IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,

Petitioners,

v.

MARK BRINKMAN, et al.,

Respondents.

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

BRIEF FOR RESPONDENTS

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Opinions Below

The district court's initial liability ruling of 7 February 1973, now reported at 446 F. Supp. 1254-65 as an appendix to the court's latest ruling, is reprinted in the appendix to the petition for certiorari ("Pet. App.") at pp. 1a-25a. The court's first remedy order was entered 13 July 1973. Pet. App. 26a-31a. The first opinion of the court of appeals is reported as *Brinkman* v. *Gilligan*, 503 F.2d 684 (6th Cir. 1974) (*Brinkman I*). Pet. App. 32a-69a.

On remand from *Brinkman I*, the district court entered orders on 7 January 1975 (Pet. App. 70a-72a) and 10 March 1975. Pet. App. 73a-88a. The court of appeals opinion in *Brinkman II* is reported at 518 F.2d 583 (6th Cir.), *cert. denied sub nom.*, 423 U.S. 1000 (1975). Pet. App. 89-98a.

On remand from *Brinkman II,* the district court entered remedial orders and judgments on 29 December 1975 (Pet. App. 99a-109a), 23 March 1976 (Pet. App. 110a-13a), 25 March 1976 (Pet. App. 114a-16a) and 14 May 1976. Pet. App. 117a. The court of appeals' opinion in *Brinkman III* is reported at 539 F.2d 1084 (6th Cir. 1976). Pet. App. 118a-23a. This Court's opinion, vacating and remanding, is reported as *Dayton Bd. of Educ.* v. *Brinkman,* 433 U.S. 406 (1977) (*Dayton I*). Pet. App. 124-41a.

On remand from *Dayton I,* the district court filed an opinion dismissing the complaint on 15 December 1977, which is reported at 446 F. Supp. 1232 (S.D. Ohio). Pet. App. 142a-88a. The court of appeals' opinion in *Brinkman IV* is reported at 583 F.2d 243 (6th Cir. 1978). Pet. App. 189a-217a. This Court granted certiorari on 8 January 1979.

Counterstatement of Questions Presented

Whether, as the court of appeals held below, the Dayton Board of Education was operating a basically dual school system at the time of trial, necessitating a systemwide desegregation remedy?

Counterstatemenet of the Case

A. Prior Proceedings.

This suit commenced on 17 April 1972 with the filing of a complaint by black parents and their school children[1]

[1] In their petition for certiorari (pp. 20-21) and in their brief (pp. 54-56), petitioners make a frivolous attack on plaintiffs' standing to sue. Despite the fact that this issue had been resolved against petitioners by the district court and by the court of appeals in

seeking to disestablish the racially dual system of public schooling in Dayton, Ohio, pursuant to the Thirteenth and Fourteenth Amendments and their contemporaneous implementing legislation, 42 U.S.C. §§1981 and 1983-1988. Complaint, ¶¶1, 12. Defendants included the Dayton Board of Education, its individual members and Superintendent of Schools and the State Board of Education and responsible state officials. Complaint, ¶¶4-10. Following extensive admissions by all defendants (App. 53-78),[2] the trial judge conducted an evidentiary hearing from 13 November to 1 December 1972, limited to whether the acts of the Dayton Board "have created segregated educational facilities in violation of the Equal Protection Clause." Pet. App.

Brinkman I, it was resurrected by petitioners before this Court in *Dayton I*. We responded by demonstrating that individual respondents have a real present-day stake in this litigation, and that the case has properly proceeded as a class action. *See* Brief for Respondents at 95-101 in *Dayton Bd. of Educ.* v. *Brinkman*, No. 76-539. Although petitioners' standing argument was a jurisdictional one, which the Court would have been obliged to look into even on its own motion, *cf. City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), the Court's opinion in *Dayton I* elected not to address the standing argument and proceeded on the basis that jurisdiction was established. Petitioners' standing contention was thus necessarily resolved against them in *Dayton I;* and, on remand therefrom, they did not renew the argument either in the district court or in the court of appeals. They are therefore foreclosed from relitigating that issue in this Court. In all events, the issue must be resolved in respondents' favor, for the reasons set forth in our brief in *Dayton I*, cited above.

[2] "App." references are to the three-volume appendix filed herein. When the exhibit volume is referred to, the page number is followed by "Ex." Trial exhibits not reproduced in the exhibit volume of the appendix are designated "PX" for plaintiffs' exhibits and "DX" for defendants' exhibits. References to the original transcript are designated as follows: "R.I." for the twenty-volume, consecutively-paginated transcript of the violation hearing in November and December 1972; "R.II." for the February 1975 remedial hearings; "R.III." for the remedial hearings in December 1975 and March 1976; and "R.IV." for the November 1977 hearing on remand from this Court.

2a; also Pet. App. 34a, 143a, 188a.[3] The plaintiffs introduced substantial additional evidence showing that the Dayton public schools had been riven by a long and continuous history of intentional system-wide segregation leading to the creation and maintenance of a basically dual system from long before *Brown* through the time of trial; the defendants countered by arguing that any discrimination had only minor effect and, in any event, had been dissipated by the passage of time. The district court issued an opinion on 7 February 1973 finding "racially imbalanced schools, optional attendance zones, and recent Board action [i.e., the 3 January 1972 rescission of a system-wide program of desegregation], which are cumulatively in violation of the Equal Protection Clause." Pet. App. 12a.[4] By its 13 July 1973 supplemental order on remedy, the district court approved a "plan" eliminating optional zones and required a "free choice" election process for in-coming high school students, based on its read-

[3] Plaintiffs filed the action in the Columbus rather than the Dayton division of the district court because of the joint and independent allegations against the State level agencies and officials, all located in Columbus. The district court denied defendants' motions to dismiss for improper venue or, in the alternative, for transfer to the Dayton division on these grounds. *E.g.*, Pet. App. 33a. Yet the trial judge then deferred hearing on the claims against the State defendants; and, to date, these claims, as well as those against all defendants arising under the Thirteenth Amendment and the applicable federal civil rights statutes, 42 U.S.C. §§1981 and 1983-1988, have never been heard. (At the beginning of the November 1972 trial, Judge Rubin noted that "[t]his is a limited hearing on this case and it is intended to be a preliminary inquiry." App. 1.)

[4] The district court determined that the case was a "class action by the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education." Pet. App. 1a. The court also credited plaintiffs' pre-*Brown* evidence of official racial discrimination as the policy of the Dayton Board (Pet. App. 2a-4a), but it did not relate that conduct to the evidence of post-*Brown* discrimination nor otherwise attach any legal significance to it. *E.g.*, Pet. App. 3a.

ing of Mr. Justice Powell's dissenting opinion in *Keyes* v. *School Dist. No. 1,* 413 U.S. 189, 226-227 (1973). Pet. App. 29a-31a.

The Dayton Board appealed, claiming that there was no continuing constitutional violation; and plaintiffs cross-appealed, contending that the district court had erred in failing to make additional violation findings relating to almost all aspects of the operation of the Dayton public schools and that the remedy ordered failed to overcome the pervasive effect of the proven violations, including the deliberate perpetuation of a basically dual system from the time of *Brown* through the time of trial. In its 20 August 1974 opinion in *Brinkman I,* 503 F.2d 684 (Pet. App. 32a), the court of appeals discussed at somewhat greater length than had the district court both the pre-*Brown* evidence of intentional discrimination (Pet. App. 39a-40a) amounting to a "basically dual system" (Pet. App. 56a) and the "serious questions" (Pet. App. 66a) as to whether the Board's conduct following *Brown* relating, for example, to staff assignment, new school construction and reorganization, should have been included within the "cumulative violation" of the Equal Protection Clause found by the district court. Pet. App. 56a-67a. But the court of appeals reserved ruling on these issues, rather than expressly supplement or reverse the constitutional violation findings of the district court as requested by plaintiffs in one prong of their cross-appeal. Pet. App. 56a, 67a; also Pet. App. 194a. Thus, the court of appeals only affirmed the three-part "cumulative violation" (Pet. App. 67a) but, nevertheless, reversed the trial judge's remedy and remanded for development of a plan of broader scope. Pet. App. 68a-69a.

Following additional remedial proceedings on remand in the district court (Pet. App. 70a, 73a), the court of ap-

peals in its 24 June 1975 opinion in *Brinkman II* directed promulgation and implementation of "a system-wide plan for the 1976-77 school year" without reaching the reserved issues. 518 F.2d 853, 857 (Pet. App. 96a). On remand, following the appointment of an expert (murdered in the midst of his desegregation planning in the Federal Building in Dayton), the appointment of a master, and evidentiary hearing (Pet. App. 99a-106a), the district court approved a system-wide plan pursuant to orders of 23 March and 14 May 1976. Pet. App. 110a, 117a. On appeal by the Dayton Board, the court of appeals affirmed, again without reaching the reserved questions. 539 F.2d 1084 (Pet. App. 118a). Following denials of stays by the court of appeals and Circuit Justice Stewart, the system-wide plan was implemented in September 1976 and has successfully operated to this day without disruption.

On certiorari, this Court reviewed the proceedings and opinions below. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) (hereafter *"Dayton I"*). Noting the ambiguity of the district court's opinion (433 U.S. at 412-14), the Court evaluated each aspect of the three-part "cumulative violation" holding and determined that, at most, any constitutional violation related solely to "high school districting," i.e., "optional attendance zones for . . . three Dayton high schools." 433 U.S. at 413. The Court admonished the court of appeals for failing to review—i.e., to affirm, to supplement or to reverse (in contrast to "to discuss")—the limited and ambiguous violation findings of the district court in view of the extensive record evidence of intentional segregation concerning all aspects of the historic and continuing operation of the Dayton public schools. 433 U.S. at 416-18. Left only with the limited findings of the district court, this Court held that the court of appeals erred in imposing a system-wide plan for viola-

tions of patently lesser scope, i.e., optional zones affecting only three high schools. 433 U.S. at 417-18. In view of the confusion at various stages in the courts below and the substantial claim that the extensive record revealed additional violations, the Court therefore remanded for thorough judicial review and detailed findings but left the system-wide plan in effect pending further proceedings. 433 U.S. at 418-21.

Pursuant to this Court's mandate, the court of appeals remanded the case to the district court for further proceedings. 561 F.2d 652. The district court conducted a brief evidentiary hearing, 1-4 November 1977, again limited to the intentionally discriminatory conduct of the Dayton Board. Nevertheless, the district court dismissed the plaintiffs' complaint by opinion and judgment issued 15 December 1977. Pet. App. 142a. The opinion is based solely upon finding no continuing violation of the Equal Protection Clause (Pet. App. 188a) and makes no determination concerning the plaintiffs' claims against the State defendants and claims arising under the Thirteenth Amendment and federal civil rights acts (42 U.S.C. §§1981, 1983-1988) against all defendants. *See* note 1, *supra*. The opinion begins by noting: "The course of this protracted litigation has been marked by conceptual differences not only as to the facts, but as to the legal significance of those facts." Pet. App. 143a. Still guided by Mr. Justice Powell's minority view (quoting the separate opinion in *Austin Independent School Dist.* v. *United States*, 429 U.S. 990, 995 and n.7 (1976); *see* Pet. App. 146a-47a), the district court applied a restrictive view (*e.g.*, Pet. App. 153a, 157a-60a, 162a-69a, 171a, 180a) of this Court's decision in *Dayton I* with respect to causation and effect. Pet. App. 146a-47a; also Pet. App. 149a, 154a, 159a, 171a. The district court then proceeded to resolve all disputed facts concerning in-

tent against the plaintiffs and further determined that the numerous admitted or uncontroverted intentionally segregative and discriminatory policies and practices of the Dayton Board were isolated, attenuated, or otherwise had no current "incremental segregative effect." *E.g.*, Pet. App. 149a, 154a, 159a, 171a.

Plaintiffs promptly appealed. On 5 January 1978, the district court denied plaintiffs' motion to stay the judgment dismissing the case pending appeal; on the same day the Dayton Board voted to reinstate pupil segregation beginning with the second semester. On 16 January 1978, the court of appeals (a) granted plaintiffs' motion to stay the termination of the plan pending appeal and (b) expedited the appeal.

The court of appeals, pursuant to the standards for appellate review articulated by this Court in *Dayton I*, 413 U.S. at 416-18, reviewed in its opinion (for the first time) the trial judge's findings concerning equal-protection violations against the bulk of the evidence of intentional segregation. The appellate court concluded that the district judge's findings were clearly erroneous and his conclusions were plainly wrong in all material respects. *E.g.*, Pet. App. 194a and n.10, 196a, 199a, 202a, 206a, 210a, 211a, 212a. The court below found that the record evidence "demonstrates conclusively" (Pet. App. 194a) the following:

> (1) The Dayton Board, through explicit policies and covert practices amounting a system-wide program of segregation, operated a basically dual system at the time of *Brown*. Pet. App. 194a-205a.
>
> (2) The Dayton Board refused at all times thereafter to take any action to dismantle this dual system. Pet. App. 205a-06a, 208a-09a, 216a.

(3) The Dayton Board opted instead to perpetuate and to build upon the continuing dual system through the time of trial by a variety of intentionally segregative policies and practices, including racially motivated faculty and staff assignment, optional zones, school construction, and reorganizations of grade structure. Pet. App. 206a, 209a-14a.

(4) The Dayton Board failed to show in what respect the pattern of one-race schools was not caused by the system-wide impact of this longstanding, systematic program of intentional segregation (Pet. App. 209a); instead, the direct evidence of the Dayton Board's intentionally segregative conduct following *Brown* showed that it had perpetuated and compounded the basically dual system through the time of trial through a variety of segregative practices of systemwide nature and impact. Pet. App. 216a-17a.

As a result, the court of appeals reversed the decision of the district court on constitutional grounds and continued the systemwide desegregation plan which has been in operation since September 1976. Pet. App. 217a.

Following denials of the Dayton Board's applications for a stay of judgment by the court of appeals, Circuit Justice Stewart and Associate Justice Rehnquist, this Court granted certiorari on 8 January 1979.

B. The Dayton School District: General Geography and Demography.

As reflected in the report (App. 34-35) of the Master previously appointed by the district court, the city of Dayton has a population of 245,000 and is located in the east-central part of Montgomery County in the southwestern part of the state of Ohio, approximately 50 miles

due north of Cincinnati. The Dayton school district is not coterminous with the city; some parts of the school district include portions of three surrounding townships and one village, while some portions of the city are included in the school district of three adjacent townships. The total population residing within the Dayton school district boundaries is 268,000; the school pupil population is 45,000, about 50% of whom are black. Prior to implementation of the desegregation plan now in effect, the vast majority of black and white pupils had separately attended schools either virtually all-white or all-black in their pupil racial composition. E.g., Pet. App. 48a-51a; App. 1-5-Ex. (PX 2A-2E), 212-16-Ex. (PX 100A-100E), 321-22-Ex. (DX CU).

The Dayton district is bisected on a north/south line by the Great Miami River. Historically, the black population has been concentrated in the south-central and southwest parts of the city, primarily on the west side of the Miami River and south of the east-west Wolf Creek, both of which have long been effectively crossed at convenient intervals, both literally and by school policies and practices. *See, e.g.*, maps in pocket part of appendix exhibit volume. The area of black containment was originally quite small and grew from 1913 through the time of trial reciprocally with school board policies and practices designed to separate black pupils and staff from white. *See* pp. 12-67, *infra*. The black population originally was contained in the southwest quadrant, but there is now also a substantial black population in the northwest quadrant across Wolf Creek. Extreme northwest Dayton and most of the city east of the Miami River are and have been heavily white in residential racial composition. *See, e.g.*, App. 306-09-Ex. (DX BY) (census tract maps). The district court made the following finding as to the causes of such residential segregation (Pet. App. 147a-48a) (record citations and footnote omitted):

> Since shortly after the 1913 flood, Dayton's black population has centered almost exclusively on the West Side of Dayton. . . . Since that time this population has moved steadily north and west. . . . Without question the prime factor in this concentration has been housing discrimination, both in the private and public sector. Until recently, realtors avoided showing black people houses which were located in predominantly white neighborhoods. . . . In the 1940's, public housing was strictly segregated according to race. . . . This segregated housing pattern has had a concomitant impact upon the composition of the Dayton public schools.

See also, e.g., App. 80-83, 220-22-Ex. (PX 1433), 223-33-Ex. (PX 143J), R.I. 189-210, PX 143E-M) (public housing and relation to school discrimination); App. 143-48, R.I. 656, 663-65, PX 153-153B (Sloane, PHA, VA, FHA, and relation to school discrimination); R.I. 881-84, 897-925, 952-53, App. 176-79 (Taeuber, residential and school segregation and discrimination); App. 518-22, R.I. 782-93, 2084-2106 (offers of proof), PX 144 and 144A and R.I. 758-61 (local customs of housing and school segregation).[5]

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[5] From such testimony, evidence and offers of proof, it is manifest that the trial court's quoted finding—that in Dayton both official racial discrimination and the dominant white community's custom and practice of racial exclusion (compared to other factors like choice, economics, birth rates or in-migration) have been primary causal elements in the marked historic and continuing residential segregation—is indisputable. (One of the issues still in much dispute in this case, however, is whether *school* discrimination contributed to the prevailing local custom and practice of almost complete residential segregation; whether *school* policies and practices were also motivated, at least in some significant part, by the racial discrimination prevailing in other aspects of the local community; and whether *school* discrimination and segregation operated reciprocally with such residential discrimination and segregation to create and perpetuate a *dual school system.* This is

(Footnote continued on next page)

Geographically and topographically there have been and are no major obstacles to complete desegregation of the Dayton school district. Pet. App. 121a. The Master determined that where pupil transportation is necessary, the maximum travel time would be about twenty minutes. App. 39. As found by the Board's experts, due to the compact nature of the system, "the relative closeness of the Dayton Schools makes long-haul transportation[,] an issue in many cities[,] moot here." App. 438.

C. The Pre-*Brown* Dual System.

In 1887 the state of Ohio repealed its school segregation law and attempted to legislate the abolition of separate schools for white and black children. 85 Ohio Laws 34. That statute was sustained the following year by the Supreme Court of Ohio. *Board of Education* v. *State,* 45 Ohio St. 555, 16 N.E. 373 (1888). Although the Ohio courts had occasion, some forty years later, specifically to remind Dayton school authorities of this legal prohibition of separate schools for black and white children, the laudable goals of the 1887 legislation were not attained in Dayton

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[5] (Continued)
one of the issues that is addressed in the remainder of this brief. It is sufficient for present purposes to note that the district court's limited findings do not answer the issue: for, even while crediting evidence such as that cited above, it totally failed to consider these same witnesses' experience with the two-way, causally interwoven, and reciprocal relationship between school discrimination and segregation and housing discrimination and segregation in the Dayton community. As we demonstrate in the Statement and Argument hereafter, the evidence conclusively demonstrates that segregative intent was a primary motivation in the Dayton Board's creation, perpetuation, and compounding of a dual school system, pursuant both to explicit segregation policies and covert segregation practices, that did in fact proximately cause or materially contribute to the systematic pattern of one-race schooling extant at the time of trial.)

until implementation of the desegregation plan now in effect at the start of the 1976-77 school year.

Many of the facts which follow in this section were admitted by all Dayton Board defendants in their responses to plaintiffs' pre-trial Requests for Admissions. *See* App. 53-78. These facts were also the subject of extensive and largely uncontroverted evidence at trial.

The facts of racial segregation in the Dayton public schools, as revealed by the record before the Court, begin in 1912. In that year Louise Troy, a black teacher, taught an all-black class just inside the rear door of the Garfield school; all other classes in this brick building were occupied by white pupils and white teachers. App. 137. About five years later, four black teachers and all of the black pupils at Garfield were assigned to a four-room frame house located in the back of the brick Garfield school building with its all-white classes; and soon a two-room portable was added to the black "annex," making six black classrooms and six black teachers located in the shadow of the white Garfield school. App. 137-38. A four-room "permanent" structure was later substituted for the two-room portable (about 1921 or 1922), and eight black teachers were thus assigned to the eight all-black classrooms in the Garfield annex. App. 139. *See also* App. 53, 64, 73 (admission no. 1).

When Mrs. Ella Lowrey, a black teacher for several decades in the Dayton system, performed her practice-teaching requirement with the black students in the "annex" at Garfield in 1917, the four all-black classrooms contained 50 students each. App. 138. When the permanent structure replaced the two-room portable in the early 1920's, Mrs. Lowrey taught a sixth-grade class of 62 black children, before which she had taught a fourth-grade class of 42

black children while her white counterpart in the main "white" building had a class of only 20 white children. R.I. 624-25; App. 139. In Mrs. Lowrey's words, "doing 40 years service in all in Dayton, . . . I never taught a white child in all that time. I was always in black schools, black children, with black teachers." App. 143. [At one time during this early history prior to 1931, one black teacher, Maude Walker, taught an ungraded class of black boys at the Weaver school. All other black teachers in the system were assigned to the black annex at Garfield. App. 93.]

About 1925 school authorities learned that two black children, Robert Reese and his sister, had been attending the Central school under a false address, even though they lived near the Garfield school. They had accomplished this subterfuge by walking across a bridge over the Miami River. The Reese children were ordered by school authorities to return to the Garfield school, but their father refused to send them to the black Garfield annex. Instead, he filed a lawsuit in state court seeking a writ of mandamus to compel Dayton school authorities to admit children of the Negro race to public schools on equal terms with white children. R.I. 526-29; App. 115-16. In a decision entered of record on 24 December 1925, the Court of Appeals of Ohio denied a demurrer to the mandamus petition. This decision was affirmed by the Ohio Supreme Court and Dayton school authorities were specifically reminded that state law prohibited distinctions in public schooling on the basis of race. *Board of Education of School District of City of Dayton* v. *State ex rel. Reese*, 114 Ohio St. 188, 151 N.E. 39 (1926). *See* App. 53, 64-65, 73 (admission no. 2).

During the pendency of the Reese case, the eight black teachers assigned to the Garfield annex were employed on a day-to-day basis because school authorities did not know

whether the black teachers were going to be in the Dayton system after the lawsuit. Black teachers would not be needed if the courts required the elimination of all-black classes, since the Board deemed black teachers unfit to teach white children under any circumstances. App. 139-40; *see also* App. 186.

Following the state court decision, Robert Reese and a few of his black classmates were allowed to attend school in the brick Garfield building, but the black annex and the white brick building were otherwise maintained. Black children were allowed to attend classes in the brick building only if they asserted themselves and specifically so requested; otherwise, they "were assigned to the black teachers in the black annex and the black classes." App. 140-41.

During this time, there apparently were some other black children also in "mixed" schools. For example, Mrs. Phyllis Greer, who had direct contact with the Dayton public schools over a fifty-year span as student, teacher, principal and central administrator in charge of "equal educational opportunity" review (App. 85-86), attended "mixed" classes at Roosevelt high school for three years prior to 1933. App. 89-90. But even when they were allowed to attend so-called "mixed" schools, these black children were subjected to humiliating discriminatory experiences within school. At Roosevelt, for example, black children were not allowed to go into the swimming pool and blacks had separate showers while Mrs. Greer was there (App. 89); while Robert Reese was at Roosevelt (after leaving Garfield), there were racially separate locker rooms, and blacks were allowed to use the swimming pool but not on the same day as whites. App. 116. At Steele High School, black children were not allowed to use the pool at all during this period. App. 423-24. Even in the "mixed" classrooms

black children could not escape the official determination that they were inferior beings because of the color of their skin. Mrs. Greer vividly remembers, for example, "when I went to an eighth grade social studies class I was told by a teacher, whose name I still remember, . . . that even though I was a good student I was not to sit in front of the class because most of the colored kids sat in the back." App. 90. And she remembers with equal clarity that, while in the second grade at Weaver, she "tried out for a Christmas play and my teacher wanted me to take the part of an angel and the teacher who was in charge of the play indicated that I could not be an angel . . . because there were no colored angels." App. 88-89.

Also, throughout this period, and until 1954, black children from a mixed orphanage, Shawen Acres, were assigned across town to the black classes in the black Garfield school (and also to the blacks-only Dunbar secondary school, discussed *infra*), while the white orphan children were assigned to nearby white classes and white schools. App. 87-88, 523-24, 525. This practice was terminated following the *Brown* decision in 1954 at a time when the black community in Dayton was putting pressure on the school administration to stop mistreating black children. App. 184-Ex. (PX 28); App. 55, 67, 74 (admission no. 7 (d)).

The black pupil population continued to grow at Garfield, and another black teacher was hired and assigned with an all-black class placed at the rear door of the brick building. App. 141. In 1932 or 1933, Mrs. Lowrey (*see* p. 13, *supra*), was also placed in the brick building, again with an all-black class "in a little cubby-hole upstairs," making ten black teachers with ten black classes at Garfield. App. 142. Finally, around 1935-36, after many of the white children had transferred out of Garfield, school

authorities transferred all the remaining white teachers and pupils in the brick building to other schools and assigned an all-black faculty, principal and student body to Garfield. App. 94, 142-43, 234-Ex. (PX 150 I); PX 155 (faculty directories); *see also* App. 54, 65, 73 (admission no. 2).

As the black pupil population was growing rather rapidly during the 1930's, not even the conversion of Garfield into a blacks-only school was sufficient to accommodate the growth. So, with the state court decision in *Reese* then some nine years old, the Dayton Board also converted the Willard school into a black school. The conversion process was as degrading and stigmatizing as had been the creation and maintenance of the Garfield annex and the ultimate conversion of the brick Garfield into a black school. In the 1934-35 school year, six black teachers (who were only allowed to teach black pupils) and ten white teachers had been assigned to the Willard school. In September of 1935, the Board transferred all white teachers and pupils to other schools, and Willard became another school for black teachers and black pupils only. App. 93, 234-Ex. (PX 150 I); PX 155 (faculty directories); App. 54-55, 66, 74 (admission no. 6).

At about this same time, in 1933, the new Dunbar school, with grades 7-9, opened with an all-black staff and an all-black student body. App. 234-Ex. (PX 150 I). Mr. Lloyd Lewis, who was present at its inauguration, testified that the Dunbar school "was purposely put there to be all black the same as the one in Indianapolis [the Crispus Attucks school, *see United States* v. *Board of School Comm'rs*, 332 F. Supp. 655, 665 (S.D. Ind. 1971)] that I had left." R.I. 1378; App. 530-33, 550-52. The Board resolution opening Dunbar stated that grades 7 and 8 were to be discontinued at Willard and Garfield (these two black elementary schools

served grades 7 and 8, whereas the system prior to 1940 was otherwise generally organized on a K-6, 7-9, 10-12 grade-structure basis, App. 387), and that "attendance at the Dunbar School be optional for all junior high students for all 7th, 8th, and 9th grade levels in the City." App. 191, 259-Ex. (PX 161A). Of course, this meant only all *black* junior high students, since Dunbar had an all-black staff who were not permitted by Board policy to teach white children. App. 93, 191, 297; PX 155 (faculty directories).

