sought to meet it by attempting to establish that they "consistent[ly] and resolute[ly] appli[ed] racially neutral [neighborhood school] policies." *Oliver* v. *Michigan State Bd. of Educ., supra,* 508 F.2d at 182. They failed, because the record of their actions showed their unhesitating willingness to give up "neighborhood schools" for segregated schools. So they were rightly not excused from the obligation to desegregate.

B. The District Court's Rejection of the Board's June 10 and July 8 Plans Was Compelled by *Green* and *Swann*.

The preceding discussion also serves to establish the vacuity of the Petitioners' claim (Pet. Br. 79-81) that their June 10 and July 8 plans were improperly rejected because the district judge desired, as a matter of substantive principle, to mandate racial balancing of the Columbus school system. Petitioners' liability defense was a broad one. Residential patterns, not school authorities' actions, they argued, were responsible for the segregated nature of public schooling in Columbus. Or, to the extent that their "remote" predecessors in office may have committed constitutional violations, the significance of these acts was negated by superseding residential shifts unrelated to them. The defense failed, because the proof showed, and the district court found, that persistent, consistent segregative conduct was a dominant characteristic of the Columbus public school system. In his opinion, however, the district judge indicated with precision the kind of proof by which the board could justify the continued operation of one-race schools in any plan it might propose:

System-wide statistical remedies have been implemented and approved by many courts, perhaps because of a concern that all schools, parents, children and neighborhoods should be required equally to bear the burdens of desegregation. The fact that such plans have been used in the past does not necessarily mean that they are the only legal alternatives available. In *Swann,* 402 U.S. at 26, the Supreme Court stated:

> Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely non-discriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

. . .

If a limited number of racially imbalanced, predominantly white schools remains under a plan or plans submitted for the Court's approval, those schools would receive close scrutiny under the *Swann* test, and the defendant school authorities would be required to satisfy the Court that their racial composition is not the result of present or past discriminatory actions or omissions of defendant public officials or their predecessors in office. As is noted earlier, it would be extremely difficult to attempt to roll back the clock at this point and determine what the school system would look like now had the wrongful acts and omissions discussed earlier in this opinion never occurred. Officials striving to satisfy the Court that a number of white schools are to remain such because of racially

> neutral circumstances would have a difficult, but perhaps not an impossible, task.

(Pet. App. 74-75.) Petitioners never accepted the invitation proffered, in accordance with *Swann,* by the district court. They submitted two plans: one which left most Columbus schools, black and white, unaffected (July 8); and one which left 22 virtually all-white schools unaffected (June 10).[151] Yet no proof about these particular schools' racial composition was presented at the remedy hearings. The feasibility of including all schools in a remedial plan was demonstrated by the staff-prepared "32%" alternative and the plan drafted by a team employed by the Ohio State Board of Education (Pet. App. 104-07). In these circumstances the district court could neither say that the "greatest amount of actual desegregation, taking into account the practicalities of the situation" would be achieved by the board's plans, nor that remaining schools predominately of one race were unaffected by the system-wide violation which it had found. Hence the court was compelled to reject the two board plans because of the absence of any evidentiary justification for their results (Pet. App. 102, 103, 105).

The district court's use of "32.5% ±15%" as a reference point (Pet. Br. 79-81; *but see* Pet. App. 78-79) does not establish that the court "impose[d] the *exact result* criticized in *Swann* . . ." (Pet. Br. 81). Indeed, it is only

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[151] The June 10 plan was not rejected, as Petitioners misleadingly suggest (Pet. Br. 79 n. 43) because it left "some" schools which were racially identifiable in the sense that they fell slightly outside the "±15%" measure. These were "22 one-race schools" (Pet. App. 100): 18 elementary schools, three junior high schools and one senior high school with enrollments projected to be more than 90% white (*see* Def. R. Ex. G, R. Tr. 103, at 49-63, 83, 89-90, 93). The far more modest July 8 plan left a much greater number of "one-race" schools.

Petitioners' tactical trial decisions which create the potential appearance, at first blush, that this might even arguably be the case.

In the first place, neither the district court's initial opinion nor the order and judgment to prepare and submit plans even referred to a "±15%" guideline (*see* Pet. App. 72-75, 76-77, 87-89). And, as discussed above, the court indicated its willingness to examine proposals which left one-race schools in accordance with the *Swann* principles. Although the court used the range as one device for categorizing the results of the plans submitted (Pet. App. 99-106), again in its July 29 opinion and order it did not mandate a plan under which all schools would come within the "±15%" range, despite the fact that the staff's "32%" plan and the State Board submission indicated that such results were feasible. Instead, the court required only that "[t]he plan must be capable of desegregating the entire Columbus school system" and suggested that the "32%" or State Board plans could be used as a "starting point" for preparation of an acceptable remedy (Pet. App. 111). *Cf. Pate* v. *Dade County School Bd.,* 434 F.2d 1151 (5th Cir. 1970).

Moreover, the measure itself, contemplating a variance between 17.5% and 47.5% among the schools, hardly could be said to require exact racial balancing of enrollments had it been mandated. In *Swann,* where the district-wide proportion was used as a starting point, school enrollments ranged from 9% to 38% black. 402 U.S. at 9-10. There is no indication that the district court would have been less than receptive to a plan under which, due to practical difficulties, some schools fell outside the ±15% range. Nothing in the court's orders and opinions, certainly, can be interpreted to require that the Petitioners propose a

plan calling for *even less* variance, which they elected to do (*see* A. 74-94, 109-10, 120).

The fact that, faced with the necessity of desegregating the system, the staff and board determined upon a plan "providing a [relatively] uniform racial balance . . . as a matter of policy" is not an indication that despite explicit opinion language to the contrary, "it [was judicially] mandated." *Wright* v. *Council of the City of Emporia, supra,* 407 U.S. at 474.

The bald truth is that Petitioners spurned the district court's repeated offers to accept a plan leaving one-race schools, or providing for significant variation in the racial composition of schools, so long as adequate constitutional justification were provided. They cannot now be heard to contend that the trial court forced them into doing what they did voluntarily.

III.

Dayton Board of Education v. *Brinkman* Did Not, and Should Not Be Interpreted to, Change the Foregoing Principles; and the Interpretation of That Decision Urged by Petitioners Unduly Limits the Remedial Discretion of Federal Courts.

Petitioners' major contention here is that the rulings below are inconsistent with *Dayton Bd. of Educ.* v. *Brinkman, supra* and must be reversed on that account. Not only is this reading of the *Dayton I* decision not required by the Court's language in that opinion, but it would emasculate the historic equitable remedial powers of the federal courts to vindicate constitutional rights. The burden which Petitioners would place on plaintiffs in school desegregation cases is so great that continued implementation of *Brown* would be virtually halted except in those instances where

school authorities admit to a policy of pervasive segregation. That was neither the holding nor the intent of *Dayton I.*

A. *Dayton I* Did Not Overrule *Keyes* or the Other Decisions Upon Which Plaintiffs Rely; Since the Courts Below Properly Applied the Principles of *Swann* and *Keyes* to the Proof and Findings in the Record, No Modification of Their Judgments Is Indicated by *Dayton I.*

This is not a case like *Dayton I.* There the district court had decided the liability issue on February 7, 1973, prior to issuance of this Court's ruling in *Keyes. See* 433 U.S. at 408 n.1. It had found, in this Court's words, "three separate although relatively isolated instances of unconstitutional action" which, combined with rescission of a voluntarily adopted desegregation resolution of the school board, it held "cumulatively in violation of the Equal Protection Clause." *Id.* at 413. The district court neither evaluated the existing segregation of the Dayton public schools by taking into account the probative value of the constitutional violations which it found (*Keyes, supra,* 413 U.S. at 206) nor required a systemwide remedy. On appeal, the Sixth Circuit did not hold the trial judge's failure to make additional findings of segregation clearly erroneous. It recognized that the appellant plaintiffs relied on *Keyes* to support a finding of systemwide violation, but the court expressed no clear agreement with that argument. Instead, it "simply h[e]ld that the remedy ordered by the District Court is inadequate, considering the scope of the cumulative violations." *Brinkman* v. *Gilligan,* 503 F.2d 684, 704 (6th Cir. 1974). The Court of Appeals remanded with instructions to approve a plan which would "eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" *Id.* at 704, quoting *Keyes, supra,* 413 U.S. at 200. But the appellate panel

never flatly stated that state-imposed school segregation in Dayton had been systemwide in scope and effect.[152]

Dayton I held improper the requirement of a systemwide remedy in a case in which there was no sufficient "predicate for a finding of the existence of a dual school system," *Keyes, supra,* 413 U.S. at 201. The opinion stressed the importance of the case "for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system," 433 U.S. at 409, and pointedly noted the Court of Appeals' failure to hold the district court's limited findings to be clearly erroneous or inadequate, *id.* at 416-18. This Court was careful *not to say,* however, that a systemwide remedy in Dayton might not in fact be required to correct constitutional violations committed by the school authorities. It remanded the case to the district court for new hearings and more specific findings, based upon which an appropriately tailored remedy could be fashioned. *Id.* at 419-20.

It is a paragraph at the end of the *Dayton I* opinion, sketching the proceedings which this Court anticipated would follow its remand, which is the basis of Petitioners' claims in this case:

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[152] The Court of Appeals thus did not negate the possibility that a remedy which was less than systemwide, but more comprehensive than that originally ordered by the district court, would accord with its view of the case. However, on a subsequent appeal, the Sixth Circuit said that "the meaning of [its first decision] is that the Dayton school system has been and is guilty of de jure segregation practices. *See Keyes* v. *School District No. 1* [citation omitted]." 518 F.2d 853, 854 (6th Cir. 1975). It remanded "with directions to modify the plan . . . so as to improve the racial balance . . . in as many of the remaining racially identifiable schools in the Dayton system as feasible." *Id.* at 857. This was not the equivalent of holding clearly erroneous the lower court's failure to find systemwide liability. *See* 433 U.S. at 418.

> The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact discriminate against minority pupils, teachers, or staff. *Washington* v. *Davis, supra.* All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes,* 413 U.S. at 213.

