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TOWARD NATIONWIDE SCHOOL DESEGREGATION: A "COMPELLING STATE INTEREST" TEST OF RACIAL CONCENTRATION IN PUBLIC EDUCATION

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INTRODUCTION

> In the last two years, public school integration has increased dramatically in the South while it has shown a significant decline in most of the large Northern cities.
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> The data, contained in a survey released today by the Department of Health, Education and Welfare, show that of the total number of Negro students in the nation the percentage attending majority white schools increased from 23 to 33 per cent between the fall of 1968 and the fall of 1970.
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> But the increase was attributable almost wholly to the rapid rise in the South. In the 11 states of the Old Confederacy, the percentage of Negroes in schools with a white majority increased from 18 to 39. In the Northern and Western states, integration remained about steady at 27 per cent, with gains in some areas being offset by declines in big cities.[1]

The newspaper story tells a startling tale. In 1954 the Supreme Court's historic decision in *Brown v. Board of Education*[2] ordered desegregation of our Southern public schools, and in the 1964 Civil Rights Act[3] Congress added its weight to that major national commitment. Yet in the same years that have seen desegregation come to the South, the nation has experienced intensification of racial concentration in the public schools for millions of children in the North and the West. An anomaly so clear and pervasive requires re-examination of the constitutional assumptions which have permitted intensified Northern school segregation in an era of Southern desegregation under constitutional fiat. A nationwide legal common-denominator is vitally needed to maintain the integrity of our commitment to achieve a desegregated society. There is such a denominator, if a constitutional freedom from racial isolation in governmental programs were recognized and protected by

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†Member, Rauh and Silard, Washington, D.C.

[1] N.Y. Times, June 18, 1971, at 1, col. 5.

[2] 347 U.S. 483 (1954).

[3] 42 U.S.C. §§ 1971, 1975a(d), 2000a to 2000h-6 (1970).

application of the "compelling state interest" test, racial concentration in every school district in the nation would be alleviated.[4]

The argument for such a nationwide constitutional standard rests on basic propositions concerning the intent of the emancipation amendments and the character of public education. The thirteenth, fourteenth, and fifteenth amendments were intended to insure full freedom and equal rights in society for blacks and other minorities.[5] Surely the promise of freedom and equality applies in the public schools. They are in every sense state institutions. Their operation and maintenance are governed by state law and state officials. The actions of the separate subdivisions and school districts of the state in operating and maintaining schools under authority delegated to them by the state are, in relation to the Constitution of the United States and amendments thereto, actions of the state subject to the requirement of equal protection. School assignment practices *resulting* in racial concentration of students invoke the freedom and equality guarantees of the emancipation amendments no less than overtly racial segregation plans, for they equally inhibit and demean that freedom and equality. This article suggests that when school policies and practices cause substantial racial concentration their validity should be tested by the "compelling state interest" standard now applied in other areas of major constitutional import.

THE PREVAILING DE JURE STANDARD IN SCHOOL SEGREGATION CASES

Actions by states and their subdivisions, other than actions explicitly requiring or even intending segregation by race, have nevertheless in effect and result caused and perpetuated substantial segregation by race in public schools in many areas throughout the nation. Housing developments have created restricted residential areas.[6] Perpetuation of arbitrary school attendance zones and assignment of children to schools in discrete "neighborhoods" of racial and economic concentration have fostered substantially segregated schools, particularly in our great metropolitan areas.[7] School boards have in effect perpetuated the residential

[4] *See* text accompanying notes 116-23 *infra*.

[5] *See* Baker v. Carr, 369 U.S. 186, 285-86 (1962) (Frankfurter, J., dissenting): "An end of discrimination against the Negro was the compelling motive of the Civil War Amendments."

[6] *See* Bradley v. School Bd., 338 F. Supp. 67, 72-74 (E.D. Va.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *cert. granted sub nom.* School Bd. v. State Bd. of Educ., 93 S. Ct. 936 (1973) (No. 72-549).

[7] *See id.* at 89.

status quo in planning new schools and have not advanced the needs of the underprivileged in our society.[8] Reasonable means of alleviating racial concentration in the public schools have been rejected by school boards and other authorities or have not even been given consideration. As a result, racially segregated public schools are today the rule rather than the exception in most of the states. There being no compelling governmental interest or necessity for the *modus operandi* by which state officials perpetuate school segregation, a case for nationwide constitutional relief is presented. What most inhibits that relief is the prevailing *de jure* standard in school segregation cases.

In resolving conflicts between governmental actions and interests given protection by the federal constitution, the Supreme Court has applied a variety of standards. Sometimes, as in economic regulation cases, the burden has been placed heavily on the complaining citizen to prove the unjustified character of the government's conduct rather than upon the state to show cause for intruding on constitutional rights.[9] More often, and particularly in the favored areas of fundamental civil liberties and rights such as speech, press, religion, and the franchise, the burden has been heavily upon government to justify its suspect laws or conduct.[10] Not so in the area of school segregation. There the racial isolation of students is said to invoke no constitutional prohibitions if it results from racially "neutral" school assignment plans reflecting no "intention" to promote racial segregation. Under the *de jure* standard the racial motive of the school board is made the necessary condition for application of constitutional prohibitions.[11]

By contrast, in almost every other area of constitutional review the effect of governmental conduct, whatever its purpose, governs the resolution of the controversy. For instance, the Supreme Court long ago rejected governmental protestations of benign purposes as justification of laws or regulations which inhibit exercise of first amendment liberties.[12]

In more recent years the Supreme Court has receded from an

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[8] *See id.* at 87.

[9] *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 537-39 (1934).

[10] *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 463-66 (1958).

[11] *See* Bradley v. School Bd., 462 F.2d 1058, 1069 (4th Cir. 1972), *cert. granted sub nom.* School Bd. v. State Bd. of Educ., 93 S. Ct. 936 (1973) (No. 72-549): "When it became clear that state-imposed segregation had been completely removed within the school district of the City of Richmond . . . further intervention by the district court was neither necessary nor justifiable."

[12] *See* Thomas v. Collins, 323 U.S. 516, 532 (1945).

absolute protection rule in first amendment and other cases in favor of a variety of balancing-of-interest tests, particularly the test that requires the state to show a "compelling interest" to justify restraint on the protected civil liberties.[13] But such balancing standards remain objective in application; bad governmental motive is nowhere made the precondition for striking down the infringing governmental conduct. Similarly, the fundamental substantive and procedural liberties protected under the fourth, fifth, and sixth amendments, chiefly as concerns criminal processes, are objectively applied. If a party has been arbitrarily searched or denied rights of notice, trial by jury, or other protected rights, the constitutional inquiry examines the action of government and its effect, not the government's purpose. When state law infringes rights such as trial by jury, "[t]he question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive."[14]

But in resolving questions of race discrimination, particularly of school segregation, the racially segregating effect of governmental action is not deemed sufficient to establish a constitutional violation. Instead, courts are requiring, under the *de jure* approach, that the racial purpose of the officials involved be proved to establish a constitutional case.[15] How did this constitutional double standard become established?

