LEGISLATIVE RESPONSES TO SCHOOL DESEGREGATION LITIGATION

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

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TUESDAY, APRIL 16, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY
Washington, DC.

The subcommittee met, pursuant to notice, at 10:04 a.m., in room 2226, Rayburn House Office Building, Hon. Charles T. Canady (chairman of the subcommittee) presiding.

Present: Representatives Charles T. Canady, Henry J. Hyde, Bob Inglis, Michael Patrick Flanagan, F. James Sensenbrenner, Jr., Martin R. Hoke, Lamar Smith, Bob Goodlatte, Barney Frank, Melvin L. Watt, and John Conyers, Jr.

Also present: Representatives Robert C. Scott and Sheila Jackson Lee.

Staff present: William L. McGrath, counsel; Jacquelene McKee, paralegal; Mark Carroll, staff assistant; and Robert Raben, minority counsel.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. The subcommittee will be in order.

Today's hearing marks the second time this subcommittee has convened to explore the important topic of school desegregation. Last September, we held a field hearing in Cleveland, OH, to learn about that city's experience with a Federal court lawsuit concerning the public schools. Congressman Martin Hoke, a member of this subcommittee who represents Cleveland, has been very energetic topic, and it was helpful to examine one of these cases in some on this detail.

Our purpose today is to take a broader perspective on the topic of school desegregation litigation and to ask whether this is an area where Federal legislation might be helpful and appropriate. There are literally hundreds of public school districts in this country currently laboring under some sort of school desegregation decree, and most of these are being supervised by a court. But as the Supreme Court has reminded us time and again, Federal court intervention contravenes the important principle that local autonomy of school districts is a vital national tradition.

Of course, where de jure segregation existed, it was both right and proper for the Federal courts to intervene to protect and vindicate the constitutional rights of minority students, but as many of these cases enter the third, fourth, and even fifth decade, it is only sensible to ask whether the Federal courts are doing all they can

and should to expedite the reestablishment of local democratic control over public education. That is the purpose of today's hearing.

No doubt we will hear the objection that Congress has no business getting involved in this issue. The Federal courts, we will be told, are the exclusive arbiters of the appropriate instance and duration of their involvement in these cases. But I don't accept that argument. We recently confronted similar claims in connection with our efforts in the area of prison reform litigation. I believe we have proposed and passed very helpful prison legislation that achieves two important objectives: we have protected legitimate constitutional rights and guarantees, and we have crafted guidelines to ensure that judicial intervention in the administration of prisons is no broader and lasts no longer than is constitutionally necessary.

It is my hope and expectation that we will be able to achieve the same result in the area of school desegregation litigation. Any legislation we propose will be faithful to the letter and spirit of the Supreme Court's jurisprudence in this area, but I believe that there may well be a meaningful role for Congress to play in facilitating the transition from our current widespread Federal judicial management of public school districts to local self-governance.

I would like to thank Mr. Hoke for his leadership on this issue, and I look forward to working with him and other interested members as our efforts proceed. And I appreciate the participation of each of our witnesses today. I look forward to your testimony.

Our first panel today——

Mr. FRANK. Mr. Chairman.

Mr. CANADY. Yes. Yes, Mr. Frank is recognized.

Mr. FRANK. We are here today as part of something that's very familiar to those engaged in civil rights litigation. This is a pattern-and-practice situation, but it's the pattern and practice of this subcommittee that's relevant.

We hear from the majority that they accept the fact discrimination based on race and on sex continues to be a problem in our society, although I believe we've made a great deal of progress in confronting those. We, I think, agree at least verbally that there is a continuing problem. But you wouldn't know that discrimination based on race or sex was a problem in this society if you were a close follower of this subcommittee, because this subcommittee has, since the majority took over, embarked on a very interesting practice; namely, to have hearings only about what are seen as weaknesses in efforts to combat discrimination, but never to have any hearings, never to look into or consider legislation about the continuing problem of discrimination itself.

We have had hearings to criticize affirmative action. We have had hearings to criticize school busing. We will have a hearing on Thursday critical of bilingual aspects of the Voting Rights Act. We have yet to have a hearing, since January 1995, on the problems of discrimination as they exist.

It is legitimate to be questioning, and in some cases critical, of the efforts to resolve discrimination. That's part of our job. But it is also part of our job to be concerned about discrimination. And when you have an arm of the Congress, the one charged with jurisdiction over constitutional rights in the first instance, although obviously that's a jurisdiction shared by every Member of both

Houses, but when you have the Subcommittee on the Constitution consistently ignoring the underlying problems of discrimination and focusing only on shortcomings in the efforts to deal with discrimination, you get a very biased and distorted picture, and that's what we have.

There are problems in law enforcement. There are problems in violence. There are a whole lot of problems of discrimination. And so what we have is one more long series of hearings which criticize the efforts of those who seek to end discrimination who come to those hearings and make very good points. But we have had no attention in this subcommittee to the underlying problem of discrimination itself.

In fact, if you were just looking at this subcommittee, and you knew nothing else about the world, your inference would be that there is no more discrimination in America based on race and sex because we've done nothing as a subcommittee under Republican direction to deal with that. What you would conclude is that there continues to be an obsession with discrimination by some people, and they do harm in the name of fighting a discrimination that apparently long since ended. I think that is a very unbalanced view.

It is also part of the pattern and practice, I think unfortunately, of the irrelevance of this subcommittee, and indeed this committee, on major issues. The chairman says it is possible to conceive of legislation. It is possible intellectually to conceive of legislation; I will predict that there will be no legislation. There is, I think, not any great intention to have legislation.

The Judiciary Committee, when it does legislate, of course, generally finds its work product rebuffed by the House, and, therefore, we have a two-track situation. When the House plans to legislate, the committee is ignored, as yesterday when we deal with a constitutional amendment that this committee had never voted on, and in fact we voted on a constitutional amendment in a form in which this committee had never even had a hearing. When we do legislate on bills that come out of here, they are substantially ignored or undone. So there's a two-track situation. The serious legislating is done on the floor without much regard for what this committee does, and then this committee continues to make some political points on other issues. That's a legitimate part of what we do, but it shouldn't be all of what we do.

And my most serious concern is the continuing failure of this subcommittee ever to address in the past year and 3 months any underlying discrimination problem. All of the hearings that have dealt with race and sex discrimination have been critiques of solutions, and not one hearing has been aimed at whether or not there continues to be a problem of discrimination, whether we are dealing adequately with job discrimination or school discrimination or discrimination in law enforcement. I think that's a very, very unfortunate dereliction of duty.

Mr. CANADY. Mr. Hyde. Go ahead.

Mr. HYDE. As always, it's fascinating to hear our good friend from Massachusetts lecture us on balance, bias. I just think personally he has much too narrow a definition of discrimination. Discrimination is a comprehensive term, and it works both ways. There is such a thing as reverse discrimination. There is a problem

with using discrimination to remedy discrimination. And the person being discriminated against doesn't really care one way or the other, all he or she knows is they're not getting admitted to the college; they're not getting the promotion; they're not getting the job because they're the wrong sex; they're the wrong color; they're the wrong ethnicity. And that is an ongoing problem that was ignored for 40 years under the aegis of the enlightened gentleman of the left who ran this committee. And I've served on it 22 years except for an interim when I left—in a huff, I might add. [Laughter.]

But I was lucky and fortunate and happy to come back because I enjoy this committee and I enjoy the gentleman from Massachusetts.

But we have looked at discrimination, but we have looked at an aspect of discrimination that was in the Bermuda Triangle under the previous regime. So, as far as imbalance, I would suggest that the whole engine of executive government is directed toward those aspects of discrimination that touch the conscience and the sensitivity of the gentleman from Massachusetts. We have a White House and a Justice Department that is energized and active and successful on behalf of that aspect. It puts some small balance into the equation when Congress decides to look at the consequences of all of these laws that are designed to give preferences to people because they belong to the right group.

So I have no problem with what we're doing. I salute it.

I think that's all I have.

Mr. CANADY. Would the gentleman yield?

Mr. HYDE. Surely.

Mr. CANADY. Let me respond briefly to what Mr. Frank has said.

Mr. HYDE. Oh, excuse me, one more thing. The gentleman is quite right; we did not have hearings on the amendment requiring a two-thirds vote on tax increases. I think in an ideal situation, in a proper situation, we should have, but I do add that we have had hearings, extensive hearings, on the notion, the concept of supermajority required to increase taxes, when we deal with rather extensively the balanced budget amendment. That was part of that legislation. We had hearings, extensive hearings, on it. We all vented our spleen and vented our ideas, and so it was—it wasn't exactly a zero in terms of committee action on that——

Mr. FRANK. Would the gentleman yield?

Mr. HYDE. With pleasure.

Mr. FRANK. I thank the gentleman, and I appreciate that.

I did not mean to suggest that the gentleman from Illinois was responsible for the way we dealt with that. Indeed, it seemed to me that he might have had his "huff" warmed up at some point to make another trip, maybe a "huff" in the next room. [Laughter.]

But the point I would make is this: as the gentleman knows, because he is one of the most serious legislators here, having a hearing on a concept doesn't really, in my judgment, fulfill our responsibilities. What counts is the language, and the language that we voted on yesterday had never remotely come before us. And I think, as a matter of fact, we had a hearing on one set of language, and the hearing showed some very severe problems with that language. The gentleman from Illinois was one of the ones who most articulately pointed that out.

So a hearing on a concept I don't think discharges our legislative responsibility. I think the hearings ought to include at least an approximation of the actual words, particularly when we're talking about a constitutional amendment.

Mr. HYDE. The gentleman will agree that serious issues do deserve hearing, and we waited—we were in the desert for a long time under the gentleman's administration. When——

Mr. FRANK. Oh, no. If the gentleman——

Mr. HYDE [continuing]. Came to products liability, when it came to pro-life legislation, there was no chance in hell——

Mr. FRANK. If the gentleman would yield——

Mr. HYDE [continuing]. That we would get hearings on——

Mr. FRANK. If the gentleman would yield one last time—I was chairman of a subcommittee here for several years of Judiciary and elsewhere, and I just want to say——

Mr. HYDE. A blessed memory.

Mr. FRANK [continuing]. No issue that the minority asked me to have a hearing on ever went without a hearing. So if the gentleman has quarrels with other people, he can state them, but when I was chairman of the subcommittee—you can talk to the people who were the ranking members—we had a number of hearings at the request of the ranking minority members. And, yes, I do believe in fairness and balance in hearings. If the gentleman would look at the hearings that I conducted when I was chairing subcommittees, I think he will find that there was never any quarrel with the Republicans.

Mr. SENSENBRENNER. Mr. Chairman.

Mr. CANADY. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Mr. Chairman, I'd kind of like to be the big bad wolf to huff and puff a little bit about what happened before a year and a half ago. I served——

Mr. FRANK. Is that the huff that one leaves in or is that a different huff?

Mr. SENSENBRENNER. No, no, this is a much different huff, Gentleman from Massachusetts.

I was on this subcommittee for most of my career in Congress, as was the gentleman from Illinois. And I remember that when the gentleman from California, Mr. Edwards, a blessed memory, chaired this subcommittee. Not only did we have one oversight hearing after another, but for one whole year the report that was submitted to the House by the chairman of the Judiciary Committee said that the Civil and Constitutional Rights Subcommittee, I think, had only one legislative hearing all year and the rest were all oversight hearings. And, furthermore, those oversight hearings were so patently unfairly put together that I had to invoke the rights of the minority and the Rules of the House on numerous occasions in order to have a countervailing viewpoint placed on the public record by having a minority day of hearings.

Now this subcommittee, I think, has had a pretty good mix of legislative hearings, as well as oversight hearings, but also the witnesses that the chairman has selected have represented different viewpoints, and that's more than you could say for the former chairman of this subcommittee. You know, I look at this, and I see Mr. Taylor, who was a regular witness on behalf of the majority

during the Edwards administration of this subcommittee. I also see someone from the NAACP Legal Defense and Education Fund. They were regular witnesses. But there were never regular witnesses on the other side during the Edwards administration. You know, you talk about being fair, but the way you ran this subcommittee, your party ran this subcommittee, was patently unfair.

Now, in conclusion, I will say, you ran your subcommittee a little bit differently than Mr. Edwards did, Mr. Frank, and I give you credit for it. But we're talking about this subcommittee. We're talking about civil rights issues. Before November 1994, this subcommittee was basically a bullhorn for one particular viewpoint. I think that Mr. Canady is being eminently fair. He wants to get both sides on the record.

Yes, I'll yield.

Mr. FRANK. I thank the gentleman for yielding. I appreciate his differentiating me. I was not only not the chairman of this particular subcommittee; I never served on it. And, yes, I think it was run somewhat unfairly, but I continue to believe that for you to cite previous unfairness as a justification for current imbalance is a mistake, and what I was talking about was the substance. The point is that we have not had one——

Mr. SENSENBRENNER. Well, maybe I'll change from being the big bad wolf to the elephant with the long memory, because I was a victim of discrimination against the minority in this subcommittee; you were not.

Mr. FRANK. No, I disagree. No, I'm not personally a victim because, among other things, I can go back to my office and get some work done, which I will do very shortly. So I'm not the victim. The victims, in my judgment, are the people who suffer discrimination because the problem here is substantive. It is that there has not been one hearing on racial and sexual discrimination. It is legitimate and I agree we should have hearings that critique efforts at a solution, but I think when all the hearings are referenced to critique a solution and none of them are under the underlying problem, that's the kind of imbalance and bias that is not justified by previous imbalance.

Mr. SENSENBRENNER. I yield back my time.

Mr. CANADY. Thank you. Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I kind of feel like I've wandered into the middle of a dispute that I didn't know was going to be part of this hearing today and about which I am ill-prepared by history because I was not here to either defend or refute or deny or admit guilt about. So I think I will turn my attention to the order of the day and concede the right of the majority party, whoever that might be at a given time, to conduct hearings on whatever they want to have hearings on, but remind folks that what goes around will come around, and hopefully it will come around soon.

I got—on the subject of the day, the desegregation of schools, I take it that's what we're here about. This is—I'm in the right hearing, am I not, Mr. Chairman, if I can talk about that issue?

I am reminded of a phone call that I received from the very, very attractive black woman who used to work the doors upstairs in the House until she was fired under this regime and is now a student

at one of the community colleges here in the D.C. area. She called me about 3 or 4 weeks ago, and she was doing a research project for a class and her assignment was to write a paper about real-life experiences that people have had in the matter of school desegregation. And she called me thinking that I would have some cogent experiences to relate to her because she knew how old I was and she wanted the benefit of being able to quote my real-life experiences in her paper.

And she asked me what impact did school desegregation have on my life, and she was surprised when I told her that I attended school in Charlotte-Mecklenberg, the city from which the *Swann* v. *Board of Education* decision sprang, and that I attended school from 1951 to 1963, and that when I graduated from high school in 1963 I was still attending an all-black school. This was—what?—9 years after the 1954 *Brown* v. *Board of Education* decision, and she was surprised to know that I had not attended an integrated or desegregated school, even though I graduated from high school in 1963.

I reminded her that in the South southern legislators and school boards took the *Brown* v. *Board of Education* comment about "all deliberate speed" in a completely different light than the Supreme Court probably intended it, and that, in fact, nobody was attending a desegregated school in Charlotte-Mecklenberg in the year 1963, when I graduated from high school, nor were they doing so in 1967, when I graduated from undergraduate school, and they barely were doing it in 1970, when I graduated from law school, and that but for the *Swann* v. *Board of Education* litigation, they might not now be doing it in Charlotte-Mecklenberg.

I reminded her that I, in fact—during those days students drove school buses; we didn't just ride them, and that part of my survival was the little income that I received from driving a school bus past at least four white schools that I could have attended, had the schools been desegregated, to attend an all-black school that I was assigned to by the board of education and the administration in the Charlotte-Mecklenberg school system.

So I wish Mr. Sensenbrenner hadn't left because there was one thing that he said that I can relate to, which is when you have been the victim of discrimination yourself, it does in fact color your outlook on discrimination. And maybe we are here talking about the burdens that busing and school desegregation place on people under this committee chairmanship because there ain't anybody on this committee on the majority side who has any experience with discrimination in schools and school busing to effect the objective of segregating schools rather than desegregating schools.

So I hope you all will bear with me as we go through these hearings if I come to this subject from a slightly different perspective than most of you do, because I was there, like Mr. Sensenbrenner has reminded us, in the minority and discriminated against, and I understand the historical context in which school desegregation and busing was being implemented at that time, and how it has been implemented in my city and county and State for the years since then.

I yield back the balance of my time.

Mr. CANADY. The gentleman's time has expired.

This morning we are pleased to welcome two distinguished colleagues to testify. First, we will hear from Congressman Bill Lipinski. Congressman Lipinski hails from the district—from the State of Illinois and has represented its Third District since 1983.

Then we will hear from Congressman Martin Hoke. Congressman Hoke is a member of this subcommittee and currently serving his second term as Representative of Ohio's 10th District.

We thank each of you for being with us this morning. Without objection, your full statement will be made a part of the record, and I would ask that you summarize your testimony in no more than 10 minutes.

Congressman Lipinski.

STATEMENT OF HON. WILLIAM O. LIPINSKI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. LIPINSKI. Thank you, Mr. Chairman, and good morning, Mr. Chairman and members of the subcommittee. I thank you for the opportunity to testify today.

I commend you for holding this very important hearing on how court-ordered school desegregation efforts are affecting school systems throughout the Nation. Many cities throughout the Nation, including Chicago, are spending millions of dollars to comply with court-ordered desegregation efforts that no longer achieve the objective of racial integration. Each year the Chicago public schools spend a minimum of $37 million on busing efforts to meet the requirements of a 1981 court-ordered decree designated to achieve both equality and racial integration.

Now, 15 years after the decree was issued, the Chicago public schools have a white population of less than 10 percent. It is obvious that the court decree and busing will not and cannot achieve any real measure of racial integration in a school system that is less than 10 percent white. In fact, the Chicago Public School Board recently admitted that the primary goal of busing is not to achieve racial integration, but to meet the equality provision. Therefore, the board is willing to bus a child up to 5 miles so that he or she can participate in a special course or program that may not be available at a school within walking distance.

However, magnet schools which offer unique art classes or intensive foreign language programs are deluged with thousands of applications and accept less than 100 applicants a year. For example, Chicago Disney Magnet School received between 2,000 and 4,000 applications each year and accepted only 50 to 60 new students. Given such odds of acceptance, it is clear that children are not being bused to their first choice of schools or even their second or their third choices.

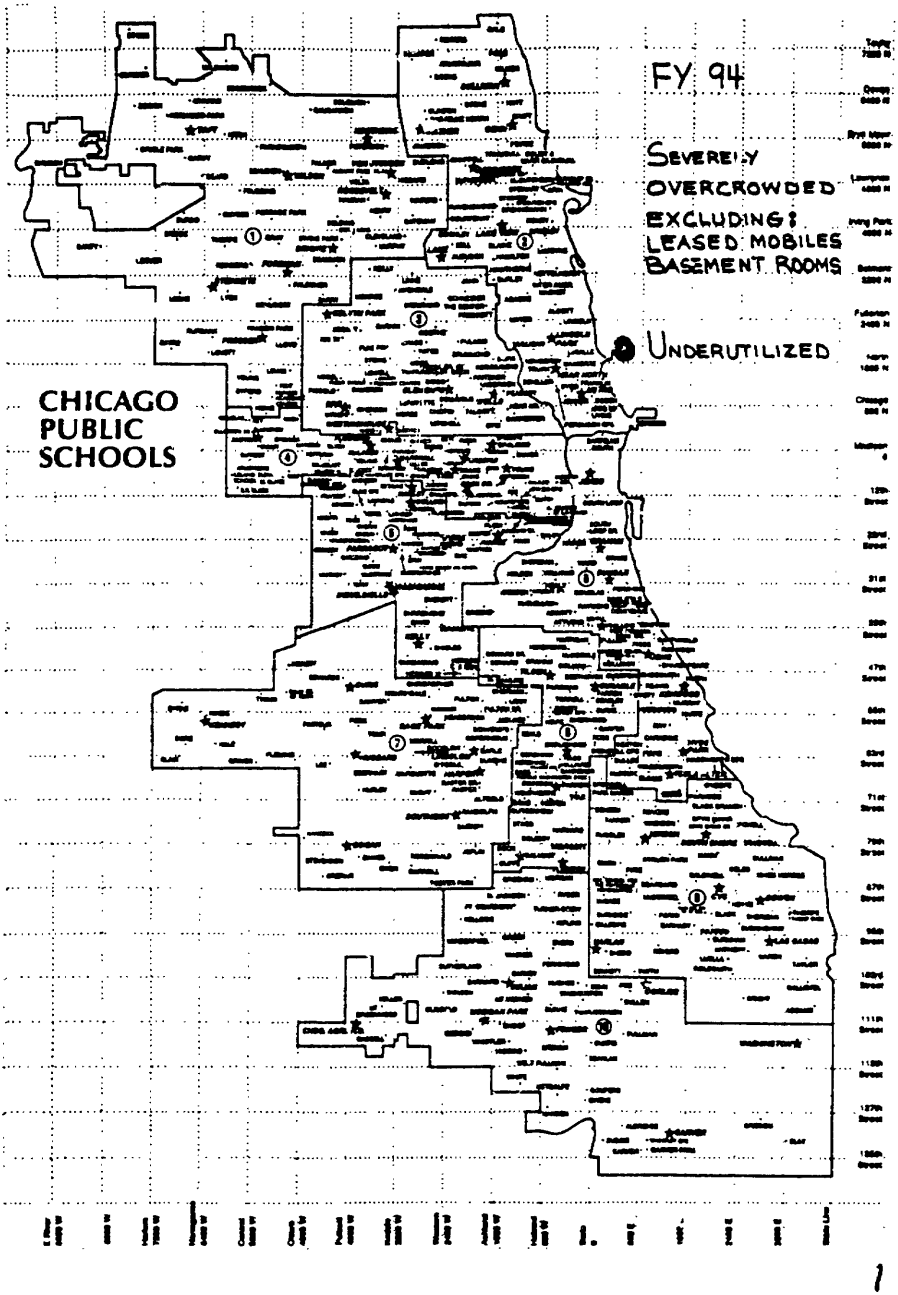
Despite this reality, the board continues to bus hundreds of children each day to overcrowded schools outside of their neighborhoods. Overcrowding is a very serious problem in the Chicago public schools. The local news media has exposed children being taught math and science in school gyms and being forced to use broom closets as classroom space. However, what is not being reported is the fact that there are also underutilized facilities in the city that could be put to better use by the Chicago public schools.

I would like to enter into the record copy of maps provided by the Chicago Public School Board showing what they consider to be underutilized and overutilized facilities, Mr. Chairman.

Mr. CANADY. Without objection.

Mr. LIPINSKI. Thank you.

[The information follows:]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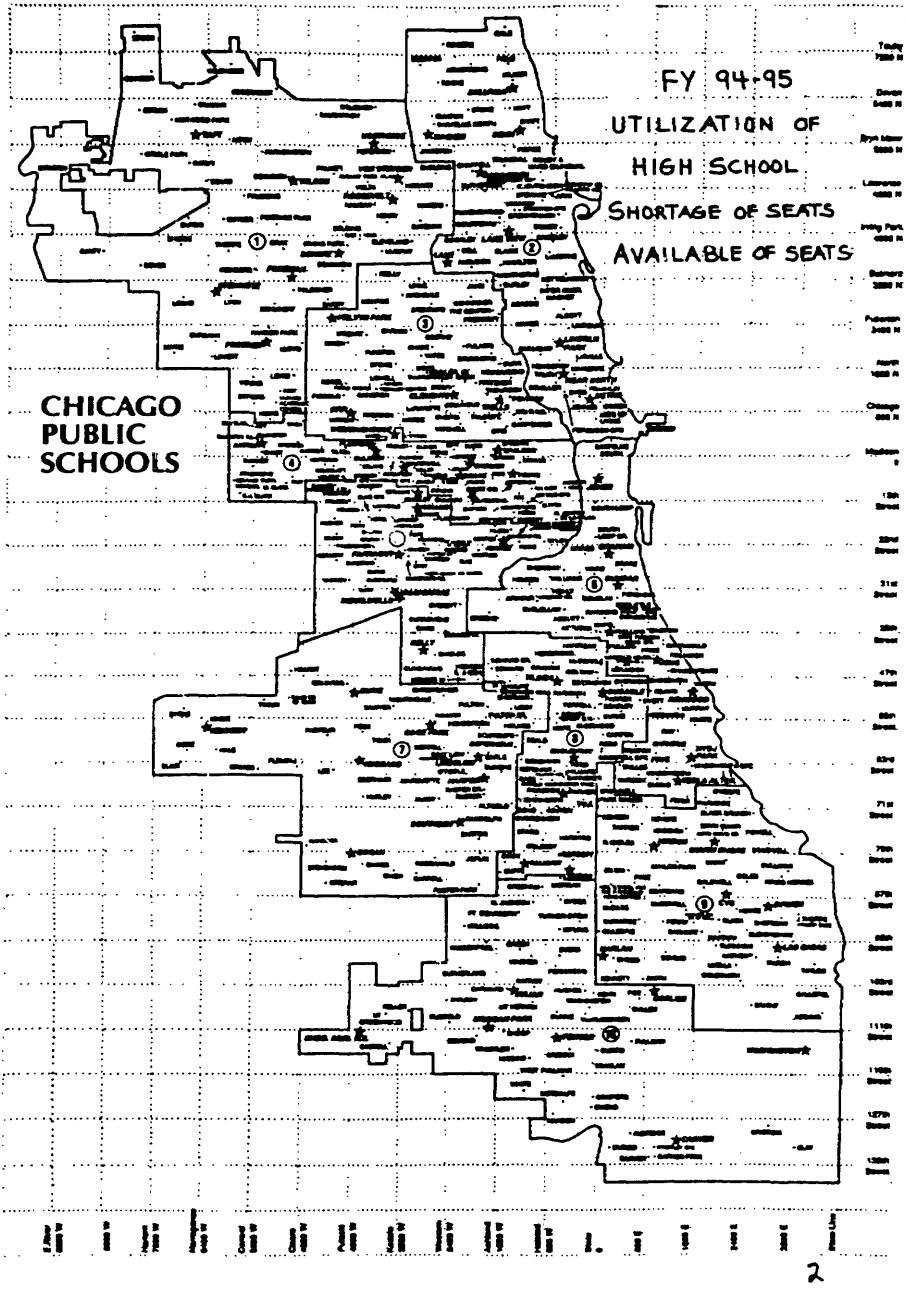
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Mr. LIPINSKI. The underutilized facilities are most often located in predominantly African-American neighborhoods of Chicago. Busing, therefore, is partly responsible for the overcrowding at outlying schools, especially since few white children actually attend public schools. The result is that students within walking distance of many schools are denied access because the schools are already filled with students bused in from other parts of the city.

A Chicago Sun Times editorial from March 20, 1995, which I would also like to submit for the record, summarizes the problem best. Mr. Chairman, if I may submit this for the record?

Mr. CANADY. Without objection, it will be made a part of the record as well.

Mr. LIPINSKI. Thank you.

[The information follows:]

MARCH 20, 1995--EDITORIAL PAGE

Let's Face It: Busing's Time Is Past

Busing as a means of desegregating the Chicago public schools is widely acknowledged to be an empty exercise.

Sure, the bus companies have been enriched. But what about the students, what about their schools, and what about their neighborhoods? In 1995, under school reform, maybe it's time to face facts: Busing is obsolete.

Rep. William Lipinski (D-Ill.) last week proposed that Chicago seek judicial review of its court-ordered busing mandate, which costs $37 million a year—80 percent paid by Chicago taxpayers. The school system buses about 33,000 students—53 percent black, 30 percent Hispanic and 14 percent white. Ninety percent of the students in the city schools are minorities.

Lipinski is not the first to question the value of the 1981 desegregation plan, but his timing is right. The issue should be considered as the schools face a projected budget shortfall of at least $150 million in the coming year.

The 1981 court order was intended to provide equity in education. The vast majority of Chicago students benefit from desegregation programs, and no one has suggested doing away with those educational programs.

But busing has not desegregated schools. In many cases, it merely moves students out of violence-plagued neighborhoods into safe schools.

Much has changed since 1981. But Chicago's traditional strength—its neighborhoods—has not. In many neighborhoods that have eroded, bad schools are to blame.

The most monumental change in the schools is the reform experiment begun five years ago. This bottom-up management is based on the principle that parents, teachers and community members should run their local schools. It believes that, ultimately, improving local schools will strengthen neighborhoods.

School reform and busing are both solutions. Reform is supposed to fix schools that don't perform. Busing lets some students escape from schools that don't perform. This may be a case, however, of solutions canceling each other out.

We hope these questions are considered when the Senate Education Committee meets today in Chicago.

With the Chicago public schools in a budget crisis, every expenditure must be up for review. Otherwise, when the hostile Legislature starts to meddle, everything will be up for grabs.

Mr. LIPINSKI. It reads, and I am quoting here, "But busing has not desegregated schools. In many cases, it merely moves students out of violence-plagued neighborhoods into safe neighborhoods.

"Much has changed since 1981. But Chicago's traditional strength—its neighborhoods—has not. In many neighborhoods that have eroded, bad schools are to blame."

That's the end of the quote from the editorial, the Sun Times.

The solution to me is obvious: rather than bus a child to an overcrowded school away from home, the board should emphasize rebuilding neighborhood schools. Neighborhood schools build community pride and rely on commitment of students and parents. If the Chicago public schools did not have to divert $37 million to busing costs, the system would be able to upgrade every school and provide a quality education to each child in their own neighborhood. The equality provision of the court decree would be achieved by giving the same quality teachers and textbooks to inner-city schools as are given to outlying schools. Underutilized facilities should not be ignored. They should be improved with funds that are foolishly spent on busing.

Chicago's Mayor Daly and the new school board agree that money spent on busing would be better spent rebuilding our neighborhood schools. They wish to end busing for racial integration, but cannot at this time because they are still bound by the 1981 court-ordered decree.

For this reason and many others, I have introduced H. Con. Res. 101, along with the chairman of this full committee, who I am very honored to call a very good friend of mine, Congressman Henry Hyde. The resolution expresses the sense of Congress that court-ordered desegregation efforts should be reexamined for their effectiveness.

The bill reads that any court currently having in force a decree or other order regarding desegregation that is more than 3 years old should reconsider the decree in light of any changed facts and make any modifications necessary. After careful review, I believe the courts will drop the outdated and expensive decrees, recognizing that court-ordered school desegregation efforts are not achieving racial integration. Then money now spent enforcing court-ordered decrees could be spent on providing a quality education to all students in every school.

Diverting millions of dollars from foolish busing efforts to real school reform is a perfect solution, especially as Congress continues its partisan rankling over the balanced budget and the proposed spending cuts. By redirecting existing money, millions of dollars will be readily available for schools without one dollar cost to the Federal Government or to the taxpayers. The plan is fiscally responsible and directly serves the needs of our children.

Again, I thank you for the opportunity to testify today. I believe this issue is very important to the future of our Nation's schools and the future of our children. I hope this hearing is the beginning of a legislative solution to the ineffective court-ordered school desegregation efforts that constrict systems throughout this Nation.

And if there's any questions that the members of this subcommittee have, I will be happy to try to answer them in regards to this

particular issue as it pertains to the city of Chicago. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Lipinski follows:]

PREPARED STATEMENT OF WILLIAM O. LIPINSKI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Good morning, Mr. Chairman and Members of the Subcommittee. Thank you for the opportunity to testify today. I commend you for holding this very important hearing on how court ordered school desegregation efforts are affecting school systems throughout the nation. Many cities throughout the nation, including Chicago, are spending millions of dollars to comply with court ordered desegregation efforts that no longer achieve the objective of racial integration.

Each year, the Chicago Public Schools spend a minimum of $37 million on busing efforts to meet the requirements of a 1981 court ordered decree designed to achieve both "equity" and "racial integration." Now, 15 years after the decree was issued, the Chicago Public Schools have a white population of less than ten percent. It is obvious that the court decree and busing will not, and cannot, achieve any real measure of racial integration in a school system that is less than ten percent white.

In fact, the Chicago Public School Board readily admits that the primary goal of busing is not to achieve racial integration but to meet the equity provision. Therefore, the Board is willing to bus a child up to five miles so that he or she can participate in a special course or program that may not be available at a school within walking distance. However, magnet schools which offer unique art classes or intensive foreign language programs are deluged with thousands of applications and accept less than a 100 applicants a year. For example, Chicago's Disney Magnet School receives 2,000 to 4,000 applications a year and accepts only 50 to 60 new students. Given such odds of acceptance, it is clear that children are not being bussed to their first choice of schools or even to their second or third choices.

Despite this reality, the Board continues to bus hundreds of children each day to overcrowded schools outside of their neighborhoods. Overcrowding is a serious problem in the Chicago Public Schools; the local news media has exposed children being taught math and science in schools' gymnasiums and being forced to use broom closets as classroom space. However, what is not reported is the fact that there are also underutilized facilities in the city that could be put to better use by the Chicago Public Schools. These underutilized facilities are most often located in the predominately African-American neighborhoods of Chicago.

The solution, to me, is obvious. Rather than bus a child to an overcrowded school away from home, the Board should emphasize rebuilding neighborhood schools. If the Chicago Public Schools did not have to divert $37 million to busing costs, the system would be able to upgrade every school and provide a quality education to each child in their own neighborhood. The equity provision of the court decree would be achieved by giving the same quality teachers and textbooks to neighborhood schools as are given to outlying schools. Underutilized facilities should not be ignored; they should be improved with funds that are foolishly spent on bussing.

Chicago's Mayor Daley and the new School Board agree that money spent on busing would be better spent on rebuilding our neighborhood schools. Unfortunately, the Chicago Public Schools will continue to bus students for as long as they are under the 1981 court ordered decree. The Chicago Public School Board is not willing to change its school desegregation efforts for fear of violating the 15 year old decree. For this reason, I introduced House Concurrent Resolution 101 along with Congressman Henry Hyde, Chairman of the full Committee. The resolution expresses the sense of Congress that court ordered desegregation efforts should be reexamined for their effectiveness. The bill reads that any court currently having in force a decree or other order regarding desegregation that is more than three years old should reconsider that order in light of any changed facts and make any modifications necessary, consistent with serving the educational needs of children and a rational allocation of taxpayers' money.