433 U.S. at 420. The paragraph has spawned new theories among the commentators,[153] but its meaning is unclear. The most critical issue is whether the "incremental segregative effect" inquiry described in the third sentence displaces the *Keyes* holding that the district court could conclude that there was a dual school system in Denver based on his Park Hill findings (*see* pp. 118-19 *supra*), or whether it is merely an alternative statement of that holding which emphasizes, in light of the peculiar posture of *Dayton I,* the necessity for a lower court *finding* of systemwide impact in order to justify a systemwide remedy. Nothing in the

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[153] *E.g.,* S. Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies,* 72 Nw. U.L. Rev. 382 (1978).

remainder of the opinion indicates disapproval of *Keyes* in whole or in part, *see, e.g.,* 433 U.S. at 410. Indeed, the very paragraph quoted above cites *Keyes'* recognition that the plaintiffs there would be entitled to a systemwide remedy only if the district court concluded, based on the legal principles enunciated by this Court, that there had been a systemwide violation. *Id.* at 420. Had some part of the *Keyes* jurisprudence been intended to be altered, it is reasonable to expect that there would have been some discussion of burdens of proof, for example. The absence of such a discussion from the paragraph suggests that it was a reformulation rather than a replacement of the *Keyes* principles. *See id.* at 421-24 (Brennan, J., concurring in judgment).[154]

Hence, we conclude, *Dayton I* left the vitality of the *Swann* and *Keyes* principles intact. That being the case, *Dayton I* has no independent substantive significance for the instant matter since, as we have argued above, the district court properly made a finding of systemwide segregation in accordance with the *Keyes* standards. *See* Argument §I.C. *supra.* The district court's finding, affirmed by

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[154] Petitioners argue that these questions were settled two days after *Dayton I* by the remands in *School Dist. of Omaha* v. *United States,* 433 U.S. 667 (1977) and *Brennan* v. *Armstrong,* 433 U.S. 672 (1977). (See Pet. Br. 58.) We cannot agree. In both those cases, the Courts of Appeals' findings of systemwide liability had been made before the decision in *Arlington Heights, supra,* and both remands directed reconsideration in light of that decision. In *Omaha* the Court of Appeals had itself created and applied, after the trial of the case, a presumption of liability, 433 U.S. at 667-68; and in *Brennan* "there was 'an unexplained hiatus between specific findings of fact and conclusory findings of segregative intent'" resolved by the Court of Appeals' use of a presumption of consistency, 433 U.S. at 672. Since the findings of liability were due to be reconsidered, this Court noted that the *Dayton I* inquiry should also be addressed, and included reconsideration in light of *Dayton I* in its remand directions. There is no discussion, much less an overruling, of *Keyes* in the majority's *per curiam* opinions.

the Court of Appeals, takes this case out of the *Dayton I* "limited violations" category. Even if the Court had not made the finding, under *Keyes* the same result was indicated since the Petitioners failed to show that their actions were not the cause of segregation in the Columbus public schools. §I.C. *supra.*

For these reasons, the district court was exactly right in refusing Petitioners' motion to reopen the proof and make new findings which would have been unnecessary under *Keyes.* The trial judge reconsidered his findings in light of *Dayton I* and concluded:

> Viewing the Court's March 8 findings in their totality, this case does not rest on three specific violations, or eleven, or any other specific number. It concerns a school board which since 1954 has by its official acts intentionally aggravated, rather than alleviated, the racial imbalance of the public schools it administers. These were not the facts of the Dayton case.

(Pet. App. 94.) This determination is unexceptionable as an interpretation of the *Dayton I, Omaha* and *Brennan* opinions, as we have shown. The decisions below cannot be overturned on the basis of settled precedent; the Court will have to accept the invitation of Petitioners and various *amici* to extend *Dayton I* and to overrule *Keyes, Swann* and *Green.* It is to the enduring justice of the principles enunciated in these cases to which we turn.

B. *Dayton I* Should Not Be Extended to Displace the Evidentiary Rules Announced in *Keyes*; the Record Here Confirms the Wisdom of *Keyes'* *Prima Facie* Case Approach to the Determination of the Nature and Extent of the Constitutional Violation in School Desegregation Cases.

We have suggested above that the decision in *Dayton I* did not displace the evidentiary and constitutional principles announced and applied by this Court in *Keyes*. Rather, in our view, *Dayton I* gave content to the requirement in *Keyes* that there be proof of "intentionally segregative school board actions in a *meaningful* portion of a school system" in order to establish "a prima facie case of unlawful segregative design on the part of school authorities" which "shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions," 413 U.S. at 208 (emphasis supplied), and to *Keyes'* holding that proof of "a systematic program of segregation affecting a *substantial* portion of the students, schools, teachers, and facilities within the school system" furnishes "a predicate for a finding of the existence of a dual school system," 413 U.S. at 201 (emphasis supplied).

In *Dayton I* this Court explicitly held that ". . . the District Court's findings of constitutional violations did not, *under our cases,* suffice to justify the remedy imposed." 433 U.S. at 414 (emphasis supplied). Clearly that statement is a determination that the extent of the constitutional violations found by the district court, and neither held clearly erroneous nor supplemented by the Court of Appeals, did not show "a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system." As such, the opinion furnished guidance to the district judge in the instant matter (who reconsidered his initial findings after

Dayton I was handed down and found the records in the two cases to be significantly different, Pet. App. 94) and to other federal courts involved in school segregation litigation. Further, inasmuch as the Sixth Circuit had never explicitly disapproved plaintiffs' contention that a system-wide remedy was required by application of the *Keyes* presumption to the district court's findings (*see* pp. 134-35 and n.151 *supra*), *Dayton I* must also be read, we concede, to hold that the constitutional violations found by the district court in that case did not extend to "a meaningful portion" of the Dayton school system.[155] This also served to provide important guidance to federal trial and appellate courts. We do not concede, however, that *Dayton I* must by its terms or its result be read any more broadly; and we strenuously insist that a reading of *Dayton I* which displaces, rather than informs, application of *Keyes* flies in the face of the explicit statements throughout the opinion that the judgment which the Court reversed was inconsistent with prior holdings, including *Keyes*. *See* 433 U.S. at 410, 413, 414, 420.

Petitioners (and various *amici*) contend that *Dayton I* should be extended to require a school-by-school, incident-by-incident determination (and apparently on a mathematical basis) of the amount of desegregation which would have resulted had each segregative step not been taken, or each segregative decision not been made. This should be, they say, a mandatory inquiry for federal trial courts irrespective of *Keyes'* authorization for a dual system conclusion, and irrespective of *Keyes'* prima facie case and burden-shifting principles. Thus, although the district

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[155] Thus the Court was not required to announce any new rule in order to reverse the judgment in *Dayton I*, nor to question the principles of previous decisions which it *explicitly said* were not complied with by the lower courts in that case.

court here was faithful to the Court's admonition in *Dayton I* that "only if there has been a systemwide impact may there be a systemwide remedy," 433 U.S. at 420 (*see* Pet. App. 95), in Petitioners' view this case must at the least be returned to the trial court for the formality of entering findings using the words "incremental segregative effect."

This position finds little support in the language of the Court's opinion, even apart from its inconsistency with the approving citation of *Swann, Wright* and *Keyes* in that decision. For not only in the paragraph quoted at page 136 *supra,* but throughout the *Dayton I* opinion, the Court refers only to the effect of the "violations":

> . . . If such *violations* are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these *violations* had on the racial distribution of the Dayton school population, as presently constituted, when that distribution is compared to what it would have been in the absence of *such constitutional violations.* The remedy must be designed to redress *that difference,* and only if there has been a systemwide impact may there be a systemwide remedy . . . (433 U.S. at 420) (emphasis supplied).

The Court did not refer to a determination of the effect of "each violation," nor call for a remedy to redress "each impact." It obviously recognized the futility and waste of judicial energy which would be involved in requiring that district courts parse even an overwhelmingly systemwide violation into individual components which must each be separately identified and reflected in a voluminous opinion prior to summing them to a systemwide total. *See also,*

433 U.S. at 414, 417, 419.[156] The same conclusion was drawn by the Court of Appeals.[157]

The new interpretation urged by Petitioners is a considerably oversimplified approach to the issue of causation discussed in *Keyes* and in their Brief. It assumes that segregative acts by school officials have effects which are limited to the short term only; that such acts' bearing on the attitudes and perceptions of schoolchildren and their parents are of no concern to courts enforcing the Fourteenth Amendment; and that actions which effectively continue the legacy of past discrimination are not proscribed unless they assume exactly the same form as earlier, overt manifestations of unlawful conduct. In the area of school desegregation, at least, Petitioners would ignore Justice Frankfurter's profound comment that the Constitution "nullifies sophisticated, as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U.S. 268, 275 (1939).

These points are exemplified by Petitioners' attitude toward their pre-1954 conduct. Although they voice, some-

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[156] The stay opinion of Mr. Justice Rehnquist refers to the absence of "specific findings mandated by *Dayton* on the *impact discrete segregative acts had on the racial composition of individual schools* within the system" (Pet. App. 212). Although Mr. Justice Rehnquist was the author of the Court's *Dayton I* opinion, the italicized phrase does not appear in that opinion so we cannot know whether this meaning was intended by the entire Court. *Cf.* Pet. App. 213, 214. We urge the Court to reject such an interpretation of *Dayton I* and not to announce such a requirement for school desegregation cases here or in No. 78-627, *Dayton Bd. of Educ.* v. *Brinkman.*

[157] This is the meaning, we think, of the Court of Appeals' statement that

> *Dayton* does not, however, require each of fifty separate segregative practices or episodes to be judged solely upon *its* separate impact on the system. The question posed concerns the impact of the total amount of segregation found—after each separate practice or episode has added its "increment" to the whole . . . (Pet. App. 197) (emphasis in original.)

what halfheartedly, the notion that plaintiffs' evidence of pre-*Brown* practices was "subjective," "hearsay," or unreliable (Pet. Br. 39, 69), there is really little dispute about the events. They are unimportant, according to Petitioners, because their effects were short-term ones, at best:

> Although intentionally discriminatory actions by predecessor boards of education during the period 1909-1943 may have had the immediate impact of causing the student bodies of five schools to be predominantly black, the racial composition of those schools at the time of trial cannot be logically attributed to the lingering effects of school board actions which occurred during that period [footnote omitted] (Pet. Br. 63).