Within a very short time, grades 10, 11 and 12 were added to the blacks-only Dunbar school. Then in 1942, just two years after the Dayton school authorities had reorganized all schools to a K-8, 9-12 grade structure, the Board again assigned the seventh and eighth grades from the all-black Willard and Garfield schools to the all-black Dunbar school. App. 191, 260-Ex. (PX 161B). Black children from both the far northwest and northeast sections of the school district traveled across town past many all-white schools to the Dunbar school. App. 97-98, 211, 214, 296-97. Many white children throughout the west side of Dayton were assigned to Roosevelt high school past or away from the closer but all-black Dunbar high school. Although some black children were allowed to attend Roosevelt, those who became "behavior problems" were transferred to Dunbar. App. 91. And other black children from various elementary schools were either assigned, channeled, or encouraged to attend the black Dunbar high school. App. 124-25, 214, 250-51.[6] The most effective means

[6] Prior to 1940, no high schools had attendance boundaries. App. 393-94. The black Dunbar school was located in close proximity to the Roosevelt high school which, although it always had space, apparently had too many black children. Along with Steele and Stivers, these high schools were located roughly in the center of the city and served high school students throughout the city. (In

of forcing black children to attend the blacks-only Dunbar, of course, was the psychological one of branding them unsuited for association with white children. *See* pp. 15-16, *supra*. As Mr. Reese testified, he "chose" Dunbar over Roosevelt after suffering the humiliation of being assigned to separate locker rooms, separate showers, and separate swimming pools at Roosevelt: "I wanted to be free. I felt more at home at Dunbar than I did at Roosevelt. . . . You couldn't segregate me at Dunbar." App. 116-17. Similarly, Mrs. Greer testified: "I went to Dunbar because I felt that if there was going to be—if we were going to be separated by anything, we might as well be separated by an entire building as to be separated by practices." App. 90. (Dunbar was also excluded from competition in the city athletic league until the late 1940's, thereby requiring Dunbar teams to travel long distances to compete with other black schools, even those located outside the state. App. 90, 123, 133-34; R.I. 570.) *See also* App. 55, 67, 74 (admission no. 7).

Even these segregative devices were not sufficient to contain the growing black population. So between 1943 and 1945, the Board, by way of the same gross method utilized to convert the Willard school into a black school, transformed the Wogaman school into a school officially designated unfit for whites. White pupils residing in the Wogaman attendance zone were transferred by bus to other schools, to which all-white staffs were assigned. By September 1945 the Board assigned a black principal and an all-black faculty with an all-black student population to

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addition, the Parker school had been a city-wide single-grade school which served ninth graders. App. 408-09.) In 1940 attendance boundaries were drawn for the high schools with the exception of Dunbar and a technical school (whose name varied), both of which long thereafter remained as city-wide schools. *See* p. 45, *infra*.

the Wogaman school. App. 90-91, 123-24, 234-Ex. (PX 150 I); PX 155 (faculty directories); App. 54, 66, 74 (admission no. 4).

Still other official devices were used to keep blacks segregated in the public schools. One such device, resorted to regularly during the 1940's and early 1950's, was to cooperate with and supplement the discriminatory activities of Dayton public housing authorities. Throughout this period, racially-designated public housing projects were constructed and expanded in Dayton, subject to Board approval.[7] App. 80-83, 220-222-Ex. (PX 143 B). In 1942, the Board transferred the black students residing in the black De-Soto Bass public housing project to the Wogaman

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[7] App. 143-45. The district court had earlier refused to admit *any* proof related to public housing and the school authorities interaction therewith, including even the leasing of space and assignment of one-race classes and staffs to rooms in the racially designated projects, "until [plaintiffs] can establish that the School Board participated in some fashion with the original determination that this would be a white or black project [. W]hatever else the Board might have done, they have taken the area as they found it." App. 79. Although plaintiffs then produced evidence to meet the trial judge's major premise (and other evidence to show how the Board also intentionally advantaged itself of the explicitly dual public housing administration), the district court's only findings concerning the hotly-disputed segregative interrelationships between the school and public housing authorities are contained in these words (Pet. App. 147a-48a):

> In the 1940's public housing was strictly segregated according to race. (T.R.1 182-186). This segregated housing pattern [public and private] has had a concomitant impact upon the composition of the Dayton public schools (T.R.2-380, 382-Robert Rice).

The trial court made no findings concerning the Board's conduct in relation to public housing. In contrast, the court of appeals found from the uncontroverted evidence that the school authorities "operated one race classrooms in officially one race housing projects which the district court found were 'strictly segregated according to race,'" Pet. App. 201a and n.35.

school (App. 260-Ex. (PX 161 B)), and a later overflow to the all-black Willard school, rather than other schools that were equally close (App. 92), while transferring white students from the white Parkside public housing project to the McGuffey and Webster schools and the eighth grades from those schools to the virtually all-white Kiser school. App. 260-Ex. (PX 161B). Finally, in the late 1940's and early 1950's, the Board leased space in white and black public housing projects for classroom purposes, and assigned students and teachers on a uniracial basis to the leased space so as to mirror the racial composition of the public housing projects. App. 82-83, 223-33-Ex. (PX 143 J).

By the 1951-52 school year (the last year prior to 1963-64 for which enrollment data by race are available), there were 35,000 pupils enrolled in the Dayton district, 19% of whom were black. There were four all-black schools, officially designated as such, on the west side of Dayton: Willard, Wogaman, Garfield and Dunbar. These schools had all-black faculties and (with one exception, an assignment made that school year) *no* black teachers taught in any other schools. App. 10-Ex. (PX 3). In addition, there were 22 white schools with all-white faculties and all-white student bodies. And there was an additional set of 23 so-called "mixed" schools, 7 of which had less than 10 black pupils and only 11 of which had black pupil populations greater than 10% (ranging from 16% to 68%). App. 216-Ex. (PX 100E). The schools with any racial mix, however, were also marked by patterns of racially segregative and discriminatory practices within the schools, and, with the one exception noted above, none had any black teachers. Eighty-three percent of all white pupils attended schools that were 90% or more white in their pupil racial composition. Of the 6,628 black pupils in the system, 3,602 (or 54%) attended the four all-black schools with all-black

staffs; and another 1,227 (or 19%) of the system's black pupils were assigned to the adjacent schools which were about to be converted into "black" schools (*see* pp. 25-27, *infra*). Thus, 73% of all black students attended schools already or soon to be designated "black." App. 2-Ex. (PX 2B), 216-Ex. (PX 100E).[8]

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[8] *The District Court's Opinion* (Pet. App. 147a-49a, 151a-52a, 153a, 158a-59a, 169a-71a). Virtually all of the subsidiary facts set forth to this point in this section are not in dispute. Many of them are the subject of findings by the district court (although they are peppered throughout its opinion as though they were each unrelated to the other) and while others (*e.g.*, the *Reese* litigation, the conversion of Garfield, Willard and Wogaman into blacks-only schools, and the specifics of the Board's entanglement with public housing discrimination) were ignored by the district court, the court's opinion does not conflict with these undisputed facts. Thus, the district court finds that "public housing was strictly segregated according to race" (Pet. App. 147a-48a) (*cf.* note 7, *supra*); that the Board segregated many black children and discriminated against the few others who attended predominantly white schools in accordance with "an inexcusable history of mistreatment of black students" (Pet. App. 149a); that "until 1951 the Board's policy of hiring and assigning faculty was purposefully segregative" (Pet. App. 153); that the discriminatory transfer of black children from Shawen Acres Orphanage to the blacks-only Garfield school was "arguably. . . a purposeful segregative act" (Pet. App. 159a); and that "the first Dunbar High School was intended to be and was in fact a black high school." Pet. App. 170a. The district court, however, refused to determine whether these "incidents of purposeful segregation" amounted to a systemwide policy of intentional segregation or otherwise rendered the system dual at any time.

The Court of Appeals' Opinion (Pet. App. 195a-96a, 197a, 198a-201a, 203a). The court of appeals made extensive specific findings substantially in accord with the subsidiary facts heretofore described in text. In only two instances did the court of appeals find it necessary to question a subsidiary district court finding. First, with respect to the trial court's statement that the policy of assigning the black Shawen Acres Orphanage children to the blacks-only schools rather than to nearby white schools was "arguably. . . a purposeful segregative ," (Pet. App. 159a), the court of appeals concluded that "[t]o the extent that this finding implies that this practice was *not* purposefully segregative, it is clearly erroneous." Pet. App. 199a (emphasis in original.)

In 1951 and 1952 the Dayton Board confronted its last pre-*Brown* opportunities to correct the officially-imposed school segregation then extant. Instead, the Board acted in a manner that literally cemented in the dual system and promised racially discriminatory public schooling for generations to come. What the Board did involved a series of interlocking segregative maneuvers, which substantially expanded the separation of black from white children and staff, primarily through implementation of a new and overt faculty segregation policy, the use of "optional attendance zones," and the construction of an additional all-black school.

Prior to this time, as previously noted, the Board would not allow black teachers to teach white children under any circumstances (App. 186); black teachers were assigned only to all-black schools, and white teachers were assigned only to white and "mixed" schools. In the 1951-52 school year, in purported response to black community pressure, the Board announced a "new," but equally demeaning, faculty segregation policy (App. 182-Ex. (PX 21)):

Second, the court of appeals credited the Board's admissions and the uncontradicted documentary and testimonial evidence showing that the Board "pursued an overt policy of faculty segregation. . . . Defendants admitted that prior to 1951 the board forbade the assignment of black teachers to white or mixed classrooms 'pursuant to an explicit segregation policy.'" Pet. App. 195a and n.11. In contrast, the trial court made the clearly erroneous finding that "[t]here is no direct evidence that black teachers were forbidden to teach white children at any school." Pet. App. 151a. Although the Sixth Circuit also supplemented the findings concerning many significant facts (virtually all of them uncontradicted) which had been ignored by the trial court, these two are the only instances relating to the 1912-1952 period in which the appellate court arrived at a subsidiary factual conclusion which was in conflict with a district court finding. The court of appeals, however, also inquired whether this pattern of intentionally segregative conduct amounted to an official Board policy of segregation and rendered the Dayton system dual. *See* notes 9, 11 and 13, *infra,* and 4, 5 and 7, *supra.*

> The school administration will make every effort to introduce some white teachers in schools in negro [*sic*] areas that are now staffed by negroes [*sic*], but it will not attempt to force white teachers, against their will, into these positions.
>
> The administration will continue to introduce negro [*sic*] teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro [*sic*] teachers.

This faculty policy, incredibly, was contained in a statement of the Superintendent disavowing the existence of segregated schools in the Dayton district.

In 1954 the Superintendent made a further "integration statement," which included the following (App. 184-Ex. (PX 28)):

> About two years ago we announced a policy of attempting to introduce white teachers in our schools having negro [*sic*] population. We have not been too successful in this regard and at the present time have only 8 full or part-time teachers in these situations. There is a reluctance on the part of white teachers to accept assignments in westside schools and up to the present time we have not attempted to use any pressure to force teachers to accept such assignments. The problem of introducing white teachers in negro [*sic*] schools is more difficult than the problem of introducing negro [*sic*] teachers into white situations. There are several all-white schools which in the near future will be ready to receive a negro [*sic*] teacher.

As will be seen (*see* pp. 32-37, *infra*), this express faculty segregation policy continued for almost two more decades

as a primary device for identifying schools as intended for blacks or whites.[9]

In the school year following the announcement of the "new" faculty segregation policy, the Board remained under pressure, as its records reflect, from "[t]he resistance of some parents to sending their children to school in their district because it is an all negro [*sic*] school." App. 209-Ex. (PX 75). In response, the Board constructed a new all-black school (Miami Chapel) located near the all-black Wogaman school and adjacent to the black DeSoto Bass public housing project; Miami Chapel opened in 1953 with

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[9] *The District Court's Opinion* (Pet. App. 151a-53a). The district court correctly concluded that "until 1951 the Board's policy of hiring and assigning faculty was purposefully segregative." Pet. App. 153a. But the court attempts to ameliorate the harsh racism of the 1951-52 policy change by characterizing it as a "policy of dynamic gradualism" (*id.*) which "was substantially implemented during the 1950's and 1960's." *Id.* at 152a. The policy itself, quoted above, speaks louder and clearer than the district court's ameliorative efforts, which are clearly erroneous. The court also erred in not recognizing the Board's faculty policies as the hallmark of the Dayton-style dual system. (The court's continuing errors, with respect to post-*Brown* faculty-assignment practices, are treated at pp. 36-37, *infra.*)

The Court of Appeals' Opinion (Pet. App. 195a-96a, 197a, 202a-03a). The Sixth Circuit characterized the Board's faculty-assignment policy as "an overt policy of faculty segregation" (Pet. App. 195a), "an explicit segregation policy" (*id.*), "purposeful segregation of faculty by race" (*id.* at 197a), and "deliberate policy of faculty segregation." *Id.* at 202a-03a. And "contrary to the finding of the district court, . . . the Board 'effectively continued in practice the racial assignment of faculty through the 1970-71 school year.' To the extent that the finding of the district court is contrary to the conclusion of this court, it is clearly erroneous." *Id.* at 196a. Moreover, the court of appeals recognized and held that the discriminatory faculty-assignment policy "was inextricably tied to racially motivated student assignment practices" (*id.* at 197a; *see also id.* at 211a), and that the district court erred in failing to attribute any legal significance to the faculty policy "which, at the time of *Brown I,* made it possible to identify a 'black school' in the Dayton system without reference to the racial composition of pupils." *Id.* at 203a.

an all-black student body and an 85% black faculty. App. 11-Ex. (PX 4). The Board altered attendance boundaries so that some of the children in the four blacks-only schools were reassigned to the four surrounding schools with the next highest black pupil populations; and, through either attendance boundary alterations or the creation of optional zones, it reassigned white students from these mixed schools to the next ring of whiter schools. R.I. 1456; App. 274-75, 283-92, 345-46; PX 123.

Thus, the boundaries of the black Garfield and Wogaman schools were retracted, thereby assigning substantial numbers of black children to the immediately adjacent ring of "mixed" schools with the highest percentage of black pupils: Jackson (already 36% black in the 1951-52 school year), Weaver (68% black), Edison (43% black) and Irving (47% black). App. 216-Ex. (PX 100E). As Jackson and Edison were re-zoned to include more black students, their outer boundaries were simultaneously contracted through the creation of "optional zones" (Jackson/Westwood and Edison/Jefferson) so that white residential areas were effectively detached from Jackson and Edison and, for all practical purposes, attached to the next adjacent ring of "whiter" schools. Thus, the Board brought blacks in one end and allowed whites to escape out the other in these "transition" schools. The Board also created optional zones (Willard/Irving, Willard/Whittier and Wogaman/Highview, as well as an option between the new Miami Chapel and Whittier) in white residential areas contained within the boundaries of the original schools for blacks only, so that whites could continue to transfer out of these all-black schools. R.I. 1456; App. 274-75, 283-92. (Prior to 1952 whites had been freely allowed to transfer to "whiter" schools, but such transfers were abolished in 1952. App. 288, 183-Ex. (PX 28).) Optional zones were thus substituted for the prior segregative

free-transfer practice[10] to continue the Board's policy of protecting whites from associating on an equal basis with black students and staff.

During this period the Board also created another optional attendance zone affecting Jackson; this zone was instituted in an area of the Jackson zone containing the Veteran's Administration Hospital, and allowed whites to attend Residence Park, which at that time was all-white. App. 271-73, 216-Ex. (PX 100E). (This option is discussed further at p. 47, *infra.*) Additionally, the Board during this period created an optional zone between Roosevelt (31.5% black) and Colonel White (100% white). App. 275-76, 216-Ex. (PX 100E). The immediate and long-range racial significance of this option are discussed in greater detail at pp. 45-46, *infra.*

Finally, the Board began to transfer black teachers to the formerly "mixed" schools in transition (but *none* to the all-white schools) thereby confirming their identification as schools for blacks rather than whites in the traditional fashion. App. 286, 6-10-Ex. (PX 3).[11]

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[10] The Superintendent's 1954 statement (*see* p. 24, *supra*) included the following: "All elementary schools have definite boundaries and children are obliged to attend the school which serves the area in which they reside. The policy of transfers from one school to another was abolished two years ago when the boundaries of several westside elementary schools were shrunken, permitting a larger number of Negro children to attend mixed schools." App. 183-Ex. (PX 28). Thus, the purpose of free transfers was accomplished by a new device, optional zones, which served the same end of allowing whites to avoid attendance at black or substantially black schools.

[11] *The District Court's Opinion* (Pet. App. 155a-57a). Incredibly, the district court concluded that the West Side reorganization "was an experiment in integration" and, inconsistently, that "[i]ts purpose was to enable black students to go to an integrated rather than an all-black school if they chose to do so." Pet. App. 155a. These conclusions are clearly erroneous, arrived at only through

[11] (Continued)

the most selective and argumentative reading of the record imaginable. For example, the district court cites the testimony from the latest hearing of former Superintendent Wayne Carle in support of the proposition that the West Side reorganization was an "experiment in integration." While Dr. Carle's testimony is not absolutely free of ambiguity (because of his understanding that another superintendent in 1952 and 1954 characterized it as an "experiment in integration" in response to the black community's continuing protest of school segregation (App. 468-70)), taken as a whole it is impossible to characterize his views as being that the events of 1952 were integration-oriented. But the district court selectively relies on five pages of the transcript (App. 468-70) and ignores altogether the very next two pages (App. 471) in which Dr. Carle placed his view in context by emphasizing that "you can't operate part of the system on a segregated basis without signalling that the rest of the system is on a segregated basis" (App. 471); "The action that was taken there was that nothing was done to eliminate the segregation that already existed in the three schools whose boundaries were changed" (*id.*); and that if the Board had *truly* adopted a policy of *real* desegregation and "that were communicated to the community, I suspect it might have a much different effect than minor boundary changes involving schools that remain all black" (App. 472).

These points are unassailable, but by ignoring them the district court had just begun to err. These basic errors were compounded three-fold: First, the court ignored further testimony from Dr. Carle pointing out that a central part of the West-Side reorganization was its use of supportive segregative devices such as assigning black teachers to the schools adjacent to the four blacks-only schools (App. 492), accompanied by the creation of optional attendance zones (App. 492, 494).

Second, the court concluded that "[t]he events of 25 years ago, I suspect, would not affect any student in school at the moment and might not even have affected his parents" (App. 493) (statement of the court). The court's view seems to be that the only harm in segregation occurs at the time of initial imposition, and that subsequent generations have nothing to complain about—a view that is foreclosed by *Brown*.

Third, the court refused to allow Dr. Carle to answer the question, "In light of those two factors [assignment of black teachers and creation of optional zones], Dr. Carle, do you have a view as to the intention of the Board insofar as whether or not there was an intention to establish these [schools adjacent to the blacks-only schools] as the next black schools in Dayton" (App. 494). The court refused to allow the testimony (App. 494-95). Thus, the court relies on the testimony of a witness to support a

[11] (Continued)

conclusion drawn by the court but with respect to which the court would not allow the witness to testify.

The court made other comparable errors in drawing its conclusions about the West-Side reorganization scheme. The court cited the testimony of plaintiffs' expert, Dr. Gordon Foster, for the proposition that the West-Side reorganization was intended as an "experiment in integration . . . to enable black students to go to an integrated rather than an all-black school if they chose to do so." Pet. App. 155a, citing App. 292. This is not an accurate representation of Dr. Foster's testimony, but rather a highly selective reading which distorts both the sum and the substance of the record. For the twenty-five previous pages of transcript, Dr. Foster had detailed, as summarized above (*see* pp. 25-27, *supra*), the large numbers and variety of segregative devices utilized by the Dayton Board in the West-Side reorganization. At App. 292 Dr. Foster concluded this testimony as follows:

> the effect was clearly one of locking in and freezing this configuration including these schools into an all-black school situation.

There can be no mistake as to the objective meaning of this twenty-five pages of testimony, and of Dr. Foster's conclusion, or the objective fact that the Board's actions in this reorganization were intentionally segregative, whatever the Board's *stated* intent. Thereafter, at App. 292-94, the court engaged Dr. Foster in a colloquy ranging from "tipping points" to the "alternatives" to the West-Side reorganization available to the Board. At several points in this colloquy, it is clear that Judge Rubin is not satisfied, for example, when Dr. Foster debunks "tipping points" (App. 293-94), or suggests limited actions which the Board might have taken to show that its actual purpose was at least racial nondiscrimination, rather than segregation, in a difficult situation of a school district with a prior history of segergation and a community undergoing racial change. App. 293. But what apparently peeved the district judge the most was Dr. Foster's evaluation of the ineffectiveness of even such limited alternatives (which the Board, of course, eschewed in its segregative reorganization) in the context of a dual school system (App. 292 and 293):

> The problem, as I see it in this type of situation, is essentially one of diddling around piecemeal with desegregation instead of attacking the problem wholesale and making clear that you are desegregating the entire system.
>
> * * *
>
> I think the only secure solution and the only safe solution is to dissestablish a dual structure in the entire system so that

At the time of this Court's May 17, 1954 decision in *Brown* v. *Board of Education*, therefore, Dayton school officials were operating a racially dual system of public education.[12] This segregation had not been imposed by

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[11] (Continued)

> whites [who may wish to] flee . . . meet the same situation wherever they go.

Viewing Dr. Foster's testimony as a whole, therefore, the district court engaged in much more than just a clearly erroneous selective reading of the record in suggesting that this expert believed the Board's purpose was integrative rather than segregative; it is also a gross misrepresentation, both of Dr. Foster's opinion and the uncontroverted, objective evidence.

The Court of Appeals Opinion. The court of appeals found it unnecessary to specifically address the details of the West Side reorganization. Rather, the Sixth Circuit subsumed most of its disagreement with the district court's purported findings on this score within its conclusion that at the time of *Brown I* "defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the Fourteenth Amendment. Our holding is based upon substantial evidence, much of which is undisputed. The finding of the district court to the contrary is clearly erroneous. . . ." Pet. App. 194a (footnote omitted). The appellate court did, however, specifically address the district court's findings that the use of optional zones—which had their race-oriented origins in the West Side reorganization (theretofore racial separation in "mixed" residential areas had been accomplished through a "free transfer" policy)—had neither racial purpose nor racial effect, and held that these findings were clearly erroneous (Pet. App. 209a-10a); the court of appeals also reversed as clearly erroneous the district court's failure to accord real significance to the Board's overtly unnamed but intentionally segregative school construction policy (*e.g.*, Miami Chapel) which, with the coordinate and explicitly race-based faculty-assignment policy, demonstrably earmarked the West Side schools for the education of black children and the remainder of the system for whites. Pet. App. 195a-96a, 197a, 202a-03a, 211a.

[12] At the remand hearing following *Dayton I*, plaintiffs offered the testimony of a local historian on the facts of school discrimination prior to *Brown* in an attempt to persuade the trial court of these undeniable facts. Instead, Judge Rubin *prohibited* the witness from testifying about the creation of a dual school system prior to 1954. App. 518-19. In its subsequent opinion, the district

[12] (Continued)

court then not only failed to find such a dual system but also misused the obviously startled witness' very limited testimony following the court's surprising ruling. *Compare* Pet. App. 148a and 170a-71a *with* App. 518-22. Petitioners also seek to make more out of this testimony than objective analysis will support. *See* Pet. Br. 30.

We note also that whenever petitioners have the need either to assail the credibility of one of plaintiffs' witnesses, especially those who also happen to be present or former *managing agents of the Board, see, e.g.*, Pet. Br. 35 (referring to two such witnesses as "impassioned advocates for the plaintiffs") and 28 (characterizing the Superintendent of Schools at the time of trial as *plaintiffs'* "chief witness"), or to suggest that this case turns on credibility choices which are shielded from appellate review (*e.g.*, "[m]uch of the testimony was raw opinion testimony of witnesses who had obvious ideological motivations to secure a specific result" (Pet. Br. 39)), they play fast and loose with both the nature of the testimony and the bases of the district court's findings. The district court made no finding, and petitioners can cite to none, which turns on such credibility choices. We note, moreover, that the logic of petitioners' approach would yield the conclusion that all of the witnesses called by the Board were ideological segregationists. Such a rule would be of considerable value to respondents, to the extent we are required to prove subjective racial malevolence.

Petitioners are thus mistaken in their assertion (Pet. Br. 38-39) that the court of appeals has abused the "clearly erroneous" standard of appellate review set out in FED. R. CIV. P. 52(a). *Cf., e.g., Zenith Radio Corp.* v. *Hazeltime Research, Inc.*, 395 U.S. 100, 122 n.18 (1969); *United States* v. *Yellow Cab Co.*, 338 U.S. 338 (1949). Much of the testimony here, especially about pre-*Brown* events but also about the post-*Brown* era, consisted of unchallenged eyewitness accounts, and most of the remaining decisive facts appear in documentary form. *Cf., e.g., United States* v. *General Motors Corp.*, 384 U.S. 127, 142 n.16 (1966); *United States* v. *E. I. DuPont DeNemours & Co.*, 353 U.S. 586, 598 n.28 (1957). The factual questions presented by this case are a mixture of law and fact, or they are questions of ultimate fact of "public law" and constitutional magnitude. *Cf., e.g., Berenyi* v. *Immigration Service*, 385 U.S. 630, 636 (1967); *United States* v. *John J. Felin & Co.*, 334 U.S. 624, 639-40 (1948) (Frankfurter, J.); *Baumgartner* v. *United States*, 322 U.S. 665, 671 (Frankfurter, J.). In the final analysis, we are confident that a review of the *whole* case will cause this Court, as it did the court of appeals, "on the entire evidence [to be] left with the definite and firm conviction that a mistake has been committed [by the district court]." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

state law: indeed, it was operated in open defiance of state law.[13]

D. Continuation of the Dual System After *Brown*.

1. *Faculty and Staff Assignments.*

The Board continued to make faculty and staff assignments in accordance with the racially discriminatory policy announced in 1951 (*see* pp. 23-25, *supra*) at least through the 1970-71 school year. App. 449-50, 453-54, 490-92, 536, 559-68. For example, in the 1968-69 school year, the Board assigned 633 (85%) of the black teachers in the Dayton system to schools 90% or more black in their pupil racial compositions, but only 172 (9%) of the white teachers to such schools. The Board assigned only 72 (9%) of the black teachers to schools which were 90% or more white, but 1,299 (70%) of the white teachers were assigned to such schools. App. 14-Ex. (PX 5D).

Prior to the 1968-69 school year, the Board maintained teacher applications on a racially separate basis. Once

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[13] *The District Court's Opinion.* The district court did not specifically speak to this concluding point, but apparently would have reached the clearly erroneous conclusion that the Board was not operating a basically dual system at the time of *Brown*. (In an earlier order of 10 March 1975, entered upon the remand from the court of appeals in *Brinkman I*, 503 F.2d 684 (Pet. App. 32a), the district court ambiguously opined: "We do not deal with a mandated dual school system; we do not deal with actions taken on a school-by-school basis. We do deal with a system that has in the past permitted segregative practices to exist." Pet. App. 77a (footnote omitted). *See also* Pet. App. 75a ("At no time, however, did defendant maintain a dual system of education.")

The Court of Appeals' Opinion (Pet. App. 194a-205a). The court of appeals specifically held that "at the time of *Brown I*, defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment" (Pet. App. 194a); "defendants' segregative practices at the time of *Brown I* infected the entire Dayton public school system." *Id.* at 205a. "The finding of the district court to the contrary is clearly erroneous." *Id.* at 194a.

teachers were hired, their records were kept on various racial bases which were used to segregate teachers and schools. Substitute teacher files were color-coded by race and substitutes assigned on a racially dual basis. And the Board restricted the hiring, transfer, and promotion of black teachers primarily to black or "changing" schools, while white assignments or transfers to these schools were discouraged. App. 94-97, 102-06, 109-11, 117-21, 158-60, 161-63, 164-67, 6-10-Ex. (PX 3). Principals, assistant principals, counselors, coaches and other clerical and classified personnel were assigned on an even more strictly segregated basis. App. 246, 193-Ex. (PX 42); R.I. 814-17, 831-33.

Thus, from at least 1912 through 1968 the assignment of personnel in the Dayton school system fit perfectly the classical mold of state-imposed segregation. Such assignments mirrored the racial composition of student bodies: the Board assigned faculty members to new schools and additions so as to reflect the pupil racial composition at opening, thereby identifying them as "black" or "white" in accordance with the Board's policy (App. 301-02, 381, 11-12-Ex. 17 (PX 4)); and the Board enforced the racial identity of those schools already all-black or all-white by assigning virtually one-race staffs. In the 1963-64 school year, for example, the Board assigned 40 of 43 new full-time black teachers to schools more than 80% black in their racial compositions. App. 13-Ex. (PX 5A). This practice was equally effective in identifying the formerly mixed schools as "changing" or black by assigning more than token black faculty only to these schools and thereafter assigning increasing numbers of black teachers only to these schools. App. 109-14, 178-79, 6-10-Ex. (PX 3). As articulated by Mrs. Greer, a long-time student, teacher and administrator in the system (*see* p. 15, *supra*), the "assignment of staff to go along with the neighborhood change was the

kind of thing that gave the impression of the schools being designed to be black, because black staff increased as black student bodies increased." App. 98. As Board member Leo Lucas put it, race-oriented faculty-assignment practices "manifest the intent of the Board" and have a "spill-over" effect on all aspects of school operation. App. 536.