THE DEVELOPMENT OF THE DE JURE STANDARD

Most constitutional principles have a definitive origin in some landmark litigation or judicial ruling. Not so the *de jure* principle that governmental action must be racial in purpose as well as effect to transgress the fourteenth amendment's equal protection clause. In the first one hundred years following adoption of the fourteenth amendment, the requirement of a forbidden racial purpose became established more through judicial assumption and dicta than any definitive adjudication. The setting from which most of the Supreme Court's racial rulings arose may explain this process of adoption. From the earliest instances[16] the racial cases before the Supreme Court almost invariably concerned overt racism. In education, for instance, the cases involved no such

[13] *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

[14] United States v. Jackson, 390 U.S. 570, 582 (1968).

[15] Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972), *cert. granted, sub nom.* School Bd. v. State Bd. of Educ., 93 S. Ct. 936 (1973) (No. 72-549).

[16] *See* text accompanying notes 22-23 *infra*.

subtleties as segregation resulting from neighborhood school assignment policies; in most of the states, school segregation was expressly required or authorized by law.[17] Similarly, in other major areas such as voting,[18] jury service,[19] property ownership,[20] and employment[21] the cases usually presented purposeful and undisguised racial discrimination or segregation.

In this context it is hardly surprising that the Supreme Court's decisions focused upon the racial purpose of the state laws or actions under review and tended to emphasize the fourteenth amendment's basic guarantee against such intentional racial discrimination. As early as the 1880 decision in *Strauder v. West Virginia*,[22] involving a state law restricting jury service to white persons, the Court emphasized that the fourteenth amendment was concerned with inequality thrust upon blacks "by law because of their color," constituting "discrimination because of race or color." The same theme was voiced by the companion ruling in *Ex parte Virginia*.[23] A great many decisions of the Court in subsequent decades similarly prohibited racial laws and other governmental acts under the *de jure* view of the equal protection clause, which sufficed to reach and invalidate state actions plainly racial both in effect and in purpose.

The delimiting *de jure* requirement of racial purpose might well have been re-examined in the period after World War II when the Supreme Court began its retreat from *Plessy v. Ferguson*[24] and that case's myopically narrow view of the fourteenth amendment. But such reanalysis was unnecessary, because *Brown v. Board of Education*[25] and its precursors continued to arise from laws overtly racial in their segregation requirement. Thus, although *Plessy's* "separate but equal" con-

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[17]*E.g.*, ch. 46, art. 4, §§ 3, 18, [1862] Kan. Laws; Act No. 63, § 58, [1896] S.C. Acts 171; ch. 66, § 1492, [1903] Va. Acts 816.

[18]South Carolina v. Katzenbach, 383 U.S. 301 (1966); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Guinn v. United States, 238 U.S. 347 (1915); *see* Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

[19]Eubanks v. Louisiana, 356 U.S. 584 (1958); Cassel v. Texas, 339 U.S. 282 (1950); *Ex parte* Virginia, 100 U.S. 339 (1880).

[20]Shelley v. Kraemer, 334 U.S. 1 (1948); Oyama v. California, 332 U.S. 633 (1948); Buchanan v. Warley, 245 U.S. 60 (1917).

[21]Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[22]100 U.S. 303, 307, 310 (1880).

[23]100 U.S. 339, 345 (1880).

[24]163 U.S. 537 (1896).

[25]347 U.S. 483 (1954).

clusion was ultimately overruled in *Brown*, no definitive Supreme Court ruling reversed *Plessy's* underlying confining view of the fourteenth amendment's ambit. That construction commands no approbation in the Supreme Court of today. It is clear that the Court now accepts the proposition that freedom from racial discrimination and segregation in the public life is the central right affirmatively secured by the emancipation amendments. As stated in the opinion by Mr. Justice Brennan in *McLoughlin v. Florida*,[26] "the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the states." Indeed, it is difficult to understand the decision in *Jones v. Alfred H. Mayer Co.*[27] as anything but a belated vindication of Justice Harlan's historic 1883 dissenting opinion in the *Civil Rights Cases*,[28] espousing the view that positive freedom and equality in society for Negroes was guaranteed by the thirteenth and fourteenth amendments.

But the expansive constitutional perception now accorded those amendments was not extended in the 1940's and 1950's when the principle of desegregation first achieved Supreme Court protection. The historical fact is that in the series of decisions paving the way toward and largely dictating the ultimate rationale of *Brown*, the Supreme Court was operating not under the view expressed by Harlan in 1883, but rather under the constraints of the opposite view expressed by the majority opinion in the *Civil Rights Cases* and later in *Plessy v. Ferguson*. The members of the Court in the 1940's were not ready to overrule these precedents, but they were equally unwilling to approve obvious racial discrimination compelled or fostered by governmental action. A series of rulings in race cases thus proceeded under a compromise constitutional standard. While the Court was not ready to recognize the substantive constitutional right of the Negro to freedom from segregation and discrimination, the Court was equally unready to uphold racial laws under the "rational basis" standard, the prevailing equal protection standard in legislative classification cases. The compromise struck was the adoption of an axiom that differential treatment "because of racial prejudice"[29] is suspect and presumptively prohibited. By this means,

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[26]379 U.S. 184, 192 (1964).

[27]392 U.S. 409 (1968).

[28]109 U.S. 3, 35-36 (1883) (Harlan, J., dissenting).

[29]Korematsu v. United States, 323 U.S. 214, 223 (1944); *accord*, Loving v Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

without accepting Justice Harlan's historic plea for the substantive constitutional right of blacks to freedom from racial segregation and discrimination, the Court nevertheless had at hand a test sufficient to achieve the desired result by pursuing but distinguishing the traditional "arbitrary classification" theme of the equal protection cases involving state economic regulation. This approach seemed sufficient, for in every major case in the 1940's and 1950's that came before the Court, the segregation and discrimination against the Negro plaintiffs was intentional. The racial character of the provisions of the collective bargaining contract in *Steele v. Louisville & Nashville Railroad Co.*,[30] of the resale covenant in *Shelley v. Kraemer*,[31] of the separate education facilities in *Sweatt v. Painter*,[32] *McLaurin v. School Board*,[33] *Gaines v. Canada*,[34] and similar cases was beyond question. Since the legislature or the private party invested with government powers was in each case acting with clear racial intent, the "*per se* invidious" approach seemed adequate for achievement of the desired result without need to reexamine *Plessy* and the *Civil Rights Cases* in their rejection of a general constitutional right of the Negro to freedom and equality in public life. And since overt racial classification was presented to the Court in *Brown*, the Court could again achieve the desired result simply by overruling *Plessy* without reaching the ultimate issue whether the emancipation amendments affirmatively secure for the Negro a right to equal and unsegregated participation in the public life. *Plessy's* spurious conclusion that segregation if equal is well-motivated was answered in *Brown* on its own terms, without questioning the assumption about the ambit of the constitutional rights of Negroes which the *Plessy* formulation implicitly espoused.