Again, thank you for this opportunity to testify today. I believe this issue is very important to the future of our nation's schools and the future of our children. I hope this hearing is the beginning of a legislative solution to the ineffective court ordered school desegregation efforts that constrict school systems throughout the nation.

Mr. CANADY. Thank you, Mr. Lipinski.

Mr. Hoke.

STATEMENT OF HON. MARTIN R. HOKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. HOKE. Thank you, Mr. Chairman. Let me begin just by expressing my gratitude to you personally for taking this issue on and for having these hearings, and for having the hearing in Cleveland.

We, by the nature of this committee, get involved in issues about which Americans care very deeply and hold extraordinarily passionate views, and I admire the courage that you have shown on this and many other occasions to hold hearings about controversial constitutional questions.

In September 1995, this subcommittee traveled to the congressional district that I represent, the west side of Cleveland, OH, in western Cuyahoga County, to learn about this issue from those who have to live with it every single day of the year: parents, teachers, school administrators, and professors who are entrusted with the responsibility of analyzing the impact of public policy. The message from that hearing was clear.

Mr. CANADY. We need to have quiet in here while the witnesses are testifying.

Mr. HOKE. Thank you, Mr. Chairman.

The message of that hearing was clear: more than anything else, Clevelanders want quality education for their children. They overwhelmingly prefer to send their children to schools in their own neighborhoods, and the race of the pupil sitting next to their child is almost completely irrelevant to them.

The overwhelming sentiment expressed by my constituents and other community leaders is that busing for racial balance has failed to improve academic achievement opportunities for minorities; it has drained the financial resources of Cleveland's public schools, and it has sent those who could afford it packing to the suburbs or the parochial educational alternative.

Let me quote a few of the witnesses. Dr. Thomas Bier, the director of the housing policy research program at Cleveland State University, said, "I believe busing for the purpose of racial balance has hurt the city of Cleveland because it has contributed to the economic and social weakening of its resident population."

Dr. Bier also spearheaded a study under the auspices of the Citizens League Research Institute which found that school choice and proximity to home are more important to Cleveland parents than is the district's racial mix.

Another witness, a mother speaking from her own experience, stated, "The busing nightmare has left poor black children [traveling] long unnecessary distances to schools outside their neighborhoods, and [has] facilitated repeated and unnecessary school reassignments to justify race ratios."

Finally, the leader of a grassroots movement for neighborhood schools said, "The court order in Cleveland did not provide equal opportunity, nor did it end the deliberate assignment to schools and exclusion from schools on the basis of race, color or nationality. On the contrary, [it] required deliberate racial assignment. . . ."

Now, in addition to these personal reflections, the empirical evidence is convincing. That Cleveland proper has declined in popu-

lation from 857,000 in 1968 to just under 500,000 today, while the overall population of northeastern Ohio has increased, is a direct reflection of the impact of busing, as is the fact that nearly 40 percent of Clevelanders live at or below the poverty level.

Almost $1 billion has been spent on desegregation activities in Cleveland; yet, the schools are worse off now than they were before this utterly unjustifiable spending explosion. Enrollment has plummeted. Graduation rates have declined. Average SAT scores have dropped like a rock. Truancy rates have skyrocketed. And racial integration has not been achieved. Schools with a 60-percent minority population in 1970 are 79 percent minority today.

The greatest tragedy of all is that most of these schools have been rendered completely dysfunctional. Why? Because those who can afford to, whatever their race, have gotten out and have gone where they have the freedom to decide for themselves where their children will attend school. They decide. Not a Federal judge. Not a school administration. Not a plaintiff's lawyer. That kind of freedom is a simple concept and it is the bedrock of the American experiment. The fact that such freedom is not available to the poorest families in our land is unspeakably unjust, and it is a very real and incontrovertible unintended consequence of court-ordered busing that its creators and the remaining proponents of court-ordered busing simply ignore.

Indeed, those who have been left behind are at the very bottom of the economic ladder—single-parent families, welfare recipients, those children who more than anyone else need the additional support of attending classes with kids from intact, emotionally-healthy and stable families. But these are the families that have moved out. And any teacher will tell you that when a classroom reaches a certain threshold—and they may differ as to what that threshold is, 25 percent, 40 percent, 50 percent—of kids from dysfunctional families, learning simply stops and warehousing begins.

Today we're going to hear from a number of constitutional scholars and legal experts on the role that the courts have played in this endeavor and what the Congress may be able to do. Federal courts have assumed unprecedented authority in the administration of busing orders. Congressional willingness to permit this expanded judicial role was the result of cowardly school boards and State legislatures that refused to do what is both morally right and constitutionally required; that is, to eliminate racial discrimination. Unfortunately, this broad expansion of judicial authority has brought nonelected, permanently-appointed Federal judges into the daily management of local institutions, something that our Framers surely never intended because they knew that the lack of accountability that comes from permanent tenure is utterly inappropriate for both the creative and deliberative formulation of public policy solutions as well as for the day-to-day execution of them.

While the picture that I've drawn of the Cleveland public schools is both disturbing and discouraging, I don't believe that anyone, except perhaps for a handful of people who have a vested interest in seeing that the current system is perpetuated, would challenge its accuracy. We are at ground zero. We have nowhere to go but up. We are in the ashes and it is now time for the phoenix to rise. I have every and absolute confidence in our ability to do just that.

And to that end, I look forward to hearing the legislative and other proposed solutions that will be presented by our distinguished panel of witnesses today.

And I would add—and I'm sorry that the gentleman from Massachusetts is not here—that the purpose of this hearing is in fact to solicit legislative solutions, and the only reason that I haven't personally already introduced legislation to deal with this issue is that I wanted the benefit of the wisdom of today's witnesses, all of which is a long way of saying that we cannot add clairvoyance to Mr. Frank's otherwise extraordinary resume.

I thank you, Mr. Chairman, for calling this hearing, and I look forward to the panelists.

[The prepared statement of Mr. Hoke follows:]

PREPARED STATEMENT OF HON. MARTIN R. HOKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Chairman Canady, please allow me to begin by expressing my gratitude and admiration to you for holding this second hearing on federally mandated and monitored school desegregation. The Subcommittee on the Constitution is by its very nature involved in issues about which Americans care very deeply and hold passionate views. I greatly admire the courage that you have shown in calling this hearing and holding other hearings about controversial constitutional questions.

In September of 1995, this subcommittee traveled to the congressional district I represent—Cleveland, Ohio—to learn about this issue from those who have to live with it every single day of the year: parents, teachers, school administrators and professionals entrusted with the responsibility of analyzing the impact of public policy. The message of that hearing was clear. More than anything else, Clevelanders want quality education for their children. They overwhelmingly prefer to send their children to schools in their own neighborhoods. And the race of the pupil sitting next to their child is almost totally irrelevant to them.

The overwhelming sentiment expressed by my constituents and other community leaders is that busing for racial balance has failed to improve academic achievement opportunities for minorities, drained the financial resources of Cleveland public schools, and sent those who could afford it packing to the suburbs or to the parochial educational alternative.

Let me quote a few of the witnesses. Dr. Thomas Bier, director of the Housing Policy Research Program at Cleveland State University, said, "I believe busing for the purpose of racial balance has hurt the City of Cleveland because it has contributed to the economic and social weakening of its resident population." Dr. Bier also spearheaded a study under the auspices of the Citizens League Research Institute which found that school choice and proximity to home are more important to Cleveland parents than is the district's racial mix. Another witness, a mother speaking from her own experience, stated, "The busing nightmare has left poor black children [traveling] long unnecessary distances to schools outside their neighborhoods, and [has] facilitated repeated and unnecessary school reassignments to justify race ratios." Finally, the leader of a grassroots movement for neighborhood schools said, "The court order in Cleveland did not provide equal opportunity, nor did it end the deliberate assignment to schools and exclusion from schools on the basis of race, color or nationality. On the contrary, [it] required deliberate racial assignment . . .".

In addition to these personal reflections, the empirical evidence is convincing. That Cleveland proper has declined in population from 857,000 in 1968 to just under 500,00 today (while the overall population of northeastern Ohio has increased) is a direct reflection of the impact of busing, as is the fact that nearly forty percent of Clevelanders live at or below the poverty level.

Almost one billion dollars has been spent on desegregation activities in Cleveland, yet the schools are worse off now than they were before this utterly unjustifiable spending explosion. Enrollment has plummeted. Graduation rates have declined. Average SAT scores have dropped like a rock. Truancy rates have sky-rocketed. And racial integration has not been achieved. Schools with a 60 percent minority population in 1970 are 79 percent minority today.

The greatest tragedy of all is that most of these schools have been rendered completely dysfunctional. Why? Because those who can afford to—whatever their race—have gotten out and have gone where they have the freedom to decide for them-

selves where their children will attend school. They decide. Not a federal judge. Not a school administrator. Not a plaintiff's lawyer advised by an overpaid accountant calculating racial percentages. That kind of freedom is a simple concept and it is the bedrock of the American experiment. The fact that it is not available to the poorest families in our land is unspeakably unjust. Indeed those who have been left behind are at the very bottom of the economic ladder—single parent families, welfare recipients—those children who more than anyone else need the additional support of kids from intact, emotionally healthy and stable families. But these are the families that have moved out. And any teacher will tell you that when a classroom reaches a certain threshold (and they may differ as to what that is—twenty five percent, forty percent or fifty percent) of kids from dysfunctional families, learning simply stops and warehousing begins.

Today, we will hear from a number of constitutional scholars and legal experts on the role the courts have played in this endeavor and what the Congress may now do. Federal courts have assumed unprecedented authority in the administration of busing orders. The willingness to allow this expanded judicial role was the result of cowardly school boards and state legislatures who refused to eliminate racial discrimination. Unfortunately, this broad expansion of judicial authority has brought non-elected, permanently appointed federal judges into the daily management of local institutions—something the framers surely never intended, because they knew that the lack of accountability that comes from permanent tenure is utterly inappropriate for the creative and deliberative formulation of public policy solutions or the day-today execution of them.

While the picture I've drawn of the Cleveland Public Schools is both disturbing and discouraging, I don't believe that anyone—except for a handful of people who have a vested interest in seeing the current system perpetuated—would challenge its accuracy. We are at ground zero. We have nowhere to go but up. We are in the ashes and now it is time for the phoenix to rise. I have every and absolute confidence in our ability to do just that. To that end, I look forward to hearing the legislative and other proposed solutions that will be presented by our distinguished panel of witnesses today. Thank you Mr. Chairman.

Mr. CANADY. Thank you, Mr. Hoke.

Are there questions from any members?

Mr. CONYERS. Yes, there are.

Mr. CANADY. Mr. Conyers.

Mr. CONYERS. Thank you very much.

Ed, good morning.

Mr. LIPINSKI. Good morning.

Mr. CONYERS. Let me ask you, what was the purpose of the two documents you introduced? What were they?

Mr. LIPINSKI. One is an editorial from the Chicago Sun Times agreeing with the position that——

Mr. CONYERS. Oh, editorials, that's self-explanatory.

Mr. LIPINSKI. OK.

Mr. CONYERS. What else?

Mr. LIPINSKI. It's a map from the Chicago Board of Education showing the overcrowded and the underutilized schools, and the purpose of that is to demonstrate that one of the principal reasons these schools are overcrowded is because of children being bused into them. There are a number of incidents——

Mr. CONYERS. You got that from the public school system?

Mr. LIPINSKI. Correct.

Mr. CONYERS. OK. What is the date of the map?

Mr. LIPINSKI. It's not dated at all, Congressman, but it was given to me in December of last year by the head of the Chicago School Board, and I'll be happy to get a letter from him stating its accuracy, if you wish.

Mr. CONYERS. No, you don't have to; I'll contact him myself. What is his name?

Mr. LIPINSKI. What is his name? Gary Chico.

Mr. CONYERS. OK, he's not there anymore.

Mr. LIPINSKI. He's the president of the Chicago Board of Education. He was the chief of staff for the mayor of the city of Chicago. That's where he no longer is.

Mr. CONYERS. OK. When it first came out, what was your view of *Brown* v. *the Board of Education*?

Mr. LIPINSKI. Are you asking me that question?

Mr. CONYERS. I am.

Mr. LIPINSKI. I had no problem with it whatsoever.

Mr. CONYERS. OK, and will that be evident to me if I review your many speeches and writing across the years in our careers?

Mr. LIPINSKI. I don't know if you can find that or not, but certainly——

Mr. CONYERS. But that's the fact, anyway?

Mr. LIPINSKI. I don't believe that we should have any discrimination in this country, and I don't think people should be forced to go to school 3, 4, 5 miles away from their home because of the color of their skin. And, unfortunately, that is exactly what was happening in those days, and to a great extent that's what's happening in the city of Chicago today.

Mr. CONYERS. How much of Chicago do you represent?

Mr. LIPINSKI. How much? About, let's see, 60——

Mr. CONYERS. What part of it is of your district?

Mr. LIPINSKI. I will let you know in just one moment.

Mr. CONYERS. OK.

Mr. LIPINSKI. About 200,000 people.

Mr. CONYERS. So about half your district is Chicago?

Mr. LIPINSKI. It's a little bit less than that.

Mr. CONYERS. It appears that this is a subject of great importance to you, and the citizens of Chicago, and other elected officials. Have you ever discussed this subject with other African-American leaders?

Mr. LIPINSKI. Yes, I have.

Mr. CONYERS. Good. Jesse Jackson?

Mr. LIPINSKI. No, I've never discussed it with Jesse Jackson, but I've discussed it at great lengths with former Congressman Gus Savage.

Mr. CONYERS. Have you talked about it with other African-American leaders in Chicago?

Mr. LIPINSKI. I've talked about it with some of the African-American constituents that I represent. I don't know who you might have in mind. I haven't discussed it with Jackson. I mentioned a former Congressman and a current Congressman I've discussed it with. I've also, as I say, discussed it with a number of my constituents.

Mr. CONYERS. Sure. Would you be willing to discuss it with Jesse Jackson?

Mr. LIPINSKI. I have no problem discussing it with Jesse, Sr., or Jesse, Jr.

Mr. CONYERS. OK. You just haven't got to it yet? Or maybe they haven't talked to you about it?

Mr. LIPINSKI. They've never discussed it with me, no.

Mr. CONYERS. OK.

Mr. LIPINSKI. And Congressman Jackson I have tried to have a number of discussions with, but so far he's been extremely busy; he hasn't had the opportunity, apparently, to do so.

Mr. CONYERS. All right, thank you very much.

Martin, you and Lou Stokes work closely together, I presume?

Mr. HOKE. We both represent Cleveland.

Mr. CONYERS. Yes, the last time I saw you before Judiciary, you were both sitting at the same table, as a matter of fact, presenting the same issue; right?

Mr. HOKE. Yes.

Mr. CONYERS. OK. Have you two ever talked about this subject?

Mr. HOKE. I don't know that we have.

Mr. CONYERS. OK. I assure you would be willing to discuss this matter with him, though.

Mr. HOKE. Well, certainly. Absolutely.

Mr. CONYERS. OK. What was your opinion of *Brown* v. *the Board* when it first came out?

Mr. HOKE. When it first came out, was it 1952 or 1954?

Mr. CONYERS. 1954.

Mr. HOKE. It was 1954; I was 2 years old, and I didn't have an opinion at that time.

Mr. CONYERS. Did you develop one?

Mr. CANADY. The gentleman's time has expired. Without objection, the gentleman will have 2 additional minutes.

Mr. CONYERS. Thank you very much. I'll try to bring this to a close.

When you became cognizant of the opinion, what did you think of it?

Mr. HOKE. I am absolutely committed to and believe in both the moral authority of, as well as the constitutional requirement for, no racial discrimination in public schools.

Mr. CONYERS. But as far as that case went——

Mr. HOKE. When I studied that case in law school in a constitutional law class, I had no problem with it.

Mr. CONYERS. OK. And you still do not?

Mr. HOKE. That's correct.

Mr. CONYERS. OK.

Mr. HOKE. Although I have to tell you, it's not *Brown* v. *Board of Education* that really informs me about the way I think about the current problem in Cleveland, OH, with respect to the quality of education and that citizens in Cleveland have an alternative for themselves.

Mr. CONYERS. Could you explain that to me?

Mr. HOKE. What I mean is that I think in terms of the practical—we have a serious problem, and so I don't—when I think about solutions to that problem, I don't gloss over the problem with the solution of just applying the *Brown* v. *Board of Education* decision in terms of the way that I go about thinking about it. I mean, when we had a hearing on this in Cleveland, I think that the fundamental foundation of *Brown* v. *Board* was not the issue. So it hasn't occurred to me to put that in my day-to-day thinking on the issue.

Mr. CONYERS. OK. Have you talked with any of the members of the court, officials in the Cleveland or school systems with African-American leaders?

Mr. HOKE. Yes. Let me answer your question two ways. First of all, when I——

Mr. CANADY. The gentleman's time has expired. Without objection, the gentleman will have 1 additional minute.

Mr. CONYERS. I just want him to respond to that question.

Mr. CANADY. One additional minute.

Mr. CONYERS. Thank you very much.

Mr. HOKE. And I'll be happy to respond to your question. When I asked to have this hearing set up in Cleveland, I did a great deal of research; I talked to many, many different people of all races including the board president, a number of the members of the school board, and a number of the people that were running for school board because there was an election going on at the time, and people from all parts of the city to try to get a feeling of their position on this issue.

But I would also say to you that I may have a slightly different model for what my office is and the way that I go about it. I mean, I represent residents of the 10th District of Ohio, and I look, first of all, to them, to respond to their needs and their aspirations, hopes, and concerns. And that's my primary focus in terms of the way that I conduct my business and the way that I think about these issues.

Mr. CONYERS. Thank you very much.

Mr. HOKE. Thank you.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. CANADY. Are there other members with questions? Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I just had a couple of questions. And I want to express my thanks to both of these gentlemen who come here to talk about their individual situations. Unfortunately, you're talking about them in a global context when it seems to me that your real concerns are Chicago and Cleveland, and so I'm a little concerned about the implications of some of the things you're saying applied more broadly, and maybe even at your own local situations.

I want to be the first to go on record as saying this is an inordinately difficult issue. It has race implications. As Martin indicated in his presentation, it has major class implications that sometimes in some cities transcend even the racial implications. So I don't want to minimize the importance of this or the difficulty of it. It is an extremely difficult issue and one that I have had to wrestle with for a long, long period of time. And the more you deal with the issue, the more difficult you understand the issue is.

But let me ask a couple of questions. Mr. Lipinski indicated that, I think he said—let me see how he said it here—race "almost completely irrelevant" is one part of your statement.

My first question is: should race be a factor at all, in your opinion, in the assignment of kids to school?

Mr. LIPINSKI. No, I don't think it should be a factor at all. I don't think that a person should be deprived of an opportunity to go to school because of race. I don't think an individual should be given——

Mr. WATT. OK. I—and this is not a trick question. I'm just trying to be clear on where you are.

Martin, you agree that race should not be a factor at all?

Mr. HOKE. Race is clearly a factor; there is a constitutional mandate, as well as legislative mandates that have come from this Congress, that——

Mr. WATT. But you—I mean, I take it that where you're going is you——

Mr. HOKE. Now may I finish my answer?

Mr. WATT. Well——

Mr. HOKE. May I please finish my answer? You asked me the question. May I please finish my answer?

Mr. WATT. Well, the answer to the question is either yes or no, and I—and you said yes and Mr. Lipinski said no. I mean, I—and I take it that, whatever explanation you're giving, I take it that where you would like the law to go——

Mr. HOKE. The question is: do you want to have the benefit of my feelings and thoughts about this or do you want to make a political point and a speech? Are we going to have a dialog or is this a cross examination?

Mr. WATT. It's a cross examination.

Mr. HOKE. All right, then the answer is yes.

Mr. WATT. Thank you. But I hope we'll get some constructive dialog out of——

Mr. HOKE. I doubt it, if it's going to be as though I'm a hostile witness on cross examination.

Mr. WATT. I'm not hostile to you, Martin; I'm just trying to get to a point. And the only point that I'm trying to get to is—I mean, to talk to me about what the current status of the law is, obviously, you're dissatisfied with what the current status of the law is. I know what the current status of the law is. So you don't need to talk to me about what the current status of the law is. You're trying to move the law someplace where it's not. And so I want to get to that point.

And, I mean, I'm not adverse to you; you're not adverse to me. I've got 5 minutes, and, you know, hey, we can talk about this. I'll be happy to talk to you about it on the floor sometime outside the context of this hearing, but you don't have to get huffy with me. I'm not angry at you, and I don't want you to be angry at me. I'm trying to do my job.

Let me go back to Mr. Lipinski while you cool off a little bit and while I cool off a little bit. [Laughter.]

Mr. CANADY. The gentleman's time has expired. Without objection, the gentleman will have 2 additional minutes.

Mr. WATT. Why don't you just go ahead and give me 3 now?

Mr. CANADY. Why don't we just make it 3? [Laughter.]

Why don't we make it 3? I think that's an admirable suggestion. Without objection, it will be 3 minutes.

Mr. WATT. And would you give Mr. Hoke 2 more for what he just took out of my time.

Mr. CANADY. I'm going to give—I may give Mr. Hoke 5 since he's—or maybe I'll give him 8. Anyway——

Mr. WATT. Well, that would be just like some of the discrimination that goes on. [Laughter.]

You gave him ten; you gave us 5 to open. So that's fine.

Mr. CANADY. Well, I will assure you that the gentleman from North Carolina had more than 5 minutes for his opening statement.

Mr. WATT. Let me ask the question I'm really trying to get to. Bill, if the result of what you have just talked about, race not being a factor, and the result of the court reviews that your bill and Mr. Hyde's bill would mandate resulted in segregated schools again in the South, what would be your attitude toward that?

Mr. LIPINSKI. Well, I don't see how the Justice Department could come down with a program that would ultimately convince the courts to resegregate schools in the South, and I would certainly be opposed to that. I'm opposed to——

Mr. WATT. But isn't that exactly what you just said? I mean, you're going to mandate a review and you want race not to be a factor at all, and we know what the housing patterns are. If the result of that review is to result again in segregated schools in the South—I'm not even talking about Chicago or Cleveland—what would be your attitude about it? That's all I—that's what——

Mr. LIPINSKI. Well, I would not want to see schools anyplace be forcibly segregated, but I will——

Mr. WATT. De facto segregated, I'm talking about de facto segregation. I'm not talking about forcibly segregated. We're talking about de facto segregation. If the result of what you were saying was to return us to segregated schools in the South, would that be acceptable to you? That's the question I'm asking.

Mr. LIPINSKI. It would not be acceptable to me. It would not be acceptable to people in this country, nor would it happen. You are talking about a situation that existed 30, 40—even in your own particular situation, you talked about when you graduated from law school. That was back in what, 1967, was it, 1968?

Mr. WATT. 1970.

Mr. LIPINSKI. 1970, OK. So even since that time, it's 25, 26 years since that situation existed. Now, you know, we may——

Mr. WATT. But the housing patterns, which really would then be determinative of where somebody went to school—race would not be a factor—the housing patterns in my city are more segregated now than they were then.

Mr. CANADY. The——

Mr. LIPINSKI. Well, I don't think that that's—well, I'd just like to answer this, though. I don't think——

Mr. CANADY. Without objection, the gentleman will have 1 additional minute.

Mr. LIPINSKI. I don't think that that would occur because, even in the city of Chicago, if you would do away with mandatory busing for integration purposes, you still have a number of regional schools; you still have a number of magnet schools where people from all over the city can attend on a voluntary——

Mr. WATT. But those would be voluntarily.

Mr. LIPINSKI. On a voluntary basis, yes.

Mr. WATT. In Chicago. Suppose the result of this in the South—I'm just hypothetically——

Mr. LIPINSKI. Well, I continue to hear nowadays the South is further ahead than the North.

Mr. WATT. Suppose the result of that in the South would be you've got no magnet schools, you've got no—none of these attractions and things that you're talking about, and the result was to return us to segregated schools.

Mr. LIPINSKI. Well, you are coming to a conclusion that I do not believe in this day and age——

Mr. WATT. I'm not coming to that conclusion. I'm just supposing it as a—I'm asking for——

Mr. LIPINSKI. But I've already answered your question that I would oppose that, but I am also telling you that the situation you are referring to is not going to happen today. And you are talking about--you know, don't you——

Mr. WATT. So I should just trust those officials again——

Mr. LIPINSKI. There are——

Mr. WATT [continuing]. Like I did in 1954 and 1960 and 1970.

Mr. LIPINSKI. Well, I don't think you trusted them, either. I mean, you know, people went to court to resolve the situation.

But you are talking about——

Mr. CANADY. The gentleman's time has expired.

Mr. LIPINSKI. OK.

Mr. CANADY. I will yield time to you to continue.

Mr. LIPINSKI. In the city of Chicago there are $87 million worth of money spent on busing; $37 million of that is for busing for quality education and for integration purposes. If you were to do away with that in the city of Chicago and every place else in this country where it exists, you would have an extraordinary amount of money to rebuild inner-city schools, to improve the teaching at inner-city schools, to improve the textbooks, to improve the facilities, and everyone then would really get the quality education that all Americans so desperately need today in our changing economy.

Mr. WATT. Could you yield to me just one second to ask just one more question?

Mr. CANADY. 30 seconds to ask one more question.

Mr. WATT. How does that differ from separate but equal, what you just said?

Mr. LIPINSKI. We are not mandating anything whatsoever as far as separate and equal. You know, if you are—I don't really know what your point is other than you are——

Mr. WATT. No, I'm just asking how what you just said, which is upgrade the schools in the black areas and give them more books and give them more equipment, how does that differ from separate but equal——

Mr. LIPINSKI. When separate but equal was in force, it forced by a law children to attend segregated schools. There would be nothing in the law today that would force those children to attend segregated schools.

Mr. WATT. So it's OK if it's de facto——

Mr. LIPINSKI. Now you are attempting to——

Mr. WATT [continuing]. But it's not OK if it's ordered.

Mr. LIPINSKI. You are attempting to defend a system that is costing school boards across this country millions and millions of dollars and does no good whatsoever for the students. The only people it benefits are the people who own the bus companies that bus

these children around and some people that are willing to go into court to perpetuate that situation.

Mr. CANADY. OK, I will reclaim my time now. And, as you know, there's a vote going on on the floor. I want to thank the two Members who have been with us——

Mr. HYDE. I have some questions, Mr. Chairman.

Mr. CANADY. Well, we will——

Mr. HYDE. I don't want to——

Mr. CANADY. We will return——

Mr. HYDE. I don't want to keep them——

Mr. CANADY. We will return——

Mr. HYDE. May I just have a minute?

Mr. CANADY. Sure, Mr. Hyde is recognized.

Mr. HYDE. Mr. Lipinski, your bill simply says to courts that are administering consent decrees that were entered into some years ago review them under current circumstances to see if they're still accomplishing the purpose for which they're intended; is that correct?

Mr. LIPINSKI. That is correct.

Mr. HYDE. And some of these decrees may still have vitality and need to be maintained and some of them have long outlived their usefulness and are still draining the taxpayers for money that could be used to educate kids, not ship them around a city; is that correct?

Mr. LIPINSKI. That is correct.

Mr. HYDE. Now Chicago has 10 percent white population in the public school system.

Mr. LIPINSKI. Correct.

Mr. HYDE. How in the world can you bus the 90, the rest of the population, which I assume are nonwhite, around—how do they sprinkle that 10 percent around to integrate them?

Mr. LIPINSKI. Well, the white population is not bused at all. They simply go to their neighborhood schools, or if they can get into a magnet school, they go in. So there- ——

Mr. HYDE. What is accomplished by busing the black population?

Mr. LIPINSKI. There is—I'll give you a perfect example. Kennedy High School, located three blocks from where I live, all right, the enrollment there is 80 percent African-American, 15 percent Hispanic, 5 percent white. Now do you really believe that there is any integration taking place at that institution?

Mr. HYDE. Go in the school lunch room and watch. The answer is, no, of course not.

Mr. LIPINSKI. But the purpose of this legislation is for the Justice Department to ask the courts to review the existing consent decrees that enable or force, I should say——

Mr. HYDE. And there's nothing in what you want accomplished that's going to result in segregation in the South because you assume the courts are still the courts administering justice and they're going to look, rereview or review the decrees which are now governing the relationships in those schools under current conditions. That's all you're asking?

Mr. LIPINSKI. That is absolutely correct, and I really, in all honesty, have to say I resent that line of questioning saying that I want to resegregate schools in the South or—and I resent it even

more because I don't think that that is a very good approach to take to a very, very serious problem, bringing out a bogeyman such as that.

Mr. WATT. If the gentleman would yield just for a second—I just——

Mr. HYDE. Sure.

Mr. WATT. I really want to be clear that I respect you greatly. I really had no intention of implying that you want to re-segregate schools. I'm just trying to—I'm trying to take what you're saying about Chicago and apply it to what I know exists in my neck of the woods, as they say. I don't—I have every reason to believe that your interest is genuine. What I want to make sure is that you've thought through the implications of what you're saying. I'm not accusing you of being racist, and I hope you don't resent—I think you resent some implication that I have not intended to make to you. And if—if I have made that implication to you, I want to, in front of all of these people and on the record, apologize to you. I had no intention of implying that you are supporting returning to segregated schools in the South, but the concept that you have proposed, if it has that implication in the South, whether you intend it or not, I am troubled by. And I want to be clear on that because I don't want you to leave here thinking that I think you are racist——

Mr. LIPINSKI. But I believe that by you bringing up that bogeyman you are not giving the legislation that I have proposed a fair hearing because, if you did, there is no way that the legislation that I proposed would result in that occurring. And by you using that argument, I think that you hurt the entire process here. And I, frankly, was surprised at it and I do resent it. And we can discuss this, you and I, at another time.

Mr. WATT. Well, I'll be happy to discuss it off the record with you.

Mr. LIPINSKI. We all have to go and vote.

Mr. WATT. I just wanted to make sure my apology to you and my disclaimer of what you were saying I was saying got on the record. I'll be happy to discuss it with you on an individual basis, to give you whatever assurance I can give you.

I really haven't even read your bill. So to—I mean, I thought the purpose of this hearing was to give us more edification about it, and all I'm trying to do is question where your bill would lead to, without ever having read it. I mean, I really have never read the bill. I hope I don't ever have to.

Mr. CANADY. The gentleman's time has expired. There's a vote going on. The subcommittee will stand in recess and reconvene immediately after the vote.

Thank you, gentlemen, for being here.

[Recess.]

Mr. CANADY. The subcommittee will be in order.

I'd like to ask the members of the second panel to come forward and take their seats. Starting off our second panel today, we will hear from Dr. David Armor. Dr. Armor is research professor at the Institute of Public Policy at George Mason University and is a nationally-recognized authority on issues related to school desegregation litigation. He has served as an expert witness in dozens of de-

segregation lawsuits and has recently authored a book entitled, "Forced Justice: School Desegregation and the Law."

Next we will hear from Mr. William Taylor. Mr. Taylor is the vice chairman of the Leadership Conference on Civil Rights. For 15 years, he taught civil rights law at Catholic University Law School, and he is now an adjunct professor at Georgetown University Law School.

Then we will hear from Mr. Charles Cooper. Mr. Cooper was the Assistant Attorney General for the Office of Legal Counsel under President Reagan and is now a partner with the Washington law firm of Shaw, Pittman, Potts & Trowbridge. He has represented numerous clients in school desegregation lawsuits and successfully sought unitary status on behalf of the Oklahoma City and Wilmington, DE, public school districts.

Following Mr. Cooper, we will hear from Mr. Theodore Shaw. Mr. Shaw is the associate director-counsel of the NAACP Legal Defense and Education Fund, where he supervises the fund's litigation program. Mr. Shaw also has extensive experience in the area of today's hearing.

To conclude this panel, we will hear from Ms. Marcy Canavan. Ms. Canavan is chairman of the board of education of Prince George's County Public School District. The school board is currently operating under Federal court supervision in connection with desegregation litigation.

I thank each of you for being with us here with this morning. Without objection, your full statement will be made a part of the record, and I would ask that each of you summarize your testimony in no more than 10 minutes.

And, again, I want to express the gratitude of the subcommittee for your willingness to be with us and your patience during the first panel.

Now I would like to recognize Mr. Armor.

STATEMENT OF DAVID J. ARMOR, RESEARCH PROFESSOR, THE INSTITUTE OF PUBLIC POLICY, GEORGE MASON UNIVERSITY

Mr. ARMOR. Thank you. Mr. Chairman and members of the subcommittee, I appreciate being invited to testify today on the issue of school desegregation, otherwise known as school busing.

Many persons I meet are quite surprised when I tell them I spend a lot of time testifying in Federal court in school desegregation issues. I assure them—they say to me that, "I thought that issue was settled and over a long time ago." I always assure them, as I assure you today, that the school busing issue is very much alive in America and promising to survive well into the 21st century, 50 years after *Brown* v. *Board of Education.*

I'm pleased to be here today to give you a brief overview of the current status of school desegregation across the country, what I see as some of the current problems, and what Congress might do to help resolve those problems. My comments are based on nearly 30 years of research, writing, and court testimony in this field, including onsite consulting with more than 40 school districts since the early 1970's. I'll also draw in my comments on a recent, a 1990

survey of school desegregation that was done by the Department of Education, for which I was a coprincipal investigator.

According to this 1990 desegregation survey, almost 700 school districts nationwide have formal desegregation plans. The majority of these plans are either court ordered or mandated by a State or Federal agency. Most of these court cases are at least 20 years old and many are far older. I testified, by the way, just a year and a half ago in Topeka, KS, putting in their third desegregation plan in the 40, basically over 40 years since *Brown* v. *Board of Education.* Topeka, of course, was one of the cases in that decision, and they are still under remedies for desegregation.

About 60 percent of our largest 150 cities have desegregation plans of some type. We don't see much publicity about this, but the great majority of desegregation plans today still use some form of mandatory busing, and that busing is used to attain racial balance requirements or, we might even call them, quotas, specific and sometimes narrow and very rigid.

