Nos. 72-549 and 72-550

In the Supreme Court of the United States

OCTOBER TERM, 1972

SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, ET AL., PETITIONERS

v.

STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, ET AL.

CAROLYN BRADLEY, ET AL., PETITIONERS

v.

STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, ET AL.

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

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
J. STANLEY POTTINGER,
Assistant Attorney General,
A. RAYMOND RANDOLPH, JR.,
Assistant to the Solicitor General,
BRIAN K. LANDSBERG,
WALTER W. BARNETT,
JOHN C. HOYLE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

499-315—73——1

Cases—Continued

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-549

SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, ET AL., PETITIONERS

v.

STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, ET AL.

No. 72-550

CAROLYN BRADLEY, ET AL., PETITIONERS

v.

STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, ET AL.

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

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has substantial responsibility under 42 U.S.C. 2000c-6, 2000d, and 2000h-2, with respect to school desegregation. This Court's resolution of the issues presented in this case will affect that enforcement responsibility. The United States participated as *amicus curiae* in this case in the court of

appeals and has participated in this Court's previous school desegregation cases, including *Brown* v. *Board of Education,* 347 U.S. 483; 349 U.S. 294; *Cooper* v. *Aaron,* 358 U.S. 1; *Goss* v. *Board of Education,* 373 U.S. 683; *Green* v. *County School Board of New Kent County,* 391 U.S. 430; *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19; *Swann* v. *Board of Education,* 402 U.S. 1; *Wright* v. *Council of City of Emporia,* 407 U.S. 451; *Keyes* v. *School District No. 1, Denver, Colorado,* No. 71–507, this Term; and *Norwood* v. *Harrison,* No. 72–77, this Term.

I. INTRODUCTORY STATEMENT

The issue in this case is whether the district court, acting under this Court's mandate "to eliminate racially separate public schools established and maintained by state action," [1] abused its remedial discretion by ordering the consolidation of a city school system and two surrounding county school systems in order to achieve a more uniform distribution of the races in the schools throughout the area, where each of the school systems had been operated as a dual, segregated system in the past, where each was assumed by the district court to be now operating a unitary system within its boundaries (Pet. App. 238a), and where there is no evidence that the boundaries were established on account of race.

Prior to *Brown* v. *Board of Education,* 347 U.S. 483, the school system in the City of Richmond, as well as the school systems throughout the Commonwealth of

[1] *Swann* v. *Board of Education,* 402 U.S. 1, 5.

Virginia, were racially segregated (Pet. App. 189a). After *Brown I* and *Brown II,* [2] state and local officials in Virginia used a variety of methods to resist desegregating their schools (Pet. App. 313a).

This lawsuit began in 1961, when individual plaintiffs sued to require desegregation of the school system in the City of Richmond. In 1966, after protracted proceedings, the district court entered a decree ordering the Richmond school system to implement a "freedom of choice" plan. [3]

The current phase of this litigation commenced on March 10, 1970, with the filing by the plaintiffs of a motion for further relief on the basis of the 1968 decisions in *Green* v. *County School Board,* 391 U.S. 430, and its companion cases, [4] holding that freedom-of-choice programs that fail to bring about desegregation are constitutionally inadequate remedial measures. The Richmond School Board "admitted that their freedom of choice plan, although operating in accordance with [the district court's] order of March 30, 1966, was operating in a manner contrary to constitutional requirements" (Pet. App. 2a) and proposed two desegregation plans for the City schools, the second of which the court adopted on an interim basis for the 1970–1971 school year (Pet. App. 40a–41a, 182a). The plain-

[2] *Brown* v. *Board of Education,* 349 U.S. 294.

[3] See *Bradley* v. *School Board of the City of Richmond,* 317 F. 2d 429 (C.A. 4); *Bradley* v. *School Board of the City of Richmond,* 345 F. 2d 310 (C.A. 4), vacated and remanded, 382 U.S. 103; see also the August 17, 1970, opinion of the district court below, at Pet. App. 1a.

[4] *Raney* v. *Board of Education,* 391 U.S. 443; *Monroe* v. *Board of Commissioners,* 391 U.S. 450.

tiffs had also proposed their own plan, involving zoning and pairing within the Richmond school system (Pet. App. 24a). The district court found that this plan could not be implemented in time for the upcoming school year, but "would, if adopted, create a unitary system," and that the plan "may well not only create a unitary system, but do much toward the thwarting of resegregation of schools once the unitary system has been put into effect" (Pet. App. 41a). The court also found that "there is no intractible remnant of segregation in the City of Richmond school system * * *" (*ibid.*).