In sum, for historical reasons school segregation cases have been resolved in the courts under the restrictive *de jure* standard. That standard has served to underscore the iniquitous character of the previous segregation-by-law system in the South, where courts have insisted on integration even at great public cost and dislocation;[35] but the concentration of national attention on Southern segregation-by-law in the

[30]323 U.S. 192 (1944).
[31]334 U.S. 1 (1948).
[32]339 U.S. 629 (1950).
[33]339 U.S. 637 (1950).
[34]305 U.S. 337 (1938).
[35]*See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

years following the *Brown* decision has tended to obscure the reality of ever-increasing racial isolation in metropolitan area public schools in the North and West, accelerated by the immigration of blacks and the emigration of whites.

THE LIMITATIONS OF THE DE JURE STANDARD

Occasional efforts after *Brown* to point to the worsening situation in the North were generally dismissed with the answer that Northern segregation is not the product of purposeful racial design but merely the consequence of the "neutral" neighborhood school system operating in cities whose neighborhoods are racially segregated. School children who complained that they were attending all-black public schools in Cleveland, Detroit, or Chicago, were told that the federal constitution provides no recourse unless their segregation is shown to result from the purposeful racial design of those who operate or regulate the public schools.

The first major federal court ruling to that effect was issued by the Court of Appeals for the Seventh Circuit in 1963 in *Bell v. School City*.[36] Negro children attending public schools in Gary had complained of their assignment to predominantly black schools in their ghetto neighborhoods. They were met by the ruling of the court of appeals that the Constitution imposes no "affirmative duty . . . to recast or realign school districts or areas for the purpose of mixing or blending Negroes and whites in a particular school."[37] While the high concentration of black children in certain schools was conceded, the court agreed with the district court's finding that the condition was constitutionally unobjectionable because the school attendance lines had " 'not been drawn for the purpose of including or excluding children of certain races.' "[38] The district court also found that a neighborhood school plan "honestly and conscientiously constructed with no intention or purpose to segregate the races"[39] is not legally objectionable even if "the resulting fact is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites. . . ."[40]

Soon after *Bell* another federal court of appeals ruled to the same

[36]324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).
[37]*Id.* at 212.
[38]*Id.* at 213.
[39]*Id.*
[40]*Id.*

effect. In *Downs v. Board of Education*,[41] the Tenth Circuit refused to grant relief against school segregation arising from a neighborhood school assignment system adopted by the authorities after Kansas City abandoned its pre-*Brown* segregation-by-law practice. The court ruled that the Constitution does not bar a "neighborhood school plan, even though it results in a racial imbalance in the schools, where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation."[42]

An even more definitive ruling against the plea for desegregation was the 1966 decision of the Court of Appeals for the Sixth Circuit in *Deal v. Cincinnati Board of Education*.[43] In its decision the court rejected the plea of black school children for desegregation of Cincinnati schools. The court asserted that the fourteenth amendment as construed by the Supreme Court in *Brown* reaches only a state's classification of Negro school children "*because of their race*."[44] Following extensive exposition of that racial purpose construction of the Constitution, the court concluded that boards of education "have no Constitutional obligation to relieve against racial imbalance" either by busing of school children or by "selection of new school sites" so as to minimize racial concentration.[45] The court ruled that the fact of racial imbalance alone "is not a deprivation of equality in the absence of discrimination."[46]

THE DE FACTO STANDARD

As a result of these and similar decisions, in the 1970's public school desegregation is being eliminated by judicial fiat in the South while public education in Northern cities is conducted in increasingly racially segregated schools. The unacceptable social, educational, and human consequences of that course were exposed some years ago in a number of judicial rulings in smaller Northern localities, and they have been the subject of comment by eminent authors.[47] These decisions and

[41]336 F.2d 988 (10th Cir.), *cert. denied*, 380 U.S. 914 (1964).

[42]*Id.* at 998.

[43]369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

[44]*Id.* at 58 (emphasis added).

[45]*Id.* at 61.

[46]*Id.* at 62.

[47]*See* Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. REV. 285 (1965).

discussions noted the inadequacies of the *de jure* test of racial isolation in public schools.[48] They emphasized that while evil governmental intent may be lacking, segregation has effects no less harsh upon millions of our public school children in the North.[49] The insult of overt or official racism may be absent, but the injury of racial isolation in the schools is just as great in Detroit as in Atlanta. Accordingly, it was suggested that a *de facto* standard of constitutionality be employed to measure segregation in public schools. The fourteenth amendment, it was urged, forbids all racial isolation in public programs and requires the assignment of students in each of a city's public schools in a manner which duplicates the entire city's racial balance. Northern school boards were said to have a duty to undertake busing and other means to achieve in each school the same racial balance that exists in the city's school population.

As commendable as a pure *de facto* approach may be in its logic and ultimate effect and although it has begun to achieve judicial acceptance in such other areas as housing and employment,[50] it has not won judicial approval in the area of education. The few lower court decisions in the North which had espoused the *de facto* norm did not survive on appeal, and the Supreme Court repeatedly refused to hear the constitutional argument for stringent school desegregation on a nationwide basis.[51] Illustrative is *Barksdale v. Springfield School Committee*,[52] in which the district judge granted relief against racial imbalance in the public school system of Springfield, Massachusetts, upon a finding that unequal educational opportunity resulted from such imbalance. The court stated that:

> While Brown answered that question affirmatively in the context of coerced segregation, the Constitutional fact—the inadequacy of segregated education—is the same in this case, and I so find. It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors. Education is tax supported and compul-

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[48]Fiss, *supra* note 47, at 602-03.

[49]*See* text accompanying notes 96-102 *infra*.

[50]Griggs v. Duke Power Co., 401 U.S. 424 (1971); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291, 295-96 (9th Cir. 1970); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968).

[51]*See* notes 36-46 *supra*.

[52]237 F. Supp. 543 (D. Mass. 1965).

> sory, and public school educators, therefore, must deal with inadequacies within the educational system as they arise, and it matters not that the inadequacies are not of their making. This is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact.[53]

The ruling was reversed on appeal and the district court was instructed to dismiss the action without prejudice. The appellate court noted that it could not accept an absolute constitutional right of plaintiffs "to have what the [district] court found to be 'tantamount to segregation' removed at all costs."[54] A similar view was recently espoused in a dictum in *Swann v. Charlotte-Mecklenburg Board of Education*,[55] in which the Chief Justice declared judicial intervention inappropriate "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools."

In lieu of a *de facto* test which cannot command judicial acceptance and a *de jure* standard which tolerates intolerable school segregation, this article proposes the adoption in school cases of the "compelling state interest" standard which has increasingly been applied by the Suprem Court in analogous areas. Under that test, governmental action which intrudes upon or curtails a basic constitutional guarantee must reflect a "compelling" state need or interest before it will be allowed to restrict or impair constitutional freedom. Surely the abolition of racial discrimination and segregation in society as hallmarks of the Negroes' *ante bellum* second-class citizenship was the primary purpose of the fourteenth amendment. State laws and school policies which perpetuate racial isolation in the public education system should not pass constitutional muster in the absence of a truly compelling state interest to justify so direct a curtailment of fundamental constitutional guarantees. As hereafter demonstrated,[56] a compelling interest standard sensitively applied by the courts could achieve major desegregation progress in our Northern schools and perhaps ultimately could secure approximate

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[53] *Id.* at 546.

[54] Springfield School Comm. v. Barksdale, 348 F.2d 261, 264 (1st Cir. 1965).