In its 1971 *Swann* decision, the Supreme Court said that busing for racial balance was only a starting point, a means to end of dismantling the dual school system. In fact, however, racial balance has instead become a rigid, bottom-line goal for nearly all desegregation plans in this country. And despite the Supreme Court's repeated insistence that court supervision should be temporary and that local control should be reinstated once compliance with court orders has been demonstrated, many court-ordered busing plans are still in place. Now this is not to say that there's been no progress, and although I know that you're concerned today, or many of you are concerned, about problems, let me tell you some of the progress that's been made in this area, I think to set the stage for where the problems are.

As recently as 10 years ago, mandatory busing was even more prevalent than it is today and very few school districts could be said to have been declared unitary; that is, dismissed, the court order having been complied with, and dismissed and supervision terminated. In the past 10 years, however, voluntary desegregation plans, which I happen to support and have designed a number of, are more commonplace, replacing the older mandatory plans, especially with the use of magnet schools, which have been a very effective tool.

And, I think more important for today's purposes, a growing number of school districts have been granted unitary status. As many of you know, the major impetus for unitary status has been the recent Supreme Court decisions in Oklahoma City and DeKalb County, GA, the *Dowell* and the *Pitts* decisions. Both of them went a long way to clarify exactly what a school district had to do to attain unitary status. Before those two decisions—and I can speak from experience in talking to many, many school boards over the years—most school districts were under the impression, reinforced by a lot of lower court decisions, that these court-ordered plans were more or less permanent. Most of these school districts adjusted their student attendance zones every few years to maintain racial balance in all schools.

Now after the successful petitions of Oklahoma City and the DeKalb County, a number of other districts have followed their

lead and have been declared unitary by lower courts. I won't go into detail here, but in 1994 alone I testified in the Savannah, GA, case; the Columbus, Moscobe County, GA, case; the Dallas, TX, case, and the Wilmington, DE, case, all four of which had petitioned for unitary status, and all four of those were granted. In the case of Dallas, it was a partial unitary status declaration, but it did affect the school busing part of the order, which was in many respects the most important.

During 1995, a number of additional unitary status declarations took place, including those for Denver, CO; Buffalo, NY; Broward County, FL. I just finished testifying in a unitary hearing in St. Louis, MO, and my able panel member, Mr. Taylor, here was the cross examiner for that case. So we'll probably hear more about St. Louis from him.

I'm currently consulting with several other school districts at the present time who are petitioning for unitary status. I believe that most of these districts will, in fact, attain unitary status, given my review of the successes they have made in complying with court orders.

Now given these experiences, I'm convinced that the vast majority of school districts that are still under court order have, in fact, satisfied the legal requirements for unitary status. What has come to concern me, and I think this is the focus of the proposed legislation, is the number of school boards who do not want unitary status now that it's within reach.

I think there are three reasons that I have encountered in the field as to why boards, school boards, who once obviously fought these busing orders, now do not want unitary status and to be released from court orders.

One is, and perhaps the biggest reason, is money. The best example in this regard is the St. Louis case and also a companion case, Kansas City in Missouri, who have received nearly $3 billion in aid from the State under court order to finance the most expensive school desegregation plans in the country. Now in these two cases, the Federal courts—and there's two different district courts involved here—have profoundly altered the normal school financing process and have created unrealistic and unsustainable levels of financing in those two school districts. For example, their pupil-teacher ratios are among the lowest in the country, 13 teachers for every pupil in these two large city systems. Given this unprecedented amount of State funding, it's understandable why these two school boards will not voluntarily give up their State revenues, but it's also understandable why the voters in Missouri continue to elect State officials who have sought to end the court order. Fortunately, the State is a defendant in this case and, in fact, can, and has, filed for unitary status.

But money has been a large factor in other cases that I've encountered. It's been a factor in Phoenix and Tucson, AZ; Indianapolis, IN; Yonkers, NY, and Cleveland, OH, just to mention a few cases. That is, money from the State, or the prospect of money from the State, has prevented those districts from filing for unitary status. Unlike Missouri, however, in these cases either the State is not a party to the litigation or it has joined with the school board in opposing unitary status.

The second type of reason is political or ideological. Some school boards find that a court order offers a convenient shield to accomplish a variety of policies that might otherwise be controversial, such as closing schools, opening or locating new schools, or reassigning faculty and principals.

In other cases, I think school boards believe that mandatory busing is actually beneficial for producing racial balance; that is, that racial balance will enhance minority education. As I show in my recent book, Forced Justice, I believe the evidence is clear that racial balance no longer has any—never did perhaps—by itself, has any role in minority academic achieve. It remains, however, a powerful dogma in many education and civil rights circles and is the reason why many school boards fail to seek unitary status.

I think some districts that fall in this category would be San Francisco and San Jose, CA; Orlando, Orange County or Orlando, FL, and Charlotte-Mecklenberg, NC. I believe there are many more school districts that fall into this category, and I probably should add Chicago after the comments this morning from Congressman Lipinski.

Possible improvements, I don't have any specific proposals. I'm not a legislator nor an attorney, and I may not use the proper words to describe these things, but there are some things that I think could be done that might be helpful, if it is within the power of Congress to do.

The first is, borrowing from Tampa, FL, a lower court, district court, told Tampa that it had two choices. Either it could petition for unitary status, because it hadn't done so in spite of 40 years—I'm sorry, 30 years—of a mandatory busing plan, or it could implement all of the things that the plaintiffs want them to do. So Tampa promptly filed for unitary status.

I think it would be very useful if the Justice Department could list all of the cases that are currently nonunitary that are still, in effect, active in its files and, if possible, list what needs to be done in those districts for them to be unitary.

I think that even the appearance of a list without the requirement of listing the requirements would be a tremendous impetus to many districts out there that are basically hiding under the court order or hoping that it will be a sleeping dog that lies and doesn't wake up.

Second, Congress could assist the unitary process, I believe, by making it possible for official intervention by a broader array of persons or agencies. This would be especially helpful in those cases where funding is a major issue. I believe the cities of Phoenix, Indianapolis, and Cleveland would have filed for unitary status motions long ago if they had the standing or the ability to file such a motion. They're not parties to the case at this time.

Finally, I think Congress should conduct a careful review of all Federal funding programs to make sure that court-ordered plans are not receiving some type of priority. The key here is the MSAP program. The Magnet School Assistance Program gives priority points if you're under a court order. Many school board members have told me, "We would love to have unitary status, but we don't want to lose our magnet school funding." So I think in this case

there are Federal programs that are actually harming the progress toward unitary status.

That's really the essence of my comments, and I look forward to answering questions.

[The prepared statement of Mr. Armor follows:]

PREPARED STATEMENT OF DAVID J. ARMOR, RESEARCH PROFESSOR, THE INSTITUTE OF PUBLIC POLICY, GEORGE MASON UNIVERSITY

I would like to thank you, Mr. Chairman and members of the Subcommittee, for inviting me to testify on the issue of school desegregation, otherwise known as school busing. Many persons I meet are quite surprised when I tell them that I spend a lot of time in federal courts testifying on school busing issues They say, "I thought that problem was over a long time ago." I assure them, as I assure you today, that the school busing issue is very much alive in America and promising to survive well into the 21st century, fifty years after the Supreme Court decided *Brown* v. *Board of Education.*[1]

I am pleased to be here today to give you a brief overview of the current status of school desegregation in this country, where some of the current problems are, and what Congress might do to help resolve the problems. My comments are based on nearly thirty years of research, writing, and court testimony in this field, including on-site consulting with more than forty different school districts.[2] I will also draw on the results of a national survey of school desegregation conducted in 1990 by the Department of Education, for which I was a Co-Principal Investigator.[3]

CURRENT STATUS

According to this 1990 survey, almost 700 school districts nationwide have formal desegregation plans, and the majority of these plans are either court-ordered or mandated by a state or federal agency. Most of the court cases are at least twenty years old, and many are far older. About 60 percent of our largest 150 school districts have desegregation plans of some type.

Although we do not see much publicity about this, the great majority of desegregation plans today still use some form of mandatory busing to attain racial balance requirements or quotas. In its 1971 *Swann* decision, the Supreme Court said that busing for racial balance was only a starting point—a means to an end of dismantling the dual school system.[4] In fact, however, these racial balance requirements have instead become a rigid bottom line goal for nearly all desegregation plans. And, despite the Supreme Court's repeated insistence that court supervision should be temporary, and that local control should be reinstated once compliance with court orders has been demonstrated, many court ordered busing plans are still in place.

This is not to say that there has been no progress. As recently as ten years ago, mandatory busing was even more prevalent than today, and very few school districts had been granted "unitary status" (which means termination of the court order). In the past ten years, however, voluntary desegregation plans have become more commonplace, especially with the use of magnet schools, and a growing number of school districts have been granted unitary status.

The major impetus for unitary status has been two Supreme Court decisions, *Dowell* v. *Oklahoma City* and *Pitts* v. *Freeman* for DeKalb County, Georgia, which clarified exactly what a school district had to do to attain unitary status.[5] Before these two decisions, most school districts were under the impression-reinforced by a lot of lower court decisions—that their court ordered plans were more or less permanent. Most of these school districts adjusted their student assignment practices every few years to maintain racial balance in all schools.

After the successful petitions by Oklahoma City and DeKalb County, a number of other school districts followed their lead and have received unitary declarations from lower courts. For example, during 1994 I testified in four unitary hearings unitary, all of which were successful to some degree:

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[1] *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

[2] See David J. Armor, *Forced Justice: School Desegregation and the Law,* New York, Oxford University Press, 1995, for a more detailed analysis of school desegregation issues.

[3] See Lauri Steel, Roger E. Levine, Christine H. Rossell, and David J. Armor, *Magnet Schools and Desegregation. Quality, and Choice,* Palo Alto, American Institutes for Research, May 1993. Also, Christine H. Rossell and David J. Armor, "The Effectiveness of School Desegregation Plans, 1968–1991," *American Politics Quarterly,* forthcoming July 1996

[4] *Swann* v. *Charlotte-Mecklenburg,* 402 U.S. 1 (1971).

[5] *Dowell* v. *Oklahoma City,* 111 S. Ct. 630 (1991); *Pitts* v. *Freeman,* 118 L. Ed. 2d 108 (1992).

Savannah, Georgia, had converted a failed mandatory busing plan to a voluntary plan in 1988; the voluntary plan with magnet schools was a success, and they filed for unitary status in 1993. It was opposed by the Justice Department but was granted by the District Court in 1994. Justice did not appeal.

Columbus, Georgia, maintained mandatory busing for racial balance between 1970 and 1980. After they stopped making annual adjustments to attendance zones, demographic changes led to greater imbalance, and the NAACP Legal Defense Fund petitioned for additional relief. The school district then filed for unitary status in 1992, and it was granted by the District Court in 1994. LDF has appealed to the 11th Circuit Court of Appeals.

Dallas, Texas, maintained a desegregation plan for twenty years, and it finally filed for unitary status in 1993 after tiring of continued intervention in school policies by plaintiffs and the federal court. The District Court granted partial unitary status (including student assignment) in 1994.

Wilmington, Delaware, is the only metropolitan consolidation and mandatory busing plan ordered by a federal court. After maintaining a very high degree of racial balance for about 14 years, the State of Delaware filed a motion for unitary status in 1993. Although the motion was nearly withdrawn in favor of a consent decree that would have continued mandatory busing for many years, a successful intervention by the Delaware Legislature led to a unitary declaration by the District Court in 1994. It is on appeal at the present time.

During 1995 a number of additional unitary status declarations have occurred, including those for Denver, Colorado; Buffalo, New York; and Broward County, Florida. I have just finished testifying in a unitary hearing in St. Louis, Missouri, and I am currently consulting with several other school districts who are petitioning for unitary status. I believe that most of these districts will also receive unitary status within the next year or two.

Given these experiences, I am convinced that the majority of school districts who are currently under court-ordered desegregation plans have satisfied the legal requirements for unitary status. What has come to concern me, however, are the number of school boards that do not want unitary status, now that it is within reach.

THE PROBLEM OF UNITARY STATUS

I believe there are three major reasons why school districts fail to seek unitary status, even when it appears that they have satisfied the legal requirements.

The first and most important reason is money. The best examples in this regard are St. Louis and Kansas City, Missouri, who have received well over $2 billion from the State Treasury to implement the most expensive school desegregation plans in the country. In these two cases, the federal courts have profoundly altered the normal school financing process and have created unrealistic and unsustainable levels of funding (example: their pupil-teacher ratios are among the lowest in the country at about 13 to 1). Given this unprecedented amount of state funding, it is understandable why these two school boards will not voluntarily give up their state revenues. But it is also understandable why the voters and taxpayers in Missouri have repeatedly elected state officials committed to ending the court orders. Fortunately, the State is a defendant in these two cases and can (and has) filed for unitary status.

Money has been a large factor in a number of other cases. State funding for desegregation (or the prospect of such) has been an obstacle to unitary status in Phoenix and Tucson, Arizona; Indianapolis, Indiana; Yonkers, New York; and Cleveland, Ohio, just to mention a few. Unlike the Missouri cases, however, in these cases either the state is not a party to the litigation, or it has joined with the local district in opposing unitary status.

The second type of reason is political or ideological. Some school boards find that a court order offers a convenient shield for a variety of actions that might otherwise be unpopular or controversial, such as closing schools, locating schools, or reassigning faculty and administrators for the purpose of racial balance. In other cases, some school boards believe that mandatory busing for racial balance benefits the academic performance of minority students, and a court order is the only feasible way to maintain such an unpopular policy. As I show in my book, *Forced Justice,* modern evidence contradicts this benefit thesis, but it remains a powerful dogma in many education and civil rights circles to this day.[6] School districts that fall into the political/ideological category include San Francisco and San Jose, California; Orange County (Orlando), Florida; and Charlotte-Mecklenburg, North Carolina. I be-

[6] David J. Armor, *Forced Justice,* Chapter 2.

lieve that there are many more school districts than those listed here that fall into this category.

Finally, the third reason is fear of the unknown. I have consulted with a number of school boards who would like to seek unitary status but who are not confident about the outcome. This is either because the local federal judge is opposed to it, or the case has been inactive for so long that the board would rather leave "a sleeping dog lie." I prefer not name these districts for the sake of confidentiality.

POSSIBLE IMPROVEMENTS

Although I do not have specific legislative proposals in mind, there might be several things that Congress could do to increase the prospects of unitary status for reluctant school districts that have met their federal obligations.

First, borrowing an idea from a recent District Court order in Tampa, Florida, a school board should have only two options: either file a motion for unitary status and have a hearing, or implement whatever policies plaintiff says are necessary to attain unitary status. Not surprisingly, faced with these options, Tampa filed a unitary motion. I believe it would be useful if the Justice Department were required to list all of its non-unitary desegregation cases, and to indicate on the list what each school district must do to attain unitary status. I think such a list would generate a lot of petitions for unitary status, particularly by school boards who are avoiding unitary status for political reasons.

Second, Congress might assist the unitary process by making it possible for official intervention by a broader array of persons or agencies with a stake in the outcome of unitary status, such as parents, taxpayers, city governments, state legislatures, and so forth. This would be especially helpful in those desegregation cases where state funding is the obstacle. For example, I believe that the Cities of Phoenix, Indianapolis, and Cleveland would have filed unitary status motions for their school systems, if they had the standing do so, because of the adverse impact mandatory busing has had in those cities.

Finally, Congress should conduct a careful review of all federal funding programs to make sure that court-ordered desegregation plans are not receiving some type of priority. For example, the Magnet School Assistance Program (MSAP) gives priority points for school districts operating under court ordered plans. I have had a number of school board members tell me that one reason they oppose unitary status is that they would lose their priority for magnet school funding.

CLOSING COMMENTS

If Congress takes action in this area, some people will criticize you for trying to "turn back the clock" by ending court-ordered desegregation plans, which will in turn lead to resegregated schools. I would like to offer three suggestions for responding to such criticisms.

First, in my experience, most school districts that have been declared unitary still maintain desegregation plans; the difference is that they usually convert to voluntary techniques-such as magnet schools—and adopt more flexible racial balance goals.

Second, Congress is merely facilitating what the Supreme Court itself has been saying for many years, that ultimately school policy in a democracy must be determined by local authorities, not by the federal courts.

Finally, if school districts do return to neighborhood schools, I would point out that the Supreme Court has said repeatedly that the only illegal school segregation is that intentionally caused by school boards, and that neighborhood schools that reflect de facto housing patterns are not now, nor never have been, unconstitutional.

Thank you for the opportunity to offer my opinions about this important issue.

Mr. CANADY. Thank you, Mr. Armor.

Mr. Taylor.

STATEMENT OF WILLIAM TAYLOR, VICE CHAIRMAN, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. TAYLOR. Thank you, Mr. Chairman and members of the subcommittee. My name is William Taylor. I appreciate the opportunity to testify here today. As Mr. Sensenbrenner noted earlier, I do have a history of appearing as a witness before this committee, and so I appreciate the invitation to come back today.

I have worked on issues of school desegregation for more than 40 years, ever since fresh out of law school in 1954 I had the great good fortune to join the legal staff of Thurgood Marshall at the NAACP Legal Defense and Education Fund. I continue to be actively involved in litigation and other forms of advocacy on this issue today because I am convinced that experience and research demonstrate that school desegregation is one of the initiatives that has contributed to a broadening of opportunity in this country for young people to complete high school, to go on to college, and to go on to better-paying jobs, and that if we, even at this point, were to curtail that opportunity, we would suffer a great loss to the detriment of the welfare of children in this country.

I understand that members of the subcommittee are contemplating the possibility of legislation that would in some fashion curtail or alter the power of the Federal courts to order desegregation remedies involving busing, and I heard more about that here this morning in the testimony that Representative Lipinski gave and in reading the testimony of other witnesses on this panel.

I won't comment specifically on particular proposals, in my main presentation, but I'd be glad to answer questions about them. I think that kind of legislation would be ill-advised for a couple of reasons. As you may know, 15 years ago the Congress debated a series of bills, popularly known as court-stripping legislation, that would have curtailed the jurisdiction of the Federal court to issue remedies in particular kinds of cases: abortion, prayer in school, and school desegregation, issues that were volatile then and that remain volatile now. Ultimately, none of this legislation passed, mainly because of opposition in this body.

By the time the debate was over, many legislators agreed on several things. One was that, while Congress has authority under article III to regulate the jurisdiction of the Supreme Court and has power over the structure of the lower courts, that power does not extend to an invasion of the role of the judiciary in interpreting the Constitution and in protecting the constitutional rights of citizens. Congress may certainly reverse a Supreme Court decision interpreting a statute, but to go further would be a dangerous incursion on separation of powers.

In addition, while section 5 of the 14th amendment vests in Congress the power to enforce the 14th amendment, it has been clear for many years that this does not authorize a narrowing of constitutional guarantees or a narrowing of constitutional remedies. Where the Court oversteps its bounds, the remedy lies in a constitutional amendment or in rare cases impeachment, but it does not lie in legislation, and to go down that road would be very dangerous, indeed.

This was not, I should add, a debate that was partisan. Attorneys General and Solicitors General from past administrations, Democratic and Republican, share the concerns that I have noted and urged the Congress to vote against the legislation.

Now, secondly, a 1996 version of court-stripping or court-altering legislation would be ill-advised for policy as well as constitutional reasons. As you know, the Supreme Court has provided a remedy, an avenue, for ending court supervision of school desegregation cases. Some school districts around the Nation have taken that

route, and courts have not been reluctant thus far to make grants of unitary status and end their own jurisdiction or supervision over a case. This is happening at a time when many people are beginning to recognize the benefits that have been achieved in many places around the country through desegregation.

For example, studies by the Rand Corp. and by other respected researchers point to the fact that from 1970 to 1990 the achievement gap between black and white students as measured by the National Assessment for Educational Progress, which is a very well-respected research instrument, that gap was cut almost in half. There is a great deal of evidence that desegregation contributed significantly to the progress that minority students have made during that period of time.

And it's not just a matter of achievement scores. I've just come, as has been noted, from a 3-week hearing on unitary status in St. Louis, where I represent the NAACP and a class of black and white children. In St. Louis, the majority who participate in the major school desegregation programs, which are magnet programs in the city and the metropolitan transfer program, are completing high school and are going on to college. These are overwhelmingly poor children. For example, the transfer children are all black, and 75 percent of them are eligible for free and reduced-price lunch. So the fact that they are completing school and going on to college I think is indicative of the progress that is being made. Their counterparts in racially-isolated schools in very large numbers are dropping out of school.

Finally, in my initial presentation, I think we should face the fact that if these remedies were to be terminated, we would be depriving parents of choice, something that we all say that we want. In St. Louis, 12,000 students, white and black, are attending magnet schools in the city; 13,000 black city students get on buses every day to go to schools in St. Louis County in 16 suburban districts. Their parents make sacrifices because they believe, and rightly so, that doing this is the ticket to a better education and to a better chance in life for their children.

I would join the sentiment that has been expressed at some point that the Congress has not given enough attention to this subject, but you can't do it in a 1-day hearing. I think I've heard a lot of things said this morning that I don't have time to respond to about the costs of busing and desegregation, about the benefits or lack of benefits. The only way really to get at this would be to set side some time and listen to the facts about this, and I think then you would be in a position to make a judgment, and I am confident that the judgment would be that you ought not to tamper or alter the jurisdiction of the courts, and, indeed, that you ought to support the desegregation efforts that are going on.

Thank you.

Oh, I should just add that I was invited only yesterday. So I didn't have time to present a prepared statement, but I have given counsel two items. One is a report of the Citizens' Commission on Civil Rights on the Court-Stripping Legislation of 15 years ago, which I think is informative, and the second is an article of mine that deals with the achievement issues. And I would ask that they be included in the record at an appropriate point.

Mr. CANADY. Without objection.
[See appendix, pp. 83–122.]
Mr. CANADY. Mr. Cooper.

STATEMENT OF CHARLES J. COOPER, PARTNER, SHAW, PITTMAN, POTTS & TROWBRIDGE

Mr. COOPER. Thank you, Mr. Chairman and members of the committee. First, I'd like to add my commendations to you, Mr. Chairman, and to the whole committee for holding hearings on this very important subject, and I appreciate the opportunity to be with you this morning to discuss them.

For over four decades, the Federal courts have, to varying degrees, exercised a remarkable level of control over the public schools in this country. Many school desegregation cases have been in the Federal courts now for three decades and more, as we have heard from previous witnesses.

The Supreme Court school desegregation decisions, however, have consistently held that a trial court's mission in devising and implementing a remedial plan is to eliminate the de jure violation and to return schools—and this is the language of one of the Court's most recent opinions, the Freeman case—"to return schools to the control of local authorities at the earliest practicable date in order to restore their true accountability in our governmental system."

In the Court's most recent school desegregation case, *Missouri* v. *Jenkins,* this theme was reiterated. The Court said a district court must "strive to restore State and local authorities to the control of a system operating in compliance with the Constitution."

And over the past 5 years, the Supreme Court in three major decisions has made it clear that the time has come in the vast majority of these cases for the Federal courts to get out of the business of running school districts. However, because the Federal courts have for so long provided an avenue for the adoption of policies usually not viable through the democratic political process, a variety of powerful interests have blocked attempts to return to court to obtain the release of the public schools from Federal court supervision in many school districts in this country. And, in my view, legislation similar to that approved by this Congress in the area of prison reform litigation would hold some very real promise for removing some of these obstacles.

Now my prepared testimony discusses the current state of the law; I will not belabor the point. I think the committee's members are all familiar with that. Suffice it to say that I think the leading statement on the issue comes from the *Dowell* case, the Oklahoma City case, which held that a district court must end its supervision of the public school district and terminate the desegregation decree if the school board shows that it has complied in good faith with the desegregation decree for a reasonable period of time, and that the vestiges of past discrimination have been eliminated to the maximum extent practicable.

Now under the standards established by the Supreme Court in the area of unitariness, many school districts in America, as I mentioned earlier and as Mr. Armor has mentioned, I believe would qualify for a judicial declaration of unitariness and an end to Fed-

eral judicial supervision. Yet, the number of school districts actually seeking such termination is quite small.

The biggest impediment, I submit, to ending Federal judicial control over public education is the reluctance of local school boards to seek unitary status. On this score, I agree with the thoughts that Dr. Armor has shared with the committee previously. The reasons for this reluctance vary from school district to school district, but the most common justification is fear that the school district will lose State, and in some cases Federal, funding that is tied to financing a desegregation order.

A second common rationale for refusing to seek relief from a court order is the desire to use the court's coercive powers, essentially its busing orders, to maintain racial balance in the schools, something that would be difficult to maintain in many districts in the face of a strong public desire oftentimes for a closest school policy.

The Washington Post, just 2 weeks ago, chronicled the latest chapter in a textbook example of this phenomenon in an article on a school district within close proximity to this hearing room, the Prince George's County, MD, Public School District. The school district there has been operating for over two decades under a court order designed to achieve racial balance, initially by means of a forced busing order and later through both busing and an elaborate magnet school program. When the forced busing order was entered in 1972, the district was 78 percent white and 22 percent black. Scrupulous adherence to the court's busing order for 13 years resulted in massive white flight. By 1985, the district was 60 percent black and only 35 percent white, with the white population continuing to dwindle steadily.

Recognizing that the forced busing plan was quickly producing the absurd result of black students being bused across the county to attend predominantly black schools, the plaintiffs in that case agreed to implementation of a magnet school plan, I think largely in the hopes of retaining more of the white students. That has not worked. Today the school district is 72 percent black and only 19 percent white, and white enrollment continues to shrink.

As Justice Powell observed back in 1979, "By acting against one-race schools, courts may produce one-race school systems." And that is precisely what has been occurring for the last quarter of a century in the Prince George's County district.

Even worse than these points is that the court's magnet school order has actually inflicted injustice upon the class that it is supposed to protect. The magnet program currently serves over 24,000 students. Nevertheless, the school system still has some 500 openings in the magnet program. These openings do not exist due to any lack of interest on the part of Prince George's County schoolchildren. To the contrary, over 4,100 students remain on the waiting list, but the school district says it cannot admit any of these children because they are black. Under the court's order, the open slots are reserved for white students. As a result of the substantial decrease in the number of whites in the district, there simply are not enough white children to fill the available openings.

According to the Post's article on this subject, there appears to be little disagreement among those in the school district that the

situation is intolerably unjust. Even the strongest adherent to racial balance at all costs have not been heard to argue that these 4,100 black children should be barred from taking open slots in the magnet school program solely because of the color of their skin. Nonetheless, a majority of that board appears, again according to the Post article, likely to refuse to authorize the district to seek to have the order modified when the matter is voted upon later this month.

The Post explained that most of the board members feared that such a request "would make it easier for the court to free the school district from the initial 1972 desegregation order that mandated race-based busing—a move that would cost the school system millions of dollars it gets from the State." That's a quote from the Post article.

I submit that a Federal court order whose only justification is to protect a school district from the democratic political process should not be permitted to stand. And the situation in Prince George's County is not an isolated case. We've heard from Dr. Armor regarding other additions to the cases he's mentioned which are similar to Prince George's County's, are cases involving Kansas City, Detroit, and Richmond are also similar. And that, again, names only a few of the more prominent examples in which the school boards have joined with the plaintiffs in seeking greater judicial supervision of their own districts in the belief that additional funding would be made available to the district if it remained under court order.

In short, while the substantive constitutional law governing school desegregation cases is for the most part favorable to the elimination of Federal judicial supervision over many public school districts, many school boards are content, for either financial or ideological reasons, to have their school districts supervised by a Federal judge rather than by themselves. So legislation could well be helpful, and I would suggest to you is needed, not to alter the substantive law, but rather to open the way for these cases to be brought before the courts for consideration of whether the time has come to end Federal judicial supervision of the public schools.

I want to share with you three proposals. They're drawn directly from the Prison Litigation Reform Act, which was approved by Congress and on which this subcommittee, of course, labored long and hard. So these are not original thoughts on my part, but it does seem like they address in the prison area a very analogous situation and could be useful to be considered here.

And my time has expired, Mr. Chairman. My proposals are contained in my testimony. I'll be happy to very quickly summarize them, if you'd like.

Mr. CANADY. If you could in a moment or two, yes.

Mr. COOPER. Yes.

The most important reform, I think, Mr. Chairman, would be to broaden, if possible, the public officials or the units of government that can of right intervene in cases of this kind. Again, the Prison Reform Act legislation does say that public officials who have some responsibility for the funding or some other direct responsibility in the prison area have the ability of right to intervene in prison re-

form litigation. That concept would be very useful if transported to the school desegregation context.

The phenomenon that Mr. Armor mentioned is a widespread one, wherein many agencies and units of government that actually have responsibility for funding some of these orders can't get into the case because the school board is the only defendant, and the school board, therefore, is controlling the decisions with respect to how the litigation shall proceed, and whether or not unitary status shall be sought.

I think that is the key point I want to make here, Mr. Chairman, and the other two proposals are subsidiary to that one. So I'll rest on my written testimony.

[The prepared statement of Mr. Cooper follows:]

PREPARED STATEMENT OF CHARLES J. COOPER, PARTNER, SHAW, PITTMAN, POTTS & TROWBRIDGE

Mr. Chairman and Members of the Subcommittee, I appreciate this opportunity to testify on the current status of school desegregation litigation in the federal courts. My professional experience in the school desegregation area dates back to the 1978 Term of the United States Supreme Court, when I served as law clerk to Associate Justice (now Chief Justice) William Rehnquist. Among the most important cases decided that Term were the *Columbus* and *Dayton* school desegregation cases.[1] From 1981 until 1985 I served in the Civil Rights Division of the Department of Justice. More particularly, I was integrally involved in developing and advancing the Justice Department's positions in the "unitariness" cases of that time, most notably those involving the Norfolks, Denver, Mobile, and Little Rock school systems.[2] I also handled several cases, including the St. Louis and the Conway County (Arkansas) desegregation cases, involving the issue of a state's liability for the costs of a local school district's desegregation remedy.

I entered private practice in late 1988, and have been involved in a number of school desegregation cases since that time. Most notably, I was involved in representing the Oklahoma City School Board before the Supreme Court in *Board of Education* v. *Dowell*, 498 U.S. 237 (1991), which established the constitutional standards to be used by district courts in determining when a formerly *de jure* segregated school system is "unitary" and thus is entitled to have the remedial decree dissolved and the case terminated.[3] I also handled the proceedings on remand before the district court and the Tenth Circuit Court of Appeals, both of which held that the Oklahoma City School District had achieved unitary status and was thus entitled to termination of the case.[4] More recently, I represented the Desegregation Committee of the Delaware House of Representatives in federal litigation concerning the unitary status of the four school districts in the Wilmington area. The district court declared the four school district unitary and terminated the case, and the decision is now pending on appeal before the Court of Appeals for the Third Circuit.[5]

For over four decades, the federal courts have, to varying degrees, exercised a remarkable degree of control over the public schools in this country. During the early years, in the wake of the Supreme Court's landmark ruling in *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954), federal court intervention was, of course, essential to eradicate the disgraceful practice of segregating school children by law on the basis

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[1] *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979); *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979).

[2] *Riddick by Riddick* v. *School Board of city of Norfolk*, 784 F.2d 521 (4th Cir. 1986), cert. denied, 479 U.S. 938 (1987); *Keyes* v. *School District No. 1*, 653 F. Supp. 1536 (D. Col. 1987); *Keyes* v. *School District No. 1*, 895 F.2d 659 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 951 (1991); *Appeal of Little Rock School District*, 949 F.2d 253 (8th Cir. 1991); and *Little Rock School District* v. *Pulaski County Special School District*, 921 F.2d 1371 (8th Cir. 1990).

[3] The term "unitary status" was originally developed by the courts as a designation for school districts that had successfully eliminated a "dual system" of education, that is separate schools for black and white students. Although the Supreme Court has noted some confusion as to the precise meaning of the term, *see Dowell*, 498 U.S. at 245–46, it has come to signify a school district that has completely remedied prior *de jure* segregation, and thus is entitled to release from all federal judicial supervision.

[4] *Dowell* v. *Board of Educ. of Oklahoma City*, 778 F. Supp. 1144 (W.D. Okla. 1991), affd, 8 F.3d 1501 (10th Cir. 1993)

[5] *Coalition to Save our Children* v. *State Board of Education*, 901 F. Supp. 784 (D. Del. 1995), appeal pending, No. 95–9452 (3rd Cir.).

of the color of their skin. However, as time passed and *de jure* segregation was eliminated, the federal courts in many cases continued to supervise local school districts, often for the purpose of achieving a particular level of racial balance (usually attained by forced busing) determined by the court to be necessary to eliminate the vestiges of the *de jure* violation. Many of these cases have now been in the federal courts for three decades and more.

The Supreme Court's school desegregation decisions have consistently held that a trial court's mission in devising and implementing a remedial plan is to eliminate the *de jure* violation *and* to "return[] schools to the control of local authorities *at the earliest practicable date* . . . [in order] to restore their true accountability in our governmental system." *Freeman* v. *Pitts*, 503 U.S. 467, 490 (1992) (emphasis added); *see also Missouri* v. *Jenkins*, 115 S. Ct. 2038, 2054 (1995) ("a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution"); *Milliken* v. *Bradley*, 433 U.S. 267, 280–81 (1977) ("[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."); *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 410 (1977) ("local autonomy of school districts is a vital national tradition").

Over the past five years, the Supreme Court, in three major decisions, has made it clear that the time has come in the vast majority of cases for the federal courts to get out of the business of running school districts. While these rulings, properly understood, have established appropriate standards for determining when remedial orders should be dissolved and control of the public schools returned to responsible local officials, they have not effectuated, and cannot by themselves effectuate, this objective. Because the federal courts have for so long provided an avenue for the adoption of policies usually not viable through the democratic political process, a variety of powerful interests have blocked attempts to return to court to obtain the release of the public schools from federal court supervision in many school districts in this country. In my view, legislation similar to that approved by this Congress in the area of prison reform litigation will go a long way toward removing many of these obstacles.