In April 1971, after further hearings, the district court ordered the Richmond school system to operate under a new plan, designated Plan III, for the 1971–1972 school year (Pet. App. 110a-155a). Plan III had been proposed by the Richmond School Board (Pet. App. 111a, 119a) as an alternative to the plan earlier suggested by plaintiffs. Since in the court's view "either plan would fulfill the School Board's legal duty" (Pet. App. 146a), the court deferred to the School Board's proposal. The court concluded that when implemented, Plan III would eliminate "the racial identifiability of each facility to the extent feasible within the City of Richmond" (Pet. App. 121a; 325 F. Supp. 828, 835).[5]

Under Plan III, the racial composition of high schools in Richmond would range from 57 percent black and 43 percent white to 79 percent black and

[5] In regard to the present status of the Chesterfield and Henrico County school systems, which surround Richmond, see n. 8, *infra*.

21 percent white; middle schools would range from 39 percent black and 61 percent white to 81 percent black and 19 percent white; and elementary schools would range from 34 percent black and 66 percent white to 80 percent black and 20 percent white (Pet. App. 142a–144a). For the 1971-1972 school year, the racial composition of the student population of the Richmond school system as a whole was 69 percent black and 31 percent white, with 29,750 black students and 13,500 white students (Pet. App. 417a). The Richmond school system operated under Plan III in 1971–1972 and has continued to do so (Pet. App. 564a).

On July 6, 1970, nearly one year before the court adopted Plan III, the district judge wrote to counsel for the plaintiffs suggesting that "It may be that it would be appropriate for the defendant school board to discuss with the appropriate officers of the contiguous counties as to the feasibility or possibility of consolidation of school districts * * *" (Pet. App. 83a–84a). The counties referred to are Chesterfield and Henrico, which lie on the boundaries of the City of Richmond.[6] Each of these counties had a student population that was more than 90 percent white in the 1970–1971 school year (Pet. App. 566a). In 1971–1972, Chesterfield County enrolled 21,588 white and 2,166 black students (Pet. App. 418a); during the same period

[6] In Virginia, cities are completely independent from counties; cities have territorial exclusivity and integrity and their taxing jurisdiction does not overlap with that of the neighboring counties. See McSweeney, *Local Government Law in Virginia, 1870–1970*, 4 U. of Richmond L. Rev. 174, 177 (1970).

499-515—73——2

Henrico County had 31,299 white and 3,018 black students (Pet. App. 417a).

On December 5, 1970, the district court granted the motion of the Richmond School Board (App. 90a–97a) to join, as parties defendant, the School Boards and Boards of Supervisors of Chesterfield and Henrico Counties (Pet. App. 184a; 51 F.R.D. 139).[7] Late in the summer of 1971 the court began hearings on the Richmond School Board's complaint that Chesterfield and Henrico Counties had failed to assist Richmond in the desegregation of the Richmond metropolitan area schools and that the Fourteenth Amendment required a "unitary public school system which reasonably reflects the racial composition of the City of Richmond and the Counties of Henrico and Chesterfield * * *" (App. 94a).

On January 10, 1972, the court fashioned new relief in this case by ordering the consolidation of the school systems of the City of Richmond and Chesterfield and Henrico Counties into a single, combined school district, resulting in a population of 65 percent white and 35 percent black students (Pet. App. 417a–418a). Under the consolidation plan, which has not been implemented, the area would be divided into six geographical subdivisions, five of which would emanate from the center of Richmond to the outlying Counties roughly like wedges of a pie, thus bringing together within school attendance zones areas of the black inner City and the white suburban Counties (Ex. App. 27e–33e). The result would be that nearly all black students in the region would attend schools that are 20 to 40 percent black (Pet. App. 570a).

[7] The court also ordered the joinder of the State Board of Education and the State Superintendent of Public Instruction.

The court of appeals reversed the district court's order requiring consolidation of the three school systems[8] on the ground that the district court had improperly compelled "one of the States of the Union to restructure its internal government for the purpose of achieving racial balance in the assignment of pupils to the public schools" (Pet. App. 562a).