[55] 402 U.S. 1, 32 (1971).

[56] *See* text accompanying notes 116-23 *infra*. A recent ruling suggesting in school cases a balancing standard not unlike the "compelling interest" test is People v. San Diego United School Dist., 19 Cal. App. 3d 252, 265-66, 96 Cal. Rptr. 658 (1971). *See also* Karst & Horowitz, *Emerging Nationwide Standards for School Desegregation—Charlotte and Mobile, 1971*, 1 BLACK L.J. 206 (1971).

"racial balance." Moreover, this standard would supply a truly nationwide norm, requiring all states, municipalities, and school districts to minimize racial isolation in public education.

A nationwide standard may be required not only for a beginning of progress in the North but even for continued progress in the South. Courts are increasingly troubled in the exercise of enforcement functions under *Brown* which compel their continued approbation of full desegregation remedies in the South while the North becomes increasingly segregated. The recent demonstration of judicial concern along these lines is manifested in a concurring in part, dissenting in party opinion by Justice Stewart, joined by Justices Burger and Blackmun, in *Oregon v. Mitchell*:[57]

> Congress has now undertaken to extend the ban on literacy tests to the whole Nation. I see no constitutional impediment to its doing so. Nationwide application reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country . . . . Nationwide application avoids the often difficult task of drawing a line between those States where a problem is pressing enough to warrant federal intervention and those where it is not. Such a line may well appear discriminatory to those who think themselves on the wrong side of it. Moreover, the application of the line to particular States can entail a substantial burden on administrative and judicial machinery and a diversion of enforcement resources. *Finally, nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country. A remedy for racial discrimination which applies in all of the States underlines an awareness that the problem is a national one and reflects a national commitment to its solution.*

The remainder of this article seeks to review the judicial history of the "compelling state interest" standard and to examine its potential application to the existing conditions of racial concentration in our nation's public schools.

THE "COMPELLING INTEREST" STANDARD

Unlike the more absolute *de jure* and *de facto* tests of constitutionality, the "compelling state interest" standard requires a balancing of

[57] 400 U.S. 112, 283 (1970) (emphasis added).

individual constitutional claims and asserted governmental interest—with the scales weighted in favor of the individual. To civil libertarians in the Meikeljohn tradition[58] who have long fought for an absolute standard in first amendment cases, a balancing test has a conservative ring. They can assert with historical accuracy that in that area the balancing approach is a regression from the more absolute protections earlier afforded by the Supreme Court in the era of the *Carolene Products* footnote.[59] But granting the ultimate dangers of any balancing test in civil liberties areas, it is noteworthy that the "compelling interest" test has proved effective as a means of extending, not curtailing, constitutional right since it first found favor before the Supreme Court in the late 1950's.[60] If "compelling interest" is a balancing test that has proved useful for advancing other constitutional rights, there may be reason for supposing that it can serve a similar function in the area of present concern.

The "compelling state interest" standard first surfaced in Supreme Court decisions in the late 1950s in cases involving state legislative investigations. These investigations were usually conducted under the rubric of internal security, but were most frequently simply harassments against unpopular "leftist" and civil rights activists. To the members of the Court so deeply and recently immersed in the "clear and present danger" polemic in *Douds*,[61] *Dennis*,[62] and similar "Communism" cases, a "compelling state interest" formulation was, of course, a natural corollary to the Learned Hand principle.[63] However, the crucial difference was that in the forced disclosure cases commencing in 1957 "compelling interest" was being employed not to override a first amendment claim but to strike down governmental intrusions upon liberty.[64] Moreover, in these decisions the Court was not merely returning to the more libertarian mood of the 1940's; it was for the first time giving recognition under the first amendment to a right of silence by the individual when the state makes unjustified demands upon him for disclosures intruding upon the privacy of his political thoughts and associations.

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[58]A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[59]United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

[60]*See* text accompanying notes 66-94 *infra*.

[61]American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[62]Dennis v. United States, 341 U.S. 494 (1951).

[63]*Id.* at 510: " 'In each case courts must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' "

[64]*See* text accompanying notes 66-74 *infra*.

The compelling interest concept appears to have originated in the 1957 concurring opinion of Justices Frankfurter and Harlan in *Sweezy v. New Hampshire*.[65] They asserted that for the citizen to yield his privacy and political liberty to a legislative inquiry "the subordinating interest of the State must be compelling."[66] In 1958 the full Court espoused the "compelling interest" standard in striking down a state judicial demand for disclosure of organizational membership in *NAACP v. Alabama*.[67] Finding such disclosure to have a deterrent effect on the first amendment right of association, the Court made detailed inquiry into the question whether Alabama had demonstrated an interest in obtaining the disclosures "which is sufficient to justify the deterrent effect."[68] The Court concluded from its analysis that Alabama had "*fallen short of showing a controlling justification* for the deterrent effect on the free enjoyment of the right to associate . . . ."[69]

The term "controlling" in the *NAACP* opinion was soon construed to have meant "compelling." By 1959, in a case involving a Virginia investigation againt the NAACP, the Court declared that it had held in the *Alabama* case that such individual liberties as speech, press, and association "*cannot be invaded unless a compelling state interest is clearly shown.*"[70] In 1960 in a similar setting in *Bates v. City of Little Rock*,[71] the Court struck down a state demand for identification of organizational membership. In so doing it declared that the standard for decision was whether the state could demonstrate "so cogent an interest" as to "justify" abridgment of first amendment right because in liberties cases "the State may prevail only upon showing a subordinating interest which is compelling."[72] The standard was again approved and applied in *NAACP v. Button*[73] when the state's purported interest to require against illegal practice of law was found insufficient to restrict NAACP legal support to individuals seeking judicial redress.

The test established in the investigative disclosure cases was soon employed more generally in the resolution of first amendment ques-

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[65]354 U.S. 234 (1957).
[66]*Id.* at 265.
[67]357 U.S. 449 (1958).
[68]*Id.* at 463.
[69]*Id.* at 466 (emphasis added).
[70]Scull v. Virginia, 359 U.S. 344, 353 (1959) (emphasis added).
[71]361 U.S. 516 (1960).
[72]*Id.* at 524.
[73]371 U.S. 415, 438 (1963).

tions. In the 1963 decision in *Sherbert v. Verner*,[74] involving intrusion on freedom of religious belief by a Saturday work rule, the Court stated that it was required to decide "whether some compelling state interest enforced in the . . . statute justifies the substantial infringement of appellant's First Amendment right,"[75] because it is "basic that no showing merely of a rational relationship to some colorable state interest would suffice . . ."[76] Subsequent rulings have continued to apply the test in first amendment controversies.[77] A most definitive recent example is the Court's ruling that Amish parents could assert a freedom of religion objection to the compulsory education requirements applicable to their children.[78]

The standard which has thus won favor since 1957 in first amendment rulings has also found significant application in a historic line of voting rights cases. First, in the "one man-one vote" malapportionment suits beginning with *Baker v. Carr*,[79] the Court, without much consideration of the constitutional standard involved, gave primacy to the individual liberty over a variety of asserted state interests.[80] And once sensitized by its malapportionment decisions to the primacy of the right to vote, the Court in a series of decisions commencing in 1965 has upheld individual voting rights against a variety of state restrictions under the "compelling interest" standard. In *Carrington v. Rash*,[81] the Court struck down a Texas statute prohibiting voting by members of the military sent to the state for their duty. While the Court did not directly iterate the "compelling interest" standard, it implicitly adopted the standard when it said that because the right to vote is "close to the core of our Constitutional system, . . . states may not casually deprive a class of individuals of the vote because of some remote administrative

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[74]374 U.S. 398 (1963). *See also* DeGregory v. Attorney Gen., 383 U.S. 825 (1966); Gibson v. Forida Legislative Investigating Comm., 372 U.S. 539 (1963).