White teachers similarly were assigned in disproportionate numbers to the predominantly white schools. Thus, for example, in the 1968-69 school year, the Board continued to assign new teachers and make transfers according to the following segregation practice (App. 13-Ex. (PX 5A)):

	Schools with predominantly white student enrollment	*Schools with predominantly black student enrollment*
Black Teachers	40	95
White Teachers	223	64

As the former Superintendent testified, "it is obvious in terms of the new hires and transfers for that year the predominating pattern was the assignment of black teachers to black schools and white teachers to white schools." App. 245.

It was therefore possible at any time during this period to identify a "black" school or a "white" school (and a school in "transition") anywhere in the Dayton system without reference to the racial composition of pupils.

In November of 1968 the United States Department of Health, Education and Welfare [hereinafter, "HEW"] began an investigation of the Dayton public schools to determine whether official policies and practices with respect to race were in compliance with Title VI of the Civil Rights Act of 1964. By letter of 17 March 1969, the acting

Director for the Office of Civil Rights of HEW notified the Dayton Superintendent (and the chief state school officer) that "[a]n analysis of the data obtained during the [compliance] review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff." App. 109-Ex. (PX 11A). Following this determination, the Dayton Board agreed with HEW to desegregate all staff so "that each school staff throughout the district will have a racial composition that reflects the total staff of the district as a whole" (App. 110-Ex. (PX 11F)), in accordance with the principles set forth in *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). At that time, the Dayton professional staff was approximately 70% white and 30% black; the Board-HEW agreement required complete staff desegregation by September 1971. App. 111-Ex. Nevertheless, by the time of trial in November 1972, it was still possible to identify many schools as "black schools" or "white schools" solely by the racial pattern of staff assignments. [The manner in which the Board's assignment of its professional staff at the high school level, for example, still served to racially identify schools, although less dramatically than prior to the 1971-72 school year, is demonstrated by a table set out in *Brinkman I*, 503 F. 2d at 698 (Pet. App. 57a). Moreover, classified personnel (e.g., secretaries, clerks, custodians and cafeteria workers) continued to be assigned on a racially segregated basis. App. 246a.]

No non-racial explanation for the Board's long history of assigning faculty and staff on a racial basis is possible. School officials, of course, had absolute control over the placement of their employees; consequently, the Board's historic race-oriented assignments of faculty members intentionally earmarked schools as "black" or "white." App.

300-01, 449, 461-62. Nor can the impact of this manifestation of state-imposed segregation on student assignment patterns be minimized. While that effect is not precisely measurable, it is so profound that it could not have been eliminated merely by desegregating faculties and staffs. One of plaintiffs' expert witnesses, Dr. Robert L. Green, Dean of the Urban College and Professor of Educational Psychology at Michigan State University, described how such faculty-assignment practice "facilitates the pattern of segregation" (App. 114) in these terms (App. 107-08):

> When there has been historical practice of placing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentially uni-racial or predominantly black or predominantly white.

See also App. 300-02, 536-38, 559-60. Such racial assignment of staff is also "strong evidence that racial considerations have been permitted to influence the determination of school policies and practices. . . ." *Kelly* v. *Guinn*, 456 F.2d 100, 107 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); *see Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 202 (1973); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971).[14]

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[14] *The District Court's Opinion* (Pet. App. 151a-54a). The district court conceded that "remnants of the old [explicitly racial] policy [of assigning black teachers only to teach black children], such as discouraging black teachers from going to all-white schools . . . , and assigning black substitute teachers to black

[14] (Continued)

schools . . . , did continue to appear after 1960," but the court argued that "the [1951-52] policy of dynamic gradualism was substantially implemented during the 1950's and 1960's." Pet. App. 152a. This latter conclusion is not clearly erroneous only if it is read as recognizing that the Board's emphasis was on the gradualism, in the words of its 1951-52 policy (*see* p. 24, *supra*) of "not attempt[ing] to force white teachers [into black schools], against their will," and of "introduc[ing] negro [*sic*] teachers, gradually, into [white] schools . . . where there is evidence that such communities are ready to accept [them]." The facts set forth above in text are not disputable, and the district court's effort to set a tone different from those facts is clearly erroneous. The district judge should have adhered to what he observed at trial: "we have abundant testimony the School Board did assign black teachers to black schools and white teachers to white schools. Let me say I am aware of that. May I ask that we now abandon that for evidentiary purposes." App. 302.

Also plainly erroneous is the court's implicit effort to find support for its tone in the fact that "by 1969 the Dayton school system had the most black educators and the second highest percentage (24.4%) of black educators of the twenty largest systems in the State of Ohio." Pet. App. 152a. This argument is specious. In school systems in almost every state which had explicit segregation laws the proportionate number of black teachers was as substantial as in Dayton. And as in Dayton, the "southern" districts also assigned pupils and teachers to schools, in the words of *Brinkman I*, "pursuant to an explicit segregation policy." 503 F.2d at 697. Thus, the presence of a substantial number of black teachers may in some cases be evidence of non-discriminatory hiring; in others, it is the legacy of an explicitly dual system of hiring and assigning teachers on a racial basis, as in Dayton.

Similarly erroneous is the court's finding that "vestiges of the Board's earlier illegal practices were evident until approximately 1963 [,b]ut by 1969 all traces of segregation were virtually eliminated." Pet. App. 153a. *But see* pp. 32-35, *supra*. (Also wrong is the idea that HEW's intervention in 1969 was "edg[ing] the legal limit" (Pet. App. 153a): first, HEW's action was clearly within the bounds of settled precedent, *United States* v. *Montgomery County Bd. of Educ.*, *supra*, except that most districts at that time were allowed only one year, rather than the two HEW allowed Dayton, to totally eliminate *de jure* faculty segregation practices, *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211, 1217-18 (5th Cir.) (*en banc*), *rev'd on other grounds sub nom. Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290 (1970) (as former Superintendent Carle pointed out, HEW acquiesced in the Board's desire to delay complete fac[illegible]y

2. *School Construction, Closing and Site Selection.*

The Board's school-construction, school-closing and site-selection policies and practices over the past two decades did nothing to alleviate, or even to cease taking segregative

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[14] (Continued)

desegregation over a two-year period, App. 492); second, the court's view is not credible to anyone, including the courts, familiar with HEW's previously adjudicated unwillingness to fulfill its Title VI obligations, *see* p. 60, *infra*.)

Finally, the court committed a fundamental error of both logic and fact in failing to recognize the obvious relevance of the Board's race-based faculty policies to the question of the Board's segregative intent with respect to other areas of school administration affecting pupil attendance patterns. Thus, the court's argument that faculty segregation had no impact because in each instance "the school was already identifiable as being black because of the racial composition of the students" (Pet. App. 153a), is factually untrue. For example, in 1962 when the Board converted the old Dunbar into McFarlane elementary and opened the new Dunbar High School, virtually all-black faculties and virtually all-black student bodies were *simultaneously* assigned to these schools; the same is true of the racial assignments of staff to all of the new one-race schools and additions. *See* pp. 39-41, *infra*. Faculty- and student-assignment practices operate hand-in-glove, a point so obvious it is difficult to understand how the district court missed it. The court compounded its factual error by failing to give faculty-segregation practices their due weight of "hav[ing] the clear effect of earmarking schools according to their racial composition." *Keyes*, 413 U.S. at 202. *See, e.g.*, pp. 32-36, *supra*. This "clear effect" may not be quantifiable with mathematical precision, but it is substantial in any realistic sense.

The Court of Appeals' Opinion (Pet. App. 196a, 206a-07a). The court of appeals reiterated its *Brinkman I* finding that the Board "effectively continued in practice the racial assignment of faculty through the 1970-71 school year," and held that "[t]he finding of the district court to the contrary is clearly erroneous." Pet. App. 206a (footnotes omitted). *See also* note 9, supra. The court of appeals further held (Pet. App. 206a):

> The district court also erred in failing to attribute the correct legal significance to the persistently discriminatory faculty assignment practices as a component of the Board's perpetuation of the dual system extant at the time of *Brown I*.

See also Pet. App. 207a, 211a.

advantage of, the condition of state-imposed segregation extant at the time of *Brown*. To the contrary, the Board's policies and practices in these areas intentionally impacted the dual system and literally sealed it in. In the period of expansion of the school system from the late 1940's to the mid-1960's, the overwhelming majority of new schools and additions to schools were located by the Board in either virtually all-black or virtually all-white areas, and attendance boundaries were drawn or maintained so that new schools and expansions of existing facilities opened as virtually one-race schools. App. 258-63, 304, 556-59. Of 24 new schools constructed between 1950 and the time of trial, 22 opened 90% or more black or 90% or more white. App. 258, 11-Ex. (PX 4). During the same expansion period, additions to existing facilities followed the same pattern. Seventy-eight of some 87 additions of regular classroom space, for which racial compositions are known, were made to schools 90% or more one race at the time of the expansion; only nine additions were made to schools less than 90% black or white. App. 304. The race-based nature of these practices is made crystal clear by the coordinate assignment, pursuant to the Board's "policy" (*see* App. 381), of professional staffs to these schools and additions tailored to their intended racial identities. App. 301-02, 378-79, S.Ct.A.316-381, 460-62, 11-12-Ex. (PX 4).

Plaintiffs' expert, Dr. Gordon Foster, testified that such school construction patterns "by and large . . . took the place of changing zone lines in terms of maintaining existing racial patterns and compacting them." App. 347. Mr. Bagwell, the Dayton Board's chief rebuttal witness with respect to school construction, admitted that "in effect then, when you . . . put an addition to a school, that as far as that space is concerned, you determine the boundaries and they are coextensive with the original boun-

daries of the school. . . . So that if a school is already 100 percent black and you are making an addition to that school, you in effect have determined the boundaries to be . . . creating a hundred percent black school unit." App. 381. The same is true with respect to the virtually all-white or all-black primary units. App. 269-70, 555-56. And the placement of portable classrooms also operated in a pattern that reflected the basic dual structure of the system. App. 266-68.

An example will illustrate the similar racial underpinnings of the more complex process of locating and constructing new schools. In 1962, the Willard and Garfield schools (previously designated for blacks only) were closed, and the old blacks-only Dunbar high school building was converted into McFarlane elementary. Most of the children from the Willard and Garfield attendance areas were simply reassigned to the McFarlane school which opened, certainly to no one's surprise, with an all-black pupil population and an all-black faculty. Some children from the Willard and Garfield areas were also assigned to the all-black Irving and Miami Chapel elementary schools. At the same time, a newly constructed Dunbar high school, located in a black neighborhood at the farthest corner of the school district away from substantial white residential areas, opened with a virtually all-black student body and faculty. App. 265, 296-97, 523-24, 526, 531-34, 556-58, 5-Ex. (PX 2E), 11-Ex. (PX 4), 218-Ex. (PX 130C), 6-Ex. (PX 3). Thus, a major new element was added to the dual system and, although there was some juggling within, the color line was expanded and reinforced.

As discussed at pp. 49-50, *infra*, immediately prior to these racial events, the Board had additional opportunity to locate three other new high schools and draw attendance

lines that would work toward dismantling the basically dual pupil assignment pattern at the high school level. Instead, in conjunction with optional zones, the drawing of attendance lines and the coordinate assignment of faculty, the Board also converted Roosevelt into a blacks-only school and opened two new virtually all-white high schools and a "mixed" school.[15]

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[15] As Dr. Foster testified, this systematic pattern of one-race construction for new schools and additions "has managed to lock-in and compact both the school population and the residential population in the inner city, and at the same time to promote housing segregation and school segregation in the far-flung suburbs" of the Dayton school district. App. 260. *See also* App. 269-70, where Dr. Foster describes the pattern of constructing one-race schools and additions in Dayton as basically that of "locked-in black schools," with white schools "in the area of the white suburban expansions which are farthest" from the black areas:

> I think the [Supreme] Court's language for this, which even lay people can understand, was something like, as I remember, a loaded game board. . . .

It is precisely this "loaded game board" (*see Swann*, 402 U.S. at 28; *id.* at 20-21) that petitioners overlook when they cite (Pet. Br. 35-37) the testimony of these witnesses as showing that everyone agrees that the Board had no alternative to its segregative site-selection practices, and that residential segregation would have caused the same result no matter what the Board did short of busing pupils for desegregative purposes. But the very heavy hand the Board played in facilitating, influencing and incorporating the basic dual foundation, resulting in "locked-in" one-race schools, precludes the Board from arguing that "the congruency of housing and school boundaries [was] inevitable." *United States v. Board of School Comm'rs*, 474 F.2d 81, 86 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973). The Board's segregative role in this regard is illustrated by the testimony of one of the witnesses relied upon by the Board. This witness observed that when the new Dunbar high school opened in 1962, "there were no houses there [in the vicinity of the new school] then, very few. . . . The school was there and the people went where the school was." App. 528. "And then a lot of housing developments came in there later and it all became more and more segregated because Dunbar High School was there." App. 526. Moreover, feasible non-segregative alternatives repeatedly presented themselves, but the Board persistently closed its eyes to such options. *See, e.g.*, pp. 49-51, *infra; see also* Argument, pp. 114-19, *infra.*

A final example, presenting the converse of the above examples, relates to the Board's failure to utilize excess capacity to the maximum efficiency as pupil populations declined by over 10,000 following their peak year in the mid-1960's. Even conservative estimates at the time of trial indicated that the Board could have closed down 9 or 10 average-size elementary schools. App. 263-65, 197-206-Ex. (PX 56). Such closings would have presented the Board with substantial opportunities to accomplish significant savings in costs, and at the same time accomplish substantial desegregation. (There would be substantial cost savings with respect to such closings, even if substantial pupil transportation were required to accomplish school desegregation conveniently and safely for the children. According to the Board, the average yearly per pupil transportation cost on Board-owned buses is $50.00, while the average yearly per pupil cost for simply maintaining a pupil space in a school is $140.00. App. 61, 72, 77 (admissions 33 & 33A).) But rather than closing selected black and white schools and reassigning pupils to accomplish actual desegregation, the Board elected the more costly segregative option of keeping these under-utilized schools open and maintaining their racial identity.[16]

[16] *The District Court's Opinion* (Pet. App. 169a-71a, 173a-80a). The district court acknowledged the segregative pattern of the Board's school construction/site-selection practices (Pet. App. 173a), which from an administrative perspective "approached the level of haphazard in some instances." *Id.* The court concluded, however, that plaintiffs had not shown that the Board's practices of "site selection, construction of additions, use of portables, or school utilization had a segregative purpose or that such policy had an incremental segregative effect upon minority pupils, teachers, or staff." *Id.* at 180a. With respect to the question of segregative intent, the court's conclusion is unsupportable. The court is able to arrive at this conclusion with a straight face only by treating these practices in a context completely removed from the Board's systematic pre-*Brown* practices of building and converting schools for black students and black teachers only, by not recognizing how much the post-*Brown* patterns of faculty assignments to new schools bespoke unmitigated segregative intent, and

3. *Optional Zones and Attendance Boundaries.*

We have already shown how the Dayton Board utilized optional zones and attendance boundary manipulation as

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further by avoiding the obvious facts, such as the construction of the new Dunbar (and the interrelated closing of Willard and Garfield, and conversion of the old Dunbar into McFarlane), which are inexplicable except in terms of race. In this more complete context (a context with which the court studiously refused to deal), the finding of no segregative intent is clearly erroneous. Even more astounding is the court's conclusion that none of these practices had segregative effect. This conclusion is contrary to the court's own subsidiary findings (*e.g.*, *id.* at 173a), and contrary to sound reason. Given the opinion's repeated conclusions that nothing the Board did had a segregative effect, a stranger to the district court's conduct in this case would no doubt be puzzled, if not flabbergasted, as to why the Dayton schools were almost totally segregated at the time of trial.

The Court of Appeals' Opinion (Pet. App. 207a, 210a-12a). The court of appeals held that the trial court's conclusion that the Board's construction, site-selection and related practices were not infected with segregative intent was clearly erroneous. Pet. App. 211a. The appellate court noted the near-total segregative pattern of new school construction and additions to existing schools, "[c]oupled with . . . the coordinate racial assignment of professional staffs to . . . these schools and additions on the basis of the racial composition of the pupils served by the schools" (*id.* at 210a), which "unmistakeably increased or maintained racial isolation." *Id.* at 211a. The court of appeals concluded, moreover, that "the post-*Brown I* practices of racially motivated faculty assignments to new schools bespeaks a concomitant segregative intent in the location of new schools and additions." *Id.* The court also found clearly erroneous the trial court's finding that these practices also had no segregative effect (*id.* at 211a-12a); the appeals court correctly concluded that "defendants pursued a policy of containment through school construction and site selection practices." *Id.* at 212a.

With respect to the circumstances surrounding the construction of the new Dunbar high school and conversion of the old Dunbar into McFarlane elementary (whose attendance zone was drawn to take in most of the students from the blacks-only Willard and Garfield schools, which were simultaneously closed), the court of appeals arrived at the unassailably "reasonable presumption that the simultaneous assignment of both a predominantly black faculty and student body at these schools was the product of segregative intent and an effort to perpetuate the dual system extant at the time of *Brown I*." *Id.* at 207a.

segregative devices in connection with the 1952 West-Side reorganizations (*see* pp. 25-27, *supra*). There are additional examples of both practices which stand on their own as segregation techniques.

Optional zones are dual or overlapping zones which allow a child, in theory, a choice of attendance between two or more schools. App. 257. Yet, the criteria stated by the Board for the creation of both attendance boundaries and optional zones are precisely the same: they constitute merely a type of boundary decision and serve no other educational or administrative purpose. App. 250, 320-21. Optional zones have existed throughout the Dayton school district and apparently have been created whenever the Board is under community pressure which favors or disfavors attendance at a particular school. App. 280-81, 393-95, 401-03. Other than for such purely "political" reasons, there is no rationale which supports the establishment of an optional zone rather than the creation of an attendance boundary, which is a more predictable pupil-assignment device (App. 321); and, as the district court found in its first opinion, optional zones "destroy or dilute" the so-called "neighborhood school concept." Pet. App. 12a-13a.

In many instances in Dayton optional zones were created for clear racial reasons, as, for example, in the West-Side reorganization. From 1950 to the time of trial, optional zones existed, at one time or another, between pairs of schools of substantially disproportionate racial compositions in some fifteen instances directly effecting segregation at some 21 schools. The West-Side reorganization in 1952 (*see* p. 26, *supra*) involved six optional areas with racial implications: Willard-Irving, Jackson-Westwood, Willard-Whittier, Miami Chapel-Whittier, Wogaman-Highview, and Edison-Jefferson. App. 274-75, 283-92. Other optional zones with demonstrable racial significance at

some time during their existence include the following: Three optional zones between Roosevelt and the combination Fairview-White; two optional zones between Residence Park and Adams; and optional zones between Westwood and Gardendale, Colonel White and Kiser, Fairview and Roth, Irving and Emerson, Jefferson and Brown, and Jefferson and Cornell Heights. App. 274-82, 323-24; PX 47-51 (maps and overlays).

In addition, at the high school level, Dunbar remained in effect a systemwide optional zone for blacks only through 1962 when it was converted into an all-black elementary school (App. 296-97) (*see* p. 40, *supra*); and Patterson Co-op remained a city-wide and, through the 1967 school year, virtually all-white optional attendance zone. The city-wide Patterson Co-op operated in a more subtle segregative fashion than did Dunbar. In 1951-52, Patterson had no black students and no black teachers (App. 217-Ex. (PX 130B)); by 1963 its student body and faculty were only 2% black (App. 218-Ex. (PX 130C)); and by 1968 the pupil population rose to 18.3% black and the faculty to 3.5% black. App. 219-Ex. (PX 130D). Students were admitted to Patterson through a special process involving coordinators and counselors, none of whom were black prior to 1968. App. 357-58. Patterson has over the years (even after 1967 through the time of trial) served as an escape school for white students residing in identifiably black or "changing" high school attendance zones, particularly Roth and Roosevelt. App. 187-88. In conjunction with the attendance-area high schools, these two special high schools operated as city-wide dual-overlapping zones contributing to the pattern of racially dual schools at the high school level throughout the district. *See* App. 296-97, 187-88.

Actual statistics on the choices made by parents and children in four optional areas are available. In each in-

stance the option operated in the past, and in three instances at the time of trial, to allow whites to transfer to a "whiter" school. For example, in the Roosevelt-Colonel White optional area (which was carved out of Roosevelt originally about 1951-52 when the Board was creating optional areas as a substitute for free transfers between various West-Side elementary schools (*see* pp. 26-27, *supra*)), from the 1959-60 school year through the 1963-64 school year a cumulative total of 1,134 white but only 21 black students attended Colonel White. App. 158-Ex. (PX 15A1). Testimony from a Dayton school administrator indicates that from 1957 through 1961, although this optional area was predominantly white, black students who lived in the area attended Roosevelt which had become virtually all-black (Colonel White was 1% black). App. 169-71; R.I. 797-802, 831-33. The Roosevelt yearbook for 1962 shows that only three white seniors from the optional area attended the black high school. App. 156-57-Ex. (PX 15A). As Mrs. Greer testified, this optional area did "an excellent job of siphoning off white students that were at Roosevelt." App. 98.

At the November 1977 hearing the Board presented a witness who had conducted a statistical analysis of this optional area and argued that it was having an integrative effect by 1970 because blacks in the zone were attending Colonel White. App. 505-07. This witness conceded, however, that he was only looking at the effect on the "white" school (Colonel White) and not the "black" school (Roosevelt); the true picture, therefore, was that in 1970 317 white students used the optional zone to avoid attending Roosevelt, which was thereby made 100% black rather than the 87% black it would have been without the racial option. App. 507-10, 515-17. This impact, of course, was in accord with the historic purpose and function of optional zones in Dayton to allow whites to avoid black in favor of "whiter" schools.

As another example, the Colonel White-Kiser option acquired its racial implications after its creation in 1962 with the racial transition of the Colonel White school. At its inception and for several years thereafter, when both schools were virtually all-white, most children in the White-Kiser option area chose White. As Colonel White began to acquire more black students, whites chose Kiser more often until in the 1971-72 school year, no white children chose the 46% black Colonel White school, while 20 chose the 6% black Kiser school. App. 159-Ex. (PX 15B1), 275-76-Ex. (DX AI (b)). The Veterans Administration optional area between Residence Park and Jackson operated in a similar way. App. 315-Ex. (DX CO), App. 317-Ex. (DX CP). Petitioners' exhibits show that from 1957 through 1963 no children from the former V.A. optional area attended Jackson, while 32 whites (and 8 blacks) attended Residence Park. In the 1957-58 school year, Residence Park was basically white and Jackson was black. App. 161, 271-73. (By 1963, however, Residence Park had become 80% black. App. 218-Ex. (PX 130C).)

Although by the time of trial many of these still-existing optional zones had already exhausted their segregative purpose of allowing whites to leave predominantly black or "changing" schools to which they would otherwise have been assigned, over the long term they clearly contributed substantially to, and facilitated, school segregation.[17] Moreover,

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[17] When petitioners say that "the undisputed evidence is that racial considerations never played a role in the establishment of optional zone attendance boundaries in the Dayton system [citing App. 391, where one of the Board's managing agents says that race never played a role]" (Pet. Br. 34), they either grossly mis-state the case, or they mean that respondents were unable to produce evidence of subjective racial motive on the part of responsible school officials. For the facts set out in text—"optional zones" employed for "political" purposes, without justification in accepted principles of educational administration, in defiance of claimed "neighborhood school" postulates, and with frequent clear racially

even by the time of trial several of these optional areas continued to permit whites to escape to "whiter" schools, thereby further impacting the black schools and precipitating additional instability and transition in residential areas. From 1968 through 1971 when Roosevelt was a 100% black school, for example, 375 white children from the Roosevelt-Colonel White optional area attended Colonel White. App. 158-Ex. (PX 15A1). Throughout its life, then, this option has allowed very substantial numbers of white children to avoid attending Roosevelt. By 1968, however, and not atypically, the optional area had undergone significant racial change and substantial numbers of black children were also attending Colonel White. App. 156-57-Ex. (PX 15A), 158-Ex. (PX 15A1). Plaintiffs' expert, Dr. Foster, explained how optional attendance areas facilitate both educational and racial segregation:

> [T]he short term effect . . . is to allow whites to move out of a school assignment that is becoming black. . . . [App. 282].
>
> [G]enerally where you have an optional zone which has racial implications, you have an unstable situation that

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segregative impact—certainly create a "dispute," standing alone, as to whether segregative intent was at work. When it is recalled that "optional zones" in Dayton originated in the early 1950's as the offspring of the prior free-transfer policy which was a patent segregation device, and that such zones were the key to converting more of the West Side schools into black schools, the only reason that a "dispute" exists is because of petitioners' refusal to face the plain facts. When these facts are then placed in the context of a system that was methodically practicing racial discrimination in virtually all other areas of school administration, the conclusion that "optional attendance zones" were regularly predicated upon segregative intent is put beyond doubt, if not beyond "dispute." With great frequency, optional zones in Dayton were pure racial gerrymanders. *Cf. Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). The fact that such machinations sometimes had no racial implications can mean no more, on this record, than that the Board also found them adaptable to non-racial "political" purposes.

> everyone realizes is in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation. . . . [T]hese [optional areas in Dayton] accelerated and precipitated further segregation. . . . [App. 281].

Formal attendance boundaries, in conjunction with optional zones, have also operated in a segregative fashion; and in some instances firm boundaries were also drawn along racial lines. An example is the boundary separating Roth and Roosevelt which was drawn in 1959. Roth took almost all the white residential areas on the far west side of Dayton from Roosevelt. At its opening, Roth had only 662 pupils, while Roosevelt's enrollment dropped by 602. Coupled with the exodus of whites out of Roosevelt through the Colonel White-Roosevelt optional areas, almost all whites were thereby transferred out of Roosevelt by Board action, in short order converting Roosevelt into a virtually all-black school. App. 295, 348; PX 48 & 46. (And, of course, the designation of Roosevelt as a black school was evidenced in the traditional way, by assigning ever-increasing numbers of black teachers to the school. App. 9-Ex. (PX 3).)[18]

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[18] Petitioners point (Pet. Br. 24, 28) to a small handful of actions, including the construction of Roth, taken over the long course of this record which they argue is proof of their "intent to improve racial mix while preserving the concept of neighborhood schools. . . ." Pet. Br. 28. The notion that the location of Roth was based on integrative intent was refuted by petitioners' own witness on the subject, who said that race was not considered at all. App. 389. Petitioners' argument about Roth also ignores the fact, shown in text, that the Roth attendance boundary was drawn in such a way as to remove nearly all of the white students from Roosevelt, thereby markedly hastening its conversion into a black school. (*See also* the alternatives discussed in the next paragraph in text.) Petitioners' other three actions claimed to have been based on "intent to improve racial mix"—the 1952 West Side reorganization (of all things), the 1967 location of the Jefferson primary unit, and the 1969 revision of the Stivers high school boundaries (Pet.

Another high school under construction at the same time as Roth, Meadowdale, opened in 1960, but as an all-white school with an all-white staff. App. 11-Ex. (PX 4). Opportunities were available for the placement of such high schools and use of the excess capacity or the redrawing of the boundaries of Roth, Roosevelt, Stivers, Fairview and Meadowdale in order to accomplish desegregation. But school authorities selected the alternatives that continued rather than alleviated the extreme racial segregation at the high school level. App. 269, 295, 348-49; PX 6. This pattern was capped in 1962 when a new Dunbar high school opened with a virtually all-black faculty and a defined attendance zone that produced a virtually all-black student body. At the same time the Board converted the old Dunbar high school building into an elementary school (renamed McFarlane), whose newly-created attendance zone took in most of the students in the zones for the all-black Willard and Garfield schools, which were closed. *See* p. 40, *supra*.