In analyzing the questions presented by this case, it is first necessary to determine what particular constitutional violation or violations, if any, are present. If the only violation is the operation of a dual school system within the City of Richmond, we believe that the court is limited in its remedial powers to fashioning relief within the boundaries of the City school system. If, on the other hand, there is also an inter-system violation—that is, a constitutional violation that in some manner involves two or more of the school systems—a remedy tailored to eliminate that violation should also be fashioned. In this case, however, the record does not reveal an inter-system violation and we therefore conclude that the district court exceeded its remedial powers in ordering consolidation.

[8] The court of appeals found that the Chesterfield and Henrico County school systems, which surround Richmond, have undergone a transformation from *de jure* segregation to a unitary system within each county (Pet. App. 571a–572a).

II. THE REMEDIAL POWERS OF A DISTRICT COURT TO DISMANTLE A CITY'S DUAL SCHOOL SYSTEM DO NOT, IN THE ABSENCE OF AN INTER-SYSTEM CONSTITUTIONAL VIOLATION, EXTEND TO ORDERING THE REFORMATION OF LONG STANDING, NEUTRALLY ESTABLISHED SCHOOL SYSTEM BOUNDARY LINES AND THE CONSOLIDATION OF CITY AND COUNTY SCHOOL SYSTEMS

It is not disputed here that in the past the school system of the City of Richmond was *de jure* segregated and that the City's school authorities have an affirmative duty to dismantle that dual school system. *Swann* v. *Board of Education,* 402 U.S. 1. The question now presented concerns the remedial powers of a federal court in fashioning relief to insure the dismantling of such a system.

With respect to the basis for its order, the district court concluded in its lengthy opinion (Pet. App. 164a–520a) that the previously dual school system of the City of Richmond cannot be desegregated unless it is consolidated with the school systems of Chesterfield County and Henrico County, even if each school system were "legally now unitary within itself" (Pet. App. 238a). The court apparently reached this conclusion, which is contrary to the court's earlier findings (Pet. App. 24a, 121a; see p. 4, *supra*), on two grounds: (1) that the racial composition of the school system of the City of Richmond, when compared with the school systems of the two surrounding Counties, is disproportionately black, thus resulting in racially identifiable school systems (*e.g.,* Pet. App. 186a, 188a, 201a, 208a–210a, 230a, 237a–238a); and (2) that, in the court's view, it was necessary to

bring more white students into the school system of the City of Richmond in order to achieve a "viable racial mix" and, hence, more stable desegregation (*e.g.,* Pet. App. 200a, 207a, 230a, 237a, 238a, 416a–418a, 437a–440a, 444a–445a, 519a).[9] In our view, neither ground justifies the relief granted by the district court; nor, for the reasons stated in point III, *infra,* is similar relief warranted here on the basis of any inter-system constitutional violation.

A. THE CONSTITUTION REQUIRES THAT RICHMOND'S DUAL SCHOOL SYSTEM BE DISMANTLED, BUT THIS MANDATE DOES NOT WARRANT REQUIRING THE CITY SCHOOL SYSTEM TO BE RACIALLY BALANCED AS COMPARED WITH THE SCHOOL SYSTEMS OF THE SURROUNDING COUNTIES

A school system that has operated in the past as a dual system, with one set of schools for white children and another for blacks, has a constitutional obligation totally to eliminate such racial discrimination from its schools and to achieve a unitary system. "The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual systems." *Swann* v. *Board of Education, supra,* 402 U.S. at 22. Thus, "School boards * * * operating state-compelled dual systems were * * * clearly charged with the affirmative duty to take what-

[9] The court said that it did not intend "to require a particular degree of racial balance or mixing" and would allow deviations from the "viable racial mix contemplated by the [consolidation] plan" if they appeared appropriate (Pet. App. 519a–520a).

ever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* v. *County School Board,* 391 U.S. 430, 437–438.

The Richmond public school system, like other public school systems in the Commonwealth of Virginia, is operated, maintained and supervised by the local school board (Pet. App. 576a). In the past the Richmond School Board operated a dual school system. The purpose of this lawsuit, originally instituted in 1961, is to require the Richmond School Board to dismantle that dual system in accordance with the decisions of this Court, which require that the City school system operate not white schools or black schools, but "just schools." *Green* v. *County School Board, supra,* 391 U.S. at 442. And as the district court itself found at one point (see p. 4, *supra*), it appears that successful implementation of Plan III will achieve that result with respect to the Richmond school system.