[75]374 U.S. at 406.

[76]*Id.*

[77]*E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[78]Wisconsin v. Yoder, 406 U.S. 205 (1972).

[79]369 U.S. 186 (1962).

[80]*See* Reynolds v. Sims, 377 U.S. 533, 579-80 (1964). In *Reynolds* the Court postulated the existence of "legitimate considerations" for deviation from a one man-one vote rule, but found geographic consideration of "area alone" to be an "insufficient justification for deviations." While the opinion suggested that a state might give some additional weight to its political subdivisions in the legislature (if it did not create undue imbalance from the equal voting principle), ultimately it concluded even that consideration would not justify a substantial deviation. *Id.* at 580-81.

[81]380 U.S. 89 (1965).

benefit to the State."[82] In the following year the Court handed down its decision in *Harper v. Virginia Board of Elections*[83] striking down the poll tax under the equal protection clause. Again the constitutional standard which applied was not expressly set forth, but the Court clearly was not applying a "rational basis" standard in prohibiting state taxes burdening the franchise. The Court emphasized that it had long held "that where fundamental rights and liberties are asserted under the equal protection clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined" and that "the right to vote is too precious, too fundamental, to be so burdened or conditioned" by a tax.[84] In the years since *Carrington* and *Harper*, the Court has continued to strike down restrictions upon the franchise under the principle that "if a challenged state statute grants the right to vote to some . . . and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."[85]

As the foregoing analysis indicates, the "compelling interest standard" has been developed chiefly in the first amendment and right-to-vote areas. But the principle has not been confined to these matters. Rather, it appears to be gaining favor with the Court as the applicable test wherever a major substantive constitutional right is invoked. As early as 1964 the Court found no "overriding statutory purpose" sufficient to justify a Florida miscegenation law.[86] It won approbation and application by the Court in 1969 in *Shapiro v. Thompson*,[87] in which the right of interstate travel was found to be impaired by durational residence requirements for state welfare eligibility. In *Griswold v. Connecticut*[88] and *Eisenstadt v. Baird*,[89] the standard was employed to

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[82] *Id.* at 96.

[83] 383 U.S. 663 (1966).

[84] *Id.* at 670.

[85] Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969). In addition, *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residence requirement); City of Phoenix v. Kolodziejski, 399 U.S. 204, 212-13 (1970) (statute allowing only property taxpayers to vote on general obligation bond issue); Evans v. Cornman, 398 U.S. 419, 422-23 (1970) (law preventing residents of federal enclaves from voting in state elections); Cipriano v. City of Houma, 395 U.S. 701, 704 (1969) (statute prohibiting nonproperty taxpayer from voting in revenue bond issue); Williams v. Rhodes, 393 U.S. 23, 31 (1968) (minority party regulation).

[86] McLaughlin v. Florida, 379 U.S. 184 (1964).

[87] 394 U.S. 618, 634 (1969).

[88] 381 U.S. 479, 496-97 (1965) (Goldberg, J., concurring).

[89] 405 U.S. 438 (1972).

strike down anti-contraception laws upon a finding that a substantive constitutionally protected liberty of personal relations was impaired by the statutes. The historic rulings in recent days in the abortion[90] and the capital punishment[91] decisions touch a similar chord, as do a series of decisions by the Court in the "poverty" cases.[92] Three members of the Court have indicated their view that "compelling interest" is now generally applicable to government impairment of "the exercise of a Constitutional right." Justices Brennan, White, and Marshall in their opinion in *Oregon v. Mitchell*, stated that "governmental action that has the incidental effect of burdening the exercise of a Constitutional right . . . . may withstand Constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest."[93]

What is the present ambit of the "compelling interest" standard? In ordinary legislative classification cases under the equal protection clause when no "basic" individual rights are jeopardized, "rational basis" remains the applicable test.[94] In the areas of procedural rights—such as those of the fourth, fifth, and sixth amendments—the Court generally continues to apply an absolute *de facto* standard. But where significant substantive liberties and rights of the Constitution are at stake, "compelling state interest" has become the generally accepted standard. That development is hardly surprising. A Court committed to the primacy of such substantive constitutional rights as the first amendment freedoms, access to the ballot, and a variety of personal liberties expressly secured or implicit in the due process clause, is naturally driven to a standard of review that makes government intrusion the exception rather than the rule, by placing the burden of justification on the state to show urgent necessity for its liberty-restricting actions.

If the "compelling state interest" standard now protects other significant substantive constitutional rights from even unintentional state curtailment, how is it that when state action causes racial discrimination or segregation the courts remain wedded to the onerous *de jure* tests of constitutionality? If a promise of full equality for Negro Americans was

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[90]Roe v. Wade, 93 S. Ct. 705 (1973).

[91]Furman v. Georgia, 408 U.S. 238 (1972).

[92]Boddie v. Connecticut, 401 U.S. 371 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Griffin v. Illinois, 351 U.S. 12 (1956).

[93]400 U.S. 112, 238 (1970) (Brennan, White & Marshall, JJ., concurring and dissenting).

[94]*See, e.g.*, Richardson v. Belcher, 404 U.S. 78 (1971).

implicit in the emancipation amendments, why are states deemed free to assign Negro children to racial isolation in the public education system so long as the states' purposes are not demonstrably racial? Is freedom from racial isolation in a governmental program a less "fundamental" right or interest than freedom from governmental restraint on rights of speech, franchise, travel, or marital relations?

THE FUNDAMENTAL RIGHT OF FREEDOM FROM RACIAL ISOLATION

The proposition that freedom from racial isolation in public education represents a fundamental right protected under the thirteenth and fourteenth amendments has been espoused under a variety of arguments. One line of argument asserting that segregation impairs fundamental rights is the educational and psychological injury to students. Another approach asserts that the fourteenth amendment's guarantee against intentional governmental segregation is invoked by a "neighborhood school" system resulting in racial isolation, because of the past complicity of government agencies in the development of ghetto neighborhoods. Finally, there is the argument asserting that the thirteenth and fourteenth amendments inhibit racial isolation in a public system of education because such isolation constitutes a continuing badge of servitude and denial of full freedom and equality in society. A brief examination of each separate line of argument is appropriate; it is likely that all three will contribute to the ultimate acceptance of nationwide school desegregation.