I. THE CURRENT STATE OF THE LAW

As I previously mentioned, in the *Dowell* case, the Supreme Court specifically addressed the question of the standards that federal courts should apply when considering a motion for unitary status. The Court held that the district court must end its supervision of a public school district and dismiss the case if the school board shows that it has "complied in good faith with the desegregation decree since it was entered," and that the "vestiges of past discrimination ha[ve] been eliminated to the extent practicable." 498 U.S. at 249–50. The Court precisely identified the "vestiges" of segregation that must be eliminated: "In considering whether the vestiges of *de jure* segregation ha[ve] been eliminated as far as practicable, the District Court should look not only at student assignments, but 'to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.'" *Id.* at 250 (quoting *Green* v. *New Kent County School Board*, 391 U.S. 430, 435 (1968)).

A year later, in *Freeman*, the Supreme Court expanded its holding in Dowell to encompass the partial withdrawal of judicial supervision. A finding of partial unitary status will be appropriate if the school district has demonstrated full and satisfactory compliance with the desegregation decree in some, although not all aspects of the system, and if continued supervision in those areas is not necessary to achieve compliance in other facets of the system, and school officials have shown their good faith acceptance of the Constitutional principles that led to judicial intervention in the first place. 503 U.S. at 491. Thus, lingering problems with respect to the school district's faculty, for example, generally will not preclude dissolution of the court order governing student assignment.

Finally, last Term in *Jenkins*, the Court reaffirmed *Dowell* and *Freeman*, and held that extraneous factors such as how minority students fare on national achievement tests cannot preclude unitary status unless there has been a finding that the violation of the Constitution giving rise to judicial supervision in the first place bore some causal relationship to the lower test scores. The Court explained that "numerous external factors beyond the control of [the school district] and the State affect minority achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus." 115 S. Ct. at 2055–56. Obviously, this will never be the case for children who entered the system after the schools were desegregated. *See id.* at 2056. By definition, the prior *de jure* segregation could not have impacted upon their academic performance because they did not attend school at the time it existed.

Under the standards established in these Supreme Court rulings,[6] many school districts in America operating under court order qualify for a judicial declaration of unitariness and an end to federal judicial supervision. And yet, for the reasons I shall now turn to, the number of districts seeking unitary status declarations remains very small.

II. OBSTACLES TO ENDING FEDERAL COURT SUPERVISION OF THE PUBLIC SCHOOLS

The biggest impediment to ending federal judicial control over public education is the reluctance of local school boards to seek unitary status. The reasons for this reluctance vary from school district to school district, but the most common justification is fear that the school district will lose state (or in some cases federal) funding that is tied to financing a desegregation order. A second common rationale for refusing to seek relief from a court order is the desire to use the court's coercive powers (i.e., its busing orders) to maintain racial balance in the schools—something that would be difficult to maintain in many districts in the face of strong public desire (one held by both black and white parents) for a closest school policy should student assignment once again become the subject of the democratic process.

The *Washington Post* just two weeks ago chronicled the latest chapter in a textbook example of this phenomenon in an article (attached) on the Prince George's County, Maryland public schools. The school district there has been operating for over two decades under a court order designed to achieve racial balance, initially by means of forced busing and later through both busing and a magnet school program. When the forced busing order was entered in 1972, the school district was 78 percent white and 22 percent black.

Scrupulous adherence to the court's busing order over the next thirteen years resulted in massive white flight. By 1985, the district was 60 percent black, and only 35 percent white, with the white population continuing to dwindle steadily. Recognizing that the forced busing plan was quickly producing the absurd result of black students being bussed across the County to attend mostly black schools,[7] the plaintiffs (represented by the NAACP) agreed to implementation of a magnet school plan (with a busing plan as a back up in the event that the magnet schools failed to achieve sufficient racial balance) in hopes of retaining more white students.

It has not worked: today, the school district is 72 percent black and only 19 percent white, and white enrollment continues to shrink. As Justice Powell observed, "[b]y acting against one-race schools, courts may produce one-race school systems." *Estes* v. *Metro. Branches of Dallas NAACP*, 444 U.S. 437, 450 (1979) (Powell, J., dissenting from dismissal of certiorari as improvidently granted). That is precisely what has been occurring over the last quarter of a century in Prince George's County.

Even worse than its complete failure to achieve integrated schools, the court's order has actually inflicted injustice upon the class it is supposed to protect. The magnet program currently serves over 24,000 students. Nevertheless, the school system still has some 500 openings in the magnet program. These openings do not exist due to any lack of interest on the part of Prince George's County school children. To the contrary, over 4,100 students remain on the waiting list. But the school district says it cannot admit any of these children because they are black. Under the court's order, the open slots are reserved for white students; as a result of the substantial decrease in the number of whites in the district, there simply are not enough to fill the available openings.

According the *Post* article, there appears to be little disagreement that this situation is intolerably unjust. Even the strongest adherents of racial balance at all costs have not been heard to argue that these 4,100 black children should be barred from taking open slots in the magnet program solely on the basis of the color of their skin. Nevertheless, a majority of the board appears likely to refuse to authorize the district to seek to have the order modified when the matter is voted upon on April 25. The *Post* explained that most of the board members feared that such a request "would make it easier for the court to free the school district from the initial 1972 desegregation order that mandated race-based busing—a move that could cost the school system millions of dollars it gets from the state."

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[6] Thus far, the lower courts appear to be applying *Dowell* and its progeny in a manner consistent with the Supreme Court's rulings in those cases. However, this is an area Congress should monitor closely to ensure that inconsistent applications of these precedents do not arise. Should that occur, it may become appropriate for Congress to consider imposing a uniform substantive standard to be applied by courts considering unitary status motions.

[7] The attached May 29, 1986 article from the *Washington Post* vividly illustrates this pattern by describing a black 10-year-old boy's journey past four different public elementary schools only to arrive at a school with a predominantly black enrollment.

I cannot say that the funding which the State of Maryland provides to the Prince George's County schools is inappropriate; the current level may very well be in the best interests of the people of Maryland. But I do know this: a federal court order whose only justification is to protect the Prince George's County school board from the democratic political process should not be permitted to stand.

The situation in Prince George's County, Maryland is not an isolated case. In school desegregation cases involving Kansas City,[8] Detroit,[9] Richmond,[10] and Yonkers[11] to name only some of the most prominent examples, the local school board has at one time or another joined the plaintiff class in seeking greater judicial supervision on the belief that additional funding would be available to the district if it remained under court order.

In short, while the substantive constitutional law governing school desegregation cases is for the most part favorable to the elimination of federal judicial supervision over the public schools, many school boards are content—for either financial or ideological reasons—to have their school districts supervised by a federal judge rather than by themselves. Thus, legislation is needed most urgently not to alter the substantive law in this area, but rather to open the way for these cases to be brought before the courts for consideration of whether the time has come to end federal judicial supervision of the public schools.

III. POTENTIAL LEGISLATIVE SOLUTIONS

The ideas which I am about to suggest are largely taken from the Prison Litigation Reform Act on which this Subcommittee has labored so long.

First, in my view, the most important reform that Congress could enact in this area would be to expand the class of state and local officials who have standing to intervene in school cases. As matters now stand, local school boards, and in some cases, state boards of education, control litigation of school desegregation cases. Often state authorities, with the *de facto* responsibility for funding the court's desegregation order, have little or no voice in the lawsuit.

In the Wilmington school desegregation case, the federal district court permitted the Desegregation Committee of the Delaware House of Representatives to intervene in the case. The Committee, which was a moving force behind the effort to obtain unitary status for the Wilmington area schools, thus obtained the right to present evidence and argument on the unitary status motion, and to participate in any appeal. The district court's decision to permit intervention was made pursuant to Federal Rule of Civil Procedure 24(b), and thus was completely discretionary. If the district court judge had denied the Committee's request to intervene, the decision would not likely have been reversible on appeal. In many other cases, state authorities interested in ending the court's reign over public education are not so lucky. This decision should not be left to the discretion of the courts; legislation should be enacted in this area, as in the prison reform litigation area, permitting any state or local official with jurisdiction over public education or the appropriation of funds for public education to intervene as of right in a school desegregation case.

Second, defendants and intervenors should be given the right to immediate termination of any desegregation order or consent decree that was entered in the absence of explicit findings (i) that the school district had violated federal rights protected by the Constitution; (ii) that the relief was narrowly drawn; (iii) that the relief goes no further than necessary to correct the violation of a federal right; and (iv) that the relief is the least intrusive means necessary to correct the violation of federal rights.

Third, Congress should impose a presumptive termination date both for all existing desegregation orders and for any new orders that may be entered. As with the similar provision in the Prison Litigation Reform legislation, a period of two years after passage of the statute or entry of the order would be appropriate. The legislation should require the automatic termination of any desegregation order upon the

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[8] *See Jenkins,* 115 S. Ct. at 2044 (the Kansas City school district, "which has pursued a 'friendly adversary' relationship with the plaintiffs, has continued to propose ever more expensive solutions").

[9] *See Milliken* v. *Bradley,* 433 U.S. 267, 293 (1977) (Powell, J., concurring in judgment) (action is "largely a friendly suit between the plaintiffs . . . and . . . the Detroit School Board. These parties . . . have joined forces apparently for the purpose of extracting funds from the state treasury.").

[10] *See School Bd. of Richmond* v. *Baliles,* 829 F.2d 1308, 1310 (4th Cir. 1987) ("the School Board successfully moved to be realigned as a plaintiff").

[11] *See United States* v. *City of Yonkers,* 880 F. Supp. 212, 216 (S.D.N.Y. 1995) (plaintiffs are the Yonkers School Board and local branch of NAACP; defendants are State of New York and various state agencies and officials).

passage of this period unless the court finds that continuation of the order remains necessary to remedy the violation of federal rights.

Enactment of these three proposals would advance immeasurably the goal of returning educational policy to the people by greatly increasing the likelihood that unitary status petitions will be presented and vigorously pressed in court. As the Supreme Court has consistently maintained, '[d]issolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.'" *Dowell,* 498 U.S. at 248 (quoting *Spangler* v. *Pasadena City Bd. of Educ.,* 611 F.2d 1239, 1245 (9th Cir. 1979) (Kennedy, J., concurring) (citation omitted)).

(The Washington Post, Apr. 2, 1996)

P.G. Schools Struggle With Racial Plan

Officials Reopen Debate On Magnet Admission Rule

By Lisa Frazer
Washington Post Staff Writer

This much is clear now to leaders of the Prince George's County school system: The white student population has dwindled so drastically during the last decade that the public schools cannot readily fill slots reserved for white students under a racial balance plan.

While school officials acknowledge that fact, they are at odds over whether they should ask a federal judge to free them from an 11-year-old court mandate designed to prevent the county schools from becoming overwhelmingly black. That goal has become increasingly difficult in a school system that today is 71.8 percent black and 18.6 white.

For the second time this academic year, the school system is debating whether to hold on to the racial balance plan that now may be useful only for the financial support it brings to the schools.

At the center of the dispute are the county's magnet schools, which offer specialized programs with popular themes, such as French immersion, Montessori and performing arts. Created in 1985 to draw white students to schools in predominantly black neighborhoods, magnet programs throughout the county have at least 500 openings for nonblack students, but school officials have found no eligible students to fill them. Meanwhile, 4,100 black students are on waiting lists for the same programs.

On one side of the dispute are Superintendent Jerome Clark, the Board of Education's community advisory committee on desegregation and board members who say the school district should go to court to seek a change in the racial restriction so that black students can fill those vacant slots next school year.

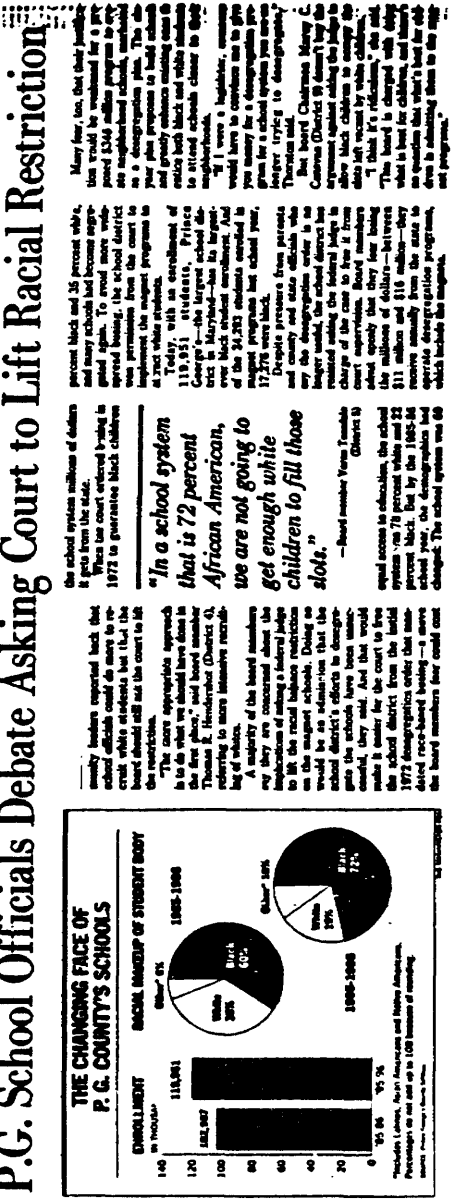
"In a school system that is 72 percent African American, we are not going to get enough white children to fill those slots," said board member Verna Teasdale (District 5).

But on the other side are board members who argue that the district should avoid going to court and instead improve its efforts to recruit white students from the county's non-magnet schools and private schools.

"That sounds good," board member Alvin Thornton (District 7) said about the proposal to go to court. "But it is not that simple."

Thornton and the other board members on his side are likely to prevail when the issue comes up for debate again at a school board meeting April 25. The board voted Thursday to postpone a decision on whether to go to court, but a majority of its members appear ready to reject the idea. When the same issue came up in October, the board decided to ask its advisory committee to consider whether efforts to recruit white students had been exhausted. The committee of 100 com-

P.G. School Officials Debate Asking Court to Lift Racial Restriction



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HEADLINE: P.G. Busing Revisions Get Mixed Reactions

BYLINE: By Barbara Vobejda, Washington Post Staff Writer

BODY:

Every weekday morning, 10-year-old Jermaine Howard climbs into a bus near his Fort Washington home and rides to Owens Road Elementary School. On the half-hour trip, the bus rolls by one, then two, three, eventually four other elementary schools.

It is a bus ride that his mother, Chris, has objected to for more than a year, on the grounds that her fourth grader could be attending school much closer to home. This piece of the Prince George's County busing plan, she argued, was not accomplishing its objective of desegregation: Jermaine, who is black, is being bused to a school where enrollment is already predominantly black.

But a few weeks ago, Chris Howard was informed by the county that next year, Jermaine will be assigned to Indian Queen Elementary, a school that is only five minutes away from their home.

"It's the best idea they've had," Chris Howard said of the change. "I couldn't understand why they had to be bused so far. To bus [black] children to a predominantly black school, what good is that doing?"

Jermaine is one of about 500 students affected by modifications to the county's busing plan, approved recently by the Board of Education, to eliminate unnecessary busing of black children.

Although some parents have praised the changes, the county chapter of the NAACP has expressed concern about the plan. Leaders of the civil rights group say there may be more children who are being bused unnecessarily.

The changes, implemented this month, adjust the busing plan adopted 13 years ago under a federal court order to desegregate. The busing plan remains a fixture in the school system's efforts to desegregate. For some who believe black children bear a disproportionate burden of the busing, it has been a point of contention.

Until this year, when a magnet school plan was introduced, busing was the sole strategy to improve integration in the county's 175 scho ls. As the county has concentrated on the ambitious system of magnet schools, which offer special programs as an incentive for white parents to send their children to schools in

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predominantly black areas, attention has shifted from the busing plan.

The busing changes, which affect fewer than 1 percent of the 103,000 students in the county, were prompted by a legal agreement between the Board of Education and the NAACP, which filed the original desegregation lawsuit against the county. The agreement, signed last summer, required the schools to study ways to eliminate unnecessary busing of black students.

That requirement, which paved the way for introduction of a magnet school plan, reflected a longstanding belief in the black community that youngsters were being bused unnecessarily to predominantly black schools outside their neighborhoods. When the study was released, there was some surprise that so few students could be taken off bus routes.

While the NAACP disputes the study's findings, school board member Sarah Johnson said that, given the number of schools that have been closed in the black communities, she was pleased and surprised there were any black students who could be sent home to neighborhood schools.

"There has to be a home [school] to come to," she said.

Since the initial busing plan was adopted in the early 1970s, black enrollment in the county has increased from 25 percent to 60 percent and many neighborhoods have become predominantly black. In the southern half of Prince George's County, for example, the school enrollment is 70 percent black.

"Once you're at that demographic mix, the options for large-scale movement of youngsters to dramatically change racial composition are extremely limited," said Deputy School Superintendent Edward Felegy.

Under the changes approved by the board, about 100 students in parts of Glenarden and Palmer Park will no longer be bused. Instead, they will be able to walk to neighborhood schools. Also, about 400 students in six other communities will still ride buses but will attend schools closer to their homes.

That includes youngsters who, like Jermaine Howard, live within walking distance of a school but will be assigned to a bus because of traffic.

The plan itself has drawn only quiet reaction. No speakers showed up at a recent public hearing on the changes. Attorneys for the NAACP are deciding whether and how they will respond to the plan, and leaders of the organization are cautiously raising their concerns.

"What appears to be happening is that black students are being bused more than necessary to fill up other schools in other areas, obviously not for integration purposes," said Richard (Steve) Brown, executive secretary of the county NAACP. He argued that, in a preliminary review of the plan, officials should have included more students from middle and high schools.

Felegy said the staff spent months poring over bus routes and demographic charts to determine which students could be taken off buses or put on shorter bus rides. Their conclusions were based on the racial composition of the schools and space considerations.

NAACP leader Brown argued that some of the guidelines school staffs used in making their determinations were arbitrary. He said more students might have been included under different guidelines.

GRAPHIC: Picture, Jermaine Howard, 10, greets his mother, Chris, as she meets his school bus. By Sharon Farmer for The Washington Post

Mr. CANADY. Thank you, Mr. Cooper.
Mr. Shaw.

STATEMENT OF THEODORE SHAW, ASSOCIATE DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATION FUND

Mr. SHAW. Thank you, Mr. Chairman, for your invitation to participate in this important hearing today. I want to start out by saying a few words about terminology because, as I think we all know, often terminology controls the end or the outcome of the debate.

School desegregation is not the same as school busing, and I want to underscore that. School busing has become a pejorative term. Those who use it know they're using it in that way. Most of the busing that occurs in this country occurs for purposes unrelated to school desegregation. Only a minuscule percentage of students who are bused to public schools in this country are bused for purposes of desegregation. Yet, when we talk about desegregation, we equate it with busing. It obscures the fact that what we're really talking about when we talk about school desegregation is school desegregation, not busing. Busing is a way of getting students to school widely used in this country before and after the school desegregation process; it was used; it will continue to be used.

Secondly, with respect to neighborhood schools, prior to the school desegregation process picking up momentum, the term "neighborhood schools" was almost nonexistent. My guess is, if you go back and look in the literature and look in the public discourse, it was not used at that time. In an ideal world, we certainly would like all our children to walk across the street to school, but we don't have an ideal world, and we also know, I think, all of us know in our hearts, and we know empirically, that white parents will send their children to west hell on a bus if that school at the other end of the trip is a predominantly white school, which they often mistakenly equate with quality.

Thirdly, terms like "forced busing" or "forced justice," again pejorative terms, really are empty of content except to set people against the underlying initiative which is at issue. Forced busing is no more improper than any other judicially-ordered remedy which is implemented after finding a constitutional or statutory violation. We don't talk about other kinds of remedy with the word "forced" in front of it.

Finally, when we talk about voluntary plans, I just want to point out that, while I'm a supporter of properly implemented and drawn magnet schools, magnet schools are not completely voluntary to the extent that they have to empty out the students who live in that neighborhood, often black students. Those students have to be sent somewhere else. That's not a voluntary decision on their part. So I think it's important to understand the parameters of the terminology we use and all the implications.

A few substantive comments; I'm going to try to keep my testimony—I have to keep it very short. One is that we're talking about constitutional violations that have been found by courts, most of which have been skeptical at best at the beginning of the desegregation trials that have eventually produced the remedies that have been ordered into place, and these courts have the constitutionally-devolved responsibility to ensure that a remedy is properly imple-

mented. Once a remedy is effectuated there is an orderly process for the termination of school desegregation cases that has been evolved through the governing jurisprudence. It is not something, contrary to Dr. Armor's testimony here today, that has existed only since the *Pitts* and *Dowell* cases. The Court talked about it in *Swann*, talked about it in *Green,* talked about it in the *Pasadena* and the *Milliken* cases, and I'll be glad to entertain any questions about those cases and how the process has been developed.

Pitts and *Dowell* did say more about how that process could and should proceed, and there's nothing stopping school districts from going into court to achieve unitary status. Let me turn to another point about which we have heard some discussion, the point of local control. School boards are ultimately responsible for delivering public education, and a lot of the arguments that have been used against desegregation in the past are arguments based upon local control. When school boards decide that they want to, for whatever reason, maintain desegregation plans, all of a sudden local control goes out the window; opponents of desegregation are talking about how other officials in other parts of the State that don't have a direct interest in the litigation—that is to say, they're not a defendant or plaintiff—ought to be granted authority to intervene. Well, we already have rule 24 of the Federal Rules of Civil Procedure that allows anyone with a right that is being affected, if it's of the nature that is appropriate, to intervene, and we don't need to tinker around with legislative expansion of intervention that would apply only for the purposes of school desegregation. Individuals or other parties ought to be able to come in and file a motion to intervene, and if they have a right that needs to be protected under rule 24, the courts ought to let them in.

A few words about the Jenkins case: I argued the *Jenkins* case in the Supreme Court last term before the Supreme Court. I can tell you that the underlying purpose of school desegregation has never been to affect the achievement scores of black students, although that is not to say that achievement is always irrelevant. It's a fine distinction that was lost upon many people involved in that case and upon some on the Court, unfortunately.

There are other imperatives for school desegregation, however, and what we're ultimately talking about I think in this country is whether we believe in principle of *Brown.* There was some discussion about that earlier. If we believe that we can have segregated schools and we are not going to pay any costs in terms of the social fabric, that people are somehow going to be thrown together, after 18 years of segregated schooling they're going to be able to live together, work together in harmony, then we ought to go down the road that some are suggesting. Go back to neighborhood schools, which in and of themselves are a product, at least in part, of school segregation; that is to say, the residential patterns are a product of school segregation, and they, in turn, continue to operate even when the school desegregation plan has been dismantled. As a consequence, if we decide we want to go down that road, we ought to know what we're doing.

There is a book that is coming out shortly that was authored by Dr. Orfield up at Harvard University. You're familiar with him. He was going to testify, but couldn't be with us today. He talks about

the effects of the return to so-called neighborhood schools in Norfolk and in Oklahoma City. Suffice it to say that the promises that were made about achievement scores, about PTA participation, about commitment of funds to minority schools, simply have not been kept. The schools have not been maintained. It is an illusory promise, and what we simply have at the end of the day is a return to segregated education, separate and unequal.

It is not true, and it is not my belief, that black children have to sit next to white children in order to learn because of some magic dust that rubs off of white children that enables black children to learn. But because of structural racial inequality that continues in this society, segregated public school education that is the result of Federal, local, State policies that have all interacted with private actors to produce the segregated school and housing patterns that exist today do have consequences in terms of the quality education that African-American and Latino and other minority students achieve. What we are really talking about is whether we are going to continue to try to do something about those consequences or whether we're going to walk away from them, and the truth of the matter is that there is no ideal or perfect solution.

Let me just finally say, with respect to the issue before us—and I hope I can articulate this point adequately—is that I find it very ironic that in the social discourse today about the school desegregation issues, that the impetus is for resegregation. People cloak it in terms of race-neutral policies such as neighborhood schools, but they know what the result is going to be. There's that impetus, on the one hand, and yet when we talk about the redistricting cases and voting rights, African-Americans who seek empowerment within the segregated realities that exist because of choices that they didn't make are described as pursuing balkanization and segregation.

What I am saying is that we as a nation right now are schizophrenic when it comes to these kinds of issues involving desegregation. We preach integration or desegregation, but we practice segregation. The only consistent thing is at the end of the day the interests of African-Americans are losing out. I would like to see an honest discussion about these policies, and I hope this committee, I know this committee, will continue to pursue these discussions, and some of that will be further developed.

Thank you.

Mr. CANADY. Thank you, Mr. Shaw.

Ms. Canavan.

STATEMENT OF MARCY CANAVAN, CHAIRMAN, PRINCE GEORGE'S COUNTY BOARD OF EDUCATION

Ms. CANAVAN. Good afternoon, Mr. Chairman. I appreciate the opportunity to be here because very often legislative bodies discuss education without including anybody who has to deal with the reality at the other end.

I'm chairman of the board of Prince George's County, MD, which is the county to the east and south of Washington, DC. We have 120,000 students, 175 schools, and we've been under court supervision for desegregation programs since 1972 when court ordered busing began.

To give you some idea of the real costs, we have both an involuntary busing plan and a Magnet/Milliken plan. On the involuntary busing, we spend only about $1.2 million a year because, as my predecessor said, lots of students will be on the bus anyway to schools. Neighborhood schools in our county can be as far as 11 miles away, as my own children's were.

We spent $30 million this year on our Magnet/Milliken program and we receive State aid of between $5.5 and $13 million a year for that, and, yes, that's a big concern to us and all other school systems. We received Federal grants only twice, a $4 million and a $3.8 million in 1988 and 1989.

When this court case began in 1972, we had 163,000 children; 76 percent were white; 22 percent black, and less than 2 percent other minorities. Between 1972—that was the highest enrollment we ever had in the school system—and 1986, dozens of county schools were closed because enrollment began a steady decline. The schools that were closed were in predominantly inner-beltway black areas of the county where enrollment declined due to the end of the baby boom, but also because thousands of those students were being bused to outer-beltway areas and a lot of the school buildings were particularly old and run down.

We never did reach our court-ordered goal, by the way. Our court-ordered goal, so you understand what's being talked about here is that 85 percent of our students are supposed to go to integrated schools. In our case, the court in 1980 defined integrated as between 10 and 80 percent black. We have never in 24 years hit that goal.

In 1981, the case was reopened, and rather than expand the busing, we went to a Magnet/Milliken program. Magnet schools were programs that were placed in predominantly black schools that were outside the 80-percent guideline, and they were done to attract white students, although in most cases we admitted a mix, 60 percent white, 40 percent black, to those programs.

We had some schools, particularly close to the D.C. line, that had 90 to 100 percent black enrollment and no white population nearby. We were allowed under agreement with the NAACP and other plaintiffs to create Milliken II schools. Those are schools which are too isolated to be integrated by any means, and they're given extra resources. So whereas our normal class size is 30, 31, in a Milliken II it will be 20. Instead of half-day kindergarten, Milliken II's will have whole-day kindergarten. We had a computer take-home program. They got educational enhancements. The idea is to make up for some of the problems that racially separate schools have. Clearly, separate is not equal, and it was an attempt to make up for some of that.

By 1985, our enrollment had dropped down to 102,000 students. And, as someone said, at that point the school system was 35 percent white and 60 percent black. We started with two magnet schools in 1985 and 10 Milliken II schools and expanded them rapidly since then. We also created some mirror magnet programs. Mirror magnets are schools that take only black applicants; the only magnet students admitted are black, and the reason for that is we felt that, in the interest of fairness, since all of our integration problems were schools that were more than 80 percent black,

we would have a hugely disproportionate number of white kids with access and very few black students. Mirror magnets evened that out, so that today in our magnet program our school system-wide black enrollment is 72 percent; magnet enrollment is about the same. This year it's 74 percent. We wanted to be sure that black students had access to those programs because they wouldn't under a strictly desegregation plan.

We now have magnet programs in 53 schools. They serve 25,000 kids. We have a Milliken II program in 21 schools. They serve 11,000, and we have other kinds of schools, like continuity, that accept additional children.

Since the 1981 decision, we have had schools that have shifted outside the guidelines. They were inside that 80 percent line in 1981; they are now 80–85 percent black. We have put magnet programs in some of them, and in others have created something called model comprehensive. Again, it's additional resources to help offset becoming an all-one-race school. We also still have 12,000 students who are being forced bused at the same time.

About 4 years ago, our board wanted to undo some of the busing. We decided that we would review every year all 12,000 assignments and see who could return to the neighborhood school without violating the court order or without overcrowding the school. We had 1,100 who could have been sent back right then and there. We had public hearings, as is our policy, and one of the things that hasn't been discussed today is the majority of the communities who came to those hearings whose kids could have gone back, didn't want to go back. And they didn't want to go back for a lot of reasons, the smallest of which was the quality of the schools. Their reasons as parents were very good, very solid, and I need to take this out of the intellectual arena a little and deal with real children, because that's who's being talked about here. We wound up only undoing 300. The rest didn't want to go, and we didn't make them. We decided it was unreasonable to force people back whose communities had been forced out 20 years ago.

And, by the way, also for the record, our magnet schools did not displace any community residents. We made it a policy specifically not to do that. We would not remove students to make room for people being bused in.

At this point our school system is 72 percent black, and in the southern half of the county it's 85 percent black student enrollment. We don't believe we'll ever hit the numerical goal the court has set. We came up with a plan, after a year of study, which would send us back to court, and it brings up some of the concerns the others have raised here.

That plan calls for major educational improvements in the school system. What we would do is put our Milliken model, our magnet, our model, comprehensive model, in all of our schools, so that there's a considerable upgrading before we move kids back. This would be followed by an assessment plan which is laid out; we will look at test scores, these achievement factors, with the idea being to close that huge gap which exists in Prince George's County, MD, and across the country, between black and white students.

It's very expensive to do this. Lowering class size means you need more classrooms and more teachers. Our enrollment is now

back up to 120,000 kids. It has not continued to decline. We need $172 million in school construction and $143 million in operating costs in order to do this and return everyone. Every elected official in our county 2 years ago, right before the election, supported the plan. But we haven't seen the cash yet. Suddenly, things have changed.

I wanted to spend a minute or two talking about some of the kind of problems that real-life situations create. Somebody mentioned it earlier. We have 1,500 kids on our magnet school waiting list this year. We have 500 vacancies that could be filled immediately by African-American students. Almost none of the kids on that list are African-American. The board's going to decide in 2 weeks whether or not we do go to court. It clearly will violate the court order if we admit 500 African-American students to the magnet schools. It will push certain schools over the Court guidelines.

Let me back up. Our 80 percent guideline changes as the population changes—up to about almost 90 percent at this point. If we do what seems sensible to everybody and to me, put those 500 kids in the program, it will push some of the schools over the boundary. The board will make that decision in 2 weeks.

But that's the least example which you need to be thinking about. That's one of those things that seems common sense to everybody; what to do in that situation. What we're most concerned with, is that there is no educational research that neighborhood schools are better—none. Each of you needs to think in your own districts of the private schools you're aware of. Is a single private school—the best private school in your district—is it a neighborhood school or does it, in fact, import kids, as ours do in Prince George's County, from D.C., Virginia, and all over the world? That's nonsense. You need to get away from that and ask yourself, what is better about neighborhood schools.

Second of all, there is a lot of educational evidence that isolating large numbers of poor children in single buildings is very bad for them. It's irrefutable. We've even done our own research on that subject, and the single determiner for likelihood of educational success, isn't race and it isn't anything else the school controls. It isn't what we do. It isn't the teachers we hire or anything else. It's the father's income, plain and simple. And that is beyond the control of the school system. We have to deal with it, but that's the single most important factor, not the other things that you think would be.

Our plan is trying to deal with that. We have got to do something with the millions of poor children in this country who are not graduating from school properly educated. That is one thing I think needs to be pointed out very strongly that Congress can do.

The Federal Government has had a tradition, with the atomic bomb and a lot of other large national issues over the course of this country's history, of doing the research that's necessary. Believe me, school boards are not the enemy here. If we knew what to do, we would be doing it. We have done all the common-sense things that every one of you can think of, and it hasn't closed that gap. The gap's narrowed; it's gotten better but it is still there. Test scores are a little better here and there, but there is an enormous gap, and we're turning out millions of kids every year while we de-

bate this issue who aren't given a chance to compete. That's one thing you can do right off the bat.

Do the kind of research—and I don't mean anecdotal. I can tell you anecdotes from our system of this school or that school which was successful in specific areas. I mean concrete, statistical, well-grounded information about what we can do. We can't change the father's income, but we can change what we're doing.

We need to be very careful with that. We need to be realistic about ending busing. In our county the people calling for ending busing overwhelmingly don't have kids involved. Their kids aren't being bused. They're not the ones who are affected. Our only substantive information is, of those being bused, the majority of the ones we considered didn't want to go back.

I will have to say this; it's something I don't like to say because it's very ugly and nasty, but I hear it all the time: we want to end the busing. It's frequently from people whose kids go to school with bused kids; they want those kids out of their school.

I'm a school board member. I'm here to set policy for what's best for children. It is not good for "those" kids to be dumped out of a school. I hear this most often, surprisingly, not from white parents, but from black middle class parents. In Prince George's County, many of our residents moved here to get away from what they perceive as bad D.C. public schools and the problem that large numbers of low-income kids have. They don't want "those" kids in their school, either. We need to focus not just on the race here, but there's a great deal of economic problem with these kids. But the fact is that kids didn't create the problem, and we have to solve it for them.

And I saw my time's up. So I won't go into the other few things.

[The prepared statement of Ms. Canavan follows:]

PREPARED STATEMENT OF MARCY CANAVAN, CHAIRMAN, PRINCE GEORGE'S COUNTY BOARD OF EDUCATION

Good morning, Mr. Chairman and members of the Subcommittee. I am Marcy Canavan, Chairman of the Prince George's County Board of Education and Executive Director of the Maryland Education Coalition. I have been a school board member since 1986. The Prince George's County school system has 120,000 students, 175 schools and has operated a court ordered desegregation program since 1972. We currently operate both a involuntary busing plan and a magnet and Milliken II school plan. The involuntary busing costs approximately $1.2 million per year and the magnet Milliken II program cost $30 million this year. Since 1987 we have received between $5.5 and $13 million in state aid for the magnet and Milliken programs. We received a federal grant of $4 million in 1988 and $3.8 million in 1989 but have received no federal money for the program since then.