Nevertheless, the district court ordered consolidation of the Richmond school system with the school systems of Henrico and Chesterfield Counties. The court assumed that if each of the three school systems were considered separately, each would be operating a unitary system in compliance with the mandates of this Court (Pet. App. 238a), but it held that the conversion of these three formerly dual school systems into three separate unitary school systems would not be enough to satisfy the requirements of the Fourteenth Amendment.

The opinion of the district court and the record suggest a number of different sources from which the court derived this affirmative duty to consolidate school systems. First, the view not infrequently expressed in the expert testimony upon which the court relied is that it is harmful for blacks to go to school in predominantly black schools (*e.g.,* App. 263a–365a [Dr. Thomas Pettigrew], 194a–264a [Dr. Thomas C. Little]; Pet. App. 186a–190a, 197a–200a, 477a–478a). But while this is so with respect to state-segregated schools (see *Brown* v. *Board of Education,* 347 U.S. 483, 494), it does not readily follow that blacks attending predominantly black schools operated by a neutrally-established predominantly black school system experience this harm,[10] particularly in a situation such as that present here, where one of the most recent actions of local authorities was to bring more than 8000 additional students into the system, 98 percent of whom were white (Pet. App. 178a); at the least, expert opinion is divided on this question.[11] Moreover, we deal here with a constitutional issue—whether legislative authorities are to be foreclosed from making their own choices

[10] See *Brunson* v. *Board of Trustees of School District No. 1,* 429 F. 2d 820, 824, 826 (C.A. 4) (Sobeloff, J., concurring, rejecting the theories of Dr. Pettigrew, one of plantiffs' principal expert witnesses).

[11] See the authorities discussed in Goodman, *DeFacto School Segregation: A Constitutional and Empirical Analysis,* 60 Calif. L. Rev. 275, 308–310, 336–338 (1972), and Bickel, *The Supreme Court and the Idea of Progress* 138–141 (1970); Cf. Mosteller and Moynihan, *On Equality of Educational Opportunity* 6–7 (1972); see also Pet. App. 452a, summarizing the testimony of Dr. Hooker, and note 10, *supra.*

among the various educational and sociological theories involved. Though the Fourteenth Amendment does forbid racial classifications, it neither "enact[s] Mr. Herbert Spencer's Social Statics," *Lochner* v. *New York,* 198 U.S. 45, 75 (Holmes, J., dissenting), nor does it prescribe the internal reorganization of states to serve sociological theories.

Another possible basis for the district court's decision is the view that there are generally educational and administrative advantages in having larger school systems (*e.g.,* Pet. App. 271a–281a), a view apparently supported by "the established policy of the [State] Board [of Education] to recommend larger units of administration" (*id.* at 272a). Whatever may be the desirability of centralization of school administration as a matter of social or legislative policy,[12] however, there is nothing inherently unconstitutional about having different school systems serving different geographical areas separated by boundary lines that have not been drawn on account of race. Of course, as a school district's boundaries are expanded to encom-

[12] Consolidation and centralization are, of course, not universally endorsed by those in this field. See *Bickel*, *supra*, note 11, at 140–141. A preference for local control of school policies and administration within the confines of governmental units bearing the requisite fiscal and budgetary responsibility, rather than mere adherence to political subdivision lines for their own sake, is a principal countervailing consideration (see p. 20, *infra*, and n. 19, *infra*). This was ignored in the district court's statement that, on the basis of what it regarded as "the insubstantiality of nonracial reasons for adhering to political subdivision boundaries as attendence limits," it inferred "that insistence on such a policy must be predicated on its known racial effects" (Pet. App. 258a).

pass larger areas and hence more people, the school district's population tends to reflect the racial mix of the population of the surrounding region. But with respect to school systems, the Fourteenth Amendment does not prefer centralization and consolidation over more localized control and it does not require a State to have only one school system for its entire population, even if state boundaries are the logical stopping points in the consolidation process.

In determining that one school system for the entire region should be created, the district court relied upon (Pet. App. 187a) this Court's statement in *Swann, supra,* 402 U.S. at 26, that for remedial purposes, there is "a presumption against schools that are substantially disproportionate in their racial composition." But disproportionate in relation to what? Surely not to some absolute standard, for the Constitution does not establish any fixed ratio of black students to white students that must be achieved. Instead, whether a particular school is racially imbalanced or identifiable can be determined only by comparing it with "the racial composition of the whole school system." *Swann* v. *Board of Education, supra,* 402 U.S. at 25; see also *id.* at 24.

