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No issue of our time has drawn the courts more deeply into the vortex of social change and conflict than that of school segregation. In the 18 years since *Brown v. Board of Education*,[1] the Court, falteringly at first, decisively at last, has spelled out the remedial obligations of communities that had deliberately segregated children by race in their public schools.[2] That task is nearly completed.[3] However, the problem of de facto segregation—racial imbalance resulting merely from adherence to the traditional, racially neutral, neighborhood school policy in a community marked by racially segregated residential patterns[4]—has yet to be faced. On this issue, the Supreme Court has

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1. 347 U.S. 483 (1954).

2. *See, e.g.*, Swann v. Board of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

3. A major question still to be decided is the extent to which adjacent school districts in the same metropolitan area must merge for purposes of integration. *See* Bradley v. School Bd., — F. Supp. — (E.D. Va. 1972).

4. Some have suggested that the de jure-de facto distinction is wholly artificial. If only the facts were known, they argue, any long-continued racial imbalance would be found the product of purposeful segregation policy by school authorities.

kept tight-lipped silence, denying certiorari in several cases squarely presenting the issue.[5] It may now be ready to speak.[6]

This Article sets out and analyzes the conflicting arguments regarding the constitutionality of the neighborhood school in areas of de facto segregation. Part I reviews the Supreme Court rulings on de jure segregation in the aftermath of *Brown*. Part II then evaluates five major arguments against the constitutionality of de facto school segregation. Part III discusses freedom of choice and considers whether the equal protection clause requires this remedy or, indeed, more. Part IV analyzes the empirical evidence to date on the question whether segregated schools do in fact deny equal educational opportunity.

I

BROWN AND ITS PROGENY: THEIR BEARING ON DE FACTO SEGREGATION

A. The Doctrinal Significance of Brown

The inevitable point of departure is *Brown v. Board of Education*,[7] which held that state-imposed segregation in the public schools specifically on the basis of race violates the equal protection clause. Two elements—racial classification by law and harm to blacks—were equally essential to the finding of constitutional wrong. Thus, the pro-

5. The constitutional status of de facto school segregation has frequently been adjudicated by state and lower federal courts, with discordant results. Several federal district courts have held it a violation of the equal protection clause. The federal courts of appeals have unanimously upheld it. Keyes v. School Dist. No. 1, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, — U.S. — (1972); Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966); Barksdale v. Springfield School Comm., 348 F.2d 261 (1st Cir. 1965); Gilliam v. School Bd., 345 F.2d 325 (4th Cir. 1965); Downs v. Bd. of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); Sealy v. Dept. of Public Inst., 252 F.2d 898 (3d Cir.), *cert. denied*, 356 U.S. 975 (1958).

6. The issue may, but need not, be resolved in the pending Denver desegregation case. Keyes v. School Dist., 445 F.2d 990 (10th Cir. 1971), *cert. granted*, — U.S. — (1972). There, the Court has agreed to review the Tenth Circuit's holding that Denver school authorities had no affirmative constitutional duty to desegregate racially imbalanced schools in the city's "core area" which, the trial court found, had not been segregated by official intent. The issue is complicated, however, by the trial court's finding, upheld on appeal, that schools in the Park Hills area of northeast Denver *had* been segregated by design. The narrow question thus posed is whether a school district that has committed de jure segregation with respect to certain schools in a discrete area has a duty to desegreate all schools throughout the district. If the Court answers that question affirmatively, it could reverse the Tenth Circuit's decision without reaching the question of de facto segregation. If, however, the Court were to hold that the de jure segregation in northeast Denver has no bearing upon the school district's obligation to remedy de facto segregation in the core area, the issue which is the subject of this Article would be squarely posed.

7. 347 U.S. 483 (1954).

foundly difficult questions of benevolent discrimination on the one hand (racial classifications beneficial to blacks) and de facto discrimination on the other (nonracial classifications harmful to blacks) were not before the Court and not meaningfully illumined by it.

Some dispute this analysis, contending that the issue of de facto segregation was effectively decided by the Court's declaration that "[s]eparate educational facilities are inherently unequal";[8] that the constitutional evil the Court identified was not the governmental use of race as a classifying trait but the harmful psychological and educational effects of isolating Negroes from contact with white peers in schools regarded by the community as inferior. In this view, any official action that produces these effects violates the principle for which *Brown* stands.

However, this approach misreads the Chief Justice's opinion. While it is possible to argue that the Court considered the harmful effects of segregation necessary to its disposition, there is not the slightest indication that the Court believed them alone sufficient. Misunderstanding on this point may proceed from a failure to recognize the major premise upon which the decision rests—that legislative classifications *based on race*, at least when disadvantageous to Negroes or other minorities, are constitutionally disfavored. Therefore, the disputed minor premise in *Brown* holds that school segregation is a racial classification and does in fact disadvantage and discriminate against blacks; this is what leads to the conclusion of unconstitutionality. On the other hand, a nonracial classification, even if it led to disadvantage, supports neither the minor premise in *Brown* nor its conclusion.

1. Racial Classifications and Legal Precedent

As Chief Justice Warren noted in *Brown*, the Supreme Court had previously construed the fourteenth amendment "as proscribing all state-imposed discriminations against the Negro race."[9] The central purposes of the amendment, the Court had held, were to protect the newly emancipated Negroes from laws "directed by way of discrimination against [them] as a class, or on account of their race,"[10] to guarantee "that no discrimination shall be made against them by law because of their color,"[11] and to exempt them "from unfriendly legislation against them distinctly as colored."[12]

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8. *Id.* at 495.
9. *Id.* at 490.
10. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).
11. Strauder v. West Virginia, 100 U.S. 303, 307 (1880).
12. *Id.* at 308.

"Separate but equal," the doctrine announced in *Plessy v. Ferguson*,[13] qualified this general principle in holding that enforced separation of the races in public facilities does not constitute discrimination against Negroes so long as the facilities are physically equivalent. In *Brown*, the Court dodged the separate-but-equal doctrine by distinguishing *Plessy*: In public education, segregated schools are "inherently unequal," and therefore de jure school segregation comes within the general constitutional prohibition of prejudicial racial classifications. The harmful psychological and educational effects on Negro children that were mentioned in *Brown*[14] did not constitute the basis of the ruling. This becomes more evident when *Brown* is read in the light of its companion case, *Bolling v. Sharp*.[15] In outlawing school segregation in the District of Columbia, *Bolling* held that such a legal restriction imposed on the liberty of Negro children was "not reasonably related to any proper governmental objective"[16] and was therefore arbitrary and unconstitutional. This reasoning called for invalidation of de jure school segregation even if the only resulting detriment to Negroes was denial of the liberty of access to schools from which they were barred because of their race. Any doubt that the special harmful psychological and educational effects on Negro children from school segregation mentioned in *Brown* did not constitute the basis of the ruling was laid to rest in a series of subsequent per curiam decisions invalidating state-imposed racial segregation in virtually all areas of life.[17]

B. The Empirical Significance of Brown

Though *Brown* left the legal issue of de facto segregation undecided, it may have gone far toward foreclosing a critical factual issue. In finding that "[s]eparated educational facilities are inherently unequal"[18] and separation of the races in school "has a detrimental effect upon the colored children,"[19] the Court may have supplied the central empirical premise for the argument that de facto segregation amounts to a constitutional denial of equal educational opportunity. Although

13. 163 U.S. 537 (1896).
14. 347 U.S. at 494-95.
15. 347 U.S. 497 (1954).
16. *Id.* at 500.
17. Schiro v. Bynum, 375 U.S. 395 (1964) (municipal auditorium); Johnson v. Virginia, 373 U.S. 61 (1963) (courtroom seating); Turner v. City of Memphis, 369 U.S. 350 (1962) (airport restaurants); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf course); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor and City Council v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses).
18. 347 U.S. at 495.
19. *Id.* at 494.

Brown dealt with state-imposed separation of Negro students solely because of their race, the same retarding and demoralizing effects upon black children might be found in a de facto segregated school in a Northern ghetto.

Unfortunately, the social science writings and testimony offered in support of the psychological findings of harm in *Brown*[20] had little probative force. The main theme of that evidence was that Negro children, from a very young age, are sensitive to and strongly affected by prejudice and discrimination generally. None of the empirical studies brought to the Court's attention, either in oral testimony or in the plaintiffs' Brandeis brief,[21] even purported to isolate the effects of public school segregation per se;[22] the only item even remotely addressed to that question was an article reporting the undocumented opinions of social scientists in response to a nationwide poll.[23] It is not surprising, therefore, that constitutional scholars, whatever their views as to the correctness of the decision, have been reluctant to believe that the Court relied to any great extent on the "modern authorities" cited in its opinion.[24]

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20. *Id.* at 494 n.11.

21. The appendix to appellants' brief, signed by thirty-two sociologists, anthropologists, psychologists, and psychiatrists who had done work in the field of American race relations, is reprinted as *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 MINN. L. REV. 427 (1953).

22. *See* Gregor, *The Law, Social Science, and School Segregation: An Assessment*, in DE FACTO SEGREGATION AND CIVIL RIGHTS 99, 101-04 (O. Schroeder, Jr. & D. Smith eds. 1965); van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1960); Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955).

23. Duetschen and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCH. 259 (1948).

24. Professor Herbert Wechsler found it "hard to think the judgment really turned upon the facts;" rather, it "must have rested on the view that racial segregation is, in principle, a denial of eqnality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959). Professor Edmond Cahn was loathe to "have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records." Cahn, *supra* note 22, at 157-58.

To him, the fact that "racial segregation under government auspices inevitably inflicts humiliation" and that such official humiliation "is psychologically injurious and morally evil" was self-evident, so obvious that "the Justices of the Supreme Court could see it and act on it even after reading the labored attempts by plaintiffs' experts to demonstrate it 'scientifically.'" *Id.* at 159. The Court's gracious allusion to the psychological experts as "modern authority" was merely "the kind of gesture a magnanimons judge would feel impelled to make," but "once the courtesy had been paid, the Court was not disposed in the least to go farther or base its determination on the expert testimony." *Id.* at 160.

Similarly, Professor Charles L. Black, though considering it beyond dispute that southern segregation is "actually conceived and does actually function as a means of

If the Court's empirical observations did not, and could not, soundly rest upon the evidence of record, how then does one properly account for the presence of these observations in the opinion? At least three possible answers might be suggested: first, the findings of psychological harm were self-evident and therefore subject to judicial notice; second, the findings were inessential to the result in *Brown* and therefore did not need the solid empirical foundation that would have been required had constitutional imperatives truly hinged upon them; third, the findings were merely a way of saying that the state, having drawn a racial classification, could not sustain its consequent burden of showing racially separate schools to be equal. Each of these theories would rationalize the findings in *Brown* as to de jure segregation but render them less pertinent to the issue of de facto segregation.

The harm was self-evident. This is essentially the view taken by Professors Edmond Cahn and Charles Black.[25] But the segregation these commentators thought patently degrading and dehumanizing was the systematic, officially commanded apartheid of the South, not the de facto racial imbalance of the North. The question, wrote Black, is not whether segregation must always be discriminatory, but "whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union."[26] It is southern society

> that has just lost the Negro as a slave, that has just lost out in attempt to put him under quasi-servile Codes, . . . that views his blood as a contamination and his name as an insult . . . that extralegally imposes on him every humiliating mark of low caste and that until yesterday kept him in line by lynching careless of his consent, moved by law, first to exclude him from voting, and secondly, to cut him off from mixing in the general public life of the community.[27]

The argument of self-evidence is acceptable only so long as it focuses upon those aspects of school segregation that are integral to the southern caste system. Take away the element of official racial classification and the harmfulness of school segregation becomes a matter requiring proof—proof of a much higher order than that presented in *Brown*.

The harm was superfluous. According to the view, *Brown* interpreted the equal protection clause to forbid the state's use of race as a

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keeping the Negro in a status of inferiority" denied, nonetheless, that "anything like principle reliance was placed on the formally 'scientific' authorities, which are relegated to a footnote and treated as merely corroborative of common sense." Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 (1960).

25. See note 24 *supra*.

26. Black, *supra* note 24, at 427.

27. *Id.* at 426.

basis for excluding persons from particular public facilities or for separating one group of persons from another. Arguably, both propositions were implicit in earlier decisions holding that Negroes may not be barred on racial grounds from a law school open to whites[28] and may not be set apart within such a school.[29] Under this view, the discussion of inferiority feelings in *Brown* becomes merely a buttressing argument designed to show, in the Court's words, that the intangible considerations resorted to in the higher education cases "apply with added force to children in grade and high schools."[30]

The harm was presumed and not disproven. Under this approach, the findings of harm simply negate the proposition that racially separate schools are demonstrably equal and segregation clearly harmless—a proposition that, in view of the presumptive invalidity of racial

28. Sweatt v. Painter, 339 U.S. 629 (1950).

29. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

30. 347 U.S. at 494. This construction, too, finds support among commentators. Professor Ira M. Heyman contends that the Chief Justice's opinion, read properly, "establishes the proposition that the fourteenth amendment renders invalid laws employing racial classifications in the field of public education whether or not Negroes are made to feel inferior thereby." Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CALIF. L. REV. 104, 105 (1961). In Heyman's view, state-imposed segregation in public schools violates the equal protection clause irrespective of any showing of specific harm. It is unconstitutional simply because it bars persons, on racial grounds alone, from access to facilities which are inherently unique, and in that sense "unequal." The earlier *Sweatt* and *McLaurin* decisions, he points out, were cited in *Brown* for the proposition that "intangible considerations," qualities "incapable of objective measurement" might render physically equivalent educational institutions "unequal"; *Brown* merely drew the appropriate conclusion—that since no two schools are alike in all the intangibles relevant to equality and since the differences are "incapable of objective measurement" separate schools cannot be regarded as "equal" no matter how similar their objective characteristics. To ask whether the public school from which a Negro child is excluded by race is objectively superior to the one reserved for him is no more appropriate than to ask whether the neighborhood to which the state bars him entry or the house it restricts him from buying, in both cases on racial grounds, is objectively superior to the neighborhoods or houses which remain accessible to him. Under this reading, *Brown* has no implications whatever for de facto segregation, since denial of admission to a particular school—and *that* is the constitutionally impermissible ingredient of segregation—is violative of equal protection only when race is used as the criterion of exclusion.

Professor John Kaplan proposes a similar reading of *Brown*. Kaplan, *Segregation, Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U.L. REV. 157 (1963). In his view, the decision merely applied to elementary and secondary schools a principle the Court had already established for higher education in *McLaurin*: that "race may not be made the criterion for separating one group of students from another." *Id.* at 172. In *Brown*, as in *McLaurin*, "it was the racial separation, rather than any inequality of facilities or other educational benefits, that was the essence of the plaintiffs' claim." *Id.* In observing that "such considerations apply with added force" to children in grade and high schools because of the psychological harm these children suffer, the Court "was asserting that *Brown* was in a sense an easier case than *McLaurin* and *Sweatt v. Painter*, where this type of harm to young children was not to be expected," rather than "that harm to Negro children or inequality of schools was the essence of the constitutional violation." *Id.*

classifications, the state was burdened with proving. Professor Louis Pollak, though supporting the assignment of burden of proof to the state and applauding the result in *Brown,* thought it "corrosive of the judicial function" to translate this "amateur wisdom into constitutional imperatives."[31] He would have reached the mark by another route. Starting from the established premise that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect"[32] and thus "not entitled to the ordinary presumptions of validity,"[33] he would have concluded that "the reasonableness of these racial distinctions and the absence of harm said to flow from them" could not be sustained unless the Court "were prepared to say that no factual case can be made the other way."[34]

Professor Pollak did not offer this as an interpretation of what the Chief Justice had said but as an alternative rationale. Yet it is possible to interpret *Brown* and *Bolling* along the lines Pollak proposed. In *Bolling* the Court declared that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[35] Upon such scrutiny it becomes clear that "[s]egregation in public education is not reasonably related to any proper governmental objective."[36] A statute so lacking in affirmative justification could therefore only be salvaged by a conclusive showing, not even attempted by the state in *Brown,* that racially segregated education was utterly harmless to members of the minority group.

This was exactly the opposite of the situation in social and economic regulatory legislation, where the Brandeis brief is a more effective device for upholding statutes of this kind than for overturning them.[37] Such legislation may be defended by merely suggesting a possible factual basis for the legislative judgment in order to confirm its rationality, a purpose satisfactorily served even by a brief containing methodological flaws, incomplete data, and large doses of conjecture. In the case of racially discriminatory legislation, the presumption of constitutionality is reversed; it is those asserting the constitutional violation who are entitled to the benefit of factual doubt. They need merely show that the possibility of harm cannot be ruled out, and to that modest purpose even a weak Brandeis brief is more than adequate.

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31. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. PA. L. REV. 1, 27 (1959).

32. Korematsu v. United States, 323 U.S. 214, 216 (1944).

33. Pollak, *supra* note 31, at 27.

34. *Id.*

35. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

36. *Id.* at 500.

37. P. FREUND, THE SUPREME COURT OF THE UNITED STATES 151-52 (paperback ed. 1961); Cahn, *Jurisprudence,* 31 N.Y.U.L. REV. 182, 183 (1956).

With the issue in that posture, the Court in *Brown* was wholly justified in accepting the sociological evidence with an uncritical eye. If 90 percent of the experts polled held the opinion, however unsupported, that enforced segregation had detrimental psychological effects on the Negro child, how could the Court exclude the possibility? If the statutes at issue were part of a larger system of legally imposed segregation, why be at pains to isolate the harmful effects of school segregation per se from those of the widespread discrimination and prejudice mandated and generated by the state?

It is quite otherwise with de facto segregation, which is neither imposed by a state racial classification nor simply one aspect of a larger state system of apartheid. In the de facto situation, the alleged harmful effects on Negro children arise in the context of a state policy—the preservation of neighborhood schools—that has a proper governmental objective, and the harmful effects are not self-evident nor judicially noticeable; the challengers of school segregation must therefore face the burden of proving these effects. The findings in *Brown,* based on the conclusory opinions of social scientists unsupported by actual data, merely raise possibilities of harm, but do not sustain this burden of proof. Thus, as already shown by the previous two arguments, the findings of harm in *Brown* are largely irrelevant to the issue of de facto segregation.

C. Subsequent Judicial Applications of Brown: The Blurring of the De Jure-De Facto Distinction

1. Segregation by Gerrymander: The Significance of "Motive"

If the distinction between de facto and de jure segregation was, in principle, reasonably clear at the time of *Brown,* subsequent developments have done much to blur it. The first development was the recognition that the fourteenth amendment outlaws not only explicit racial classifications in the field of pupil placement, but also such subtler methods of state-created segregation as that accomplished by gerrymandering of attendance zones or selecting school construction sites. In *Taylor v. Board of Education,*[38] the Second Circuit found that the school board of New Rochelle, New York, had for many years contrived boundary lines in such a way as to establish an all-Negro school and that its rigid adherence to those boundaries could have had no rational purpose other than to perpetuate the original segregation. The Court held this a violation of the equal protection clause, despite the absence of a formally stated policy of racial separation, and ordered

38. 294 F.2d 36 (2d Cir.), *cert. denied,* 368 U.S. 940 (1961).

that children in the segregated Negro school be permitted to transfer out on request.[39]

Since the fourteenth amendment "nullifies sophisticated as well as simple-minded modes of discrimination,"[40] it was inevitable that intentional racial gerrymandering be proscribed. Yet this result is hard to reconcile with the oft-stated principle that legislative motive is not a proper basis for holding a statute unconstitutional.[41]

It may be that the issue of racial motivation in school segregation cases will be limited to situations in which the state is unsuccessful in showing any rational purpose underlying its action, other than segregation.[42] However, courts have not indicated that they will take such a limited view and have instead sympathetically entertained a number of cases involving purposeful segregation without even mentioning the traditional policy against prying into motive.[43]

If the courts are indeed prepared to inquire into motive, thorny questions will arise even if one assumes that racial motivation is capable of being proven at trial. What of the case in which one or more members of a school board, but less than a majority, are found to have acted on racial grounds? What if it appears that the school board's ac-

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39. 294 F.2d at 39.

40. Lane v. Wilson, 307 U.S. 268, 275 (1939) (referring to the fifteenth amendment).

41. Palmer v. Thompson, 403 U.S. 217, 224 (1971); United States v. O'Brien, 391 U.S. 367, 383 (1968); Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 224 (1949). *See generally* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

The Court has not always honored this principle. For instance, in Gomillion v. Lightfoot, 364 U.S. 339 (1960), an act of the Alabama legislature changed the city of Tuskegee's boundaries from a square to an irregular 28-sided figure, allegedly removing "from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident." *Id.* at 341. The Court held that the complaint of Tuskegee's Negro residents, now outside the city's boundaries, amply stated a claim of racial discrimination in violation of the fifteenth amendment, and that if the allegations remained uncontradicted at trial, "the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of towns so as to deprive them of their pre-existing municipal vote." *Id. But see* Palmer v. Thompson, 403 U.S. 217, 224 (1971), and United States v. O'Brien, 391 U.S. 367, 383 (1968), both interpreting *Gomillion* as a discriminatory-effect, rather than a discriminatory-motive, case. This retrospective gloss has puzzled at least one commentator [Ely, *supra*], as it does the present author.

42. In Gomillion v. Lightfoot, 364 U.S. 339 (1960) [see note 41 *supra*], the state's allegedly discriminatory purpose emanated from the most superficial examination of the statute and its operative effects. No excursion into legislative history was undertaken to expose it; no innocent explanation for the state's action seemed possible.

43. *E.g.*, United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1968); Clemons v. Board of Educ., 228 F.2d 853 (6th Cir.), *cert. denied*, 350 U.S. 1006 (1956); Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

tion was prompted by a mixture of motives, including constitutionally innocent ones that alone would have prompted the board to act? What if the members of the school board were not themselves racially inspired but wished to please their constituents, many of whom they knew to be so? If such cases are classified as unconstitutional de jure segregation, there is little point in preserving the de jure-de facto distinction at all. And it may well be that the difference between any of these situations and one in which racial motivation is altogether lacking is too insignificant, from the standpoint of both the moral culpability of the state officials and the impact upon the children involved, to support a difference in constitutional treatment.[44]

2. *Remedying De Jure Segregation*

The development that, more than any other, has blurred the distinction between de jure and de facto segregation is the heavy remedial burden the Court has imposed in decisions dealing with southern school desegregation. Beginning with *Green v. County School Board*[45] in 1968 and culminating in *Swann v. Charlotte-Mecklenburg Board of Education*[46] in 1971, the Court ruled that school districts in which the races were formerly segregated by law must not simply discontinue that practice but must also take affirmative steps to assure that student bodies are no longer identifiable as "Negro" or "white."

These decisions apply only to school boards that formerly operated state-compelled dual systems,[47] yet they have an important bearing on the problem of de facto segregation. First, they cast a retro-

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44. An additional development that tends to obscure the distinction between de facto and de jure segregation is the increasing recognition of the role that official action, state and federal, has played in the creation and continuance of racially clustered residential patterns, North as well as the South. See text accompanying notes 192-93 *infra*.

45. 391 U.S. 430 (1968).

46. 402 U.S. 1 (1971).

47. The following excerpts from *Swann* underscore that de jure segregation alone is the target evil.

> This case and those argued with it arose in states having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race.

402 U.S. at 5-6.

> We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. . . . We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree.

Id. at 22, 23.

spective light on the meaning of *Brown* and, more especially, upon the status of the "finding" that segregation does psychological and educational harm to Negro children. As we have seen, some scholars regard that finding as merely a buttressing argument, inessential to the result in *Brown* and therefore not subject to the rigorous empirical scrutiny that would be required if constitutional imperatives depended on it. The *Green* and *Swann* cases throw doubt on that interpretation and suggest a much more central role for *Brown*'s empirical finding. In imposing an affirmative duty to end what might be called "post-de jure" segregation—continued racial imbalance in schools formerly segregated by law—these cases presuppose that de jure segregation has ill effects that continue even when legislative racial classification is removed. Otherwise, what reason would there be for burdening southern school districts with an affirmative duty to end desegregation in fact? If the evil struck at in *Brown* were simply the use of racial laws to separate black students from white students or to exclude them from particular schools, and if the harmfulness of segregation pending more persuasive empirical evidence were otherwise considered uncertain, no more should be required of the state than to abstain from drawing racial lines.