Under Maryland law, Prince George's County originally operated a segregated school system, with separate schools for black and white students. Although segregation officially ended, the Prince George's school system remained essentially segregated as a result of years of de jure segregation. Almost 20 years after *Brown* vs. *Board of Education* the school system was taken to court and court supervision began on March 29, 1972 with the intention of desegregating the school system. Although the original suit charged the school system with violations in several areas the court decree issued on December 29, 1972 dealt only with student attendance.

During the 1971–2 the school system had its highest enrollment ever—162,828 students. 76% were white, 22% were black and less than 2% were other minorities. Under the terms of the court order, the school system began a involuntary busing program during the school year 1972–3. The involuntary busing program continues with only slight modification today—24 years later, approximately 12,000 students are still being involuntarily bused out of their communities under the terms of this court order.

By November 1974, all other issues except student assignment had been settled, including the issue of teacher assignment. An agreement reached dealing with teacher assignment required that the racial balance of each school's faculty must be kept within a range of plus or minus 7% of the racial balance of the Prince George's County faculty as a whole. That agreement has occasionally led to teachers being forcibly transferred in contravention to the usual policies governing transfers. Several years ago, seven teachers transferred under the terms of this agreement brought suit. The plaintiffs and the Prince George's County Board of Education defended the agreement and the agreement remains in place today.

As enrollment in the Prince George's County schools declined between 1972 and 1986, dozens of schools were closed, particularly in the predominantly black inner beltway area where enrollment declined not only due to the end of the baby boom, but because many thousands of students were being bused further out into the county due to the court order. Many school buildings in the inner beltway area were also old and in need of replacement.

In 1981, the plaintiffs in the desegregation case reopened the case. They sought to have the court assume jurisdiction in several areas: special education assignment, talented and gifted programs, student discipline, faculty hiring and faculty assignments and student classroom assignments, but the court found that there were no grounds to reopen the case except to deal with student school assignments.

Although the court did not expand its jurisdiction to the other areas, black students were in fact significantly under represented in talented and gifted programs and over represented in special education programs. Black students were also disproportionately suspended and expelled for disciplinary reasons, particularly male students.

The school system, in recognition of these concerns has embarked on many programs to deal with these alarming statistics, including changing the way talented and gifted students are identified, working to be sure black students are not inappropriately placed in special education and embarking on a program to reduce the numbers of suspensions and expulsions.

Instead of expanding the involuntary busing program, the school system and the plaintiffs agreed on a program of magnet and Milliken II schools. Magnet schools are special programs designed to attract white students to schools which had a black enrollment of more than 80%. Milliken II schools were named after a settlement reached in *Milliken* v. *Bradley*, a Detroit desegregation case. In the Detroit case, the original settlement, Milliken I, was going to create a city to suburbs involuntary busing plan. When the Supreme Court ruled that that was not permitted since the suburbs had not operated segregated schools, Milliken II schools were created. These are schools which cannot be desegregated without crossing jurisdictions or without traveling an unreasonable distance. The schools are given extra money and resources in an attempt to make up for their segregated status.

By 1985, the Prince George's County school system's enrollment had fallen to 102,530 students—35% were white, 60% were black and 5% were other minorities. The Prince George's program began with 12 magnet schools and 10 Milliken II schools—all elementary in 1985. The next year the program expanded to 29 magnet schools and 15 Milliken II schools.

Some of the schools created in the second year of the program were "mirror magnets," schools which were not necessary for desegregation, but which were opened in predominantly white schools and accepted only black magnet students. The purpose was to be sure that in process of desegregating, the opportunity to attend magnet programs, which are more expensive and widely regarded as superior, was not disproportionately denied to black students. The court guidelines stated that the school system would be considered integrated when 85% of our students attended schools which are between 10% and 80% black. Since no schools fell below the 10% guidelines, all the schools which needed to be integrated needed to have white students enrolled. The magnet program has continued to expand and now exists in 53 schools and serves 25,377 students, as has the Milliken II program which is now in 21 schools and serves 11,448 students.

In addition, as students moved up in the magnet programs, in order to create sufficient space, continuity programs were created in various schools, beginning in the 1988–9 school year and now exist in 7 schools, serving 1,139 students. In 1990–1 the school system also began to create what were originally called "interim Milliken" schools. These were schools which were integrated according the court decree when the case was reopened, fell outside the guidelines due to demographic changes. They received some but not all of the Milliken II benefits. That program, now known as Model Comprehensive, exists in 15 schools and serves 9,410 children.

In 1990, the School Board approved a resolution which called for an annual review of communities which were being involuntarily bused with the intent of return-

ing students to neighborhood schools in cases in which moving them would not violate the court order and where there was space available. At the time there were approximately 11,000 students being involuntary bused. 1,100 could have been returned, but following public hearings only 300 were reassigned because in the other cases, for a variety of reasons the communities did not wish to return to the neighborhood schools.

There is tremendous demand from citizens and from elected officials in the county to end the involuntary busing and return to neighborhood schools. Right now our enrollment is 120,000 students, of whom 72% are black, 19% are white and 9% are other minorities. It is becoming increasingly difficult to desegregate the school system, especially in the southern half of the county where 85% of them are black. Both the enrollment and the black percentage of the student population are expected to grow for the several years.

In 1994 the Board adopted a plan, created after a year of study, which would return all involuntarily bused students in the county to their neighborhood school, while maintaining the magnet program. This plan calls for major educational improvement to our school system, funding every non-magnet school at the level of the Milliken II or Model Comprehensive schools. It calls for dropping the current court definition of desegregation—which we believe is an unattainable numerical goal—in favor of a new standard based on academic success for our students. The plan outlines the measures which would be used to assess student achievement.

Since our current student teacher ratio is 30 or 31 to one and the Milliken II standard is 20 to 1, there is a large cost both in the operating budget and the capital budget required: $172 million in school construction and $143 million in operating costs. Much of the capital construction expense will occur anyway due to increasing enrollment. Although before the last election this plan received considerable support, there has been precious little cash produced since then. The plan is to be phased in over six or more years.

We have also now hit a new problem—Although our magnet school program had a waiting list of 4500 children this year and we have space available for an additional 500 students, we did not accept them, because almost all of those children on the waiting list are black and to admit them would be a violation of the court ordered guidelines. Although those guidelines have been adjusted as the racial balance of the student population shifted, admitting these students would still be a violation. The Board will decide in two weeks whether or not to go to court to seek a change in the court order to admit these students.

As you will hear today, what to do about desegregation is not clear. The example of excluding 500 black students from participating in a desired magnet program in order to pursue desegregation is just one.

As you decide what role the federal government will play in desegregation, keep in mind that the purpose of desegregation is to, according to the Supreme Court, "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." However, much of the conventional wisdom about what to do is simply not borne out by the facts.

Many people, including myself, do not believe that we will ever be able to reach the numerical desegregation goals set by the court, but I am also constrained to point out that when the numbers were reversed—as they were in 1972 when the court order began and the school system was 22% black—most people, whether or not they approved of busing, did believe desegregation was possible.

When people call for an end to court supervision, what they frequently mean is an end to involuntary busing and a return to neighborhood schools. There is a difference. When court supervision is ended, it does not usually mean that a school system can resegregate the school system. Ending busing in Prince George's will clearly do so. Far more schools will become overwhelmingly black. That is why our school system's plan calls for ending busing before we seek to end court supervision. Another alternative would be to seek to have the court order ended with a final order requiring the county and state governments to pay for our plan.

There is, moreover, no proof whatsoever that neighborhood schools are "better." Think of any desirable private school you know, I'll wager that not one of them is a neighborhood school. The most desirable schools in our county should be Milliken II schools—they are neighborhood schools which, other than special education centers, are the most expensive type of school we operate, yet in 10 years on the Board I have never heard a single parent ask to have their child transferred to one.

Educational research, on the other hand has shown that it is clearly bad for large numbers of poor children to be in a single school. A return to neighborhood schools in Prince George's County and I expect in most jurisdictions, would create such schools.

Our experience in 1990 suggests that some parents whose children are involuntary bused want that busing to continue for a variety of very sound reasons, many of which had nothing to do with the quality—real or perceived—of the schools. The magnet program in Prince George's County has made it abundantly clear, in fact, that parents will put their children on a bus in a heartbeat if they believe it will lead to a better education.

You also need to know that at least in Prince George's County the majority of those who demand a return to neighborhood schools do not have children who are being bused. Some of them are not affected at all and some have made it clear that they want the bused children out of "their school." I have heard this argument from white parents, but I hear it far more often from middle class black parents. Many parents in Prince George's County moved out of DC to get away from the problems that schools filled with low income children have and are clear that they do not want their children in schools with a lot of poor children. This sounds ugly and harsh but it is a reality which must be dealt with.

There are, on the other hand, many good reasons to end court supervision and/or the involuntary busing of children and I am sure you are aware of many of them, but the problems that will be created by ending busing need to be dealt with rationally and realistically.

First and foremost: school systems need the sort of research which can best be done by the federal government. By this I do not mean anecdotal stories about a school here and there which is successful with educating large numbers of poor or minority students, but substantive research about what works. Across the nation school systems, in spite of their best efforts are not succeeding in closing the gap between poor and middle class children. Prince George's County has the largest concentration of middle class black families in the country and in schools like Surrattsville High School where the whole student body is middle class and predominantly black the achievement levels are similar for black and white students, but black students are far more likely to be poor than white students and the gap in Prince George's County, Maryland and the country is enormous.

Our own school data strongly suggests that the single most important determiner of academic success is the father's income—not the school, curriculum or any of the traditional things schools control. This is also one factor we cannot control, so we need more and better information about how to effectively counter that poverty.

I do favor an end to involuntary busing and court supervision in Prince George's County because I believe that duly elected school boards ought to be making decisions about what is best for children. A federal judge does not have to answer to citizens, but elected officials do. I also believe we need to be realistic. "Ending the busing" will not save money. We could bus kids for 100 years for a fraction of what it will cost to build, add on to, or renovate schools in areas where they were closed 20 years ago. We are also concerned that being released from court supervision could mean an end to the magnet aid we receive from the state. I do not believe busing is productive, but neither will ending it solve our problems, and it may make it easier for us to ignore them.

Poor families are not usually as involved with their schools for a variety of reasons and they frequently do not know how to work the system as well as more affluent parents. As local budgets become tighter, the problems of possible discrepancies between schools becomes greater. I know of elementary schools in Prince George's County which have raised $30,000 in a year to buy playgrounds or computer labs and I know of some which raise almost nothing.

To make a return to neighborhood schools work will take assistance and an intense focus on the welfare of children. The federal government can help with that through research and financial assistance. We at the local level will have to make a similar commitment to what is best for children and not what is politically expedient.

Reserved Seats in the Schools

HERE'S A math problem for parents as well as public school officials in Prince George's County: Your magnet schools—the ones with the specialized programs created to attract a racial mix of students—have about 500 openings for their programs and about 4,100 students on waiting lists for these programs. Question: How many students does the system admit? The answer is zero—at least for now—because the admissions depend on race, and there aren't enough white students for their seats and there is a waiting list for black students. Second question: Given these numbers, what should the school board try to do?

Answer: The board members are at odds over whether they should ask a federal judge to free them from a court mandate that was designed originally to prevent the county schools from becoming overwhelmingly black. But today that's not easily accomplished, because the county's school system is 71.8 percent black and 18.6 percent white. But the math here also includes financial support tied to the system as it stands. Some board members argue that the focus should be on improving efforts to recruit white students from the county's non-magnet and private schools.

But what does that do for the black students on waiting lists? School Superintendent Jerome Clark believes the board should go to court and seek a change so that black students can fill the vacancies in the next school year. School board member Marcy Canavan does too, calling the argument against going for a change "ridiculous." Her answer is the direct and sensible one: "This board is charged with doing what is best for children, and there's no question that what's best for children is admitting them to the magnet programs."

It is true that the county could lose between $11 million and $16 million received annually from the state to operate desegregation programs, including the magnets. But how can this spending be reconciled with its effect: a county that is holding seats open for whites while blacks are lined up but shut out? The students who live in the county, attend the county schools and seek admission to the special programs should not be denied access solely because of their race. Ms. Canavan gets to the point: "We need to construct the school system for the betterment of students, not to pursue some illusory number we're never going to reach."

W, Post 4/15/96

PG plans more 'Milliken' schools

Taking this path in lieu of busing will be costly

By Mana Kokianaris
THE WASHINGTON TIMES

Barnaby Manor Elementary School in Oxon Hill is 97 percent black, but neither a federal court nor the Prince George's County school system is marking it for integration.

In a county where desegregation has been debated since a federal court ordered forced busing in 1972, Barnaby Manor and 20 other virtually black schools remain one-race as long as the county gives them extra money for more teachers and special programs.

These are the "Milliken II schools," created as the result of a second court order that came down in 1985. And while the Board of Education wants to get out of the 1972 court order mandating forced busing, it wants to continue to comply with the 1985 order mandating Milliken II schools.

In fact, it wants to more than double their number. It is seeking $32 million to turn 34 more schools into Milliken II schools over the next six years, although it has not designated which schools. The money is part of a total $346.2 million desegregation and expansion plan the board will vote on next semester.

"It [a one-race school] goes against everything we have preached about, and that makes both black and white people fear it," acknowledg s Alvin Thornton, chairman o. the board's desegregation committee.

Still, Mr. Thornton is a strong proponent of Milliken II schools, calling them a "remedy" for the impossible task of integrating every county public school.

The court used the same reasoning in 1985 when it issued an order acknowledging county schools — 75 percent white when forced busing began — had become 60 percent black.

There were simply not enough nonblack children in Prince George's schools to achieve racial balance through busing, the court found.

So, instead of an integration order, the court mandated that schools with a population at least 80 percent black become either magnet schools or Milliken II schools.

Magnet schools offer a special program, such as an emphasis on science, that can attract children countywide.

Milliken II schools are neighborhood schools that get extra money for such programs as smaller class sizes, full-time guidance counselors, all-day kindergarten, free field trips and tutoring before and after school. Other schools in the county don't necessarily get these programs.

Administrators of Milliken II schools are also required to use a school-based management program called the "Comer Project for Change."

The "Comer Project," named after Yale University educational researcher James Comer, involves parents and teachers in all major school decisions. At Barnaby Manor, for example, a team of 50 percent parents and 50 percent staff meets monthly to plan school events and review policies.

Most Milliken II schools are elementary, but there is also one middle school and one high school. They are named after former Michigan Gov. William Milliken, a Republican, who instituted a simular program in Detroit.

Today, the Prince George's public school system is 70 percent black and expected to be 80 percent black soon after the turn of the century. Mr. Thornton says that's why the county needs more Milliken II schools.

He says integrating Prince George's now would mean busing black children out of the county and nonblack children into it. Even if parents would go for it, which is doubtful, the court would not, Mr. Thornton said.

"Our court system does not permit us to move children, for the purposes of educating them, outside of these municipal boundaries," Mr. Thornton said. "Milliken to me is kind of an automatic consequence. Then it becomes logical to say, 'How do you make them work better?' How do you improve them?' Not whether they are, in fact, necessary. They are absolutely necessary."

The county started out with 10 of the schools, mostly near the District line. It has gradually increased their number to 21 over the last decade. If the six-year desegregation and expansion plan passes, there would be 55 Milliken II schools.

The total plan seeks to end forced busing, open closed schools, build new ones and pump $147 million into instruction, including at Milliken II schools.

There would also be $94 million to improve instruction in neighborhood schools, including the creation of smaller classes. And it would preserve the county's magnet schools.

The plan hinges on money from the County Council and the Maryland General Assembly. Whether lawmakers will agree to come up with all the needed cash is a matter of considerable doubt, although they seem ready to support some parts of the plan.

For example, the council has given preliminary agreement to fund part of its construction component. The council said it would pay $36 million if the state agreed to pay $16.5 million for school construction.

And County Executive Wayne Curry believes strongly in the

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portion of the plan to end forced busing.

"We're going to work as hard as anybody can to get us out of this 20-year-old school desegregation suit in a community that is majority African-American and other ethnic minorities. It serves no purpose, in my opinion, and it's obsolete for our times," he says.

But whether there will be money for the plan is another matter.

"We don't really know where the money will come from, especially with the county the way it is now [strapped for cash]," said Anne T. MacKinnon, newly elected chairman of the County Council.

Asked if he would fight to fund the entire plan, Mr. Curry said: "We will — to the extent we will be able to. . . . It's a little premature" to decide.

But some who have closely examined the plan already question the board's wish to spend so much money — nearly 22 percent of what the plan contains for instructional programs — on Milliken II schools.

John Dill, a member of the county's Committee of 100, pointed out at a recent meeting of the group that the school system has no data to show residents the difference Milliken II schools make for children.

The Committee of 100, formally known as the Community Advisory Council on Magnet and Compensatory Programs, is a 10-year-old community group charged with monitoring the county's progress in desegregation and student achievement. The group in late October endorsed the six-year plan, which it had studied since the school board unveiled it in July.

"How can we justify the expense?" Mr. Dill asked.

That's a question heard often by board member Marcy Canavan, who represents part of southern Prince George's, including Fort Washington. Ms. Canavan is the only member of the nine-person school board who has expressed strong, public reservations about Milliken II schools and other big-ticket items in the desegregation and expansion plan.

"We don't have any objective evidence Milliken's work better, and the money is a big issue because no one believes we're going to get the money," Ms. Canavan said. "And there is no reason to believe that doing this is going to provide equal education."

Mr. Thornton said the county is researching Milliken II students' progress over the last five years. In the last county report on the schools in 1989, Milliken II schools showed the system's most rapid rate of improvement in student performance. The county measured performance with results from the California Achievement Test, the standardized test then used in Maryland.

Still, there is no way of proving the extra resources the county puts into Milliken II schools made the difference. Mr. Dill says that could make the program vulnerable.

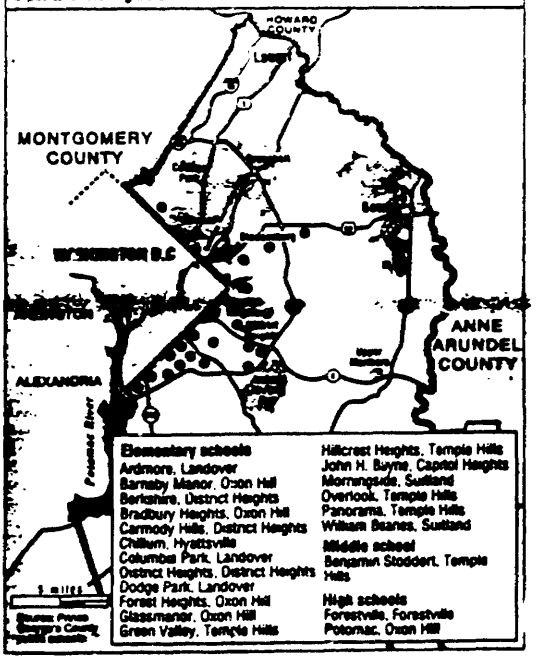
Mr. Thornton says that's not the point. Milliken II schools do not exist to show a certain level of student performance, he said. They exist to satisfy a court order.

"The court order says that we agree to create a certain number of Milliken schools and in those schools you will have a program" that includes the smaller classes and free summer school, Mr. Thornton said. "Nothing is there about specific academic outcomes."

■ *Jim Keary contributed to this report.*

MOVE FOR MORE MILLIKENS

Prince George's County has 21 Milliken II schools and plans 34 more over the next six years. Milliken II schools get extra money for smaller class sizes, full-time guidance counselors, all-day kindergarten, free field trips, and tutoring before and after school



Elementary schools
Ardmore, Landover
Barnaby Manor, Oxon Hill
Berkshire, District Heights
Bradbury Heights, Oxon Hill
Carmody Hills, District Heights
Chillum, Hyattsville
Columbia Park, Landover
District Heights, District Heights
Dodge Park, Landover
Forest Heights, Oxon Hill
Glassmanor, Oxon Hill
Green Valley, Temple Hills
Hillcrest Heights, Temple Hills
John H. Bayne, Capitol Heights
Morningside, Suitland
Overlook, Temple Hills
Panorama, Temple Hills
William Beanes, Suitland

Middle school
Benjamin Stoddert, Temple Hills

High schools
Forestville, Forestville
Potomac, Oxon Hill

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Fourth-graders take a swing break outside Barnaby Manor Elementary School.

Barnaby Elementary kindergartner Roque Canas Jr. gives his teacher Phenoris Copes a hug in class.

Enhanced-school plan pins high hopes on small classes

by Mana Kokianaris
THE WASHINGTON TIMES

It's a recent Wednesday morning at Barnaby Manor Elementary in Prince George's County and principal Sharon Quarles is pointing out one of the benefits of being a "Milliken II" school.

The benefit, whose name is Karen Davis, is standing in a bright and tidy classroom amidst 17 second-graders.

"This is one terrific teacher," Mrs. Quarles beams.

If it weren't for the Milliken II program, which gives schools extra money for more teachers and special programs, Ms. Davis would probably still be teaching in the private school she came from.

Instead, she's here in Green Hill, giving a lesson on a child's [illegible] dinosaurs in general and the apatosaurus in particular.

Hands are flying, the questions answered as quickly as she can ask them.

"What does he eat?"

"Plants!"

"What kind of teeth does he have?"

"Soft!"

"What else?"

"Flat!"

After assigning her class to choose a dinosaur and write about its characteristics, Ms. Davis talks briefly about why she chose Barnaby Manor, one of 21 Milliken II schools in Prince George's.

"If I were to choose one thing, it would be the class size," Ms. Davis says.

Having fewer than 20 students allows her to devote individual attention to each of them, she says. It also minimizes discipline problems.

"I want to teach," Ms. Davis says. "I don't want someplace where I'm working all day on discipline problems."

As a Milliken II school, Barnaby Manor also gets an "instructional resource teacher" for reading. With this teacher's help, Ms. Davis can divide her already-small class in two so each of them works on reading with only eight or nine students at a time.

Mrs. Quarles, who has been principal of Barnaby Manor since it became a Milliken II school in 1985, says her students have shown steady improvement on standardized tests, in attendance, and in social skills.

She credits, in part, the Milliken concept and a school-based management system called "the Comer process." Named after a researcher at Yale University, it calls for team decision-making at the local school level. At least half the team members should be parents.

"We don't allow finger-pointing" on the team, Mrs. Quarles says. "You have your focus and every decision you make is for the children."

Every month, the team plans something to get parents to come to the school. It might be "family math night," or a seminar in which school officials explain to parents what is on the standardized test their children will take. Mrs. Quarles notes proudly that February's event honoring Black History Month was so crowded it had to be moved to a nearby high school.

The Board of Education, in a plan it will consider next semester, is seeking $32 million over the next six years to turn 34 more schools into Millikens. The money is part of a total $346.2 million plan that would end forced busing, build schools and spend $147 million on instruction.

One board member, Marcy Canavan, is skeptical.

"Just lowering class size is not going to solve the problem" of student achievement, she says. "And because some Millikens may be good, doesn't mean they all are."

Ms. Canavan also notes that whether the plan goes forward depends on money from the County Council and the Maryland General Assembly. That's uncertain, at best.

Alvin Thornton, chairman of the board's desegregation committee and a strong proponent of the Milliken II program, says the schools are worth the money.

But he says that while money can help a Milliken II school get started, it can't make it thrive.

"It'll never work unless there is community involvement and empowerment," he says. "The Milliken concept at some point assumes that a community connectedness would kick in to really make them viable."

Second-graders at Barnaby Manor, one of the "Milliken II" schools that a court has allowed to receive extra funds instead of submitting to busing, clamor to answer teacher Stephanie Barnett's question.

Barnaby Manor pre-K students sing and clap prior to boarding a bus for a field trip. From left are Danyell Loughlin, Brandon Smalls, Kenneth Minor, Natasha Bracket and Johnathon Sommers.

A student leaps through the air in his second-grade classroom at Barnaby Manor, on Owens Road in Oxon Hill.

W. Times, 12-12-94

'End the busing' rhetoric is cheap political tripe

Viewpoint

Marcy Canavan

It has become very politically correct lately to call for a return to neighborhood schools. Virtually every politician running for office has promised to "end the busing" and save millions of dollars, which would then, of course, be enough to save the school system. I hope the public will give more thought to the issue than the politicians, because the "end the busing" rhetoric I have heard so far is both thoughtless and dishonest.

Last year, 11,934 students were "forced bused" in Prince George's County. This is as a result of a portion of the 20-year-old desegregation order that is still in effect. It was reaffirmed almost 10 years ago when the county Board of Education and the NAACP reached a new court supervised agreement to begin magnet and Milliken schools as an alternative to more forced busing.

One cold hard fact to remember in the discussion about desegregation is that no court in the United States has ever permitted a school system to deliberately resegregate a school system, whether it is under a court order or not. Demographic changes that result in schools becoming racially identifiable are not always illegal, but a deliberate act that would send children to segregated schools has never been permitted. Forcibly undoing the busing plan would clearly resegregate some (but not all) affected schools.

Second — neighborhood schools have much to recommend them, but they are also not the cure-all they are being proclaimed to be. Think of any top-flight private school: is it a neighborhood school? Our own county executive who loudly proclaims the advantages of neighborhood schools, did — like every other parent — what he felt was best for his child. Did he send him to a "neighborhood" school or was it to a school that draws from two states and the District of Columbia?

We must all be very careful that in our zeal to undo busing and return to neighborhood schools, we do not do a major disservice to those who are being forced bused. There are clearly people who are forced bused who would like to return to their neighborhood schools, but contrary to popular opinion, that is not the case for everyone.

Three years ago, the board began to annually review forced busing. We looked at all the children who are forced bused and when there was space in the neighborhood school and it would not resegregate the affected schools, we held hearings to let the parents make their wishes known. In 1991, we proposed returning the first group to their neighborhood schools — 803 students.

The majority of neighborhoods considered for return to neighborhood schools did not want to go! Only 292 of the 803 students were re-assigned. The board, quite rightly in my opinion, decided that it would not be right to take the same neighborhoods who were forced out 20 years ago and force them back now against their wishes. If a neighborhood attends a school where neighborhood children have been going for 20 years it is their school whether or not they live next door.

In my part of the county that is particularly easy to understand. My children's "neighborhood" elementary school is almost five miles from home and no one walks due to distance and safety. Our neighborhood high school is 11 miles away.

Finally, the big argument made is as usual, money. Let's get real. The school system estimates that the cost of the forced busing is $1.4 million. Seventy percent of students in the county, as in Montgomery, ride the bus anyway for distance or safety reasons.

I have a news flash for the politicians. We don't have space for 11,000 students in their "neighborhoods." A new elementary school, which could hold about 600 students, costs about $8 million to build. A high school can run more than $20 million. For the cost of building schools to accommodate these students in their neighborhood, we could bus them forever.

Having said all that, I do believe that there are some very real reasons to support neighborhood schools and that we should make sure that children have the right to attend their neighborhood school if they want to. It will not solve our educational problems and it will certainly not save money, but for communities, a school can serve as a focal point and community meeting ground. It is also easier for parents to be involved in the school and attend PTA meetings.

The board has a committee, headed by Alvin Thornton, that is reviewing the entire desegregation case. That committee will be issuing a comprehensive report this spring, including recommendations. I hope that, in the meantime, we as a community do not fall victim to the easy rhetoric about saving money. We have just named a school after a man who is most noted for fighting to overturn the seperate but equal doctrine, which kept schools segregated for years. Let's be sure that we are not swallowing bogus rhetoric about saving money as an excuse to deliberately return to that doctrine.

We must be sure that in the debate about how to "return" to neighborhood schools, we, whose children are not forced bused (which includes every politician I have heard demand neighborhood schools), listen very carefully to those whose children are bused.

There are possibilities. One that occurs to me immediately is an open enrollment plan that lets everyone choose between at least two schools. I am sure others will emerge from thoughtful discussions of the subject, but bogus rhetoric about building a school or two and ending the busing to save money has got to stop. This is not a simple issue or one that is going to be easy and cheap to solve. It does not offer a panacea for our ills.

Let's begin a rational dialogue about what benefits we can expect, what the true cost will be and what our honest beliefs about desegregation are.

Marcy Canavan is a school board member from Accokeek.

JOURNAL 12-9-93

Mr. CANADY. OK, thank you, Ms. Canavan. I want to thank each of the members of the panel for being with us today.

Let me go back to Dr. Armor for a question. We've heard a number of comments from other witnesses about the relationship between student achievement and desegregation efforts, and I would like to ask you, Dr. Armor, to summarize what your understanding is of what the research has actually shown about that relationship, and if you've written a book on the subject, I'd appreciate the benefit of your analysis.

Mr. ARMOR. Thank you very much, Mr. Chairman. I would refer you to—I believe it's chapter 2 of my book, which has a fairly comprehensive assessment. Quite frankly, I think the best evidence on this question, if you look at those school districts that have maintained a very high degree of racial balance—Wilmington, DE, for example; St. Louis, and the schools that maintain racial integration in St. Louis; in Kansas City—studies that I've done, case studies, show very clearly that the years and years of racial balance has had no appreciable impact upon the achievement gap.

The national studies that Mr. Taylor referred to, NAEP, actually the Rand study published a couple of years ago, agreed with the study I did earlier that showed that the main reason for the closing of the gap between black and white students happened to be the improved economic status of black families. And, as a matter of fact, in my book there's a discussion of, if you compare the segregated schools nationwide, the gap between black and white students narrowed in both cases. So the fact is there is an improving of achievement of black students—or there was anyway—but it's not attributable to the segregation; it's attributable either to school programs or to improved conditions of families.

Desegregation again and again and repeatedly has not been shown to have effect. Even the most optimistic studies show only very modest or very small improvements in academic achievement. So I think that one of the real myths here that prevents some boards and some groups from ending mandatory desegregation techniques is the belief that you have to have racial balance to have good education; it's just simply not true. There's no really solid evidence in favor of it.

Mr. TAYLOR. May I comment on that?

Mr. CANADY. Yes, Mr. Taylor, you can comment on that.

Mr. TAYLOR. Well, without seeking to renew a controversy that we recently had——

Mr. CANADY. I think it may have been renewed. [Laughter.]

Mr. TAYLOR. Well, possibly so.

Mr. FRANK. Repetition is not against the rules of this Congress, as you may have noticed. [Laughter.]

Mr. TAYLOR. Point well taken.

First of all, Dr. Armor says that improved circumstances of black parents has resulted in the improvement of scores for their children, and that we agree with, but I did ask him how did that improvement in the circumstances of African-American parents take place. Well, it took place between 1970 and 1990 because there was an expansion of educational opportunity.

And I might say this relates to another subject before this committee. The Rand study shows that the parents of black teenagers

in 1970, about 6 percent of them had college experience. In 1990, about 25 percent of them either had college experience or college degrees. That came about because colleges, yes, using affirmative action policies, opened the doors that had been closed to these colleges and universities in 1970, and African-American students and other minority students seized that opportunity, worked, got themselves college degrees. That opened the doors to better jobs and to better income, and now we're seeing the result of that because they have formed stable families and their children are doing better in schools. That's simply the fact of the matter.

The other aspect of this is that, if you've tracked the NAEP scores over the years, you will find that the greatest increases and improvements took place in the South in the 1970's. Earlier this morning Mr. Watt talked about Charlotte-Mecklenberg. Well, the experience in Charlotte-Mecklenberg is that once you had an opportunity for desegregated schools, you had real change in the school systems, and that was across the South.

One more point—well, two more points: one is Dr. Armor himself first did a study in St. Louis that said that it was all socioeconomic status and that the school didn't play any role in achievement differences and then he repudiated it——

Mr. CANADY. My time has expired.

Mr. TAYLOR. Then he repudiated it.

Mr. CANADY. Without objection, I'll give myself 2 additional minutes.

Mr. TAYLOR. OK. Then he repudiated his own study because he had made an enormous error in the data, and he could only explain 60 to 65 percent of the differences in black and white achievement scores by differences in the socioeconomic status of black and white students. So even his own data doesn't support what he just said here now.

Finally, I really do want to emphasize a point that Mrs. Canavan made. One of the things Congress received when you considered the extension of the Elementary and Secondary Education Act legislation 2 years ago was the largest study ever done. It's called "Prospects," by Abt Associates. It was an evaluation of title I, and the conclusion that it came to was that the worst educational environment you can provide for children is an environment of concentrated poverty. That's what we're doing in this country; we're providing environments of concentrated poverty.

There are things that can be done. There are models that can be followed even in that kind of environment, but you're really stacking the odds against teachers, parents, students, and school systems when you concentrate poverty. And that's another reason why desegregation is important.

Ms. CANAVAN. Could I offer a response to that also?

Mr. CANADY. Yes, you can respond.

Ms. CANAVAN. Briefly, we have an unusual situation because our county is suburban; it's still involved. We have high school—one of the ones I represent, Surrattsville High School, has a black enrollment of between 60 and 70 percent, and they do a lot of indepth comparison of test scores. Black students in that school and white students do about the same—one will outscore the other by a percent or two on the average. In other words, the achievement levels

are the same. And I think you need to keep in mind here some of the effects you're talking about are poverty. Some may be due to racial discrimination. But others are poverty related, but, again, there's not enough adequate research on it.

The other problem I'd raise if you are going to return to neighborhood schools, especially nationwide, local schools have been leaving more and more fundraising up to foundations, community grants, PTA's, things like that, as budget gets tighter across the country. We have schools right in my own county where one elementary will raise $30,000 for computer lab and another raises nothing. You can see yourself that after 10 years of that the cumulative effect, when you go back to strictly neighborhood school, is you're going to have some schools with vastly more resources.

Mr. CANADY. Thank you.

Mr. Frank.

Mr. FRANK. Thank you. Mr. Chairman, I'm particularly appreciative of what you've had to say and the context, and it does strike me in this general debate we haven't looked enough at the economic segregation aspect. Of course, one of the factors is that in much of the country race and poverty are correlated, and that's one of the advantages, it seems to me, to bring out. And it's also then—becomes one of the disadvantages of this neighborhood school concept because the neighborhood school then becomes a reinforcer of economic segregation.