Thus, the question whether, for example, an elementary school having a student body 70 percent black and 30 percent white is racially imbalanced or has a substantially disproportionate racial composition is in itself unanswerable. Some frame of reference is needed and, as *Swann* indicates, the proper compari-

son (to the extent that racial balance is relevant) is with the racial composition of the population in the school system operating the particular school since the purpose is to ensure complete elimination of the dual system by having one set of schools for both blacks and whites. And under *Swann* there would be no presumption against schools, such as the one in the example above, if these schools reflected the black-white ratio of the entire school system. 402 U.S. at 25–26.

Why then would there be a presumption against the school system itself with the same 70:30 ratio of blacks to whites, as the district court concluded here with respect to the school system of the City of Richmond? (Pet. App. 186a–188a.) Stated differently, on what basis could the district court conclude that its remedy should reach outside the school system of the City of Richmond? Apparently, the court believed that it must look beyond the Richmond system in fashioning relief because the City school system is racially disproportionate or imbalanced in relation to the adjacent County school systems, thereby resulting in racial identifiability of the three systems (*e.g.*, Pet. App. 185a–187a, 230a, 237a–238a). But the court had to look beyond the Richmond system and compare it with the surrounding Counties in the first place in order to determine whether the Richmond system is racially imbalanced in comparison with the adjacent systems. This is not only circular as a reason for

fashioning relief beyond the Richmond system,[13] but also heedless of the extent of the constitutional violation being remedied.

As this Court held in *Swann*, "the nature of the violation determines the scope of the remedy." 402 U.S. at 16. Here the school children of Richmond were not racially segregated from the school children of Henrico or Chesterfield Counties (see point III, *infra*). The district court was therefore required, in devising a desegregation plan for the Richmond system, to order a remedy for implementation within that system and not beyond. That was the frame of reference for determining whether the Richmond school system had violated the Constitution and it likewise delineated the permissible extent of relief. Having found that the Richmond system was not in compliance with constitutional requirements, the court had a duty to correct "the condition that offends the Constitution," *Swann* v. *Board of Education, supra,* 402 U.S. at 16, not a commission to act more generally as a problem-solver implementing programs and policies (contrary to state law) that some might find enlightened or desirable.

The district court's ruling to the contrary obscures the distinction between requiring the dismantling of a dual school system and requiring a particular racial

[13] Of course, where the issue is whether there has been an inter-system violation, such as racial discrimination in the establishment of school district lines, the scope of the inquiry necessarily extends beyond the confines of a single system. See, *e.g.*, the cases cited in n. 14, *infra*.

mix for the school system as a whole, as consideration of this Court's recent decisions in *Wright* v. *Council of City of Emporia,* 407 U.S. 451, and *United States* v. *Scotland Neck Board of Education,* 407 U.S. 484, illustrates. In both *Wright* and *Scotland Neck,* newly drawn (or newly implemented, in the *Wright* case) school system boundary lines would have had the effect of impeding desegregation of a dual school system. As the Court explained in *Wright,* the city was properly enjoined from withdrawing from the joint city-county school system because "[t]he court's remedial power was invoked on the basis of a finding that the dual school system violated the Constitution, and since the city and county constituted but one unit for the purpose of student assignments during the entire time that the dual system was maintained, they were properly treated as a single unit for the purpose of dismantling that system." 407 U.S. at 459–460.[14]

Here by contrast there is no history comparable to that in *Wright* of the City and either of the Counties constituting one school system during the period when dual systems were operated. Instead, these boundary lines were neutrally established, without regard to race, and have been coterminous with the political sub-

[14] Federal courts have also properly enjoined the maintenance of separate small black school districts that were created "to reflect racial separation by schools" and ordered consolidation of these districts with neighboring white districts. *E.g.*, *Haney* v. *County Board of Education of Sevier County*, 429 F. 2d. 364, 366 (C.A. 8); *United States* v. *Texas*, 321 F. Supp. 1043 (E.D., Texas), affirmed, 447 F. 2d 441 (C.A. 5), certiorari denied *sub nom. Edgar* v. *United States*, 404 U.S. 1016.

divisions of the City of Richmond and the Counties of Chesterfield and Henrico for more than 100 years (Pet. App. 571a).[5] Indeed the court of appeals here "searched the 325-page opinion of the district court in vain for the slightest scintilla of evidence that the boundary lines of the three local governmental units have been maintined either long ago or recently for the purpose of perpetuating racial discrimination in the public schools" (Pet. App. 571a).