In still other instances, firm attendance boundaries have not been enforced for white children when assigned to black schools. For example, a pupil locator map made to assist in developing a middle school plan in the 1970-71 school year showed that many white children assigned by their attendance zone to the black schools actually attended the predominantly white schools located on the other side of Wolf Creek. App. 210. A similar situation existed in the Residence-Park-Jackson area. *See* p. 47, *supra*.

Finally, the Board also persistently refused to redraw boundaries between, or pair, contiguous sets of schools

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Br. 28) — are of a similar quality. But these are minor skirmishes, designed to focus attention away from the overpowering record evidence of intentional segregation. Petitioners' counsel properly described them as "isolated incidents" (App. 390), at best; even if petitioners' version of these events could be accepted, they pale out of existence in the light of the whole record.

which had been, and were at the time of trial, substantially disproportionate in their racial compositions. Examples of such contiguous pairs include Drexel (8% black) and Jane Adams (79% black); McGuffey (42% black) and Webster (1% black) or Allen (1% black); Irving (99% black) and Emerson (9% black); Whittier (99% black) and Patterson (0% black). PX 68, 62. Such alternatives to segregation—many of which were recommended by subordinate school administrators and even the Ohio State Department of Education (App. 131-32, 113-4-9 Ex. (PX 12))—were rejected by the Board.[19]

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[19] *The District Court's Opinion* (Pet. App. 155a, 159a, 162a-69a, 170a, 174a). The court's unsupported summary conclusion that "[n]o evidence has been presented suggesting that attendance zones were redrawn to promote segregation" (Pet. App. 155a), is clearly erroneous, as the evidence set forth above demonstrates. Examples of similar errors include the conclusion that no segregative intent was involved in the redrawing of Dunbar's high school zone in 1962, as well as the boundary changes attendant upon conversion of the old Dunbar into McFarlane elementary, Pet. App. 159a. Viewed in their historical context (which of course the district court does not do), there is no alternative but to conclude that these changes were carried out with segregative intent. Similar clear error occurred with respect to the court's evaluation of the Roosevelt boundary change which accompanied the 1959 opening of Ruth high school (Pet. App. 174a), as demonstrated by the factual discussion at p. 49, and n.18, *supra*.

The court's conclusions that optional zones, including the city-wide high school options, had neither segregative intent nor effect (Pet. App. 162a-69a), also are clearly erroneous. Here as elsewhere the courts commits threshold error in not analyzing the optional zones in light of their genesis in the early 1950's when they were deliberately initiated for demonstrably segregative ends. *See* pp. 26-27, and n.11, *supra*. In proper context, therefore, many optional zones in the Dayton district were instituted for racial reasons, and over time they had a significant racial impact which preserved, perpetuated and exacerbated intentionally-imposed systemwide segregation. The court's contrary conclusions are manifestly erroneous.

[Optional or dual overlapping zones were the mainstay of the "southern" style of dualism. *See Green*, 391 U.S. at 432. Such options are a classical segregation device which the courts have found prevalent in the "northern" cases as well. *See, e.g., United*

4. Grade Structure and Reorganization.

As previously noted, the Board persistently refused to alter grade structures by pairing schools to accomplish pupil desegregation. *See* pp. 50-51, *supra*. Likewise, the different grade structures involved in the construction of primary units, and the various grade organizations of the Dunbar high school (and Willard and Garfield prior to 1962) have perpetuated and compounded school segregation. *See* pp. 17-19, 40, *supra*.

The Board acted in similar fashion in the 1971-72 school year when it reorganized the grade structures of some 20 elementary schools from K-8 to K-5, 6-8. This grade reorganization program presented an important opportunity for the Board to accomplish substantial desegregation by judicious selection of sites, alterations of feeder patterns, and the establishment of the new attendance zones for both the middle (6-8) and elementary schools (K-5) affected. App. 70-81-Ex. (PX 10). Yet, in the face of recommendations from the State Department of Education of alternatives for accomplishing substantial desegregation, and the development of a pupil locator map so that there could be

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States v. *School District of Omaha*, 521 F.2d 520, 540-43 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975), and cases cited; *Bradley* v. *Milliken*, 484 F.2d 215, 232-35 (6th Cir. 1973), and cases cited. Judge Wisdom has correctly described this device as "unadulterated segregation." *United States* v. *Texas Educ. Agency*, 457 F.2d 848, 867 (5th Cir. 1972) (*en banc*).]

The Court of Appeals' Opinion (Pet. App. 209a-10a). The court of appeals rejected as clearly erroneous (Pet. App. 210a) the district court's conclusory finding that "[n]o evidence has been presented suggesting that attendance zones were redrawn to promote segregation," and the appellate court specifically found that the Board had used "optional attendance zones for racially discriminatory purposes in clear violation of the Equal Protection Clause." Pet. App. 209a (footnote omitted). The factual details set out above compel the conclusion reached by the court of appeals.

no doubt about the racial impact of its actions, the Board implemented a plan which reimposed segregation at three middle schools and their feeder elementaries, increased racial segregation at another middle school, and accomplished some desegregation at the fifth middle school. App. 147-48-Ex. (PX 12). The Board's actions thus resulted in "increasing or maintaining segregation as opposed to availing the opportunity of decreasing it." App. 303. The Ohio State Department of Education was of a similar view; it notified Dayton school authorities that the middle school reorganization program "has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to school children." App. 148-Ex. (PX 12).[20]

5. *Pupil Transfers and Transportation.*

Prior to the West-Side reorganization in 1952 (*see* pp. 25-27, *supra*), the Dayton Board regularly transferred (and provided transportation where necessary to) white children from the attendance areas of black schools, past or away from other all-black schools to "whiter" schools.

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[20] *The District Court's Opinion* (Pet. App. 157a-58a). The district court concluded that the grade-structure reorganization accompanying the creation in 1971 of five middle schools was not a result of segregative intent. This conclusion might not be clearly erroneous if the facts had arisen in a school system with no history of intentional segregation. But these events occurred in Dayton, and even the Ohio State Department of Education could not avoid the conclusion that the Board was up to its same old segregative tricks. The district court's contrary finding is clearly erroneous.

The Court of Appeals' Opinion (Pet. App. 212a-13a). The court of appeals characterized the district court's finding as "questionable in light of plaintiffs' convincing demonstration that the natural, probable, and foreseeable result of the establishment of the middle schools was an increase or perpetuation of segregation" (Pet. App. 213a), and held that the trial court erred in "fail[ing] to recognize the middle school system as one of the areas in which defendants failed to disestablish Dayton's dual school system." *Id.*

App. 412-13. Thereafter, the Board utilized optional zones to provide white children with an equally effective means of transferring out of the core black schools to "whiter" schools. *See* pp. 26-27, *supra*. And the city-wide Dunbar and Patterson Co-op high schools operated in similar fashion. *See* p. 45, *supra*.

In addition, curriculum, hardship and disciplinary transfers have functioned in many instances to allow white children to avoid attendance at identifiable black schools as well as to channel black students away from white schools. App. 171-73, 153; R.I. 799-800, 819-22. These practices reinforced the racial identification of the schools. Two prime examples are the use of curriculum transfers by white students under the Board's Freedom of Enrollment plan (App. 153-54, 171-73), and the emergency transfers of students in 1969 involving the Roth and Stivers high schools. App. 299, 164-65-Ex., 169-Ex. (unmarked exhibits). This latter incident takes on additional significance because it occurred in connection with the only time prior to trial that the Board redrew an attendance boundary to accomplish desegregation. This was accomplished by adding some of the all-black Roosevelt and Dunbar attendance areas to the predominantly white Stivers high school. App. 218-20. In the very first year following this realignment, disciplinary problems at Stivers, as well as at the predominantly black Roth, led to the transfer of 34 black students out of Stivers to the all-black Dunbar or Roosevelt schools, and 36 white students out of Roth to the virtually all-white Meadowdale, Stivers, Kiser and Fairview high schools. None of the white children transferred were assigned to black schools; and none of the black children transferred were assigned to white schools. App. 219-25.

Overall, hardship, emergency and special education transfers were also carried out in such a way as to reflect and reinforce the underlying racial duality in pupil assignments. App. 299. During the 1972-73 school year, for example, 266 (or 70%) of the 377 black children transferred were assigned to black schools, and 155 (or 91%) of the 171 white children transferred were assigned to white schools. App. 174-75-Ex. (PX 16F).

Throughout the post-*Brown* period, non-resident pupils attending the Dayton system on a tuition basis were assigned in a similar racially dual fashion: white pupils were assigned to white schools (App. 211-12), and black pupils were assigned to black schools. App. 126-27. The assignment practices relating to several hundred white high school pupils from Mad River Township, who attended the Dayton system on a tuition basis throughout the 1950's, is illustrative. These students were assigned to the virtually all-white Stivers, Kiser, Wilbur Wright, and Belmont high schools. When the Board felt there might be capacity problems at the schools, the Board did not consider assigning these non-resident pupils to the black Dunbar, Roosevelt or Roth high schools, which had ample space. Instead, the Board notified the Mad River Township school district that space would be unavailable for these tuition pupils in the 1960's. App. 211-13, 409-11, 170-Ex. (unmarked exhibit). In all of the various forms of pupil reassignment, it was the unbroken practice of the Board *never* to reassign white pupils to identifiably black schools. App. 212.

An additional, classical segregation technique utilized by the Dayton Board was "intact" busing. There are two examples. First, in 1963 white children from the Ruskin school were transported as a segregated unit (*i.e.*, teacher and class as a unit) into separate one-race classes at the

racially mixed Central school. App. 129-30. The second instances occurred in 1968 when the black Edison school was partially destroyed by fire. These black children were transported to a number of white schools throughout the city. But they remained as segregated as if they had been transferred to all-black schools, because they were accommodated in the white transferee schools in racially segregated classes. App. 128-29, 188-89.

Significantly, intact busing was not the Board's first alternative with respect to reassigning the Edison children. As Assistant Superintendent Harewood, the first black in the Board's central administration, recounted the incident, the first proposal under consideration was to house these black children in neighborhood churches. This proposal was abandoned only under pressure from Mr. Harewood, who pointed out that there were vacant classrooms in other schools in the city. Then, without further consultation with Mr. Harewood, the decision was made to transport self-contained black units into the white schools. App. 128-29. The next fall, the new Superintendent of Schools ordered that the "intact" aspect of these reassignments be terminated. Upon later examination, however, he found that the black children were still being segregated within the white schools under somewhat more subtle "tracking" procedures, and he again ordered that the children be fully integrated. App. 189. Thus, only through pressure from a new Superintendent and from Mr. Harewood was the "intact" brand of racial discrimination terminated, and the Edison children integrated into the white schools to which they had been reassigned.

Also at this time, predominantly black groups of children from the overcrowded Jefferson school were assigned by non-contiguous zoning to a number of white schools. R.I. 848-50; PX 122. These small amounts of actual, al-

though only one-way, desegregation were short-lived, however. Instead of expanding the use of these desegregative alternatives, the Edison and Jefferson reassignments were terminated for the 1971-72 school year and the black children were resegregated into the rebuilt black Edison school (and by then, the black McFarlane middle school), and the black Jefferson school. App. 208. The segregative effect of these reassignments is shown by the following chart comparing the percentage of blacks in the receiving white schools (*see* PX 122) in the 1970-71 school year to that existing in the 1971-72 school year:

	% Black 1970-71	% Black 1971-72
Ft. McKinley	9.6	1.6
Loos	9.5	6.0
Horace Mann	11.1	0.7
Shiloh	7.4	0.9
Shoup Mill	13.9	1.4
Valerie	20.0	13.5

Thus, for several decades Dayton school authorities have transported children for a variety of reasons. But, with only a few hard-fought exceptions, children have never been transported in such a fashion as to accomplish desegregation; with singular consistency, the Dayton Board's transportation practices have maintained, reinforced and/or exacerbated racial segregation. [Although transportation has been used only twice (*see* p. 54, *supra*) for desegregation purposes, pupil transportation has not been an uncommon event in Dayton. For many years white children in the far northwest, northeast and southeast areas of the system were transported to white schools in those areas (App. 196); and, of course, black orphan children were transported all the way across town to the

all-black Garfield school (*see* p. 16, *supra*). (Ohio law requires that local school authorities make transportation available, and the Dayton Board so acts, for students who are assigned to schools beyond a prescribed distance from home. App. 193, 196, 414.)]

Finally, the Board's Freedom of Enrollment policy, adopted in 1969, as it existed at the time of trial was, at best, a washout as a desegregative technique. Under this policy, students residing in an attendance area were given first priority to attend that school; second priority was given to students requesting transfer to a school for a specially available course; and the third priority was given to children requesting transfers and whose enrollment would improve the racial balance in the receiving school. App. 161-62-Ex. (PX 16B). The first priority merely froze in the pattern of segregation which began two-thirds of a century ago. The second priority actually contributed to school segregation because it was used by whites to transfer from black schools to white schools. *E.g.*, App. 153-54. (In the 1972-73 school year, for example, 22 of 23 white students transferring under the Freedom of Enrollment policy were transferred to white schools. App. 173-Ex. (PX 16D).) Under the third priority, 459 black children transferred in the 1972-73 school year to white schools, thereby accomplishing some actual desegregation; but only one white child, formerly in a parochial school matriculating into a 54.3% black high school, made a racial balance transfer. App. 173-Ex. (PX 16D), 299. Hence, transfers under the Freedom of Enrollment policy were exclusively one-way—i.e., some blacks and some whites transferring to white schools—and had a negligible if not retrogressive impact on the racially dual pattern of pupil attendance. As the Superintendent testified, "the pattern . . . has been pervasive down through the years, that no white students,

regardless of from where they came, or the purpose, were assigned to black schools." App. 212.[31]

6. *The Board's Rescission of Its Affirmative Duty.*

As reflected in the foregoing pages, black citizens of Dayton had long been thwarted in their attempts to end state-imposed racial segregation in their public schools. Even aggressive action, such as that taken by Robert Reese's father when he went to court in 1926 to challenge intentional efforts to segregate his children, was effectively blunted by Dayton school authorities' commitment to sep-

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[31] *The District Court's Opinion* (Pet. App. 160a-62a). Even if the approach of the district court is followed and the above facts are assessed in total ignorance of the remainder of this massive record, the conclusion would seem inescapable that many of these instances reflect subjective racial malevolence on the part of the school authorities. The district court not only ignores the whole record, however, it also ignores many of these facts; as to others, the court summarily concludes that the evidence reflects nothing more than strict racial neutrality. By themselves and in the context of the other widespread discrimination of record, the facts described above are further evidence of the intentional discrimination which infected the Dayton school system at the time of trial, and, at a minimum, they are part of the deliberate perpetuation of the dual system.

The Court of Appeals' Opinion. The court of appeals did not specifically address this evidence of discrimination in its *Brinkman IV* opinion (in *Brinkman I,* the court concluded that this evidence raised "serious questions," Pet. App. 66a, of racial discrimination, *id.* at 65a-66a), but rather subsumed them within its general "consideration of the legal and factual issues previously reserved by this court in *Brinkman I* (*id.* at 194a) and its overall conclusion that in the post-*Brown* era the Board pursued "racially motivated policies with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization [which] perpetuated or increased public school segregation in Dayton . . . and, in addition, . . . committed affirmative acts that have exacerbated the existing racial segregation." *Id.* at 213a. At the very least, as with the "middle school reorganization," these diverse transfer policies and practices are another "of the areas in which defendants failed to disestablish Dayton's dual school system." Pet. App. 213a.

aration of the races. *See* pp. 14-15, *supra*. During another period of active unrest, 1951-52, the Board imposed the West-Side reorganization and a new racially discriminatory faculty-assignment policy. *See* pp. 23-27, *supra*. The black community's repeated protests following *Brown* to the continued segregation also were turned aside. *See* App. 52-53-Ex. (PX 9), 150-51-Ex. (PX 13A), 152-Ex. (PX 13B), 153-55-Ex. (PX 13N). By the late 1960's, however, those who objected to state-imposed school segregation began to gain allies, both in the white community in Dayton and among state and federal agencies. As previously noted (*see* pp. 34-35, *supra*), HEW conducted a Title VI compliance review in 1968 and forced the Board in 1969 to agree to end its racially dual faculty-assignment policy. HEW had also noted the "substantial duality in terms of race or color with respect to distribution of pupils in the various schools . . ." (App. 109-Ex. (PX 11A)), but the agency did not pursue this concern with similarly aggressive action. (As is commonly known, from the frequent judicial declarations on the subject, HEW has generally failed to fulfill its Title VI obligations with respect to pupil desegregation in both the North and the South. *See, e.g., Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*); *Brown* v. *Weinberger*, 417 F. Supp. 1215 (D.D.C. 1976). And it has not been notably aggressive even with respect to faculty segregation. *See Kelsey* v. *Weinberger*, 498 F.2d 701 (D.C. Cir. 1974).)

Also during these years, the Dayton Board, in the 1971 words of the State Department of Education, "passed various and sundry resolutions . . . designed to equalize and to extend educational opportunities, to reduce racial isolation, and to establish quality integrated education in the schools." App. 117-Ex. (PX 12). But these were just words and informal ones at that. As the State Assistant

Superintendent for Urban Education noted at the same time, there was a definite need for action and not just words. App. 116-Ex.

On 29 April 1971, the Board requested assistance from the State Department of Education's Office of Equal Educational Opportunities to provide technical assistance in the development of alternative desegregation plans. The Board also authorized its President to appoint a committee of community representatives to assist and advise the Board in connection with such proposed plans. App. 48-49-Ex. (PX 9).

The State Department of Education responded by assembling a team of consultants and specialists to evaluate data and make recommendations. Their recommendations were submitted to the Dayton Superintendent on 7 June 1971. App. 113-49-Ex. (PX 12). The State Department advised the Dayton Board of its constitutional and other legal obligations (App. 128-Ex.) (emphasis in original):

> Since the Board, *as an agency of state government,* has created the inequality which offends the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative duty to comply with the Constitution; that is, as the Supreme Court has stated, "to eliminate from the public schools all vestiges of state-imposed segregation."

The State Department then turned its attention to a list of alternatives, and urged the Dayton Board to shoulder its constitutional obligations *now* (App. 135-Ex.) (emphasis in original):

> *Delaying tactics could be continued.* The Board, in spite of resolutions and overt commitment, could

> choose to make only the slightest mandated changes, and to utilitze the best legal talent available to resist compliance with constitutional requirements. Other school districts have chosen this alternative, even as Dayton has used similar methods in the past. However, the highest court in the land has stated the constitutional offensiveness of state-imposed segregation of school-children, and persisting delay clearly violates the oath of office of members of the Board of Education in the state of Ohio.

The State Department concluded by recommending "a comprehensive plan" that would be a "constitutionally valid and inoffensive, educationally sound, and morally proper" approach for "the Dayton Board of Education, acting as an agency of Ohio State Government . . ." to take. App. 158-Ex. (Under the terms of Opinion No. 6810, issued by the Ohio Attorney General on 9 July 1956, the State Department of Education has the primary affirmative duty to see that local school districts comply with their Fourteenth Amendment obligations with respect to public schooling. App. 331-40-Ex.)

The Board-appointed advisory committee of community representatives became known as the "Committee of 75." In his charge to the Committee, the Dayton Board President stated: "We have admitted that the district is guilty of procedures which have led to the racial isolation of school children." App. 50-Ex. (PX 9). The Committee issued its report in the fall of 1971. The Report of the Committee of 75 (App. 48-63-Ex.) also urged the Board to adopt a comprehensive plan and joined the State Department in emphasizing "that time for a change in Dayton has run out! We must act now." App. 63-Ex.

On 8 December 1971 a majority of the duly constituted Dayton Board—for the first time ever, and perhaps em-

boldened by the knowledge that they would soon be out of power, the balance of which had been shifted to vocal "anti-busing" candidates who had prevailed in the November elections (*see* App. 198-99)—responded with meaningful action. It first "recognize[d] and admit[ted] that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor Boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs. . . ." App. 15-Ex. (PX 7). The Board then adopted a program of actual systemwide desegregation and directed the Superintendent to implement such a new pupil-assignment policy for the 1972-73 school year. The new policy consisted of two principal parts: first, the existing attendance zones and the Freedom of Enrollment policy were abrogated effective 1 September 1972; second, in their stead, a new pupil-assignment policy was adopted, the goal of which was that no school would have a racial composition "substantially disproportionate to the district as a whole." App. 23-Ex. Pursuant to the Board's directions, the Superintendent of Schools adopted a plan for fall 1972 prepared by Dr. Gordon Foster and others of the Title IV Florida School Desegregation Consulting Center of the University of Miami. App. 64-108-Ex.

On 3 January 1972, however, a newly-constituted Dayton Board (three new members of the seven-member Board had been elected the previous November to take office in January) rescinded the prior Board's action of 8 December 1971, refused to consider the plan adopted by the Superintendent, reinstated the Freedom of Enrollment policy and reimposed the segregated attendance zones. App. 24-46-Ex. (PX 8). By its actions, the new Board made it clear to the

Superintendent that he would not be permitted to exercise his independent authority over the assignment of pupils (*see* App. 254-Ex.; Ohio Rev. Code §3319.01) to implement the pupil-assignment plan he had promulgated and adopted pursuant to the December resolutions. App. 190, 463. The Ohio law just cited vests the local Superintendent of Schools with the responsibility to "assign the pupils of the schools under his supervision to the proper schools and grades," except with respect to the assignment of pupils to schools outside their school districts of residence, where board approval is necessary. The Board thus undid the operative administrative action of the Superintendent and intentionally reinstated systemwide segregation of the public schools.[22]

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[22] *The District Court's Opinion* (Pet. App. 180a-85a). In its initial 1973 liability ruling, the district court analyzed the Board's 1972 rescission of its 1971 desegregation resolution and concluded that the Board's action "constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton." Pet. App. 11a. The court completely repudiated this analysis in its 1977 ruling on remand from this Court. The court ignored altogether the findings of the Committee of 75, the State Department of Education, and HEW, as well as the admissions of the Board itself, that the Board was responsible—i.e., had caused—the serious racial segregation of the schools then extant. These findings and admissions of public agencies and their appointed representatives are probative; indeed, in the context of this record they are eminently correct. The district court clearly erred in not assigning weight to, and in refusing to adopt, these findings and conclusions. In addition, the district court failed to evaluate the circumstantial evidence to determine whether evidence of racial discrimination was among the factors motivating the rescission, and the district court similarly failed to determine whether the Board's action undid Superintendent Carle's administrative action which was operative under Ohio law. As a consequence, the court also erred in failing to conclude that the rescission was itself either an independent act of intentional systemwide segregation or the effective frustration of a constitutional remedy for the intentional segregation inherited by the new Board from its predecessors.

The court is clearly mistaken in its apparent conclusion that the Board's December 1971 decisions aimed at curing admitted

7. *The Dual System at the Time of Trial.*

At the time of trial, the Dayton school district was segregated by race, as it always had been. In the 1971-72 school

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acts of segregation constituted an effort to "manufacture" a constitutional violation "by political or legal maneuvering." Pet. App. 184a. Here the district judge appears to be relying upon his personal "views as to the obligations and the legal representation of public bodies, and it does not include in my opinion the discussion with non-representing attorneys. . ." App. 485 (statement of the court); *see also id.* at 484-85. These views (contrary to those held by the judge in 1972, when he considered these matters irrelevant, *see* App. 485, 201-02) have to do with the fact that prior to the December 1971 resolutions, Superintendent Carle and some of the Board members met with several persons on different occasions who were knowledgeable about school desegregation in the United States. The judge seemed particularly upset that one of these persons was an attorney, Louis R. Lucas, who subsequently represented (and still does) the plaintiffs in this litigation. Regardless of Judge Rubin's personal views, Dr. Carle was clearly correct in claiming the right to do as he and the Board members did: "We had virtually every month or so been consulting with people who were involved with desegregation and/or legal aspects of desegregation around the country, and this was just one more opportunity to expose myself to a person who had a good deal of experience in the field." App. 485.

Thus, any asserted "manufacturing" of constitutional violations by the December resolutions represented the duly constituted majority's attempt to respond to *their* perceptions of the preceding year's events concerning their hopes and plans for desegregation *and* their defeat at the polls by vocal pro-segregation forces. The Board's December 1971 decision to desegregate the system was, therefore, the considered and resolute product of determinations that affirmative remedial action was required to comply with the Board's constitutional obligations. When the new Board voted on 3 January 1972 to rescind this desegregation program and reinstate segregation across the board, it did more than simply make a different judgment about appropriate educational policy. It deliberately turned back the clock in a demonstrably segregative fashion in response to the dominant white community hostility to desegregation. And it did so without offering any evidence to show that the uniform conclusions of HEW, the Ohio State Department of Education, the Committee of 75, and the 1971 Board and Superintendent of Schools, were either precipitous or incorrect. The rescission undid the desegregation pupil assignments adopted by the Superintendent and intentionally reimposed segregation on

(Footnote continued on following page)

year (when the complaint was filed), there were 69 schools in the Dayton district; 49 of them had student enrollments 90% or more one race (21 black, 28 white). Of the 54,000 pupils enrolled, 42.7% were black; 75.9% of all black students were assigned to the 21 black schools. App. 4-Ex. (PX 2D). In 1972-73 there were 68 schools, of which 47 were virtually one-race (22 black, 25 white). Fully 80% of all classrooms were virtually one-race. (Of the 50,000 pupils in the district that year, 44.6% were black). App. 1-Ex. (PX 2A).

Thus, although the system was larger, it was basically the same dual system that existed at the time of *Brown* (*see* pp. 21-22, *supra*). [It was also the same one that existed in the 1963-64 school year (the first year after *Brown* for which racial data are available). In that year there were 64 schools in the Dayton system, of which 57 had student enrollments 90% or more one race (13 black, 44 white). Of the 57,400 pupils in the district that year,

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[22] (Continued)
a systemwide basis. It was a purposeful act of racial discrimination infecting the entire system and again communicating a policy of segregation to all of Dayton's citizens. The district court thus came somewhat closer to the correct analysis in its 1973 opinion, particularly in light of this Court's implicit holding in *Dayton I* that an equal-protection violation would be made out if the Board had "acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman* v. *Mulkey*, 387 U.S. 369 (1967). . . ." Pet. App. 130a, 433 U.S. at 413-14.

The Court of Appeals' Opinion. In its *Brinkman I* decision the court of appeals detailed the facts set forth above. Pet. App. 40a-48a, 53a-56a. In the opinion below, *Brinkman IV*, the court of appeals did not again discuss the rescission, apparently because of this Court's approval (Pet. App. at 130a) of the *Brinkman I* disposition of this issue, which found it "unnecessary to pass on the question of whether the rescission by itself was a violation of [plaintiffs' constitutional] rights." Pet. App. at 56a. In particular, the court of appeals did not address plaintiffs' contention that the rescission did in fact "undo operative regulations affecting the assignment of pupils." *Dayton I*, 433 U.S. at 413.

27.8% were black. Yet 79.2% of all the black pupils were enrolled in the 13 black schools; and 88.8% of all pupils were enrolled in such one-race schools. App. 3-Ex. (PX 2C).]

Every school which was 90% or more black in 1951-52 *or* 1963-64 *or* 1971-72, and which was still in use at the time of trial (1972-73 school year) remained 90% or more black. Of the 25 white schools in 1972-73, all opened 90% or more white and, if open, were 90% or more white in 1971-72, 1963-64, and 1951-52. App. 5-Ex. (PX 2E). *See also Brinkman I,* 503 F.2d at 695.