Adverse Effect on Students

The core of the Supreme Court's ruling in *Brown v. Board of Education*[95] was, of course, the finding that public school segregation denies equality to minority children because of its adverse psychological and educational impact upon them. A number of subsequent decisions in Northern cases emphasized that the psychological and educational impact of racial isolation in the schools is no less damaging when it results from non-racist school assignment policies rather than conscious racial purposes.[96] A strong case can surely be made for elimination of

[95]347 U.S. 483 (1954).

[96]*See, e.g.*, Hobson v. Hansen, 269 F. Supp. 401, 504 (D.D.C. 1967); Barksdale v. Springfield School Comm., 237 F. Supp. 543 (D. Mass. 1965); Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964); Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962); Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

racial isolation in the schools because of its adverse impact on minority children in the "fundamental" area of education.[97]

A fact less frequently noted but perhaps equally worthy of consideration is the adverse effect of school segregation upon the majority white students. Ours is a pluralistic society. Disparate social, economic, cultural, racial, and ethnic groups make up our complex society. In order to prepare school children for the world into which they will graduate, the public schools should reflect as much as possible the pluralism of our society. Denial of opportunities to white children to know, to befriend, and to relate to children from other racial and economic groups denies them full preparation for productive and adjusted living. And for the society itself, education under conditions of racial isolation inevitably continues and intensifies the racial estrangement and misunderstanding which presently impair the viability of our pluralistic system.

These insights, which largely underlay the Supreme Court's commitment to desegregation in 1954 and following years, have recently met serious challenge. The *Coleman Report*,[98] and more recent academic studies,[99] have thrown doubt upon the previous assumption that desegregation means improved educational achievement for minority students. The present discussion is inappropriate for elaboration on the debate over the educational value of desegregation. It is this author's view that in the long run, under improved conditions of desegregation and of minority motivation for achievement, the anticipated educational benefits of school desegregation will be realized. In any event, the manifest psychological and political disabilities which clearly flow from racial isolation in education provide a strong constitutional argument against racially "neutral" school assignment policies which perpetuate racial isolation in our schools.[100]

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[97]Pettigrew, *The Consequences of Racial Isolation*, in LAW, LAWYERS AND SOCIAL CHANGE (H. Horowitz & K. Karst eds. 1969).

[98]U.S. DEP'T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).

[99]*See* Armour, *The Evidence on Busing*, 28 PUB. INTEREST 90 (1972).

[100]The proposition has been aptly stated in 1 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 214 (1967) (supplementary statement by Commissioner Frankie M. Freeman):

> The question is not whether in theory or in the abstract Negro schools can be as good as white schools. In a society free from prejudice in which Negroes were full and equal participants, the answer would clearly be 'Yes.' But we are forced, rather, to ask the harder question, whether in our present society, where Negroes are a minority which has been discriminated against, Negro children can prepare themselves to participate effectively in society if they grow up and go to school in isolation from the majority

Government Complicity in the Growth of Ghetto Neighborhoods

A somewhat different argument for the applicability of constitutional guarantees against a "neighborhood school" or other student assignment system yielding racial isolation emphasizes past complicity by government agencies in the development of our racially concentrated neighborhoods. Decisions in Detroit[101] and Pontiac[102] have recently applied a hybrid form of the *de jure* concept on this basis. They hold that since state governments are in part responsible through their past housing policies for development of our residential ghettos, they cannot simply replicate and perpetuate that pattern in their school assignment policies. Because government itself aided and induced housing segregation, its remedial obligation in the schools is to alleviate rather than to perpetuate the results of its wrongdoing.

The government complicity principle is appealing, and probably in many major Northern cities the record of governmental complicity in the growth of segregated housing is demonstrable. But whether the principle can find general application outside the South remains to be seen. Moreover, now that federal and state laws and authorities have substantially adopted the norm of housing *desegregation*, the complicity theory may have a shortened life expectancy. When the segregating effect of past governmental housing action has fairly been vitiated by the passage of time and by remedial governmental measures, it may no longer serve to support a constitutional school desegregation requirement. There is occasion, therefore, to examine a third line of argument for constitutional relief against racial isolation in Northern public schools. That is the argument which rests chiefly on the thirteenth and fourteenth amendments' substantive guarantees of full freedom for black Americans.

The Substantive Guarantee of Full Freedom

The Supreme Court's 1883 decision in the *Civil Rights Cases*[103] gave birth to the principle that the thirteenth and fourteenth amendments assure only against racially discriminatory "state action." Under

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group. We must also ask whether we can cure the disease of prejudice and prepare all children for life in a multiracial world if white children grow up and go to school in isolation from Negroes.

[101]Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972).

[102]Davis v. School Dist., 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 233 (1971).

[103]109 U.S. 3 (1883).

that restrictive reading it is only when the *state* has made race, as such, the basis of differential treatment that the Constitution is invoked. This construction reads the emancipation amendments as only a negative guarantee against state hostility to minorities rather than a positive guarantee of state protection. Under that construction "private" racial discrimination was long assumed after 1883 to be beyond constitutional reach.[104] But the recent decision in *Jones v. Alfred H. Mayer Co.*[105] indicates a major reappraisal by the Supreme Court in line with the 1883 dissent by Justice Harlan, which emphasized the thirteenth and fourteenth amendments' affirmative guarantees that states will advance and protect full freedom and equality for racial minorities.[106] Under the *Jones* reading of the amendments, they become the basis for interdicting even "private" discrimination that the state has in no way sanctioned or approved, because denial of equality in the incidents of daily life is an infringement of the "freedom that Congress is empowered to secure under the Thirteenth Amendment."[107]

Under this substantive interpretation the Constitution reaches even "private" conduct which defeats the promised conditions of freedom and equality in society for black citizens. Clearly, under this approach the *de jure* limitation in public school segregation cases is no longer viable. If even purely private discrimination is now defeated by the freedom and equality assurances of the emancipation amendments, *a fortiori* racial isolation in a *public* system of education is equally within constitutional reach if it is antithetical to the promised freedom and equality. If denial of private homes is constitutionally impermissible because it "herds men into ghettos"[108] and thus subjects minorities to continued conditions of segregation and inferiority in society, it seems

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[104]The case for a contrary constitutional reading was set forth in Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966). A number of earlier analyses are set forth therein at note 5.

[105]392 U.S. 409 (1968).

[106]"That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the Thirteenth Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable." Civil Rights Cases, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting).

"The Constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment 'by appropriate legislation' include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

[107]392 U.S. at 443.

[108]*Id.* at 442.

clear that racial isolation in a public education system equally invokes the conditions of inferiority and inequality which it was the purpose of the amendments to terminate forever.

Where racial isolation in public education results from "neighborhood schools" or other governmental policies and practices, *Jones* provides a new and direct predicate for finding impairment of the fundamental rights sought to be secured by the emancipation amendments. That substantive and result-oriented application of the emancipation amendments would bring them into line with other seminal constitutional guarantees. When states are constitutionally precluded from imposing even rational and benign limitations of the citizen's right to speak,[109] write,[110] vote,[111] marry,[112] or travel,[113] it seems elementary that they should equally be precluded from school policies that invade the paramount right of black citizens to freedom from racial segregation in a public school system. Surely the central promise of the emancipation amendments is equal in import to that of the first amendment, in which compelling government necessity is the minimum condition for a victory of the state over the citizen's constitutional claim. While in *McLaughlin v. Florida*[114] the *de jure* character of the miscegenation law in issue made the proposition somewhat obvious, the comparison there made by Mr. Justice Harlan appears precisely applicable in the present context. Citing first amendment decisions applying the compelling interest standard, he stated:

> The fact that these cases arose under the principles of the First Amendment does not make them inapplicable here. Principles of free speech are carried to the States only through the Fourteenth Amendment. The *necessity test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination—prohibition of which lies at the very heart of the Fourteenth Amendment.*[115]

Now that the school segregation question is recognized as a nationwide problem, what is needed is an application of the same standard that

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[109]*See* Gooding v. Wilson, 405 U.S. 518 (1972).