Thus, in our view, when the Richmond school system has achieved a unitary system within its own neutrally established boundaries it has complied with the constitutional requirement that it dismantle its dual school system.

B. THE DISTRICT COURT ABUSED ITS DISCRETION IN REQUIRING THE REFORMATION OF LONG STANDING, NEUTRALLY ESTABLISHED SCHOOL DIVISION LINES IN ORDER TO ACHIEVE A "VIABLE RACIAL MIX"

The district court also believed that the school system of the City of Richmond could not become a unitary system within its boundaries because a "viable racial mix" would not be possible in light of the racial composition of Richmond's population (Pet. App. 207a, 420a, 519a; see, *e.g., id.* at 201a, 230a, 237a–238a, 436a–442a, 444a). The court pointed to evidence that the current proportion of blacks to whites in the Richmond school system had resulted in

[5] The only change in these boundary lines occurred when the City annexed some of the land in the two Counties. This recent annexation added some 8,000 pupils to the Richmond system, of whom 98 percent were white (Pet. App. 177a–178a).

whites leaving Richmond's public schools and that unless the trend were reversed, the City's schools might become all black.[16]

The duty of the district court in this case was to ensure that the Richmond school system converted to a unitary system. And as we have discussed, see pp. 11–17, *supra,* as long as the school authorities operate just schools instead of one set of schools for blacks and another for whites, it matters not at all whether the system has more black students than white students or vice-versa. The schools of Vermont are not segregated even though most of them are all white. Under the district court's theory and its consolidation order, which would reverse the racial composition of the Richmond schools from majority black to majority white, the apparent goal is to have a school system with substantially more white children than black children. But the Fourteenth Amendment does not prefer predominantly white school systems over predominantly black school systems and it does not sanc-

[16] The district court stated: "The term 'viable racial mix' was defined by Dr. Little as 'It is a racial mix that is well enough established that it will continue to prosper. It will be a desirable, reasonable mix for educational purposes * * *' " (Pet. App. 420a n. 22). The court apparently relied heavily upon the testimony of an expert witness, Dr. Pettigrew, that in order to achieve "integration" the racial composition of each school should be between 20 percent and 40 percent black, and rejected the testimony of another expert witness, Dr. Hooker, that the idea that blacks must always be in the minority in each school is a racist proposal. See Pet. App. 567a–570a. (Dr. Pettigrew agreed, however, that under Plan III the Richmond school system was "desegregated" (App. 321a).)

tion the district court's transforming its preferences in this regard into a constitutional command.

We of course agree that the federal courts have wide discretion to bring about unitary school systems. But as Chief Justice Marshall stated long ago, to say that the matter is within a court's discretion means that it is addressed not to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[17] The purpose of a court-ordered remedy in these cases is to cure the violation, to correct "the condition that offends the Constitution." *Swann* v. *Board of Education, supra,* 402 U.S. at 16. Yet here the district court, instead of ordering relief within the bounds of Richmond's constitutional violation, went far beyond in the hope of forestalling the result of a possible migration of whites from the City, a result not in itself unconstitutional but thought by the district court to be undesirable.

If a certain desegregation plan would become ineffective shortly after implementation this is certainly something the district court should consider. Surely it would have been proper in this case for the district court to seek a remedy within the Richmond system that promised maximum stability.[18] But the desire to

[17] *United States* v. *Burr*, 25 Fed. Cas. 30, 35 (No. 14,692d, 1807).

[18] Indeed at one point in the present litigation the district court found that a plan analogous to Plan III "may well not only create a unitary system, but do much toward the thwarting of resegregation of schools once the unitary system has been put into effect" (Pet. App. 41a).

preserve the existing racial character of the City of Richmond or of its school system is not of constitutional dimensions and does not warrant including within the scope of relief other school systems that are uninvolved in Richmond's violation. Petitioners may prefer a consolidated school system with a large, stable white enrollment; the Constitution does not.