The Board was operating a dual school system at the time of trial.[23]

E. The Remedy.

The systemwide desegregation plan now in place in Dayton was implemented at the start of the 1976-77 school year pursuant to district court orders on remand from the court of appeals' judgment in *Brinkman II,* 518 F.2d 853, *cert. denied sub nom.,* 423 U.S. 1000 (1975) (Pet. App. 89a).

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[23] *The District Court's Opinion* (Pet. App. 149a-50a). The district court did not dispute any of the statistical facts set out in text, but it, of course, concluded that none of the Board's intentionally segregative conduct, which had gone uninterrupted for 60 years, required remedial action.

The Court of Appeals' Opinion (Pet. App. 205a-06a, 213a-14a). The court of appeals concluded that the Board's post-*Brown* conduct, "rather than eradicate the systemwide effects of the dual system extant at the time of *Brown I,* . . . perpetuated or increased public school segregation in Dayton . . . and, in addition, [that the Board] committed affirmative acts that have exacerbated the existing racial segregation." Pet. App. 213a. "The evidence of record demonstrates convincingly that defendants have failed to eliminate the continuing systemwide effects of their prior discrimination and have intentionally maintained a segregated school system down to the time the complaint was filed in the present case." *Id.* at 206a. Accordingly, the court determined that the Constitution demands a remedy.

Upon that remand, the district court appointed an expert, Dr. Charles Glatt, to examine the system and make desegregation recommendations. Dr. Glatt was murdered in the midst of his work in the federal building in Dayton. Thereafter, both plaintiffs and the Board presented plans for the district court, pursuant to its order of 5 November 1975. The Board's plan was prepared by the team of experts appointed by the Board. The Board had voted to submit the plan to the court, but, by vote of 4-3, the Board refused to approve the plan. App. 439. The plan prepared by the Board's experts utilized diverse choice, zoning and curriculum differentiation mechanisms for desegregation, but the plan did not specify actual pupil assignments, and no provision for transportation was included. R.III. 38-40, 52, 67-69, 101, 136-37, 149-51, 206-20, 252-53. Both plaintiffs' experts and the Board's experts were in agreement, however, that approximately 15,000 pupils would have to be transported under either the Board's plan or plaintiffs' plan, and that, because of Dayton's compact nature and the efficiency of its thoroughfares, complete, effective desegregation could be accomplished without presenting any threat to the health, safety or education of school children due to factors of time, distance and amount of transportation. App. 438; R.III. 224; "A Desegregation Plan for the Dayton, Ohio Public Schools," at 127, 138 (2 December 1975) [the Board's plan].

Following an 8 December 1975 hearing, the district court entered an order on 29 December 1975 on the plans submitted. Pet. App. 99a-106a. After summarizing the nature of the plans, the limited nature of federal judicial intervention, and the Board's broad discretion in matters of administrative and education policy (*id.* at 100a-02a), the court gave the Board the following options (*id.* at 102a):

> The defendants may adopt their own plan, may adopt the plaintiffs' plan, may combine the two, or any parts

> thereof, provided that each school in the school district as of September 1, 1976, is desegregated as defined herein.

Observing that the system was 48% black and 52% white, the court stated that any school would be deemed desegregated if it "reflect[ed] this district ratio plus or minus 15%." *Id.* at 103a. The court set forth two exceptions to this requirement. First, it allowed all students already enrolled in high schools to remain at their present school through graduation because of the importance the court attached to high school "loyalty." *Id.* Second, citing *Swann*, 402 U.S. at 24, the court held that "where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis." *Id.* at 104a. The court then appointed Dr. John A. Finger (who had been the district court's expert in *Swann*) to act as Master pursuant to Rule 53, Fed. R. Civ. P., to work out the details of a plan with Dayton school officials. The following guidelines were set for the Master with respect to elementary students (*id.* at 104a):

> 1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
>
> 2. Students should be transported to the nearest available school;
>
> 3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

On 15 March 1976 the Master submitted his report. App. 34-52. The Master recommended that elementary schools be desegregated primarily on the basis of the common tech-

nique of pairing schools. With respect to high schools, the Master relied on a program of choices and random assignments limited by racial guidelines. Under his plan, the Master estimated that the maximum distance of travel for any students would be somewhat in excess of 5 miles, but that "the longest travel time should not much exceed 20 minutes." App. 39.

The district court conducted a hearing on the Master's report on 22 and 23 March 1976. At this hearing, the Dayton Board requested several modifications of the Master's plan: to be allowed to reassign pupils to paired schools in advance in the spring by the central administration, rather than by the school principals on the first day of the 1976-77 school year; to be allowed to exchange paired schools (with no transfer of teachers) on an annual rather than semi-annual basis; to be allowed to assign high school students on geographic-zone rather than choice and random-assignment bases; and to phase in the elementary plan over three years (including withholding some 8 schools from the desegregation plan for the 1976-77 year). R.III. 288-89. The Board presented no argument, testimony, or other evidence that any school or child should be excluded from the plan because of any geographic location or claim of excessive distance or time involved in reassignment and transportation.

On 23 March 1976 the district court entered its final order approving the proposed desegregation plan of the Master, with modifications, and directing the Dayton Board to implement the plan for the 1976-77 school year. Pet. App. 110a-13a. The court gave the Board the discretion either to implement the Master's report or the Board's proposed modifications, except insofar as the Board sought a three-year phase-in of the plan at the elementary level. *Id.* at 110a-11a. The district court also

expressed its willingness to consider proposed modifications to the plan at any time from any party. *Id.* at 112a. A judgment was entered on 25 March 1976 in accordance with the 23 March order. Pet. App. 114a-16a. Thereafter, the Dayton Board sought six additional modifications which, with one exception (concerning the exclusion of eighth graders from the plan), the district court approved by an order of 14 May 1976. Pet. App. 117a.

The Dayton Board then appealed, and their appeal was heard by the Sixth Circuit on an expedited basis. The court of appeals issued its decision in *Brinkman III* on 26 July 1976. Pet. App. 118a-23a. The court of appeals noted that although its decision in *Brinkman II* had

> ordered system-wide desegregation, the Board proposed no plan to achieve this mandate and made no showing of the existence of conditions related to the topography of the Dayton area, location of natural or artificial barriers, geographic isolation or similar considerations which might militate against an order requiring cross-district transportation of pupils. [*id.* at 121a]

As to the Board's argument that the district court's guiding standard that each school should be within the district-wide racial ratio, plus or minus 15%, the court of appeals said (*id.* at 121a-22a):

> Rather than establishing a fixed mathematical requirement as the Board claims it does, this formula provides a flexible basis of pupil assignment similar to that approved by the Supreme Court in *Swann, supra.* The flexibility of the district court's judgment is further illustrated by the exemption of two entire grades of high school students, the provision for variations from the plus or minus 15% requirement "in excep-

> tional circumstances" and the options granted the Board which permitted it to choose alternate methods of achieving desegregation rather than being required to follow in every detail the plan submitted by the Master. We view the use of mathematical ratios in this case as no more than "a useful starting point" in shaping a remedy for past discrimination. *Swann, supra,* 402 U.S. at 25.

Finally, the court of appeals dealt with an argument raised by the Board for the first time at oral argument: that the district court's order required periodic changes in the Dayton plan to maintain a fixed racial balance in perpetuity in violation of this Court's intervening decision in *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424 (1976). The court found that this contention was completely without merit: "The short answer to this argument is that the judgment directs no changes after the 1976-77 school year." *Id.* at 123a. The court noted that the plan ordered by the district court "established the first constitutionally sufficient desegregation plan for the Dayton system. If adjustments to this plan are sought by any of the parties in future years the district court will necessarily consider the limitations of *Spangler* in dealing with such requests." *Id.*

Upon review of the court of appeals' judgment in *Brinkman III,* this Court remanded the case to the district court for further consideration of the violation and of the remedy in light of the extent of the violation, directing that the systemwide plan remain in effect pending such consideration. *Dayton I,* 433 U.S. 406 (1977), Pet. App. 124a. In the proceedings in the district court pursuant to that remand, the Board continued to adhere to its consistent legal strategy of contending that no court-ordered remedy

of any magnitude is permissible. The Board did not propose modifications of the plan with respect to any affected schools, but insisted that it was not constitutionally responsible for the racial composition of a single school. The Board would not even assume *arguendo* that there were at the time of trial any vestiges of any of the Board's conceded intentionally discriminatory conduct; and, consequently, it offered no alternatives to the systemwide plan now in effect. As we asserted below, without challenge from the Board, "[a]s we understand the Board's position . . ., if plaintiffs are correct in their claim of a systemwide violation, then the plan of desegregation currently in place is as good a cure as any." Brief for Appellants 65 and Reply Brief for Appellants 29, 6th Cir. No. 78-3060.[24]

The remedial plan implemented in the fall of 1976 has real potential for eradicating racial discrimination, root and branch, from the Dayton school system. *See* Appendix B to Brief for Respondents in *Dayton I,* No. 76-539.[25]

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[24] In its petition for certiorari and in its brief on the merits to this Court, the Board makes no claim that the systemwide plan now in effect compels any annual reassignments or an otherwise unconstitutional racial balance if the violation is systemwide in scope and impact.

[25] *The District Court's Opinion* (Pet. App. 188a). The district court concluded that none of the racial segregation extant at the time of trial resulted from constitutional violations. The court therefore dismissed plaintiffs' complaint in its entirety.

The Court of Appeals' Opinion (Pet. App. 214a-17a). The court of appeals concluded that the systemic nature of the Board's intentionally segregative practices had had a systemwide impact necessitating an across-the-board remedy. Finding that the Board had not met its burden of showing that a less extensive remedy would be adequate, the court reaffirmed the plan it had approved in *Brinkman III.*

Introduction and Summary of Argument

Introduction

The essence of the questions presented by the Dayton Board here is the same as that presented to this Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971): who is responsible for the flourishing of the basically dual system in the years following *Brown*? And who bears the burden of explaining the continuation of a system of basically one-race schools following *Brown* through the time of trial? Without doubt, it would have been easier to answer these questions as a matter of federal judicial intervention and local administrative practicality by dismantling the basically dual system of public schooling in Dayton in 1954 (and even easier in 1933 or in 1912) than it was to desegregate in 1976, just as it would have been easier to convert Charlotte into a unitary system in 1954 than it was in 1971. But the answer given by a unanimous Court in 1971 in *Swann* still applies with full force to the case here because, as we shall demonstrate, there is no constitutionally principled way to distinguish Dayton from Charlotte on the undeniable facts of record.

It is worthwhile to recall the contours of the answer given by this Court in 1971 to the claim by school authorities that they should not be held responsible for the continuing pattern of largely one-race schooling. The Court did not pretend that the circumstances had remained the same since 1954, when state-imposed school segregation was outlawed in *Brown I*, 347 U.S. 483. The Court acknowledged, and accepted partial responsibility for, the inordinate delay in implementing the command of *Brown II* that officially segregated school systems begin the "transition to a system of public education freed of racial dis-

crimination." 349 U.S. 294, 299 (1955).[28] The Court also noted that the remedial problem had been significantly complicated by the recalcitrance of state and local authorities, by agents of racial discrimination other than school authorities, and by the complexity of urban growth since *Brown*.

As to past delay and the need for refined guidelines, the Court said (402 U.S. at 6):

> These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once. Meanwhile district courts and courts of appeals have struggled in hundreds of cases with a multitude and variety of problems under this Court's general directive. Understandably, in an area of evolving remedies, those courts had to improvise and experiment without detailed or specific guidelines. This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts,

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[28] The course from *Brown II* to *Swann* may be traced through the following opinions of this Court: *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Goss* v. *Board of Educ. of Knoxville*, 373 U.S. 683 (1963); *Griffin* v. *County School Bd. of Prince Edward County*, 377 U.S. 218 (1964); *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Bradley* v. *School Bd. of Richmond*, 382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968); *Raney* v. *Board of Educ. of Gould School Dist.*, 391 U.S. 443 (1968); *Monroe* v. *Board of Comm'rs of Jackson*, 391 U.S. 450 (1968); *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 226 (1969) and 396 U.S. 290 (1970); *Northcross* v. *Board of Educ. of Memphis*, 397 U.S. 232 (1970).

> of necessity, embraced a process of "trial and error," and our effort to formulate guidelines must take into account their experience.

With respect to non-school forms of racial discrimination having an impact on the problem of persisting school segregation, the Court noted (*id.* at 7):

> In addition to finding certain actions of the school board to be discriminatory, the court also found that residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions. School board action based on these patterns, for example, by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education. These findings were subsequently accepted by the Court of Appeals.

Defiance and urban complexity were discussed together, in these words (*id.* at 14) (footnotes omitted):

> The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts. The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or

> negating remedial action before it was fully implemented. Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns.

This Court did not absolve urban school authorities of the affirmative remedial obligations imposed in principle by *Green*, and surrender *Brown* to the notion that dismantling dual schooling had been rendered too complex. Instead, the Court, as had District Judge McMillan, confronted reality and applied the spirit of the Fourteenth Amendment, which had been found in *Brown*.[27] Much of the responsibility for delay must be borne by state and local authorities, the Court noted (402 U.S. at 13 & 14):

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[27] District Judge McMillan's findings are reported at 300 F. Supp. 1358 and 1381 (W.D.N.C. 1969); 306 F. Supp. 1291 and 1299 (W.D.N.C. 1969). His understanding from the record evidence of the wide-ranging and enduring impact of operating one set of identifiable "Negro schools" and another of "white schools," and the interaction between such dual schooling and other community discrimination and residential segregation, was not novel. That same experience formed the basis for the landmark decision of the Fifth Circuit on which this Court expressly relied in *Green* v. *County School Bd.*, 391 U.S. 430, 435, 440 (1968), to require actual desegregation rather than the continued "racial identification" of schools under the guise of ineffective "free choice" and "free transfer" schemes. 391 U.S. at 435-442. Judge Wisdom wrote for the Fifth Circuit in *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967):

> Here, school boards, utilizing the dual zoning system, assigned Negro teachers to Negro schools and selected Negro neighborhoods as suitable areas in which to locate Negro schools. Of course, the concentration of Negroes increased in the neighborhood of the school. Cause and effect came together. In this circuit, therefore, the location of Negro schools with Negro facilities in Negro neighborhoods and white schools in white neighborhoods . . . came into existence as state action and continues to exist as racial gerrymandering.

> Over the 16 years since *Brown II*, many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.
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> * * * * *
>
> The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems.

In addition, the impact of faculty assignment and other forms of discrimination not directly involving pupil assignments was independently significant. 402 U.S. at 18-20. Said the Court (*id.* at 18):

> In *Green*, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extra-curricular activities, and facilities were among the most important indicia of a segregated system. 391 U.S. at 435. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

The Court also found that the school authorities had in fact played a segregative role in the patterns of residential development and urban growth. To the school authorities' parroting of "residential patterns over which we have no control," a unanimous Court responded (402 U.S. at 20-21):

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
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> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown,* closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the sep-

> aration of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.
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> 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.

Finally, the Court assessed the substantial, though not precisely definable, impact that flows directly from a long-standing policy and practice of racial separation (*id.* at 28):

> 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. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

While observing that "[o]ne vehicle can carry only a limited amount of baggage" (*id.* at 22), and that

> [w]e are concerned in these cases with the elimination of the discrimination inherent in the dual school sys-

> tem, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds

(*id.*), the Court recognized that "desegregation of schools ultimately will have impact on other forms of discrimination." *Id.* at 22-23. After all, segregation of the schools had certainly had a similar impact in facilitating other modes of discrimination. The Court therefore found it unnecessary to "reach in this case the question whether a showing that school segregation is a consequence of other types of state action, *without any discriminatory action by the school authorities,* is a constitutional violation requiring remedial action by a school desegregation decree." *Id.* at 23 (emphasis added).

In combination, the factors thus assessed by the Court presented "a 'loaded game board' " which often could not be effectively counteracted merely with " '[r]acially neutral' assignment plans." *Id.; see also North Carolina State Bd. of Educ.* v. *Swann,* 402 U.S. 43, 45-46 (1971) (A " 'color blind' . . . requirement, against the background of segregation, would render illusory the promise of *Brown*. . . . "). Accordingly, the Court required school authorities and the courts to "make every effort to achieve the greatest possible degree of actual desegregation . . .," 402 U.S. at 26; *see also Davis* v. *Board of School Comm'rs,* 402 U.S. 33, 37 (1971), which adds, "taking into account the practicalities of the situation." The Court thus squarely placed the responsibility for school segregation in a system with a history of state-imposed racial separation on the school authorities (402 U.S. at 26):

> 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. 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 predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. 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.

Federal judicial attention was first directed at Charlotte when the plaintiffs there filed their initial complaint in 1965, whereas Dayton did not come under such scrutiny until 1972. Also, Charlotte carried out its program of systematic pre-*Brown* discrimination pursuant to written state law, whereas Dayton accomplished essentially the same result through local policy and practice in contravention of state law. But, as we shall show, there is no constitutional significance in these differences—unless the Court was wrong in its conclusion in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973), that local action can create a dual school system, within the contemplation of *Brown*, just as effectively as statutory command. For after *Brown*, Dayton did pretty much the same thing that Charlotte did: it ignored and resisted its *Brown II* duty; and, by covert policy and persistent practice, it perpetuated and compounded its officially inflicted system of public school segregation from *Brown* through the time of trial. As a result, as we demonstrate in the Argument, *Swann* applies full force to this case.

Summary of Argument

I.

A. *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973), was clearly right in its holding that discriminatory official conduct in violation of ostensible state law can cause as much harm and have as much impact as discriminatory state legislation. This holding is in precise accord with the intent of the framers of the Fourteenth Amendment and the Reconstruction implementing legislation pursuant to which this case is brought, as frequently recognized by this Court. *E.g.*, *Ex Parte Virginia*, 100 U.S. 339 (1880); *Yick Wo* v. *Hopkins*, 117 U.S. 356 (1886); *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278 (1913); *Monroe* v. *Pape*, 365 U.S. 167 (1961). When this Court outlawed state-imposed school segregation in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), it announced a constitutional principle that was as binding with respect to the local segregative policies, practices, customs and usages of Dayton school authorities as it was the statutory dual systems of the South. The Dayton Board could hardly feign ignorance of the applicability of *Brown*, because Ohio school authorities were expressly informed of *Brown's* meaning by an opinion of the Ohio Attorney General *and* a decision of the United States Court of Appeals for the Sixth Circuit in 1956. Opinion No. 6810 (July 9, 1956) (App. 331-40-Ex.); *Clemons* v. *Board of Educ. of Hillsboro, Ohio*, 228 F.2d 853 (6th Cir. 1956); *id.* at 859 (Stewart, J., concurring).

B.1. At the time of this Court's decision in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), the Dayton Board of Education was pursuing a systematic program of racial separation in the public schools which constituted the district basically a dual school system. Defendants' discriminatory policies and practices extended throughout the

system and infected every facet of school administration. This conclusion does not rest on circumstantial evidence (or the standards for analyzing that type of evidence set out in such cases as *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and *Washington* v. *Davis*, 426 U.S. 229 (1976)); nor does this conclusion in any way need support from the evidentiary and burden-shifting principles articulated in *Keyes*. Rather, the conclusion is compelled as a matter of direct and largely uncontroverted evidence.

B.2. In terms of actual segregative impact, the Dayton Board's discriminatory policies and practices over the course of the half century preceding *Brown* are constitutionally indistinguishable from the segregation laws invalidated in 1954. The Board's actions dramatically identified certain schools and certain parts of the system for the education of black students only; reciprocally, other schools and other parts of the system were earmarked for whites. The result was not perfect apartheid, but it was overwhelming state-imposed segregation nonetheless. Just as surely as in Charlotte, the Dayton Board, through its official actions, had prescribed an environment and a mind-set of racially separate public schooling with intractable, far-reaching consequences.

B.3. Contrary to the contention of petitioners, we do not attach decisive evidentiary significance to the year 1954. But that year does have singular legal significance: Upon the decision in *Brown*, the Dayton Board's federal constitutional responsibilities were drastically altered. What the Board did following *Brown* must therefore be evaluated in light of the Board's duty to effectuate "the transition to a system of public education freed of racial discrimination," *Brown II*, 349 U.S. 294, 299 (1955), in accordance with the evolving guidelines laid down by this Court with increasing

specificity during the years between *Brown II* and *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Instead of complying with its constitutional duty, however, the Board continued to pursue many of its overt segregation practices, supplemented by covert discriminatory practices which both perpetuated and expanded the dual system.

II.

A. Now that the court of appeals has confronted the complete record and properly found an intended dual system at the time of *Brown* that Dayton school authorities thereafter perpetuated through the time of trial, the "incremental segregative effect" inquiry described in *Dayton I*, 433 U.S. at 420, does not apply by the express terms of the Court's decision. Whatever the meaning of this cryptic phrase for the remedial inquiry in cases "where mandatory segregation by law of the races has long since ceased" (*id.*), it has *no* meaning independent of *Green*, 391 U.S. at 438, *Swann*, 402 U.S. at 24-26, and *Keyes*, 413 U.S. at 213-14, in this case where just such officially imposed systemwide segregation persisted through the time of trial in the form of a basically dual system created and maintained by local school authorities. In the context of such a systemwide violation having a continuing systemwide impact, a systemwide remedy is required by *Dayton I*, 433 U.S. at 420, *citing Keyes*. 413 U.S. at 213. That such dual schooling was imposed both prior to and after 1954 in contravention of state law rather than pursuant to a state statute is irrelevant. As a result, the remedial inquiry here is controlled by *Swann* and *Green* v. *County School Bd.*, 391 U.S. 430 (1968); adherence to the principles there enunciated dictates the need for a systemwide desegregation remedy, as the court of appeals correctly concluded.

B. At no time between *Brown* and the time of trial did the Board take any action which was either designed to effectuate, or which did in fact effectuate, the transition to a non-discriminatory system of schooling. If the phrase "isolated instances" has any relevance to this case, it is as a description of Board actions resulting in desegregation. Even if the Board's post-*Brown* conduct is deemed to have been "racially neutral" (which it demonstrably was not), therefore, *Swann* and *Green* impose the obligation to bring about a maximum amount of desegregation within the practicalities of the situation, at least in the absence of a convincing demonstration by the Board that the one-race status of specific schools is not attributable in any significant respect to present or past discrimination by school authorities. The Board here, of course, made no such showing; instead, if anything, intentionally segregative conduct following *Brown* not only perpetuated, but also further aggravated the continuing racially dual system of schooling "by intensifying the stigma of implied racial inferiority." *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 461 (1972); *see also United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 492 (1972) (Burger, C. J., concurring).

III.

A. Alternatively, if the Court determines that the Board's pre-*Brown* program of discrimination resulted in something constitutionally less than a dual school system, the conclusion is still inescapable on this record that the Dayton Board was at the time of trial operating a school system intentionally segregated on a systemwide basis, necessitating a systemwide remedy. Under *Keyes*, the direct evidence of an official pre-*Brown* segregation policy coupled with both direct and circumstantial evidence of post-*Brown* intentional discrimination raises a strong in-

ference that, as of the time of trial, the longstanding and continuing purposeful discrimination on the part of the school authorities was at least one of the primary and proximate causes contributing to the pervasive segregation of the Dayton schools. In light of the extensive and wide-ranging nature of this evidence, the Board bore the burden of disproving this *prima facie* case. *Keyes*, 413 U.S. at 203 and 208-13. The Board did not come close to meeting that burden: it totally failed to show that its systematic program of segregation was not intended.

B. Plaintiffs, under *Swann* and *Keyes*, are thus entitled to a systemwide desegregation remedy, except to the extent that the Board can clearly demonstrate that specific one-race "school assignments are genuinely nondiscriminatory"—i.e., "not the result of present or past discriminatory action on their part," *Swann*, 402 U.S. at 26, despite the Board's proven intent to segregate the entire system. *Keyes*, 413 U.S. at 213-14. The "incremental segregative effect" question of *Dayton I*, no matter whose burden it is, has no meaning in such a context independent of the standards for judging causation and remedy in *Keyes* and *Swann*. Where, as here, the nature and extent of the violation is systemwide intentional segregation, the proper scope of the remedy is actual systemwide desegregation. *Dayton I*, 433 U.S. at 420; *Keyes*, 413 at 213-14; *Swann*, 402 U.S. at 24-26.

IV.

The decisions by this Court in this case and in the companion *Columbus* case do not relate to correcting any aberrant review provided by a single circuit, as charged by petitioners. Instead these cases will determine whether this Court's commitment to "root and branch" relief from intentional segregation within local school districts is to con-

tinue in any meaningful form as the constitutional law of this entire Nation. At stake, therefore, is whether *Brown* is to be rendered a hollow declaration by gutting *Green*, *Swann*, and *Keyes* and transforming *Dayton I* into a talismanic justification for limiting any school relief to the current and almost complete level of residential segregation. We respectfully submit that, instead, these cases are due to be affirmed so that this and future generations of schoolchildren will not again have to live under a new regime of "separate and equal."

ARGUMENT

I.

At the Time of Trial in This Case the Dayton Board of Education Was Operating a Segregated School System Within the Meaning of *Brown* v. *Board of Education*; That System Had Existed Throughout This Century; It Became Unconstitutional Upon *Brown's* Correct Interpretation of the Fourteenth Amendment in 1954; But, Instead of Being Dismantled, Thereafter It Was Deliberately Compounded Through the Time of Trial.

The parties have taken approaches to the record evidence that are wholly irreconcilable. There has been no offer of compromise from either side, and no position taken which is capable of compromise. This Court is left, as the lower courts have been, with no immediately apparent middle ground. The reason is this: The Dayton Board cannot win without questioning the sincerity of *Brown* and its progency, and in effect contending that this comparatively brief commitment to equal protection of the laws has been "a vain thing." [28]

[28] *Cf. Screws* v. *United States*, 325 U.S. 91, 100 (1945).

This fundamental conflict in the positions of the parties has been disguised somewhat by petitioners' arguments (Pet. Br. 13-26) concerning the nature and role of evidentiary presumptions to assist in determining the presence or absence of segregative intent. The judgment of the court of appeals, however, does not depend on the use of any presumption concerning intent, and this Court's decision in this case need not turn on such issues (*see* discussion at pp. 90-93, *infra*). And petitioners' "legal presumptions" argument—*e.g.*, that "the Sixth Circuit creat[ed] . . . a legal presumption of systemwide and continuing segregative intent and effect by juxtaposing pre-1954 actions with a current condition of racially imbalanced school populations" (Pet. Br. 13)—is false on its face. Of greater relevance to this Court's review and understanding of the fundamental conflict here at issue, therefore, is the petitioners' suggested approach to analyzing the basic factual question of whether past or present intentionally discriminatory school board conduct contributed to the creation or maintenance of the current condition of school segregation existing at the time of trial.

The controlling assumptions in petitioners' approach are as follows: First, the "focus of judicial inquiry should be on conditions existing at the time of suit" (*e.g.*, Pet. Br. 15), not on the historic process (including school board conduct) leading to the continuing condition of one-race schooling. Second, such extreme school segregation is a "natural" even "inevitable" condition, rarely if ever attributable to the action of school authorities as compared with the "forces" of residential segregation. *E.g.*, Pet. Br. 45-47. It is, therefore, *not probable* that *past* school board administrative policies and practices, even where they have been racially discriminatory, contributed much to the development of present racial patterns; acts of intentional and even across-the-board discrimination occurring fifteen

to thirty years ago (when segregation was not only the official policy but also the accepted community standard) *probably* are *not* connected in any way with the continuing and current condition of segregation. *E.g.*, Pet. Br. 46-54. Third, each item of evidence of intentionally segregative school board action should be evaluated (1) in almost complete isolation from the whole record of school discrimination (and even other evidence relating both to intent and to the development and growth of any system of basically dual schooling) and (2) in the context of the historic and continuing residential segregation (for which, petitioners' argue, they bear neither responsibility nor input). *E.g.*, Pet. Br. 27-39, 45-54.[29]

This is the gist of petitioners' case. It was accepted in its entirety by the district court and condemned to the same degree by the court of appeals. It requires an approach to the evidence that blinks reality. It entails assumptions about the effect of educational policy implementation that do not accord with observed history. It trivializes the impact of an official act of racial discrimination and puts itself at odds with human knowledge and understanding—and with *Brown* v. *Board of Education*. It is so wrong that if it is right, then petitioners and their friends of Court are also correct in their implicit contention that the plaintiffs in cases such as this ought to prevail only in the most extraordinary of circumstances.