[110]*See* Cohen v. California, 403 U.S. 15 (1971).

[111]*See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[112]*See* Boddie v. Connecticut, 401 U.S. 371 (1971).

[113]*See* Shapiro v. Thompson, 394 U.S. 618 (1969).

[114]379 U.S. 184 (1964).

[115]*Id.* at 197 (Harlan, J., concurring) (emphasis added). In addition, *see* Loving v. Virginia, 388 U.S.1, 11 (1967).

secures other significant constitutional liberties from state infringement. As demonstrated in the remainder of this article, if that standard is applied, few states and school boards will be able to show a compelling governmental interest for perpetuating current practices which relegate black students to racial isolation in public education. If the state had the burden to justify its acts and policies resulting in segregation in public schools, "compelling interest" would provide a standard that could achieve substantial school desegregation throughout the land.

THE COMPELLING INTEREST STANDARD APPLIED

How would the compelling interest standard actually operate? In our metropolitan areas, where high racial concentration in the public schools now exists, are there compelling governmental interests for the "neighborhood school" system which perpetuate harsh racial concentration?

The first salient point is that the standard addresses itself to objective, not to subjective, considerations. Thus the inquiry is not into the historical origins or causes of the existing segregated pattern but into whether the state can show strong justification for the existing segregated pattern. To be judicially manageable, that issue must be reduced to a series of separate questions addressed to the individual practices and policies that now determine the pattern of public school attendance: school site selection, delineation of individual school attendance areas, establishment of the boundaries of school districts, recourse to transportation, and choice of grade structure among schools. In every school district the confluence of policies and practices in these distinct areas determines the student composition and the degree of racial concentration in each school. Governmental choices in each of these areas directly affect the degree of racial concentration in the schools.

As to each of the separate areas of governmental choice that affect school attendance and segregation, the constitutional standard here suggested would ask *whether the state has a compelling interest in pursuing a policy or practice yielding more segregation than another feasible policy or practice*. Put conversely, the standard asks whether there is a method of operation or policy choice less racially-concentrating in effect which can be adopted without sacrificing any compelling governmental interests. What the standard thus requires is that government authorities make the *least segregating feasible choices* in the maintenance and operation of public schools.

Experience in the last few years with urban desegregation plans

adopted by federal courts provides some practical insight into the separate areas of governmental choice which determine school attendance and racial concentration. In an able analysis by Professor Fiss, the mechanisms available to reduce racial concentration in urban schools were listed as: (1) open transfer (freedom of choice) for minority students; (2) strategic school-site selection to reduce racial concentration; (3) rezoning of attendance districts, enlarging or altering attendance patterns; and (4) busing into non-contiguous attendance districts.[116] As that analysis correctly observed, sensitive employment of a variety of these available options can materially reduce existing racial isolation in urban public schools without undue cost and without large-scale busing away from the student's home area. These various areas of governmental option to reduce racial concentration may be grouped with particular counter-assertions of governmental interest. For instance, to the option of strategic school-site selection in new construction as a means of reducing racial concentration the state may respond that it lacks funds for school construction in urban areas. To the option of substantial busing away from the student's immediate residential area as a means of reducing racial concentration, the state is certain to assert the value of the "neighborhood school" concept. To the option of creating metropolitan-wide school districts that would reduce racial isolation by combining minority student populations in the city with white children in neighboring suburbs, a state may assert its interest in preserving the identity of suburban and urban school districts with existing political and taxing authorities in those separate jurisdictions. To the option of permitting open transfer (freedom of choice) for minority students, a state may object that such a plan would afford them preferential choices denied to white students.

Doubtless factual situations will vary so that a mechanism for reducing racial concentration available in one place may be far less effective in another, while a government interest serious in one locality may be less so in another. But even a brief consideration of the contending interests shows that in every metropolitan area in the nation there are desegregation options which could be pursued without sacrificing any vital public interest in the operation and maintenance of the schools.

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[116]Fiss, *supra* note 47, at 571-74.

Strategic Site Selection

The objections to the use of strategic site selection for desegregation are that little money is available for new school construction and that there is no need for new schools at a time when the student population is diminishing. There are answers to these objections.

First of all, while the rate of new school construction has slowed, some new construction continues in order to replace old and obsolete schools. When new schools are being built in a regular replacement program, school sites should be selected in a manner that tends to reduce racial concentration in the school system. The record in recent Northern school desegregation cases[117] has proved how effectively racial concentration has been perpetuated because over the years officials have located new schools at the centers of existing racially identifiable housing areas. It is reasonable to predict that a policy seeking to reduce segregation by strategic site selection would be as effective in the opposite direction if consistently applied over a period of years. Even if a state asserted that it faced no prospects for new school construction, the governmental interest in desegregation of the schools should provide some reason for reassessing the prospects. Even when the schools are not overcrowded and the buildings not obsolete, if the quality of educational achievement is impaired by racial concentration—as it surely is—then perhaps desegregation itself constitutes a valid reason for building new schools at new locations. The very acceptance of the "compelling interest" standard as a mandate to promote school desegregation brings to bear a new and significant factor upon the desirable timing of new school construction.

Busing to Noncontiguous School Zones

To the proponents of busing across school attendance lines to noncontiguous zones as a means of reducing racial concentration there is daily voiced in our press and legislative halls the objection asserting the "neighborhood school" concept. The value in having children attend schools as close as possible to their homes is said to negate busing to reduce segregation.

Do the states have a compelling interest in maintaining neighborhood schools? It is the author's belief that in any final balance between the interest in school-home proximity and desegregation the latter

[117] *See, e.g.*, Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971).

should usually prevail, because there is no vital interest in having schools located close to the home. Indeed it is arguable that our insular "neighborhoods" are a negation of our pluralistic society, and that not "neighborhood schools" but a *mix of neighborhoods in our schools* best serves to prepare students for participation in that society.

In any event, at the least the neighborhood school issue requires a balanced quantitative approach. Certainly there is some point at which busing far from home areas becomes tedious, expensive, and generally undesirable. But it is noteworthy that in most of our metropolitan areas there is *already* considerable school busing. In most of them imaginative shifting of school attendance lines would reduce existing racial concentration with little additional travel.

Altering Attendance Lines

The redrawing and reshaping of school attendance lines and principles offers numerous options for reducing racial concentration. In some situations simply moving the existing boundaries of attendance between two neighboring schools may achieve significant desegregation without sacrificing the basic principle of compact school attendance zones. Beyond that simple device there is the possibility of applying a number of variations of the "Princeton plan" school-pairing approach,[118] in which the existing designation of schools into elementary, junior high, and high school grades is altered. Individual schools presently serving a particular spread of grades can be paired and combined to serve a larger range of grades or vice versa.