Second, the Court's remedial strictures threaten the viability of the de facto-de jure distinction at the moral and political levels. That distinction, and the massively differential treatment predicated upon it, are bitterly resented by a large segment of the southern community, who regard the present posture of the federal courts as imposing a constitutional double standard based on sectional discrimination. Southeru parents ordered to bus their children to distant schools in the interest of racial balance while their northern counterparts are permitted segregated neighborhood schools may understandably feel unjustly treated. One need not agree with the Sixth Circuit that a disparate rule for North and South is tantamount to a "judicial Bill of Attainder"[48] in order to acknowledge that such a distinction, like others of major consequence and deep social divisiveness, would ordinarily be subjected to rigid scrutiny and retained only for substantial reasons. What reasons justify the imposition of the duty only on school boards that recently practiced de jure segregation?

a. The remedial cases in historical context. Consideration of these issues is best approached by first briefly examining the historical context. The original *Brown* opinion in 1954 (*Brown I*) did not address itself to the matter of remedy; that phase of the litigation was handled in a second opinion (*Brown II*) a year later.[49] The cases involved were remanded to the district courts with instructions that school boards be

48. Monroe v. Board of Comm'rs, 380 F.2d 955, 958 (6th Cir. 1967), *vacated*, 391 U.S. 450 (1968).

49. Brown v. Board of Educ., 349 U.S. 294 (1955).

required "to achieve a system of determining admission to the public schools on a nonracial basis";[50] to "effectuate a transition to a racially nondiscriminatory school system";[51] and "to admit to public schools on a racially nondiscriminatory basis with all deliberate speed."[52] These generalities left considerable room for interpretation, not only as to the pace of the transition, but also as to what a "racially nondiscriminatory school system" should look like when achieved.[53]

On the premise that *Brown I* and *II* did not require enforced integration but merely freedom to attend the school one chooses regardless of race, virtually all the southern states enacted "pupil placement" laws requiring that children be assigned initially to the old racially designated schools but be given opportunities to transfer to schools formerly reserved for members of the other race.[54] By the mid-sixties, decisions of the relevant courts of appeals had ruled out this practice, making it clear that no plan of desegregation would be acceptable, even as a temporary expedient, unless initial assignments were nonracial.[55] State racial classifications were impermissible at any step in the assignment process. Even so, few observers foresaw that *Brown II* would be read as imposing upon the South a more exacting duty than the fourteenth amendment itself was thought to impose upon the North. Professor Alexander Bickel expressed the general view when, in 1964, he wrote that "what most of us visualize as the end result of desegregation is a school system in which there is residential zoning, either absolute or modified by some sort of choice or transfer scheme, and in which, in any event, children are assigned without regard to their race."[56]

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50. *Id.* at 300.

51. *Id.* at 300-01.

52. *Id.* at 301.

53. A distinguished three-judge district court, in an early dictum that came to be widely quoted, declared that "the Constitution . . . does not require integration," but merely forbids discrimination. *Brown,* it said, did not decide that a state "must mix persons of different races in the schools or . . . deprive them of the right of choosing the schools they attend" but only that it "may not deny to any person on account of race the right to attend any school that it maintains." Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955). The above quote was expressly overruled in United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 389 n.2 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967).

54. *See generally* Meador, *The Constitution and the Assignment of Pupils to Public Schools,* 45 VA. L. REV. 517 (1959); Note, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts,* 62 COLUM. L. REV. 1448 (1962).

55. Dillard v. School Bd., 308 F.2d 920 (4th Cir. 1962), *cert. denied,* 374 U.S. 827 (1963); Green v. School Bd., 304 F.2d 118 (4th Cir. 1962); Northcross v. Board of Educ., 302 F.2d 818 (6th Cir.), *cert. denied,* 370 U.S. 944 (1962); Dove v. Parham, 282 F.2d 256 (8th Cir. 1960); Mannings v. Board of Pub. Instruction, 277 F.2d 370 (5th Cir. 1960); Gibson v. Board of Pub. Instruction, 272 F.2d 76 (5th Cir. 1959).

56. Bickel, *The Decade of School Desegregation, Progress and Prospects,* 64 COLUM. L. REV. 193, 212 (1964).

Some southern school boards did adopt nonracially classified residential zoning plans; others supplemented them with transfer options. The great majority, however, opted for "freedom of choice" plans under which pupils selected their own schools in the first instance, priority (in cases of overcrowding) going to those living nearest the chosen school.[57] All of these measures were thought to be consistent with guidelines established in 1965 by the Department of Health, Education, and Welfare as conditions of eligibility for federal financial assistance.[58] The critical question became whether freedom of choice or free transfer (or residential zoning, though this issue was slower in coming to the courts) was an end in itself, constituting full compliance with the school board's obligation to establish a unitary nonracial system, or whether, in the broadest interpretation, such plans were acceptable only as a step towards a constitutionally mandated system of racially mixed schools unidentifiable, even de facto, as "Negro" or "white." The courts of appeals were divided—the Fourth and Sixth Circuits taking the former view,[59] the Fifth Circuit the latter,[60] and the Eighth wavering to and

57. Approximately 57% of all voluntary desegregation plans approved by the Office of Education in 1965 were based on freedom of choice. Twelve percent used geographic zoning. The remainder utilized freedom of choice to some degree, although not as the sole means to desegregation. U.S. COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-66, at 29 (1966). *See* Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 64 (1967).

58. In Title VI of the Civil Rights Act of 1964, Congress provided that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financed assistance." 42 U.S.C. § 2000d (1970). Federal agencies empowered to extend such assistance were directed to issue implementary regulations. 42 U.S.C. § 2000d-1 (1970). The Department of Health, Educatiou and Welfare responded by issuing regulations covering discrimination in federally aided schools [45 C.F.R. §§ 80.1-80.13 (1971)], and in April 1965, the Office of Education established guidelines to aid local and state school officials in their desegregation efforts. U.S. OFFICE OF EDUCATION, HEW, GENERAL STATEMENT OF POLICIES UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 RESPECTING DESEGREGATION OF ELEMENTARY AND SECONDARY SCHOOLS (1965). The 1965 guidelines set forth three types of acceptable plans: geographic attendance areas, freedom of choice, and a combination of the two. Revised guidelines issued in 1966 set forth more detailed procedural requirements for freedom of choice plans and, significantly, conditioned the acceptability of such plans upon their effectiveness in furthering desegregation. U.S. OFFICE OF EDUCATION, HEW, REVISED STATEMENT OF POLICIES FOR SCHOOL DESEGREGATION PLANS UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 § 181.54 (1966). *See generally* Dunn, *supra* note 57; Note, *School Desegregation and the Office of Education Guidelines*, 53 GEO. L.J. 325 (1966).

59. Green v. County School Bd., 382 F.2d 338 (4th Cir. 1967), *vacated and remanded*, 391 U.S. 430 (1968); Monroe v. Board of Comm'rs, 380 F.2d 955 (6th Cir. 1967), *vacated and remanded*, 391 U.S. 450 (1968); Bradley v. School Bd., 345 F.2d 310 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965).

60. United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

fro depending on the panel.[61]

The issue came to the Supreme Court in *Green v. County School Board.*[62] The context was a rural Virginia county throughout which Negroes and whites were dispersed in roughly equal numbers. In 1965 the school board took its first and only step toward compliance with *Brown,* adopting a freedom of choice plan under which each pupil was permitted to choose between the formerly all-white and the formerly all-Negro school. After three years of operation, not a single white child had chosen to attend the formerly Negro school, while only 15 percent of the Negroes had enrolled in the formerly white school. The school board maintained, and the Fourth Circuit held,[63] that the plan fully discharged the state's duty to achieve a "racially nondiscriminatory school system."[64] Writing for a unanimous Court, Justice Brennan declared that in *Brown II,* school boards operating state-compelled dual systems

> were nevertheless clearly charged with the *affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.* [emphasis added] . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*[65]

Freedom of choice, therefore, was not an end in itself but "only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end."[66] New Kent County's freedom of choice plan, rather than furthering the dismantling of the dual system, had "operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board."[67] Accordingly, the Board was required to come forward with a new plan and, "in light of other courses which appear open . . . such as zoning, fashion steps which promise

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61. *Compare* Raney v. Board of Educ., 381 F.2d 252 (8th Cir. 1967), *rev'd and remanded,* 391 U.S. 443 (1968), *and* Clark v. Board of Educ., 369 F.2d 661 (8th Cir. 1966), *with* Jackson v. Marvell School Dist., 389 F.2d 740 (8th Cir. 1968); Kemp v. Beasley, 389 F.2d 178 (8th Cir. 1968); *and* Kelley v. Altheimer, 378 F.2d 483 (8th Cir. 1967).

62. 391 U.S. 430 (1968).

63. 382 F.2d 338 (4th Cir. 1967). The court referred to its reasoning in Bowman v. County School Bd., 382 F.2d 326 (4th Cir. 1967) in upholding the school board's policy.

64. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

65. 391 U.S. at 437-39.

66. *Id.* at 440, *quoting* Bowman v. County School Bd., 382 F.2d 326, 333 (4th Cir. 1967).

67. 391 U.S. at 441-42.

realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[68]

In a companion case from the Sixth Circuit, *Monroe v. Board of Commissioners*,[69] the Court rejected, on similar reasoning, a free transfer plan that allowed a child, after registering in his assigned neighborhood school, to transfer to another school of his choice if space were available. Here, as in *Green*, residential zoning would have produced a considerable measure of integration had it not been accompanied by the transfer option, which was exercised by every white child in the "Negro school" and by nearly every Negro child in one of the two "white schools." The result was about the same as in *Green*: the Negro school remained all-Negro and 80 percent of the Negro students attended it; one of the white schools remained virtually all white, while the other became mixed.

The essence of *Green* and *Monroe* was that free choice or transfer plans do not satisfy the school board's constitutional obligation under *Brown II*, where straight residential zoning would produce a greater measure of desegregation. The Court had no occasion to decide whether geographical zoning would itself be insufficient if other methods—such as pairing or consolidation of schools—would produce greater integration.[70] That question was answered in *Swann v. Charlotte Mecklenburg Board of Education*,[71] which held that federal district courts have wide remedial discretion in the field of desegregation and do not abuse it by requiring major restructuring of attendance areas along with whatever reasonable busing that may entail. In the particular case, the trial court had disapproved a plan submitted, after much prodding and delay, by the Charlotte, North Carolina school board in favor of a more ambitious one (the "Finger Plan") prepared by a court-appointed expert in school administration. The board proposed to close certain schools and revise certain boundary lines, but it insisted that attendance areas remain contiguous and therefore rejected such techniques as the pairing and clustering of non-

68. *Id.* at 442.

69. 391 U.S. 450 (1968).

70. The Fifth Circuit so held, declaring in a series of decisions that school boards must, where zoning alone does not produce adequate integration, adopt pairing, consolidation, and involuntary busing arrangements of the sort most federal courts have held not to be required in the context of northern de facto segregation. Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682 (5th Cir.) *cert. denied*, 396 U.S. 940 (1969); United States v. Greenwood Mun. Separate School Dist., 406 F.2d 1086, 1093 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969); Graves v. Walton County Bd. of Educ., 403 F.2d 184 (5th Cir. 1968); United States v. Board of Educ., 396 F.2d 44 (5th Cir. 1968); Davis v. Board of School Comm'rs, 393 F.2d 690, 694 (5th Cir. 1968).

71. 402 U.S. 1 (1971).

adjacent zones; in consequence, more than half the black elementary school students would have remained in schools overwhelmingly black. The Finger Plan, on the other hand, by transporting black students in the first four grades to outlying white schools and white students in the fifth and sixth grades to inner-city black schools—an average round trip of 15 miles for the 10,000 pupils to be bused—promised to produce student bodies ranging from 9 to 38 percent black (the district-wide proportion being 21 percent black). The trial court's order, insofar as it approved this plan, was vacated by the Fourth Circuit.[72] Though agreeing that school boards must use every feasible means of accomplishing school desegregation, including the merger of nonadjacent attendance areas, and that the Charlotte board's plan was therefore properly disapproved, the court of appeals concluded that the Finger Plan would place an unreasonable burden on the school system and its pupils.

The Supreme Court, Chief Justice Burger writing, made it plain that "an assignment plan is not acceptable simply because it appears to be neutral;" such a plan

> may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments.[73]

The objective, said the Court, "is to dismantle the dual school system";[74] school boards must use all reasonable means to that end and district judges have ample discretion to determine where the limits of reasonableness lie. Mathematical ratios may be used as "a starting point in shaping a remedy" but not as an "inflexible requirement";[75] one-race or virtually one-race schools "will require close scrutiny to determine that school assignments are not part of state-enforced segregation;" but "the existence of some small number of [such schools] is not in and of itself the mark of a system that still practices segregation by law," and school authorities have the burden (hence the opportunity) "to satisfy the Court that their racial composition is not the result of present or past discriminatory action on their part."[76] Whatever else, an acceptable plan must provide for the optional transfer of those in the majority racial group of a particular school to other schools where

72. 431 F.2d 138 (4th Cir. 1969).
73. 402 U.S. at 28.
74. *Id.*
75. *Id.* at 25.
76. *Id.* at 26.

they will be in the minority, must grant them free transportation, and must make space available for them in the schools of their choice.

The *Swann* decision clarifies much but also leaves much unclear. One area of uncertainty is the allocation of discretion among school authorities, district courts, and appellate courts. To what extent may the district judge properly substitute his judgment for that of school officials in choosing between reasonable alternatives? How much deference is due the district court's decision when it approves a school board's proposal in the face of strong argument that another plan would be more effective?[77]

There is, however, a more basic unanswered question. The *Swann* Court, in the tradition of *Brown II* and *Green*, declares it the constitutional objective to dismantle the dual school system. This formulation leaves in the dark whether the basic remedial goal—to be pursued within reason and with deference to the competing interests—is (a) to eliminate all racial imbalance whatever its source, (b) to eliminate *severe* racial imbalance—the "one-race" or "racially identifiable" school—whatever its source; or (c) to eliminate *severe* racial imbalance resulting from deliberate racial discrimination past or present. The first view would tolerate nothing less than a uniform ratio of blacks to whites in all schools, if feasible. The third view, on the other hand, would not be offended even by severe and avoidable imbalance so long as this condition were proven not to be the consequence, direct or indirect, of deliberate discrimination. The middle view, probably nearest the Court's mind, would accept some deviation—even avoidable deviation —from the norm of strict racial balance, though just how much is an open question.[78]

b. Theories for distinguishing de facto segregation. What basis might a court have for requiring the elimination of racially identifiable schools in a district formerly segregated by law that would not also apply to a district where segregation was never legally prescribed, at least not in recent times? In blunt terms, if busing is obligatory in the South, why

77. These issues were not posed in the *Swann* case because the Charlotte school board had so clearly defaulted. Had the board come forward promptly with a more adequate plan, albeit less ambitious than the Finger Plan, one wonders (a) whether the District Court would have been justified in rejecting the board's proposal in favor of the more effective but also more burdensome alternative, and (b) whether a decision *approving* the former in preference to the latter (as in effect the Fourth Circuit did) would have been subject to reversal.

78. Arguably, the degree of permissible variation should reflect in part a judgment as to the educational consequences of one or another racial composition. The difference between a black representation of 9 per cent and one of 38 per cent (the range approved by the District Court in *Swann*) may be academically inconsequential whereas the much smaller spread between 40 per cent and 60 per cent may be critical for the child's school performance.

not also in the North? There are, I suggest, two general rationales for such a duty in any case. First, the duty might be justified as a prophylactic, a way of making certain that a school board's policy of racial segregation has in fact been discarded. A district in which officials have long segregated children by race, even after *Brown*, is no longer entitled to the usual presumption of good faith;[79] on the contrary, a court may reasonably demand assurance that the school board "has abandoned its earlier unconstitutional policy of segregation, assurance which only the objective fact of actual integration can adequately provide, inasmuch as only that is 'clearly inconsistent with a continuing policy of compulsory racial segregation.' "[80] Furthermore, the very existence of racially homogeneous student bodies, even if innocently created, is a standing invitation to racial discrimination in the distribution of educational resources; when a school board has shown a disposition to act from racial motives in the past, a court may properly afford relief that will remove the opportunity to do so in the future.[81]

This rationale applies only to districts that formerly segregated children by race, because only in these cases is it possible to justify an inference of bad faith. This is consistent with the narrow reading of *Brown I* as nothing more than a ban upon racial classification, and, strictly speaking, it does not depend on the premise that even de jure segregation is educationally or psychologically harmful.[82] There is no indication, however, that this prophylactic rationale is in fact the basis on which the courts have acted.

The second theory, on which the Court seems more clearly to have acted, is curative rather than prophylactic. The aim of the relief afforded must be "to render a decree which will so far as possible eliminate the discriminatory effects of the past. . . ."[83] Not only must the state cease discriminating by race; it must, to the exent possible, undo the consequences of its prior discrimination.

The principle is a familiar one. In a variety of contexts, the Court has fashioned equitable relief with a view to "wiping the slate clean"[84] and assuring the elimination of the "discriminatory effects of

79. In Green v. County School Bd., 391 U.S. 430, 439 (1968), the Supreme Court held that adoption of freedom-of-choice plans, where other "more promising courses of action" are available, demonstrates "a lack of good faith" on the part of the school board.

80. Hobson v. Hansen, 269 F. Supp. 401, 495 (D.D.C. 1967), *aff'd*, 408 F.2d 175 (D.C. Cir. 1969).

81. *Cf.* United States v. Crescent Amusement Co., 323 U.S. 173, 189-90 (1944).

82. Of course, without that assumption it is doubtful whether any court would break from the traditional policy of refusing to impute improper motives to state officials in respect to action otherwise constitutionally permissible.

83. Green v. County School Bd., 391 U.S. 430, 438 n.4 (1968).

84. NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241, 250 (1939).

the past. . . ."[85] But while the principle is sound, its application to the questions of school desegregation and the validity of residential assignment is more problematic. Why should it be thought necessary, in order to dissipate the discriminatory effects of the dual school system, to adopt a policy of forced integration? More particularly, in what respect does a racially neutral policy of residential zoning fail to eliminate the discriminatory effects of the past?

Since the Supreme Court has not spoken directly to these questions, we are forced to speculate. This much seems clear: the mere existence of racially imbalanced student bodies under a bona fide system of nonracial zoning cannot, without more, be characterized as a product of past unconstitutional discrimination. That today's policy of residential zoning produces the same racial composition as yesterday's policy of official segregation does not by itself establish a causal relationship between yesterday's policy and today's racial composition, for the latter might well have occurred even without the former.

There are, however, at least two possible lines of argument under which the curative (or dissipation-of-effects) rationale might support an affirmative duty of racial mixing in de jure situations while not extending it to de facto contexts. The first argument is that the longstanding policy of racial segregation in southern schools has contributed historically to the formation of racially segregated neighborhoods, causing families, both black and white, to cluster around the schools their children were required to attend. In the words of the Fifth Circuit, "school boards, utilizing the dual zoning system, . . . selected Negro neighborhoods as suitable areas in which to locate Negro schools. Of course the concentration of Negroes increased in the neighborhood of the school. Cause and effect came together."[86] To the extent this may have happened, the present racial composition of the schools is rightly viewed as the legacy of past unconstitutional conduct.

The main difficulty with this theory is its empirically questionable premise—that the previously segregated schools are significantly responsible for the presently segregated neighborhoods. Residential segregation is far more prevalent in the North, where legally-imposed

85. Louisiana v. United States, 380 U.S. 145, 154 (1965). The Court barred Louisiana from using a fairly drawn and fairly administered literacy test for voting where the effect would be to perpetuate the advantage gained by white voters who had been registered under a previous discriminatory test while Negroes were excluded.

86. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967). The Supreme Court may have had this possibility in mind when it observed that the existence of uniracial schools requires school officials "to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." Swann v. Board of Educ., 402 U.S. 1, 26 (1971).

school segregation was relatively rare, than in the South. Admittedly, it is possible that neighborhoods became segregated in precisely those southern communities where Negro and white schools were located far enough apart to permit nonoverlapping racial enclaves to develop around them. But given the absence of solid evidence to that effect, and in view of the contrary inference that may be drawn from the northern experience, the bare conjecture is a frail basis on which to construct a remedial duty of such mammoth proportions.

The second argument is that official school segregation helped to shape the attitudes of the community, both black and white, toward Negroes and Negro schools. These attitudes still persist and give segregation its psychological sting. Thus, even if present segregation is not itself traceable to the state's past unconstitutional conduct, the damaging effects of that segregation assuredly are. The point is not merely, as has been suggested,[87] that as long as the schools are segregated in fact the community may cling to the assumption that they are still segregated in law, but rather that the community, having acquired the habit of regarding Negro schools as inferior, will continue to do so even though fully aware that segregation is no longer official policy. Thus, the stigma originally placed on the Negro schools by the policy of official segregation now survives that policy and will not be erased until those schools have lost their racial identity.

c. Considerations challenging the distinction between de facto and post-de jure segregation. To review briefly, we have examined two possible bases for distinguishing the "de jure-affirmative remedy" decisions from the de facto segregation context—the "prophylactic" theory and that explanation of the "curative" theory which rests on the carryover of the harmful effects of de jure segregation. But additional considerations throw doubt on their power to distinguish.

The dissipation-of-effects rationale clearly rests on the tacit premise that de jure segregation—and, more than that, "post-de jure" segregation (continuing racial imbalance in schools formerly segregated by law)—is educationally and psychologically harmful. *Brown I*, we have seen,[88] did not strictly depend on that assumption; *Green* and *Swann* almost surely did. As suggested earlier, if the Court were not convinced that schools formerly segregated in law and now segregated in fact were and continue to be inferior schools, its remedial demands upon the offending school districts would be difficult to justify. The

87. Hobson v. Hansen, 269 F. Supp. 401, 495 (D.D.C. 1967), *aff'd*, 408 F.2d 175 (D.C. Cir. 1969).

88. See text accompanying notes 7-17 *supra*.

assumption of harmfulness is particularly unavoidable if the rationale for requiring the liquidation of post-de jure segregation is the persisting stigma generated originally by the policy of enforced segregation.

In support of the de facto-de jure distinction, one could, perhaps, still argue that it is only in the atmosphere of a racist, previously de jure-segregated community, that racial imbalance has continuing harmful effects.[89] Alternatively, it might be contended that the burden of empirical uncertainty is allocated differently in the southern post-de jure context than in the northern de facto context. Just as in *Brown* the state may be thought to have had the burden of persuasion on the relevant questions of constitutional fact, and what was "found" was merely that this burden had not been carried—that de jure segregation was neither proven harmful nor self-evidently harmless—[90] so the "finding" implicit in *Green* and *Swann* was merely that post-de jure segregation is not demonstrably harmless, that once a school board has engaged in racial discrimination factual doubts will be resolved against it not only for substantive purposes but for remedial purposes as well. Hence, the argument concludes, there would still be room to resolve factual uncertainties in favor of the challenged state action in the case of de facto segregation, where the usual presumption of constitutionality continues to operate. This rejoinder, however, is less than convincing. It glides too quickly from immediate substantive violation to ultimate procedural remedy. If the Court's willingness to outlaw de jure segregation even without convincing proof of its harmful effects were understandable only in terms of the strong constitutional policy against classification by race,[91] once racial classification ended, so too would the justification.

Irrespective of how the dispute over "harmful effects" is resolved, there exists a larger consideration. Although concededly not unreasonable, one wonders uneasily whether something more solid ought not be required—a firmer and more demonstrable link between present segregation in fact and past segregation by law—in order to justify a remedy which, however desirable as a matter of social policy, so significantly burdens the daily lives of millions of people. The uneasiness becomes more acute when the burden falls on a single region of the country. Arguably, it requires stronger reasons than any we have mustered to justify a sectional discrimination of such major proportions. Since the *Swann* case appears to make *Green* and its burgeoning progeny settled law, the only apparent way to eliminate the sectional discrimination would be to outlaw northern-style de facto segregation.

The de jure-de facto distinction, even if reasonably acceptable in principle, is also highly problematic in application, because the Court

89. See text accompanying notes 18-37 *supra.*
90. See text accompanying notes 30-37 *supra.*
91. See text accompanying notes 356-481 *infra.*

has never clarified at what point in time the state must have abandoned its policy of segregation in order to be exempt from the affirmative remedial obligation imposed by its decisions. Historically, racial segregation in public education has not been confined to the South; at one time or another it was widespread in other regions as well.[92] Yet the three court of appeals decisions denying a constitutional duty to abolish de facto segregation all arose in cities—Cincinnatti,[93] Gary,[94] and Kansas City, Kansas[95]—where racial segregation in schools was formerly mandated by state or local law. Ohio discarded its statute in 1887,[96] Indiana in 1949,[97] and Kansas City not until the advent of *Brown*.[98] If Negro and white parents in Mississippi are required to bus their children to distant schools on the theory that the consequences of past de jure segregation cannot otherwise be dissipated, should not the same reasoning apply in Gary, Indiana, where no more than five years before *Brown* the same practice existed with presumably the same effects? True, the earlier the policy of segregation was abandoned the less danger there is that it continues to operate covertly, is significantly responsible for present day patterns of residential segregation, or has contributed materially to present community attitudes toward Negro schools. But there is no reason to suppose that 1954 is a universally appropriate dividing line between de jure segregation that may safely be assumed to have spent itself and that which may not. For many remedial purposes, adoption of an arbitrary but easily administrable cutoff point might not be objectionable. But in a situation such as school desegregation, where both the rights asserted and the remedial burdens imposed are of such magnitude, and where the resulting sectional discrimination is passionately resented, it is surely questionable whether such arbitrariness is either politically or morally acceptable.