I also, though, had a couple of questions. Mr. Cooper, I understand your sense that we could change the law so that there was no economic incentive for local education authorities not to try to become unitary, but I was struck by your also saying that we could change the ideology—or that one of the problems is the ideological incentive, and it seems to me there's a contradiction here.

You say that we had local school boards, some for ideological reasons and some for financial reasons, who weren't seeking this remedy that's available to them. And the dilemma I have is this: I can understand your view that a financial incentive to do one thing rather than another distorts the local decisionmaking process, but when you lament, as it seemed to me you were doing, the ideological situation, I don't know how that squares with your preference for local educational control. I mean, what you're saying is you're for local educational control when they agree with you.

And, in particular, for example, on page 11 of your testimony you say what we should do legislatively is we should enact legislation permitting any State or local official with jurisdiction over public education or the appropriation of funds for public education to intervene as a right. Well, you can't mean that literally since any member of the State legislature could then intervene. Do you mean that? Should any member of the State legislature be able to intervene in a case as a right?

Mr. COOPER. On that suggestion I'm simply echoing the provision as I understand it in the Prison Reform Act, and as I do understand that provision, it would, indeed——

Mr. FRANK. Any State legislator?

Mr. COOPER. I think it would, indeed, permit any public official——

Mr. FRANK. OK.

Mr. COOPER [continuing]. Or any unit of government.

Mr. FRANK. Well, let me respond. First, that seems to me sort of strange. I mean, sometimes schools may be prisons, but I don't think that should be the goal of legislative policy.

Secondly, just to correct things, this subcommittee did not do the prison litigation reform, unless I was absent that day. I think the Crime Subcommittee did.

But, finally, that doesn't seem to be much of an answer, to be honest. You're just saying this in the school context because that's what we do in the prison context, but I would also say this: here's one reason why your analogy between prisons and schools seems to be misguided. You talk a lot, and others talk a lot, about the importance of having the educational decisions be in the hands of local educational authorities. I guess I've always thought that school boards deserved more deference than prison wardens here. So I would reject that analogy.

But, in any case, if you were going to allow any State official to intervene, what then—what if there is a legitimate conflict—we're talking about ideologically now, not financial incentives—between the local school board—in other words, Ms. Canavan has just made some arguments about busing, about local schools. You would allow the Maryland Legislature, any member of the Maryland Legislature, to go to court and say, "She doesn't know what she's talking about, Judge; overrule her"?

Mr. COOPER. I would permit any member of the Maryland legislature or the Delaware Legislature, for example, in a case that's quite, I think, useful for these purposes, where a committee, the desegregation committee of the Delaware Legislature, which I happen——

Mr. FRANK. I didn't ask you about that. I asked you about any legislator. I'm trying to read what you said. You're saying any State legislator can go into court——

Mr. COOPER. This was a group of legislators.

Mr. FRANK. But you said any State or local official. That's not a committee. That's——

Mr. COOPER. Yes, I'm trying to illustrate this point. It was not the legislature itself. It was a committee of one——

Mr. FRANK. But I'm talking about what you wrote. I'm not asking you about the history of the Delaware case. I'm saying, are you advocating that we should say that any State legislator should be, as a matter of right, able to go into court and be a full party in this lawsuit involving the local education——

Mr. COOPER. And bring to the fore the issue whether or not the Constitution, which is the only thing the district courts are there to enforce and to vindicate——

Mr. FRANK. OK, but——

Mr. COOPER [continuing]. Continues to authorize the district court to hold sway over the school district, whether that——

Mr. FRANK. Even over the objection of the locally-elected——

Mr. COOPER [continuing]. Be for financial or otherwise.

Mr. FRANK. So it's your—you're advocating that any Stage legislator be empowered to go into court and be a full party over the objection and in fact to oppose the recommendation of the locally-

elected school board. Now that's a plausible position, but if that's local educational control, I'm misreading the English language.

And I think what that shows is this, and it's a perfectly reasonable position, but you should not then say this is an effort to restore local educational control. It is an effort to say, look, we don't like this effort on integration; we don't like your obsession with segregation, or whatever, but it's hardly local control.

Let me just ask—I would ask for the same 2 minutes, Mr. Chairman.

Mr. CANADY. Yes, without objection, the gentleman will have 2 additional minutes.

Mr. FRANK. Not on this subject, but it's one that is also floating around, because I'm struck with this in trying to keep this Federal judiciary out of the schools and empowering the local authorities. Have you got a view on the Parental Rights and Responsibilities Act? That's one that's been brought forward which would empower any parent to go into Federal court if they didn't like what the kid was being taught, if they felt that the local school board had, for instance, done an inappropriate curriculum for political or culture or other reasons. Would you find the Parental Rights and Responsibilities Act a further erosion of local control and a further intrusion of the Federal courts, or would you be in favor of that?

Mr. COOPER. I, frankly, don't know anything about the act. I haven't studied the act. I haven't given it——

Mr. FRANK. OK, I'll send you a copy, and I'd be really appreciative if you would send me your view, because I once again think that this emphasis on reducing the role of the Federal courts, which we hear, and empowering local educational authorities, would go directly contrary to that, which is one of the things we've already had a hearing on, and I know there are many, many Members of the House who want to push it. So I would be interested in that.

Thank you.

Mr. COOPER. Well, if I could just respond briefly, to the extent that this act would empower individuals to seek the vindication of their constitutional rights, then I, without knowing any more about it, strongly suspect that I would favor it. What I am suggesting in my testimony, in the themes that I am trying to advance here, is that the district court's jurisdiction has only one legitimate basis. And if that basis is satisfied, if those goals have been fulfilled according to the standards that the Supreme Court has articulated, there is no longer any legitimate basis for the district court to continue its involvement in school affairs, in prison operations, or in any other——

Mr. FRANK. I agree, but that's hardly what you're arguing. What you're arguing also is that we should not defer to the primacy of the local educational authority in deciding whether or not that's going on, but we should allow any politician in the State——

Mr. COOPER. Not in——

Mr. FRANK [continuing]. To intervene in the lawsuit, and I think that's a much further reach.

Mr. COOPER. Not in the context in which the litigation itself and the relief that has been afforded has created these perverse incentives to——

Mr. FRANK. No, I wasn't talking to—that's wrong. I was talking about separate incentives, and you're not talking—you're not entitled to rely on your sentence here; that's a separate issue. You talked about separate ideological and financial things, and I'm talking about setting these standards aside——

Mr. CANADY. The gentleman's time has expired. We'll have a second round of questions.

Mr. Hyde.

Mr. HYDE. Thank you very much.

I listen to Mr. Taylor always with interest and I learn things, but I'm not aware of a court-stripping bill around here. Now the Lipinski resolution, as I understand it, is asking the courts to review busing decrees, consent decrees, and I don't view that as court-stripping, unless you do. Do you view that as court-stripping?

Mr. TAYLOR. Well, I guess, Mr. Hyde, I would view it as court-tampering rather than court-stripping. [Laughter.]

Mr. HYDE. The people's body sticking their nose into a judge's determination really is a pretty heinous thought, when you think about it, because after all they are omniscient; they're certainly omnipotent. So I'm not in disagreement with you. Judges ought to—what they say ought to be it, and the people's body ought to keep their collective noses out of it; you're right.

Mr. TAYLOR. I've missed your acerbic tone, Mr. Hyde. I'm glad to be exposed to it again. [Laughter.]

But I would be pleased to try to answer the question on my own. I mean, no, I don't think courts are omniscient. In fact, as days go on and I read more Supreme Court opinions, I think they're less and less omniscient.

Mr. HYDE. Now that Earl Warren has passed on.

Mr. TAYLOR. That's right. That's right. [Laughter.]

Mr. HYDE. Yes, I know.

Mr. TAYLOR. But I do think that this kind of legislation, whether by design or in other ways, puts the court under pressures that it ought not to be put under. There is a process for raising the issues. There's a doctrine—and I find myself, I guess, in a conservative position here—called case in controversy that says only people with a concrete stake ought to participate. And with all due respect, the notion that Congress could command the courts not at the instance of any particular party to reexamine a case, or Mr. Cooper's proposition that people with very remote interests should be allowed to come in and open up decrees, I think could do great mischief. It could politicize the process, and I don't think we want to do that.

Mr. HYDE. Let me hypothesize. I hope I've used the word right. Sometimes I confuse it with hypothecate, but hypothesize. [Laughter.]

Ms. Canavan has—Ms. Canavan has indicated, and the testimony here indicates, that people who are in the busing mode don't want to get out of it because big dough is involved. We're talking money. And if we had to terminate these desegregation orders and the busing, that funds might be withheld. And, therefore, the attractiveness of the funds drives a perpetuation of this situation.

Now let's say that's so; the taxpayer is kind of the forgotten person here. Mr. Cooper was taking a little beating for saying any State legislature—legislator—could intervene, but they've got to

vote on millions of dollars that end up in all these school districts paying for these buses, as Chicago, according to Bill Lipinski's $38 million a year—so the taxpayers have an interest. And the parents and the school boards don't want to rock the boat because they're getting money they otherwise might not get. So the poor taxpayer, somebody ought to speak up for them, if the parents won't and the school board won't. So——

Mr. TAYLOR. Well, in St. Louis, where I've just come from, where significant State money is going into school desegregation and school improvement—and, by the way, busing is not, as has been stated, a significant part of the cost. The costs are in various other areas that we could discuss.

But in that place, because the State is putting the money in, the State certainly had standing, and the State attorney general has not been shy at all about challenging the expenditures and asking for unitary status. The same thing I believe could happen in Maryland, even if the State is not a party. If the State really believes that the expenditures it is engaging in are a burden on the taxpayer and are not carrying out the remedial purposes of the order, it could go into court. So it's not a question——

Mr. CANADY. The gentleman's time has expired. Without objection, the gentleman will have two additional minutes.

Mr. HYDE. Why, thank you.

Ms. CANAVAN. Could I respond to that also?

Mr. HYDE. In just a second, absolutely.

Just a couple more things. I don't want to abuse the time, and I thank the chairman.

I'm just going to express myself and not even ask for an answer. But people really concerned about kids—and you all are; I stipulate that—but, from my perspective, ought to be thinking about vouchers and parental choice. I heard Mr. Shaw talk about depriving parents of choice. You really deprive them of choice when the children of the affluent can go to a private school and get some moral guidance they can't get on the street and in the alleys or in the public schools, and poor parents ought to have a chance at that. And I think the educational level would rise; the kids would be better off; society would be better off; the public schools would be better off because of the competition.

But that's a long way from you supporting that, Mr. Taylor, or your organization, but I hope before I die that one day you do support real parental choice. Don't think imparting moral guidance to little kids other than having them get it on the street is a bad thing.

Mr. TAYLOR. Mr. Hyde, I don't think that at all. I will, even though you didn't ask for an answer, I'll give you a very quick response.

One of my concerns is that you will be depriving parents of choice in St. Louis and in places around the country if you bring to an end these programs that are doing a lot of good, that allow parents to exercise choice for magnets and——

Mr. HYDE. Nobody wants to bring them to an end. We just want the court to say, hey, are they doing what they're supposed to do? That's all.

Mr. TAYLOR. Yes, but, as Mr. Shaw pointed out, that's what happens when unitary status is declared. You go back to a segregated situation.

Secondly, I will send you a paper I just did on magnet schools, and I would love to continue the conversation with you about choice because I think it is a topic that is well worth the discussion.

Mr. HYDE. I thank you.

Ms. Canavan.

Ms. CANAVAN. Yes, I just wanted to respond about two things you raised. One is the issue of going back to court. Maybe all these other cases are different, but in Prince George's County black residents with kids in the system are part of the class action. Any of those parents could bring suit at any time they want, first of all.

Mr. CANADY. The gentleman's time has expired.

Mr. Conyers.

Mr. CONYERS. Could I allow the lady to complete her thought?

Ms. CANAVAN. OK.

Mr. CANADY. If you wish to yield her time, certainly.

Mr. CONYERS. Well, I—it didn't take me long to figure out that it would be appropriate to yield her some time.

Ms. CANAVAN. Thanks. That will—I will be real brief.

Any of those parents could bring, or parties to the suit, they can bring action any time they choose to. And since 72 percent of our enrollment is black, that includes most interested parties.

Second of all, our State money is not by court order. Our State legislatures voluntarily pay that money. We did discuss going to court, but they did it voluntarily. I think that's a real important difference.

The other thing, I want to make myself perfectly clear. I am not against ending—going back to neighborhood schools or getting released from court, but, as the gentleman next to me said, there's some confusion here; they're not the same thing. No Supreme Court is going to allow you to deliberately resegregate a school system once they release you from court order. And no mistake about it, in Prince George's County going back to neighborhood schools will resegregate our school system.

What we are trying—if we go, our plan that we would like to go to court with, we can't get released from court first. If we do, there's no question we'll not be allowed to resegregate.

Mr. HYDE. How do you desegregate when you've got 10 percent white and 90 percent nonwhite? How would you desegregate?

Ms. CANAVAN. That's exactly what our point is. We don't believe we can. But to return to neighborhood schools, if we get released from the court order, it won't let us resegregate by reassigning the kids. We want to reassign the kids and then get released.

Mr. HYDE. They're already segregated; you don't have the numbers.

Ms. CANAVAN. Not according to the court. It will make it worse.

Mr. HYDE But you're paying a lot of money to shuttle kids from a black school to a black school.

Ms. CANAVAN. Not always. We pay $1.2 million a year to bus kids that's attributable to forced busing. To rebuild—to put the schools in the communities, to return them, we could bus them for

100 years before we'd make up the difference. It's not just that. It is true everybody ought to have the ability to school in their neighborhood. That's what we want to get to. We want to allow everybody to go to neighborhood schools. But in my district the 300 who stood up and screamed bloody murder about not wanting their busing undone last year, no, I'm not going to send them back.

Mr. COOPER. Mr. Chairman, Ms. Canavan has touched on a——

Mr. CANADY. The time is controlled by Mr. Conyers.

Mr. COOPER. Oh, I'm sorry.

Mr. CONYERS. Let me ask Ms. Canavan——

Mr. HYDE. I ask unanimous consent that Mr. Conyers have an additional 2 minutes because I think we trespassed on his time.

Mr. CANADY. Without objection.

Mr. CONYERS. Thank you very much, Mr. Hyde.

You mentioned the father's income being determinative. Dr. Armor mentioned improved economic status within the family. Are we hearing some of the same things?

Mr. ARMOR. Yes, I believe what Ms. Canady [sic] pointed out is what we find—I'm sorry, Canavan, sorry—[laughter]—is exactly what my research has found: that it isn't the racial composition of the school that a black child is exposed to; it's the economic level of his family. And there are huge gains that could be made, that have been made, by black families who have become middle class.

Mr. CONYERS. Do you, Messrs. Taylor and Shaw, wish to qualify that in any way?

Mr. TAYLOR. Yes the economics is terribly important but the key to improved economic circumstances is improved educational opportunity.

Mr. SHAW. I would only add that I agree that the economic status issues are equally important. I observe, though, that I think it's almost impossible to disaggregate race and class in this country.

Ms. CANAVAN. And we have disaggregated it somewhat in Prince George's, and we've found both to be factors, but overwhelmingly economics was the more important determiner.

Mr. ARMOR. And, of course, if I may add, that is the entire purpose of the fairly complex statistical methods that people like me use to, in fact, disaggregate things that are in reality highly correlated. When we do the statistical analysis, again, I agree with Ms. Canavan, that, in fact, it isn't the racial composition; it is the economic level of the family when you disentangle them.

Mr. CONYERS. Now what about *Brown I;* did you agree with that decision?

Mr. ARMOR. Yes, indeed.

Mr. CONYERS. Think back to your writing and speaking on it when it came out.

Mr. ARMOR. Well, I was a sophomore in high school when it came out.

Mr. CONYERS. OK.

Mr. ARMOR. But soon after that, I was a student at UC Berkeley, and I was very active in the civil rights activities, including some sit-ins in Berkeley, CA. Believe it or not, we had segregated lunch counters in Berkeley, CA. So, yes, I was a strong supporter of the *Brown* decision.

Mr. CONYERS. And you always have been?

Mr. ARMOR. Absolutely.

Mr. CONYERS. And *Brown II*?

Mr. ARMOR. *Brown II* is a little bit of an amorphous. That's the remedy decision of *Brown,* but the best I have made of that is that they said that students should be assigned on a nonracial basis, nondiscriminatory basis, and there's been a lot of debate about exactly what that means.

Mr. CONYERS. I understand that. That's why I'm asking you where you come out on it.

Mr. ARMOR. *Brown II,* I have no problem with *Brown II.*

Mr. CONYERS. OK. What is your view on the resolution that Congressman Lipinski has introduced and that has been discussed here, the one that would review court desegregation decisions?

Mr. ARMOR. I have not actually seen a piece of legislation. I have seen—I have heard some discussion about it.

Mr. CONYERS. You didn't come here to advocate it or criticize it?

Mr. ARMOR. Well, what—no, but what I did come to do, come here to say, is that I have witnessed personally many cases where school boards, either out of fear or out of shielding, or whatever, are reluctant to go forward. And some of them really do not know what might happen. I think that the——

Mr. CONYERS. Are reluctant to go forward with——

Mr. ARMOR. For unitary status, for the fear of the consequences. What I advocated, but I don't know if this relates to the bill or not——

Mr. CONYERS. In what cities have you found that to be occurring?

Mr. ARMOR. Well, in my statement I mention Orlando, which is Orange County, FL. I think there's quite a bit of that——

Mr. CONYERS. Any others?

Mr. ARMOR. Oh, San Francisco.

Mr. CONYERS. Any others?

Mr. ARMOR. Let me get my statement out. I think Chicago is probably one of them, if I understood Mr. Lipinski. I don't know a lot about that specifically.

Mr. CONYERS. Oh, well, wait a minute. Are you sure you don't want to incorporate Chicago simply on the basis of what you have heard here this morning.

Mr. ARMOR. Well, I actually have--I have worked in the past with the Chicago system. I did not know they still had a court order. I know they have a voluntary plan, but if, in fact, they still have a court order, there's no reason why they should. They have complied with it for——

Mr. CONYERS. You've been working in this area for about 30 years or more?

Mr. ARMOR. Yes, I have.

Mr. CONYERS. Tell me——

Mr. CANADY. The gentleman's time has expired. The gentleman will have 2 additional minutes, in addition to the 2 minutes you've already had.

Mr. CONYERS. Thank you for your generosity, Mr. Chairman.

Now let me go back—and this is not intended to embarrass you, but the statistical error that has been publicly referred to, you have corrected it and have made the changes that would be required following the correction of that error have you not?

Mr. ARMOR. Certainly. The correction occurred before the trial, the hearing actually started.

Mr. CONYERS. Now, tell me, what was the nature of the error?

Mr. ARMOR. The amount of the achievement gap in St. Louis that was explainable in terms of a relatively limited number of economic characteristics is about two-thirds instead of about 90 percent plus. The fact is we still explain most of the gap.

Mr. CONYERS. How did that error occur——

Mr. ARMOR. The Census data I got—the Census data——

Mr. CONYERS [continuing]. Knowing human nature to be what it is?

Mr. ARMOR. It's just a simple——

Mr. CONYERS. We're not asking you as if we don't make errors.

Mr. ARMOR. It was a simple computer error of a person, a colleague, that was getting the data for me from the U.S. Census Bureau, and it's a complex data set. So——

Mr. CONYERS. Thank you very much.

Finally, Ms. Canavan, you said, what can we do? That always resonates with me. What is it that we can do? You know, you said that's how this is going to be dealt with, and I'm interested if you have any specific recommendations to put into the history books here this morning.

Ms. CANAVAN. Well, let me get the easy one out of the way that every school board member in the country would say: send a check. [Laughter.]

However, that aside, there is a serious need for research, serious research, on a nationwide scale on how we are going to deal more effectively with poor children in our school systems. Absolutely, we need to look at a lot of major changes in the way we've done business, and they're expensive; that's the problem.

Mr. CONYERS. Well——

Ms. CANAVAN. Things like year-around school, so that kids don't fall 5 years behind.

Mr. CANADY. The gentleman's time has expired.

Mr. Flanagan.

Mr. FLANAGAN. Thank you, Mr. Chairman.

Mr. Taylor, I have some questions, more involving process than actually the substance here. I was intrigued that when you spoke, six Members of Congress went scurrying for a copy of the Constitution earlier. That was fairly astounding.

Mr. TAYLOR. It doesn't hurt, I don't think.

Mr. FLANAGAN. No, no, it never does. It never does, but I think the process is something that we should take a minute and look at here.

When *Brown I* came along and rightly decided so, Congress had a unique opportunity to act and failed to.

Mr. TAYLOR. Correct.

Mr. FLANAGAN. Then the Court went ahead and said, well, we've got a problem; we've got to fix it.

Mr. TAYLOR. Right.

Mr. FLANAGAN. And then a judicial solution was taken. It has been fraught with problems, rightly, wrongly, good, bad, or otherwise. However you come down on the issue, it has been fraught with much angst, anguish, and problems from beginning to end.

Congress now wants to do what it should have done then. And my question to you is how is that wrong? Or how right or improper?

Mr. TAYLOR. Well, Congress did act in the 1964 Civil Rights Act to both give the Attorney General the power to bring suits in Federal court and——

Mr. FLANAGAN. Apart from the mild abrogation of the courts and putting a thumbprint on judicial activism—and I don't want to get any charged terms here or anything; I really am trying to be a little more even-handed than that—but, apart from that action, Congress had an opportunity to actually act affirmatively and lay out a solution of its own. It failed to; it wants to now. Why is that not right?

Mr. TAYLOR. I think Congress can act in an appropriate way, but what *Katzenbach* and other cases said was that the fifth section of the 14th amendment enables Congress to expand the rights of persons, but not to limit them. It's a one-way ratchet. It does not enable Congress to cut back on remedies in a way that will impair constitutional rights.

Now I would say there——

Mr. FLANAGAN. Well, I don't think there's any disagreement——

Mr. TAYLOR. Right.

Mr. FLANAGAN [continuing]. Here that Congress can't act contrary to the Constitution. We all agree to that. But why does the judicial remedy selected have to be the only remedy, and anything that is contrary to that judicially-selected remedy is somehow de facto unconstitutional?

Mr. TAYLOR. Because, Mr. Flanagan, to the extent that the judiciary is interpreting the rights that exist under the Constitution, which is the preeminent responsibility, as you know, of the judiciary, then any impairment of those rights would be an impairment of constitutional rights. Now there are ways in which Congress can act which do not impair constitutional rights and remedies, but the concern here is that a cutback on a remedy or a requirement that the Court do A, B, and C would impair a remedy which has a constitutional dimension. And the way to deal with that, obviously, is through amendment to the Constitution.

Mr. FLANAGAN. But to lay in contrary to the court in a specific solution, by what Mr. Hyde uniquely and wonderfully called the people's body, which should have acted originally and did not——

Mr. TAYLOR. Right.

Mr. FLANAGAN [continuing]. But now wants to, and finally has the resolve to act where it should have before. I still don't understand how this is a transgression on the proper role of the court under the doctrine of judicial review. They selected a solution. The solution has not worked well, and at least not worked to the point where there is wide satisfaction with it. The people's body wishes to act. Why and how is this wrong?

Mr. TAYLOR. Well, it depends on the circumstances—the action is not wrong. And, by the way, I guess I wouldn't concede that the remedies that the court has ordered have not worked. They have worked well in a variety of circumstances, which is what I tried to talk about during my testimony. The place where they have worked least well is where the remedies have been confined to a central

city in a larger metropolitan area, and the reason Charlotte-Mecklenberg works well is it's a city/county district, and the reason why some other place may not work well is because you've got economic and racial concentrations——

Mr. FLANAGAN. I would certainly agree with you on that. I'd also observe that the blanket solution or the broad solution—that's a better term—selected by the courts in enforcing their remedy, their conjured remedy to this constitutional transgression that no one denies existed and exists—what I don't understand is that, why the people's body, with a unique opportunity to act on behalf of the people with the voice of the people, to come to a better solution, should be somehow impaired against the unelected and holy thou who have come to a different solution.

Mr. CANADY. The gentleman's time has expired. Without objection, the gentleman will have 2 additional minutes.

Mr. TAYLOR. I'll take, I think, 30 seconds and maybe my colleagues——

Mr. FLANAGAN. Sure. Yes, absolutely. I didn't mean to restrict the discussion.

Mr. TAYLOR [continuing]. May have something to say about this.

I think Congress does have authority to act. I think and I worry, frankly, about the fact—you know, it's no secret this has been the most politicized issue over the years, and it's a hot potato. And that doesn't mean Congress shouldn't act, but when we're talking about the protection of minority rights, I think we ought to be very careful.

Some years ago, there were hearings, extensive hearings, held in the Senate by then-Senator Mondale, which resulted in 20 volumes of work on all aspects of school desegregation. I'm not saying it would take that much for Congress to act in a reasonable fashion, but I think that Congress will have to be prepared to set aside, or this committee and the corresponding committee would have to be prepared to set aside, a substantial amount of time to talk about what would be a positive contribution.

The other thing, the last thing I would say on the subject is courts don't simply slap these remedies down. They do ask local school districts to come up with remedies. They do obtain a great deal of input, and then they make their judgments based on the best evidence.

Mr. FLANAGAN. I would merely add that I applaud the Court for selecting a remedy in the case where Congress refused to act.

Mr. TAYLOR. Right.

Mr. FLANAGAN. A remedy had to be found; the Court did it. Congress is now prepared to act in the face of a remedy that's been less than terrific, not to say that ours would be better or otherwise. And I think you're right; I think we do have to talk long and hard about it before we pick another remedy to be sure.

But my question, again, returns to process, and I don't think it's at all improper for us to legislate this. I think it's high time we did, and I think it is the right thing to do now.

I'm sorry, Mr. Shaw.

Mr. SHAW. May I? The time has expired.

Mr. CANADY. The time has expired. We are going to have a second round. So I think we need to move on here. Mr. Hoke.

Mr. HOKE. I'd be happy to yield to the gentleman.

Mr. SHAW. Thank you, Mr. Hoke.

I wanted to make a point that I think answers the question you're asking. I don't conceive that it was the responsibility of Congress after *Brown* v. *Education* to act. The responsibility was in the courts. These are cases in which article III jurisdiction has been invoked, and the Supreme Court under *Marbury* v. *Madison* and all the jurisprudence after that, as you know, the judiciary has held that it is emphatically the province of the judiciary to say what the law is. Congress, in fact, did act, or at least a significant part of Congress, with the Southern Manifesto, to condemn *Brown*. Nonetheless it is the Court's province first and last.

Mr. FLANAGAN. Well, certainly last; I don't know about first, though. I think the three branches of government have a coequal ability to interpret the Constitution, and the courts certainly have the last word, without a doubt, under judicial review and our great reverence for it. But nowhere enshrined in the Constitution does it give them first, last, and always.

Mr. SHAW. Once article III jurisdiction has been invoked, I'm talking about.

Mr. HOKE. Mr. Shaw has suggested that busing is a code word and that it is a code word for a pejorative view of desegregation. My opinion is that it is a code word, and it's not just my opinion personally, but this is what I've learned from the hearing that we had in Cleveland. But it is, in fact, a code word for freedom specifically, or the lack of freedom, and specifically a parent's freedom to choose where their children will go to school. This is a freedom which is being denied parents on the basis of economic status rather than racial status, and that is a great concern that I have.

Somebody talked about—I think it was Mr. Taylor who talked about—concentrated poverty, that what we're doing is concentrating poverty, with the suggestion that the reason that poverty is being concentrated is the result of segregation. And I think that that's the nub of the question. You conclude that it's the result of segregation; I've heard other people testify that you've got the chicken and the egg confused here, and that, in fact, the reason we have concentrated poverty—and I only know in detail and in depth the situation in Cleveland, OH, where nearly 40 percent of the city lives in, at, or below the poverty level. And if, in fact, there has been a concentration of poverty, it is because people of economic means—and I'm reminded, and I think it's important to remind ourselves that two-thirds of the African-Americans in this country are now in what is considered to be the middle class. But people of economic means, those that can afford to, have left the inner city.

And so if those who can afford to have gotten out, then who are left? Those that can't afford to get out. And if we have created a ghetto, certainly it appears to be more of a minority ghetto than a white ghetto. I don't doubt that for a moment, but the unfortunate reality is that those that could have left, and now we're in a situation, at least in Cleveland, and from the testimony I've heard it sounds like it's similar in other places, where we've got these dysfunctional problems in the schools. Teachers are the most eloquent on this subject, and I really appreciate your testimony, Ms.

Canavan, because you're so close to the immediacy of the problem, where you have kids that are coming from dysfunctional families and it's mostly affected by economics in these classes.

Does it not strike some of you, or am I off on the wrong tangent here, because it strikes me that this whole notion of the lack of accountability that rests in the Federal judiciary because it is a permanent tenure, and the constitutional Framers never intended that those judges—do I get an additional 2 minutes?

Mr. CANADY. You get your customary 2 minutes.

Mr. HOKE. You know, my understanding of the constitutional framework of this, is that we have a permanent Federal judiciary because they're not entrusted with either conceiving, deliberating, and creating the laws, nor with executing them. That's what the legislative and executive branches do.

And so we've got the situation where we've heard all this testimony except there seems to be some disagreement from Mr. Taylor, but I mean, frankly, it's not very compelling. And the weight of the evidence is that our inner-city, our core city school systems are in a shambles. William Boyd is the acting school superintendent for the Cleveland city schools. He's the acting school superintendent because he's been appointed by the Governor because the school system's completely broke. And he's saying it's the worst school system in the country. I don't like to say that here because I represent Cleveland, OH, but this is what we're facing.

And so I guess my question is, is anybody else either troubled by or thinks that maybe one of the reasons that, in trying to correct what is clearly a moral wrong and a constitutional wrong—that is, segregation—we have put so much power in the Federal judiciary, and we have gotten lousy results, because the judiciary was never intended to be used that way.

Yes, Mr. Armor.

Mr. ARMOR. Your question was, doesn't anybody have this view? And I agree. In my 30 years of experience, one of the problems that judges have—this is a real human problem—once they get involved with a remedy, it's very, very hard not to basically take over control. And I know judges that call people up in the middle of the night to ask why is the board doing this and why is it doing that. They have conferences. They get involved in siting schools. A lot of judges don't do this, and a lot of judges are, I think, very, very proper, but there's a human aspect.

Once you take over control of a school system and you have the power to make these decisions—and, by the way, almost everything you do in a school system that's important to anybody has a potential impact upon the racial composition of schools or a faculty or a resource distribution. There's nothing that doesn't come under a school. And the human process, leaving a judge in control of a school system for 20 or 30 years clearly was never contemplated by the Supreme Court, and the Supreme Court right now is trying to tell lower courts to please bring these to an end, and some lower court judges out there, by the way, are actually doing this. They're bringing the parties in and saying, why do we still have this case 30 years later? But there are those who can't help themselves from getting involved in the day-to-day decisions, and that clearly was not intended and that clearly is wrong.

Mr. CANADY. The gentleman's time has expired. We're going to have a second round. I've got a couple of questions I'd like to ask in the second round.

I'm going to quote the testimony of Dr. Armor. In Dr. Armor's testimony he says, "I believe it would be useful if the Justice Department were required to list all of its nonunitary desegregation cases and indicate on the list what each school district must do to attain unitary status."

I want to ask Mr. Taylor, Mr. Shaw, and Mr. Cooper, in that order, to briefly respond to that suggestion. I don't have much time, please give us a succinct response.

Mr. TAYLOR. Why, in 1988, I believe, which was after the round of what I refer to as court-stripping legislation, the Justice Department published or produced, I believe, at Mr. Kastenmeier's request, a list of cases in which the Justice Department was involved and what the status of those cases was, and how many were unitary and how many were operating under a general injunction. And I think I'm probably the possessor of the last extant copy of that because I keep getting calls about it.

I think it would be perfectly appropriate to update that list, so that you'd have some information about what's going on around the country.

Mr. CANADY. Mr. Shaw.

Mr. SHAW. I think that it would be appropriate to get that list. With respect to what the school districts have to do to be declared unitary, that's a little bit more complicated. I'm not sure that the Justice Department would have a view. If it did, I don't know that that view would be ultimately controlling. There are other parties involved and the Court is ultimately the determinant.

Mr. CANADY. But you believe it would be appropriate for us to ask them their view?

Mr. SHAW. Oh, sure. I don't see any problem with that.

Mr. CANADY. OK. Mr. Cooper, would you like to comment on that?

Mr. COOPER. I think it's an entirely well-founded suggestion. Mr. Taylor is right, although I think it was earlier than 1988 actually. I may be——

Mr. TAYLOR. The last list I think was——

Mr. COOPER. OK, but that list actually had its origins earlier, a few years earlier, because I was in the Civil Rights Division at the time. And I thought that producing that list would be a very good idea.

I think even better than having a list, though, is the second suggestion, which is asking the Justice Department, at least in the cases in which it is a party, the moving plaintiff, to identify the things that would satisfy the Department of Justice in terms of when the school district can qualify under the Court's standards for declaration of unitary status and a return of the school district to the local authorities and outside the supervision of the district court. That would be a very, very useful enterprise.

Mr. CANADY. OK, thank you, Mr. Cooper. Let me move on to another subject that we have touched on repeatedly, that is the Prince George's County magnet school program, and the fact that under that program we have a situation in which there are 500

openings for nonblack students with a waiting list of about 4,100 black students. The black students can't get into those slots.

Do you think that is a violation of equal protection or some violation of other constitutional requirements? Mr. Shaw, could you address that briefly?

Mr. SHAW. I don't know that it would rise to a violation of equal protection. I want to stress this. I have been adamantly opposed to those kinds of caps being maintained in magnet schools under those types of circumstances. I think that it is OK to cap the schools during an initial enrollment period, but if the white students don't show up, I don't think black or minority students should be denied opportunity to those institutions that offer all these wonderful educational facilities.

Mr. CANADY. OK, thank you.

Mr. Taylor, would you like to comment on that briefly?