Such changes can facilitate major reductions in racial concentration, and there appears to be no serious governmental interest against their utilization. Indeed, it may be that the present rigid lines of demarcation between junior high and high school locations actually tends to disserve the interest of compact school attendance districts, so that for many children the pairing device can simultaneously reduce both segregation and distance between school and home. An interest may, of course, be asserted against such changes to the effect that the physical separation between elementary, junior high, and high school students is educationally desirable. Such a question is ultimately one for experts in school administration. But it is probably a reasonable appraisal to say that while physical separation between the grades has some advantages,

[118]Fiss, *supra* note 47, at 573.

it does not amount to a compelling or even serious governmental interest in the operation of the public schools.

Metropolitan School Districts

A fourth approach which has recently been suggested, and now has been espoused by federal courts in Richmond[119] and Detroit,[120] is the creation of metropolitan school districts or attendance lines in order to desegregate inner-city schools.[121] White migration to the suburbs is now such that in many major cities only the most limited desegregation can be achieved within the city limits. For a variety of reasons whites have moved to the suburbs, and it is only by school attendance plans which include suburban public school students that real desegregation can be achieved.

The political opposition to metropolitan school attendance is, of course, enormous. But it is difficult to see a compelling interest sufficient under the Constitution for states' maintaining the present rigid school district boundaries between the cities and the suburbs. The interest likely to be asserted is the administrative benefit of maintaining school attendance districts coextensive with taxing districts. Since the cities and suburbs usually have their separate governments and separate tax jurisdictions from which school revenues are derived, it may be asserted that confusion and problems will arise if attendance districts are combined while taxing jurisdictions remain separate and that the revenue base for the schools should be coextensive with the school population base.

Such a governmental interest argument has some cogency. But to the extent that it rests on the constitutionality of the present methods of financing public education, it cannot carry much weight, for our system of public school finance by the local school tax is itself currently under serious constitutional attack. Because the local tax system of finance perpetuates unequal funding in public schools, the California Supreme Court ruled in 1971 in *Serrano v. Priest*[122] that it violates the

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[119]*See* Bradley v. School Bd., 338 F. Supp. 67 (E.D. Va.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *cert. granted sub nom.* School Bd. v. State Bd. of Educ., 93 S. Ct. 936 (1973) (No. 72-549).

[120]*See* Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972).

[121]*See generally Hearings on Equal Educational Opportunity Beforethe Senate Select Committee on Equal Educational Opportunity*, 92d Cong., 1st Sess., part 21 (1971); Taylor, *Metropolitan-Wide Desegregation*, 11 INEQUALITY IN EDUC. 45 (1972).

[122]5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

fourteenth amendment. While a narrowly divided Supreme Court has declined in the *Rodriquez* case[123] to adopt the *Serrano* principle, surely there is little merit in the present system, which makes individual communities chiefly responsible for financing their public schools and yields major disparities in education because of disparate community wealth. If metropolitan school districts would also require the merging of presently separate city and suburban school districts to create a new metropolitan tax base for public education, that would probably be a virtue and not a vice. Metropolitanization would not only reduce segregation in the schools, but would also help to equalize city school revenues and educational quality. Although it is a novel and controversial reform, metropolitanization of our public school systems would strongly promote desegregation, and there appears to be no credible countervailing public interest.

Open Tranfer

Another major method for promoting desegregation is the offer of open transfer or "freedom of choice" to minority group students in schools with high racial concentrations. Here there is no problem of forced busing, for the choice and transportation burden can be that of the individual student and his family. The only possible argument against such a transfer option as a means of reducing racial segregation is that it would provide students from minority groups a privilege and choice not offered to white students under assigned attendance systems.

Surely such an objection to transfer options for blacks and other minority groups reflects a failure to understand the fourteenth amendment itself. A privilege of blacks and other minorities against forced attendance in a segregated public school—*particularly when we consider that school attendance is mandatory*—is a privilge which lies at the heart of the equal protection clause. Contrary to a limiting view of the clause, which would merely guarantee that governmental action in the schools be "color-blind," it is increasingly clear that the thirteenth and fourteenth amendments' guarantee is the substantive rights of blacks and other minorities to freedom from enforced racial isolation in government programs. Thus any objection that an option to minority group children to transfer into less segregated public schools in their com-

[123]San Antonio Idependent School Dist., v. Rodriquez, 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 41 U.S.L.W. 4407 (U.S. Mar. 21, 1973).

munity gives those children a special privilege is answered by the Constitution itself. Accordingly, no credible objection, and certainly no "compelling" governmental interest, appears against adoption in urban school systems of open transfer for minority children as one means of alleviating racial concentration in the public schools.

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The foregoing examination of the compelling interest test in application is necessarily preliminary. Reliable assessment of any constitutional standard requires specific cases to test its workability. What is urged at this juncture is only that the basic "compelling interest" standard has merits in the area of segregation comparable to those that persuaded the Supreme Court to apply it in other constitutional areas and that its application to public school attendance issues is feasible. For now the espousal of the standard itself is more important than the specific resolution of the competing values in each case. Today it is not even recognized by school boards and other governmental agencies that they must consider the segregating consequences of many of the decisions they make. If the courts begin to require the state to justify practices that perpetuate segregation in the public schools and governmental authorities undertake to minimize segregation then much progress can be made. Once the concept of the "least segregating choices" begins to win approbation and application, much of the school segregation in our metropolitan areas which is shrugged off today as an inexorable consequence of demography will be seen in a truer light as the avoidable consequence of official indifference to a vital constitutional promise.

CONCLUSION

If the "compelling interest" standard is adopted to measure governmental action that perpetuates segregation in public schools, a final important question necessarily arises in states and localities that have practiced segregation by law and are now under *Brown* desegregation orders. Certainly in those states and localities the Supreme Court's mandate to eliminate racial segregation "root and branch,"[124] to achieve racial balance even by rigorous methods, is not supplanted by the compelling interest standard here urged. That is a *minimum* standard applicable throughout the nation without any necessary predicate in

[124]Green v. County School Bd., 391 U.S. 430, 438 (1968).

governmental segregation by design. Where that has existed, the Supreme Court correctly requires the most rigorous and complete removal of segregation as a remedial matter—in such cases the state cannot assert any compelling interest to justify less than complete eradication of past violation.

Nevertheless, it is apparent that even in those cases the determination of required remedial measures now depends on *objective* rather than subjective standards. The Supreme Court so held at its last term in *Wright v. Council of the City of Emporia.*[125] It is a fair prediction that once effective measures to achieve racial balance in the schools have been implemented in the localities that formerly practiced segregation by law, courts will seek a new constitutional standard for application. That standard will likely be the "compelling interest" test. For beyond all constitutional and semantic niceties that test rests on an understandable and common-sense proposition: that only the most weighty of reasons should suffice to justify educational policies or practices which perpetuate the insult and injury of racial isolation in our nation's public schools.

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[125]92 S. Ct. 2196, 2203 (1972).