Petitioners studiously avoid any recognition of the context within which the segregative actions of their predecessors took place. The creation of all-black schools, staffed with all-black faculties, and having attendance zone boundaries enforced for black, but not for white, pupils, represented as certain and effective a signal to the community about areas within which blacks were allowed and expected to reside as the racial zoning ordinances struck down by this Court in *Buchanan* v. *Warley,* 245 U.S. 60 (1917). *See also, City of Richmond* v. *Deans,* 281 U.S. 704 (1930).

Whatever may have been the case, for example, before the Champion Elementary School was located and constructed between the 23rd Street and Eastwood facilities, there was no possibility that anyone would mistake the Board of Education's message when it opened: black children are to be separately educated in accordance with the public policy of Columbus; this separate education will take place in the Champion Elementary School, which has certain specified attendance zone boundaries; white parents

who desire that their children attend white schools should not choose to reside within such zone. Not surprisingly, neither the area of the Champion School—nor that of *any other* school created and identified as a black school by board acts—has ever thereafter changed significantly in its racial composition from black to white.[158] In a very real sense, and to a very considerable degree, continued residential segregation around Columbus' officially created and identified black schools "flow[s] from a longstanding segregated [school] system," *Milliken* v. *Bradley,* 433 U.S. 267, 283 (1977) [hereinafter cited as *Milliken II*].[159, 160]

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[158] There are no exceptions to this statement in Columbus (*see* A. 776-86, L. Tr. 3909). Although Petitioners point to a slight decrease in the non-white population at Highland Elementary (Pet. Br. 31), the change is insignificant, is within the range of normal fluctuation which has characterized the school since 1964, and does not alter Highland's identity as a substantially blacker school than its neighbors: West Mound (13.9% black), Burroughs (11.1% black) and West Broad (1.9% black). (*See* A. 776, 782, L. Tr. 3909.)

[159] Petitioners seek comfort (Pet. Br. 64 n. 32) in the statement of Mr. Justice Stewart, concurring in *Milliken* v. *Bradley, supra,* 418 U.S. at 756 n. 2 that the "fact of a predominantly Negro school population in Detroit—[was] caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears . . . ." However, they fail to read the statement in its full context. In the footnote, Mr. Justice Stewart was responding to a statement by Mr. Justice Marshall that "Negro children in Detroit had been confined by intentional acts of segregation to a growing core of Negro schools surrounded by a receding ring of white schools." *Id.* Mr. Justice Stewart was of the view that "[t]his conclusion is simply not substantiated by the record presented in this case." We do not read the *Milliken* concurring opinion as a declaration that the causes of *all* residential and school racial concentration are "unknown and unknowable." What is at issue in this case is the responsibility of Columbus school officials for patterns of black concentration around schools officially designated and identified as "black" schools. Prior to 1954, the board's acts were of the grossest nature, involving zone lines which were rigid for black students but permeable for whites, and the replacement of white

(Footnote 159 continues and Footnote 160 is found on next page)

Petitioners would have the Court overrule the remedial holdings in *Swann* and *Keyes, supra,* which squarely put the burden on school authorities who are found to have engaged in segregation to demonstrate that the racial composition of individual facilities was caused exclusively by other factors. In *Swann,* the Court's allocation of the burden of proof reflected the long experience of the lower federal courts in dealing with school desegregation cases. 402 U.S. at 6, 14, 21.[161] The "need for remedial criteria of

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(Footnotes continued from preceding page)

with black faculties. After *Brown,* the pattern was continued somewhat more subtly, by the assignment of predominantly black faculties only to predominantly black schools, by school construction and boundary setting determinations, by the creation of optional attendance areas and discontiguous zones, and by a varied series of acts such as segregative class relocation which served to reinforce the stereotype of black students and black classes as undesirable. This record shows an increase in black population, as in Detroit; but it does not show that segregation was its inevitable concomitant in the absence of intentionally discriminatory school system decisions.

[160] The central, enduring role of school system practices influencing housing choices and patterns was fully explicated on this record by plaintiffs' expert witnesses. No effective rebuttal to this testimony was presented by Petitioners, and the validity of the phenomenon as described in the district court's opinion (Pet. App. 57-58) is confirmed by the facts of record. *See* text at nn. 155, 156, and pp. 87-94 *supra; see also,* note 121 *supra.* We do not ask, therefore, that this Court give "legally presumptive weight" to any abstract conception of the relationship between school and housing segregation, or hold that "school officials are responsible for residential patterns as a matter of law" (Pet. Br. 78). We ask simply that courts' inquiry into such matters *on the records made before them* not be hobbled by a mechanical insistence upon a showing at each and every school facility in the system, as if events at each site were divorced from *any* relationship to either the system as a whole or to events at other sites.

[161] As long ago as 1966, Judge Wisdom wrote that "the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration." *United States* v. *Jefferson County Bd. of Educ.,* 372 F.2d 836, 869 (5th Cir. 1966), *aff'd on rehearing en banc,* 380 F.2d 385 (5th Cir.), *cert. denied sub nom. Caddo*

sufficient specificity to assure a school authority's compliance with its constitutional duty" flowed directly from the diverse and enduring consequences of school authorities' discriminatory actions. *See, e.g., id.* at 13-14, 19-21, 28.[162] In *Keyes,* this Court noted that "common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." 413 U.S. at 203. This fact furnishes the predicate for a "dual system" finding where a substantial portion of a school district has been shown to have been intentionally segregated, *id.* at 201.

Parish School Bd. v. *United States,* 389 U.S. 840 (1967) (emphasis omitted). Here the policy has been covert, but the district court found it to be system-wide. Surely the Constitution does not require less of school authorities who dissembled than of those who frankly admitted their segregationist design.

[162] This Court's exposition in *Swann,* 402 U.S. at 20-21, of the interlocking character of school and residential segregation, and the "far-reaching" consequences of individual school decisions, is supported by the analysis of leading demographers and sociologists, some of whom testified for plaintiffs below. *See* K. Taeuber, *Demographic Perspective on Housing and School Segregation,* 21 WAYNE L. REV. 833 (1975); A. Campbell and P. Meranto, *The Metropolitan Educational Dilemma,* in THE MANIPULATED CITY 305, 310 (S. Gale and E. Moore. eds., 1975); R. Green, *Northern School Desegregation: Educational, Legal and Political Issues,* in USES OF THE SOCIOLOGY OF EDUCATION 251 (1974); M. Weinberg, DESEGREGATION RESEARCH 311-13 (1970); *cf.* K. Vandell and B. Harrison, RACIAL TRANSITION IN NEIGHBORHOODS 13 (1976) (school factors important in housing selection); American Institute of Public Opinion, THE GALLUP OPINION INDEX 13 (1976) (opinion surveys show preference for integrated neighborhoods); O. Duncan, SOCIAL CHANGE IN A METROPOLITAN COMMUNITY 108 (1973) (same). That the great majority of people, both black and white, do not intentionally seek out segregated housing and schools further reinforces the conclusion in *Swann* that it is the actions of public officials, such as the discriminatory practices found below, that play the most significant role in shaping the segregated character of communities. In the words of *Swann,* such actions present courts with a "loaded game board" that calls for affirmative remedies.

The *Keyes* Court considered and rejected the very arguments now urged by Petitioners:

> . . . Where school authorities have been found to have practiced purposeful segregation in part of a school system, they may be expected to oppose system-wide desegregation, as did the respondents in this case, on the ground that their purposefully segregative actions were isolated and individual events, thus leaving plaintiffs with the burden of proving otherwise. But at that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only "isolated and individual" unlawfully segregative actions. In that circumstance, it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent.

Id. at 208-09.

No adequate justification for overruling *Swann* and *Keyes* has been presented by Petitioners or any of the *amici* who support them. There is no disagreement with the general evidentiary principles which undergird those decisions. *Compare, e.g., West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 636-41 (1943). Nor is it disputed that school authorities are in a far better position than plaintiffs to document their own actions and to delineate their effects. *Cf.* note 5 *supra.* Finally, *Keyes* has not resulted in any manifest injustice; the ultimate outcome of school desegregation litigation in the lower federal courts (including the Sixth Circuit) still turns on the proof presented, not on any reflexive application of presumptions. *See, e.g., Higgins* v. *Board of Educ. of Grand*

Rapids, 508 F.2d 779 (6th Cir. 1974); *Reed* v. *Cleveland Bd. of Educ.,* 581 F.2d 570, 571 (6th Cir. 1978) (discussing unreported remand order). Certainly this case is a poor vehicle for such a momentous decision, since Petitioners made no attempt whatsoever to introduce competent evidence which would suggest, contrary to the assumptions underlying *Swann* and *Keyes,* that school authorities' intentionally segregative acts do not contribute to the creation of intractable school segregation by exacerbating residential segregation.

The course urged by Petitioners also departs from the consistent thrust of this Court's decisions since *Brown I* because it overemphasizes the contemporaneous, narrowly demographic impact of school authorities' segregative acts to the total exclusion of other, equally destructive effects of conduct which puts an official stamp of approval upon racial discrimination. "In a word, discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination." *Milliken II, supra,* 433 U.S. at 283. Unquestionably, in order to justify particular measures in addition to nondiscriminatory pupil assignment, "it must always be shown that the constitutional violation caused the condition for which remedial programs are mandated." *Id.* at 286 n.17. But the breadth of the equity court's remedial power in school desegregation cases is tied directly to the recognition in *Brown I* that "[s]eparate educational facilities are inherently unequal." 347 U.S. at 495. *See Milliken II, supra,* 433 U.S. at 282.