The purpose of this rather lengthy discussion of the "de jure-remedy" cases is not to suggest that the courts, their patience understandably exhausted by the dilatory tactics of many southern school districts, have now prescribed remedies that go beyond what is necessary

92. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849).

93. Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

94. Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

95. Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

96. Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 58 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

97. Bell v. School City, 213 F. Supp. 819, 822 (N.D. Ind. 1963), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

98. Downs v. Board of Educ., 336 F.2d at 990-91.

and appropriate to cure the constitutional wrong diagnosed in *Brown I*—though that conclusion in tempting. The point is that the recent remedial decisions of the Supreme Court and of the Fifth Circuit have profound implications for the issue of de facto segregation. Whatever the independent merits of that issue, the southern decisions create strong pressures—moral, political, and logical—for a ruling that will make the Constitution nationally uniform in its application to school desegregation and avoid the appearance—perhaps the reality—of invidious sectional discrimination. This Article concludes that abolition of racial imbalance ought not be held constitutionally mandatory. But it must, in all fairness, be conceded that the southern analogy appeals forcefully to the contrary.

II

CONSTITUTIONAL ALTERNATIVE TO DE FACTO SEGREGATION

A. Constitutional Doctrines: The Uneasy Case Against the Neighborhood School

The *Brown* decision rested, if uncomfortably, upon bedrock: the firmly settled constitutional principle banning state imposed classifications based on race when injurious to blacks or other minorities. The more difficult issue of de facto school segregation, as seen from *Brown* and its progeny, is undecided. Therefore, let us now test the constitutionality of de facto segregation by examining the possible constitutional principles upon which the case against it may rest.

There are several reasonable theories upon which an affirmative constitutional duty to eliminate de facto school segregation might be predicated, and the following section analyzes five of them. It is important to note at the outset that the following theories are discussed solely in relation to the situation in which assignment to neighborhood schools is compulsory, with no possibility of transfer outside of the prescribed school zone. In other words, is compulsory school assignment by neighborhood unconstitutional? Part III will then discuss whether injection of freedom of choice affects the constitutional picture.

1. The Racially Specific Effects Rationale

a. Outline of the argument. The short argnment against de facto school segregation has frequently been that, since de jure segregation was invalidated because of its psychological and educational harm to black children, and de facto segregation inflicts the same harm, the latter should also be banned. The standard response, outlined above,[99]

99. See text accompanying notes 7-98 *supra.*

argues that de jure segregation was outlawed not because of its empirical proven effects but because it classified children by race in violation of the longstanding constitutional policy against such classification. That is, it was not that blacks were treated badly, but that they were treated as blacks.

This response invites further inquiry into the basis for the constitutional policy against racial classification. What is it about distinctions based on race which renders them so odious? The integrationist might well answer along the following lines.

The hatefulness of racial classification by the state may lie in the pervasive harm it does, in its tendency to stigmatize and demoralize members of the designated groups, to alienate them from the values and institutions of the larger society, to breed resentment, create social instability, and stir violence. When practiced by the state, discrimination has a strong exemplary effect. It invites others to do likewise, making discrimination respectable and removing the social constraints which might otherwise inhibit it.

To the extent that racial classification is constitutionally disfavored because of its obnoxious effects upon members of the minority group and upon the society, de facto segregation merits the same disfavor if it produces essentially the same effects. The contention, in essence, is that the strong constitutional policy against racial classification and discrimination by the state is broad enough to cover not only action based on race but also racially neutral enactments effectively isolating blacks from whites with the same stigmatizing, demoralizing, and socially divisive consequences.

The main factual premise of this argument is that a black school, even when not labeled as such by present or past law, is perceived as inferior in the eyes of the community. Black children forced to attend such a school are demoralized by feelings of isolation from the white mainstream, and experience the same feelings of inferiority experienced by children in schools segregated de jure.[100]

To be sure, not all the evils inherent in de jure segregation can confidently be ascribed to de facto segregation.[101] In particular, the state

100. Two further factual premises, the significance of which will shortly appear [see text accompanying notes 130-37 *infra*], are (a) for psychological and other reasons associated with race or caste, the black child incurs a greater educational deficit when surrounded in school exclusively by his neighborhood peers than does a white child of the same social class; and (b) the grossly deficient education typically received by black children, often as a result of segregation, has a long range adverse effect on the collective economic and political status of the group and hence, derivatively, upon each of its members even though each may not be directly affected. These factual assumptions, though plausible, have not been convincingly confirmed by scientific data.

101. For one thing, de facto segregation may not have the same damaging impact upon the hearts and minds of black children that de jure segregation has, or at least was declared to have in *Brown*. *See* Kaplan, *supra* note 30, at 174-75. While the

does not, by maintaining neighborhood schools, endorse the principle of racial discrimination and thereby give it legitimacy. Yet de facto school segregation fosters and facilitates diserimination in other ways. It perpetuates stereotyped racial attitudes by denying white children the opportunity for equal-status contacts with black peers. Furthermore, the isolation of black children in all-black or nearly-all-black schools makes them especially vulnerable to subtle and covert forms of discrimination in the distribution of educational resources. The difficulty of detecting racial motivation, and adequately remedying it if detected, may suggest the desirability of desegregation as a prophylaxis if nothing else. For the argument, we shall assume that the effects of the neighborhood school policy, both immediate and long-range, are of much the same general sort as those produced by de jure raeial classifications.

b. Racially specific harm defined. Even assuming that de facto and de jure segregation are identical in impact, it would not follow that the same constitutional principles would apply equally to both. State aetion that is neutral on its face and serves legitimate non-racial ends does not violate the equal protection clause merely because those it burdens often happen to be black. The same effects result from many laws, such as neutral tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities. Sales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges are more burdensome to the poor than to the rich, and hence more so to the average black than to the average white. These and countless other de facto discriminations would be disallowed by a rule condemning, or requiring special justification for, all state action disproportionally harmful to members of minority groups. The objection to such a rule is not solely one of practicality, but also one of prineiple. It is the individual, not the group, to whom the equal proteetion of the laws

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young child may not know whether the racial make-up of his school is mandated by law, his parents surely know that fact, and it may well be through its effect upon their perceptions, attitudes, self-concept, and morale that official discrimination makes its imprint upon the child's personality. Moreover, de jure school segregation in its Southern heyday was an integral part and a vivid symbol of an entire system of official apartheid, the total effect of which was to exclude black people from participation in a wide spectrum of community life. Racial imbalance in the schools, resulting from a neutral, traditional policy of geographic districting may not have anything like the same psychologcial significance. Finally, even if there were no reason to suppose de facto school segregation less harmful than de jure, it still would not follow that the findings of harm in *Brown* as to the latter should automatically be extended to the former. The tentative evidentiary basis for those findings in 1954 [see text accompanying notes 22-37 *supra*] remains inconclusive to this day. See text accompanying notes 356-481 *infra*.

is guaranteed.[102] A man's blackness does not exempt him from neutral laws applicable to the majority of citizens. Why then should he be exempt solely because others disadvantaged by the law happen disproportionately to be black?

The distinction between deliberate racial discrimination and mere disproportionate impact, between forbidden de jure and permitted de facto racial discrimination, is a familiar one in our constitutional jurisprudence. Never has the Court declared a law, prima facie neutral, unconstitutional solely because it had a statistically disproportionate impact upon members of a minority group, and on many occasions it has held or implied the contrary. To put the issue in proper perspective, it may be useful to examine some of the other contexts involving the distinction between de jure and de facto racial discrimination.

(i) Jury selection. The exclusion of blacks from grand and petit juries has been a persistent source of litigation. Traditionally, courts have only disallowed intentional discrimination. In an early case,[103] the Court, after striking down a state statute declaring blacks ineligible for service on grand or petit juries, added that the state was free to prescribe nonracial qualifications for its jurors—limiting them, for example, to males, freeholders, citizens, or educated persons. Although it must have been even more apparent in 1880 than today that such limitations would exclude blacks to a disproportionate degree, the Court denied that "the Fourteenth Amendment was ever intended to prohibit this. . . . Its aim was against discrimination because of race or color."[104] And so the principle has remained:

> Fairness in selection has never been held to require proportional representation of races upon a jury. . . . The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.[105]

The principle thus announced in the jury cases has strong implications for the school issue. In many ways a better case can be made

102. Shelley v. Kraemer, 334 U.S. 1, 22 (1948). *See also* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938); McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151, 161-62 (1914).

103. Strauder v. West Virginia, 100 U.S. 303 (1879).

104. *Id.* at 310.

105. Akins v. Texas, 325 U.S. 398, 403-04 (1945). As recently as 1965 the Court reiterated that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him" and that the constitutional evil is "purposeful discrimination based on race alone." Swain v. Alabama, 380 U.S. 202, 208-09 (1965). *Accord,* Carter v. Jury Comm'n, 396 U.S. 320, 332, 339 (1970); Cassell v. Texas, 339 U.S. 282, 286-87 (1950); Thomas v. Texas, 212 U.S. 278, 282 (1909).

for racially balanced juries than for racially balanced schools. A racially balanced jury, unlike a racially balanced school, can be secured at little sacrifice to any important governmental interest. The educational qualification for jurors, despite its disproportionate screening effect on blacks, present no real obstacle for every community has more than enough qualified blacks to provide a representative jury. In addition, the black defendant on trial for his life or liberty has no less vital an interest in the racial composition of his jury than has the black school child in the racial composition of his classroom; the defendant's interest has a footing not only in the equal protection clause but also in the due process clause and the specific fifth amendment guarantee of trial by jury.

The declaration that purposeful discrimination alone is forbidden may not be everything it seems. The Court has repeatedly held that when jury commissioners who know no eligible blacks confine their selection of jurymen to people they personally know to be eligible, the resulting exclusion of blacks amounts to unconstitutional discrimination.[106] The commissioners have an affirmative duty to know the qualifications of potential jurors from all segments of the community. Breach of that duty is apparently viewed as a kind of intentional discrimination,[107] perhaps because the commissioners' unfamiliarity with qualified blacks is so likely to reflect a conscious racial choice. But the cases may also stand for a broader proposition: disproportionate exclusion of blacks from juries, whether or not it be intentional, is unjustified unless shown to result from a method of selection calculated to produce a representative cross section of those in the community who possess the qualifications reasonably thought necessary for able jury service—unless, in other words, the racial imbalance is due either to chance or to the operation of neutral and truly relevant qualifications. There is strong support for such a view in the Court's opinions. In *Hill v. Texas*,[108] the Court concluded that continued exclusion of blacks from grand juries was unconstitutional where the evidence left "no room for inference that there are not among them householders of good moral character, who can read and write, qualified and available for jury service."[109] And while affirming the power of the states to prescribe

106. Cassell v. Texas, 339 U.S. 282, 287-90 (1950); (Reed, J., plurality opinion); Hill v. Texas, 316 U.S. 400, 404 (1942); Smith v. Texas, 311 U.S. 128, 131-32 (1940).

107. The statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes in an area where Negroes made up so large a proportion of the population, prove the intentional exclusion that is discrimination in violation of petitioner's constitutional rights. Cassell v. Texas, 339 U.S. 282, 290 (1950) (Reed, J., plurality opinion).

108. 316 U.S. 400 (1942).

109. *Id.* at 404.

relevant qualifications for its jurors, the Court has stressed that jury lists must be drawn from a source that "reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty."[110] Applying a similar test, the Fifth Circuit has declared it unconstitutional for a county regularly to excuse day laborers (overwhelmingly black) from jury duty on the ground of economic hardship, a procedure which, though neutral and perhaps rational, tended to exclude the blacks and the poor for reasons unrelated to their competence. The Ninth Circuit has gone even further, barring a county from using a special "clear-thinking" test that excluded black jurors in disproportionate numbers and, in the court's view, did not fairly test the abilities required for intelligent jury performance.

(ii) Electoral districting. Another area in which the de jure-de facto, or discriminatory purpose-disproportionate effect, distinction has played an important role is that of electoral districting. *Wright v. Rockefeller,*[111] decided in 1964, upheld the constitutionality of New York's congressional apportionment law even though it created districts irregular in shape and irrationally homogeneous in ethnic composition —one 86 percent black and Puerto Rican, another 95 percent white. Despite this glaring imbalance, the district court was unpersuaded that the legislature had acted with race in mind, and the Supreme Court accepted this finding as dispositive. While Justices Douglas and Goldberg dissented on the ground that the state had not adequately negated the strong prima facie inference of racial motivation, neither of them disputed the majority's premise that the constitutional outcome hinged on the question of legislative intent rather than on the disproportionate effect.[112] No member of the Court intimated that the heavy concentration of black and Puerto Rican voters in one district, and their virtual exclusion from another, might, without more, amount to an unconstitutional racial discrimination.

The authority of *Wright* on this point is clouded, however, by subsequent statements of the Court retrospectively interpreting its decision in an earlier racial-gerrymandering case, *Gomillion v. Lightfoot.*[113] *Go-*

110. Carter v. Jury Comm'n, 396 U.S. 320, 332-33 (1970), *citing* Brown v. Allen, 344 U.S. 443, 474 (1953).

111. 376 U.S. 52 (1964).

112. Justice Goldberg agreed that "[t]he question for decision in this case is whether appellants have sustained their burden of proving that the boundaries of the Seventeenth and Eighteenth Congressional Districts of New York were purposefully drawn on racial lines." *Id.* at 67. Justice Douglas, for his part, conceded that "[n]eighborhoods in our larger cities often contain members of only oue race; and those who draw the lines of Congressional Districts cannot be expected to disregard neighborhoods in an effort to make each district a multiracial one. But where, as here, the line that is drawn can be explained only in racial terms, a different problem is presented." *Id.* at 59.

113. 364 U.S. 339 (1960).

million involved an act of the Alabama legislature changing Tuskegee's boundaries from a square to an irregular 28-sided figure, thus allegedly removing "from the city all save only four or five of its four hundred Negro voters while not removing a single white voter or resident."[114] The Court held that the complaint of Tuskegee's black residents, now outside the city's boundaries, amply stated a claim of racial discrimination in violation of the fifteenth amendment, and that if the allegations remained uncontradicted at trial, the "conclusion would be irresistable . . . that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their preexisting municipal vote."[115] While this language seems to suggest that the basis for the decision in *Gomillion* was impermissible racial motivation (purpose), in *United States v. O'Brien*[116] Chief Justice Warren reaffirmed the familiar prnciple that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[117] In *Gomillion*, he noted, "the Court sustained a complaint which, if true, established that the 'inevitable effect' . . . of the redrawing of municipal boundaries was to deprive the petitioners of their right to vote for no reason other than that they were Negro. . . . [T]he purpose of the legislation was irrelevant, because the inevitable effect . . . abridged constitutional rights."[118] The Court has never attempted to reconcile this reading of *Gomillion* with its action in *Wright*. Perhaps the Chief Justice merely meant that the Court will never *guess* at legislative motive, that a law that is prima facie neutral will be classed as racially discriminatory only when, as in *Gomillion*, its effects so clearly bespeak a racial purpose as to leave no room for innocent explanation.

(iii) Other cases. In other cases, too, the Court has declined to view nonracial classifications as racially discriminatory merely because of their differential impact on minority groups. For example, it has upheld the constitutionality of a literacy test for voting,[119] though aware of its disproportionate impact upon blacks. And, while striking down a state poll tax statute on nonracial grounds[120] (including its necessarily

114. *Id.* at 341.
115. *Id.*
116. 391 U.S. 367 (1968).
117. *Id.* at 383.
118. *Id.* at 385. More recently, in Palmer v. Thompson, 403 U.S. 217 (1971), Justice Black, referring to *Gomillion*, observed that while "there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind the law is relevant to its coustitutionality . . . the true focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did." *Id.* at 225.
119. Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45 (1959).
120. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

discriminatory impact upon the poor), no member of the Court suggested that the tax might be racially discriminatory, even though that contention was made and might have seemed persuasive in view of the fifteenth amendment's explicit proscription of racial discrimination in voting.

There is, in addition, more recent evidence of the Court's unwillingness to treat legislation neutral on its face as racially discriminatory solely because of its differential impact upon minority groups. In *Hunter v. Erickson*,[121] the Court voided a provision of Akron's city charter requiring that any ordinance dealing with racial discrimination in housing be approved by a majority of the voters. This referendum requirement, the Court said, placed "special burdens on racial minorities within the governmental process";[122] it created "an explicitly racial classification treating racial housing matters differently from other racial and housing matters,"[123] thus disadvantaging those who might benefit from a law banning racial discrimination. Last term, in *James v. Valtierra*,[124] the Court refused to extend the *Hunter* rationale to a referendum requirement that placed a de facto burden upon disadvantaged minorities. California's constitution provided that no low-rent housing should be built by any public body without voter approval. A federal district court overturned this provision on the authority of *Hunter* but was reversed by the Supreme Court, which pointed out that the California provision, unlike Akron's, involved no distinction based on race. While three dissenting Justices would have declared the referendum provisions unconstitutional as a de jure discrimination against the poor, none claimed it to be a racial discrimination. The doctrinal inference seems clear: a law that is neutral on its face does not become racially discriminatory merely because its burden falls disproportionally on the black.[125]

Yet the principle that invalidates de facto school segregation need not be so broad as to endanger other neutral classifications hav-

121. 393 U.S. 385 (1969).

122. *Id.* at 391.

123. *Id.* at 389.

124. 402 U.S. 137 (1971).

125. Apart from its general doctrinal implications, *Valtierra* has a more immediate bearing on the school segregation issue. Establishment of low-rent public housing in outer city or suburban neighborhoods is one of the most promising means of combating racial segregation in housing, and consequently in schools. Indeed, most people deem it a more desirable, less artificial, method of desegregation than school busing, which offers integration only for a few daily hours and only within a constricted institutional setting, before returning the black child Cinderella-like to the ghetto. If, as *Valtierra* implies, neutral state action does not violate the equal protection clause, though it effectively blocks the more desirable approach to desegregation, it is anomalous to hold neutral neighborhood assignment plans unconstitutional because they reject the less desirable approach—busing.

ing statistically disproportionate impact on blacks. One may assume, at least for argument's sake, that if the ill-effects of the neighborhood school policy were felt indiscriminately by black and white children in de facto segregated slum schools, the fact that most children in harm's way happen to be black would make no constitutional difference. But the impact of the neighborhood school policy may be racially discriminatory in a much stronger sense. If it is true that de facto, like de jure segregation, generates feelings of racial inferiority in black school children, the injury is one they incur distinctively as blacks, solely on account of their race. A white child similarly situated would not be similarly affected. In that sense, the neighborhood school policy can be said to inflict a "racially specific" harm, a harm differing in kind from that inflicted by the above examples of state action that hurt more blacks than whites, but hurt the individual black no more than his white counterpart. In contrast, the neighborhood school policy penalizes the black child to a greater extent than his white counterpart similarly situated.

The principle that even a racially neutral classification may fall when it produces racially specific harm finds support in those economic discrimination cases[126] that invalidated fee-payment requirements inflicting "poverty-specific" harm upon the poor. The Court has described such requirements as invidious discriminations though they do not classify on the basis of poverty, have no tendency to stigmatize the poor, are not malevolently motivated, and serve legitimate purposes. If anything is invidious about them, it is that they hurt the poor man precisely because of his poverty, just as the neighborhood attendance requirement hurts the black child because of his blackness.

There are, of course, important differences between these de facto wealth classifications and de facto racial segregation, differences that cut both ways. On the one hand, the constitutional policy against racial discrimination is more firmly grounded both in history and precedent than the policy against economic discrimination.[127] Moreover, de facto racial segregation, at least in public schools, is more demeaning and stigmatizing than a payment requirement. On the other hand, the poverty-specific impact of a payment requirement is more obvious and undeniable than the racially specific impact of the neighborhood school policy, which can be demonstrated, if at all, only by highly sophisticated empirical methods. Finally, it is significant that

126. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax); Douglas v. California, 372 U.S. 353 (1963) (attorney's fee); Griffin v. Illinois, 351 U.S. 12 (1956) (transcript fee).

127. *Compare* Hunter v. Erickson, 393 U.S. 385 (1969) *with* James v. Valtierra, 402 U.S. 137 (1971).

the payment requirements invalidated by the Supreme Court deprived indigents of vitally important rights: the vote, right to counsel, and right to appeal from criminal conviction. Had the interests not struck the Court as fundamental, the requirements would undoubtedly have been upheld. While it can fairly be argued that education, too, is a fundamental interest,[128] its claim to that status is yet to be established.

c. Empirical difficulties. Even if one were satisfied that the state should be held to strict constitutional account for consequences that are racially specific in the sense just described, one would have great difficulty in determining when that condition is met. For example, the supposed psychological impact upon the black child—the harm most easily described as racially specific—is the least well-documented of the suspected evils of segregation. There is little reliable evidence that de facto or de jure school segregation makes the black child feel inferior.[129] Besides, feelings of inferiority, if these be the only adverse consequences of neighborhood schools, seem a thin basis on which to challenge neutral state action that does not deliberately discriminate by race. Any number of "state actions" may be psychologically painful to blacks yet constitutionally impeccable. For example, a black applicant for a government job, turned down for failing to meet a neutral qualification, may interpret the rejection as a racial slight, or feel marked as inferior; yet no constitutional relief is warranted.

It may be that the racially specific harm inflicted by the neighborhood school policy is not limited to the psychological. There is some evidence that the deficiencies of the slum school, including the racial and class composition of its student body, may result in a greater learning deficit for the black child than for the white child similarly situated. One major study[130] reveals that the verbal achievement of black students is more sensitive than the verbal achievement of white students to variations in school environment, and especially to variations in the social class level of the student body.[131] Furthermore, even if the immediate learning deficit produced by slum schooling were felt indiscriminately by black and white children alike, blacks would ultimately pay the stiffer

128. See text accompanying notes 235-91 *infra.*

129. See text accompanying notes 387-401 *infra.*

130. J. COLEMAN, et al., EQUALITY OF EDUCATIONAL OPPORTUNITY 296-97, 304 (1965) [hereinafter cited as COLEMAN REPORT].

131. Another pertinent piece of evidence is the finding of the United States Civil Rights Commission that the racial makeup of the student body has an independent effect upon black student achievement over and above that produced by the social class makenp. 1 UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 100-101 (1967) [hereinafter cited as RACIAL ISOLATION]. This finding is in conflict with the results of other investigations. *See, e.g.*, J. COLEMAN, *supra* note 130, at 302-10; Wilson, *Educational Consequences of Segregation in a California Community*, in 2 RACIAL ISOLATION 165, 184-87.

price. A given educational deficit results not only in greater loss of job opportunity for the black, who faces fewer opportunities to begin with, but, more important, the inadequate education received by most black children feeds the prevailing racial stereotypes, handicaps the collective efforts of the group to improve its social and economic status, and thereby has derivative effects on the individual members of the group beyond those that flow directly from the learning gap itself. Members of racial and religious minorities, as the Supreme Court long ago recognized,[132] depend heavily for their chances in life on the prestige and power of the group to which they belong.[133] Therefore, any governmental policy that seriously retards the progress of any segment of the black community promises to have fallout effects on other segments. Poor schooling inevitably reduces the number of black success stories, just as it stands in the way of effective political organization of the black community. In both cases it damages even those individuals who are not directly its victims, and doubly damages those who are. No other governmental policy has so basic and universal an impact on blacks as the neighborhood school plan. Admittedly, these amorphous secondary effects are impossible to isolate and quantify; standing alone, they might not make a persuasive case of racially specific effects. But their weight belongs on the scales with whatever immediate learning deficit may be found racially specific.

Whether black children, as such, do incur a racially specific academic deficit is, however, open to question. The finding that black achievement is more responsive than white achievement to variations in the quality of the school and the characteristics of its students[134] does not necessarily prove that the inadequacies of the segregated slum school are felt more keenly by black students than by whites of the same social class. The explanation may be that children of disadvantaged background, whether black or white, are more dependent on the school, and hence more vulnerable to its deficiencies, than children whose home

132. Beauharnais v. Illinois, 343 U.S. 250, 263 (1952).

133. One aspect of this interdependency is touched on in K. CLARK, DARK GHETTO 60-61 (1967):

> The competitive demands of the growing Negro middle class, if successful, would open more doors for all Negroes. A Negro in a managerial or executive position tends, also, to reduce the novelty of a Negro foreman or Negro salesman. A Negro professor might increase the employment chances for Negro secretaries on a college payroll. The tendency of white Americans to lump all Negroes together could lead ironically to major social advances, as Negroes in high-status jobs prepared the way for gradual acceptance of all Negroes.