Moreover, as against petitioners' desires in this regard, there is a legitimate interest—recognized by this Court in an analogous context—in maintaining the integrity of the existing, neutrally established political boundaries between the City of Richmond and the surrounding Counties since disregard of these boundaries may substantially impair the normal functioning of local government. *Mahan* v. *Howell,* No. 71–364, decided February 21, 1973, slip op. at 7. As the court of appeals concluded, the district court's consolidation order gives rise to "practicalities of budgeting and financing that boggle the mind. Each of the three political subdivisions involved here has a separate tax base and a separate and distinct electorate. The school board of the consolidated district would have to look to three separate governing bodies for approval and support of school budgets" (Pet. App. 578a). Cf. *San Antonio Independent School District* v. *Rodriguez,* No. 71–1332, decided March 21, 1973, slip op. at 49–50.[19]

[19] In *Rodriguez* this Court also pointed out that (slip op. at 45–46):

"The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. * * *"

Thus, we believe the court of appeals properly concluded that since the constitutional violation was the operation of a dual school system within the bounds of the City of Richmond, the proper remedy is to assure that that system is effectively replaced with a unitary school system within the City. The district court therefore exceeded the proper bounds of its remedial discretion in ordering the reformation of long standing, neutrality established school division boundary lines in order to achieve what is considered to be a more "viable racial mix."

III. THE RECORD DOES NOT REFLECT ANY INTERSYSTEM CONSTITUTIONAL VIOLATION

To conclude that the remedial power of the district court to dismantle Richmond's dual school system was limited to fashioning a remedy within long standing, neutrally established school system boundary lines does not, however, end the inquiry in this case. The court of appeals also carefully considered whether there was any constitutional violation involving more than one school system, and concluded there was not (Pet. App. 572a; see also amended complaints at App. 99a, 721a).

While it is difficult to determine the extent to which the district court found an inter-system, as distinguished from an intra-system, violation in this case, the court of appeals stated specifically that it found no inter-system violation because there had been "no joint interaction between any two of the units involved" or any action by higher state officials "for the purpose of keeping one unit relatively white by confining blacks to another" (Pet. App. 572a). We agree that the record does not support a finding that the State's maintenance of the three separate systems constituted an invidious racial classification.

The mere existence of long-standing, neutrally established governmental lines separating the now predominantly black City of Richmond from the predominantly white suburban Counties of Chesterfield and Henrico is not, by itself, an invidious racial classification. Cf. *Wright* v. *Rockefeller,* 376 U.S. 52; *Jefferson* v. *Hackney,* 406 U.S. 535. Nor does the Equal Protection Clause require racial balance between separate school systems in a single State.[20] *Spencer* v. *Kugler,* 404 U.S. 1027, affirming 326 F. Supp. 1235 (D.N.J.).

In *Spencer* this Court affirmed the district court's decision that, at least in States not recently operating dual school systems, extreme racial imbal-

[20] Indeed, the Constitution does not necessarily require racial balance in schools in a single school district, even if that district was formerly dual. See *Swann* v. *Board of Education, supra,* 402 U.S. at 24 ("The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.").

ance, without more, does not require neutrally established school district boundary lines to be revised. 326 F. Supp. at 1243. If, as we have suggested above, pp. 9–21, *supra,* the operation of a dual school system normally constitutes an intra-system violation to be remedied within the confines of the system, *Spencer* applies as well in States where dual systems recently existed. In the absence of any independent proof of inter-system discrimination, the three school systems in this case, in their relationship with the State and with each other, stand on no different footing than the racially disparate systems in *Spencer.*

The question, then, is what if any independent proof of inter-system discrimination exists here. That question can be approached in much the same manner as the question of *de jure* segregation *within* a school system where State law has not required segregation. Cf. *Keyes* v. *School District No. 1,* No. 71–501 (argued October 12, 1972). Just as neutrally drawn, long-standing neighborhood zone lines are presumptively nondiscriminatory,[21] so also, in our view, are neutrally drawn long standing district lines. Cf. *Mahan* v. *Howell, supra.*[22]

Petitioners rely primarily on evidence of housing discrimination and of various kinds of either intra-system or state-wide racial discrimination to overcome

[21] See *Deal* v. *Cincinnati Board of Education,* 419 F. 2d 1387, 1393 (C.A. 6); *Bell* v. *School City of Gary, Indiana,* 324 F. 2d 209 (C.A. 7), certiorari denied, 377 U.S. 924.