Brown repudiated with finality the notion that officially enforced racial separation connotes anything other than the inferiority of the Negro race.[163] Of necessity, the federal

[163] *See* C. Black, *The Lawfulness of the Segregation Decisions,* 69 YALE L.J. 421, 424 and n. 25 (1960); E. Cahn, *Jurisprudence,*

courts have had to take race into account in formulating remedies adequate to overcome the effects of officially sanctioned racial discrimination. *Swann, supra,* 402 U.S. at 19; *McDaniel* v. *Barresi,* 402 U.S. 39, 41 (1971); *North Carolina State Bd. of Educ. v. Swann, supra,* 402 U.S. at 45. The goal is "to eliminate from the public schools all vestiges of state-imposed segregation," *Swann,* 402 U.S. at 15, "to convert to a system without . . . 'white' school[s] and . . . 'Negro' school[s], but just schools," *Green* v. *County School Bd. of New Kent County, supra,* 391 U.S. at 443. This effort has required a sensitivity—especially on the part of district courts, *see, e.g., Milliken II,* 433 U.S. at 287 n.18—to attitudes and perceptions about the racial identity of schools, because of the invidious signification of identifiably black schools created and maintained through deliberate official action. *E.g., Wright* v. *Council of the City of Emporia, supra,* 407 U.S. at 465-66; *Kemp* v. *Beasley,* 423 F.2d 851, 856-58 (8th Cir. 1970).[164]

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30 N.Y.U.L. Rev. 150, 158 (1955); L. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. Pa. L. Rev. 1, 28 (1960); *United States* v. *Jefferson County Bd. of Educ., supra,* 372 F.2d at 872 (Wisdom, J.); *Brunson* v. *Board of Trustees,* 429 F.2d 820, 826 (4th Cir. 1970) (Sobeloff, J.); *cf. Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 441-43 (1968).

[164] Petitioners' approach is completely unresponsive to these factors, which are incapable of being included in a simple calculus which determines the effect of segregation only by counting bodies in certain residential locations. For example, this Court has long recognized that racial faculty assignments serve to identify schools as "black" or "white" and make more difficult the process of desegregation. *Swann, supra,* 402 U.S. at 18-19; *Bradley* v. *School Bd. of Richmond,* 382 U.S. 103 (1965); *Rogers* v. *Paul,* 382 U.S. 198 (1965); *see also, Bradley* v. *School Bd. of Richmond,* 345 F.2d 310, 324 (4th Cir. 1956) (Sobeloff and Bell, JJ., dissenting in part). Longstanding and pervasive faculty segregation is a prominent feature of this case and its companion. The application of accepted statistical methods to determine the correlation between the percentage of black student enrollment and the proportion of black faculty at each Columbus school for which data are

These intangible but crucial concerns of the Fourteenth Amendment bolster the propriety of requiring desegregation "root and branch," *Green, supra,* 391 U.S. at 438; *Keyes, supra,* 413 U.S. at 213. They underscore the soundness of the evidentiary presumptions created in *Keyes,* for only by requiring an effective remedy which eradicates *all* vestiges of state-imposed segregation can we be certain that the future composition of schools will not continue to be affected by past discrimination. *See Swann, supra,* 402 U.S. at 32; *Pasadena City Bd. of Educ.* v. *Spangler, supra.*

Finally, Petitioners' argument is flawed because it fails to take into account nonperformance of their constitutional obligation to dismantle the dual school structure which they created. Petitioners assert that even if they concede responsibility for specific segregative acts at specific segregated schools, their subsequent alleged adherence to a "racially neutral" "neighborhood school" principle which merely reflects residential patterns discharges any constitutional duty they may have (*e.g.*, Pet. Br. 63-65). This

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available in 1964, 1968 and 1972 yields the following coefficients of correlation and determination:

	1964	1968	1972
Coefficient of correlation (R)	.82	.84	.88
Coefficient of determination (R^2)	.67	.71	.77

(Calculations prepared from Pl. L. Exs. 387, 389, 391, 393, 395 and 397, L. Tr. 3910, the source of the percentages shown in Pl. L. Exs. 383 and 385, L. Tr. 3909, reprinted at A. 776-801). These figures mean that statistically, the racial composition of the student bodies at Columbus' schools in the years given accounted for between two-thirds and three-quarters of the variation in faculty racial composition. *See* J. Freund, MODERN ELEMENTARY STATISTICS 421-22 (4th ed. 1973).

Such patterns unquestionably influenced the perception of schools and surrounding residential areas, but Petitioners' mechanical approach to desegregation cases takes no account of them. In the companion *Dayton* case, No. 78-627, an even more dramatic demonstration of the phenomenon is provided by the assignment of an all-black faculty to Dunbar High School, which in theory served the entire city; no white students chose to attend.

argument was rightly rejected in *Swann,* 402 U.S. at 28. *Cf. Brewer* v. *School Bd. of Norfolk, supra.* Limiting the reach of the principles declared in *Brown* to the type of classically dual systems operated by the school districts there before the Court, as Petitioners implicitly urge, would amount to little short of overruling that decision.

In sum, the theme of effective remedy which has characterized this Court's rulings from *Brown II,* 349 U.S. 294 (1955) to *Milliken II* is right and just. *Dayton I* should be reaffirmed as indicating that systemwide remedies may not rest upon inadequate proof of systemwide violations. But the Court should again reject the school-by-school, mechanical approach and also reaffirm the applicability of the *Keyes* presumptions in school desegregation cases.

C. The Formula Advanced by Petitioners Would Deprive Federal District Courts Sitting as Equity Tribunals in School Desegregation Cases of the Discretion and Breadth of Remedial Authority Which This Court Has Consistently Upheld as Necessary to Effective Implementation of the Constitutional Provisions Here at Issue.

In addition to its other defects, Petitioners' argument would, if adopted, strip federal district courts of the flexibility they need, and have traditionally had, in exercising equity jurisdiction, to devise sensible remedies that fairly reconcile the interests of all concerned. The insistence upon a single mechanical rule in which the relief granted would depend entirely on the ability of plaintiffs to establish a tight chain of causality between adjudicated wrongdoing and the current segregated conditions that exist at particular schools is fundamentally unsound. Equitable relief "is not limited to the restoration of the *status quo ante.* There is no power to turn back the clock. Rather, the relief must be directed to that which is 'necessary and appropriate in the public interest *to eliminate the effects*'" of

the evil that required equity's intervention. *Ford Motor Co.* v. *United States,* 405 U.S. 562, 573 n.8 (1972) (emphasis in original). It goes without saying that, if the litigation is protracted and the evil takes new forms, equity has ample power to pursue it.[165] Indeed, it is the "duty of the court to modify . . . [a] decree so as to assure the complete extirpation of the illegal" conduct. *United States* v. *United Shoe Machinery Corp.,* 391 U.S. 244, 251 (1968).

These principles are applicable in full force to cases involving constitutional rights,[166] and in particular to school desegregation cases. From the outset, the Court has regarded considerations of practicality and flexibility as touchstones in shaping school desegregation remedies:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.

Brown v. *Board of Educ.,* 349 U.S. 294, 300 (1955). In *Swann,* this Court attempted to "suggest the nature of limitations without frustrating the appropriate scope of equity," 402 U.S. at 31, which it had earlier described:

> . . . Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

402 U.S. at 15. *Accord, Milliken II, supra,* 433 U.S. at 281.

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[165] *See United States* v. *Armour & Co.,* 402 U.S. 673, 681 (1971) (*dictum*).

[166] *E.g., Louisiana* v. *United States,* 380 U.S. 145, 154 (1965).

The focus of Petitioners' proposals is inconsistent with these principles. Desegregation decrees are designed to end segregation, not merely its methods and causes. As this Court has only recently emphasized, "the remedy does not 'exceed' the violation if the remedy is tailored to cure the '"*condition* that offends the Constitution."' *Milliken I, supra* at 738," *Milliken II, supra,* 433 U.S. at 282. The same guidelines have been enunciated and applied again and again in anti-trust cases.[167]

Where there has been a finding of systemwide segregation, approaching the task of defining the remedy on a school-by-school basis, dependent upon prognostications about the exact racial composition of that facility absent discrete segregative decisions, not only trivializes the constitutional principles but invites the adoption of remedies which are certain to fail of their objective. Where school authorities' intentionally segregative acts marked facilities as "black" and began the process of racial turnover, limiting the remedy to only the directly traceable impact of the initial violation may constitute little more than tinkering which fails to alter that deliberately fostered racial identifiability. Moreover, the experience of the federal courts since *Brown* indicates that plans which involve a greater

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[167] *E.g., United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88-89 (1950):

> A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with the acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited.

In addition to the cases cited in *Gypsum, see, e.g., United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189-90 (1944); *United States* v *Loew's, Inc.*, 371 U.S. 38, 53 (1962).

number of schools may be more stable and acceptable to the community than more limited plans, because they distribute responsibility for participating in the remedy more evenly and do not leave racially identifiable schools as ready havens for flight. *See, e.g., Kelley* v. *Metropolitan County Bd. of Educ.,* Civ. No. 2094 (M.D. Tenn., July 15, 1971), *aff'd* 463 F.2d 732 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972) ("In order to prevent certain schools from becoming vehicles of resegregation, the schools which have less than 15 per cent black pupils after the implementation of this court-adopted plan shall not be enlarged either by construction or portables, and shall not be renovated without prior court approval"); *Harrington* v. *Colquitt County Bd. of Educ.,* 460 F.2d 193 (5th Cir.), *cert. denied,* 409 U.S. 915 (1972); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 362 F. Supp. 1223 (W.D.N.C. 1973), *appeal dismissed,* 489 F.2d 966 (4th Cir. 1974), *subsequent proceedings,* 379 F. Supp. 1098 (W.D.N.C. 1974).[168] This Court explicitly endorsed the consideration of such factors at the remedy stage in *Wright* v. *Council of the City of Emporia,* 407 U.S. 451, 464-65 (1972) and *United States* v. *Scotland Neck City Bd. of Educ.,* 407 U.S. 484, 489-90 (1972). *Milliken* v.

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[168] The likelihood of conflict and resistance to desegregation is increased when plans are partial and people believe, correctly or not, that they have been unfairly singled out to bear a disproportionate part of the burden of remedy. "Opposition diminished when the plans were made more inclusive," U.S. Commission on Civil Rights, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 156 (1967); G. Orfield, "Minimum Busing and Maximum Trouble," in MUST WE BUS 143-48 (1978). *See also,* J. Egerton, SCHOOL DESEGREGATION: A REPORT CARD FROM THE SOUTH 18-19, 22, 30, 41-45 (1976); M. Giles et al., "Desegregation and the Private School Alternative" in SYMPOSIUM ON SCHOOL DESEGREGATION AND WHITE FLIGHT (1975); M. Giles, D. Gatlin, and E. Cataldo, DETERMINANTS OF RESEGREGATION: COMPLIANCE/REJECTION BEHAVIOR AND POLICY ALTERNATIVES (National Science Foundation, 1976); G. Orfield, *If Wishes Were Houses Then Busing Could Stop: Demographic Trends and Desegregation Policy,* URBAN REVIEW 117-18 (Summer, 1978).