Examples could be multiplied, from the black entrepreneur who creates employment opportunities for fellow blacks, to the Jackie Robinsons who blaze trails into formerly closed occupations or labor unions, opening the doors of apprenticeship programs that require the recommendation of a union member for admission.

134. See note 130 *supra* and accompanying text.

environment is more supportive. Blacks may be collectively more sensitive to school variations simply because a larger proportion of them are poor.[135]

Such a conclusion, however, would be oversimple. It would obscure the fact that, for reasons closely associated with his subordinate caste status, the black student at every social and economic level encounters a more inhospitable, more handicapping environment than his white compeer. The poor black is more likely than the poor white to live in a dilapidated house. His family structure is more often unstable, more often fatherless and female-dominated. He bears the psychological scars of racism in addition to those of poverty. Living as he does "so much on the margin of the dominant culture, and experiencing so many immediate and overwhelming problems of existence, [he may find that] identification with a set of majority culture symbols is not personally relevant, and becomes cumulatively less relevant with the increasing impact of social alienation and individual hopelessness."[136] For all these reasons, the lower-class black student may draw even less intellectual nourishment from his home environment than the lower-class white student, and may be even more dependent upon the school for the development of his capacities.[137]

One might well conclude from the foregoing that since the differential impact of the neighborhood school plan on the black youngster is not simply an effect of economic class but springs from a variety of sources more closely associated with his blackness, it may fairly be characterized as racially specific. On the other hand, the background

135. *See* Wilson, *Social Class and Equal Educational Opportunity*, 38 HARV. EDUC. REV. 77, 84 (1968).

136. OFFICE OF POLICY PLANNING AND RESEARCH, UNITED STATES DEPARTMENT OF LABOR, THE NEGRO FAMILY 29-30 (1965) [hereinafter cited as MOYNIHAN REPORT].

137. At higher social class levels, race-to-race differences are still greater. The children of middle-class blacks "often as not must grow up in, or next to the slums,—an experience almost unknown to white middle-class children." *Id.* These black children are constantly exposed to the "pathology of the disturbed group and constantly in danger of being drawn into it. . . . Many of those who escape do so for one generation only: as things now are, their children may have to run the gauntlet all over again." *Id.* Thus, the social experience of the middle-class black youth is determined by his caste-status much more than by his class-status.

The picture is further complicated by evidence that middle-class blacks may be more sensitive to the school's environment, injured more severely by its shortcomings (including those associated with segregation), than whites or lower-class blacks. [See text accompanying note 446 *infra*]. This may be accounted for by the fact that the strength of the school's influence upon a child's achievement is a complex phenomenon involving the interaction of both "preparation" and "dependency" effects. The middle-class black child is maximally responsive to school variations because he is at once better prepared for school than the lower-class black yet, for reasons closely associated with race, more dependent on school than the middle-class white. The relationship between social class and school sensitivity thus assumes a very different shape for the two racial groups.

characteristics that distinguish blacks from whites within each class are not racial in any biological sense, but are cultural, social, economic, or psychological characteristics growing out of the unique historic experience of black people in this country as a submerged caste. If white and black subjects were rigorously equated not only by income, occupation, and education, but also by more specific variables such as quality of housing, size and structure of family, personal interaction patterns within family, self-image, etc., the apparent interracial differences in achievement would largely disappear. This concession strikes at the very heart of the concept of racially specific effects, for it suggests that segregated schools do not bring a sharply delineated class of effects that single the black child out because of his blackness, but merely display a continuum on which effects are never strictly racial but merely correlated to race.

The concept of racially specific harm may therefore be so problematic, so difficult to define or apply, that it cannot profitably be used as a basis for constitutional decisionmaking. The only effects that clearly qualify are the psychologically based—those that stem from the black's sense of himself as black—and these are almost impossible to trace or measure and may appear in response to a broad range of state actions. While the possibility of psychological harm, however unmeasurable, may be enough to doom an explicit racial classification, as in *Brown*, it may be that something more substantial should be required to defeat a classification neutral in form and innocent in purpose.

d. The political impotence factor. Thus far the integrationist argument has rested chiefly upon the supposed similarity of impact between de facto and de jure school segregation. The argument goes on to stress a related similarity—that de facto, no less than de jure, segregation victimizes a powerless minority group unable to protect itself in the political arena. This potential for majoritarian abuse, one of the features which has always made racial classifications constitutionally suspect, belongs to all laws which effectively discriminate against minority groups, not merely those deliberately aimed at them. Again, the constitutional principle is broad enough to encompass de facto as well as de jure discriminations.

To assess this argument we must examine closely the broad proposition that judges owe less than normal deference to legislative decisions adversely affecting the interests of the poor and politically powerless. An explicit statement of this view, written with specific reference to the issue of de facto school segregation, comes from Judge J. Skelly Wright in *Hobson v. Hansen*:[138]

138. 269 F. Supp. 401 (D.C. 1967), *aff'd*, 408 F.2d 175 (D.C. Cir. 1969).

> Judicial deference to [legislative] judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure—a term which need carry no disparging or abusive overtones—may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority . . . .[139]

In several constitutional areas the Court has taken explicit note of the workings of the political processes. To Mr. Justice Jackson, the equal protection clause was a salutary check against the arbitrary action to which officials are prone when allowed to "pick and choose only a few of those to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if large numbers were affected."[140] In opinions dealing with state regulation under the commerce clause, Mr. Justice Stone frequently alluded to the notion that legislation, the burden of which falls chiefly on out-of-state interests unrepresented in the enacting legislature, "is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."[141] Justice Stone returned to this general theme in a celebrated footnote in *United States v. Carolene Products*,[142] "[P]rejudice against discreet and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry."[143] No doubt the Court's vigorous intervention in the field of state legislative apportioument was

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139. 269 F. Supp. at 507-08.

Judge Wright did not hold that the political weakness of an affected group in respect to a particular legislative issue is itself reason to invoke a strict equal protection test, irrespective of the usual political stature of the group and of the nature of the interests at stake. Such a view would play havoc with the principle of majority rule. Rather, Judge Wright emphasized that the affected interest is not of the garden variety and that the complaining groups occupy a special status. He conceded that "[i]f the situation were one involving racial imbalance but in some facility other than the public schools, or unequal educational opportunity but without any Negro or poverty aspects (e.g., unequal schools all within an economically homogeneous white suburb), it might be pardonable to uphold the practice on a minimal showing of rational basis." Only "the fusion of these two elements in de facto segregation in public schools," in Judge Wright's view, "irresistably call for additional justification." *Id.* at 508.

140. Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

141. South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938). *See also* Southern Pacific v. Arizona, 325 U.S. 761, 767-68 n.2 (1945).

142. 304 U.S. 144 (1938).

143. *Id.* at 153 n.4.

originally prompted at least in part by the recognition that the underrepresented districts often could not rely on the political processes for redress. The Court ultimately made this rationale explicit:

> The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.[144]

While the reasoning of these cases bears resemblance to Judge Wright's "voiceless minority" thesis, certain contrasts may be more important than the similarities. First, in the commerce and voting cases, the beneficiaries of the Court's action were not only voiceless in a metaphorical sense, but literally voteless, wholly or partly disenfranchised. It is one thing to say that the "normal" political restraints are inoperative when those who bear the brunt of a statute have no access to the polls; it is another thing to say that the political process affords less than "normal" protection because groups, although having unimpeded access to the polls, lack the strength—either of numbers or other resources—to prevail.

Second, in both the commerce and voting cases, the action of the Court can be seen as protecting majoritarian values against encroachment by parochial or minoritarian interests. In utilizing the commerce clause to invalidate state action, the Court vindicates the interests of the national "majority" against the parochialism of the states. In that area, moreover, as in some other constitutional fields, the Court's decisions are politically responsible in the sense that they are formed with an eye to congressional policy[145] and are subject to congressional reversal. As for the apportionment cases, it is obvious that the reorganization of state legislatures on the basis of one-man-one-vote—a move calculated to end their domination by overrepresented rural minorities—served to remove a check upon majority rule, not create one. Indeed, it may well be argued that the populist philosophy which finds expression in one-man-one-vote is fundamentally at odds with the platonic guardianship contemplated by Judge Wright, and that the function of the Court as a political balance-wheel rings of the very justifications offered for giving sparsely populated rural districts more than their pro-rata share of legislative representation. Furthermore, it is arguable that there is at least a surface inconsistency between the fact that the one-man-one-vote principle—and the democratic values that underlie it—would not

144. Kramer v. Union Free School Dist., 395 U.S. 621, 627-28 (1969).
145. *See, e.g.*, Parker v. Brown, 317 U.S. 341 (1943).

permit blacks or welfare recipients (any more than farmers) to cast weighted votes to protect themselves against the callousness of the majority and the fact that similar compensatory protection should be afforded by a paternalistic judiciary.

Third, the voting cases (though not the commerce cases) involved attacks upon the very laws that inflicted the political disability. Few would argue that all laws enacted by a malapportioned state legislature which adversely affect the interests of the underrepresented districts are constitutionally infirm. No such claim has been made even as to legislation enacted in the South during the period of black disenfranchisement. Thus, the reapportionment analogy affords scant support for the argument that the interests of the black community merit special attention by the courts because blacks are not an effective political force.

In addition, even if there is a sound basis for suggesting that the Court should adopt a protective posture toward groups with little political strength, by what criteria are those groups identified? The answer implied by Judge Wright's analysis is that some identifiable groups are so inarticulate, incohesive, and lacking in leadership, that they cannot gain a satisfactory hearing from the lawmaking authorities, cannot even properly make their needs known. In a sense, such groups effectively lie outside of the political spectrum. It is for the important interests of these groups that the courts must stand sentry.

For our purposes, this formulation of the "political impotence" concept is debatable on two counts. First, if indeed there are groups that have no voice or visibility and that, in an almost literal sense, cannot make themselves heard, it is by no means clear that the urban black is among them. Numerically, blacks approach a majority in many large cities and are an increasingly formidable voting bloc in most. Numbers aside, they speak with a voice ever more audible; civil rights organizations and ad hoc community groups have been remarkably successful in focusing public attention on the issues of educational inequality and, in particular, de facto school segregation. Seldom have their demands been wholly ignored. If proponents of racially balanced schools have not carried the day in the political forum, it is not because their needs have escaped attention. Further, in determining whether the political processes can assure a full hearing for the interests involved, it is also relevant to consider the institutional characteristics of the legislative or administrative body whose action or inaction is under review. In many ways, the school board is an eminently democratic institution. While some boards are appointed by political officials, the overwhelming majority are popularly elected, usually by the voters of the entire school district at large. They conduct their business in regular public meetings, and all members of the community are free to attend and air their

grievances. In addition, their proceedings are unobstructed by filibusters, committee vetoes, or many of the other distorting features that so often prevent other legislative bodies from responding to broadly perceived needs.[146]

Second, even if one accepts the premise of "invisibility," it does not follow that the appropriate remedy is independent judicial assessment of the legislative merits of their claims. Familiar analogies suggest otherwise. If a trial judge or administrative official, in exercising discretion, ignores a relevant factor or denies a party a fair hearing, this does not result in an appellate court taking the substantive issues into its own hands. The normal remedy is to remand the cause with corrective instructions. It follows that the *possibility* that a legislature or administrative body may have ignored the interests of a minority group at most justifies a remand of the issue to the lawmakers with instructions to reconsider their policy with that interest in mind. Some constitutional decisions—those, for instance, that hold a law vague or proclaim a general principle but leave the legislature broad discretion to implement it—are in effect remands with instructions. But a judicial decree instructing a school board to come forward with a plan of desegregation that effectively abolishes racial imbalance, and along with it the neighborhood assignment policy, can hardly be so characterized.

A more promising justification for judicial solicitude toward ethnic minorities is Mr. Justice Stone's suggestion that "prejudice against discreet and insular minorities" may curtail the operation of those political processes which ordinarily protect minorities and therefore "may call for correspondingly more searching judicial inquiry."[147] While this famous statement is more frequently cited than explicated, Justice Stone may have had in mind the fact that minority groups that are the target of racial prejudice often have great difficulty in forming those political alliances deemed the surest safeguard of minority interests in a pluralist democracy.[148] The general political effectiveness of minority groups depends on their ability to pool their strength with others in pursuit of common goals or to exchange support on issues of importance

146. Though all must admit that the overwhelming majority of school board members are business and professional people, often members of the civic elite, and that the black and the poor are notoriously underrepresented, some may find it ironic—at least in terms of democratic theory—that a judicial body composed exclusively of successful members of an elite profession—a body on which only one black man has ever sat—may set at naught the judgments of popularly elected school boards on the ground that their racial class and occupational composition rendered them incapable of appreciating and responding to the needs of the underdog.

147. United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938).

148. *E.g.*, S. BENN & P. PETERS, THE PRINCIPLES OF POLITICAL THOUGHTS 412-13 (1965).

to one or the other group. In this way, legislation intensely distasteful to a minority and promoting no deeply felt interest of the majority (or the other minorities) will normally be defeated, and legislation urgently sought by a minority and inoffensive to the majority (or other minorities) will frequently be enacted. Race prejudice, however, frustrates the working of this coalitional process. A statute that singles out blacks, either purposefully or in effect, isolates them from the rest of the political community. Since they alone are injured, no one else is allied to them by ties of self-interest, and those whose interests are unaffected may be dissuaded by prejudice from making common cause. The same isolating effects may be produced by a statute that, though not racially discriminating in its purpose or limited to blacks in its impact, is perceived in racial terms by the community, and polarizes sentiment along racial lines. The black minority's claim to judicial solicitude is not that it is voiceless but friendless, not politically invisible but politically unmarriageable. Race prejudice divides groups that have much in common (blacks and poor whites) and unites groups (whites, rich and poor) that have little else in common than their antagonism for the racial minority. Race prejudice, in short, provides the "majority of the whole" with that "common motive to invade the rights of other citizens" that Madison believed improbable in a pluralistic society.[149]

School desegregation is in many ways a prime illustration of this thesis, for it is an issue that strongly polarizes community sentiment along racial lines. While black children are not the only ones adversely affected, since white slum children may also be disadvantaged in precisely the same way, lower-class and lower-middle-class whites, among whom anti-black sentiment may run high, tend to be the strongest opponents of desegregation.[150] Thus, despite its active political efforts, the black community may be less able to exert effective political leverage on this issue than on others, such as welfare, in which it can form political alliances with disadvantaged whites. In this respect, the neighborhood school policy has the same political impact as a statute aimed specifically at blacks: both tend to isolate the black from other segments of the community and prevent his making common cause with his natural political allies.

There is, however, an important countervailing factor. The basis for the extreme opposition by the majority to integration through compulsory busing may not be irrational prejudice but the intense feeling among parents that the vital interests of them and their children are threatened by such proposals. The *Carolene Products* rationale, however, is most persuasive in situations where, due to prejudice, an other-

149. J. MADISON, THE FEDERALIST 61.

150. CRAM, THE POLITICS OF SCHOOL DESEGREGATION (1968).

wise apathetic majority closes its eyes to the legitimate needs of the minority, rejecting them even though they could be accommodated without great sacrifice to the majority's rationally felt interests. Where, instead, the majority, not merely out of crude prejudice, is passionately convinced that the educational well-being of its own children is vitally at stake, it is unconvincing to speak of the legislative outcome as something other than the product of normal political processes.

e. The "constitutionally acceptable purpose" approach. The analysis to this point suggests, though not without major reservations, that de facto school segregation has much in common with de jure segregation—more, certainly, than a mere statistically disproportionate impact on blacks. Still, de facto and de jure racial discriminations, including school segregation, also have important differences. Classifications based on race rarely promote any constitutionally acceptable purpose; even more rarely are they designed to do so. This cannot be said of de facto segregation. How important are these distinctions?

(i) Lack of constitutionally acceptable purpose. The established notion that racial classifications are in most circumstances irrelevant to any constitutionally acceptable purpose is probably the factor that most clearly distinguishes de jure from de facto discrimination, yet it falls far short of supplying a self-sufficient basis for the constitutional principle condemning the former but not the latter. For one thing, the generalization that race is irrelevant is riddled with exceptions. To be sure, race has nothing to do with a man's inherent worth, but in some circumstances, it may have much to do with the quality of his performance. For example, a black patrolman or teacher may be more effective in a ghetto classroom or police beat than an equally qualified white. Employment or assignment policies that recognize this fact may or may not be constitutional, but they are certainly not irrelevant. More broadly, the benevolent or preferential discrimination that favors blacks in order to compensate for, or extinguish the continuing effects of, past racial injustice may or may not be valid, but, again, they certainly do not lack relevance to constitutionally acceptable purposes.

The generalization that racial classifications are in most circumstances irrelevant, even if limited to those classifications found hurtful to blacks, would not, by itself, provide a sound basis for the compelling state interest test judicially applied to de jure classifications.[151] That premise might support a per se rule invalidating all racial classifications on the ground that a rule of reason, calling for case-by-case sifting, would be burdensome and unreliable. The premise assuredly would support a presumption of unconstitutionality rebuttable only by

151. See text accompanying notes 234-301 *infra.*

an affirmative showing of relevance on a case-by-case basis. Under the established doctrine, however, a racial classification—even if found after rigid scrutiny to be relevant to a permissible state objective—nevertheless will be held invalid unless necessary to a compelling state interest. The logic of this standard suggests a different rationale: the effects of racial discrimination are so unacceptable that only a countervailing interest of extraordinary weight, achievable in no other way, is enough to justify them.

Furthermore, de facto and de jure school segregation may not be sharply distinguishable in their relatedness to legitimate public purposes. This may be so notwithstanding the Court's explicit statement in *Bolling v. Sharp*[152] that de jure school segregation is "not reasonably related to any proper governmental objective."[153] That statement, implying that de jure segregation would fail even the traditional equal protection test of reasonableness, cannot be taken at face value. Segregation does promote at least one governmental objective of unquestioned validity—avoidance of racial conflict in the classroom and its disruptive educational consequences. However much one may feel that this danger is specious, or that it may be avoided by less discriminatory means, these would not be sound constitutional objections in the usual equal protection case; the legislative choice would prevail. Thus, the *Bolling* statement requires interpretation. The Court might have been saying that de jure school segregation is not designed for any proper governmental objective, that its true aim is to keep the black in his place. Or, the Court may have been balancing: it may have meant that segregation is not closely enough related to any proper governmental end to justify the intolerable consequences, and that in a democratic, pluralistic society, racial peace cannot be purchased at the price of apartheid. These formulations, though differing in nuance, have a common thrust: de jure school segregation is to be condemned not because it serves no proper end, but because it is an improper means. Thus construed, the *Bolling* statement might also have been made about de facto segregation, which produces the same intolerable effects. Whatever the interpretation, the point is that the *Bolling* statement does not justify, but, on the contrary, is dependent upon the use of an abnormally strict equal protection test.

That caveat is reinforced by a further, perhaps more basic, observation. The typical de facto discrimination, however clearly harmful to blacks, can usually be defended in terms of some obvious and independent state interests; the typical de jure discrimination cannot, at least without strain. But school segregation, both de jure and de facto, lie somewhere between the two poles and very near one another. In each

152. 347 U.S. 497 (1954).
153. *Id.* at 500.

case, the questions of harm and of justification are correlative, not independent; both hinge on a single empirical inquiry. In the case of de jure segregation this is easily shown. Some social scientists argue that black children develop mind and personality more successfully in an all-black than in a biracial environment.[154] That premise, if true, would simultaneously establish that (a) segregation does not have a harmful impact upon black children; and (b) it does promote a legitimate state interest. Conversely, it is only by rejecting that empirical premise—implicitly in *Bolling*, explicitly in *Brown*—that the Court in those cases was able to find both harm and lack of justification. Thus, the propositions that segregation is harmful to blacks and that it serves no constitutionally acceptable purpose are not wholly independent, but rather two sides of the same empirical coin.

A parallel analysis can be made for de facto segregation. Those who argue that children learn more effectively in the comfortable, familiar, homogenous atmosphere of a neighborhood school espouse a view similar to that of the segregationists who contend that black children do better when protectively surrounded by other blacks. In this context, too, the propositions that segregation is harmful to blacks and that the harm is unjustified are not wholly independent, but rather two sides of the same empirical coin. Here again, acceptance of the state's empirical premise simultaneously establishes both a legitimate governmental interest in neighborhood schools and the absence of harm to blacks. Here again, rejection of that premise in favor of its opposite not only declares de facto segregation to be a denial of equal educational opportunity, but also goes far to negate the existence of any redeeming state interest. For while the case for neighborhood schools does not depend entirely upon the proposition that such schools are educationally effective—safety, convenience, economy and other noneducational values are also invoked—most advocates of neighborhood schools would be acutely embarrassed if forced to concede that their policy would result in inferior education for black students.

The point is simply this: If one accepts the state's empirical contention that black children do better in a safe, sheltered, homogeneous school setting, whether the organizing principle be race or neighborhood, one is hard put to conclude that segregation, either de facto or de jure, invades any constitutionally protected interest of the black child, or even that it does him any harm. On the other hand, if one concludes instead that black children do better in a biracial environment, even if it lies busing distance away, then one has great difficulty in arguing that even a bona fide neighborhood school policy significantly

154. *See* Gregor, *The Law, Social Science, and Social Segregation: An Assessment*, 14 W. RES. L. REV. 621 (1963).

advances any really substantial state interest. On either empirical premise, segregation by race and segregation by neighborhood are almost equally defensible or indefensible in terms of the legitimate governmental objective they purport to serve.

(ii) The motivation distinction. A more plausible basis for the rule condemning de jure, but not de facto racial discriminations, is the motive factor. Classifications founded on race per se express the worst in human nature. Typically, they are the offspring of prejudice, animosity, and chauvinism; they aim to preserve white supremacy and black subordination.

The probability of hidden racial animus goes much further than the irrelevancy rationale to explain the use of a compelling state interest test. The theory may be that racial classifications are so often the product of racial animus that even when a lively imagination can conjure up some acceptable purpose the odds are strong it was not this purpose the legislation had in mind. Given the familiar difficulties of proving motive, it is understandable that the burden of disproving racial animus should be assigned to the state and, further, that its credibility should be made to depend on a showing that the interest it claims to promote is a compelling one which cannot be achieved by other means.

One wonders, however, whether motive alone will bear the weight of this heavy constitutional distinction. Is there really a decisive moral difference between the state of mind that produces de facto segregation and that which produced de jure segregation? Those who advocate the neighborhood school may not want segregation, but they well know their policy begets it; either they see no harm or they deem the harm an acceptable cost. On the other hand, if de facto segregation is rarely inadvertent, de jure segregation is not always malevolent. Many an avowed segregationist genuinely believes his policy benefits all, black and white alike, offering them a classroom free from racial friction. Surely there is no great moral difference between one who favors segregation by race in the mistaken belief that blacks will be among the beneficiaries, and one who favors its functional equivalent, segregation by neighborhood, in the same mistaken belief. No doubt this characterization flatters the average segregationist; the Court has never held that the validity of a segregation law depends on an assessment of the motives which lie behind the state's decision to segregate, that such a law is unconstitutional only when it springs from racial animus. Either the constitutional ban upon racial discrimination is not based upon a judgment concerning ulterior legislative motivation or the Court, for reasons of judicial propriety, has not seen fit to make that judgment explicit. If the latter be true, it is at least a fair question whether it is proper to make this inarticulate judgment the basis for a constitutional

dividing line between de facto and de jure discriminations. And it is reasonable to conclude that the factor of malevolent motivation is farther from the core of invidiousness that condemns explicit racial discriminations than are the odious effects produced.

2. *The Linkage of Neutral State Action with Private Racial Action: Neighborhood Schooling and Private Discrimination in Housing*

a. Outline of the argument. Whether or not it is true that black children are differently affected by the slum school than white children "similarly situated" in slum neighborhoods, there is no denying that many black children come to be so "situated" solely because of their race. Residence in the ghetto, and thus membership in the class disadvantaged by the neighborhood assignment policy, is often the immediate consequence of racially discriminatory practices in the housing market. Where race directly determines place-of-residence, grouping students in school by place-of-residence becomes, in effect, racial classification once-removed. It amplifies the consequences of private discrimination; it lengthens the discriminator's arm, giving him a veto over admission to the neighborhood public school.