In contrast, from the time of trial to this day, respondents have consistently advanced, as their principal theory, the contention that the record establishes beyond doubt that petitioners and their predecessors had basically com-

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[29] With these blinders in place, such an approach necessarily limits any finding of violation to current school board practices that *increase* the school segregation above and beyond existing residential segregation.

mitted the same wrong, and therefore were under the same constitutional duty, as the school systems involved in *Brown*. We have urged alternative theories, and they are not waived here. But our primary argument, through four rounds in the courts below and one round here, has been that *Brown, Green* and *Swann* apply to this case as a matter of fact.[30] This case was not tried on a principal theory which was dependent upon concepts of *prima facie* case, presumptions, and shifting burdens of production and persuasion.[31] Although *Keyes* was welcome support,[32] plaintiffs' claim for relief did not then, and does not now, rest on *Keyes'* articulation and application of those concepts. The only aspect of the holding in *Keyes* which is relevant to this theory is a rule that is undisputed, and

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[30] Petitioners are wrong in their charge that this theory "was first suggested in the amicus brief filed by the Department of Justice when this litigation came before the Court in 1977." Pet. Br. 18. The argument was our first and principal argument in *Dayton I*, *see* pp. 58-71 of Brief for Respondents in No. 76-539, as it was on our first appeal to the Sixth Circuit leading up to *Brinkman I*. *See* Brief for Plaintiffs-Appellants in 6th Cir. Nos. 73-1974-75.

[31] Argument III, *infra*, presents our alternative equal-protection theory based on such evidentiary considerations; it need not be reached if the Court agrees with our Arguments I and II that the Dayton Board created and maintained a dual system. (In addition, the alternative Thirteenth Amendment and statutory theories based on 42 U.S.C. §§1981-1988 should, of course, await at least some consideration in the courts below (*see* note 3, *supra*) before review by this Court.)

[32] This case was tried between 13 November and 1 December 1972, and the district court's first liability decision was filed on 7 February 1973 (Pet. App. 1a), all prior to the announcement of the *Keyes* decision on 21 June 1973, 413 U.S. 189. In its Supplemental Order on Remedy (Pet. App. 26a), filed 13 July 1973, the district court "studied" *Keyes* (Pet. App. 28a) and, apparently in recognition of the fact that its approach was incompatible with the majority opinion in *Keyes*, the court placed exclusive reliance on the dissenting part of Mr. Justice Powell's separate opinion (Pet. App. 29a-30a, 31a) and Mr. Justice Rehnquist's dissenting opinion. Pet. App. 31a.

which has not been the subject of serious debate since *Ex parte Virginia*, 100 U.S. 339 (1880): that the official act of one clothed with state authority can be as harmful —can be as unconstitutional under the Fourteenth Amendment—as the official policy of a state expressed in written statute and constitution; indeed, the practical and constitutional result can be the same even when the official act contravenes state "law." Even those who do not embrace *Green* and *Swann* concede that:

> It is quite possible, of course, that a school district purporting to adopt racially neutral boundary zones might, with respect to every such zone, invidiously discriminate against minorities, so as to produce substantially the same result as was produced by the statutorily decreed segregation involved in *Brown*. If that were the case, the consequences would necessarily have to be the same as were the consequences in *Brown*.

Keyes v. *School Dist. No. 1*, 413 U.S. 189, 256 (1973) (Rehnquist, J., dissenting). How to assess whether such a result obtains is the issue that divides the parties, and apparently the one that divides the Court.

In the Statement of the Case, *supra*, we have traced the history of segregation in the Dayton public schools from "root" to "branch," *Green*, 391 U.S. at 438—the only logical way to evaluate the growth of anything. This approach to the record is no more than recognition of the plain fact that "present events have roots in the past," *United States* v. *Oregon State Med. Soc.*, 343 U.S. 326, 332 (1952), and that past conduct is significant because "it illuminates or explains the present and predicts the shape of things to come." *Id.* at 333. *Accord, e.g., Continental Ore. Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 709-10

(1962); *Standard Oil Co.* v. *United States,* 221 U.S. 1, 75-77 (1911); *Kansas City Star Co.* v. *United States,* 240 F.2d 643, 650-51 (8th Cir. 1950).[33] As a corollary to this sound method of analysis, it is essential that each part of the record be viewed in its total context and that plaintiffs' claims not be approached "as if they were [many] completely separate and unrelated lawsuits." *Continental Ore Co.* v. *United States, supra,* 370 U.S. at 698-99. What the Court said there applies here with equal force (*id.* at 699):

> In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ". . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U.S. 525, 544 . . . ; and in a case like the one before us, the duty of the [court] was to look at the whole picture and not merely at the individual figures in it." *American Tobacco Co.* v. *United States,* 147 F.2d 93, 106 (CA 6th Cir.). See *Montague & Co.* v. *Lowry,* 193 U.S. 38, 45, 46.

Accord, Keyes, 413 U.S. at 200, 203, 207-08.

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[33] In *Keyes,* 413 U.S. at 210-11, the Court confirmed the obvious relevance of this analytical principle to school segregation cases such as this. The Court, referring to *Swann,* 402 U.S. at 31-32, said (413 U.S. at 211):

> We made it clear, however, that a connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.

A. A Dual School System, Within the Prohibition of the Fourteenth Amendment and *Brown* v. *Board of Education*, May Be Brought Into Being as Effectively by Local Administrative Policy and Practice as by State Constitutional and Statutory Mandate; Such a System Cannot Stand Under the Fourteenth Amendment Even if It Also Violates State Law.

Petitioners have placed much reliance on the fact that Ohio state law has not authorized racially separate schools for ninety years. But, for even longer than that it has been settled that official conduct which does not afford equal protection of the laws is damned by the Fourteenth Amendment just as much as written state law which produces that result; and this is so even when such official conduct violates state law. In *Ex parte Virginia*, 100 U.S. 339 (1880), the Court invoked the Fourteenth Amendment against a state judge who had "exclude[d] and fail[ed] to select as grand and petit jurors certain [black] citizens . . . possessing all other qualifications prescribed by law" (*id.* at 340), even though "he acted outside of his authority and in direct violation of the spirit of the state statute." *Id.* at 348. The Court held that "immunity from any such [race] discrimination is one of the equal rights of all persons, and that any withholding it by a State is a denial of the equal protection of the laws, within the meaning of the [Fourteenth] Amendment." *Id.* at 345. In words that are now familiar, the Court defined the functional operation of the prohibitions of the Amendment (*id.* at 346-47):

> They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers

> are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

This principle has permeated Fourteenth Amendment jurisprudence ever since. *See also Virginia* v. *Rives,* 100 U.S. 313 (1880); *Neal* v. *Delaware,* 103 U.S. 370 (1881); *Yick Wo* v. *Hopkins,* 117 U.S. 356 (1886). It has been fully applied in behalf of corporate due process. *See, e.g., Home Tel. & Tel. Co.* v. *City of Los Angeles,* 227 U.S. 278 (1913); *Raymond* v. *Chicago Union Traction Co.,* 207 U.S. 20 (1970). And with at least equal force, it has been repeatedly employed in the protection of the human rights secured by the Amendment and its implementing legislation. *See, e.g., Mooney* v. *Holohan,* 294 U.S. 103 (1935); *United States* v. *Classic,* 313 U.S. 299 (1941); *Screws* v. *United States,* 325 U.S. 91 (1945); *Monroe* v. *Pape,* 265 U.S. 167 (1961); *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144 (1970).[34]

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[34] Of particular significance are the Court's decisions construing 42 U.S.C. §1983, one of the statutes pursuant to which this case is brought. Section 1983 affords a federal-court cause of action against "[e]very person who . . . [acts] under color of any statute, ordinance, regulation, custom or usage, of any State . . . [and thereby] subjects, or causes to be subjected, any cititzen . . . to the deprivation of [Fourteenth Amendment rights] . . . ." This section derives from §1 of the Civil Rights Act of April 20, 1971, 17 Stat. 13, expressly enacted to enforce the Amendment within three years following its adoption. One of the recurring objections to the 1871

When *Brown* v. *Board of Education* was decided in 1954, therefore, it announced a substantive interpretation of the

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Act was the contention that the Fourteenth Amendment operated against the states only with respect to discriminatory legislation; that the Amendment, in the words of one opponent, is "prohibitory only on the legislation of the States." CONG. GLOBE, 42d Cong., 1st Sess. 455 (1871) (Rep. Cox). This position accordingly held that Congress' authority to enforce the Fourteenth Amendment did not extend to forms of state action other than to discriminatory or otherwise unlawful legislation. *See, e.g., id.* at 420 (Rep. Bright), 429 (Rep. McHenry), 600 (Sen. Saulsbury), 661 (Sen. Bickers), app. 160 (Rep. Golladay), app. 208-09 (Rep. Blair of Missouri), app. 231 (Sen. Blair), app. 259 (Rep. Holman); *see especially* the argument of Senator Thurman, leader of the opposition in the Senate, app. 221. The proponents of the legislation flatly rejected this view of the Fourteenth Amendment. Throughout the debates they focused on the conduct of state and local officials, institutions and other instrumentalities of state government. "The laws must not only be equal on their face," said Representative (later President) Garfield, "but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive officers of the State." *Id.* at app. 153. Clearly it was with the administration of state laws that they were most concerned. *See also, e.g., id.* at 321 (Rep. Stoughton), 334-35 (Rep. Hoar), 375 (Rep. Lowe), 394 (Rep. Rainey), 426 (Rep. McKee), 429 (Rep. Beatty), 444-45 (Rep. Butler), 459 (Rep. Coburn), 482 (Rep. Wilson of Indiana), 607-08 (Sen. Pool), 696-97 (Sen. Edmunds), app. 72 (Rep. Blair of Michigan), app. 80 (Rep. Perry), app. 147 (Rep. Shanks), app. 152-53 (Rep. Garfield), app. 182 (Rep. Mercur), app. 185-86 (Rep. Platt), app. 300 (Rep. Stevenson), app. 309-10 (Rep. Maynard), app. 314-15 (Rep. Burchard).

Thus, in *Monroe* v. *Pape, supra,* 365 U.S. at 180 (*see also id.* at 193 (Harlan, J., concurring)), the Court was compelled to hold:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

This conclusion is reinforced by §1983's reference to "any . . . custom, or usage, of any State." Construing this phrase in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970), Mr. Justice Harlan wrote for the Court:

> Congress included customs and usages within its definition of law in §1983 because of the persistent and widespread discrim-

Fourteenth Amendment that was as applicable to the racially discriminatory policies, practices, customs and usages of the Dayton school authorities as it was to the boards of education involved in *Brown* which were operating segregated schools pursuant to the written command or authority of state law. Nothing in *Brown's* holding—that state-imposed segregation of the public schools is proscribed by the Equal Protection Clause of the Fourteenth Amendment—so much as intimates that its application was confined only to such segregation brought about through written law. *See also* note 43, *infra.* If there was any room for such a view, it was promptly foreclosed in *Cooper* v. *Aaron,* 358 U.S. 1 (1958), where the Court, after quoting from *Ex parte Virginia, supra,* declared that "the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, . . . or whatever the guise in which it is taken. . . ." 358 U.S. at 17.

The Attorney General of Ohio had comprehended this plain meaning even before the decision in *Cooper* v. *Aaron.* In Opinion No. 6810 (9 July 1956), advising the State Board of Education that it should withhold state support from any school district practicing racial segregation, he said (App. 339-Ex.):

> The term "law" as used in Section 3317.14, Revised Code, forbidding the distribution of state funds to school districts which have not "conformed with the

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inatory practices of state officials. . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."

The Fifteenth Amendment and its implementing legislation have been construed in a similar fashion. *See, e.g., Terry* v. *Adams,* 345 U.S. 461 (1953); *Smith* v. *Allwright,* 321 U.S. 649 (1944).

> law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.

At about the same time, the Court of Appeals for the Sixth Circuit also informed Ohio school districts that they were subject to *Brown*. *Clemons* v. *Board of Educ. of Hillsboro*, 228 F.2d 853 (6th Cir. 1956).

Thus, the principle laid down in *Brown* was immediately, and at all times thereafter, binding on the Dayton school authorities.[35] The fact that they and their successors were not brought into federal court to account for their actions until 1972 no more relieves them of their constitutional duty than did the failure of the plaintiffs in Charlotte (*Swann*) and New Kent County (*Green*) to initiate federal suit before 1965. The rights secured in *Brown* were not made available only upon demand.

When *Keyes* expressly held in 1973 that *Brown* is not limited in its application to public school segregation brought about by written state law, the Court merely adhered to what had been squarely decided a century ago in constitutional and legislative design and intent, and reaffirmed in a host of intervening judicial decisions. This case must be decided in accordance with those pronouncements.

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[35] The authors of *Brown* would be astounded to read that "[t]hat decision did not, however, create a new constitutional principle that was valid for the post-1954 era and inapplicable to the years before 1954." Pet. Br. 17.

B. At the Time of *Brown* and Ever After Petitioners Operated a Dual School System in Fact.

We show here that for forty years prior to *Brown* the Dayton Board—in only arguable and partial conformity with the separate-but-equal doctrine of federal law, *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), but contrary to state law—systematically created and operated, pursuant to plain old-fashioned racially discriminatory purpose, a segregated school system. Between *Brown* and the trial of this case, that system was deliberately perpetuated and expanded, though in some instances in more subtle ways.

1. *The Board's Pre-*Brown *Conduct.*

Our case, and the record of intentional school segregation in Dayton, began in 1912, when petitioners' predecessors operated a segregated all-black class, with an assigned black teacher, Ella Lowrey, at the rear door of the "white" Garfield school in West Dayton. At least this early, then, the Dayton Board, through its official action based solely on skin color, proclaimed that there was something wrong with allowing black and white school children to learn together. This proclamation received renewed emphasis when black children at Garfield were transferred to a four-class frame building located in back of the main building, soon expanded by a two-room portable which was later replaced with a four-room permanent structure, totalling eight all-black classes, to which were assigned eight black teachers, wholly segregated from the white teachers and students in the principal school building. This message of segregation as official educational policy was dramatically reinforced during this period when school authorities attempted to chase Robert Reese and his sister back across the Miami River to the blacks-only Garfield "annex" to prevent them from attending a "white" school—action which their father

fortunately had the wherewithal to prevent (as to his children only) through a lawsuit in state court. Despite the success of this litigation, official discrimination continued unabated and was further supplemented by the rigid practice of *never* allowing black teachers to teach white children, by discriminatory treatment of the few black students who were able to attend racially "mixed" classes, and by assigning black orphanage children from across town to the all-black classes at Garfield. Finally, in the early 1930's the Board transferred white teachers and students to other schools and converted the entire Garfield complex into a blacks-only school. *See* pp. 13-17, *supra*.

An official policy, practice, custom and usage of public school segregation was thus set in place on a systemwide basis. What happened thereafter followed the same pattern: the black pupil population continued to grow, and with it grew the Board's segregation policy; black pupils and teachers were directed, through official action, to parts of the system exclusively set aside for them; and wherever black children cropped up in a part of the system not intended for them, they were subjected to racially discriminatory within-school and extracurricular treatment.

In the mid-1930's all of the white teachers and students in the Willard elementary school were transferred to other schools, and Willard was converted into another school for black teachers and black children only. *See* p. 17, *supra*. At about the same time, Dunbar High School was constructed and opened on a systemwide blacks-only basis. The principal and staff all were black. Only black students were assigned—directly, through counselling and disciplinary procedures, and through psychological coercion—from all over the system. Dunbar had no attendance zone, but instead was a systemwide blacks-only school (which continued in fact until 1962). White students living near

the Dunbar school were assigned farther away to predominantly white schools; these high schools also had no attendance boundaries and drew their students on a systemwide basis prior to 1940. *See* pp. 17-19, *supra*.

Between 1943 and 1945 Wogaman, like Willard and Garfield before it, was converted into an all-black elementary school. *See* pp. 19-20, *supra*. These segregative practices were reinforced by insidious practices (in-school discrimination, explicitly segregated or whites-only recreation facilities, race-based pupil counselling procedures) which discouraged black students from attending predominantly white schools in more than token numbers (*see* pp. 15-16, 18-19, *supra*), and by strict adherence to the policy of not allowing black teachers to teach white children under any circumstances. *See* pp. 13-15, 17, 19-20, *supra*. Supplementing these pervasive devices was joint participation by the Board with the official discrimination of public housing authorities. *See* pp. 20-21, *supra*.

The result was that by 1951-52 (the last year prior to 1963-64 for which enrollment data by race are available), 83% of all white students attended schools that were all- or virtually all-white; 54% of the black students were assigned to the four blacks-only schools with all-black staffs (the system was 19% black at this time), and another 19% of the black students were in adjacent schools which were about to be converted (as discussed below) into black schools. *See* pp. 21-22, *supra*.[36]

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[36] To this point, neither the summary of factual conclusions set out in text nor the underlying subsidiary facts are in significant dispute. They are the subject of largely uncontradicted record evidence, the essence of which was not contradicted by the district court, although that court selected petitioners' tactic (*see* Pet. Br. 16, 50) of either ignoring these facts or alluding to them at random as though they were of anecdotal interest only. The court of appeals correctly sized up the significance of this portion of the record. *See* Pet. App. 195a-203a.

In 1951 and 1952 the Board implemented two major actions having profound racial consequences: it put its theretofore unwritten but nonetheless explicit policy of racial separation in the form of written law through formalization and slight modification of the systemwide policy of faculty segregation; and, through a series of complex, but tightly controlled, interlocking maneuvers, reorganized the West Side schools in such manner that, coupled with the other aspects of the segregation policy which had already hemmed 54% of the black pupils and all of the black teachers into educational ghettos, Dayton continued to be, and was at the time of *Brown,* a dual school system in every sense but name. The schemes worked as follows.[37]

In the 1951-52 school year, the Board, through the Superintendent, announced a policy which modified, and for the first time in writing acknowledged the existence of, its rigid policy of never allowing black teachers to teach white children. The modification, preceded by the incredible statement that the Board "is opposed to racial segregation in the public schools" (App. 182-Ex.), promised in self-contradictory terms "to continue and enlarge gradually the program of integration of the educational staff with the objective of having . . . approximately the same proportion of negro teachers as there are negro pupils in the Dayton schools." *Id.*[38] The policy statement then seeks to absolve the school authorities of the previous forty years of official

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[37] The basic facts which underlie the summary which follows in text are also not in significant dispute (*see* note 36, *supra*). But petitioners and the district court have viewed them in such isolation from the record and reality, and have so twisted their context and distorted their meaning, as to necessitate the concession from us that these are disputed "factual matters."

[38] Thus the Board defined "integration" as having in its employ enough black teachers to teach the black pupils in the system. The southern dual systems at this time were following a similar "integration" program.

racism and the twenty coming years of segregated schooling by implying that such segregation merely reflects the will of the black community as well as the white (*id.*):

> The school administration will make every effort to introduce some white teachers in schools in negro areas that are now staffed by negroes, but it will not attempt to force white teachers, against their will, into these positions.
>
> The administration will continue to introduce negro teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro teachers.
>
> The Board of Education does not consider a school to be segregated when the school district, which the school serves, contains children of only one race. Because attendance at Dunbar High School, in the 9, 10, 11, and 12 grades, is voluntary, the Board of Education does not consider Dunbar High School to be a segregated school.[39]

This policy, pretentiously phrased as both a favorable response and a defense to the black community's demands for an end to deliberate school segregation, sent forth an unmistakable message: Segregated schooling has become the official way of educational life in this community; we, the school authorities, despite the fact that our heavy hand is responsible for the establishment and maintenance of this official color line, do not propose to breach it except to the extent that the way of life itself, as determined by the controlling white majority, manifests tolerance of breaches. In other words, having secured a milieu of school segregation the school authorities then, ostensibly, submitted to

[39] Petitioners jest when they refer to this policy as an "unequivocal expression of non-segregatory intent." Pet. Br. 32.

that "natural" milieu the whole questions of if and when changes should take place. This is the genesis of the Board's current defense that school segregation was inevitable and beyond its control or influence. The proposition is denied by the above-quoted policy statement. That policy bespeaks official segregation—not just segregation of teachers, not just random, isolated or unrelated acts of errant discrimination, but a policy of intentional, systematic racial segregation in all aspects of public school operation. No other conclusion is permissible. *See* pp. 23-25, *supra*.[40]

Despite the comprehensive nature and firmness of the systemwide foundation of segregation that had been laid, racially separate schooling was apparently too important to the school authorities and their controlling white constituents just to be left to "natural" forces. Moreover, the black community continued to object to school segregation.

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[40] The district judge refused to acknowledge the significance of these facts and their conclusive nature with respect to plaintiffs' contention that the Board was effectively operating a dual system at this time and thereafter. He overlooked the very obvious fact that the Board's pre-*Brown* faculty-assignment policies operated hand-in-glove with the discriminatory pupil-assignment practices, proving beyond doubt that the Board was guilty not only of "intent to segregate," but also of subjective racial malevolence. It is thus absurd for the district court to argue that "[i]n every specific instance brought to the Court's attention in which black faculty were assigned to black schools, the school was already identifiable as being black because of the racial population of the students." Pet. App. 153a. [It is not clear from the opinion whether this statement is intended to apply to pre-*Brown* practices. If it is, it is clearly erroneous: in the four blacks-only schools created before 1954 all-black faculties were assigned simultaneously with all-black student bodies. *See* pp. 13-20, *supra*. The court's statement is also clearly erroneous with respect to post-*Brown* faculty-assignment practices, discussed below.] Discrimination in one aspect of school administration hardly can be justified, and certainly not legalized, on the theory that the same result was being accomplished through other modes of discrimination. Again, the court of appeals properly assessed the significance of the faculty segregation policy. Pet. App. 195a-201a.

In December 1952 the Board adopted a complex scheme affecting the West Side schools which again purported to be a favorable response to the protests of the black community, but which again was a patent artifice for giving the white educational community what it wanted or was perceived to have wanted: reinforced segregation of the schools. The undisputed subsidiary facts are set out in the Statement of the Case, pp. 25-27, *supra.*

The district court's suggestion that the West Side reorganization "was an experiment in integration, and was intended as such" (Pet. App. 155a), is a completely misleading characterization of the facts. The court's conclusion, immediately following the statement just quoted, is that the Board's "purpose was to enable black students to go to an integrated rather than an all-black school if they chose to do so." *Id.* This is getting somewhat closer to what may be half of the truth, which is that the Board, under continuing pressure from the black community to stop mistreating black children, proposed two alternative "plans," neither of which anyone familiar with the facts could possibly have thought would actually result in integration. The Board's purpose in these proposals was to try and appease the black community without seriously breaching the *status quo* of dual schooling in a system with increasing numbers of blacks. This point is indisputable because neither of the Board-proposed options recommended that the status of the four official blacks-only schools be altered in any respect, let alone be "integrated," by the assignment of nearby white children or faculty.[41] And

[41] Instead, the Board merely (1) substituted optional zones to guarantee the ability of nearby whites to continue to avoid attendance at the all-black schools, as they had since the conversion of these schools under the Board's prior transfer policy, and (2) continued to assign virtually all-black faculty to the all-black schools pursuant to the faculty-segregation policy discussed above. In a

beyond doubt, the option the Board implemented could not foreseeably have resulted in anything other than further entrenchment of the dual system, which is what happened. *See* pp. 25-26, *supra*.

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fact statement dated 2 December 1954, the Superintendent of Schools looked back on the events of 1951 and 1952 and made the following observations (App. 183-Ex. and 184-Ex.):

> All elementary schools have definite boundaries and children are obliged to attend the school which serves the area in which they reside. The policy of transfers from one school to another was abolished two years ago when the boundaries of several westside elementary schools were shrunken, permitting a larger number of Negro children to attend mixed schools.
>
> * * *
>
> Dunbar High School has no boundary lines. Theoretically, any child in the city can elect Dunbar, but, practically, only Negro children attend. The staff is completely negro, except for Driver Training teachers. Children who attend the high school grades at Dunbar do so by choice. A Negro child can always attend the high school which serves his area.
>
> * * *
>
> At the present time we employ 168 negro teachers out of a total 1,577 teaching positions, which is 10.6%. In September, 1951, the first negro teacher was placed in a mixed school—Weaver School. At the present time we have 17 negro teachers assigned to mixed or all-white schools. In addition, we have at the present time 8 white teachers working in all-negro schools —3 on a full-time basis and 5 on a part-time basis.
>
> * * *
>
> About two years ago we announced a policy of attempting to introduce white teachers in our schools having negro population. We have not been too successful in this regard and at the present time have only 8 full or part-time teachers in these situations. There is a reluctance on the part of white teachers to accept assignments in westside schools and up to the present time we have not attempted to use any pressure to force teachers to accept such assignments. The problem of introducing white teachers in negro schools is more difficult than the problem of introducing negro teachers into white situations. There are several all-white schools which in the near future will be ready to receive a negro teacher.
>
> The policy of sending negro children from Shawen Acres to Garfield School was discontinued this September and these children now attend Van Cleve, Brown, Loos and Shiloh schools.

That this segregative result was also actually intended by the Dayton Board represents the other half of the truth about the West Side reorganization. Three concomitant, intentionally segregative actions taken by the Board prove this second point: the placement of optional zones (to substitute for the prior "free transfer" policy) in white residential areas to allow whites to escape the already heavily black "mixed schools" to which blacks from the all-black schools were assigned; the continuation of systemwide faculty segregation pursuant to a policy expressly premised on racial discrimination (that transferred black teachers in ever increasing numbers *only* to the "mixed" schools, thereby designating them as "black schools," while otherwise maintaining with few exceptions the basic color line for staff at the all-white and all-black schools); and the construction of a new elementary school on the site of the black public housing project and assignment of all-black students and virtually all-black faculty thereto. *See* pp. 25-27, *supra.*

In this way, the Board successfully converted into all-black schools (though in a more subtle and complex manner than the earlier conversions of Garfield, Willard and Wogaman) the "mixed" schools—which in 1951-52 contained about 20% of the system's black students—surrounding the four official blacks-only schools. Hence, at the time of *Brown* three-fourths of the black school children were contained in one-race schools, staffed almost exclusively with black teachers, created and operated pursuant to racially discriminatory policies and practices of systemwide scope. The Board's intentionally segregative actions had been circumscribed by neither geography nor administrative function; they touched all facets of school operation and all parts of the system. This "all lead[s] the mind up to a conviction of a purpose and intent which we think is so

certain as practically to cause the subject not to be within the domain of reasonable contention." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 77 (1911). Petitioners were operating a dual school system at the time of *Brown*.

2. *The Nature of the Dual System at the Time of* Brown.

It perhaps conceals too much to say that Dayton school authorities found it easy, in the years following *Brown*, to maintain and build upon this almost totally segregated, dual school system. But before turning to the details of that conduct, it is helpful, for purposes of constitutional fact-finding and understanding, to assess the magnitude of the intentional segregation that had been practiced for over forty years. Because the system grew from 47 schools enrolling 34,948 pupils, 19% of whom were black, in 1951-52 (App. 2-Ex.), to 69 schools enrolling 55,142 students, 42.7% of whom were black, in 1971-72 (App. 4-Ex.),[42] petitioners suggest (Pet. Br. 29) that there could not conceivably have been any surviving vestiges of their pre-*Brown* conduct present at the time of trial. On its face, the argument transgresses reason and this Court's repeated findings about the intractable nature of intentional school segregation. At bottom, the argument, as we have said (*see* pp. 88-90, *supra*), presupposes that school segregation is a "natural" condition or, at worst, a condition independently brought about by forces of discrimination having no connection with, and wholly uninfluenced by, the discriminatory actions of school authorities. The argument reduces itself to the contention that to educate the entire pupil population of a school district on the basis of race for four decades is inconsequential in terms of segregative impact. If this is true, then the nation and this Court have seriously

[42] In 1951-52 77.6% of all pupils were enrolled in schools that were 90% or more black, or 90% or more white; the comparable figure for 1971-72 is 74.5%. App. 2-Ex. & 4-Ex.

overestimated the importance and influence of public education in a democratic society.