Bradley, supra, is not to the contrary. *See Milliken II, supra,* 433 U.S. at 281-82.[169]

Petitioners would foreclose federal courts from taking into account these and other practical elements in devising remedies in school desegregation cases. Though couched in the form of a mere change in evidentiary rules, their position, if adopted, would mark a sharp reversal in the course of history under *Brown.* The mandate to district courts would no longer be to shape remedy in a flexible manner, taking into account practicalities and the need to reconcile public and private needs, but rather to engage in a mechanistic application of artificial rules, whatever the consequences. The goal would no longer be to convert to systems "in which racial discrimination would be eliminated root and branch," *Green, supra,* 391 U.S. at 438, but to prune only the most prominent branches, leaving the roots intact and permitting discrimination to flourish again.

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[169] In *Milliken II* this Court approved specific educational remedial measures not upon the basis of evidence tracing the impact of segregation upon children school-by-school or student-by-student, but of testimony reflecting the informed judgment of educators about how "discriminatory student assignment policies can themselves manifest and breed other inequalities. . . ." 433 U.S. at 283. The Court's practical approach to remedy was reflected in its view that

> . . . Children who have been thus educationally and culturally set apart from the larger community will *inevitably* acquire habits of speech, conduct and attitudes reflecting their cultural isolation. They are *likely* to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. . . .
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> . . . . The *root condition* shown by this record must be treated directly by special training at the hands of teachers prepared for that task. This is what the District Judge in the case drew from the record before him as to the consequences of Detroit's de jure system, and we cannot conclude that the remedies decreed exceeded the scope of the violations found.

433 U.S. at 287-88 (emphasis supplied).

Little can be imagined that would be more destructive of the nation's long struggle, supported by the Court, to eliminate official racism from our society than to strip of its *practical* meaning the equal protection guarantee of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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APPENDIX

School Segregation and Residential Segregation: A Social Science Statement

The problem of school segregation and residential segregation in large cities is one of the major issues facing American society today. Courts, legislatures, public administrators, and concerned citizens have struggled to understand the origins of the problem, to assess legal and moral responsibility, and to devise appropriate and effective legal, legislative, and administrative responses. Although public acceptance of the principle of desgregation is at its highest point in our history,[1] there is remarkable dissensus and confusion about the legitimacy and effectiveness of many of the methods being used or considered to

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[1] "Over the past 25 years, the only period for which we have even moderately good data on public attitudes, there has been a consistent trend toward greater white acceptance of equality for Negroes, including greater acceptance of residential integration" (Bradburn, *et al., Racial Integration in American Neighborhoods* (Chicago: National Opinion Research Center Report #111-B, 1970)). In 1978, 13% of whites said they would move if a black family moved next door, compared to 35% in 1967 and 45% in 1963 (American Institute of Public Opinion, *The Gallup Opinion Index,* Princeton, November, 1978). Among northern white parents in 1963, 67% reported they would not object to sending their children to schools where half of the students were black. This figure increased to 76% of the parents polled in 1970 and remained about the same through 1975 (American Institute of Public Opinion, *The Gallup Opinion Index,* Princeton, February, 1976). An even higher proportion of white parents report no objections to sending their children to schools where "some" or "a few" of the pupils are black. See also Taylor, *et al.,* "Attitudes Toward Desegregation," *Scientific American,* June, 1978. In the South, where the most school desegregation has occurred, the percentage of white parents saying they object to sending their children to schools where half of the students were black fell from 83% (1959) to 38% sixteen years later (Ordfield, *Must We Bus?,* Washington: Brookings Institution, 1978, p. 109).

combat segregation. The issues are complex. Legal, factual, and political questions have become intertwined in the public debate. It is the purpose of this statement to identify certain of the factual issues that have been studied by social scientists, to summarize the knowledge that has resulted from these studies and been reported in scholarly journals and books, and to comment on the limits of social science knowledge.

This statement does not consider basic legal principles or goals for the nation. The signers of this statement cannot speak with any special authority on moral and legal issues. Some of the key issues, however, are factual issues subject to social science analysis. Many aspects of the nature of urban development and the segregation of minority groups have been studied with care by numbers of independent social scientists. Much has been learned about urban history, urban politics, changing public attitudes, the changing character of race relations, the operation of urban housing markets, and the formation and spread of racial segregation in urban areas. Section I of this statement is a summary of the current state of knowledge on some of these issues. Section II describes the kinds of conclusions that social science can and cannot supply concerning causes and effects of specific policies and actions. Section III presents a brief review of accumulated social science knowledge on the probable stability and effectiveness of several types of remedy that have been tried in school desegregation efforts. This statement emphasizes findings on which there is broad scholarly agreement, and avoids issues about which the evidence to date does not permit reasonably clear conclusions to be drawn.[2]

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[2] Although this statement was prepared initially at the request of attorneys connected with litigation concerning the Dayton and

Appendix

I.

The Causes of School and Residential Segregation and the Relations Among Them

Residential segregation between white and black Americans and other racial and ethnic minorities prevails in all large cities in the United States.[3] This segregation is attributable in important measure to the actions of public officials, including school authorities.

Although ethnic enclaves are a long-established feature of urban residential and commercial organization, the recent experience of blacks and Hispanic minorities in American cities has been far different than the historical experiences of persons of European descent. Some first and second generation European immigrants were dis-

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Columbus school systems, the evidence and conclusions herein stated refer to American urban areas generally. Some of the studies cited include Dayton and Columbus in their data base and some do not. Not all the signers of this statement purport to have studied either city.

[3] Taeuber and Taeuber, *Negroes in Cities* (Chicago: Aldine, 1965). An index of residential segregation calculated from census data on the numbers of white and nonwhite households on each city block has a theoretical range from zero (no segregation) to 100 (complete segregation). Indexes for 109 large American cities varied from 64 (Sacramento) to 98 (Miami) in 1960, and averaged about 86. Other minority groups were also residentially segregated. Updates based on the 1970 Census show a continuation of the pattern, with an average white-nonwhite segregation index for the same 109 cities of 81 (Sorensen, *et al.*, "Indexes of Racial Residential Segregation for 109 Cities in the United States, 1940-1970," *Sociological Focus,* 8 (1975), 125-142). Viewed from a metropolitan rather than central city perspective, racial segregation increased in many urban areas during the 1960's (van Valey, Roof, and Wilcox, "Trends in Residential Segregation: 1960-1970," *American Journal of Sociology* 82 (Jan., 1977), 826-844).

criminated against and were subject to restrictions on the housing they could obtain. Nevertheless their degree of residential segregation declined rapidly from the peak levels attained during periods of rapid immigration, and those peak levels were never as high as the levels typical for blacks and Hispanic minorities today.[4] The ethnic enclave for whites was temporary and, to a large extent, optional,[5] while for blacks, Puerto Ricans, and other Hispanics, "segregation has been enduring and can, for the most part, be considered as involuntary."[6]

Every major study of the housing of blacks and whites in urban America has identified racial discrimination as a major explanation of the observed segregation.[7] A recent review listed many forms of racial discrimination practiced by governmental and private agencies and individuals within the housing industry.[8]

Nearly a decade after federal legislation outlawing many such practices and a Supreme Court decision rendering

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[4] Lieberson, *Ethnic Patterns in American Cities* (New York: Free Press, 1963), p. 120-132; Taeuber, "Demographic Perspectives on Housing and School Segregation," 21 *Wayne Law Review* 833-40.

[5] Erbe, "Race and Socioeconomic Segregation," *American Sociological Review* 40 (December, 1975), p. 801-812.

[6] Butler, *The Urban Crisis: Problems and Prospects in America* (Santa Monica: Goodyear Publishing, 1977), p. 50.

[7] DuBois, *The Philadelphia Negro* (Philadelphia: University of Pennsylvania, 1899); Myrdal, *An American Dilemma* (New York: Harper, 1944); Weaver, *The Negro Ghetto* (New York: Harcourt, Brace, 1948); Commission on Race and Housing, *Where Shall We Live?* (Berkeley, University of California, 1958); U.S. Commission on Civil Rights, 1961 *Report*, VI, *Housing;* National Advisory Commission on Civil Disorders, *Report* (1968); etc.

[8] Taeuber, "Demographic Perspectives on Housing and School Segregation," *Wayne Law Review* 21:March 1975, 840-841.

them all illegal, a government study revealed that such practices continued but often in more subtle and covert form.[9]

Policies and practices of the federal government have been particularly important since the beginnings of major federal housing programs during the Depression.[10] The ghetto pattern that was created by deliberate policy has become far harder to alter than it was to create. The ghettos grew along with simultaneous pervasive discrimination and segregation in education, government employment, and provision of many government services. These became such fundamental features of American life that they were often taken for granted, viewed as "natural" forms of social organization.

A simple example will suggest the inertial resistance to change that has resulted from the history of racial discrimination in housing. Governmentally insured home mortgages spurred the widespread practice of low down payments and long repayment terms. This brought home ownership within the reach of young middle-income families, and was an underlying facilitator of rapid white sub-

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[9] U. S. Department of Housing and Urban Development, "Preliminary Findings of the 1977 Housing Market Practices Survey of Forty Cities," presented at the Tenth Anniversary Conference of Title VIII of the Civil Rights Act, Washington, D.C., April 17 and 18, 1978; Pearce, Black, White, and Many Shades of Gray: Real Estate Brokers and Their Racial Practices, unpublished Ph.D. dissertation, University of Michigan, 1976.

[10] Tens of millions of housing units have been built and occupied under federal government subsidy and insurance programs. The mass movement of white population to outlying urban and suburban developments and the growth of central area minority ghettos occurred during this period, guided by the explicit policies of discrimination written into government regulations and administrative practice. See Frieden and Morris, *Urban Planning and Social Policy,* pp. 127-131, and works cited in footnote 1.

urbanization during the last three decades. Most blacks were excluded from the FHA and VA mortgage insurance programs, based upon, among other things, the assertion that: "If the children of people living in . . . an area are compelled to attend school with a majority or a considerable number of pupils representing a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist." [11] In the current period of persistent inflation, a much higher proportion of white families than of black families has a growing equity in home ownership. Whatever gains blacks may make relative to whites in obtaining jobs and reasonable incomes, they will long lag far behind in wealth.[12] Thus will past discriminatory practices of the FHA and other housing agencies continue for decades yet to come to exert an influence on the racial structure of the nation's metropolitan areas.