For illustration, let us take the strongest possible case. A black parent seeking to enroll his child in a predominantly white school demonstrates convincingly that he cannot find a willing seller in the neighborhood in which that school is located; thus, the child's inability to meet the residence requirement is due solely to racial discrimination. The transfer is denied. The geographically exclusionary policy of the school board and the racially exclusionary policy of private property owners dovetail to deprive the child of access to his chosen school. The child is officially disqualified, if not by race, nevertheless by a single criterion—residence—that race alone makes it impossible for him to meet. It is plausible that nondiscriminatory state action, such as the residence requirement here, violates the equal protection clause when it meshes with discriminatory private action to deny an individual access to important public services and facilities solely on account of his race.

b. Precedents in support. The above theory would require no radical extension of existing constitutional doctrine. The Court has frequently invalidated seemingly neutral official action (or inaction) because of its relationship to private racial discrimination. Thus, a state may breach the fourteenth amendment by encouraging, enforcing, or implementing private discrimination,[155] putting its property or financial resources behind private activities in which discrimination is practiced,[156]

155. Reitman v. Mulkey, 387 U.S. 369 (1967); Shelley v. Kraemer, 334 U.S. 1 (1948).

156. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Muri v.

or permitting private persons to perform in a discriminatory manner functions that are governmental in character.[157] Sometimes the violation is remedied by nullifying what the state itself has done through its public officials,[158] other times by enjoining the private discrimination.[159] The important point is that state action not itself discriminatory often gives rise to a fourteenth amendment violation when viewed in relation to private discrimination.

The relationship of the neighborhood-school policy to private discrimination in housing bears a family likeness to several of the categories of state action just listed. First, the policy tends to encourage exclusionary real estate practices by offering a lily-white school as a bonus for maintaining the ethnic homogeneity of the neighborhood. The desire to exclude blacks may be inspired by bona fide concern for the quality of the school, by fear of falling property values if "good schools" cease to be available as a selling point, or by sheer prejudice; but whatever the inspiration, destruction of the tie between neighborhood composition and school composition would remove what may be a potent incentive for residential exclusion. Second, like the judicial enforcement of a restrictive covenant[160] or the trespass conviction of a Negro barred on racial grounds from a restaurant or hotel,[161] the neighborhood assignment policy attaches legal consequences, unfavorable to Negroes, to the discriminatory decisions of private individuals.

Finally, the situation here has points of tangency with cases in which the state allows private individuals to exercise governmental functions. In *Terry v. Adams*,[162] for example, the Jaybird Party, a private political group, was allowed by the state to hold preprimary elec-

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Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954); Simpkins v. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

157. Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296, 301-02 (1966) (private park). *Cf.* Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944).

158. Griffin v. County School Bd., 377 U.S. 218, 232-33 (1964).

159. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

160. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

161. *See* Robinson v. Florida, 378 U.S. 153 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963). In each of these cases, the conviction was overturned. In none, however, was the basis of decision that application of the state's neutral trespass laws to Negro sit-ins, without more, implicates the state in racial discrimination violative of equal protection. In each case, additional elements of state involvement in segregation were present—in *Peterson*, a local ordinance commanding segregation in restaurants; in *Lombard*, statements by the mayor and superintendent of police that sit-in demonstrations were undesirable and the trespass laws would be enforced; in *Robertson*, an ordinance requiring segregated lavatory facilities, which effectly discouraged restaurant integration.

162. 345 .S. 461 (1953).

tions from which Negro voters were excluded. The successful Jaybird candidates were invariably nominated in the Democratic Party primary and elected to county office in the general election. The Court ruled this a violation of the fifteenth amendment, at the same time condemning the state for permitting its electoral processes to be duplicated in such a way as to "strip Negroes of every vestige of influence in selecting the officials who control the local county matters . . . ."[163] So here, it is arguably a prima facie violation of the fourteenth amendment for the state to permit private individuals to make decisions that deprive Negroes, on racial grounds, of the opportunity to attend first-class public schools. A school board that blindly applies the neighborhood assignment criterion in a community where discriminatory housing practices have produced segregated neighborhoods has in effect abdicated to private individuals the power to control access to public educational facilities.

These analogues, though not of course controlling precedents, show that a decision along the lines proposed would not be sui generis. Further analysis points up significant distinctions, some favorable, some unfavorable, to the constitutionality of the neighborhood school policy. In certain respects the case against neighborhood school assignment is even stronger than those which previously carried the day.

A combination of state action and private discrimination violates the fourteenth amendment even though, as in *Burton v. Wilmington Parking Authority*,[164] the end result is merely to deny black people service in a privately operated business establishment for which close substitutes are readily available. Such a combination is even more to be condemned when it operates to exclude black children from a school that is both owned and operated by the state, has no economically available substitute, and performs a vital governmental service that is obligatory for all citizens. Furthermore, if the interest of the black child is stronger here than in many of the state action cases, the interest opposing it is, in one respect at least, weaker. In cases where the discriminatory conduct of private individuals is at issue, we have, in Justice Harlan's words, "a clash of competing constitutional claims of a high order: liberty and equality."[165] In a pluralistic society that cherishes privacy and personal liberty, "[f]reedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of pro-

163. *Id.* at 470.
164. 365 U.S. 715 (1961). *See also* Evans v. Newton, 382 U.S. 296 (1966).
165. Peterson v. Greenville, 373 U.S. 244, 250 (1963) (Harlan, J., concurring).

tection from governmental interference."[166] A man's decision to exclude blacks from his home, his circle of friends, or his social club may very well be within the "zone of privacy" the Constitution places off-limits to state intrusion. And even in the less intimate spheres of activity where regulation is clearly permissible—housing, employment, public accommodations—privacy and freedom of choice may well be considered a sufficiently important counterweight to the Negro's interest in nondiscriminatory treatment to make whatever balance the state strikes constitutionally acceptable.

In the school situation, however, the black's claim to equality of treatment does not collide with any similar claim by an individual of liberty, privacy, or property. The black child can be allowed to transfer into a school outside his neighborhood without impinging in the slightest upon the homeowner's decisionmaking power with respect to his own property. There are, of course, other factors which must be balanced—factors such as the capacity of the school to absorb additional students and the difficulty of establishing a workable administrative mechanism for passing upon allegations of discrimination by white homeowners. But "the competing constitutional [claim] of a high order" which provides the great counterweight in many of the state-action cases is here absent.

On the other side, the school situation differs unfavorably from the cited cases in the absence here of what might be called "community of purpose" or "tangency of action" between the state and the private discriminator. The "meshing effects" rationale we are now considering is such that neither actor need gear his action to the policies or interests of the other; each would seemingly act no differently even if the other did not exist. This is especially true of the state. In the racial covenant and sit-in cases, the state, though not itself the author of a racial policy, acted to protect the interest and enforce the exclusionary policy of the private discriminator; here, it would be difficult to prove in any particular case (though it may sometimes be true) that the discriminating homeowner's aim was to exclude blacks from the neighborhood public school much less that the school board's intent was to effectuate such a purpose. In *Terry v. Adams*,[167] denial to blacks of an effective voice in the state's electoral process was the purpose and sole effect of the discriminatory "private activity", here exclusion of blacks from educational facilities is, in most cases, merely an incidental side effect of the private action. Even in *Burton*, the purpose of the restaurant was to exclude blacks from property which in fact was owned by the state, and the state did in fact directly turn over to the

166. *Id.*
167. 345 U.S. 461 (1953).

restaurant decisionmaking power with respect to the use of that property. In the school situation, the two parties have no contact, no mutual dealings, no interaction with one another; their respective actions are concurrent but wholly independent causes of the black's exclusion from the chosen school.

The distinction, however, does not seem critical. That the state is not so "involved in" or "responsible for" the private discrimination and thus has no constitutional duty to act against it—assumptions we make for the present—in no way rules out a duty to take this discrimination into account in shaping its own policies. To tolerate private discrimination in the interest of personal liberty is one thing; to project its consequences into the public sector is another.

Nor is it a sufficient answer that in applying its facially neutral policy the state is entitled to take individuals as it finds them without stopping to inquire how they came to be where they are. Consider, for example, a first amendment parallel: In *Sherbert v. Verner*,[168] a Seventh Day Adventist, unable to find a job because of her religiously based unwillingness to work on Saturday, was denied unemployment compensation under a statute disqualifying claimants who refused available work. There, too, the state argued that it had acted on a valid secular criterion and was under no obligation to carve out a special exception for members of deviant religious groups. The Court rejected that view, holding that the application of the eligibility provision to the claimant impeded the free exercise of her religion by forcing her to choose between loss of benefits and violation of her faith. Even though "the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact,"[169] in the absence of any strong counterbalancing interest the scales tip against the statute. The Constitution, in other words, forbade the state, without compelling justification, to use its neutral statutory criterion to disqualify an applicant whose unwillingness to accept employment was due solely to religious scruples. By parallel reasoning, school authorities would be precluded, absent compelling justification, from applying a neighborhood-school policy to disqualify a child whose nonresidence in the neighborhood was due solely to racial discrimination. The school board, no less than the unemployment commission in *Sherbert*, would be required to take cognizance of the reason for the applicant's nonmembership in the eligible class. *Sherbert*, then, is authority for the proposition that rules and classifications reasonable on their face and valid in most of their applications may infringe constitutional rights when applied to individuals

168. 374 U.S. 398 (1963).
169. *Id.* at 403.

whose particular circumstances give them a claim to special consideration.[170]

Equal protection decisions lend further weight. *Griffin v. Illinois*[171] held that while payment of a fee to cover the state's cost may otherwise be a reasonable condition to obtaining a trial transcript necessary for appeal, it may not be required of a convicted criminal defendant who lacks the means to pay. *Douglas v. California*[172] ruled that while the state may generally convict and punish a person for a crime without supplying him counsel on appeal, it must make an exception for the pauper. The analogy between the indigent defendant and the black school child is impressive. Just as poverty prevents the one from meeting the fee-payment prerequisite to an effective appeal, so racial discrimination prevents the other from meeting the residential prerequisite to effective integrated schooling. The state is no more to blame for the defendant's financial condition than for the child's residential status, yet it must nonetheless make special allowance for the former condition. If equal protection demands that the circumstance of poverty not be permitted to affect a man's chances in the criminal courts, it may also require that the circumstance of having been discriminated against on racial grounds not be allowed to affect a child's chances for quality education in the public schools.

c. Doctrinal conclusion. Having considered the arguments, it is reasonable to conclude that Negro students barred by private racial discrimination from a white neighborhood cannot, without compelling justification, be barred by the state from that neighborhood's public schools because of residence. To restate the basic principle in light of *Sherbert,*

170. That the preferential exception for religious objectors held mandatory by the Court under the free exercise clause might persuasively have been prohibited under the establishment clause adds force to the *Sherbert* analogy. In Everson v. Board of Educ., 330 U.S. 1 (1947), the Court had sweepingly defined the latter clause to mean that neither state nor federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15. If the argument for state "neutrality" failed even though the alternative—special rules for religious objectors—posed a serious constitutional problem under the establishment clause, it should fare no better in the present context, where no such obstacle is encountered. Indeed, the courts have generally held that official action designed to promote racial balance does not violate the equal protection clause. *See, e.g.,* Wanner v. County School Bd., 357 F.2d 452 (4th Cir. 1966); Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964); Guida v. Board of Educ., 26 Conn. Supp. 121, 213 A.2d 843 (Super. Ct. 1965); Morean v. Bd. of Educ., 42 N.J. 237, 200 A.2d 97 (1964); Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied,* 379 U.S. 881 (1964); Addabbo v. Donovan, 43 Misc. 2d 621, 251 N.Y.S.2d 856 (1964), *aff'd* 22 App. Div. 2d 383, 256 N.Y.S.2d 178, *aff'd,* 16 N.Y.2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68, *cert. denied,* 382 U.S. 905 (1965). *Contra,* Tometz v. Board of Educ., 39 Ill. 2d 593, 237 N.E.2d 498 (1968); School Comm. v. Board of Educ., 352 Mass. 693, 227 N.E.2d 729 (1967).

171. 351 U.S. 12 (1956).

172. 372 U.S. 353 (1963).

Griffin and *Douglas*, state action that combines with private discrimination to deprive Negroes of important public benefits and facilities solely because of their race is, unless compellingly justified, a violation of the equal protection clause. This proposition is in keeping with the fourteenth amendment's purpose to assure that the Negro is not, because of his blackness, denied equal treatment at the hands of the state. Nor does the proposition involve abrupt departure from existing doctrine. The principle requires that the Negro be the victim of discrimination on racial grounds, bypassing the question whether the fourteenth amendment protects interests of the Negro other than freedom from racial classification.[173] It is triggered only when affirmative state action is present (here, adoption and application of the neighborhood assignment policy), pretermitting the issue whether the state also offends by passive toleration of discriminatory private conduct within its power to prevent. To be sure, the rule does not demand that the state itself author or sponsor a racial classification, but that is not a requisite under existing doctrine.[174]

Finally, this proposition does not rest on questionable empirical assumptions about the comparative quality of black and white schools or the educational effects of segregation. The interests at stake are essentially freedom interests—freedom to attend a chosen school or to associate with white peers in a classroom setting. Whether the choice be a wise one, whether the biracial school is in fact a better school, is beside the point; the opportunity to choose must not be denied the child directly or indirectly on account of his race. The possibility that the chosen school is in fact superior adds weight to the interest of individual freedom, but it should not be necessary for a court to make findings on that issue in order to find the combined effects of neutral state action and private discrimination unconstitutional.

d. The principle in application: scope and limitations. If the doctrine explored here goes no further than to open the doors of white schools to black children who are able to make an individualized showing of private housing discrimination, it will have scant practical significance. In view of the difficulties of proof and the financial inability of most black families to acquire housing in white middle-class neighborhoods, relatively few blacks would be in a position to make the requisite showing of discrimination, even if only a single instance of racial rejection needed to be proved. In addition, the availability of a federal statutory remedy[175] for provable acts of housing discrimination undeniably weak-

173. See text accompanying notes 101-30 *supra*.

174. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

175. The passage of the Civil Rights Act of 1968, 18 U.S.C. § 245(b) (1970),

ens the case for requiring the school board to make compensatory adjustments in its own racially neutral assignment policy in order to enable the black child to attend his chosen school.

The practical importance of the theory therefore depends upon whether, despite present statutory remedies, a class action will nonetheless lie on behalf of all Negro school children in a defined area (say, the school district) based on a general showing that widespread discriminatory practices in the housing market have tended and do tend systematically to exclude black families from certain neighborhoods in the community. Specifically, would such a showing justify requiring (a) the admission of all black applicants, regardless of their particular experience, to schools in white neighborhoods from which Negroes have been systematically excluded; or (b) at the extreme, the abandonment of school zoning altogether and the reapportionment of students to schools on a basis calculated to assure a uniform racial (and social) composition in all schools?[176]

This first possible disposition, free transfer, invites the serious objection that black children who have not themselves been victimized by identifiable acts of discrimination in housing have no higher claim than white children to the transfer option. Indeed, it might be argued that a constitutional decision which entitled all black children, whether or not discriminated against, but not white children to attend the out-of-neighborhood school of their choice would itself be an unwarranted racial differentiation. But this first possibility—admission of black students to white schools even without an individualized showing—is defensible in light of the fact that the class of blacks prevented from moving into white middle-class neighborhoods as a consequence of racial discrimination in housing is not confined to those able to show that

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and the judicial resurrection of its ancestor, the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1970) [*see* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)], together outlaw virtually all discrimination in housing. The earlier statute declared that all citizens "shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," but prescribed no remedies for enforcement. The successful plaintiffs in the *Jones* cases proceeded under 28 U.S.C. § 1343(4) (1970), which gives the federal district courts jurisdiction in civil actions "to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights. . . ." In contrast, Title VIII explicitly provides a variety of enforcement procedures, including informal conciliation by the Secretary of HUD, civil action by the aggrieved party, and civil action by the Attorney General of the United States. 42 U.S.C. §§ 3610, 3612-13 (1970). *See generally* Smedley, *A Comparative Analysis of Title VIII and Section 1982*, 22 VAND. L. REV. 459 (1969).

Even given this enforcement mechanism, discrimination in housing and the effects of past discrimination upon present housing patterns are slow to disappear.

176. The topic of remedies for possible constitutional violations in de facto cases is considered in more detail in the text accompanying notes 302-55 *infra*.

they have actually tested the market and met racial rebuff and is not remedied by affording statutory actions. In addition to difficulties of proof, the prevalence of restrictive housing practices inhibits the residential mobility of black people in subtle and complex ways—for example, by discouraging even financially able families from isolating themselves in white neighborhoods from which they fear, despite the presence of antidiscrimination laws, other blacks may in the future be excluded; or by diminishing the supply of housing available to blacks so that what remains is inflated in price beyond the means of all but the more affluent black families. Moreover, black mobility is hindered not only by the persistence of present discrimination but by the accumulated effects of past discrimination; even if the market suddenly turned color-blind, blacks would still not be able to redistribute themselves according to choice because the housing systematically withheld from them for so many years would not immediately become available.

While these considerations argue for extending the benefit of the "meshing effects" doctrine to black students as a class, such an extension is open to serious objection. The original argument drew its appeal from the premise that black students had been excluded from white neighborhoods solely and directly because of race. If the claim instead is merely that race-restrictive housing practices have contributed in subtle and indirect ways to the black family's indisposition or financial inability to leave the ghetto, the contention that the state, absent a compelling justification, must mitigate these effects becomes greatly attenuated. Nearly every aspect of the black man's condition in this country—income, occupation, education, residence, skills—is influenced much or little, directly or indirectly, by the pervasive racial discrimination he and his forebears have experienced since slavery. No one would seriously argue that the Constitution requires the state to make special allowance for all these circumstances and characteristics to which racial discrimination may be a remote contributor. Thus, while the argument for extending a right of transfer to black students as a class on the basis of a loose and generalized showing of housing discrimination is not untenable, it would seem difficult to sustain such a position on strictly principled grounds short of extending it to all de facto racial discriminations.

Even more difficult problems would be presented by the second possible disposition—complete realignment. A class suit on behalf of all black school children in the district seeking disestablishment of the neighborhood zoning system and the creation of racially balanced student bodies through such familiar techniques as consolidation, pairing, and compulsory cross-busing. Here again many members of the plaintiff class—probably the great majority—would not themselves have

been victims of the discriminatory practices they allege and arguably should have no standing to use these practices as a basis for their constitutional claim. More important, general desegregation would be a remedy illsuited to the wrong. If the interest denied by the coupling of place-based state action and race-based private action is the opportunity to attend a particular school believed by the child and his parents, rightly or wrongly, to be superior to the ghetto school, that interest is adequately vindicated by a transfer option and not at all vindicated by requiring instead that all black children be bused from their neighborhood and white children be bused to the ghetto. Such a requirement works largely against, and only minimally in favor of, freedom of choice. Whatever merit there might otherwise be in the argument (often made against open enrollment plans) that the black children ought not be put to a Hobson's choice between remaining in the ghetto school or being bused to a white school in which he would be one of a small minority, the argument has diminished validity in the present context, where the state's constitutional duty is merely to neutralize the educational consequences of private discrimination; for had there been no discrimination the black family would probably have been put to just such a Hobson's choice. If the interest denied by the state's action is identified instead as the opportunity for classroom association with white students, this associational interest would admittedly be served by a general racial balancing.[177] But, again, the interest in cross-racial association is adequately protected by transfer options—and with much less onerous effect upon those students, both white and black, who do not wish to be bused. Finally, if the interest asserted is one of equal educational opportunity, relief in the form of a general desegregation decree would present yet another difficulty; it would entail an empirical judgment that predominantly black and lower-class schools are educationally inferior by reason of their racial and class composition, a judgment which cannot confidently be made on the basis of present evidence.[178]

The dubious counterargument is that nothing short of a complete break from the neighborhood assignment concept can fully neutralize the subtle effects of private housing discrimination upon black educational opportunities. Transfer options are not enough to place the black child in as favorable a position as he would have occupied had there been no discrimination, for they demand of him, as the price of an integrated education, that he first assume the special burden of re-

177. However, in a predominantly black, lower-class district the resulting classroom mix might be less "favorable" from an educational standpoint than the one which some black students would, but for the private housing discrimination, have enjoyed iu white neighborhood schools.

178. See text accompanying notes 356-481 *infra.*

quest and then subject himself to the painful stresses of being one of the few blacks in an overwhelmingly white school. Many black parents may shrink from exposing their children to these pressures, though they would be glad for the opportunity to move into a truly integrated neighborhood as part of a general migration of black families.

On balance we might well conclude that these considerations are too feeble to justify basing a constitutional requirement of compulsory desegregation on the existence of private housing discrimination; that black families, as a class, have been denied freedom of choice in private housing, would seem at most to support no stronger conclusion than that, as a class, they be accorded a compensating freedom of choice in public schooling.[179]

3. *The Linkage of Neighborhood Schooling and State-Induced Housing Discrimination—The Collateral State Action Argument*

a. Outline of the argument. So far we have assumed that racially segregated housing patterns are not the state's making. If it can be shown that the state, besides assigning pupils by neighborhood, is constitutionally responsible for segregation in housing, the case against de facto segregation becomes even stronger.[180] At least four theories of varying plausibility support such a responsibility.

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179. Many of the obstacles to a class right of transfer, if not a class right to general desegregation, might be obviated if the state's responsibility to neutralize—i.e., avoid compounding—the effects of private racial discrimination were broadened to require similar counteraction of the effects of poverty. If grouping by residence is constitutionally suspect when it causes a child to be excluded from the school of his choice because of race, it is also suspect when it causes him to be excluded because of poverty, i.e., his parents' inability to afford a house in the desired school attendance area. The contention is that no more than the color of his skin should the size of his father's checkbook be allowed to imprison him in a slum school. Just as the school board would be required to drop the place-of-residence criterion where place-of-residence is directly determined by race, so here it would be required to do so whenever place-of-residence is directly determined by poverty. And since slum residency is almost universally determined by poverty (when not by race), there would be much less objection here than in the race context to making the transfer option a right of all children in slum neighborhoods (however that might be defined). This would still not be tantamount to general desegregation, for it would require the slum students to take the initiative and ride all the buses. But it is a large step to impose a coercive two-way busing program which denies the freedom of choice to large numbers of students, rich and poor, as a constitutionally mandatory remedy. And again, it is a far-reaching demand for children, whose essential grievance is that they have been excluded from chosen schools by the combined operation of the housing market and the neighborhood assignment policy, to ask more than the opportunity to have that exclusion lifted.

180. In *Swann*, the Supreme Court expressly reserved judgment on this question, stating:

> We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation

First, the state might be said to "act" in prima facie violation of the equal protection clause merely by maintaining common law and statutory rules that give individuals the right to discriminate.[181] This extreme position would wholly emasculate the state action requirement and has not yet been endorsed by any member of the Court.

Second, it may be that the discriminatory decisions of private homeowners, each acting independently but for the common purpose of preserving the all-white character of the neighborhood, are equivalent in cumulative effect to the racial zoning ordinance held invalid in *Buchanan v. Warley*.[182] In this view, neighborhood residents collectively exercise a "governmental function" and thus occupy a position analogous to the company town in *Marsh v. Alabama*[183] or the political party in *Terry v. Adams*.[184] The main objection to this approach is that it gives too little weight to the values of privacy and individual freedom of choice, values which clearly underlie the state action requirement and which were not at stake in the company town and Jaybird cases, neither of which involved any authentically "private" interest. It is but a partial answer that the property owner's decision to refrain from selling or renting to blacks is not a matter of personal predilection but of conformity to the "law" of the neighborhood, the unwritten social compact which each resident expects all others to honor in the supposed common interest of maintaining property values and preserving the homogeneous atmosphere of the district. In any case, it seems unlikely that the Court will soon cut so wide a swathe in the state-action concept without some showing of official involvement in the challenged activity.

Third, the state might be held accountable for racial segregation in housing because of its unequalizing effect upon the distribution of public services and facilities. Families living in the ghetto are typically served by poorer schools and hospitals, less adequate police and fire protection, fewer libraries and parks, less efficient municipal utilities than residents of more affluent neighborhoods.[185] No doubt this factual premise would be a sound basis for the enactment of federal open-

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requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.

402 U.S. at 23.

181. C. Black, Jr., *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 99 (1967); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957). *See generally* Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

182. 245 U.S. 60 (1917).

183. 326 U.S. 501 (1946).

184. 345 U.S. 461 (1953).

185. Ratner, *Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services*, 4 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 1 (1968).

housing legislation under the enabling clause of the fourteenth amendment.[186] But while the Court has upheld a federal statute abrogating part of New York's literacy requirement for voting on the ground, among others, that the "enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community,"[187] and while in another case six justices were prepared to hold that Congress may prohibit purely private conduct which interferes with "the right to use state facilities without discrimination on the basis of race,"[188] it was taken for granted in both cases that section 1 of the fourteenth amendment does not of its own force prohibit such private conduct and that, in the absence of implementing congressional action, judicial enforcement is limited to those practices which can fairly be imputed to the state.[189]

Finally, the strongest state action argument is that past and present governmental policies encouraged and promoted private residential discrimination to an extent that justifies holding the state responsible. The enactment of racial zoning legislation[190] and the judicial enforcement of restrictive covenants[191] are notable examples at the state level. At the federal level, government agencies for many years explicitly premised their policies on the assumption that economic and social stability was best achieved by maintaining the racial homogeneity of the neighborhood. Thus, from 1935 to 1950, the Federal Housing Administration took the position that "[i]f a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes"[192] and invited appraisers to lower

186. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court, construing the statute as a bar to racial discrimination in private housing, upheld 42 U.S.C. § 1982 (1970) as a valid exercise of congressional power under the enabling clause of the thirteenth amendment. *Id.* at 439.