Mr. TAYLOR. Well, I agree with that, but we cannot forget that the impetus for establishing these magnet schools was desegregation, and I think it's perfectly appropriate to have racial balance targets and to try to adhere to those targets. And where there are waiting lists, I think that the appropriate thing is to see if you can't reproduce that popular magnet. It may take some work, but, for example, Montessori, public Montessori schools have been a very popular form of magnet and the demand has grown and grown, and I think that where you are faced with a demand, you try to meet that demand. And that's a good thing, not a bad thing.

Mr. CANADY. Mr. Cooper.

Mr. COOPER. I think that the policy that is being implemented in Prince George's County raises grave constitutional questions, even in the remedial context in which it arises. Denying individual children and their parents, solely because of the color of their skin, the ability to receive the benefits of these educational opportunities seems to me—not only strikes me as a very wrong headed policy—I understand and agree with my colleagues on the panel on that score, but I think it also raises a very serious constitutional issue, again, despite its remedial context.

Mr. CANADY. Thank you.

Mr. Hyde.

Mr. HYDE. No questions.

Mr. CANADY. Mr. Hoke.

Mr. HOKE. Thank you, Mr. Chairman.

I want to go back to this question of where we are at today. And maybe I'll start by asking Mr. Armor, because he's done some work here in Cleveland and he's looked at the school district's efforts to eliminate the vestiges of discrimination. Can you share some of those findings?

Mr. ARMOR. Yes. Cleveland maintained a very high level of desegregation, according to my analysis, for—basically since—I believe 1986 was the start of the remedy—so for 10 years now. There were some changes to their plan, court approved, in recent years, but I think, from my understanding of the Supreme Court's standard for student assignment and racial balance, that they more than met that requirement for a period of time and that there's no reason for them not to be released from the student assignment aspect; that is, the busing or the reassignment, which, by the way—

may I just say that busing is a term that is well understood by people in these cases, and it is—it means the assignment of students by race and the transportation, if necessary. And I think that's the reason it's controversial, not because it's using buses. It's the assignment of students by race instead of geography that's been the controversy.

I did not study any other aspect of the case, but, of course, there is a Federal—has been a hearing on a unitary status, and there's a good chance Cleveland will be released from supervision on that one aspect.

Mr. HOKE. Well, there's a larger question which has to do whether Cleveland can afford to be released from the entire order. And I think that goes a long way to explaining why we don't see a petition for unitary status.

Mr. ARMOR. The State is heavily involved in funding it. Now this is—again, this is the problem that several people here have alluded to, and it's a very difficult problem because court intervention has set up a process, has, first of all, contributed to the loss of the middle class; creates a financing process that's not part of the local financing legitimate mechanisms. And to extricate itself—I mean, I feel sorry for St. Louis and I'm sympathetic with the problem that they get $200 million from the State every year. What are they going to do when that money is withdrawn? But it will have to be withdrawn. We have to confront the legacy. We have to deal with it because the courts cannot continue to be in charge.

So Cleveland has got the same problem. You've got to find a way—probably a phaseout plan is the only way that's going to work, where there's a phasing out of the process, and at some point in time you will turn back control to the local authorities. But unless Ohio as a State wants to start funding all of its large cities, they're going to have to find a way to turn back control and gradually reduce State funding until the local agencies and authorities and taxpayers can support it.

Mr. CANADY. If you could answer briefly, Mr. Taylor, because I want to get to one other issue.

Mr. TAYLOR. Well, I just wanted to go back to your earlier question because I thought it was a very important question and I want to set the record straight. I don't believe that inner-city schools are in good shape. I don't believe the schools in Cleveland are in good shape. What I was saying was that——

Mr. HOKE. Good. That's a test that you're breathing and reading and you have your eyes open. [Laughter.]

Mr. TAYLOR. Well, I never talked about it. That's what I——

Mr. HOKE. OK. You didn't talk about Cleveland. You talked about Kansas City.

Mr. TAYLOR. I talked about desegregation; I talked about the magnet program and the interdistrict program in St. Louis, and I would say that the inner-city schools in St. Louis, the racially——

Mr. HOKE. And I can tell you about Max Hayes High School in Cleveland.

Mr. TAYLOR. All right.

Mr. HOKE. It's a magnet school for vocational training, and it is absolutely fabulous, but the exception, unfortunately, proves the rule.

Mr. TAYLOR. But what I want to say is this: I think if we proceed from a common basis of facts, we ought to look at what the problem is. Thirty years ago this month, I was in Cleveland as staff director of the U.S. Commission on Civil Rights, holding hearings on the urban—on the causes of urban disorder in Cleveland. And I will say to you that I came away from those hearings, and hearings in other cities, with the belief that there was conscious public policy that was segregating people by race and income; that these included the public housing policy, the urban renewal policies, the transportation policies—and the Federal Government, I might say, was deeply implicated in those policies. Plus, the school policies were all working to isolate and constrict opportunity for lower income and minority people.

And I believe we are living with the legacy of that in our cities, not just Cleveland, in other cities, to this very day, and the place to look is not the courts, but the place to look is how we formulate public policy in the legislative bodies to extend——

Mr. HOKE. I'm not going to argue with you that that was true 30 years ago, but——

Mr. CANADY. The gentleman's time has expired. The gentleman will have 2 additional minutes.

Mr. HOKE. Thank you very much, Mr. Canady.

The fact is that you have to look to the courts because the courts have been the ones that have been running the show for the Cleveland public schools—and it's not the past decade; it's the past two decades since 1976; you said 1986. So you've got to look at the courts. The courts were never intended to be used this way. They're not equipped for it. They don't have the accountability for it. They don't have the creativity. They don't have the thoughtfulness. They don't have any community connection in that sense.

My problem with all of this is the suggestion that Congress shouldn't even meddle with this? Why? Because we've got such a success story in Cleveland, Mr. Shaw, because we're doing so well in Prince George's County, because we've done so great in St. Louis? I mean, for heaven's sakes, we represent these people. This is our responsibility.

Mr. TAYLOR. Let me——

Mr. HOKE. No, I'm not finished, and I'm not going to be finished. I get 2 minutes, and I'm going to use them.

It just strikes me as being absolutely incumbent upon us to recognize and not ignore this problem. There is a real problem. And it's not my constituents, quite truthfully, that are being hurt by it. It's the minority community in Cleveland at the bottom of the totem pole that has been hurt the most by these policies—policies that have been enacted by the Federal courts. And the Federal court shouldn't be in the process of determining on a day-to-day, managerial, administrative basis how the constitutional mandate for no discrimination gets played out. They must have ultimate authority to say, yes, we demand it; we require it; there will be no discrimination; we will not tolerate that under any circumstances, but we're not going to be the ones that are going to tell you how to do it, and to micromanage it. And I think that's the problem that we've got today.

And there are a lot of people who are completely wrapped up in the status quo because of their own involvement in the genesis of this. I understand that. It's human, but it's time to fix it. That's what I want to try to do.

Thank you, Mr. Canady.

Mr. CANADY. And thank you, Mr. Hoke.

I want to thank each member of this panel for being with us. Your testimony has been very helpful. It's been a very good panel, and we thank you for your time and interest in this issue.

The subcommittee is adjourned.

[Whereupon, at 1:30 p.m., the subcommittee adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING

"THERE IS NO LIBERTY . . ."

A Report on Congressional Efforts To Curb the Federal Courts and To Undermine the Brown Decision

Citizens Commission on Civil Rights

October 1982

Summary and Conclusions

Members of the 97th Congress have introduced more than a score of bills designed to limit the authority of federal courts in cases involving the controversial issues of desegregation, abortion rights and school prayer. The common purpose of these bills is to modify prevailing interpretations of the Constitution by the United States Supreme Court to reflect what the sponsors believe to be popular political sentiment.

The notion that courts should be guided in constitutional determinations by public sentiment, and curbed by legislation if their decisions conflict with popular will, is of most serious concern to the Commission. Legislation premised on this critical misunderstanding of the role of courts would radically reallocate authority in our system of checks and balances, and would eliminate vital protections against government abuse of the rights of citizens.

The measure on which this report focuses is the Helms-Johnston Amendment, intended to restrict the authority of courts to protect constitutional rights in school desegregation cases. The Helms-Johnston Amendment has passed the Senate and garnered the support of the Attorney General of the United States. The Johnston portion of the Amendment would impose limits on court-ordered busing to a student's nearest school or to schools within 15 minutes or five miles of his

or her home. The courts could not order, directly or indirectly, busing beyond that provided for in the bill, and the Justice Department is charged to enforce the bill on the complaint of a parent or student, even to the point of reopening previously decided cases.

The Helms portion prohibits the Justice Department from bringing or maintaining any action to require, directly or indirectly, the busing of a student to a school other than the one nearest his or her home.

In completely prohibiting the federal courts from issuing remedies that the Supreme Court has held are often necessary to protect constitutional rights, the Helms-Johnston Amendment violates the fifth amendment and other provisions of the Constitution designed to assure that constitutional rights are determined by the courts and changed only through the process of constitutional amendment. In predicating restraints on busing remedies on a denial of the clear evidence that busing is an effective and educationally beneficial remedy, the Helms-Johnston Amendment threatens to close the doors to equal educational opportunity. And, in calling for the unraveling of many plans that have been implemented to comply with Brown v. Board of Education, the Helms-Johnston Amendment threatens to reopen racial conflict in communities where the matter of public school integration has been long and successfully resolved.

I. The legal deficiencies of the Helms-Johnston Amendment

The Helms-Johnston Amendment relies explicitly on

While the Johnston Amendment would not remove federal court jurisdiction over school desegregation cases, it would place an absolute bar on the power of the courts to fashion a remedy calling for transportation beyond that deemed "reasonable" in the legislation. In so doing, it removes not one of a number of available options, but what may be the only effective remedy to redress a constitutional wrong.

The Supreme Court has held that where public officials have mandated the establishment of a racially segregated school system, reassignment of students is required to break up that segregated system. In many cases, reassignment can be accomplished only by busing.

The Court has placed its own limits on busing, holding that it will not be ordered where other remedies are adequate or where busing is so extensive as to infringe on the health and safety of children. Thus, the Johnston Amendment is directed only at busing that the courts have held is essential to remedy unconstitutional segregation.

Section 5 of the fourteenth amendment vests in Congress the "power to enforce, by appropriate legislation, the provisions of this Article." While the Supreme Court has held that Congress may expand on the protections of the fourteenth amendment, the Court has clearly stated (and in 1982 reaffirmed) that Congress may not narrow the guarantees of the fourteenth amendment beyond their judicially established scope. The Helms-Johnston Amendment would do just that -- deny a remedy the Supreme Court has held essential to cure the violation of a right guaranteed by the fourteenth amendment.

Article III of the Constitution mandates the existence of the Supreme Court and specifies the cases in which it shall have original jurisdiction. The Supreme Court's appellate jurisdiction is subject to "such Exceptions, . . . as the Congress shall make." Congress also has substantial power over the structure of the lower federal courts, as the Constitution extends the judicial power to the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish." While these clauses confer great authority on Congress, they cannot be read in isolation from the other parts of the Constitution.

a. Johnston invades the essential role of the federal courts in our constitutional scheme. 21

Constitutional review by an independent federal judiciary -- not dependent on the public or Congress for tenure in office or continued compensation -- was the method chosen by the Framers to guard against excesses in the use of governmental power. This fundamental concept was reflected in Chief Justice Marshall's famous declaration in the 1803 case of Marbury v. Madison that: "It is emphatically the province and duty of the judicial department to say what the law is." That principle has ever since been respected.

To ensure that the judiciary did not exceed its constitutionally circumscribed role, the Framers adopted impeachment as "the only provision . . . consistent with the necessary independence of judicial character," and deliberately designed it to be much harder to achieve than ordinary legislation. High crimes and misdemeanors must be proven, and a two-thirds vote by the Senate is required for conviction.

Similarly, the amendment process reflects the conviction that questions of constitutional interpretation not be left to simple majorities and ordinary legislation. Article V specifies that the Constitution may be amended only by a two-thirds vote in each House of Congress and ratification by three-fourths of the states.

If Congress can nullify the results of a disfavored judicial interpretation of the Constitution by ordinary legislation, both of these safeguards -- impeachment and

constitutional amendment -- are rendered superfluous, and a bare majority in Congress is given final powers of constitutional interpretation.

b. No precedent sustains the power asserted in Johnston. 28

The few judicial precedents that exist,do not support the constitutionality of the Johnston Amendment. Indeed the only instance in which Congress tried to employ its article III jurisdictional powers to nullify a judicial interpretation of the Constitution was condemned as unconstitutional by the Supreme Court in the 1872 Klein case.

c. Even if limited to the lower federal courts, Johnston is unconstitutionally discriminatory legislation. 33

The Johnston Amendment clearly applies to all courts of the United States, including the Supreme Court. But even if it could be fairly construed to apply only to the lower federal courts, it would still be constitutionally deficient. While Congress has broad authority over the federal courts, the Constitution itself restricts that power in a variety of ways. First, article III is a constraint, in that Congress may not establish lower federal courts that are merely advisory bodies -- for example, by according courts jurisdiction over a class of cases but withholding their power to require necessary remedies.

Moreover, Congress may not use its article III power in a manner that denies rights secured under other sections of the Constitution. In particular, congressional power to

allocate jurisdiction to federal and state courts over cases involving constitutional rights may not be exercised in a manner that denies the equal protection of the laws. For example, a statute providing that all constitutional claims made by minorities must be heard in state courts, while those of whites may be adjudicated in federal courts, would undoubtedly be held a racial classification, violating the equal protection guarantees of the due process clause. Similarly unconstitutional would be a statute making no mention of race on its face, but withdrawing jurisdiction only with respect to the types of constitutional claims made by racial minorities, such as claims under antidiscrimination housing ordinances.

Also, the Johnston Amendment is unconstitutional on equal protection grounds because it accords some constitutional claimants preferred status over others. It allows some the choice of either federal or state forums, while relegating others to state courts alone. Thus, it treats people differently on the basis of which constitutional rights they choose to exercise.

d. The availability of state court review does not save Johnston. 42

The constitutional defects of the Johnston Amendment are not cured simply because the state courts remain open to enforce constitutional rights. For one thing, any defendant in a state court action arising under the federal Constitution can remove that case to federal court. If the federal court

cannot grant full and effective relief to plaintiffs -- necessarily the case if the Johnston Amendment were enacted -- defendants would certainly exploit that avenue.

Moreover, because the Johnston Amendment is directed at changing Supreme Court precedents, its sponsors are plainly inviting state court judges to disregard established constitutional law and thus dishonor their oaths to obey the United States Constitution. Unless that were to happen, the legislation would be pointless. Accordingly, state court judges, who are not protected by the federal Constitution's guarantees of tenure and compensation -- and many of whom face periodic popular elections -- would be subjected to substantial political pressures to disregard established law, thus subverting the judicial independence requirements of article III.

Finally, the Johnston Amendment could result in conflicting state court decisions defining important fourteenth amendment rights as state supreme courts come to different conclusions, and the United States Supreme Court remains powerless to exercise its appellate jurisdiction to establish uniformity.

B. By allowing Congress to rewrite the Constitution by majority vote, the Johnston Amendment would drastically alter our legal system. 46

The Johnston Amendment sets a dangerous precedent, inviting one-issue groups which disagree with a Supreme Court decision to bypass the constitutional amendment process and try to work their will through Congress. A future Congress could as easily restrict jurisdiction or remedies

with respect to the fifth amendment's provisions protecting private property as today's Congress might with respect to the fourteenth amendment's provisions guaranteeing equal protection of the laws. Indeed, if Congress can by a simple majority rewrite essential elements of the Constitution, it can eliminate federal jurisdiction or remedies in all cases arising under the Constitution, leaving only the protection of the state courts. If state legislatures were to follow the example of Congress and deprive state courts of constitutional jurisdiction, there would cease to be any judicial protection of constitutional rights.

Moreover, congressional attempts to weaken the role of the judiciary would have far-reaching implications for the separation of powers which safeguards each branch from encroachment by the other. For example, it has not been so long since the federal courts turned back presidential efforts to infringe the powers of Congress by taking over steel mills, impounding appropriated funds, and resisting congressional subpoenas.

C. The Helms Amendment is unconstitutional legislation with dangerous policy implications. 50

The extent of the Helms Amendment's limitation on the Justice Department is unclear. One reading would prevent the Department from any involvement in a suit regarding school desegregation because that suit could lead directly or indirectly to busing as a remedy. A narrower reading

would prevent the Department only from actively seeking busing as a remedy in any suit in which it was participating.

On either reading, the Amendment raises constitutional difficulties. First, the bill would violate the separation of powers principles which distinguish the legislative from the executive. Article II of the Constitution charges the President with "Care that the Laws be faithfully executed," yet the Helms Amendment would place constitutional litigation conducted by the Justice Department under the direction of Congress.

A second constitutional deficiency of the Helms Amendment is that it imposes unequal burdens on those seeking the protection of minority interests. The Helms' restrictions apply only to cases brought to remedy unconstitutionally segregated school systems; the Justice Department is not similarly restricted in other areas.

Senator Helms' bill also runs afoul a principle enunciated by the Supreme Court that the federal government is constitutionally prohibited from financially supporting segregated schools. In this context, the Helms Amendment must be evaluated with regard to other federal legislation dealing with federal funds for education. Through grant-in-aid programs enacted by Congress, the federal government provides substantial assistance to public education. However, Congress has passed laws restricting the authority of federal agencies other than the Justice Department to take action against

federally-subsidized discrimination in school desegregation cases involving busing.

In Brown v. Califano, a federal court of appeals upheld these restrictions, but only because the Justice Department retained power to take effective action against unconstitutionally segregated schools. The court stated that if the Justice Department were unable or unwilling to enforce the law, the challenged amendments could be unconstitutional as applied. The Helms Amendment apparently would put the Justice Department in just that position.

In addition, the Helms Amendment raises the following policy considerations: 1) It would create a precedent for restricting the Executive's enforcement of other constitutional rights; 2) it would remove the Justice Department from school segregation cases, thus leaving courts only two poles of opinion -- the civil rights plaintiffs and the defendant school systems; and 3) it would place the entire financial burden of litigation on minority groups.

In short, if the Helms-Johnston Amendment is enacted and honored by the courts, it will shift the delicate balance of power among the three branches of government in a way which will undermine the constitutional role of the judiciary and, with the same stroke, demean the Constitution to the status of ordinary legislation. If the amendment succeeds in Congress and is struck down by the courts, the Congress will still have betrayed its constitutional oath and triggered

a confrontation that cannot but send a signal to the judiciary to hedge and trim in sustaining claims that could result in popular outcry and further legislative remonstrations.

The Commission believes that Congress should reject the Helms-Johnston Amendment as unconstitutional legislation. In addition, bar associations and civil rights, civic and community organizations should mount campaigns in communities t[illegible]ughout the nation designed to create wider public unde[illegible]standing of the profound implications and dangers of the Helms-Johnston Amendment.

II. In espousing Helm-Johnston and in related actions, the Justice Department is seeking to limit the role of courts in protecting the rights of citizens. 61

The underlying rationale of the Helms-Johnston Amendment, that in interpreting constitutional rights courts should be responsive to the dictates of the majority, finds an echo in policy declarations and actions of the Administration. The Attorney General, who serves as the principal executor of the President's constitutional duty to take care that the laws be faithfully executed, has warned the courts to "heed the groundswell of conservatism evidenced by the 1980 election."

The Justice Department has clearly begun to follow through on that theme. It has assisted Congress in its attacks on the jurisdiction of the judiciary by supporting the Johnston Amendment before congressional committees. In addition, it has taken positions in cases pending before the federal courts urging them to give extraordinary deference to popular opinion and legislatures when the issues before them are controversial.

For example, despite a clear conflict with Supreme Court decisions calling for mandatory reassignment of students to

break up segregated school systems, Justice Department officials continue to insist that they will seek only remedies that give all parents the option of rejecting desegregated schools. In a case in East Baton Rouge, Louisiana, the Department recently has proposed substitution of a voluntary plan for a mandatory remedy ordered by the court after years of intransigence and delay by local officials. While the stated rationale for reopening the court order is "white flight" from the public schools, the Department's criterion for a new plan is not effectiveness, but adherence to the rigid principle of voluntarism. The effect of the Department's argument, if sustained, would be to reward the school districts whose resistance spurs community opposition to desegregation and to impinge on the consistent holdings of the Supreme Court that such opposition is not a relevant consideration in the judicial effort to remedy unconstitutional segregation.

Similarly, a recent Department brief to the Supreme Court suggests unprecedented deference to legislatures. Articulating the government's broad approach to cases involving constitutional issues, the Solicitor General, in a "friend of the Court" brief, took the position that the proper role of the Court is only to identify the constitutional interest at stake, and then to allow the legislatures to say as a matter of "policy"

what that interest means; that is, to define the bounds of the liberty or property identified by the Court, and to say how it should be enforced.

This analysis misapprehends the importance of the judiciary to our constitutional system. It is the very essence of the judicial mission to guard zealously the promise contained in the Bill of Rights that political majorities will not be allowed to harness the power of the state to oppress unpopular views. For the judiciary to be able to articulate a right but not to give it substance -- which is the effect of Helms-Johnston as well -- is to be consigned to a meaningless exercise.

The Commission urges that President Reagan reconsider his Administration's support of the Helms-Johnston Amendment and oppose it as unconstitutional and unwise legislation.

III. In addition to mandating continuation of unconstitutionally segregated school systems, the Helms-Johnston Amendment bars the implementation of desegregation programs that have been effective in improving educational opportunity 68

In Brown II, the Supreme Court's first decision on school desegregation remedies, it recognized that appropriate plans might vary from system to system, and that district court judges, because of their proximity to local conditions, were best situated to make the initial decisions.

The Helms-Johnston Amendment would usurp this entire judicial function, and substitute for the flexible, individually-applied test of workability contemplated by the Supreme Court, a blanket, irrebuttable presumption that court-ordered busing of more than 15 minutes or five miles in

either direction is never feasible, and always poses an unjustifiable danger to the health of the children and the educational process. Helms-Johnston contains certain "findings" adopted by the Senate to support these busing limitations. Specifically, the findings are that:

(1) court orders that result in busing in excess of the bill's provisions have proven ineffective to achieve a unitary system;

(2) busing has resulted in "white flight" from school systems;

(3) transportation in excess of the bill's provisions is expensive and wasteful; and

(4) there is an absence of social science evidence to suggest that the benefits outweigh the disruptiveness of busing.

This report concludes that the findings of the Helms-Johnston Amendment are not supported by social science research or practical experience.

A. Busing has proved an effective method for establishing a unitary school system. 74

There is no evidence that demonstrates that the development and implementation of a sound desegregation plan, calling for mandatory student reassignments that require busing, is not an effective method for dismantling the vestiges of a prior, segregated system. Available evidence and common sense point in the opposite direction.

Research on the effectiveness of desegregation plans to reduce racial isolation shows that in every case where busing has been used as part of a plan to break up a segregated school system, school integration -- measured by the opportunity

for interracial contact -- has increased. Moreover, a major new study of desegregation trends across the country finds that remarkable changes occurred in the South between 1968 and 1980, that were clearly related to policies and enforcement efforts by the courts and federal executive agencies.

B. Most desegregation plans involving busing have proved very stable; in others "white flight" is not ultimately prevented by barring busing. 77

In the decade between 1968 and 1978, when many of the nation's most comprehensive busing plans were implemented, there was a marked increase in minority students attending predominantly white schools. During that same period, the proportion of white students enrolled in public schools increased, and the proportion attending private schools declined. More significantly , the studies of social scientists show that, while in some circumstances school desegregation orders cause temporary dislocations, there is no lasting or significant relationship between "white flight" and school integration in the nation's largest cities.

Busing itself is not the issue. Indeed one-half of the nation's school children are bused to school -- only 3.6 percent of them as part of a desegregation plan. In many situations, court-ordered desegregation remedies do not cause even temporary "white flight." For example, small and medium-sized cities rarely experience "white flight" at all.

Similarly, but at the other end of the spectrum, metropolitan and county-wide plans, often involving extensive busing,

have not only proved stable but in some cases have led to residential integration. A 1980 study found a trend toward increased residential integration in cities that had experienced metropolitan or area-wide desegregation for a minimum of five years. In explaining these results, the study notes that racial identification of schools historically has been an important factor in creating segregated neighborhoods. Once schools are no longer earmarked as white or black, racial barriers in housing are lowered. As residential integration grows, some communities have been able to decrease busing.

The controversy over "white flight" then has focused not on small cities or on metropolitan school districts, but rather on major cities with substantial minority school enrollments and desegregation plans that affect the center-city alone, not the suburbs. In these places, white suburbanization has been occurring for years for a variety of reasons that are essentially distinct from school desegregation. While significant decreases in public school enrollments have been noted in the period immediately surrounding the implementation of a desegregation plan, the decreases seem to be limited to the early pre- and post-implementation period. With few exceptions, by the third year of operation, the rate of decline in white enrollment has stabilized at pre-plan levels, and in some cases, is below pre-plan levels. Of course, the stability of desegregation plans may vary with the character of the plan and the quality of educational and community leadership.

C. There is wide public support for desegregation involving busing in communities that have implemented desegregation plans.

Opinion surveys, such as the Harris poll, show that in the abstract most Americans favor integration of public schools, but oppose busing as a method of integration. If the two issues are linked, and busing is posited as a tool essential to accomplish desegregation, resistance to busing drops and more people favor than oppose it. Further, polls which deal with actual experience under court-ordered busing show a more favorable response than polls which deal with busing as an abstract notion.

There are reasons that most people, black and white, who have been involved with busing support it. Superintendents of schools and school board members testified before Congress as to the positive experiences their schools had had with busing. For example, in Charlotte-Mecklenburg, North Carolina, county-wide busing began in the 1970-71 academic year. In 1981, its superintendent told Congress that he "would prefer being superintendent in Charlotte-Mecklenburg to any other large school system in the country" because the community is now "a better place to live," and the overall quality of the schools is "better today than it would have been if the Swann decision had never been made."

Almost all current research regarded by the social science profession as methodologically sound concludes that under court-ordered desegregation remedies, the achievement level of minority students has risen and that of white students has not been adversely affected. A recent comprehensive report reviewing the results of 93 case studies, showed that not only did achievement scores for minority students rise in desegregated schools, but also that, on the average, their I.Q. scores rose as well. The largest gains have occurred under metropolitan and county-wide desegregation plans that usually involve extensive busing.

Among the explanations for these gains in achievement is that educational improvements and a substantial infusion of human and financial resources often follow court orders requiring middle class white students to attend previously all-minority schools. Other factors may include changes in teacher attitudes and expectations in heterogeneous classrooms, and higher community and student norms in integrated schools than in low income, racially isolated classrooms. One black student testified about her experience in a desegregated school that, "in my old school people asked, 'Are you going to college?' In my new school they ask, 'Which college are you going to?'"

School desegregation results in other indirect educational and social benefits. For example, minority children attending desegregated schools are more likely to complete high school, attend college, select a four-year college, select a desegregated college, major in a field of study designed to lead to a more remunerative job, and finish college. Indeed, total enrollment of minority students in higher education surpassed one million in 1976, representing an increase of more than 100 percent from 1970 levels.

A very real but often ignored issue is that of collateral benefits to white students who may also be victims of racial isolation. A white high school senior from Charlotte-Mecklenburg stated, "I've been bused for five years and to be honest with you, I value that experience, my five years of busing, probably more than any of the educational things I've learned. Book learning is also good, but I learned to deal, I think, with people."

Desegregation plans have proved most successful and effective when accompanied by other educational improvements such as curriculum reform and teacher training. These improvements, often spurred by desegregation, have been financed by the Emergency School Aid Act. Yet the same Congress that is considering Helms-Johnston has abolished

The Supreme Court took a major step forward when it ruled that racial segregation laws and policies violate the equal protection guarantees of the fourteenth amendment. That principle is imperiled by the Helms-Johnston Amendment.

The amendment would do more than place a prospective limit on busing. It contains a retroactive feature that would authorize a private citizen or the Attorney General to go to federal court to overturn school desegregation plans that have been in operation for any length of time if they entail more busing than is permitted in the amendment. The dissolution of remedies previously ordered and long since implemented threatens to reopen wounds that have healed, and to reawaken community and racial conflict in America.

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THE CONTINUING STRUGGLE FOR EQUAL EDUCATIONAL OPPORTUNITY

WILLIAM L. TAYLOR

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THE CONTINUING STRUGGLE FOR EQUAL EDUCATIONAL OPPORTUNITY

WILLIAM L. TAYLOR*

I. INTRODUCTION

The Kerner Commission issued its report in March 1968, warning of the dangers of a nation divided into two societies, separate and unequal.[1] Less than a month later, Dr. Martin Luther King, Jr., the most eloquent and persuasive voice in the effort to break down walls of segregation and establish racial and social justice, was dead, struck down by an assassin.

Ever since, those who have sought to keep Dr. King's dream alive have had to wage a difficult battle to overcome new rationalizations for the existence of inequality and increasing calls for separatism. It is striking, in reviewing the quarter century since the *Kerner Commission Report* and King's death, to realize that almost all of the major legislative and judicial initiatives that have sustained the effort for equal opportunity—the Supreme Court's decision in *Brown v. Board of Education*,[2] the Civil Rights Act of 1964,[3] the Head Start program,[4] the Elementary and Secondary Education Act of 1965,[5] and other elements of the War on Poverty—were in place *before* the events of 1968. Several other important policy events occurred in the five years that followed: The Civil Rights Act of 1968 barred discriminatory practices in housing.[6] In the *Green*,

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* B.A., Brooklyn College; L.L.B., Yale University. Mr. Taylor practices law in Washington, D.C. specializing in advocacy for the rights of children. At the time of the *Kerner Commission Report* he was Staff Director of the U.S. Commission on Civil Rights. The author expresses appreciation to Barry Kazan, a Georgetown law student, for his research assistance on this article.

1 REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1 (Bantam Books 1968) [hereinafter KERNER COMM'N REPORT].

2 347 U.S. 483 (1954).

3 Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975, 2000 (1988)).

4 The Head Start program was created under the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified as amended in scattered sections of 42 U.S.C.). It was reauthorized under the Head Start Act of 1981, Pub. L. No. 97-35, 96 Stat. 499 (codified as amended in scattered sections of 42 U.S.C.), and was amended by the Human Services Reauthorization Act of 1984, Pub. L. No. 98-558, 98 Stat. 2880 (codified as amended in scattered sections of 20 and 42 U.S.C.).

5 Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

6 Civil Rights Act of 1968, tit. VIII, § 812, Pub. L. No. 90-284, 82 Stat. 73, 88 (codified as amended at 42 U.S.C. § 3612 (1988)) (prohibiting discrimination in housing).

Swann, and *Keyes* cases, the Supreme Court prescribed effective school desegregation remedies in the South and set forth rules against intentional segregation in the school districts of the North and West.[7] Further, the Court's unanimous decision in *Griggs v. Duke Power Co.*[8] broadly interpreted fair employment law to bar unintentional job discrimination practices that harmed minorities and could not be justified by business necessity.[9]

Over the last two decades, the most notable positive events have been the extensions of civil rights guarantees to members of other groups, particularly women, Hispanic Americans, and people with disabilities, who have been victims of systemic discrimination,[10] and the legislative restoration of rights and remedies that have been limited by restrictive interpretation of civil rights laws by an increasingly conservative Supreme Court.[11] Only in rare instances did statutes or court decisions seek to remove barriers to equal opportunity faced by the minority poor.[12]

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7 Keyes v School Dist No 1, 413 U S 189, 207 (1973) (holding that intentionally segregative conduct by school board in "meaningful portion" of a school system would require system-wide remedy); Swann v Charlotte-Mecklenburg Bd of Educ, 402 U.S 1, 28-29 (1971) (holding that district court has broad discretion to administer remedies, including systemwide desegregation through the use of busing); Green v. County Sch Bd, 391 U S 430, 438 (1968) (holding that school board has an affirmative duty to eliminate dual system "root and branch")

8 401 U S 424 (1971)

9 *Id* at 429-33

10 *See, e.g.*, Title IX of The Education Amendments of 1972, 20 U.S C §§ 1681-1688 (preventing discrimination on the basis of gender in educational programs receiving federal assistance); Americans with Disabilities Act of 1990, Pub L No 101-336, 104 Stat 327 (codified as amended in scattered sections of 42 and 47 U.S C and at 29 U.S.C § 706 (1988)) (providing equal access to persons with disabilities in the areas of employment, public accommodations, and transportation); Franklin v Gwinnett County Pub Sch, 112 S Ct 1028, 1087 (1992) (holding that Title IX remedies include monetary damages); Lau v Nichols, 414 U S 563, 566 (1974) (holding that non-English-speaking students are entitled to equal educational opportunity under 42 U S C § 2000d (1988))

11 *See* Voting Rights Act Amendments of 1982, Pub L No 97-205, § 3, 96 Stat 131, 134 (codified as amended at 42 U.S.C § 1973 (1988)) (reversing City of Mobile v Bolden, 446 U.S. 55, 61, 74 (1980)), Civil Rights Act of 1991, Pub L No 102-166, 105 Stat 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U S C A (West Supp 1991)) (reversing Wards Cove Packing Co, Inc v Atonio, 490 U S 642, 655-58 (1989) and other Supreme Court decisions in 1989), Civil Rights Restoration Act of 1988, Pub L No 100-259, 102 Stat 28 (codified as amended at 20 U.S.C.A §§ 1681, 1687, 1688, 29 U S C A §§ 4, 706, 42 U S C A §§ 2000-2004, 6107 (West Supp 1991)) (reversing Grove City College v Bell, 465 U S 555, 570-75 (1984))

12 *See, e.g.*, United Steelworkers v Weber 443 U S 191, 197 (1979) (upholding voluntary affirmative action program for minority workers); Milliken v Bradley (*Milliken II*), 433 U S 267, 288-91 (1977) (recognizing court's broad remedial powers in combatting school segregation); Boston Chapter, NAACP, Inc v Beecher, 504 F 2d 1017, 1021 (1st Cir 1974) (holding that defendants must demonstrate that multiple-choice test given to job applicants is

In a sense then, the drive for equality has been running on empty for almost twenty years, sustained by laws and moral authority whose origins are only dimly remembered by millions of Americans. Although the officially sanctioned caste system that replaced slavery in the South and the sanction of racism throughout the nation are gone, racial animosity and fears still lie just beneath the surface and have erupted in recent years with frightening regularity in places like Miami, Florida, Forsythe County, Georgia, and Howard Beach, Bensonhurst, and Crown Heights in New York City. The 1992 disorder in Los Angeles, spurred by the acquittal of police officers accused of beating Rodney King, had a far more devastating impact in the minority community than the counterpart events in the 1960s that gave rise to the Kerner Commission.[13]

More daunting still is the combination of race and poverty and the seemingly impersonal structures and institutions that deprive the minority poor of opportunities for advancement. When the Kerner Commission wrote its report in 1968, many cities were still great centers of employment and economic activity. In 1993, employment and economic wealth have shifted to suburbs and to "new cities," while the movement of middle-class citizens (including the minority middle class) out of cities has intensified.[14] The growing wealth of suburbs has brought superior education and other public services, often financed without great difficulty by local property and income taxes. For the minority poor in cities, services have declined; today, cities face a form of triage in seeking to meet a host of health, social, housing, and education needs.[15]

In the face of these difficulties, what is surprising is not that the movement for equality has faltered but that it persists and that people continue to move out of the shadows of deprivation and discrimination to lead productive lives. The longevity of the movement is a tribute to the

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job-related if it is found to disqualify minority applicants disproportionately), *cert. denied*, 421 U.S. 910 (1975).