Not all of the governmental discrimination that fostered residential segregation was practiced by housing agencies. Employment discrimination affected the earnings of blacks and influenced their workplaces, and both of these effects constrained housing opportunities. Discrimination in the provision of public services, such as paved roads, frequent trash collection, and new schools, was standard practice in southern cities and common in northern cities. Thus were

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[11] F.H.A., *Underwriting Manual,* 1935 Edition.

[12] Orfield, "If Wishes Were Houses Then Busing Could Stop: Demographic Trends and Desegregation Policy," *School Desegregation in Metropolitan Areas: Choices and Prospects* (A National Conference), National Institute of Education, Washington, D.C., October, 1977; Kain and Quigley, "Housing Market Discrimination, Home Ownership, and Savings Behavior," *American Economic Review* (June, 1972).

residential areas for blacks further demarcated and stigmatized. Racial discrimination was institutionalized throughout American society, and the resulting patterns of segregation in housing, schooling, employment, social life, and even political activity had many causes.[13] Discriminatory practices and racial segregation in each aspect of life contributes to the maintenance and reinforcement of similar practices and segregatory outcomes in other aspects.

Education is a pervasive governmentally organized activity that reaches into every community. The institutionalization of racially discriminatory practices throughout the public school system is a substantial cause as well as effect of society's other racial practices. Society's major institution for socializing the young, aside from the family, is the public school system. Most children are greatly influenced by their school experiences, not simply in formal academic learning but in developing a sense of self and knowledge and feelings about social life and behavior.

There is an interdependent relationship between school segregation and neighborhood segregation. Each reinforces the other. Policies that encourage development and continuation of overwhelmingly racially identifiable schools foster residential segregation. This residential segregation in turn fosters increased school segregation. The role of many governmental practices in the development and continuation of residential segregation has been documented repeatedly and summarized above. Several specific ways in which school policies and practices contribute to residential segregation may be delineated.

The racial composition of a school and its staff tends to stamp that identity on the surrounding neighborhood. In

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[13] Myrdal, *op. cit.*

many urban areas, the attendance zone of a school defines the only effective boundary between "neighborhoods." [14] Homebuyers use school attendance zones as a guide in their selection of a residence. Realtors take particular pains to "sell" the school as they sell the home; [15] the school zone is listed in many newspaper classified advertisements for homes and often serves to identify the racial character of the "neighborhood."

In many American cities during the last 30 to 60 years, residential areas of predominant minority occupancy have greatly expanded. Often an increasing black or Hispanic population has moved into housing formerly occupied by (Anglo) whites. This process of "racial succession" or "ghettoization" has been perceived as a relentless "natural" force, yet it is in fact governed by institutional policies and practices and is not at all inevitable.[16] The process is a textbook example of a self-fulfilling prophecy. The expectation by whites that an area will become black leads them to take individual and collective actions that ensure the outcome. Housing market barriers against sale or rental to blacks are reduced, panic selling tactics often stimulate white residents to leave, and potential white in-

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[14] "No other boundary system within the city is as crucial to residential behavior as the system of attendance zones delineated by school authorities." Taeuber, "Housing, Schools, and Incremental Segregative Effects," *Annals of the American Academy of Political and Social Science,* v. 441 (Jan., 1979), p. 164.

[15] Helper, *Racial Politics and Practices of Real Estate Brokers* (Minneapolis: 1969) reports that school image and racial composition play the key role in labelling neighborhoods as undesirable: "People fear that the schools will become undesirable—this, say respondents, is the main reason why white people do not want Negroes to come into their area" (p. 80).

[16] Taeuber and Taeuber, *op. cit.,* Part 2.

migrants from other parts of the city are steered away from the neighborhood because it is "turning" or "going."

Change in the racial identifiability of a school can influence the pace of change in racial composition in a "changing" residential area.[17] In contrast, a school with a stable racial mix connotes to nearby residents and potential in-movers that they will not be forsaken by school authorities. School policies can serve to "coalesce a neighborhood and generate confidence in its continued stability." [18]

Even childless households are affected by the school and neighborhood racial labelling process. Residential location is a major factor in determining social status in America.[19] Many whites who contemplate remaining in or entering an area where the school has an unusually large or increasing proportion of minority pupils or staff expect that such a school will be discriminated against by school officials. "As the proportion of disadvantaged students in the central cities has increased, there has been a simulta-

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[17] Wolf, "The Tipping-Point in Racially Changing Neighborhoods," *Journal of the American Institute of Planners,* v. 29 (1963), 217-222, esp. 220-1.

[18] Vandell and Harrison, *Racial Transition in Neighborhoods* (Cambridge: Joint Center for Urban Studies, 1976), 13.

[19] Warner, *Social Class in America* (Chicago: Science Research Associates, 1949), 151. Cf. Roof, "Race and Residence," *Annals,* v. 441 (Jan., 1979), p. 7; Marston and van Valey, "The Role of Residential Segregation in the Assimilation Process," *Annals,* v. 441 (Jan., 1979), pp. 22-25; Berry, *et al.,* "Attitudes Toward Integration: The Role of Status in Community Response to Racial Change," in Schwartz, ed., *The Changing Face of the Suburbs* (Chicago: University of Chicago Press, 1976), 221-264; Guest and Weed, "Ethnic Residential Segregation," *American Journal of Sociology,* v. 81 (March, 1976), 1088-1111, esp. 1092; Sennett, "The Brutality of Modern Families," *Transaction* (Sept., 1970), 29037; Loewen, *The Mississippi Chinese: Between Black and White* (Cambridge: Harvard University Press, 1971), 102-119.

neous increase in what are known in the community as 'undesirable' schools, schools to which parents would prefer not to send their children." [20] These parents know what all citizens know: that black Americans have less social status and power with which to persuade or coerce school authorities to meet their needs. This perception, that black schools will be allowed to deteriorate, has historical justification.[21] Whatever the objective circumstances, parents expect that children in schools perceived to be for minority children will receive inferior education. Many white parents are able to move or place their children in other schools.[22] Most black parents are unable to avoid using identifiably black schools. If all schools were interracial, whites could not link racial composition to school quality, nor could school authorities.

All discriminatory acts by school authorities that contribute to the racial identifiability of schools promote racially identifiable neighborhoods. Sometimes the effect is direct and obvious, as when the selection of school construction sites, the drawing of school boundaries, and/or the construction of additions are carefully undertaken to establish and preserve "white schools" and "black schools." Sometimes the effect is less direct. In most school districts minority teachers have until very recently rarely been

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[20] Campbell and Meranto, "The Metropolitan Educational Dilemma," in Gale and Moore, eds., *The Manipulated City,* 305-318, p. 310 (Chicago: Maaroufa Press, 1975). Cf. Surgeon, *et al., Race Relations in Chicago: Second Survey, 1975.* (Chicago: University of Chicago Family and Community Study Center, 1976, p. 158).

[21] Campbell and Meranto, *op. cit.,* p. 313; Baron, "Race and Status in School Spending," in Gale and Moore, eds., *The Manipulated City,* 339-347.

[22] Vandell and Harrison, *op. cit.*

assigned to schools with no minority pupils, and in many large urban school districts few minority teachers were employed. Had white pupils and parents regularly encountered blacks in responsible professional positions, and had minority pupils and parents seen white and black professionals equally treated, the perpetuation of stereotypical attitudes and prejudicial habits of thought would have been significantly challenged.[23]

A pervasive effect of this and certain other types of discriminatory school actions is upon the attitudes of the students who grow up experiencing such a system for a thousand hours a year. Participation in segregated institutions foments the development of prejudicial attitudes.[24] Participation in desegregated institutions, under benign conditions, can be a powerful force for breaking down prejudice.[25] "If in their own schooling they [parents] had been taught tolerance rather than intolerance many more of them would now be willing and even eager to seek out racially mixed rather than racially isolated residential areas." [26]

Racially discriminatory pupil assignment policies tend to increase residential segregation in several ways. An open transfer policy is often manipulated by school authorities to encourage or permit whites to flee schools that

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[23] Taeuber, "Housing, Schools, and Incremental Segregative Effects," *The Annals of the American Academy of Political and Social Science,* (Jan., 1979), 161.

[24] Crain and Weisman, *Discrimination, Personality and Achievement* (New York: Seminar Press, 1972).

[25] Festinger, *A Theory of Cognitive Dissonance* (Evanston: 1957); Allport, *The Nature of Prejudice* (Garden City: Anchor, 1958).

[26] Taeuber, *op. cit.,* p. 162.

are becoming biracial, and to attend overwhelmingly white schools some distance away. The effect on residential patterns would appear to be to permit white families to remain in a biracial residential area. The larger effects are, however, segregative. First, because the children who transfer lose many of their neighborhood ties, the family finds it easier to move to the neighborhood around their new school or to a more remote white enclave. Second, because the sending school is now identified as "black" or "changing," white families who might otherwise have moved into the area will be steered elsewhere and the area will become increasingly minority.[27]

When the elected officials and appointed professional leaders of a major societal institution (the public schools) establish or condone the operation of optional attendance zones in a discriminatory manner, this tells the users of the institution (students and their parents) and the general public that it is correct to view racial contact as a problem and to utilize institutional practices and policies in ways that avoid the problem. The effect on attitudes has both short-run and life-long effects that may affect so-called "private" choices in housing and other areas of life.[28] "The NORC study found that desegregated whites were more likely to have had a close black friend, to have had black friends visit their homes, and to be living in multiracial neighborhoods. It is believed that having had a close black

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[27] Molotch, *Managed Integration* (Berkeley and Los Angeles: University of California Press, 1972); Bradburn *et al.*, *Racial Integration in American Neighborhoods* (Chicago: National Opinion Research Center, 1970); Orfield, *op. cit.*, 97; Milgram, *Good Neighborhood: The Challenge of Open Housing* (New York: Norton, 1977).