In *Brown I*, 346 U.S. at 493, the Court made the following finding about the significance of public education in our society:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

In this context, the Court recognized the devastating impact of official school segregation (*id.* at 494):

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

The Court thus assessed school segregation and its far-reaching consequences "in the light of [public education's] full development and its present place in American life throughout the Nation." *Id.* at 492-93.[43]

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[43] The Court noted that "in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern." 347 U.S. at 491 n.6.

The very justification for the "all deliberate speed" remedial timetable selected in *Brown II*, 349 U.S. at 30, was the recognization that the roots of state-imposed segregation ran deep: the Court spoke of "the complexities arising from the transition to a system of public education freed of racial discrimination" (*id.* at 299), of "varied local school problems" (*id.*), of "a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [*Brown*]" (*id.* at 300), and a long list of "problems" that must be met in order "to effectuate a transition to a racially nondiscriminatory school system." *Id.* at 300-01.

This understanding of the entrenched nature of intentional school segregation was not lost—indeed, it was made more apparent—in the years between *Brown II* and *Green*. In the latter case, the Court observed (391 U.S. at 435-56):

> It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the "white" schools. . . . Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about.
>
> . . .

The Court found, in fact, that imposed school segregation had been so well fortified that it ordinarily could not be successfully penetrated by so-called "freedom of choice" attacks (*id.* at 437-38):

> In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board

> opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

The Court also found that the failure of school authorities to promptly assault the problem had only entrenched it (*id.* at 438):

> In determining whether respondent School Board met that [*Brown II*] command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system.

The Court has never deviated from this basic understanding of the enormity and severity of intentional racial segregation in the public schools.[44] The Court re-evaluated this impact in great detail in *Swann*, and reached the same conclusion: racial discrimination by school authorities has

[44] The difficulty in eradicating such ingrained segregation caused the Court to direct lower courts to "retain jurisdiction until it is clear that state-imposed segregation has been completely removed." 391 U.S. at 429.

enduring and wideranging segregative results. *See* the quotations from *Swann* in the Introduction to Argument, pp. 75-82, *supra*. *See also Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972); *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972).

And throughout the opinion in *Keyes*, the Court reiterated this understanding of the nature and significance, in terms of segregative impact, of intentional discrimination by school authorities. The Court noted that such discriminatory practices, aimed at blacks, have the "reciprocal effect" of maintaining other parts of the system for whites (*id.* at 201-02); that such racial "earmarking" of the schools "may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools." *Id.* at 202. "[R]acially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions," concluded the Court (*id.* at 203), and "a connection between past segregative acts and present segregation may be present even when not apparent. . . ." *Id.* at 211. Accordingly, the Court held "that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation." *Id.*[45]

[45] As recently as the day *Dayton I* was decided, the Court, in *Milliken II*, forcefully reconfirmed its consistent understanding of the far-flung manifestations of intentional school segregation: "discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual school system founded on racial discrimination." *Milliken* v. *Bradley*, 433 U.S. 267, 283 (1977). Speaking to some of the "inequalities . . . which flow from a longstanding segregated system" (*id.*), the Court found (*id.* at 287):

> Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits

Petitioners' effort to fritter away the long-term significance of their systematic pre-*Brown* discrimination, on the basis of a presumption that alleged post-*Brown* neutrality and the passage of time somehow overwhelmed the historic system of dual schooling, is thus foreclosed by the decisions of this Court. Moreover, the Board's post-*Brown* conduct cannot be accurately analyzed without a full appreciation for the systemic impact of forty years of unrelenting racial discrimination in the operation of the Dayton public schools. No one can say with certainty what the racial composition of the system's schools would have looked like in 1954 in the absence of this persistent history of official segregation. But this Court's decisions, the Fourteenth Amendment and human knowledge instruct that the segregative impact of this history was profound. At the time of *Brown* the entire root system and the trunk of the dual system in Dayton were firmly established. Even if what happened between then and the time of trial was no more than the growth in that environment of "natural" segregative branches (*cf. Keyes*, 413 U.S. at 211), the entire system would have been unconstitutional. *Green*, 391 U.S. at 435-441. What in fact did happen, however, cannot possibly even be classified as "natural," as we now show.

3. *The Post*-Brown *Era.*

It is not seriously contended that petitioners or their predecessors ever took any affirmative action, other than the 1971 desegregation resolutions which were subsequently rescinded (*see* pp. 59-64, *supra*), to undo any aspect of the officially-imposed systemwide segregation extant at the time

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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.

of *Brown*. Petitioners do make a half-hearted assertion that "[w]henever any purpose other than convenience of access emerges unequivocally from the evidence, the purpose is one of improving racial balance." Pet. Br. 27; *see also id.* at 31. But petitioners were not even able to sell this proposition to the district court, which found, from the testimony of two of petitioners' former managing agents, "that with one exception[46] . . . , no attempt was made to alter the racial characteristics of any of the schools." Pet. App. 150a. Even the trial court thus acknowledged "the failure of school officials to take affirmative steps to alleviate this racial imbalance. . . ." *Id.* Petitioner's case is therefore reduced to their principal argument (Pet. Br. 26-27):

> The Dayton Board contends that its intent has been to pursue a racially neutral policy of placing schools where the children are or where they are expected to be in accordance with the directive of section 3313.48 of the Ohio Revised Code.[47]

The Board claims that it has had a "long-standing concern over problems of racial isolation and its intent [has been] to overcome such problems wherever feasible without sacrificing its neighborhood school system." Pet. Br. 31.

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[46] The "exception" referred to is the 1952 West Side reorganization which, as we have seen (pp. 105-07, *supra*), was a sham.

[47] Whatever the meaning of this statute's directive that local school boards provide "free education . . . at such places as will be most convenient for the attendance of the largest number thereof" (the statute is quoted in full at page 5 of petitioners' brief), it is clear that in Dayton it did not impose any intradistrict geographical limits or "neighborhood school" constraints on pupil assignments. Witness, for example, the 1933-1962 operation of Dunbar on a systemwide basis, the similar systemwide pupil-assignment basis of Patterson Co-op (which continues to this day); and the long-distance pupil assignments under the various free-transfer, optional-zone, Shawen Acres, overcrowding, hardship, curriculum and Freedom of Enrollment policies which have existed at various times.

Petitioners do not inform us when this "neighborhood school" policy came into being, but it is an appropriate question. *Cf. Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977); *Keyes*, 413 U.S. at 212.[48]

Even if after *Brown* petitioners did pursue a program which all could agree was a racially "neutral policy of putting the schools where children were or where they were expected to be" (Pet. Br. 29), it is manifest that such a system, contrary to the Board's *Brown II* duty to disestablish intentional segregation, effectively froze in the

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[48] If it is the Board's contention that it was operating a "neighborhood school system" during the four decades prior to *Brown*, then it is readily apparent that "neighborhood school" is a euphemism for official racial segregation. Was it pursuant to the "neighborhood school" policy that Garfield, Willard and Wogaman were converted into blacks-only schools by transferring both the white teachers and the white students (who presumably resided in those "neighborhoods") in those schools to other, predominantly white schools? Was it mere implementation of the "neighborhood school" concept—whatever it means in the abstract—pursuant to which Dunbar was created in 1933 and operated as a *systemwide* blacks-only high school until 1962, and pursuant to which predominantly white high schools operated on a systemwide basis, without attendance zones, until the 1940's (and one has continued to operate without attendance boundaries to this day)? What did the "neighborhood school" theory have to do with the policy of allowing black teachers to teach only black children, or with the equally racist 1951-52 policy modification? And surely the cross-town transportation of black orphanage children to blacks-only schools, the discriminatory treatment of black children within school and in extracurricular activities, and the leasing of space in official one-race public housing projects for the education of children of corresponding race were not the products of a racially neutral "neighborhood school" policy. Maybe the "neighborhood school" system came into being with the West Side reorganization in 1952 when the policy of free transfers between elementary school zones was ended, and racial optional zones were substituted to achieve the same segregative result. If this is its origin in Dayton, then petitioners' "neighborhood school system" is due to be defined as one which seeks to provide educational opportunities in a maximized segregated environment.

It is against this background that petitioners' "neighborhood school" claim must be weighed.

pre-existing systemwide pattern of deliberate segregation. *See, e.g., Swann*, 402 U.S. at 28, *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971); *North Carolina State Bd.* v. *Swann*, 402 U.S. 43, 45-46 (1971); *Gaston County* v. *United States*, 395 U.S. 285, 297 (1969). Such a program would have been unconstitutional in this context, would only have compounded the constitutional wrong and, under *Green* and *Swann*, would not have relieved the Board of its systemwide remedial obligations. But our case need not rest here, because between *Brown* and trial the Board did not follow any comprehensible policy which could be characterized as "racially neutral" or "neighborhood school system."

Petitioners' pre-*Brown* racially discriminatory faculty-assignment policy continued in raw form until HEW intervened in 1969. The Board followed an overwhelming pattern of assigning teachers according to the race of the pupils to be taught. And as the court of appeals found, this policy reinforced the segregative nature of the Board's school construction practices through "the coordinate racial assignment of professional staffs to these schools and additions on the basis of the racial composition of the pupils served by the schools." Pet. App. 210a. In these ways, the Board's race-based faculty-assignment policy continued to earmark schools according to race just as effectively as in the pre-*Brown* years. *See* pp. 32-36, *supra*.[49]

The Board's post-*Brown* school construction and closing practices also had permanent long-run segregative impact.

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[49] In addition to the district court's clearly erroneous conclusory factual findings (*see* note 14 *supra*) the court also erred as a matter of law in failing to recognize the significance of intentional faculty segregation as a part of the Board's deliberate perpetuation of the pre-*Brown* dual system, *Green*, 391 U.S. at 435-436, and *Swann*, 402 U.S. at 18, as well as in not recognizing the plain inference that such segregative intent also underlay the Board's school construction and pupil-assignment practices. *See Keyes*, 413 U.S. at 202 and Argument III, *infra*, pp. 136-38.

Dunbar high school continued to be operated as a system-wide blacks-only school until 1962, when it was replaced with a new Dunbar high school with an attendance area defined to coincide with a virtually all-black area in the West Side.[50] Instead of locating the new Dunbar in such a manner as to facilitate its desegregation, or instead of assigning white students to the new school (after all, if the Board could assign black students from all over the system to Dunbar, it could also have assigned white pupils to the school), the Board deliberately chose to maximize segregation. Patent segregative intent is revealed by the location of the new school, by the imposition of a one-race attendance zone, by the assignment of a black principal and a virtually all-black staff, by the continuation of the very *name* of the school for a "new" all-black school, and by what happened to the old Dunbar school. The old Dunbar was converted into McFarlane elementary, whose attendance zone was drawn to take in most of the students attending the blacks-only Willard and Garfield schools, which were simultaneously closed. McFarlane elementary thus opened with an all-black student body; any doubt about whether segregative intent was a motivating factor in this conversion was eliminated when the Board assigned an all-black faculty at the opening of this "new" blacks-only elementary school. *See* p. 40, *supra*. This was unmitigated purposeful segregation. Rather than eliminating these direct vestiges of the pre-*Brown* dual system, the Board deliberately renewed and reinforced its segregation policy.

Throughout the remainder of the system, the Board's post-*Brown* brick-and-mortar practices had a similarly pervasive segregative impact. Practically all construction of

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[50] The other city-wide high school which existed at the time of *Brown*, Patterson Co-op, continued as a systemwide and, through the 1967 school year, virtually all-white high school. *See* p. 45, *supra*.

new schools and additions to existing schools resulted in uniracial educational settings. *See* pp. 38-42, *supra*. These practices did not conform to any discernible "neighborhood school" policy or any other identifiable educational philosophy. Even the district court characterized these practices as "a most imprecise science" which "approached the level of haphazard in some instances." Pet. App. 173a. But the district court failed to recognize that the unifying theme in this "haphazard" program was intentional racial segregation: over 90% of *all* new classroom space constructed after *Brown* was on a one-race or virtually one-race pupil-assignment basis, and teachers were assigned thereto on a corresponding racial basis. *See* pp. 39-41, *supra*. Viewed in total isolation from the rest of the record, this overpowering segregative pattern of classroom construction raises a strong inference of intentional segregation: "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." *Swann, supra*, 402 U.S. at 21. The coordinate racial assignment of faculties to these classrooms—itself "a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause" (*id.* at 18)—practically makes the inference conclusive. If there is any remaining room for rebuttal by petitioners, it is foreclosed by placing these events in the context of the whole record of intentional segregation.

The Board concedes that its construction practices "maintained racial isolation" (Pet. Br. 34), which is necessarily a concession that its conduct in this regard was violative of its *Brown II* duty to undo, rather than to compound, segregation. But the Board disputes the intentionally segregative nature of this conduct. It seeks to undercut the highly probative value of the racial assignment of teachers

to these new classrooms by asserting that it had long since abandoned its "pre-1951 practice of assigning black teachers to teach only in black schools." Pet. Br. 34. This is demonstrably untrue. It may be argued, with some plausibility, that the continuation of a racial pattern of faculty assignments in those schools which existed in 1951 is no more than a perpetuation, pursuant to the Board's racist policy of so-called "dynamic gradualism" (*see* note 14, *supra*), of pre-*Brown* intentional discrimination. If that were all that the post-*Brown* facts showed with respect to teacher assignments, then perhaps the most that we could contend would be that such perpetuation was part of petitioners' refusal to meet their *Brown II* remedial obligations. But the facts show more. They reveal an across-the-board pattern of faculty assignments identifying *new* classroom space according to race. *See, e.g.*, App. 11-Ex. (PX 4), and p. 39, *supra*. This is not just ancient history manifesting itself; this is indisputable direct evidence of fresh intentional segregation. No other conclusion is conceivable.

In full context, therefore, it is not credible to argue that "[t]he fact that their student compositions reflected the racial composition of the neighborhoods they served does not offset the fact that schools were built accordingly [*sic*] to racially neutral criteria." Pet. Br. 34. In sum, the Board's post-*Brown* construction practices were at war with the affirmative duty to desegregate imposed by *Brown II, and* they constituted ongoing intentional segregation on a systemwide scale.

In the Statement of the Case, *supra,* we have detailed (though not exhaustively) abundant record evidence of the discriminatory purpose and impact of numerous other of petitioners' administrative practices. These include the use of "optional attendance areas" in the fringe

areas between predominantly black and predominantly white attendance zones (pp. 43-49, *supra*),[51] the drawing or maintenance of attendance zones so as to produce contiguous pairs of opposite race schools (pp. 50-51, *supra*), the inefficient use of excess school capacity in the face of more efficient (and cheaper) alternatives that would have had desegregative impact (p. 42, *supra*), the segregative manipulation of grade structures (pp. 52-53, *supra*), the discriminatory implementation of pupil transfers and trans-

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[51] In *Dayton I* this Court recognized "optional zones" as at least arguable devices of purposeful segregation. 433 U.S. at 413. The lower federal courts have frequently found them to be just that. *See* cases cited in note 19, *supra; see also* pp. 106-07 of the Brief for Respondents in *Columbus Bd. of Educ.* v. *Penick*, No. 78-610. On the instant record, as the court of appeals determined (Pet. App. 209a-10a), a similar conclusion is inescapable. "Optional attendance areas" were unheard of prior to the early 1950's (except, of course, for the Dunbar high school, which operated as a district-wide optional zone for blacks only from 1933-1962), when they were utilized as a part of the West Side reorganization to facilitate the conversion of the "racially mixed" schools in that area into all-black schools (*see* pp. 26-27, *supra*), and also when the manifestly racial option between Roosevelt and Colonel White was created. *See* pp. 45-46, 48, *supra*. Such zones thus originated in Dayton as part of a scheme of racial separation, and they were frequently employed thereafter to reinforce the idea, made plain through numerous other intentionally segregative policies and practices, that there was something bad about having black and white children attend school together. The fact that such zones sometimes appeared in circumstances having no racial implications proves no more than that the Board found them also adaptable to nonracial political purposes. And, contrary to petitioners' suggestion (Pet. Br. 34), the fact that some of the zones with segregative impact were not abolished or modified when black students began exercising the proffered "option" to attend a white school instead of a black one does not wipe the slate clean. Most of these few situations occurred in the late 1960's and early 1970's when the Board was being subjected to intense constitutional scrutiny—not only by the black community, but now also by a community-wide citizens group, the State Board of Education and HEW. Moreover, the failure to follow one discriminatory act with another does not disprove the purpose of the earlier act, and it does not speak at all to the impact of the earlier act in converting the "sending" school into a one-race black school.

portation (including instances of transporting entire black classes to, and segregating them within, otherwise white schools) (pp. 54-57, *supra*), and a Freedom of Enrollment policy implemented in 1969 which was similar, in both design and impact, to the "freedom of choice" and "free transfer" systems invalidated in *Green* and companion cases the year before (pp. 58-59, *supra*). The court of appeals made explicit findings of segregative intent with respect to many of these practices (Pet. App. 209a-13a),[52] and the record evidence convincingly demonstrates that similar intent infected others.[53] When these practices are viewed in the context of the total record, it is clear that they were subparts of a systemwide policy of intentional segregation.

It was against this background that the Ohio State Department of Education, HEW, a Board-appointed citizens committee, the President of the Board, and eventually the Board itself—after extensive deliberations—all concluded that the Board was responsible, both morally and constitutionally, for the systematic segregation of the schools. *See* pp. 60-63, *supra*. But when the Board finally responded with meaningful action, admitted its intentionally systemwide segregative conduct of the past, and shouldered its *Brown II* remedial duty in late 1971, its operative desegre-

[52] To the extent that the court of appeals did not make findings or draw conclusions about these particular facts, we are nevertheless entitled to urge them in support of the judgment below. *Dayton I*, 433 U.S. at 418-19. Unlike the situation in *Dayton I*, however (*see id.* at 416-18), the court of appeals has now confronted the whole record and made findings and drawn conclusions with respect to the bulk thereof. It found clearly erroneous many of the subsidiary, and practically all of the ultimate, findings of the district court.

[53] The segregative nature of many of the practices listed above and numerous lower court decisions finding similar practices to be racially discriminatory are discussed in some detail at pp. 106-08 of the Brief for Respondents in *Columbus Bd. of Educ.* v. *Penick*, No. 78-610, to which the Court is respectfully referred.

gation resolutions were subsequently (in early 1972) rescinded by a newly-constituted Board resulting from an election in which desegregation was the primary issue. *See* pp. 63-64, *supra*. The basic facts are not in dispute,[54] but the district court accorded them neither evidentiary nor legal significance. The district court determined that, under this Court's opinion (433 U.S. at 413-14) adopting the rescission portion of the court of appeals' opinion in *Brinkman I* (503 F.2d at 697), the Board's rescission action was not an independent constitutional violation because the Board was under no duty to desegregate. Pet. App. 185a. Since the latter determination is incorrect, as we have shown throughout this brief, the former conclusion is necessarily wrong.[55] There are several other critical errors in the district court's treatment of these facts.

The district court assigned no probative weight at all to the findings and admissions of HEW, the Ohio State Department of Education, the Board-appointed advisory committee of community representatives, the Board's president,

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[54] However, the district court's apparent conclusion that the Board, in finally standing up to its constitutional duty, was "manufactur[ing a constitutional violation] by political or legal maneuvering" (Pet. App. 184a), is clearly erroneous. *See* note 22, *supra*. The only difference between the Board's actions of December 1971 and those of January 1972 is that the former were aimed at desegregation while the latter were aimed at reinstating segregation. The rescission action was just as much (if not more) "manufactured" as the earlier desegregation action. The district court apparently has made a purely social value judgment, which is wholly unwarranted on this record, in order to seek to repudiate the findings from its original violation opinion concerning the rescission. *See* Pet. App. 10a-11a.

[55] This Court agreed with the court of appeals that "[i]f the Board was under such a duty [to desegregate], then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution." *Dayton I*, 433 U.S. at 414, *quoting Brinkman I*, 503 F.2d at 697.

or the Board itself, that the Board had over the years engaged in intentional segregative conduct resulting in a segregated school system. In the context of this record, the findings of segregation by public agencies and the admissions of intentional segregation by the school authorities themselves (rare enough in any circumstances) reinforce, rather than detract from, the conclusion that the Board was guilty of intentional systemwide segregation. In addition, the district court should have found that the rescission itself was an independent act of intentional systemwide segregation.[56]

The rescission is therefore a part of the overall constitutional violation, as well as an independent act of systemwide segregation. The public-body findings and ad-

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[56] Further analysis shows that the rescission was in fact an act designed "to undo operative regulations affecting the assignment of pupils [and] other aspects of the management of school affairs," within the meaning of this Court's opinion. 433 U.S. at 413. As shown at pp. 63-64, *supra*, the Board's rescission resolutions divested the Superintendent of Schools of his operative authority under Ohio law to determine pupil assignments in accordance with the plan that he had already adopted. Thus, the Board's action, viewed in its particular historical context, violates the Equal Protection Clause. *Cf. Reitman* v. *Mulkey*, 387 U.S. 369 (1967). Moreover, the Board's rescission action, by singling out pupil reassignments for the purpose of desegregation and, with respect to such assignments, stripping the Superintendent of Schools of his otherwise unqualified state-law authority over intra-district student assignments, was "an explicitly racial classification treating racial [pupil assignment] matters differently than other . . . [pupil assignment] matters." *Hunter* v. *Erickson*, 393 U.S. 385, 389 (1969). These facts are more than sufficient to "trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Washington* v. *Davis*, *supra*, 426 U.S. at 242. Analysis under the types of factors described in *Arlington Heights*, *supra*, leads to the same conclusion: race was among the factors motivating the Board's January 1972 rescission of the systemwide policy of desegregation previously announced by the Board and frustration of the Superintendent's pupil-assignment plan previously announced pursuant to the Superintendent's independent authority under state law.

missions underlying the desegregation resolutions are, moreover, entitled to probative weight. The Board has dispelled none of these conclusions.

But whether the rescission and attendant findings and admissions are viewed as a renewal of the Board's long-standing policy of segregation, or whether they are ignored altogether, the record overwhelmingly demonstrates that the Board had deliberately created a dual system by the time of *Brown* which it relentlessly reinforced, expanded and compounded up through the time of trial in 1972. The system thus resulting was constitutionally indistinguishable from that created in Charlotte and condemned in *Swann* as an ongoing dual school system. Through systemwide policies and practices of intentional segregation, supplemented by a host of other intentional discriminatory actions, the Board dramatically marked certain schools and certain parts of the system for the education of blacks only; and, reciprocally, other schools and other parts of the system were set aside and preserved for whites. Pursuant to a pattern that was never breached (App. 1-5-Ex.), over three-fourths of all black students and nearly as great a proportion of white students were in one-race or virtually one-race schools in the 1971-72 school year. App. 4-Ex. (PX 2D). The Dayton Board was operating a covert dual school system at the time of trial, and the remedial principles of *Swann* therefore apply in all respects to this case.

II.

The Remedial Principles of *Green* and *Swann* Entitle Respondents to a Systemwide "Root and Branch" Desegregation Remedy Designed to Eradicate All Vestiges of the Dual System; Petitioners Have Not Met, and Have Not Even Attempted to Meet, Their Burden of Demonstrating That This Constitutional Goal Can Be Fulfilled With a Less Extensive Remedy.

The conclusions, established in Argument I above, that petitioners were essentially operating a dual school system at the time of *Brown* which was deliberately entrenched through the time of trial, bring the remedial principles of *Green* and *Swann* into full play—as this Court squarely held in *Keyes,* 413 U.S. at 213-14, and confirmed in *Dayton I,* 433 U.S. at 420, would be the case upon such a showing of a non-statutory dual system.[57] Before turning to a proper application of those principles, however, it is necessary to respond to petitioners' implicit contention that those principles were repudiated, *sub silentio,* by the "incremental segregative effect" phrase of *Dayton I,* 433 U.S. at 420.[58]

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[57] In their entire argument on the proper scope of the remedy (Pet. Br. 40-54), petitioners neither cite nor discuss the principles laid down in *Green* and *Swann.*

[58] In *Keyes,* 413 U.S. at 203, the Court held that "proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding . . . of the existence of a dual system . . ., in the absence of . . . a determination [that geography or natural barriers divided] the district into separate, identifiable and unrelated units." The Court continued that where the finding of such a non-statutory dual system is made, "as in cases involving statutory dual systems, the school authorities have an affirmative duty 'to effectuate a transition to a racially non-discriminatory school system.' *Brown II,* 349 U.S. at 301." In its conclusion, the Court summarized this principle by holding that upon finding such "a dual system, respondent School Board has the affirmative duty to desegregate 'root and branch.' *Green* v. *County School Board,* 391 U.S. at 438.'" *Keyes,* 413 U.S. at 213. Citing this holding,

A. In the Context of an Intentional, Although Non-Statutory, Dual School System, the "Incremental Segregative Effect" Inquiry of *Dayton I* is Governed by *Green* and *Swann*.

The inherent flaw in petitioners' argument about the proper scope of the remedy is its refusal to acknowledge, even *arguendo*, that the Board had ever engaged in intentional systemwide segregation. Thus, in its argument about the nature of the violation (Pet. Br. 13-39), the Board insists on characterizing its segregative conduct as "isolated acts or practices that dated back to periods ranging from twenty to sixty years before the filing of suit." Pet. Br. 30. Only by thus attempting to have its acts of intentional across-the-board discrimination defined as a niggling constitutional violation is the Board able to present its elaborate remedy argument without mentioning *Green* and *Swann*. Pet. Br. 40-54. Having so circumscribed the nature of the violation also allows petitioners to appear to be somewhat more candid in their *remedy* argument about the violation. Hence, in their remedy argument (but nowhere in their violation argument) petitioners gratuitously concede that "constitutional violations by the Dayton Board had occurred in three historic areas—faculty assignment prior to 1951, the opening of the first Dunbar High School in 1933 and a series of isolated practices that occurred at varying times before 1954." Pet. Br. 50. Since these conceded violations have been predefined as petty in nature, the

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the Court in *Dayton I*, 433 U.S. at 420, concludes that "if there has been a systemwide impact" from the constitutional violations, there may be "a systemwide remedy." In addition, *Dayton I*, 433 U.S. at 419-420, recognizes that *Swann* remedial standards apply full force to a case "where mandatory segregation by law of the races has [not] long since ceased." As we have demonstrated in Argument I, *supra*, this case is controlled by these remedial standards because the Dayton Board created, perpetuated and compounded such a basically dual system from long before *Brown* through the time of trial.