13 *See* Bill McAllister, *Call for a Panel on L.A. Unrest Echoes Historical Response*, WASH. POST, May 4, 1992, at A21; Carla Rivera, *Riots' Causes Same as in '60s, State Panel Says*, L.A. TIMES, Oct. 2, 1992, at A1, A2, A34.

14 *See, e.g.*, John F. Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82 Q.J. ECON. 175, 175 (1968) (addressing the link between discrimination and segregation in metropolitan housing markets and "the distribution and level of non-white employment"); John F. Kain, *The Spatial Mismatch Hypothesis: Three Decades Later*, 3 HOUSING POL'Y DEBATE 371, 436-38 (1992) (reviewing research regarding the impact of housing discrimination on black employment); John D. Kasarda, *Urban Industrial Transition and the Underclass*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 26, 26-35 (1989) (noting the transformation of cities from "centers of production and distribution of goods to centers of administration, finance and information exchange," and a resulting loss in available blue-collar employment).

15 *See, e.g.*, Abbott v. Burke, 119 N.J. 287, 355-57, 575 A.2d 359, 393-94 (1990) (discussing relationship of "municipal overburden" and substandard education in urban areas).

power of the idea of equality embodied in the Fourteenth Amendment and to a recognition during the 1960s that implementation required affirmative effort to undo the effects of past wrongs. The staying power of the movement is also due to the ability of so many black[16] citizens to use *Brown* and other decisions as a means of empowering themselves, through education, employment, and political and community action, and to the fact that race continues to be the central dilemma of our society and to gnaw at the American psyche.

This Essay will focus almost exclusively on developments in the area of public education as they have affected the life chances of minority children born into poverty. Such a focus risks a justified charge of oversimplification since the interconnectedness of policies in employment, economic development, housing, education, health, and nutrition is beyond dispute. Moreover, it may be said that a single-minded education approach ignores the "institutionalized pathology" of the ghetto.[17]

Without underestimating the difficulty of the challenge of providing opportunity for those who are most deprived in this society and the need for multi-faceted approaches to removing barriers to opportunity, I submit that part of the problem in confronting contemporary issues of inequality is the tendency to immobilize ourselves by making the issues too complex. I will seek to demonstrate that intervening early in a child's life through child development and public education has been shown to be a highly promising initiative even if taken independently of other initiatives. What is most needed in the lives of many children is the caring and sustained attention of adults in a setting conducive to learning with enough outside support to assure that the child is healthy and that there will be some positive reinforcement for the educational effort outside the school.

II. EDUCATIONAL PROGRESS SINCE THE *KERNER COMMISSION REPORT*

If the major educational initiatives of the 1960s—school desegregation, Head Start, and federal aid to economically disadvantaged students in elementary schools[18]—had not resulted in progress, either because they were not widely implemented or because they were not effective,

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16 Editor's Note The contributors to this symposium have used the terms "African American," "black," and "black American," often interchangeably, in their articles The *North Carolina Law Review* has elected to defer to its contributors' choices in the absence of any universally accepted racial or ethnic designation

17 *See* KENNETH B CLARK, DARK GHETTO 81 (1965)

18 Elementary and Secondary Education Act of 1965, Pub L No 100-297, 102 Stat 140 (codified as amended at scattered sections of 20 U S C (1988))

there would be true cause for despair and for an active search for other approaches. This does not appear to be the case, however.

Striking evidence of progress is found in the performance over the years of black children on reading tests conducted by the National Assessment of Educational Progress (NAEP).[19] As analyzed by Marshall Smith and Jennifer O'Day, black children born in 1971 scored an average of 189 on NAEP reading tests when they were nine years old, 236 when they were thirteen, and 274 when they reached the age of seventeen in 1988; white children born in 1971 scored 221, 263 and 295 at the same junctures.[20] The authors conclude: "These are extraordinary data By conservative estimate, they indicate a reduction in the gap between African American and White students over the past 20 years of roughly 50% when the students are 17 years old."[21]

While social scientists and educators are cautious in ascribing causes for these trends, there is evidence that school desegregation has played an important role. Black elementary students in the Southwest recorded the greatest gains in reading on the NAEP assessments during the 1970s.[22] These gains occurred during the period when school desegregation was occurring all across the region for the first time.

This strong indication of a link between desegregation and academic achievement is reinforced by case studies of particular communities that have undergone desegregation.[23] The studies reveal that in most cases

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19 NAEP is an educational research project mandated by Congress that is widely regarded by educators as providing a more reliable indication of students' knowledge and skills than the norm-referenced standardized tests used by most school districts. *See* Title IV of the General Education Provision Act, Pub. L. No. 90-247, 81 Stat. 814 (codified as amended at 20 U.S.C.A. §§ 1221-1226, 1231-1233 (West Supp. 1991)).

20 Marshall Smith & Jennifer O'Day, *Educational Equality: 1966 and Now*, *in* SPHERES OF JUSTICE IN EDUCATION: THE 1990 AMERICAN EDUCATION FINANCE ASSOCIATION YEARBOOK 53, 74 (Deborah A. Verstegen & James G. Ward eds., 1991). The analysis also revealed a reduction in the gap between blacks and whites in mathematics and science. *Id.* at 76. In addition, the reduction in racial disparities in reading was accompanied by a closing of the gap between children living in advantaged and disadvantaged homes. *Id.* at 78. Other analyses of NAEP data have reached similar conclusions. *See* NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 348-50 (Gerald D. Jaynes & Robin M. Williams eds., 1989) (discerning an "overall pattern . . . of improvement among blacks and decline in the difference between blacks and whites").

21 Smith & O'Day, *supra* note 20, at 75. Unfortunately, NAEP data from 1990 show that progress has not been maintained and that there has been a widening of the gap between black and white and advantaged and disadvantaged students. Jennifer O'Day & Marshall Smith, *Systemic School Reform and Educational Opportunity*, *in* DESIGNING COHERENT EDUCATIONAL POLICY: IMPROVING THE SYSTEM (Susan Fuhrman ed., forthcoming 1993).

22 NATIONAL ASSESSMENT OF EDUC. PROGRESS, THREE ASSESSMENTS OF PROGRESS IN READING PERFORMANCE, 1970-1980, at 42-45 (Rep. R 01, Apr. 1981).

23 ROBERT L. CRAIN & RITA E. MAHARD, DESEGREGATION PLANS THAT RAISE BLACK ACHIEVEMENT: A REVIEW OF THE RESEARCH 35-45 (June 1982). The best progress

where courts have ordered desegregation and the process is begun early in a child's school career, the achievement levels of minority students have risen modestly or significantly while those of white students remained unchanged or rose slightly.[24]

Apart from results on achievement tests, in the longer term black children attending desegregated schools are more likely to complete high school, to enroll in and graduate from four-year desegregated colleges, and to major in nontraditional subjects for minority students—majors that lead to more remunerative jobs and professions.[25] In addition, low-income black children who receive a desegregated education have a good chance to avoid the social pathology (such as hostile encounters with the police or teenage pregnancy) that blights the prospects of many of their peers.[26]

As with school desegregation, studies have shown positive results stemming from the availability of preschool child development programs for three- and four-year-olds. The most widely noted study tracked the lives of disadvantaged children who had participated in the Perry program for three- and four-year-olds in Ypsilanti, Michigan, in the 1960s.[27] The children were matched with a demographically similar group of disadvantaged children who did not participate in the program. By age 19, the report noted striking differences. Those who had participated scored higher on standardized tests, were more likely to have graduated from high school, to be enrolled in college, or to be employed, and were more likely to have avoided various forms of pathology.[28] Similar conclusions have emerged from a longitudinal evaluation of a New York State pro-

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appears to have occurred where desegregation began in kindergarten or first grade, and where comprehensive programs were instituted that included diagnostic and compensatory services for students and in-service training for teachers. *Id.* at 35-40.

24 *Id.*

25 James McPartland & JoMills Braddock, *Going to Colleges and Getting a Good Job: The Impact of Desegregation*, *in* EFFECTIVE SCHOOL DESEGREGATION 141, 146, 150 (Willis D. Hawley ed., 1981); James McPartland, *Desegregation and Equity in Higher Education and Employment: Is Progress Related to the Desegregation of Elementary and Secondary Schools?* 42 LAW & CONTEMP. PROBS., Summer 1978, at 108, 110-113, 124, 131.

26 These findings emerge from a long-term study of some 700 low-income students in Hartford, Connecticut, one group of which began in a desegregation program in the 1960s while the other remained in segregated schools. *See Study Finds Desegregation is an Effective Social Tool*, N.Y. TIMES, Sept. 17, 1985, at C1-C2; *see also* ROBERT L. CRAIN & JACK STRAUSS, SCHOOL DESEGREGATION AND BLACK EDUCATIONAL ATTAINMENT 12-24 (Center for Social Organization of Schools, The Johns Hopkins Univ. Rep. No. 359, July, 1985) (a study of the impact of the Hartford desegregation program on occupational outcomes).

27 JOHN R. BERRUETA-CLEMENT ET AL., CHANGED LIVES: THE EFFECTS OF THE PERRY PRESCHOOL PROGRAM ON YOUTHS THROUGH AGE 19 (1984).

28 *Id.* at 14-45, 57-60.

gram and from evaluations of other early childhood initiatives [29]

Certainly there are caveats about preschool education, and continuing areas of debate. Experts such as Edward Zigler caution that dangers exist in subjecting young children to rigid academics before they are ready to learn and that pre-school programs must be developmentally appropriate for each age group.[30] Others note that many of the early gains for children may be dissipated through inattention to their needs as they move through public school. On the central point, however—that where investments are made in preschool programs for economically disadvantaged children, many more children are likely to succeed in school—there is little, if any, disagreement.

Positive results also emerge from evaluations of the effectiveness of Chapter 1, the federal program established in 1965 to assist economically disadvantaged students.[31] Here too, there are caveats. While Chapter 1 assistance has helped many minority and disadvantaged youngsters master basic skills, the program has had far less success in equipping them with the higher-order skills of reasoning and analysis that are needed in today's job market.[32] Nevertheless, a consensus has developed concerning the important initiatives to take on behalf of disadvantaged children; for example, commentators have recognized the need to focus intensively on developing the reading skills of children in the primary grades.[33] Examinations of reading programs that have proved successful have identified a number of common elements: instruction of children in small groups; tutoring by teachers, aides, parent volunteers or older children; a systematic plan for instruction; frequent assessments of student progress; and modifications of groupings or instructional content to meet the needs identified.[34]

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29 *See* FERN MARX & MICHELLE SELIGSON, THE PUBLIC SCHOOL EARLY CHILDHOOD STUDY THE STATE SURVEY 3 (1988), *see also* A BETTER START NEW CHOICES FOR EARLY LEARNING (Fred Hechinger ed., 1986) (containing 10 essays appraising the benefits of early childhood education), EARLY SCHOOLING THE NATIONAL DEBATE (Sharon L. Kagan & Edward F. Zigler eds., 1987) [hereinafter EARLY SCHOOLING] (noting the personal and societal benefits of early childhood education)

30 *See* EARLY SCHOOLING, *supra* note 29, at 28-29

31 *See* OFFICE OF RESEARCH & IMPROVEMENT, DEP'T OF EDUC., NATIONAL ASSESSMENT OF CHAPTER 1 (1986-87) [hereinafter NATIONAL ASSESSMENT] (a four volume report mandated by Congress, volume one assesses the effectiveness of Chapter 1 services)

32 *See* COMM'N ON CHAPTER 1, MAKING SCHOOLS WORK FOR CHILDREN IN POVERTY 2-6 (Washington, D.C., Dec. 1992) [hereinafter MAKING SCHOOLS WORK], U.S. DEP'T OF EDUC., NATIONAL ASSESSMENT OF THE CHAPTER 1 PROGRAM THE INTERIM REPORT 27-31 (1992)

33 *See* Robert E. Slavin & Nancy A. Madden, *What Works for Students At Risk A Research Synthesis* EDUC. LEADERSHIP Feb. 1989, at 4

34 *Id.* Research on the value of other initiatives including reduced class size, the availability of counseling and social services, and the need for experienced teachers teaching in their

III. Barriers to Educational Progress

If the picture painted in the preceding section is accurate—if significant numbers of minority and economically disadvantaged students have indeed made progress in the public schools over the past two decades, and if educators can identify the initiatives (desegregation, preschool programs, specific education services) that have helped produce this progress—then why does the outlook appear so grim? Why are we confronted with evidence of dysfunctional public schools and massive educational failure, particularly in the nation's largest cities? If particular initiatives have worked elsewhere, why can they not be employed in the largest population centers of the nation?

The answers have to do with structural barriers that have intensified racial and socioeconomic isolation and that have produced self-perpetuating engines of inequality. There is also an apparent lack of national will to remove these barriers.

A. Desegregation v. Concentrations of Poverty

The research on desegregation shows that black children achieve the most substantial gains when they participate in metropolitan or county-wide plans, plans that often entail substantial busing. These plans ordinarily achieve substantial desegregation across socioeconomic status as well as racial lines.[35] The findings, consistent with research going back to the 1960s, demonstrate that disadvantaged children fare better in schools and classrooms comprised largely of advantaged students than when isolated with others of the same background.[36]

The explanations of the efficacy for disadvantaged children of desegregation across socioeconomic class lines include the fact that in schools consisting largely of advantaged children, the norms set by the parents and teachers, and by students themselves, ordinarily are high. Academic success and advancement to college are expected or demanded. When schools fall short on teacher quality or resources, middle-class parents are practiced in wielding influence to bring about change. Youngsters from low-income families in these schools also may acquire the practical

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areas of expertise, is summarized in WILLIAM TAYLOR & DIANNE M. PICHE, COMM. ON EDUCATION AND LABOR, U.S. HOUSE OF REPRESENTATIVES, 101ST CONG., 2D SESS., THE IMPACT OF FISCAL INEQUALITY ON THE EDUCATION OF STUDENTS AT RISK 25-32 (Comm. Print 1990).

35 *See* CRAIN & MAHARD, *supra* note 23.

36 *See* ON EQUALITY OF EDUCATIONAL OPPORTUNITY 142-43 (Frederick Mosteller & Daniel P. Moynihan eds., 1972); OFFICE OF EDUC., DEP'T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 21-33 (1966) [hereinafter COLEMAN REPORT]; U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 72-124 (1967).

know-how and contacts, often lacking in poor schools, they can use to enter middle-class society.[37]

The great barrier to implementing desegregation plans that combine racial and socioeconomic diversity is that school districts in the metropolitan areas of the North and West increasingly have become divided by race and economic status, and the Supreme Court has treated school district lines as almost impenetrable borders.[38]

In most of the South, school districts are countywide and encompass both central cities and suburbs. Thus, systemwide desegregation plans in places like Charlotte-Mecklenburg, North Carolina and Tampa-Hillsborough, Florida have achieved diversity that has led to educational gains, and the South has become far more desegregated than the North.[39]

The trouble is that the big cities where the barriers exist contain a very substantial proportion of the minority population of the nation. Gary Orfield and Sean Reardon report that the nation's twenty-five largest urban school districts served 27% of all African-American students in the nation, 30% of all Hispanic students, but only 3% of whites.[40]

While many central cities became more diverse ethnically with new Latino and Asian American arrivals, the cities also grew poorer. As the *Kerner Commission Report* predicted, middle-class whites continued to move to the suburbs and in several metropolitan areas, Washington, D.C. and Cleveland, Ohio among them, there was substantial suburbanization of black middle-class families as well.[41]

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37 Dennis W. Brogan, a perceptive observer of the American scene, has pointed out that schools are places where students "instruct each other on how to live in America," noting the lessons in practical politics, organization, and social ease that are part of the informal curriculum of high schools. DENNIS W. BROGAN, THE AMERICAN CHARACTER 170, 174-75 (1956).

38. *See, e.g.*, Milliken v. Bradley (*Milliken I*), 418 U.S. 717, 804 (1974) (holding that federal courts lack the power to impose interdistrict remedies for school segregation absent an interdistrict violation or interdistrict effects).

39 *See* Gary Orfield & Sean Reardon, *Working Papers: Race, Poverty and Inequality*, in NEW OPPORTUNITIES: CIVIL RIGHTS AT A CROSSROADS 1, 30-38 (Susan M. Liss & William Taylor eds., 1992). In South Carolina, Georgia, Virginia, Florida, and North Carolina, for example, the percentage of black students in schools that were more than 50% white ranged from 40% to 60%, whereas in New York, Illinois and California, fewer than 25% of black students are in such desegregated schools. GARY ORFIELD, STATUS OF SCHOOL DESEGREGATION 10 (1989). In a handful of other situations, areawide desegregation has been obtained through litigation in which courts found that the nature of the government wrongs justified a different result from *Milliken I*. *See, e.g.*, Liddell v. Missouri, 731 F.2d 1294, 1305-09 (8th Cir. 1984) (St. Louis, Missouri); United States v. Board of Sch. Comm'rs, 637 F.2d 1101, 1112-14 (7th Cir. 1980), *cert. denied*, 449 U.S. 838 (1980) (Indianapolis, Indiana); Evans v. Buchanan, 555 F.2d 373, 380-81 (3d Cir.), *cert. denied*, 434 U.S. 880 (1977) (Wilmington, Delaware).

40 Orfield & Reardon, *supra* note 39, at 8.

41 Norman Krumholz, *The Kerner Commission Twenty Years Later*, in BLACK AND WHITE: PLACE, POWER, AND POLARIZATION 19, 25 (George C. Galster & Edward W. Hill eds., 1992) (reporting that in 1960 about 2% of Cleveland's black population lived in suburbs,

The result has been a tremendous intensification of poverty in inner cities. At the end of the 1980s, in the one hundred largest cities in the country nearly three children in ten were poor.[42] In thirty-one of these cities at least half the black children were poor; in nineteen, at least half of the Native American children were poor; and in ten, at least half the Hispanic children were poor.[43] Between 1970 and 1980, at a time when the overall population of the largest cities was declining, the number of poor people living in census tracts defined as "poverty areas" (more than 20% poor residents) rose from 3.4 million to 4.4 million, and those living in "high poverty areas" (more than 40% poor residents) increased by 66%.[44] These trends continued throughout the 1980s.[45]

With this background, consider the implications of the following exhibit showing the link between concentrations of poverty in public schools and performance on tests of basic reading skills.

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while by 1990 one-third did), Joel Garreau, *Candidates Take Note It's a Mall World After All*, WASH POST, Aug 10-16, 1992, at 25 (Weekly Ed) (reporting that by 1992 a majority of all blacks in the Washington D C metropolitan area lived in the suburbs, not in the District of Columbia)

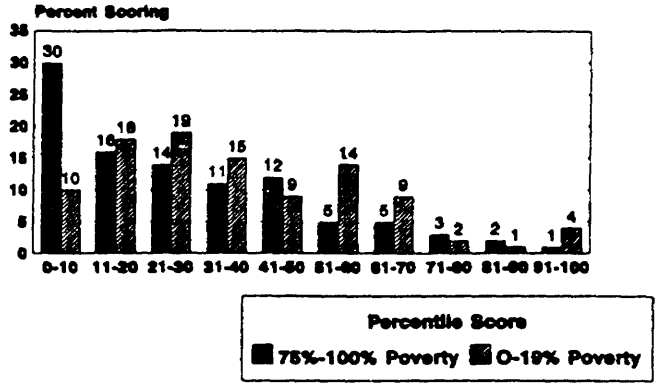
42 Children's Defense Fund, City Child Poverty Data from the 1990 Census 4 (press release, Aug 1992)

43 *Id*

44 Smith & O'Day, *supra* note 20, at 63-64 In 1980, 21% of African-American poor people, 16% of Hispanic-American poor people, but *only* 2% of all white poor people lived in high poverty areas *Id* at 64 To the extent that high concentrations of poverty present special problems, they affect minorities far more than whites *Id*

45 *See, e g* , Frank Clifford, *Rich-Poor Gulf Widens in State*, L A TIMES, May 11, 1992, at A1; Shawn Hubler, *South L A 's Poverty Rate Worse Than '65*, L A TIMES, May 11, 1992, at A1

DISTRIBUTION OF CTBS READING SCORES OF CHAPTER 1 PARTICIPANTS IN POOR AND NONPOOR SCHOOLS (DEFINED BY FREE/REDUCED-PRICE LUNCH ELIGIBILITY)[46]



As the exhibit indicates, 30% of poor children in schools with a high proportion of students living in poverty score in the lowest tenth percentile, three times the percentage of those who are in schools with a low proportion of students living in poverty. In contrast, 30% of poor children who are in low-poverty schools score in the top half, compared to only 16% who are in high-poverty schools.

This is not to say that it is impossible for children to do well in minority schools with high concentrations of poor children. In Cincinnati, where I serve as counsel for black students in a school desegregation case, the Hoffman School, in which almost 100% of the children are black and eligible for free or reduced priced lunches, has made remarkable progress in reading, math, and science over the last eight years. The key appears to lie in a remarkable principal who has been able to assemble a talented, hard-working group of teachers and to involve parents in their children's education.

The odds are stacked against schools with high concentrations of poverty, however. The reasons are not hard to discern. In the words of Orfield and Reardon: "These schools have to cope with homelessness, severe health and nutrition problems, an atmosphere of gangs and violence threatening children and few jobs for high school graduates."[47]

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46. This exhibit appears in NATIONAL ASSESSMENT, *supra* note 31, at 160 (citing ABT ASSOCIATES PROSPECTS (1992)).

47. Orfield & Reardon, *supra* note 19, at 4.

In fact, Smith and O'Day report that *nonpoor* students attending schools with such high concentrations of poverty perform less well on the average than do poor children attending nonpoor schools.[48] In light of these facts and considering the fact that it is the minority poor, not the white poor, who find themselves in schools with high concentrations of poverty, the surprise is not that the gap between black and white students' school performance has not closed more, but that it has closed as much as it has.

B. The Growth of Educational Resource Inequality

The odds against poor minority students achieving success in high poverty schools might be lessened if these schools had adequate funds to invest in the services that are calculated to best improve student performance. As noted, over the past fifteen years, researchers have become increasingly confident about which services and initiatives make a difference in the education of poor and minority students.[49] They have stressed the importance of preschool child development programs, reading programs in the early grades, reducing pupil-teacher ratios to fifteen-to-one or better, providing counseling and identifying needs for health and social services, working to involve parents in the education of their children, finding and retaining teachers who are experienced and teaching in their fields of certification, and having a broad and challenging curriculum.[50]

All of this requires money. Yet, throughout the nation, the ability of localities to finance schools depends upon their property wealth. The inequities that this system creates, largely between cities and rural areas on the one hand, and suburbs on the other, were serious enough to spawn a great deal of litigation in the late 1960s and 1970s. In 1973, the Supreme Court's five-to-four decision in *San Antonio Independent School District v. Rodriguez*[51] rejected claims of a denial of equal protection and brought such federal suits to an end.[52]

Over the past twenty years, many large central cities have lost sub-

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48 Smith & O'Day, *supra* note 20, at 63

49 *See supra* notes 23-29 and accompanying text

50 *See supra* notes 23-29 and accompanying text

51 411 U.S. 1 (1973)

52 *Id.* at 55. Cases continued to be brought in state courts based on state constitutional provisions guaranteeing equal protection or a "thorough and efficient" public education. In the last few years, the second wave of state court litigation has achieved some notable successes. *See e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989); Abbott v. Burke, 119 N.J. 287, 392-94, 575 A.2d 359, 411-12 (1990); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989).

stantial numbers of manufacturing jobs; at the same time, they have faced demands for health and social services as well as education. Suburbs, meanwhile have become major centers of employment, and the personal and property wealth of their inhabitants has increased greatly.

What this has meant in practice is well illustrated by the Texas districts that gave rise to *Rodriguez*. The prototype districts cited by the Court in *Rodriguez* were the property-poor Edgewood district, with a 96% minority population and property with an assessed valuation of $5960 per pupil, and the property-rich Alamo district, with a 19% minority population and an assessed valuation of $49,000 per pupil.[53] When state and federal contributions, which had an equalizing effect, were included, Edgewood, with a much greater tax effort, spent $356 per child, while Alamo spent $594.[54]

By the end of the 1980s, when a second challenge to the Texas school finance system was litigated in state court, Edgewood had increased from $5960 per student in property wealth to $38,854, while Alamo increased from $49,000 per child to *$570,109*.[55] The one hundred wealthiest districts in the state expended an average of $7235 per child, while the one hundred poorest, with a much greater tax effort, managed to spend $2978 per child.[56] The Texas experience was replicated in many other states—even in those like Illinois, where the State had made efforts to reduce inequity by contributing a larger share of the educational budget of local school districts.[57]

What this means in practice is that many of the property-poor districts with the largest numbers of minority and poor children simply cannot afford to furnish the services that educators now consider vital. For example, Texas funds a highly regarded preschool program, but participation by local districts has required matching funds and adequate facilities, requirements that have operated to exclude a number of the poorest districts.[58] Similarly, when property-poor Baltimore City, Maryland is compared with wealthier districts, particularly suburban Baltimore County and Montgomery County, the city suffers in its ability to provide reading programs in the early grades, small class sizes, counselors, school

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53 *Rodriguez*, 411 U.S. at 11-13.

54 *Id.*

55 *See Edgewood*, 777 S.W.2d at 392.

56 *Id.* at 393.

57 *See* G. Alan Hickrod & Lawrence E. Frank, *The Forgotten Illinois*, *in* WITNESSES FOR THE PROSECUTION: POLICY PAPERS ON EDUCATIONAL FINANCE, GOVERNANCE AND CONSTITUTIONALITY IN ILLINOIS 23, 23-28 (1989).

58 TAYLOR & PICHE, *supra* note 34, at 35.

psychologists, and nurses.[59]

Most important, property-poor central-city districts lack the ability of suburbs to attract and retain teachers who have advanced degrees and teach in their areas of certification. In fact, even students in high-ability classes in disadvantaged schools often do not have highly qualified teachers. More low-track suburban students have certified math and science teachers than do high-track students in disadvantaged minority schools.[60] Along with disparities in the quality of teaching come major inequalities in curriculum, both in the breadth of the course offerings and in the availability of advanced courses.[61]

These major inequalities are not addressed in any serious way by federal financial assistance to economically disadvantaged children. The federal policy of assisting economically disadvantaged children through the Chapter 1 program is based on the premise that funds and services provided with state and local funds are "comparable" and that federal assistance is a supplement to address the special needs of disadvantaged youngsters. State and local fiscal inequities render this notion of a level playing field a fiction, however. Some property-rich districts routinely provide a wide range of services, including preschools, elementary counselors, and social workers, while property-poor districts must rely on Chapter 1 funds to furnish only a fraction of these services. Because the services are interdependent and work well only in combination, and since Chapter 1 provides only six out of every one hundred dollars for public education, state fiscal inequity frustrates the objectives of federal policy.

IV. CONCLUSION

Two Supreme Court decisions, issued less than a year apart and both decided by a narrow five-to-four vote, thwarted the major legal campaigns for equal educational opportunity of the 1970s.[62] Neither *Milliken I*, which frustrated the effort to secure metropolitan desegregation across school district boundaries, nor *Rodriguez*, which thwarted the effort to distribute public resources for education on a more rational, equitable basis, withstands careful analysis.[63] *Milliken I*, in the words of

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59 *Id.* at 36-39.

60 JEANNIE OAKES, MULTIPLYING INEQUALITIES: THE EFFECTS OF RACE, SOCIAL CLASS AND TRACKING ON OPPORTUNITIES TO LEARN MATHEMATICS AND SCIENCE 62-67 (1990).

61 *See, e.g., id.* at 26-45.

62 *See supra* notes 38 & 51.

63 *See* William L. Taylor, Brown, *Equal Protection and the Isolation of the Poor*, 95 YALE L.J. 1700, 1725-31 (1986); William L. Taylor, *The Supreme Court and Urban Reality: A Tactical Analysis of* Milliken v. Bradley, 21 WAYNE L. REV. 751, 776-78 (1975).

the late Justice Thurgood Marshall, is "more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than . . . the product of neutral principles of law."[64]

In the case of school desegregation, that "perceived public mood" undoubtedly incorporates racial fears of ancient vintage, particularly white fears of contact with people who are both nonwhite and poor. Continued racial and socioeconomic isolation allows fears and animosities to grow on all sides. In the case of inequities in education resources, resistance to change appears to be fed by feelings of entitlement and privilege on the part of suburban residents. The public rebellion against New Jersey Governor Florio's 1990 fiscal reform effort to equalize expenditures through modest tax increases demonstrates how entrenched these feelings of entitlement truly are.

Although the Supreme Court, reflecting divisions in the nation as a whole, was closely divided in the 1970s on school desegregation and fiscal reform, it has moved considerably to the right in the intervening years. There is now little prospect that it will reassert its historic role as protector of "discrete and insular minorities"[65] at any time in the foreseeable future.

Rather, leadership will have to come from the political branches of government. An agenda for educational opportunity is straightforward enough. Its elements should include:

> (1) establishment by Congress of a right of disadvantaged children enrolled in schools that are not succeeding to transfer to schools either in the students' district or in adjoining districts, that have a record of success, with transportation provided by the state where needed. Such an initiative would be a form of public school choice that would foster the goals of racial and socioeconomic desegregation and of holding schools accountable for the performance of students,
>
> (2) a requirement established by Congress that each state be held responsible for assuring comparability in the provision of vital educational services in school districts and schools throughout the state. This initiative would translate into national policy the principles of equity established by state courts in Texas,[66] Kentucky,[67] New Jersey,[68] California,[69] and Mon-

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64 Milliken v. Bradley (*Milliken I*), 418 U.S. 717, 814 (1974) (Marshall, J., dissenting).

65 United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

66 Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989).

67 Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989).

68 Abbott v. Burke, 119 N.J. 287, 392-94, 575 A.2d 359, 411-12 (1990).

tana.[70] Only by establishing such national policy can Congress assure that its expenditures truly will serve the purpose of providing special aid for the needs of economically disadvantaged children;

(3) full funding of the Head Start program so that it will serve all eligible three- and four-year-olds, rather than the three of every ten eligible children who currently are served. Full funding should include assistance to upgrade the training and salaries of teachers; and

(4) a major investment of funds available under Chapter 1 for the professional development of teachers. The investment should be accompanied by a determined effort by President Clinton and other national leaders to make teaching a high-status profession and to attract the ablest people in the nation to its ranks.

These four proposals by no means exhaust the initiatives needed for educational reform that will benefit all children, including those who are most disadvantaged. Educators should establish high standards of performance for all students since virtually all can learn at high levels. Standardized, norm-referenced tests comparing students only to each other should be replaced by assessments measuring students' actual knowledge and abilities. States should be called upon to identify the health and social service needs of students at an early age so that barriers to learning can be removed.[71]

The four initiatives, however, do go to the heart of longstanding barriers to opportunity. To implement them will require some degree of sacrifice in the form of higher taxes. It will also require, in the words of President Clinton, "the courage to change" by accepting alterations in institutional arrangements that have been comfortable and advantageous to the affluent, much as people in the South ultimately had the courage to accept an end to the legalized caste system. The changes called for, however, do not demand a plunge into the unknown; each is undergirded by enough experience to demonstrate that it can work to the educational advantage of all children.

Over the past decade, some have staked their hopes for educational reform programs on economic self-interest. Business leaders, recognizing the lagging productivity of the economy and the changing character of the work force, have called for major efforts to bolster the public schools

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69 Serrano v. Priest, 5 Cal. 3d 584, 619, 487 P.2d 1241, 1266, 96 Cal. Rptr. 601, 626 (1971).

70 Helena Elementary Sch. Dist. No. 1 v. State, 236 Mont. 44, 54-55, 769 P.2d 684, 690 (1989).

71 *See* MAKING SCHOOLS WORK, *supra* note 12, at 6-9.

and to invest in the education and training of minorities and disadvantaged youth. These efforts have yielded only modest results, however, and overreliance on the goal of economic self-interest many be unwise, because business may ultimately fill its needs in other ways—by locating its operations abroad or by importing skilled manpower from other nations.

So, too, it may not be wise to stake one's hopes on the Kerner Commission's warning that continuation of present policies would lead to conflict and a reduction in personal freedom. The accuracy of that warning has been borne out by heightened concerns that many people feel about their personal security, in the abandonment of urban areas, and in the routine adoption of measures, such as preventive detention, that were controversial two decades ago. Yet many seem to adapt to these changes without great difficulty.

Ultimately, beyond these issues of economic self-interest and peace and good order, we may need to ask, as did the Kerner Commission, what kind of society we want for ourselves and for our children. In personal terms, the most relevant question may be whether, knowing that there are specific effective steps we can take to give a child born into poverty the care and attention that will enable the child to thrive, we can in good conscience fail to take those steps.

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