[28] Taeuber, *op. cit.*, 162-4.

friend relates directly to choice of residence in a multiracial area. This is also true for blacks." [29]

The actions of school officials are part of a set of discriminatory actions by government agencies, and other institutions. This web of institutional discrimination is the basic cause of school and residential segregation. Economic factors and personal choice are often considered as additional causes.[30]

The assertion sometimes made that residential segregation results from racial differences in economic status rather than from racial discrimination is a curious one. Racial discrimination in employment and earnings is a major cause of racial differences in economic status, and racial discrimination in access to homeownership was cited above as a cause of racial differences in wealth. Racial discrimination in education in prior years is of course one of the causes of poorer job market outcomes for black adults. It is not necessary to elaborate on these interlocking causes. The fact is that current racial economic differences have little effect on racial residential segregation. If economic variables alone determined where people lived, the rich of both races would live near one another and poor blacks and poor whites would be close neighbors. Such is not the case. Well-to-do blacks live in very different

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[29] Green, "Northern School Desegregation: Educational, Legal and Political Issues," Chapter 10 of Gordon, ed., *Uses of the Sociology of Education* (Chicago: 1974), 251. "NORC" is the National Opinion Research Center. See also Meyer Weinberg, *Desegregation Research* (Phi Delta Kappa, 1970), pages 311-313, citing Pettigrew and NORC studies. Regarding black choices, see Crain, "School Integration and the Academic Achievement of Negroes," *Sociology of Education,* v. 44 (1971), p. 19. See also Bullogh, "Social Psychological Barriers to Housing Desegregation," UCLA Graduate School of Business Administration, Special Report 2, 1969, processed.

[30] Myrdal, *op. cit.*

areas than well-to-do whites and poor whites generally do not share their residential areas with poor blacks.[31] Nor can economic factors explain the general absence of blacks from the suburbs. Studies of census data reveal that in most metropolitan areas the suburbs are open to whites in all economic categories but are generally closed to blacks, be they wealthy or impoverished.[32] If people were residentially distributed according to their income rather than their skin color, most urban neighborhoods would contain racially mixed populations.

Despite the civil rights legislation of the 1960s and numerous court orders that prohibit discriminatory employment practices, the incomes of blacks continue to lag far behind those of whites.[33] Improvements in the economic status of blacks would allow more blacks to upgrade their housing but increased spending on housing would do little to alleviate racial residential segregation.[34]

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[31] Taeuber and Taeuber, *op cit.*, chapter 4; Taeuber "The Effects of Income Redistribution on Racial Residential Segregation." *Urban Affairs Quarterly*, Vol. 4, No. 1, September 1968, pp. 5-14.

[32] Hermalin and Farley, "The Potential for Residential Segregation in Cities and Suburbs: Implications for the Bussing Controversy," *American Sociological Review*, Vol. 38, No. 5, October, pp. 595-610; Farley, Bianchi, and Colasanto, "Barriers to the Racial Integration of Neighborhoods: The Detroit Case," *The Annals of the American Academy of Political and Social Science*, Vol. 441, January 1979, pp. 97-113.

[33] In 1977 black men who worked full time for the entire year reported earnings about 69% as great as those of comparable white men. The average income of black families was 57% as great as that of white families. U.S. Bureau of the Census, Current Population Report Series P-60, No. 116, July 1978, Tables 1 and 7.

[34] Straszheim, "Racial Discrimination in the Urban Housing Market and its Effect on Black Housing Consumption," in von Furstenberg, Harrison, and Horowitz (eds.), *Patterns of Racial Discrimination, Volume 1, Housing.* Lexington, Mass: Lexington Books 1974; Taeuber, *op. cit.*

Appendix

The personal choices of individuals must be considered in any explanation of racial residential segregation. In national and local survey studies, most blacks express a preference for racially mixed neighborhoods for themselves and racially integrated schools for their children. For example, in a national study conducted in 1969, three-fourths of black respondents wished to live in integrated neighborhoods while one in six expressed a preference for an all-black area.[35] In Detroit, the proportion of blacks who said they preferred racially mixed areas rose from 56 percent in 1968 to 83 percent in 1976.[36] These preferences cannot be used to predict where black families actually live, for they have had lifelong experience with discriminatory housing markets that offer little actual freedom of choice.[37]

In the late nineteenth and early twentieth centuries, economic factors and personal preferences may have been important determinants of residential location of blacks and European immigrants.[38] As the number of blacks

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[35] Pettigrew, "Attitudes on Race and Housing: A Social-psychological View," in Hawley and Rock (eds.), *Segregation in Residential Areas* (Washington: National Academy of Sciences, 1973), 21-48.

[36] Farley, *et al.*, "Chocolate City, Vanilla Suburbs: Will the Trends Toward Racially Separate Communities Continue?" *Social Science Research*, Vol. 7, No. 4, December 1978, 319-344.

[37] Colasanto, "The Prospects for Racial Integration in Neighborhoods: An Analysis of Preferences in the Detroit Metropolitan Area," Ph.D. Dissertation, University of Michigan, 1978.

[38] Hershberg, *et al.*, "A Tale of Three Cities: Blacks and Immigrants in Philadelphia, 1850-1880, 1930 and 1970," *Annals of the American Academy of Political and Social Science*, Vol. 441, January 1979, 55-81; Lieberson, *Ethnic Patterns in American Cities* (New York: Free Press of Glencoe, 1963); Spear, *Black Chicago: The Making of a Negro Ghetto, 1890-1920* (Chicago: University of Chicago Press, 1967).

increased, institutionalized Jim Crow practices developed and for more than half a century the black residential patterns have diverged from those of the ethnic groups. The conclusions of a historical study of the development of the Negro ghetto in Chicago are exemplary of other historical studies:[39] "The most striking feature of Negro housing . . . was not the existence of slum conditions, but the difficulty of escaping the slum. European immigrants needed only to prosper to be able to move to a more desirable neighborhood. Negroes, on the other hand, suffered from both economic deprivation and systematic racial discrimination. . . . The development of a physical ghetto in Chicago . . . was not the result chiefly of poverty, nor did Negroes cluster out of choice. The ghetto was primarily the product of white hostility."

Neither economic factors nor the preferences of blacks for having some black neighbors can be interpreted as current causes of residential segregation separate and distinct from discrimination. Neither income differences nor personal choice produce high levels of racial residential segregation in hypothetical models that assume an absence of discrimination.[40]

In this review of findings, frequent use has been made of the terms "cities" and "urban areas." The usage has deliberately been loose. The concepts of a housing market, a labor market, and a commuting area all connote a broad territory. The effects of any action that alters residential patterns in a specific location are not felt solely in that location. The kinds of discriminatory actions reviewed

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[39] Spear, *op. cit.*, p. 26.

[40] Taeuber and Taeuber, *op. cit.;* Taylor, *op. cit.*

earlier in this section, whether taken by school officials, other governmental officials, commercial or financial institutions, or other groups or persons, have effects that spread beyond the neighborhoods initially affected.[41]

In the thirty-five years since Myrdal's seminal study of America's racial problems was first published,[42] American society has changed in many ways and race relations have experienced profound transformations. Social scientists have published thousands of additional studies of various aspects of race relations. If there is a common theme emerging from this myriad of studies, it is continual reaffirmation of Myrdal's observation of a process of cumulative causation binding the separate threads of social life into a system.[43] This review of research on a limited range of topics has shown that causes and effects of individual actions cannot be understood or evaluated apart from the broader social context in which they are imbedded. Residential segregation, school segregation, racial economic differences, housing preferences and neighborhood attitudes, discriminatory acts by school officials, and discrimination practiced by other governmental agencies are linked together in complex patterns of reciprocal causation and influence.

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[41] Hawley, *Human Ecology* (New York: Ronald, 1950); Berry and Kasarda, *Contemporary Urban Ecology* (New York: Macmillan, 1977); Taeuber, "Demographic Perspectives on Metropolitan School Desegregation," in *School Desegregation in Metropolitan Areas: Choices and Prospects* (Washington: National Institute of Education, 1977).

[42] Myrdal, *op. cit.*

[43] *Ibid.*, 77.

Appendix

II.

Conclusions Social Science Can and Cannot Supply

The previous section reported a brief summary of some of the conclusions that can be drawn from the writings of social scientists who have studied school segregation, housing segregation, and other aspects of race relations in twentieth-century American society. A few dozen articles, chapters, and books were cited, from the thousands that might be included in a comprehensive literature survey. The individual scholarly investigations utilized a variety of information sources—interviews with realtors, government documents, records of housing sales prices, census data, etc. The techniques for analyzing information were varied—historical interpretation, statistical analysis, logical testing of predictions from formal theories, etc. The common link is a laying out of evidence and mode of analysis so that other scholars can examine the basis for the conclusions drawn. Many social scientists agree that the conclusions reported in Section I are reasonably well established. Of course the evidence is stronger for some conclusions than for others, and the scientist is always open to altering conclusions on the basis of new evidence.

The principal conclusions reported in Section I concern relationships among discriminatory actions by educational agencies, school segregation, residential segregation, and other types of institutionalized racial discrimination. A pervasive pattern of interdependence within American urban areas was documented. In particular, it was concluded that segregative school policies are among the causes of urban racial residential segregation.

Some social scientists have been asked to refine these general conclusions and provide precise answers about specific

causal relationships in particular places and times.[44] They have been asked how much effect discriminatory and segregative school policies had on residential segregation and what exactly was the reciprocal effect of that incremental residential segregation on school attendance patterns. Even more precision is requested in the question: What is the numerical effect on current school attendance patterns that results from direct and indirect effects of individual discriminatory actions taken in the past by school officials?

Social scientists cannot answer such questions with precision. The questions can be rephrased to call for stating what the present would be like if the past had differed in certain specified respects. This is reminiscent of the grand "what if" games of history. What if the South rather than the North had been victorious in 1865? Would the United States be one nation? When would slavery have ended? What role would black labor have played in the industrialization of northern cities? Clearly there is fascinating material here for historical speculation, but any answers, however well grounded on scholarship and logical reasoning, are inherently fictional. And the game loses all point if the question becomes too narrow: What would the racial composition of Atlanta and of Chicago be in 1980? History cannot be unreeled and reeled back differently.