187. Katzenbach v. Morgan, 384 U.S. 641, 652 (1966).

188. United States v. Guest, 383 U.S. 745, 780 (1966) (upholding 18 U.S.C. § 241 (1970)) (Brennan, J., concurring). *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 652 (1966) (upholding § 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b (e) (1970), abrogating part of state's literacy requirement).

189. Justice Brennan's separate opinion in *Guest* expressly draws the distinction between limited judicial power to enforce the fourteenth amendment itself and the broader congressional power to enlarge upon the amendment's guarantees. 383 U.S. at 782-83.

190. *See* Buchanan v. Warley, 245 U.S. 60 (1917).

191. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

192. FEDERAL HOUSING ADMINISTRATION, UNDERWRITING MANUAL § 937 (1938). The FHA characterized as an "adverse influence" the "infiltration of inharmonious racial groups" [*id.* § 935]; declared that the presence of "an incompatible racial element and the social class of the parents of children at the school will in many instances have a direct bearing" on the stability of the neighborhood [*id.* § 951]; observed that neighborhood schools will be less desirable if there is "a lower level of society or an incompatible racial element" and suggested that the unwelcome children be offered a fee to attend school in another area [*id.*]; and advocated zoning and deed restrictions to bar the wrong kind of people. *Id.* §§ 933-34.

their valuations of properties in mixed neighborhoods. According to one authority, this policy "established a federally sponsored mores for discrimination in the suburban communities in which 80 per cent of all new housing is being built and fixed the social and racial patterns in thousands of new neighborhoods."[193]

These and other official policies, though subsequently abandoned, are at least partially responsible for customary patterns of segregation that still survive. Further, the refusal of homeowners to deal with potential black buyers often stems from voluntary compliance with race-restrictive covenants. The formerly (though no longer) enforceable state laws[194] that encouraged the use of those covenants may be viewed as one of the contributing causes of the present discrimination.

b. Application of the collateral state action theory to the neighborhood school. If the Court were to hold the existing racially clustered housing pattern to be the product of unconstitutional state action, neighborhood schooling would also be constitutionally suspect. Consider the most extreme case—a community in which a racial zoning ordinance restricting Negroes to a particular district complements the usual school assignment regulations requiring all children to attend their neighborhood school. The school regulation, read together with the zoning ordinance, would be functionally equivalent to the segregation statute voided in *Brown* and would doubtless meet the same fate. Arguably the result should be no different where the residential segregation is brought about not by express decree but by discriminatory market practices in which the state is implicated, and for which it bears constitutional responsibility. In neither case should it be a defense that the school board's action, considered alone, would be innocent; in the eyes of the fourteenth amendment, the state is a unity and the actions of all its diverse organs must be read together.

If the neighborhood-school assignment policy violates the equal protection clause because of its relationship to discriminatory housing practices for which the state is constitutionally accountable, the discontinuance of those practices in compliance with newly enacted federal open housing legislation would not automatically cure the infirmity. Long-established residential patterns are not dissolved overnight, and so long as they survive, the use of a geographical attendance criterion reproduces them in the classroom. In *Louisiana v. United States*,[195] the Court clearly indicated that an otherwise permissible legislative classifi-

193. Abrams, *The Housing Problem and the Negro*, in THE NEGRO AMERICAN 512, 517 (T. Parsons & K. Clark eds. 1966).

194. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

195. 380 U.S. 145 (1965).

cation may fall short of constitutional requirements when its effect is to perpetuate the consequences of prior state-imposed discrimination. That decision upheld a decree barring the use of a nondiscriminatory voter-qualification test where a previous test had been used to keep down black registration. Since the proposed new test applied only to those not already registered, its effect was to preserve the discriminatory advantages gained by white voters. The Court emphasized that the appropriate remedy for the original violation would be "a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[196]

The same reasoning might apply here. Just as Louisiana could not use its otherwise acceptable voting test until the consequences of the former discrimination had been purged, so the use of the neighborhood school plan would have to await the eradication of the effects of prior housing discrimination for which the state was constitutionally responsible. Until open housing had been enforced long and rigorously enough to assure that the residential distribution of the Negro population was no longer an aftereffect of outlawed discriminatory practices, the school board would have to refrain from the use of neighborhood residence as an assignment criterion.

Admittedly, in the Louisiana literacy-test case, the past unconstitutional discrimination and the present nondiscriminatory practice under scrutiny occurred in the same field of action (voting qualifications); there was no occasion to decide whether the continuing effects of former discrimination in one field (housing) narrows the options constitutionally open to the state in an entirely different field (education). An issue of that sort did arise, however, in *Gaston County v. United States*,[197] another literacy-test case. The Voting Rights Act of 1965[198] suspended, in certain (chiefly Southern) states, the use of any test or device as a prerequisite to registration, permitting its reinstatement only upon a showing "that no such test or device has been used [during the preceding five-year period] for the purpose or with the effect of denying or abridging the right to vote on account of race or color."[199] Gaston County, North Carolina, whose literacy test had been suspended, brought an action before a three-judge district court to have it reinstated. The trial court,[200] and later the Supreme Court, denied relief on the ground that since the county had maintained segregated and inferior schools for black children during the period when persons pres-

196. *Id.* at 154.
197. 395 U.S. 285 (1969).
198. 42 U.S.C. § 1973(b) (1970).
199. 42 U.S.C. § 1973b(a) (Supp. I, 1965), *as amended*, 42 U.S.C. § 1973b (a) (1970).
200. 288 F. Supp. 678 (1968).

ently of voting age were in school, its use of a formally nondiscriminatory literacy test would be especially burdensome to Negroes and thus have the forbidden effect of denying the right to vote on account of race. While it is not clear that the Court itself, without legislative support, would have banned the test under section 1 of the fifteenth amendment, that supposition is reasonable in view of the close similarity between the language of the Voting Rights Act and that of the fifteenth amendment,[201] and the explicit statement of the Senate committee report chiefly relied on by the Court that "the educational differences between whites and Negroes in the areas to be covered by the prohibitions . . . would mean that equal application of the tests would abridge the 15th amendment rights."[202]

Assuming that the fifteenth amendment of its own force would have dictated the same result, the case presents an obvious parallel to the de facto segregation issue. Just as the Court held Gaston County's literacy test, in the context of prior educational discrimination, to be racially discriminatory against black children, so might it find the neighborhood school policy, in the context of prior housing discrimination, to be racially discriminatory.

The major weakness of a theory linking the neighborhood school policy to unconstitutional state action in the field of housing is the remoteness of the state's causal involvement in the discriminatory practices of private homeowners. But even if that involvement be insufficient to establish a constitutional responsibility for discrimination in housing, it may still be a satisfactory basis for barring the use of a residential criterion in school assignment.[203]

4. *The Neighborhood School as an Incubator of Prejudice*

a. Outline of the argument. A fourth approach condemns de facto segregation on the ground that it fosters racism in white students, thus significantly raising the level of prejudice and discrimination in the society. Many social scientists are convinced that the all-white neighbor-

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201. The fifteenth amendment provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

U.S. CONST. amend. XV.

The Voting Rights Act provides:

> No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

42 U.S.C. § 1973 (1970).

202. 395 U.S. at 290, *citing* S. REP. No. 162, 89th Cong., 1st Sess. 15 (1965).

203. See text accompanying notes 138-75 *supra*.

hood school is a prime incubator of ethnocentric attitudes and behavior. This premise lays the foundation for a constitutional argument assimilating de facto school segregation to other examples of state action that have been held to violate equal protection by encouraging racial discrimination.[204]

b. Empirical premises evaluated. The theory being no stronger than its empirical premises, we do well to inspect these first. A variety of studies in such diverse fields as housing,[205] military service,[206] and the merchant marine[207] support the basic hypothesis that interracial mingling lessens racial prejudice. These studies tend to show that close and continuing association with Negroes, on terms of equality and especially in a common endeavor, establishes friendlier, less stereotyped, and more respectful racial attitudes.[208] Surveys comparing the racial attitudes of students[209] or graduates[210] of white and biracial schools paint a generally similar picture.

These findings, however, are far from conclusive. For one thing, the chicken-and-egg problem is especially troublesome here. It is not surprising that whites who have black classmates are more than normally tolerant; but which is the cause and which the consequence? Going to a desegregated school may make a child less prejudiced, but children whose parents are willing to send them to desegregated schools are likely to be less prejudiced to begin with. In brief, the bare statistical relationship between intergroup exposure and racial attitudes tells us even less than such correlations usually do about the direction of causality or its operating mechanisms. Furthermore, not all the evidence points in the same direction. Some studies[211] suggest that anti-Negro attitudes and stereotypes may actually be hardened by exposure to black schoolmates.

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204. See text accompanying notes 219-29 *infra*.

205. *E.g.*, M. DEUTSCH & M. COLLINS, INTERRACIAL HOUSING (1951); D. WILNER, R. WALKLEY, & S. COOK, HUMAN RELATIONS IN INTERRACIAL HOUSING (1955).

206. Information and Education Division, United States War Department, *Opinions About Negro Infantry Platoons in White Companies of Seven Divisions*, in READINGS IN SOCIAL PSYCHOLOGY 542 (T. Newcomb & E. Hartley eds. 1947).

207. Brophy, *The Luxury of Anti-Negro Prejudice*, 9 PUB. OPIN. Q. 456 (1946).

208. *See also* G. SIMPSON & J. YINGER, RACIAL AND CULTURAL MINORITIES 506-11 (3d ed. 1965); Mackenzie, *The Importance of Contact in Determining Attitudes Toward Negroes*, 43 J. ABN. AND SOC. PSYCH. 417 (1948); Mann, *The Effect of Inter-Racial Contact on Sociometric Choices and Perceptions*, 50 J. SOC. PSYCH. 143 (1959).

209. *See* appendix C-1 in 2 RACIAL ISOLATION 47, 139.

210. 1 RACIAL ISOLATION at 112; 2 RACIAL ISOLATION at 227-37.

211. Campbell, *On Desegregation and Matters Sociological*, PHYLON, Summer 1961, at 140; Dentler & Elkins, *Intergroup Attitudes, Academic Performance and Racial Composition* in THE URBAN R'S: RACE RELATIONS AS THE PROBLEM IN URBAN EDUCATION (R. Dentler, B. Mackler, and M. Warhaner eds. 1967); Webster, *The Influence of Interracial Contact on Social Acceptance in a Newly Integrated School*, 52 J. EDUC. PSYCH. 292 (1961).

At any rate, the facile assumption that biracial schooling is a dependable cure for prejudice surely oversimplifies. Many factors bear upon the relationship. Much depends, for example, on the psychological importance of racial intolerance to the individual afflicted by it. Prejudiced people run a wide gamut, from the conformist mindlessly parroting ethnic cliches[212] to the confirmed bigot, the authoritarian personality[213] for whom racial hostility answers deep-seated psychological needs, warding off anxiety, shoring up self-esteem, excusing personal failure, releasing pent-up aggression against weak and unretaliating "scapegoats."[214] While classroom exposure to minority group members may be expected to mitigate the shallow conformist kind of prejudice, it may be powerless against, indeed even intensify,[215] the deeper ego-defensive type.

The effectiveness of school desegregation as an alleviation of prejudice depends also on more objectively measurable variables such as the social class of both merging groups,[216] the ratio of black to white students in the desegregated school,[217] and such atmospheric factors as

212. Allport, *Prejudice: A Problem in Psychological and Social Causation*, in TOWARD A GENERAL THEORY OF ACTION 365, 377 (T. Parsons & E. Shils eds. 1962).

213. T. ADORNO, E. FRENKEL-BRUNSWICK, D. LEVINSON & R. SANFORD, THE AUTHORITARIAN PERSONALITY (1950); STUDIES IN THE SCOPE AND METHOD OF "THE AUTHORITARIAN PERSONALITY" 159 (R. Christie and M. Jahoda eds. 1954); G. SIMPSON & J. YINGER, *supra* note 208, at 62-74.

214. *See generally* G. SIMPSON & J. YINGER, *supra* note 208, at 54-62.

215. *See* G. SIMPSON & J. YINGER, *supra* note 208, at 510; Mussen, *Some Personality and Social Factors Related to Changes in Children's Attitudes Toward Negroes*, 45 J. ABN. & SOC. PSYCH. 423 (1950).

216. Lower-class whites are generally more hostile to blacks than middle-class whites, for it is they who are more directly threatened by black people in competition for jobs and status. Attitudes such as these that minister to social status and economic interests are not readily altered, least of all by daily confrontation with the very group deemed to threaten those interests. *See* COHEN & HODGES, CHARACTERISTICS OF THE LOWER-BLUE-COLLAR-CLASS SOCIAL PROBLEMS, 321 (1963); Lipset, *Democracy and Working-Class Authoritarianism*, 24 AM. SOC. REV. 482, 489 (1959); MacKinnon & Centers, *Authoritarianism and Urban Stratification*, 61 AM. J. SOC. 610, 616 (1956); Westie & Westie, *The Social-Distance Pyramid*, 63 AM. J. SOC. 190 (1957). For a brief review of the literature, see G. SIMPSON & J. YINGER, *supra* note 208 at ; J. STOUFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES (1955). *See also* 2 G. MYRDAL, AN AMERICAN DILEMMA 603 (1944).

217. If too few, black students will be written off as exceptions, leaving stereotypes intact; if too many, their presence can be threatening and tension-breeding. One major study suggests that the relationship between white racial tolerance and the percentage of black students in the class, though generally positive, diminishes and may even be reversed where the percentage exceeds 50%. Although white students who attended all-white schools more often preferred segregated classes than did those whose classmates included Negroes, the relationship was reversed when the proportion of Negroes was as high as one-half. See table 8.8 in 2 RACIAL ISOLATION 139. Indeed, students who had never attended class with Negroes were less prejudiced in terms of this standard than those who had been in predominantly Negro classes for several years, although they were not less prejudiced than those who had had Negro classmates as early as the first three grades.

the commitment to integration displayed by school authorities, the efforts of the staff to ease tensions and bring children together, and the balance between cooperation and competition in the social and academic life of the school. These variables complicate, but by no means destroy, the basic empirical hypothesis linking uniracial schools to racial intolerance. While the evidence is inconclusive, the hypothesis remains plausible, and we may assume its validity for purposes of further discussion.

Before we leave the empirical issue, a further point, perhaps no more than a quibble, might be mentioned. If indeed it is true that the average white child emerges less tolerant from an all-white than from a biracial school, the reason may be either that school segregation *increases* prejudice or that school integration *reduces* prejudice while segregation is neutral, merely leaving unchallenged the racial stereotypes the child brings to school from other sources. This fastidious distinction is pertinent because of the traditional understanding that the state has no affirmative fourteenth amendment duty to counteract racial discrimination in the private sector; it need only be neutral. If, remaining neutral, the state is under no obligation to enact laws prohibiting specific types of private discrimination (in housing or employment) why should it be thought obligated to take affirmative action of a much more indirect nature—school desegregation—against "racial prejudice" at large?

Unfortunately, the factual question whether neighborhood schools increase or merely fail to reduce the reservoir of prejudice in society yields no ready answer. The question presupposes a neutral baseline, a level of prejudice independent of the state's action against which to measure its effects. Comparing the attitudes of children from schools of varying racial composition is not enough, for all such compositions are the product of state action, and none provides the requisite independent benchmark. The term "neutral" might be applied with as much justice to any of several pupil placement policies: one that makes the school society a microcosm of the entire community, one that makes it a replica of the surrounding neighborhood, or one that allows students to attend the school of their choice. It would be arbitrary to select any of these as the norm by which to judge the others. Rather, the relevant question is whether a child is more likely to become a bigot by attending a segregated public school than by receiving equivalent instruction in a setting altogether void of peer group influences (for example, through private instruction in the home), and on this esoteric question no empirical data are available or ever likely to be. It would help, no doubt, if we were able to pinpoint the social and psychological mechanisms that bring prejudice into being. But while there is evidence

that incipient racial prejudice often dawns before a child comes of school age,[218] and that "[a] bigoted personality may be well under way by the age of six,"[219] no one knows to what extent this process is advanced through social interactions within the school setting.

Despite the limitations of social-scientific data, it seems that the no-affirmative duty objection should be overcome by shifting to the state the onus of uncertainty, perhaps on the theory that when a child is conscripted into a school society the membership of which is selected exclusively by the state, and when he emerges from the experience more prejudiced than if that society had been differently constituted, the state should not be allowed to take refuge in the speculation that the child might have turned out equally bigoted even had officials stayed out of the picture.

c. The constitutional theory evaluated. Putting the empirical difficulties aside, we come to the constitutional issue itself. The frame of reference is a series of decisions nullifying state action partly or wholly because its practical, if unintended, effect was to encourage racial discrimination by private individuals. Thus, in *Anderson v. Martin*,[220] the Court struck down a statute requiring that candidates for elective office be designated by race on the ballot. The vice, it said, was in

> [P]lacing the power of the State behind a racial classification that induces racial prejudice at the polls. . . . Race is the factor upon which the statute operates and its involvement *promotes the ultimate discrimination* which is sufficient to make it invalid.[221]

In *Robinson v. Florida*,[222] the Court reversed the trespass convictions of lunch counter sit-in demonstrators because of the existence of a state health regulation requiring restaurants to provide the racially segregated toilet facilities, a regulation "bound to discourage serving of the two races together."[223] The Court not only invalidated the state's racial classification, as in *Anderson;* in reversing the "neutral" state trespass conviction, it held the state constitutionally responsi-

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218. *See generally* F. GOODMAN, RACE AWARENESS IN YOUNG CHILDREN (1964); G. ALLPORT, THE NATURE OF PREJUDICE 297-311 (1954).

219. G. ALLPORT, *supra* note 218, at 297.

220. 375 U.S. 399 (1964).

221. *Id.* at 402, 404 (emphasis added). Since the statute expressly provided for racial classification and could well have been condemned on that ground alone, its practical effect as an invitation to prejudice may have been mentioned only to dispose of the objection that the classification was harmless in the way that racial categorization by the Census Bureau is harmless. Whether the Court would have reached the same result in the case of a statute having the same effect but accomplishing it by purely nonracial means—for example, by requiring candidates to identify themselves by picture—is conjectural.

222. 378 U.S. 153 (1964).

223. *Id.* at 156.

ble for the restaurant's discrimination by virtue of a regulation not explicitly commanding discrimination but effectively encouraging it.

Barrows v. Jackson[224] nullified a state trial court's award of damages for breach of a race-restrictive covenant on the ground that the damage remedy "would be to encourage the use of restrictive covenants."[225] Here the state's action was not grounded upon a racial policy but upon colorblind rules of property and contract law. True, the damage award implied a judgment that racial agreements are not against public policy; but refusal to treat this class of contracts as exceptional, and a willingness to enforce a racial convenant to the same extent as any other, seems no less neutral than a school board's decision to adhere to the residential grouping policy in the face of strong evidence that it fosters racial prejudice. Significantly, too, *Barrows*, unlike *Shelley*, did not rest upon a finding that the state had implicated itself in a particular past episode of discrimination, violating the rights of an identified Negro purchaser,[226] but rather upon an empirical generalization predicting the impact of the state's damage rule upon the future conduct of white property owners.[227] The black home buyer in *Barrows* was not before the Court, his interest was unaffected by the outcome; insofar as the breaching seller invoked the rights of Negro purchasers, it was the rights of unidentified purchasers who might in the future be discriminated against if damages continued to be available as an incentive to the use of and adherence to racial covenants.[228] *Barrows* held, in short, that governmental action reflecting no official racial policy may violate the fourteenth amendment when its effect is to increase the incidence of private racial discrimination in the society.

Reitman v. Mulkey[229] went further. It affirmed a decision of the California supreme court striking down a state constitutional amendment guaranteeing the "right of any person, who is willing or desires to sell, lease, or rent [residential real property], to decline to sell, lease, or rent such property to such person or persons as he, in his absolute discretion, chooses."[230] While the precise grounds of the decision are not altogether clear, two findings of the California court weighed heavily: first, the purpose of the amendment was to legalize racial discrimi-

224. 346 U.S. 249 (1953).

225. *Id.* at 254.

226. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

227. 249 U.S. at 254-55.

228. *Barrows* need not be viewed solely as an "encouragement" case. The invalidated rule not only operated as an inducement to the use of racial covenants; it also *commanded* compliance with whatever covenants were used. In that respect, the result in *Barrows* followed logically from the *Shelley* principle that the State may not enforce private discrimination.

229. 387 U.S. 369 (1967).

230. CAL. CONST. art. 1, § 26 (1964).

nation in housing by overturning existing fair housing laws and forestalling the enactment of others in the future; second, the operative effect of the amendment was to encourage housing discrimination to a greater extent than if the state had merely repealed, or failed to enact, the existing law. The Supreme Court emphasized the second factor, noting that the California court, "assessed the ultimate impact of § 26 in the California environment and concluded that the section would encourage and significantly involve the State in private racial discrimination."[231] In short, the chief infirmity of section 26 was that it made discrimination more probable and increased the net social propensity to discriminate.

A similar argument can be made in the case of de facto school segregation. To be sure, *Reitman* is distinguishable in that the very purpose of the constitutional amendment, as the Court found, was to make racial discrimination lawful. But if the encouragement offered to discrimination was in that sense more than incidental, it was still the unsought by-product of state action designed for what the Court assumed to be a legitimate, though race-related, purpose—a purpose not to promote discrimination but merely to abolish legal restraints and leave the decision to private choice. It is fair, therefore, to describe section 26 as a nondiscriminatory provision that, while not designed to encourage discrimination, was held unconstitutional for having that effect.

Yet in the end, the precedents just outlined stop short of the case at hand. A decision invalidating the neighborhood school plan as an encouragement to discrimination would go well beyond them. In the four cases discussed, state action was voided not (as it would be here) for its effect upon general racial attitudes, but for encouraging specific discriminatory conduct in identified activities such as voting, housing, and restaurant service.[232]

The most apparent distinction, however, is that the neighborhood school policy, unlike the state action involved in each of the above cases, takes no action in respect to race. It is not itself based on race (as in *Anderson*), nor conjoined with other state racial classifications (as in *Robinson*); it does not enforce a private agreement based on race (as in *Barrows*); its purpose, declared or (as in *Reitman*) undeclared, is not to authorize or legalize racial discrimination. The importance of this factor is hard to assess. The fourteenth amendment does not ban all governmental action, regardless of subject matter, that happens to have

231. 387 U.S. at 378-79.

232. Moreover, the manner in which the state action exercised its influence—by giving the potential discriminator a motive (*Barrows*), an opportunity (*Anderson*), or a cue (*Anderson, Robinson, Reitman*)—was more obvious and straightforward than the subtle and obscure psychological mechanisms by which the neighborhood school policy operates upon racial attitudes.

adverse indirect effects on ethnic attitudes or behavior.[233] These cases therefore merely stand for the proposition that when the state legislates on the sensitive subject of race relations it bears a greater responsibility for the radiations of its action than would ordinarily be the case. That principle would not apply to the neighborhood school plan. It does not follow, however, that to apply the fostering-prejudice theory to de facto school segregation, the Court would have to apply it to all state actions having a tangential effect upon racial attitudes. A school board can more reasonably be held responsible for the impact of its decisions on civically relevant attitude-formation than can other administrators, since it exists for the very purpose of shaping civically desirable attitudes. If, instead, the school environment nurtures racial prejudice, the school board fails within it bailiwick.

If this consideration is unpersuasive, the integrationist may still fall back on the argument that education is sui generis, that the potential impact of the public school system upon the values and attitudes of children in the formative stage of their development is so profound and lasting that the state may properly be held to a higher standard of responsibility for the effect of its policies here than in other areas. The fostering-prejudice theory, however, has expansive implications within the field of education itself. Placement of pupils is not the only action of school boards that may vitally affect the racial attitudes of white students. Counselling programs, cosmopolitan textbooks, courses on race relations and black history, and other substantive educational reforms might contribute as much to the lessening of prejudice as would integration. If the policy that produces an all-white student body is prima facie invalid because of its attitudinal effects, the policies that produce an all-white curriculum would be just as suspect.[234]

In some ways, perhaps, the pupil-assignment issue is more amenable to judicial treatment than the curriculum issue. The neighborhood criterion used by the state in distributing students is single and explicit, the alternatives are few, and the factors to be juggled—a given student population and the configuration of school locations—are easily ascertained. In contrast, the criteria used in curriculum planning, textbook selection, and the like are many and ill-defined, the range of options wide and open-ended. On the other hand, a decision ordering desegregation would present far more serious and costly problems of

233. It is perhaps for that reason that the Court in *Reitman* did not condemn section 26 for its "impact" alone but stressed also its race-related purpose to abolish and forestall fair housing legislation. 387 U.S. at 374, 376.