[22] Of course, school district lines that were used as the instruments of racial segregation of the schools are not "neutrally drawn." See the cases cited in note 14, *supra.*

this presumption.[23] The housing pattern in the Richmond metropolitan area is similar to that found in most metropolitan areas of this country. The inner city has a large black population and the surrounding suburbs are primarily white. While the causes of this housing pattern are manifold, the court of appeals accepted the contention "that within the City of Richmond there has been state (also federal) action tending to perpetuate apartheid of the races in ghetto patterns throughout the city, and that there has been state action within the adjoining counties also tending to restrict and control the housing location of black residents" (Pet. App. 572a).

Other acts cited as establishing an inter-system violation are Virginia's "massive resistance" campaign against school desegregation (Pet. App. 313), various types of delaying actions undertaken to resist desegregation of the Richmond schools (Pet. App. 189a), actions by state officials tending to reinforce racism (Pet. App. 189a), construction of racially identifiable schools after *Brown I* (Pet. App. 287a), discrimination in public employment in Henrico and Chesterfield Counties (Pet. App. 510a), lack of public transportation for poor persons (Pet. App. 514a), past state restrictions on inter-racial contacts of various kinds,[24] and state approval of school construction

[23] They also mention past instances of transportation of black students across school division lines in the State in order to perpetuate state-enforced segregation of schools (Pet. App. 360a; cf. *id.* at 388a). See p. 26, *infra*.

[24] See, *e.g.*, *Boynton* v. *Virginia*, 364 U.S. 454; *Loving* v. *Virginia*, 388 U.S. 1; *NAACP* v. *Button*, 371 U.S. 415.

sites without regard to the impact on school desegregation (Pet. App. 206a).

Such acts are a shameful part of our history, and the Nation has in recent years enacted laws to remedy many of them. See, *e.g.*, 42 U.S.C. 1973 (voting), 2000e (employment), and 3601–3619 (housing). See also the Virginia Fair Housing Law, enacted in 1972, Code of Virginia, Title 36, Chapter 5. But even if some or all of these acts, including participation in residential housing discrimination, have contributed in some degree to the present racial composition of the public schools in the three school systems within the metropolitan Richmond area, the question remains whether there is a sufficiently proximate and substantially causal relationship to the racial disparity between school systems to warrant a conclusion that state-enforced racial discrimination in the public schools has resulted.[25]

Racial discrimination in such areas as housing, employment, and public expenditures are serious problems that must be attacked directly so that they can be eliminated from our society. But as this Court said in *Swann, supra,* 402 U.S. at 22–23:

> The elimination of racial discrimination in public schools is a large task and one that

[25] The past existence of state-imposed discrimination, including school segregation, might, for example, also have contributed in some degree to decisions by individuals to discriminate in their social relationships, but this does not in itself necessarily convert what would otherwise be private discrimination into state action. Compare *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, and *Evans* v. *Abney*, 396 U.S. 435, with *Lombard* v. *Louisiana*, 373 U.S. 267, *Robinson* v. *Florida*, 378 U.S. 153, and *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715.

should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope although desegregation of schools ultimately will have impact on other forms of discrimination.

In our view, this case does not present sufficient evidence to warrant a finding that invidious state action has caused racial discrimination among the three school systems involved here. But if any inter-system violations are found we believe that, rather than utilizing the "broad brush" approach of requiring consolidation of separate school systems, any relief beyond the boundaries of the Richmond system should be tailored to fit the particular violation.

Thus, if state-imposed segregation between neighboring schools across school system lines is found, a desegregation plan between those schools might be warranted. If particular blacks are denied non-discriminatory access to housing in a particular residential area, the court might require that their children be given access to the schools in that area, or, more to the point, the court should join those responsible for housing discrimination and provide appropriate relief against them. If there is proof of an inferior curriculum or racially discriminatory allocation of funds or resources among the systems, there may be specific relief available in that area also. Cf. *San Antonio Independent School District* v. *Rodriguez*,

supra, slip op. at 51. But in none of the foregoing examples would the drastic remedy of consolidation of the separate school systems be required. And the present record in this case supports the conclusion of the court of appeals that "it is not established that the racial composition of the schools in the City of Richmond and the counties is the result of invidious state action * * * " (Pet. App. 582a–583a).

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.
J. STANLEY POTTINGER,
Assistant Attorney General.
A. RAYMOND RANDOLPH, JR.,
Assistant to the Solicitor General.
BRIAN K. LANDSBERG,
WALTER W. BARNETT,
JOHN C. HOYLE,
Attorneys.

APRIL 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973