Board is then able to approach the questions of remedy as though the record revealed only "three separate although relatively isolated instances of unconstitutional action on the part of petitioners." *Dayton I*, 433 U.S. at 413. Within this framework, the Board proceeds to separately analyze the three "isolated" violations and argue that, as of the time of trial, there were no remaining "incremental segregative effects" from these instances of intentional discrimination: whatever the immediate segregative impact of these violations, the Board argues that it had long since been wiped out by alleged corrective action by the Board (in the case of systemwide faculty segregation),[59] by over-

[59] Even if the Board's faculty segregation policy could be unlocked from its hand-in-glove connection with pupil assignments and school construction (*see* pp. 13-27, 32-41, 99-104, 116-19, *supra*), petitioners' argument that "ultimate" faculty desegregation removed all traces of "past assignment practices [which] had identified schools as black or white" (Pet. Br. 51) would not be plausible. The Board erroneously cites the testimony of one of plaintiffs' experts, Dr. Green, for the proposition that racial faculty assignments do not affect "the perception of whether such schools were intended as black schools." Pet. Br. 51. This misstates Dr. Green's testimony by placing sole reliance on an unclear question and answer which were immediately clarified. Dr. Green emphasized that the assignment of black teachers for the first time to selected schools with high percentages of black pupils, as occurred in the West Side reorganization, for example, "could well and perhaps does facilitate that school in becoming perceived as being a black school or black area if I might use that term." App. 113. A different point made by Dr. Green, which seems to confuse petitioners, is that "desegregating the faculty of a particular school community when in the past [there] has been a systematic placement of teachers to schools based on race, based upon the racial composition of the school and using the race of the teacher as a factor, simply desegregating the faculty without at the same time desegregating the pupils or students within that system does not change the community perception of that school." App. 111. There is no inconsistency between these two points: race-based faculty assignments have a causative effect on the racial identifiability of schools; once that effect has taken place, however, more than mere faculty desegregation is required to uproot the segregative impact on pupil attendance patterns.

whelming residential patterns (in the case of Dunbar),[60] and by the passage of time (in the case of the other pre-*Brown* "isolated practices").[61] *See* Pet. Br. 50-54. Even if

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[60] Both petitioners and the district court have taken the unsupportable view that the operation of Dunbar as a systemwide blacks-only high school for thirty years had only a discrete, limited segregative impact. The district court, of course, acknowledges the inescapable fact that from 1933 to 1962 the Board openly operated Dunbar as a blacks-only high school for black students from all over the city, but the court then reaches the astounding conclusion that "the effects of the Board's segregative acts [acts, mind you, that continued until 1962 *vis-à-vis* this very same school building] may have lingered [only] into the 1940's"! Pet. App. 169a. [As shown at pp. 40, 117, *supra,* the segregative acts with respect to the original Dunbar building did not cease in the least respect in 1962; they were simply redirected at the same schools with different names, as well as at new schools.] How the effects of acts can terminate 20 years before the acts themselves cease is not revealed in the district judge's opinion. The district court's only explanation apparently was that "The effects of the Board of Education's segregative acts in 1933 were totally subsumed in the effects of five to six decades of housing segregation in which the Board played no part." Pet. App. 170a. There are four fallacies in this statement. First is the implicit proposition that the Board's only "segregative acts" occurred in 1933, as if operating Dunbar as a blacks-only, city-wide school for the next three decades entailed no additional segregative acts and otherwise was harmless error. Second, the Board *did* play a direct and explicit part in housing segregation, including by the very location of such a systemwide blacks-only school in the heart of the black population concentration. *See* note 15, *supra,* and pp. 131-32, *infra.* Third, the finding totally ignores the direct impact and reciprocal effect of operating such a school on the racial composition of white high schools throughout the city. *See* pp. 17-19, *supra,* and 131-32 *infra.* Finally, the statement completely overlooks the fact that such intentionally segregative practices "may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools," *Keyes,* 413 U.S. at 202. *See also Swann,* 402 U.S. at 20-21, *readopted* in *Keyes,* 413 U.S. at 202-03. The propositions advanced by petitioners and the district court defy human experience.

[61] If the approach to the "incremental segregative effect" inquiry urged by petitioners is relevant in any context, it would be limited to an evaluation of the segregative impact of such "isolated prac-

petitioners had an accurate view of the nature of the violation, we would disagree with their application of the "incremental segregative effect" test, for the reasons, among others, discussed in the margin. *See* notes 59-61, *supra.* But petitioners have not described the nature and extent of the violation in this case; as we demonstrated in Argument I, they have missed it by a country mile.

But the structure of petitioners' argument does seem to imply a necessary concession: if there has been a systemwide violation, there must be a systemwide remedy. That is, even if petitioners are right in their approach to the "incremental segregative effect" question in a case in which the violations really are isolated and anecdotal,[62] an entirely different approach is mandated by *Green* and *Swann* in a case in which intentional segregation has been practiced on a systemwide basis. This can be the only meaning of the paragraph in *Dayton I,* 433 U.S. at 420, relied upon by petitioners. *See* note 58, *supra; see also* pp. 134-42 of

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tices" as those discussed in this part of petitioners' brief. But it has no place in this case, because the practices in question here were not "isolated"; rather, they were part and parcel of a systemwide segregation policy.

[62] Even in such a case, however, the Board's contention, accepted by the district court (Pet. App. 146a), that "the plaintiff in a case of this nature must in the first instance carry the burden of establishing both constitutional violations and the incremental segregative effect of those violations" (Pet. Br. 42), is wrong. It has never been the law that the victim of an illegal act must also bear the burden of proving that he would not have suffered the complete injury intended in the absence of the wrongdoer's illegal conduct. *See, e.g., Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle,* 429 U.S. 274, 286-287 (1977); *Arlington Heights, supra,* 429 U.S. at 270-71 n.21; *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 771-73 (1976); *Keyes,* 413 U.S. at 211 n.17; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 123-25 (1969); *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 251 (1946); *Story Parchment Paper Co.* v. *Paterson Paper Co.,* 282 U.S. 555 (1931); *Lewis* v. *Pennington,* 400 F.2d 806, 817 (6th Cir. 1968).

Brief for Respondents in *Columbus*. To contend otherwise is to remove the "incremental segregative effect" holding of *Dayton I* from its *ratio decidendi* of manifestly isolated violations (433 U.S. at 413), and to suggest that the Court there secretly overruled or modified the unanimous holdings in *Green* and *Swann*. We are confident that if the Court in *Dayton I* had intended to discard these precedents, it would have done so in a more forthright manner.

We have no quarrel with the precise holding in *Dayton I*, and we have no dispute with the "incremental segregative effect" test as an appropriate method of implementing the remedial requirements of *Green* and *Swann*—that all vestiges of intentional discrimination by school authorities be totally eradicated—in the context of a finding of comparatively minor constitutional violations. But now that the court of appeals has confronted the bulk of the overwhelming record evidence and found a basic dual school system at the time of *Brown* and ever after, the remedial inquiry is governed by *Green* and *Swann*.

B. Green *and* Swann *Require a Systemwide Remedy in This Case.*

In *Green* the Court established the basic principle: school boards operating dual school systems were "cleary charged [by *Brown II*] with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-38. *Swann* applied that principle to the urban setting. As we have shown in the Introduction to Argument, pp. 74-82, *supra*, the Court in *Swann* found that intentional segregation by school authorities has played a profound role in creating the present patterns of segregated schooling. The constitutional findings made in *Swann* are equally binding here.

Consider, for example, the devastating long-term nature of the Dayton dual system as it existed in the pre-*Brown* era, when the Board first converted and then operated Garfield, Willard and Wogaman as blacks-only lower-grade schools, when black high school students from all over the system were assigned or coerced into the systemwide blacks-only Dunbar high school, when black teachers were not allowed to teach white children under any circumstances anywhere in the system, and when black students who appeared in predominantly white schools were subjected to what even the district court acknowledged to be an "inhumane" and "inexcusable history of mistreatment of black students." Pet. App. 149a. Only by ignoring the fact that "[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people" (*Swann*, 402 U.S. at 20), can it even be suggested that school authorities did not "influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods" (*id.* at 20-21), or that such pervasive school discrimination does not "promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races." *Id.* at 21.

Take Willard, Garfield and Wogaman, which were converted into blacks-only schools by transferring their white students and faculties to other schools. Would a white family observing these circumstances, which identified these schools as undesirable for whites, ever consider residing in the Garfield, Willard or Wogaman attendance areas? It seems highly unlikely, at best. And how about a black family observing (as many did, *see* pp. 15-16, 18-19, *supra*) the degrading forms of discrimination practiced against black elementary and high school students who attended predominantly white schools, and who would never have

contact with black adult teachers and administrators in those educational settings? Would such a family be likely to seek residence in an area near one of the white schools, or would they be more likely to "gravitate" to an area closer to the Dunbar high school and the three elementary schools which had been clearly set aside for the education of blacks only? The latter of the two propositions is the only one that comports with common sense. Even if after *Brown* the Board had done *nothing* more than build "neighborhood schools" and engage in "neighborhood zoning," four decades of such overt discrimination had plainly "lock[ed] the school system into the mold of separation of the races." 402 U.S. at 21.[63]

And it was in this context that *Swann* (*id.* at 26) imposed, and in which it must impose here,

> a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion

[63] This observation is, of course, buttressed by two additional facts. First, the official racial discrimination by school authorities built upon, incorporated and encouraged the corresponding and continuing local custom of racial discrimination, exclusion, and duality in housing. *See* note 5, *supra*. Second, the intentional school discrimination continued after 1954 through the time of trial. *See* pp. 113-24, *supra*. Intentionally segregative Board practices with respect, for example, to optional zones, the similarly "haphazard" school construction program resulting consistently (and only) in a widespread pattern of one-race schools and additions, and the coordinate assignment (through at least 1971) of racially identifiable staffs to "black," "changing," and "white" schools, all served as signals to the community of the racial designation of residential areas and contributed (perhaps imprecisely but surely substantially) on a reciprocal basis to continuing housing discrimination and segregation. Thus Dayton school authorities, both before and after *Brown*, are at least as responsible for the creation of an "environment for segregation," the "growth of further segregation," and the "loaded game board" here as in the circumstances described in *Swann* and *Keyes* to justify systemwide relief.

> from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. 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.

Petitioners have never claimed that they can meet this burden *if* we are correct about the systemwide nature of the violation.[64] In our opening brief filed in the court below in *Brinkman IV*, we said:[65]

> In the instant case the Board has never tried to meet this burden. As we understand the Board's position . . . , if plaintiffs are correct in their claim of a systemwide violation, then the plan of desegregation currently in place is as good a cure as any.

And in our brief filed in reply to the Board's answering brief for appellees, we repeated this assertion:[66]

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[64] There has never been a contention in this case that the remedial plan ordered by the district court following the court of appeals' *Brinkman II* remand (*see* pp. 67-73, *supra*) exceeds the "time or distance of travel" limitations of *Swann*, 402 U.S. at 30. *See* p. 70, *supra*. Following the court of appeals' approval of this plan in *Brinkman III*, the Board contended in its petition for certiorari here, which was granted in *Dayton I*, that the plan ordered by the district court required perpetual racial balance in violation of *Swann* (*see* 402 U.S. at 22-25) and *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976). This claim was not renewed on remand from *Dayton I*, was not presented to the court below, and is not presented here in either the petition for certiorari or in petitioners' brief.

[65] *See* Brief for Appellants in 6th Cir. No. 78-3060 (served 21 February 1978) at p. 65.

[66] *See* Reply Brief for Appellants (served 6 April 78) at p. 29.

> In our opening brief (pp. 63-64 and 65), we said that "the Board has never . . . contended that plaintiffs are not entitled to a remedial plan such as that now in place *if* plaintiffs are right about the nature of the violation," and that "[a]s we understand the Board's position . . . if plaintiffs are correct in their claim of a systemwide violation, then the plan of desegregation currently in place is as good a cure as any." Defendants' brief (pp. 39-42) does not dispute these statements. The Board, therefore, must be deemed to have waived any defense that the systemwide nature of the violation (if the Court agrees with our description of it) had less than a systemwide impact.

As in their answer brief, petitioners did not take issue with these statements in their oral argument before the Sixth Circuit.

Against this background, the court of appeals' *Brinkman IV* opinion, upon finding a systemwide violation of the nature alleged by respondents, concluded that the systemwide remedial plan approved in *Brinkman III* should be continued in effect. Pet. App. 214a-17a. Similarly, if this Court agrees that the violation was systemwide and continuing, it too must approve the plan now in place. Before this Court, petitioners have not identified a single school which they contend is "genuinely nondiscriminatory" under the *Swann* remedial test. Petitioners have clearly and unmistakeably waived any such contention.[67] The plan which

[67] Even if petitioners' persistent silence on this score is viewed as a part of their tactical "all or nothing" litigation stance, they are entitled to no benefits from this strategy. Petitioners are free in the federal courts to take alternative, or even inconsistent, positions without being prejudiced thereby. But we do not think this silence is so much a strategy as it is an expression of preference: if there has to be substantial desegregation in Dayton, then it is better, as a matter of educational policy and of the long-run stability of

has now been in effect for nearly three full school years holds real promise for converting Dayton into "a unitary system in which racial discrimination would be eliminated root and branch." *Green,* 391 U.S. at 438. That plan is due to be affirmed under the precedents of this Court.

III.

Alternatively, Respondents Have Established, Under *Keyes* and the Facts Essentially Conceded by Petitioners, an Unrebutted *Prima Facie* Case of Systemwide Intentional Segregation Necessitating a Systemwide Remedy.

Here we take the factual case basically as it is conceded by petitioners and demonstrate that respondents, even under this restricted view of the case, have made out an unrebutted *prima facie* case of systemwide intentional segregation under the principles set forth in *Keyes.*[68]

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the community and the system, to desegregate on a systemwide basis. If this is the true meaning of petitioners' silence, it is well-founded (*see* pp. 153-56 of the Brief for Respondents in *Columbus Bd. of Educ.* v. *Penick,* No. 78-610) and should command the deference of the courts. It is also the only sure way in this case to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965), *quoted* in *Green,* 391 U.S. at 438 n.4.

[68] In our principal argument about the nature of the violation, Argument I, *supra,* we have relied on *Keyes* only for the proposition that a dual school system, within the contemplation of *Brown,* may exist even in the absence of the command or authority of written state law. We showed that the record establishes the existence of such a system as a matter of primary fact. Here we show, in the alternative, that even if the case is accepted on petitioners' factual terms, proper application of the evidentiary principles employed in *Keyes* requires the same conclusion. Application of the *Keyes* principles is discussed at greater length in the Brief for Respondents in *Columbus Bd. of Educ.* v. *Penick,* No. 78-610, to which the Court is respectfully referred.

A. Respondents Have Made Out an Unrebutted *Prima Facie* Case of Intentional Across-the-Board Discrimination.

In their argument about the nature of the violation, petitioners concede that "in the 1951-52 school year 54.3% of the black students in the system attended four schools that were 100% black" (Pet. Br. 16), and in their argument about remedy they seem to concede that this result was originally intended by the Board. Pet. Br. 50.[69] Petitioners' express concessions, coupled with the unchallenged and irrefutable record evidence (*see* note 69, *supra*), thus establish that as of 1952 over 54% of the system's black pupils were in blacks-only schools, which continued as such into the 1960's, one of which operated on a *systemwide* discriminatory basis until that time; and that the pre-1951 systemwide policy of absolutely prohibiting contact between black teachers and white children continued (with modifications expressly based on racial discrimination) in effect until at least 1969 through the 1951 discriminatory faculty-assignment policy.

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[69] As noted at p. 126, *supra*, petitioners concede the unconstitutionality of their pre-1951 policy of assigning black teachers to teach black children only, of operating Dunbar as a systemwide blacks-only high school, and of various practices such as the separate and unequal treatment of black pupils and teachers at Garfield in the 1910's and 1920's, discrimination against black pupils within predominantly white schools and in extracurricular activities, and the transportation of black orphanage children to blacks-only schools. While petitioners do not expressly acknowledge, they also do not dispute, and never have, the following additional unequivocal facts of record: Willard, Wogaman and Garfield elementaries were deliberately converted into blacks-only schools in the 1930's and 1940's, all of which continued in that status at least until 1962 (when Garfield and Willard were closed and most of their pupils assigned to the old Dunbar building which was renamed McFarlane); that Dunbar continued as a blacks-only systemwide high school until 1962 (when it was replaced with the new Dunbar building); that faculties continued to be assigned until 1969 in accordance with the explicitly racist 1951 faculty policy.

These intentionally discriminatory policies and practices "did not relate to an insubstantial or trivial fragment of the school system" (*Keyes*, 413 U.S. at 199),[70] and it is not even argued that they were confined to "separate, identifiable and unrelated units" (*id.* at 203) of the system or school administration. Under the *Keyes* evidentiary principles, these facts result in a *prima facie* case of systemic intentional discrimination even more powerful than the case presented in *Keyes*. Petitioners are thus called upon to show "that their actions as to other segregated schools within the system were not also motivated by segregative intent." 413 U.S. at 209; *see also id.* at 210-11.

Petitioners, in response to this *prima facie* case, primarily invoke their alleged "neighborhood school" policy. But as we have seen (*see* pp. 114-15, 130-32, *supra*), this is not a good defense because the alleged "neighborhood school system" came into rhetorical vogue only after 54% of the black children and all of the black teachers had been enclosed in educational ghettos and it was manifest that "neighborhood schools" would largely serve segregative ends; because there really never has been such a neutral "neighborhood school" policy at work in Dayton, as evidenced by the widespread resort to "optional zones," many having immediate racially segregative impact in situations where adherence to "neighborhood school" precepts would otherwise have resulted in desegregation;[71] because, in wholesale contra-

[70] In *Keyes* the Court found a *prima facie* case on the basis of intentional segregation directed at a part of the system containing slightly less than two-fifths of the black pupil population, whereas here the undisputed intentional discrimination (which resulted in *total* segregation, *cf.* 413 U.S. at 199 n.10) was directed at over one-half of the black student population and *all* of the teachers.

[71] The district court correctly found in its initial violation ruling that "an 'optional attendance zone' is a limitation upon this ['neighborhood school'] concept and if carried to an ultimate conclusion, effectively destroys it." Pet. App. 12a-13a. The segrega-

diction to such precepts, Dunbar (blacks-only until 1962) operated as a systemwide "optional zone" until 1962, as did Patterson Co-op (virtually all white through 1967) until the time of trial. The Board's school construction practices, which had the most entrenching segregative impact, also cannot persuasively be justified as the product of a racially neutral "neighborhood school" policy, for two compelling reasons. First, there is nothing about such a policy, not even as articulated by petitioners, which explains why teachers were assigned to these new classrooms on a systematic racial basis. The interrelationship between the Board's expressly discriminatory faculty assignment policy and the construction of new classrooms serves only to reinforce the presumption that petitioners' school construction practices were intentionally segregative on a massive scale.[72] Second, the district court's unchallenged finding that the Board's school construction program was "haphazard" (Pet. App. 173a) severely undermines the possibility that it was part of a consistent policy of any kind, including a "neighborhood school" policy.[73]

In all of the above areas of school operation, therefore, petitioners have failed to rebut respondents' *prima facie* case of intentional segregation. It necessarily follows,

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tive genesis of optional zones in the early 1950's (*see* pp. 43-46, *supra*) bolsters the conclusion that they were frequently infected with segregative intent.

[72] This presumption is also enhanced by the events surrounding the closing of the old Dunbar and opening of the new segregated Dunbar in 1962. *See* p. 40, *supra*.

[73] The presumption that the Board's school construction practices were infected with segregative intent gains additional support from the principle that an inference of such intent arises when school authorities knowingly pursue actions which have the "natural, probable and foreseeable result" of segregation and cannot be explained by the consistent application of racially neutral criteria. *See* pp. 109-14 of the Brief for Respondents in *Columbus Bd. of Educ.* v. *Penick*, No. 78-610.

under *Keyes*, that respondents have proved systemwide intentional segregation.[74]

B. Respondents Have Also Proved Their Entitlement to a Systemwide Desegregation Remedy.

At this juncture of the *Keyes* framework, the remedial principles of *Green* and *Swann* come into play and, to the extent that petitioners contend that less than a systemwide remedy will eliminate all vestiges of intentional discrimination from the system, they bear the burden of proving "that a lesser degree of segregated schooling . . . would not have resulted even if the Board had not acted as it did." 413 U.S. at 211; *see also id.* at 211 n.17 and 213. As shown in *Argument II, supra,* petitioners have made no effort to bear this burden, which they could not do in any event given the pervasive impact of their intentionally segregative systemwide conduct.[75] The systemwide desegregation plan now

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[74] Petitioners have constructed a convoluted semantics argument (Pet. Br. 13-39), the essence of which is to suggest that *Keyes* is no longer good law. As we have shown throughout this brief, however, the *prima-facie*-case principles laid down in *Keyes* have a firm factual basis in the real world. Petitioners' argument would lack merit if *Keyes* were no more than a case about the proper arrangement of the common-law rights of private parties. Their argument clearly has no place in a case seeking to fulfill *Brown's* commitment to the command of the Fourteenth Amendment that racial discrimination should play no part whatsoever in the arrangement of public affairs. *See also* Brief *Amicus Curiae* filed herein by the American Civil Liberties Union, in contrast to the "respondents" brief filed here by the Ohio State Board of Education.

[75] And, as pointed out in Argument IIA, *supra, Dayton I* has not altered the remedial principles applicable in this context. *See also* pp. 134-51 of the Brief for Respondents in *Columbus Bd. of Educ.* v. *Penick*, No. 78-610. As the Court described the principle in *Milliken II*, handed down the same day as the *Dayton I* opinion, the remedy does not exceed the violation when it speaks, as does the remedy imposed below, directly to it (433 U.S. at 281-82):

> The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate

in effect must therefore also be affirmed under this alternative approach to the case.

IV.

The Decisions by This Court in the Columbus and Dayton School Cases Are Critical to Meaningful Constitutional Review of Remaining Dual School Systems.

As we have demonstrated in Arguments I-III above, the court of appeals in this case has properly applied the controlling constitutional standards to the undeniable facts here of record. We believe that the judgment of the lower courts in the companion *Columbus* case is just as demonstrably correct under this Court's precedents and the record evidence there. *See* Brief for Respondents in No. 78-610. As a result, the Dayton Board's charge (*e.g.*, Pet. Br. 12-13) that the Sixth Circuit is "resisting" the decisions of this Court is totally unwarranted. Nor is the Sixth Circuit alone in providing meaningful constitutional review in school cases pursuant to the application of this Court's rulings to the differing facts and local circumstances of each case. *See, e.g., Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied* 421 U.S. 963 (1975); *Hart* v. *Com-*

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to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, see *Pasadena Bd. of Education* v. *Spangler*, 427 U.S. 424 (1976) or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation, as in *Milliken I, supra. Hills* v. *Gautreaux*, 425 U.S. 284, 292-296 (1976). But where, as here, a constitutional violation has been found, 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. (Emphasis supplied.)

See also Hutto v. *Finney*, 437 U.S. 678, 687-88 (1978).

munity School Board, 512 F.2d 37 (2d Cir. 1975); *Arthur* v. *Nyquist,* 573 F.2d 134 (2d Cir.), *cert. denied,* 47 U.S.L.W. 3224 (Oct. 2, 1978); *Evans* v. *Buchanan,* 555 F.2d 373 (3d Cir.), *cert. denied,* 434 U.S. 880 (1977), 582 F.2d 750 (3d Cir. 1978), *cert. pending; United States* v. *Columbus Municipal Separate School Dist.,* 558 F.2d 228 (5th Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978); *United States* v. *Texas Educ. Agency,* 564 F.2d 162 and 579 F.2d 910 (5th Cir. 1978), *cert. pending; Higgins* v. *Board of Educ.,* 508 F.2d 779 (6th Cir. 1974); *Oliver* v. *Michigan State Bd. of Educ.,* 508 F.2d 178 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975); *NAACP* v. *Lansing Bd. of Educ.,* 559 F.2d 1042 (6th Cir. 1977), *cert. denied,* 434 U.S. 1065 (1978); *United States* v. *Board of School Comm'rs,* 474 F.2d 81 (7th Cir.), *cert. denied,* 413 U.S. 920 (1973); *United States* v. *School Dist. of Omaha,* 565 F.2d 127 (8th Cir.), *cert. denied,* 434 U.S. 1064 (1977); *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973); *Johnson* v. *San Francisco Unified School Dist.,* 500 F.2d 349 (9th Cir. 1974); *Keyes* v. *School District No. 1,* 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976). Such cases demonstrate that the lower courts are *not* attempting, as petitioners charge (Pet. Br. 12-13), "to achieve the same sociological result in states which had no statutory or constitutional mandate for segregated schools as occurred in southern states where such mandates existed." [76]

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[76] Petitioners' *only* suggestion (Dayton Pet. Br. 24-25 and Columbus Pet. Br. 81-82) of a conflict in the legal standards applied by the circuits to review the nature of violation and scope of remedy in school cases is that the Ninth Circuit, unlike some of the other circuits, may have a different point at which the burden of going forward with evidence on segregative intent should shift. Whether there is any substantive as opposed to semantic conflict among the circuits on this narrow point is questionable. In all events, as we demonstrated in Arguments I and II, concerning the proof of continuing dual schooling here, that issue need not be reached in this case at all; and, as we demonstrated in Argument

What petitioners seek in these two cases at bar, therefore, is *not* the correction of any alleged aberration in the nature of the appellate review provided by the Sixth Circuit. Rather, as we stated at the outset of Argument (pp. 88-90, *supra*), petitioners seek to undermine the constitutional command of *Brown I and II*, and their progeny, that actual desegregation is the proper remedy for intentional school segregation that contributes to the current condition throughout a local school district. This challenge to *Keyes, Swann, Green* and *Brown II* is couched in terms of merely "interpreting" *Dayton I* to immunize any arguably "neighborhood school" approach from constitutional challenge and meaningful relief. Dayton Pet. Br. 40-54; Columbus Pet. Br. 52-79. But the upshot of petitioners' "interpretation" is that the desegregation remedy in school cases would hereafter stop at the current level of residential segregation to which petitioners' actions contributed and which remains almost complete here.

As we explained in the Introduction to Argument (pp. 74-82, *supra*), that was precisely the same claim raised by school authorities and squarely rejected by this Court in *Swann*. In Arguments I-III (pp. 88-139, *supra*) we demonstrated that this "interpretation" of *Dayton I* is legally foreclosed by the central holdings of *Keyes, Swann, Green* and *Dayton I* and is factually contradicted by the record evidence in this case. *See also* Brief for Respondents in No. 78-610, where the equally manifest legal and factual error of the defense is also demonstrated with respect to the *Columbus* case.

III, plaintiffs surely made out a *prima facie* case of systemwide intentional segregation under *Keyes, Washington* v. *Davis,* and *Arlington Heights* that defendants failed to rebut, *whatever* the point at which the burden of producing evidence should shift from plaintiff school children to defendant school authorities. *See also* Brief for Respondents in the Columbus case, No. 78-610.

This restrictive "interpretation" of the constitutional understanding of the nature and extent of the intentional school segregation violation and the scope of the essential desegregation remedy would necessarily retire *Brown I* and *II* to a largely symbolic "Hall of Fame." The words of their brave declarations might stand, but their practical meaning, and that of *Green, Swann, Keyes* and *Dayton I*—actual desegregation as the remedy for intentional segregation—would fall by the wayside.[77] The "remedy" in these two cases, and almost every other school case imaginable hereafter, would be continued one-race schooling to the full extent of the current residential segregation. In essence, petitioners' "interpretation" of *Dayton I* asks this Court to withdraw, for all practical purposes, from its considered commitment to actual desegregation as the remedy for racially dual schooling.[78]

On *Brown's* twenty-fifth anniversary, the Dayton Board offers Dayton's black school children almost complete resegregation in separate one-race schools, now and hereafter. Such a racially stigmatizing lesson would only "affect their hearts and minds in a way unlikely ever to be undone," *Brown I*, 347 U.S. at 494. Instead, this Court should inform both the Dayton school children and the Dayton school authorities that the systemwide plan of de-

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[77] As we demonstrated in Argument II, pp. 126-30, *supra*, *Dayton I* held that in circumstances where the violation is genuinely limited or isolated (as in optional zones between three high schools), the remedy must be limited to the impact of the violation, and the causation inquiry must look to the segregative effect of these limited violations rather than make an unwarranted leap to systemwide relief; in addition, however, *Dayton I* confirmed that *Swann* and *Keyes* control full force, in a case such as this, with a history of longstanding and continuing dual schooling. *See* note 58, *supra*.

[78] *See* U.S. Commission on Civil Rights, DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT (February, 1979).

segregation now in effect remains the proper remedy for the basically dual system of schooling existing through the time of trial.

CONCLUSION

The judgment below should be affirmed in all respects.

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Respectfully submitted,

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