234. Nor is it persuasive to say that the social climate of an all-white school increases ethnocentricism whereas the curricular climate merely leaves it unchecked. We have already noted the impossibility of verifying the former proposition [see text accompanying note 218 *supra*], and there is similarly no proof of the latter.

implementation and would arouse greater political opposition than a decision ordering that a particular course, textbook, or counselling service to be inaugurated. In the end there is no clear distinction between the issues of student body composition and curricular composition, and the fostering-prejudice rationale argues for a constitutional duty in the latter as in the former case.

In conclusion, the role of the neighborhood school policy in fostering racial prejudice is not, certainly, an adequate independent basis for ruling it unconstitutional. The empirical assumptions are debatable, the legal theory far-reaching and far-fetched. But if the neighborhood school policy is otherwise required to justify its existence in a balancing process, the suspected influence of school segregation on racial attitudes does seem a factor that may properly be weighed against it.

5. *Equal Educational Opportunity as a Fundamental Right*

Apart from its character as a de facto racial discrimination, the neighborhood policy may also be challenged as a denial of equal educational opportunity to children who live in economically disadvantaged neighborhoods. This argument invokes the principle that a classificaton that invades, restrains, or impinges upon fundamental rights must be closely scrutinized and will be held to violate equal protection unless necessary to promote some compelling state interest. The assignment of children to schools on the basis of neighborhood is arguably such a classification, denying children in slum areas the fundamental right to equality of educational opportunity without compelling justification. This section deals with the doctrinal question whether equal educational opportunity is a fundamental right and discusses the various theories by which segregated schools, it is argued, are inferior. The empirical premise of the latter contention is examined in detail in Part IV of this article.

a. Is equal educational opportunity a fundamental right? The fundamental rights branch of equal protection law is a doctrine in the making, and its judicial acceptance is still somewhat tentative. We may usefully begin by reviewing briefly its development and some of the conceptual problems it poses.

The doctrine first glimmered in *Skinner v. Oklahoma*,[235] in which the Court held a state statute permitting the sterilization of "habitual criminals"[236] a violation of the equal protection clause because it excepted certain crimes, such as embezzlement, tax violations and politi-

235. 316 U.S. 535 (1942).

236. The state statute defined habitual criminals as persons convicted three or more times for felonies of moral turpitude. *Id.* at 536-37.

cal offenses. In his majority opinion, Justice Douglas found no basis for the belief that the artifical lines drawn by the state had any eugenic significance.[237] Had the Court said nothing more, its decision would have stood as a rare but appropriate application of the traditional rationality test—Justice Douglas further noted, however, that a sterilization law deprives the individual of "one of the basic civil rights of man" —the right to have offspring;[238] hence, classifications contained in that law demand strict scrutiny. Despite this language, *Skinner* need not be viewed as a major departure. The Court did not say that a compelling state interest was necessary to justify the classification or that a clearly discernible rational basis, if demonstrated to the Court's satisfaction, would not have sufficed. Its rhetoric concerning basic rights would have been more important had the statutory exceptions been less capricious; in the actual context, it served merely to justify a more tough-minded application of the old rational basis standard than would have been customary in a business regulation case.

The fundamental rights doctrine resurfaced in the mid-1960's in a series of cases involving the political franchise. In *Reynolds v. Sims*,[239] ordering legislative reapportionment under a one-man, one-vote rule, the Court prefaced its analysis by observing that since "the right of suffrage is a fundamental matter in a free and democratic society" and "preservative of other basic civil and political rights" any alleged infringement "must be carefully and meticulously scrutinized."[240] A year later, in *Carrington v. Rash*,[241] the Court voided a Texas provision denying the vote in state elections to members of the armed forces who moved to the state during their military duty. The state defended the classification by noting the high proportion of transients among servicemen and the administrative expense of winnowing out, case by case, the bona fide permanent residents. While these considerations would almost certainly have supplied a rational basis for the classification under the traditional equal protection test as applied in business regulation cases, the Court held that "remote administrative benefit to the State" could not justify the casual denial of a right so "close to the core of our constitutional system."[242]

The following term, in *Harper v. Virginia Board of Elections*,[243] the fundamentality of the franchise was one of several bases for striking

237. *Id.* at 541-42.
238. *Id.* at 541.
239. 377 U.S. 533 (1964).
240. *Id.* at 561-62.
241. 380 U.S. 89 (1965).
242. *Id.* at 96.
243. 383 U.S. 663 (1966).

down a state poll tax. While the main grounds of decision were the irrelevancy of wealth as a qualification for voting and its invidiousness as a classifying trait, Justice Douglas concluded his opinion for the Court with this statement: "We have long been mindful 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."[244] The doctrine, as applied to voting, reached full flower in *Kramer v. Union Free School District*,[245] where the Court held unconstitutional a state statute restricting the franchise in school board elections to parents or custodians of public school children and owners or lessors of taxable real property. Reaffirming the principle that denials of the franchise must be rigidly scrutinized to determine whether they are necessary to promote a compelling state interest, the Court explained that the "presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people."[246] Since this assumption is itself challenged in the voting cases it "can no longer serve as the basis for presuming constitutionality."[247]

The franchise, however, is not the only interest for which the fundamental rights doctrine has been invoked. *Shapiro v. Thompson*,[248] a nonvoting case decided shortly before *Kramer*, contained the first explicit statement that something more than a rational basis is needed to justify discriminations touching fundamental rights. *Shapiro* involved the constitutionality of statutes requiring one year's residence within the state[249] as a condition of eligibility for welfare assistance. The effect of the residency requirement, the Court noted, was to create two classes of needy families indistinguishable except by the length of their residence within the state and, on that difference alone, to deny the newcomers "welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."[250] The states sought to justify this onerous distinction chiefly as a means of deterring an influx of indigent families that would deplete state funds; secondarily, they argued that the requirement served other administrative and governmental objectives by facilitating budgetary planning, providing an objective test of residency, minimizing oppor-

244. *Id.* at 670.
245. 395 U.S. 621 (1969).
246. *Id.* at 628.
247. *Id.*
248. 394 U.S. 618 (1969).
249. In addition to the state statutes of Pennsylvania and Connecticut, a comparable residency requirement for the District of Columbia was also in contest.
250. 394 U.S. at 627.

tunities for fraud, and encouraging entry of new residents into the labor market.

All these contentions were unavailing. The Court, in an opinion by Justice Brennan, held that inhibiting interstate migration was a purpose forbidden by the Constitution and therefore an impermissible justification for the challenged classification.[251] The permissible purposes claimed to be served by the one-year requirement were insufficient, since the waiting period was neither needed nor in fact used to promote any of them; hence, they would be irrational even under the traditional equal protection test.[252] But that was not the test the Court held applicable:

> At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. . . . The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.[253]

Under this exacting standard the Court concluded that none of the reasons offered by the state sufficed to justify the residency requirements.

Recognizing, as it did, the vital importance of welfare benefits, Justice Brennan's language in *Shapiro* encouraged the belief that the compelling state interest standard would be applied to all classifications in this area without regard to their impact upon interstate travel. These hopes were dashed a year later by *Dandridge v. Williams*,[254] in which the Court rejected the contention that a state administrative regulation setting an upper limit on the welfare benefits payable to any family unreasonably discriminated against large families in violation of the equal protection clause. In upholding the regulation, the Court made it clear that legislation in the area of economics and social welfare would be subject to the traditional equal protection test, even though the interests involved were "the most basic economic needs of impoverished human beings."[255] Though acknowledging the dramatic difference between these subsistence interests and the business interests typically at stake in economic regulation cases, Justice Stewart could "find no basis for ap-

251. *Id.* at 631.
252. *Id.* at 634-38.
253. *Id.* at 634.
254. 397 U.S. 471 (1970).
255. *Id.* at 485.

plying a different constitutional standard."[256] He distinguished *Shapiro* on the ground that it involved the constitutionally protected right of interstate travel.[257]

Notwithstanding *Dandridge*, it is fair to assume that the fundamental rights doctrine retains some vitality and extends strict equal protection review to rights not found in the letter of the Constitution. Given this, the case for including equal educational opportunity in the charmed circle of fundamental rights is impressive. Chief Justice Warren, in a frequently cited passage from *Brown*, strongly vouched for the central role of public education in our society:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[258]

There are, however, at least three principle objections to the recognition of a constitutional right of equal educational opportunity. First, the argument from *Dandridge*: public education, like public assistance, belongs to the domain of "economics and social welfare" and therefore is governed by the conventional equal protection standard. Second, the argument from *gratuity*: the state, having no duty to provide public education at all, is not bound to a rigid parity in educational services it does provide; its classifications need only be rational and non-invidious. Third, the argument from *judicial unfitness*: judges have no special competence in dealing with the complex questions of fact and value that would confront them in enforcing such a right, indeed less competence than the professionals whose judgments they would be called upon to review. We shall consider these objections in turn.

(i) The argument from Dandridge. Certainly one of the prime functions of education is to prepare the individual for employment and other economic opportunities; if that were its sole function it would

256. *Id.*
257. *Id.* at 484 n.16.
258. 347 U.S. at 493.

perhaps have no higher claim to constitutional preference than employment laws or the myriad other governmental arrangements which shape the individual's chances in life. At any rate, neither its "importance" to the individual nor the hardship occasioned by its denial distinguish education from the life-essential benefits whose claim to fundamentality the Court rejected in *Dandridge*. The fact that Justice Stewart could find no constitutional significance in what he acknowledged to be the "dramatically real factual difference" between business interests and "the most basic economic needs of impoverished human beings" makes it plain that degree of hardship is *not* the criterion which distinguishes the "fundamental" from the "social and economic." Nor, as a general matter, does public education differ from public assistance in the degree to which judges are competent to deal with the problems typically presented by strict equal protection review; in both fields, the courts would be faced with complex and often technical questions, both of fact and value, for which principled standards of decision are hard to find.

Conceivably one could argue that education (even in its narrow role as career-maker) is not merely one of the shifting social and economic arrangements but the ground base, the underlying precondition, of all social and economic opportunity; that equality of education is to an open democratic society what equality of franchise is to an open democratic polity; that in protecting the one, as in protecting the other, the Court would not be making substantive social policy, would not be making choices that properly belong to the individual and his elected representatives, but would be preserving an institutional framework in which all individuals have maximum opportunity to choose for themselves; and that this preservative function is part of the traditional role of the courts in our constitutional system. That argument, however, could be made nearly as aptly for public assistance, housing, and health care as well; it is unlikely to persuade anyone who accepts the traditional dichotomy, reaffirmed in *Dandridge*, between constitutionally protected intellectual liberties and constitutionally unprotected economic and social interests.

Some writers have suggested that the compulsoriness of education distinguishes it from other governmental benefits and services and warrants strict constitutional scrutiny of its classifications.[259] But the precise relevance of the compulsion factor, and the weight due it, is not altogether clear. The use of compulsion confirms the high value society places on education, but makes it no less a matter of economics and social welfare. The compulsion factor does partially answer those

259. Some writers have thought so. *See, e.g.*, Coons & Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CALIF. L. REV. 321 (1971); Horowitz, *Unseparate But Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A.L. REV. 1147, 1171 (1966).

who would uphold the validity of educational inequalities on the ground that the state has greater leeway in distributing benefits than in imposing burdens. No doubt mandatory school attendance often heightens the impact of educational disparities by barring the disadvantaged child from early employment opportunities that might benefit him more than further time-serving in a school unresponsive to his needs; the disadvantage thus unmitigated becomes less tolerable.

The real significance of the compulsion factor, however, is that it brings to the constitutional assessment an important libertarian value. In no other way, unless by military conscription, does the state impose more drastically on the liberty of the individual than by requiring him to spend in school a major part of his waking hours for a decade or more of his life. Although compulsory attendance laws have consistently been upheld as a legitimate exercise of governmental power, and although no one contends that the freedom of action and association they curtail is constitutionally protected, it can reasonably be argued that such confining regimentation creates reciprocal obligations of minimum and equal educational quality that might not otherwise exist. Surely, for example, the liberty clause, if not the equality clause, of the fourteenth amendment would offended if on grounds of efficiency children uneducable were relegated to teacherless, bookless "classrooms" and forced to idle away the schooltime hours as best they could and this even though the state might be justified in excluding such children from public school altogether. In short, though discrimination without compulsion, and likewise compulsion without discrimination, may (if rational) be constitutionally acceptable, the two together are tolerable only when compellingly necessary.

The position is tenable. On balance, however, the compulsion factor seems a marginal consideration. After all, military conscription, an obvious analogue, restricts the individual's liberty far more (if for a shorter period) and with far less reciprocal benefit than public education at its worst, yet seldom is it argued that the vast array of classifications and differentiations that determine entry to and treatment within the military establishment are subject to rigorous judicial oversight under the equal protection clause. The same overriding societal interests that make the conscriptive enterprise necessary also call for judicial deference to the substantive decisions of its designers and managers. So it may be with education. At any rate, the more one looks upon education as duty rather than right, burden rather than benefit, service demanded rather than service rendered by society, the more one loses sight of its truly important claims to special constitutional status.

Ultimately, the argument from *Dandridge* ought not prevail. Public education *is* economics and social welfare; but it is more than that.

It has another dimension which distinguishes it from material provision, however basic, and arguably lifts it to a higher plane of constitutional significance—its central importance to the system of free expression guaranteed by the first amendment and to the system of representative self-government presupposed by the entire constitutional scheme.

(ii) Education as a precondition of free speech and self-government. Education touches the first amendment at many levels. Much of what goes on in the school is constitutionally protected activity; indeed, the classroom, in Justice Brennan's words, "is peculiarly the market place of ideas."[260] For nearly half a century, moreover, ever since *Meyer v. Nebraska*[261] and *Pierce v. Society of Sisters*,[262] the freedom to attend a private school and to study whatever subjects it may offer has been recognized as a basic aspect of the "liberty" secured by the due process clause of the fourteenth amendment. Though grounded originally on the "liberty of parents . . . to direct the upbringing and education of children under their control,"[263] these educational freedoms have since been reclassified as penumbral first amendment rights and now rest upon the principle that "the state may not . . . contract the spectrum of available knowledge."[264] Thus, education is not merely economics; it is a member of the first amendment family of values.

Freedom of choice in private education is, of course, a very different thing from equality of opportunity in public education. What is more, the *Pierce* and *Meyer* decisions, in so far as they hold that freedom of educational choice may not be subordinated to the state's interest in promoting cultural assimilation, civic unity, and ethnic mingling, thrust against the notion that the state is duty-bound to achieve racial balance by compulsory means. If the fourteenth amendment does not permit, let alone compel, the states to channel children into public schools in order to meld their diverse backgrounds, it would be ironic if the same amendment, for essentially the same assimilationist purpose, not only

260. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (Brennan, J.).

261. 262 U.S. 390 (1923).

262. 268 U.S. 510 (1923).

263. *Id.* at 534-35. It was not until Gitlow v. New York, 268 U.S. 652, 666 (1925), decided shortly after *Pierce*, that the first amendment was first held to be incorporated in the due process clause of the fourteenth amendment.

264. Griswold v. Connecticut, 391 U.S. 479 (1965). *See also* Lamont v. Postmaster General, 381 U.S. 301 (1965). For other decisions relating to the first amendment rights of teachers and children, see Tinker v. Des Moines School Dist., 393 U.S. 503, 506-07 (1969); Epperson v. Arkansas, 393 U.S. 97, 104-06 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Wieman v. Updegraff, 344 U.S. 183, 195 (1952); West Virginia v. Barnette, 319 U.S. 624, 637 (1943). *See also* Serrano v. Priest, 5 Cal. 3d 584, 608, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

permitted but compelled the states to channel children into "melting pot" public schools.

A right to state-provided minimum or equal educational opportunity would have to be grounded on the recognition that the knowledge and skills acquired in school are essential tools of free speech, and that educational opportunity is indispensable if the freedom of speech is to serve those great ends that have been thought to justify its preferred constitutional position. The ultimate philosophical basis for the principle of free speech is debated. Some derive it from the very nature of man, from his unique capacity to reason, to think abstractly, to communicate thought and feeling through language; others value it more pragmatically as a means to the attainment of truth; still others agree with Alexander Meikeljohn that freedom of speech "springs from the necessities of . . . self-government" and is "a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[265] On any of these premises, free speech presupposes education, for without it men would have little capacity either for self-expression, truth seeking, or self-government. Indeed, the vital nexus between universal suffrage and universal education has been keenly perceived from the earliest days of the Republic[266] and was one of the dominant ideas of the public school movement;[267] the triumph of that movement in the middle years of the last century can fairly be said to reflect a strong national consensus for the proposition that education is indispensable to political self-government.

To be sure, the fact that education is vital to a system of free

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265. A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1965).

266. Washington warned in his farewell address: "[P]romote then as an object of primary importance, Institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened." 35 WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 230 (J. Fitzpatrick ed. 1940). Jefferson, reflecting a lifelong commitment to education, wrote: "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be." *Letter to Colonel Charles Yancey, Jan. 6, 1816,* in X WRITINGS OF THOMAS JEFFERSON 4 (P. Ford ed. 1899).

In 1822, Madison opined: "A popular Government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *Letter to W. T. Barry, Aug. 4, 1822,* in 9 WRITINGS OF JAMES MADISON 103 (C. Hunt ed. 1910).

267. The men who led the movement for free tax-supported schools frequently returned to the argument that suffrage for all demanded education for all, a proposition that appealed not only to liberals and egalitarians but also to conservatives who feared that an unenlightened electorate would become putty in the hands of demagogues. *See generally* R. BUTTS & L. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 189-91 (1953); L. CREMIN, THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION 29-33 (1951).

expression does not distinguish it in kind from life-essential material benefits like public welfare, housing, and health care. An empty stomach, a leaky roof, an ailing child are scarcely conducive to self-expression or political sophistication.[268] Indeed, education itself depends nearly as much on the quality of the child's general environment as upon the quality of his school. If nothing else, however, there is a difference of degree in the directness of the relationship; free speech and franchise are more *immediately* tied to education, which nourishes the mind, than to the subsistence benefits which nourish the body. Thus, a decision applying a strict equal protection test to education—holding equality of educational opportunity to be a constitutional right—would not be incompatible with *Dandridge*.

(iii) The argument from gratuity. The delicate interplay between education and first amendment values seems a sufficient answer to the argument from *Dandridge*. It does not, however, immediately at least, answer the argument from gratuity. That argument is bottomed on the traditional view that there is no substantive constitutional right—under either the first amendment or the due process clause of the fourteenth—to be educated at public expense; more broadly, that the state has no affirmative constitutional duty to feed, clothe, shelter, educate, or otherwise care for the basic needs of its citizens; in a phrase, that the Constitution creates no rights of minimum material provision. The basis for this conventional wisdom, though never expressly articulated by the Court, is obvious enough. The relevant constitutional texts (Congress shall make no law. . . . [N]or shall any State deprive any person of life, liberty, or property. . . .) are unambiguously negative, leaving scant fingerhold for an affirmative construction. The words reflect the libertarian philosophy that dominated the age in which they were written, a philosophy that defined liberty as the absence of coercion and that feared more than it expected from the state. These textual and historical obstacles might be less formidable were they not strongly reinforced by practical considerations. In reading affirmative duties of provision into the fourteenth amendment, courts would perforce be undertaking major initiatives in the field of social policymaking. The endeavor would require not only that courts identify the types of need that rank as fundamental, but also that they determine constitutionally acceptable minimum levels—an inquiry for which judicially formulated constitutional standards are doubtfully appropriate and which would be differently answered from place to place and time to time depending on a host of locally variable circumstances. The econ-

268. "Necessitous men are not free men." This oft-quoted apothegm comes originally from the Lord Chancellor's opinion in Vernon v. Bethell, 28 Eng. Rep. 838, 839 (1762), from which it was extracted by Justice Curtis in Rnssell v. Southard, 53 U.S. (12 How.) 139, 151 (1851).

omists' difficulty in arriving at a consensus as to the "poverty level" suggests the quandry that may await judges who embark on these seas. And, in implementing their determinations, the courts may well be faced with no choice but to issue decrees directing states to raise additional taxes—always a distasteful remedy, but never more so than when the state's only wrong is inaction.

That education may be one of the first amendment values does not establish an affirmative duty to provide schools. The constitutional freedom to engage in an activity does not include the right to be subsidized in it—the right to travel is not the right to busfare; the franchise does not include transportation to the polls. And so it is in respect to first amendment freedoms. Although courts have sometimes, without much discussion of the point, required local authorities to afford demonstrators police protection from the illegal conduct of hostile onlookers[269]—a function the state traditionally performs for all its citizens from existing resources—few would argue that the first amendment requires the state to assist faltering newspapers, finance political campaigns, or otherwise underwrite protected activities (however desirable such aid might be as a means of equalizing access to the public forum). So unswerving a libertarian as Mr. Justice Douglas, in rejecting the claim that the first amendment requires tax deductions for lobbying expenses, declared that it savored "of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the state."[270] And if even activities at the core of the first amendment have no affirmative claim upon the public fisc, it is difficult to argue that a more peripheral activity like education has a stronger claim.

Assuming this to be true, the following question arises: If minimum public education is not a fundamental due process or first amendment right, can equal public education be a fundamental equal protection right? If the state is under no obligation to maintain or finance schools at all, may classifications unequally distributing educational resources (including fellow-students), though "reasonable" and free from invidious discrimination, still be invalid for want of a "compelling state interest"? To pose this question is by no means to entertain the thoroughly discredited notion that public education, along with other public benefits, are "mere privileges" that the state may grant or deny however and to whomever it sees fit. The decisions of the Court make abundantly clear that in distributing largesse, as in everything else it does, the state must not act arbitrarily, invidiously, without requisite procedural

269. Hague v. C.I.O., 307 U.S. 496 (1939); Kelly v. Page, 335 F.2d 114, 119 (5th Cir. 1964); Downie v. Powers, 193 F.2d 760, 764 (10th Cir. 1951); Hurwitt v. City of Oakland, 247 F. Supp. 995 (N.D. Cal. 1965); Williams v. Wallace, 240 F. Supp. 100, 109 (M.D. Ala. 1965).

270. Cammarano v. United States, 358 U.S. 498, 515 (1959) (concurring opinion).

fairness, or in such a way as to infringe rights independently protected by the Constitution.[271] But the fact that the state, even in its beneficence, must conform to certain established constitutional norms, which operate no matter what the particular interests immediately involved, is no basis for concluding that it must, in dispensing benefits, meet the abnormally rigorous equal protection standard that comes into play when the interest at stake is determined to be a "fundamental right."

The argument from gratuity is deductible from a more general view of the "fundamental rights" doctrine—namely, that such rights are those and only those of liberty and privacy—which are guaranteed independently of the equal protection clause even against nondiscriminatory abridgement, and do *not* include specifically egalitarian interests having no constitutional source but the equal protection clause itself.[272] Such a view would make this branch of equal protection law virtually redundant, for if the only interests deemed "fundamental" are rights independently secured, resort to the equal protection clause becomes unnecessary.[273]

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271. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 398 (1963). For general criticism of the right-privilege distinction, see O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

272. Justice Stewart could find no constitutional significance in what he acknowledged to be the "dramatically real factual difference" between business interests and "the most basic economic needs of impoverished human beings," indicating that degree of hardship is not the criterion that distinguishes the fundamental from social and economic rights. Dandridge v. Williams, 397 U.S. 471, 485 (1970). See text accompanying notes 254-57 *supra*.

273. Justice Harlan found the fundamental rights theory

> particularly unfortunate and unnecessary . . . unfortunate because it creates an exception which threatens to swallow the standard equal protection rule; [it is unnecessary because] when the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational . . . I know of nothing which entitles this Court to pick out particular human activities, characterize them as fundamental, and give them added protection under an unusually stringent equal protection test.

Shapiro v. Thompson, 394 U.S. 618, 661-62 (1969) (dissenting opinion).