The present state of empirical knowledge and models of social change does not permit precise specification of the effects of removing particular historical actions. Although many of the causes of segregated outcomes are known, this knowledge is not so thoroughly quantified as to permit precise estimates of the effects of specific discriminatory acts on general patterns of segregation. In addition, the knowl-

[44] For an indication of the judicial context in which such questions have been posed, see Taeuber, *op. cit.*

edge that is available is incomplete. Many of the links between discrimination and segregation are only dimly perceived and not yet carefully investigated. The work of many specialists—economists, psychologists, sociologists, political scientists, geographers—cannot be integrated into a grand model. Even if each individual link were well understood, the model could not be used to crank out estimates without understanding how the entire set of relationships functions as a system.[45]

Social scientists studying real cities in a particular society and time period do not have available the techniques of experimental analysis for control of variables. There are a few hundred urban areas to be studied, and thousands of variables with which to describe them and differentiate one from another. The kinds of generalizations that are possible are limited in character. Historical reconstruction simply cannot meaningfully quantify what the racial distribution of pupils or residents would have been if particular school officials had acted differently. Delimiting the wrong that flowed from specific acts and righting the wrong are matters for jurisprudence, not social science.

III.

Knowledge about the Desegregation Process

Although most large urban school districts with substantial numbers of minority pupils enrolled have changed some of their practices as a result of *Brown* v. *Board of Education* and subsequent court decisions, many have never implemented comprehensive desegregation plans. Of those

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[45] For an example of the inability to ultilize certain formal models of the effects of prejudice and discrimination on racial segregation in the housing market, see Taylor, *op. cit.*

that have implemented such plans, most of the activity has been in recent years. There has been relatively little opportunity for sustained study of the process of school desegregation in large urban areas. Nevertheless the social science literature on school desegregation already numbers hundreds of articles and books.[46]

An early body of research on educational achievement utilized existing or only slightly modified standardized tests and assessment instruments. Many of these studies did not distinguish between racially mixed classrooms or schools that resulted from specific desegregation efforts and those that occurred for other reasons. Most lacked a time dimension, investigating only the situation at the time of study, or assuming that desegregation was an event that occurred all at once. There is a virtual consensus, from a wide variety of studies conducted in this manner, that desegregation does not damage the educational achievement of white children.[47]

The *Coleman Report* found limited but signfiicant educational gains for minority children, which it attributed primarily to the placement of these children in more challeng-

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[46] Weinberg, *The Education of the Minority Child* (Chicago: Integrated Education Associates, 1970) lists 10,000 "selected entries."

[47] Coleman, *et al., Equality of Educational Opportunity* (Washington: Government Printing Office, 1966), pp. 22, 297, 325; St. John, *School Desegregation: Outcomes for Children* (New York: Wiley, 1975), p. 35; Jencks and associates, *Inequality: A Reassessment of the Effect of Family and Schooling in America* (New York: Basic Books, 1972), pp. 105-6; Weinberg, *Desegregation Research: An Appraisal,* 2nd ed. (Bloomington, Ind.: Phi Delta Kappa, 1970), p. 88. There has also been some evidence of definite white gains in plans which combined desegregation with educational improvements. (St. John, pp. 157-62; Pettigrew, *et al.*, "Busing: A Review of 'The Evidence,'" in Nicolaus Mills, ed., *The Great School Bus Controversy* (New York: Teachers College Press), p. 148.

ing educational settings dominated by students from families with more resources and stronger educational backgrounds.[48] The *Report,* and a number of reanalyses of the national statistics on which it was based, found that the quality of the school was more important to poor children while family influences were more decisive for middle-class children.[49]

Research in the 1970's has moved toward a view of desegregation as a process rather than an event, a process which is very much influenced by the manner in which it is carried out. Segregation appears to be a deeply rooted problem. Years of quiet work within a physically desegregated school may be needed to attain the intended benefits.[50] Early experiences continue to influence later learning, and social and cultural patterns of race relations cannot be rapidly and easily altered in the school when profound inequalities of income, employment and occupational status, educational background, and social status prevail in the society.

The positive effects of desegregation can be enhanced by strong leadership of the principal in the school, by training for teachers who need help in the readjustment, and by school rules that are perceived as fair by both white and

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[48] Coleman *et al., op. cit.,* p. 22.

[49] Smith, "Equality of Educational Opportunity: The Basic Findings Reconsidered," in Mosteller and Moynihan, eds., *On Equality of Educational Opportunity* (New York: Random House, 1972), p. 312.

[50] Orfield, "How to Make Desegreation Work: The Adaptation of Schools to their Newly-Integrated Student Bodies," 29 *Law & Contemporary Problems,* No. 2, at 314 (1975); Forehand, Ragosta, and Rock, *Conditions and Processes of Effective School Desegregation* (Princeton, N.J.: Educational Testing Service, 1976), pp. 217-230.

minority children.[51] Efforts by teachers to explain racial issues and to assign students consciously to integrated work groups can have substantial positive effect.[52]

The importance of beginning integration at the onset of public schooling has long been noted. Young children have the smallest gap in academic achievement and the least developed racial stereotypes.[53] Integration becomes part of their concept of school from the beginning, not a drastic change. Federal officials report that there is seldom any difficulty associated with desegregating the earliest grades.[54] A review of scores of published studies of academic achievement shows that a large majority of the cases with first grade desegregation bring positive educational results while later desegregation has little effect on black pupil

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[51] Forehand and Ragosta, *A Handbook for Integrated Schooling* (Washington: Government Printing Office, 1976).

[52] Cook, "Interpersonal and Attitudinal Outcomes in Cooperating Interracial Groups," *Journal of Research and Development in Education,* 1978 12:1, 97-113; DeVries, Edwards, and Slaven, "Biracial Learning Teams and Race Relations in the Classroom: Four Field Experiments Using Teams-Games-Tournament," *Journal of Educational Psychology,* 1978, 70:3, 356-362; Slaven, "Effects of Biracial Learning Teams on Cross-Racial Friendships," *Journal of Educational Psychology,* 1979, forthcoming; Wiegel, Wiser, and Cook, "The Impact of Cooperative Learning Experiences on Cross-Ethnic Relations and Attitudes," *Journal of Social Issues* 1975:31, 219-244.

[53] Coleman, *et al., op. cit.,* pp. 274-275; National Opinion Research Center, *Southern Schools: An Evaluation of the Effects of the Emergency School Assistance Program and of School Desegregation* (Chicago: NORC, 1973), pp. 45-47, 79.

[54] Report from Community Relations Service of the U.S. Department of Justice accompanying letter from Assistant Attorney General Ben Holman to Senators Edward Brooke and Jacob Javits, June 19, 1976; printed in *Congressional Record* (daily edition), June 26, 1976, pp. S10708-11.

achievement scores.[55] A study of schools in the South showed that the more years of desegregation, the more positive were the results.[56] Pettigrew summarized the sociological theory and cited additional evidence.[57] Empirical results and social theory buttress the commonsense observation that small children have not yet learned that race is supposed to matter and therefore tend to act as if it does not.

Certain longer run effects of school desegregation may occur outside of the school. Few of these effects have yet been studied, but some evidence is begining to accumulate. Students from integrated schools, for example, are more likely to succeed in strong colleges.[58] A retrospective study of black adults found that those who reported attending integrated schools as children were more likely in later years to live in racially integrated neighborhoods.[59] Ultimately, studies of the long-run effects of desegregation may provide crucial evidence on the strength of the indirect effects of school discrimination that were cited in Section I. Already there is limited evidence that school desegregation can spur stable residential desegregation.[60]

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[55] Crain and Mehard, "Desegregation and Black Achievement," forthcoming in *Law and Contemporary Problems,* 1979.

[56] National Opinion Research Center, *Southern Schools,* p. 53; Forehand, Ragosta, and Rock, *Conditions and Processes of Effective School Integration,* pp. 217-230.

[57] Pettigrew, "A Sociological View of the Post-*Bradley* Era," 21 *Wayne Law Review* 813, at 822.

[58] Crain and Mehard, "High School Racial Composition and Black College Attendance," *Sociology of Education,* April 1978.

[59] Crain and Weisman, *Discrimination, Personality, and Achievement* (New York: Seminar Press, 1972).

[60] Green, *op. cit.,* p. 252, re Riverside, Calif.; Taeuber, 1979, p. 20, re Milwaukee; Kentucky Commission on Human Rights,

Appendix

Social scientists have played a central role in a vigorous political and scientific debate over the demographic and enrollment effects of implementing desegregation plans. As yet there is little consensus over the terms of the debate, the appropriate measurement techniques and theoretical formulations, and the trustworthiness of various empirical results. Nevertheless there seems to be an emerging consensus that certain types of desegregation actions are most likely to result in large declines in public school enrollment by white pupils. If a plan is limited to a small fraction of the system and produces schools with large minority enrollments surrounded by readily accessible white schools, there is likely to be instability in white enrollments.[61] A study of desegregation in large school districts across Florida showed that enrollment stability was aided by system-wide plans that avoided leaving schools substantially disproportionate in their racial composition.[62] A study of the experience in Charlotte-Mecklenburg showed that the exclusion of only a few schools produced some residential instability.[63] Limiting a desegregation plan to

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"Housing Desegregation Increases as Schools Desegregate in Jefferson County" (Louisville, 1978); Rossell, *Assessing the Unintended Impacts of Public Policy: School Desegregation and Resegregation* (Washington: National Institute of Education, 1978), p. 29; Orfield, "If Wishes Were Houses Then Busing Could Stop: Demographic Trends and Desegregation Policy," *op. cit.*, p. 51; Braunscombe, "Times Are A 'Changing in Denver," Denver *Post*, May 1, 1977.

[61] Giles, "White Enrollment Stability and School Desegregation: A Two-Level Analysis," *American Sociological Review* 43: 1978.

[62] Giles, Gatlin, and Cataldo, *Determinants of Desegregation: Compliance/Rejection Behavior and Policy Alternatives* (Washington: National Science Foundation, 1976).

[63] Lord, "School Busing and White Abandonment of Public Schools," *Southern Geographer* 15:1975; ——, "School Desegregation Policy and Intra-School District Migration," *Social Science Quarterly* 56: 1977.

the immediate vicinity of a ghetto or barrio is likely to accelerate the process of ghetto expansion described in Section I.

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