To be sure, a narrowly selective, unevenly burdensome statute may sometimes be more difficult to justify than one having broader, more uniform, impact. First, weakening the competitive position of the disfavored class, such a statute may damage them more severely and burden their protected activities more heavily than a broader restraint treating all alike. Second, a statute curtailing only one group's fundamental liberties while sparing others who differ only in small degree, or in respect to small and subsidiary state interests, may offend basic notions of fairness, which require that minor differences between individuals not be made the basis for major disparity of treatment. Third, the pattern of inclusion and exemption may be a relevant circumstance in assessing the statute's impact, motive, and asserted justification; it may expose as penal what purports to be regulatory [*see* Flemming v. Nestor, 363 U.S. 603, 637 (1960) (Brennan, J., dissenting); *cf.* Trop v. Dulles, 356 U.S. 86 (1958)], or as a

While decisions in the past decade expressly applying the strict

forbidden regulation of speech content what passes for a neutral regulation of time, place, and manner [Cox v. Louisiana, 379 U.S. 536, 575, 581 (1965) (Black, J., concurring)]; the state's willingness to make exceptions to its rule may belie the urgency of the need. Fourth, a narrowly selective statute may escape the political restraints which ordinarily guard against unfair and oppressive legislation.

For these and doubtless other reasons, an underinclusive (though not invidious) statute touching constitutional rights may be invalid where a broader regulation would not. But even in these cases, it does not follow that discrimination is the essential evil or equal protection the appropriate constitutional norm. The outcome of the same subtle balancing process can just as well be expressed in due process terms by holding that, given all the circumstances—including the discriminatory aspect of the statute—the deprivation of liberty is not justified by the requisite state interest.

Due process and equal protection grounds are also interchangeable in situations, such as the welfare residency cases, where denial of some public benefit places collateral burdens on an independently protected constitutional liberty. The statutory waiting periods condemned in *Shapiro* on equal protection grounds could easily have been characterized as a denial of the right to travel. There was solid precedent for such an approach in Sherbert v. Verner, 374 U.S. 398 (1963), in which the Court had held that a statute withholding unemployment benefits from applicants refusing available work violated—not the equal protection clause—but the first amendment when applied to a Seventh Day Adventist whose work refusal was religiously motivated. *Shapiro*, too, could have been placed on "liberty" rather than "equality" grounds, the more so since the very purpose of the welfare residence requirement, unlike the work acceptance requirement in *Sherbert*, was to chill the liberty in question.

Here again, to say that *Shapiro* could have effectively been placed on due process of right-to-travel grounds is not to say that the element of discrimination was unnecessary to the result. On the contrary, if the state had reduced the level of welfare benefits for *all* recipients, it surely would not have been held a violation of anyone's right to travel—despite the fact that the impact of the reduction upon interstate movement would have been as great as that which rendered the residency requirements invalid in *Shapiro*. Indeed, this would likely be true even if the avowed purpose of the reduction were to make the state less of a magnet to welfare seekers. For, as Justice Brennan conceded, a state "may legitimately attempt to limit its expenditures, whether for public assistance, public education or any other program," so long as it does so on a nondiscriminatory basis. 394 U.S. at 633. In such a case, the right-to-travel contention would probably be disposed of either on the ground that the reduction was justified by the state's compelling interest in preserving fiscal integrity by nondiscriminatory means, or that the impingement on interstate movement was too remote to warrant the use of a compelling interest test at all. Thus the logic of *Shapiro* comes to this: A welfare statute that would satisfy the equal protection clause but for its effects upon interstate travel, yet would raise no serious right-to-travel issue were it not discriminatory, violates the fourteenth amendment, probably on both counts, when the two elements are fused. Though such additive reasoning may not appeal to some constitutional analysts, the Court's emphasis on the statute's discrminatory purpose and effect is supported by a solid, practical consideration: a proposed uniform reduction of welfare benefits would generally encounter substantial opposition while a residency requirement, for obvious reasons, does not. The Court might well conclude that a statute chiefly victimizing nonresident interests escapes the rigors of the political process and therefore should be approached more critically than one which falls indiscriminately on residents and nonresidents alike. What is important for our present purposes is that this and other considerations that might tip the scales against a discriminatory denial of benefits even when a broader, more evenhanded, dilution would be acceptable can be given their full due in an analysis of the substantive due process, or "liberty" issue—without invoking the equal protection clause as such.

equal protection test to voting classifications seem to refute the view that the fundamental rights standard is limited to those rights independently guaranteed by other provisions, the ambiguous constitutional status of the franchise makes such a conclusion hazardous. Despite the oft-stated precept that voting in state elections is not a constitutional right, Mr. Justice Douglas has suggested that "the right to vote is inherent in the republican form of government envisaged by Article IV."[274] The right to vote is also implicit in the first amendment, not only because the franchise is preservative of the freedoms of speech and association, but also because those freedoms find their most impressive justification in the necessities of representative government. Indeed, it would be astonishing if a right characterized by the Court as "preservative of other basic civil and political rights,"[275] and "a fundamental matter in a free and democratic society"[276] were thought less worthy of protection by the Constitution than travel and marital contraception, both of which it shelters.

An additional aspect of the voting cases bears even more closely on the problem of public education and equal protection. The Court has held that a statutory limitation of the franchise may pass constitutional muster even where the state selectively exempts certain groups from that limitation based not on a compelling state interest, as required by the fundamental rights test, but merely on a rational basis. Thus, in *Katzenbach v. Morgan*,[277] the Court upheld a federal statute that suspended state English-literacy tests only for citizens educated in schools within the United States and rejected the contention that this was an invalid discrimination against foreign-language citizens not so exempted. The statute, it said, was a reform measure, extending rather than denying the franchise, and as such was subject to the familiar principle that reform may take one step at a time.[278] In other words, when the state goes further than the Constitution requires in protecting or promoting constitutionally favored interests, it will not be held to strict account for failing to distribute its largesse more uniformly.

This principle, it may be argued, carries strong implications for classifications in public education. Public education is an ameliorative

274. Baker v. Carr, 369 U.S. 186, 242 (1962) (concurring opinion).

275. Reynolds v. Sims, 377 U.S. 533, 562 (1964). *See also* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

276. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

277. 384 U.S. 641 (1966).

278. *Id.* at 657. *Cf.* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809-11 (1969).

enterprise, voluntarily undertaken by government. Its purpose is to expand opportunity and reduce existing inequalities of wealth and status. To insist that the state, in conducting such an enterprise, must adhere to a rigid parity of treatment savors of the discredited notion that the state may not reform a particular evil without attacking all others of the same genus. The Court rejected such a proposition in *Katzenbach* even though the reform efforts touched an interest of the most fundamental character.

(iv) Three answers to the argument from gratuity. There are, however, at least three answers to the argument from gratuity, that is, reasons why the absense of an affirmative due process right to minimum public education does not rule out the existence of an equal protection right to parity of participation in such education as the state chooses to provide. First, and most persuasive, the textual, philosophical, and practical difficulties that militate against the recognition of an affirmative constitutional duty to act—the negative constitutional language, the state-action doctrine, and the problem of manageable standards and remedies—do not apply, at least not as forcefully, to questions of distribution and exclusion once the state has undertaken to act.

In granting benefits to Smith while withholding them from Jones, the state does act affirmatively; to hold that Jones is "denied the equal protection of the laws" requires no stretching of the constitutional language, no blinking of the state-action doctrine. Nor would such a holding be inconsistent with the negative philosophy of the Constitution as a system of restraints upon government, for what it demands is not that the state act but that it stop acting discriminatorily. To invoke the equal protection clause in such a case would not cast the courts in quite the same unseemly role of initiating social policy; nor would it require courts to fix acceptable minimums or order tax increases. The initiative would remain with the responsible political authorities; theirs would be the decision whether to provide benefits and in what amounts. The courts' only function would be to insist that no more be given Smith than Jones—absent compelling justification—a mandate which, in theory at least, can be obeyed without increasing total expenditure.

Second, the political restraints that prevent the state from withholding essential benefits and services from the community as a whole do not effectively guard against the selective denial of those benefits. In Justice Jackson's words, "Nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were

affected. . . ."[279] While Justice Jackson drew only the modest conclusion that government ought not be allowed to discriminate "except upon reasonable differentiations fairly related to the object of regulation," one could argue that where constitutionally based rights are in jeopardy, classifications that lend themselves to majoritarian abuse must be held to a stricter accounting than would ordinarily be required.

One must not play this theme mechanically. Broadening a statutory deprivation does not invariably weaken its political appeal. Those whose oxen are gored, even when the burden or denial is extended to a wider class, may still be too few, too quiescent, too unorganized, too unpopular to make effective protest; one may reasonably wonder, for example, whether the sterilization law in *Skinner* wonld have lost much support had it been modified to cover *all* three-time felons. Indeed, "toughening" a statute may gain it more friends than enemies. This possibility is particularly real in the case of public benefit programs, where the state taxes the many to meet the urgent needs of the few, and where measures that restrict the class of beneficiaries, thus lightening the tax burden, may be welcomed rather than opposed by the majority of electors. One can be sure, for example, that an application of the strict equal protection test which put Congress to a choice between abandoning low-rent public housing altogether or expanding the program to accommodate all needy families within the eligible income group would be more likely to evoke the former than the latter response. A constitutional rule requiring the legislature to include everyone or no one would admittedly sharpen and polarize issues. But why that should be thought desirable, much less a proper purpose of judicial review, is unclear.

The political process argument does apply with full force, however, to laws touching public education, a service received by all classes of society and the uniform curtailment of which would be felt by the powerful as well as the weak. Decisions adversely affecting the quality of education for all children are apt to meet stiff political opposition and therefore to receive careful and responsible consideration; decisions short-shrifting only one or a few schools, especially schools attended by the poor or the black, may go virtually unopposed. Judicial oversight, unnecessary in the former case, may in the latter be a vital safeguard against arbitrary or heedless decisionmaking.

Third, the individual's interest in the benefits he claims, and the injury he suffers if denied, may be greater when the state provides for others than when it provides for no-one at all. Selective deprivation

279. Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

can be harder to bear than universal deprivation, comparative disadvantage harsher than absolute disadvantage. To deny me a benefit granted my neighbor may damage me far more than if he, too, were denied, especially if we are competitors. This competitive factor doubtless helps explain why the state, though it need not subsidize political parties, candidates, or publications, must be scrupulously neutral in doing so. Political groups and ideas are in keen contention; to help one may hurt the others. Hence the very consideration that cautions against recognizing an affirmative duty of support—fear of the official thumb on the scales—demands the most rigid scrutiny of whatever allocations of public largesse the state does see fit to make.

In education, too, the competitive factor looms large, larger by far than in welfare, housing, or health care; those denied such benefits do not suffer from the fact that others receive; it is the deprivation, not the discrimination, which carries the sting. In contrast, a child excluded from the public schools might very well be better off if public schools did not exist, so that his competitors in life were equally handicapped. This point admittedly has less force where the discrimination complained of is not denial of schooling but inferiority of schooling. The disadvantaged child who receives poor public education is unlikely to be better off with none even if all others were in the same boat. Children of the poor would lose ground to those middle-class children whose parents could afford private education; they might gain ground on those who previously received a better public education but whose parents can not now afford private education; the net effect is anyone's guess. The first amendment analogy suggests, however, that discrimination by state action cannot be justified solely on the ground that constitutionally permissible inaction would result in even greater inequality. One doubts, for example, that a law prohibiting political contributions by private givers and allocating public funds among Republicans and Democrats in a two-for-one ration could be defended on the ground that without the law the Republicans would have raised even more and the Democrats even less.

(v) The argument from judicial unfitness. So far, none of the arguments against a tightly protected right of educational equality has seemed very persuasive, at least to anyone willing to extend constitutional guarantees beyond the letter of the text. A final set of considerations may carry greater weight—namely, the extraordinarily complex questions of fact and value that the recognition of such a right would demand, the notable lack of judicial competence in handling these questions, and the theoretically greater ability of the professional educators and specialized lay boards whose decisions the judges would be reviewing. No one can doubt that these considerations, though

rarely discussed explicity in the Court's opinons, have played an important role in fixing the scope of judicial review. For example, the deference of courts to legislative judgments in the field of social and economic regulation undoubtedly owes much to the complexity of the subject, "the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times that judges have been overruled by events."[280] At the other pole, the scant judicial deference paid to legislative judgments impinging upon first amendment rights is due not only to the explicit and inflexible wording of the constitutional text and the fundamentality of the rights involved, but also to what Professor Thomas Emerson describes as the "special competence of the judiciary for dealing with the kind of issues that arise in protecting the mechanisms for the democratic process."[281] In this field,

> the task to be performed is not that of initiating action, but of assuring that action is channeled through acceptable modes of procedure. Hence the judgment relies more upon the knowledge and wisdom derived from historical experience, from broad political and social theory, and from weighing basic values, than upon the kind of information and skill necessary for planning and executing specific projects of economic, political or social regulation. The courts are, in short, specialists in the field of constitutional limitation.[282]

The specialized competence of the judiciary goes even further in its innovative role in the field of criminal procedure. By dint of training and experience, by the unique perspective they acquire through on-going administration of the system of criminal justice, judges are better qualified than legislators to identify the elements of procedural due process and procedural equal protection. Mr. Justice Jackson made the point with characteristic insight:

> Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility . . . of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law.[283]

In effect, judicial competence in the above areas depends on several major determinants of the scope of judicial review—the presence of an express constitutional guarantee, the fundamentality of the rights

280. Tussmau & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 372-73 (1949).

281. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 31 (1966).

282. *Id.*

283. Shaughnessy v. Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

under consideration, and whether these rights involve a burdened class unable to fend for itself in the political arena.[284] Education is one field in which the criterion of competence counsels emphatically against judicial intervention. To be sure, the Court is no stranger to public school issues, nor has it hesitated to protect children's first amendment freedoms against classroom encroachments.[285] It has banished racial classifications from this as from all other areas of public activity. In these situations, however, the issues presented were not educational issues as such. They called for the broad wisdom of the constitutional specialist, not the technical expertise of the professional educator. To demand of the state a compelling justification for the innumerable differentiations of treatment that permeate the educational system would tax the courts far more onerously. It would require them to identify the goals of education, to set priorities among these goals (for example, efficiency v. equality), and to select among alternative means of achieving them. It would involve the courts in a wilderness of low-level pragmatic choices among competing programs, grouping patterns, and resource allocations. In the process of administering a rigorous equal protection test, judges could hardly help becoming inspectors-general of the public school and arbiters of the wisdom, not merely the reasonableness, of policies and practices of the officials to whom the community has confided these decisions and whom it holds accountable. In this endeavor, the courts would find scant guidance in the generalization that equality of education is a fundamental right.

Judges are not particularly equipped to assume such a role, and, equally important, they are less equipped than those whose judgments they would be called upon to review. Teachers and school administrators have that sort of professional training and experience in education which judges boast of in the field of criminal procedure. Even the laymen who sit on boards of education and make the ultimate policy judgments can be assumed to acquire, through their on-going attention to the problems of the school system, a degree of specialized competence

284. One area in which the signposts give conflicting indications is that of state legislative reapportionment. The Court was long deterred from entering the political thicket by misgivings about its capacity to deal with the complex and politically sensitive issues that would inevitably arise. *See* Baker v. Carr, 369 U.S. 186, 267-69 (1962) (Frankfurter, J., dissenting). Ultimately, these misgivings were overcome by a recognition of the critical importance of the rights at stake and of the built-in commitment to the status quo that made it futile to expect state legislatures to reform their own selective processes. But having made the decision to intervene, the Court was probably compelled by considerations of institutional competence to adopt the one-man, one-vote formula—a relatively simple and manageable standard making it unnecessary for the courts to weigh myriad imponderables.

285. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); School Dist v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

that the generalists of the bench, occupied with a wider range of concerns, cannot hope to match. The decisions of school boards claim not only the respect courts customarily give to judgments of popularly elected legislators but, in addition, the deference normally accorded the determinations of specialized administrative agencies in a position, as courts are not, to deal with particular issues as elements in a comprehensive regulatory scheme. It is true that in the education of disadvantaged youngsters, experts of all stripes—behavioral scientists, curriculum planners, classroom teachers—have fallen short of the mark. And there is intense controversy among knowledgeable authorities as to the proper goals, methods, organizational forms, and governing structures for the public schools. But no amount of dissonance and fallibility on the part of those entrusted with responsibility for the schools recommends turning these vexing problems over to judicial overseers who have fewer qualifications for solving them, perceive them only from a distance, can act upon them only intermittently, have no opportunity to retrieve their mistakes and, above all, are not accountable to the public for the consequences of their decisions.

b. Does de facto segregation in fact provide unequal educational opportunity? The preceding analysis suggests that a strong case can be made for including equal educational opportunity among the fundamental rights sheltered by the equal protection clause even against rational state action. The question we now reach is whether the established policy of grouping children by residence for purposes of school assignment is, in fact, an infringement of that right. This question must be faced whether one's constitutional theory is based on the fundamental-rights concept of equal educational opportunity or on the concept of the constitutional ban against racial discrimination by reason of its racially specific impact upon black children as such.

Those who maintain that segregated black schools are unequal or inferior generally mean one of two things:

i) Segregation results in an unequal division of educational assets; a school with less than its share of politically effective middle-class whites almost inevitably gets less than its pro rata share of dollars, equipment, experienced teachers and other resources.

ii) Even with a proportionately equal allocation of physical assets, a homogeneously black or lower-class school offers an inferior quality of education because:

(a) racially homogeneous schools, whether black or white, deny children of both groups the opportunity to develop realistic and mutually respectful racial attitudes in place of the stereotyped, hostile, and mistrusting attitudes they have when kept apart (the racial fraternity argument);

(b) an all-black school, stigmatized as inferior in the eyes of the community, engenders feelings of self-contempt and inadequacy in its students—painful and demoralizing feelings, whether or not they contribute to any measurable flagging of performance (the psychological harm argument);

(c) in an all-black school, the child fails to develop what might be called "social competence"—patterns of speech and behavior acceptable to the dominantly white middle-class society in which he must make his way and the ease and self-confidence in the company of whites necessary to perform effectively in biracial situations (the social competence argument);

(d) the average child, whatever his race or class, tries harder, aims higher, and therefore learns more, when surrounded by middle-class whites than when surrounded by lower-class peers—black or white (the academic performance argument).

(i) De facto segregation as a source of unequal resource allocation: the "magnet" or "hostage" theory. Does de facto segregation violate equal protection by causing a maldistribution of material educational resources? Alternatively, if the malapportionment of material resources is itself considered a constitutional wrong, is desegregation an appropriate remedy? The case for the affirmative builds on what appear to be solid factual premises. There is ample evidence that schools in ghetto neighborhoods are typically underfinanced, underequipped, and understaffed, both qualitatively and quantitatively. It is clear, moreover, that this condition owes much to the political powerlessness and passivity of ghetto parents and even more to the notorious reluctance of teachers to serve in schools where a high proportion of students are looked upon as unteachable. Hence, it is reasonable to conclude that if middle-class white children were spread evenly throughout the school district, politically sophisticated and educationally demanding parents would be similarly distributed, thus insuring that each school would receive its due and removing the incentive of teachers to prefer one school to another.

Proponents of this view reject the obvious counterargument that distributional disparities, insofar as they violate the equal protection clause, are adequately remedied by a decree striking directly at the maldistribution itself—ordering that all tangible educational resources be allocated evenly among the neighborhood schools. Such a decree, they argue, would be bitterly opposed by teachers, both individually and collectively, and might succeed only in driving them, if not from the profession, at least to the suburbs. More important, so long as segregation gives some schools greater drawing power than others at the legislative level, courts cannot hope to redress the balance, to hold in harness

the myriad subtle elements that combine to determine the quality of a school's educational offering. Inequalities born of segregation, even if identified, tallied, and momentarily corrected, would almost certainly recur; parity of provision, difficult to achieve, would thus be virtually impossible to preserve. And in the futile effort, the courts would be drawn into continuing conflict with school authorities, sapping the prestige of both.

From one perspective, this theory looks upon advantaged white students as "magnets" attracting other educational resources; from another, as "hostages" against unfair treatment. The hostage theory can be understood as an aspect of that constitutional philosophy calling for judicial action to provide the preconditions for politically responsible decisionmaking. The most notable example is Justice Jackson's rationale for the use of the equal protection clause against "underinclusive" classifications:

> Invocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. . . . The framers of the Constitution knew . . . that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.[286]

In these terms, the hostage theory aims to give the school board's resource-allocation decisions a broader impact guaranteeing against unfair allocation of resources by insuring that the onus of any unfavorable distribution falls upon the powerful as well as the weak.

This constitutional contention cannot lightly be dismissed. On balance, however, it does not persuade. If the unwillingness of teachers to serve in segregated ghetto schools causes constitutionally unacceptable inequalities, less drastic remedies than forced desegregation should suffice to correct the problem. The teacher assignment policy itself could be appropriately modified; and if organized resistance from teachers made this unfeasible,[287] an offsetting allocation of other re-

286. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (concurring opinion).

287. A court might well conclude that coercion of teachers would have troublesome consequences. But, finding sufficient reason for preserving freedom of choice in teacher assignments even at the risk of depriving slum schools of experienced teachers, a court would be unlikely to regard a costly and coercive redistribution of students as a more feasible means of dealing with that problem.

sources to the slum schools may well be viewed as an adequate alternative. For instance, the presence of more experienced teachers in middle-class schools could be balanced by lower teacher-pupil ratios in the slums. At most, the district might be given a choice of means, including desegregation, by which to correct the teacher imbalance. The same point applies to maldistribution of dollars and other wherewithal. A judicial decree requiring equal division of all educational inputs might or might not be easily enforced; but it is hard to believe the difficulties would surpass those those presented by massive, community resented, desegregation. At any rate, no court should draw that conclusion, and thus adopt the superficially more drastic remedy, unless and until the direct approach proves ineffective.

There is a broader point. The effect of desegregation upon the allocation of educational resources may be more complicated than the fundamental rights argument assumes. There seems little doubt that the elimination of racial and social imbalance between neighborhood schools would have the effect of greatly reducing inequalities in the distribution of other tangible educational assets. But while integration would thus help black and lower-class students to gain an equal share of the pie, it might ironically make it more difficult for students from poor districts to obtain the larger than equal share—the special compensatory programs—that they must have if the educational gap is to be closed. Desegregation and compensatory education make competing demands upon the same limited fund of resources; a dollar spent on busing is one that might otherwise have been invested in remedial programs or smaller classes in slum schools. Politically, moreover, middle-class parents whose children are being bused to slum schools under court order may well conclude that they have sacrificed enough to the education of the disadvantaged and that the balance of the school budget be spent on programs affording at least equal benefit to their own children. Indeed, court-ordered desegregation has been known to create such bitterness that communities, in protest, have voted down an otherwise acceptable tax increase or bond issue. While the presence of large numbers of disadvantaged children in middle-class schools might awaken the interest of middle-class parents in the educational problems of the poor, it is no less possible that the concept of preferential treatment for the poor may be more readily acceptable to middle-class parents when the beneficiaries of the discrimination are in faraway ghetto schools than when they are right across the hall.

Finally, desegregation and compensatory education have contrary thrusts at the operational level. The theme of desegregation is uniformity; its aim is to minimize differences in treatment and environment to which children of diverse backgrounds are exposed in school. Its

ideal is a heterogeneous classroom comprising the full spectrum of abilities and backgrounds. Compensatory education, on the other hand, looks the opposite way—toward differentiation, particularized responses to varying needs, levels of preparation, and cultural background. Almost inevitably, it requires a homogeneous grouping of students in separate classrooms, if only for certain purposes and at certain times. While the two approaches can be partially accommodated—for example, by flexible grouping practices within the classroom or by limiting the separation of students to selected remedial courses—they cannot be fully harmonized.

(ii) De facto segregation as a cause of adverse effects on school children. We now turn to a consideration of contentions that depend on factual generalizations to which neither intuition nor empirical studies provide confident answers. The constitutional interest asserted is freedom from invidious discrimination; the factual assumptions are that a black child assigned to a predominantly black school on the racially neutral ground of residence will develop the same racial attitudes, feel the same stigma, be denied the same opportunity for cultural assimilation, and suffer the same learning deficiencies characteristically inflicted by de jure racial segregation. As a basis for invoking the fourteenth amendment against legislation that does not expressly classify by race, it would appear crucial that these assumptions be convincingly supported by empirical data.

Racial fraternity. It is a widely shared conviction that a major responsibility of the American public school is to prepare children for enlightened membership in a multicultural and racial society, to help youngsters of diverse heritages and backgrounds to understand, appreciate, and come to terms with one another as individuals rather than as stereotypes. Indeed, to many integrationists, the most convincing rationale for a policy of compulsory school desegregation is the expectation that children of both races, brought together in the school setting, will develop an attitude of mutual acceptance and respect. Desegregation, in this view, benefits black and white alike, broadening and humanizing both.

This argument has powerful appeal. It contains no facile assumption about the effects of desegregation upon academic achievement, no condescending assurance that the black child will find academic and social salvation through civilizing exposure to exemplary middle-class whites. Yet, for all its persuasiveness at the policy level, this conception of the public educational function does not translate readily into constitutional doctrine. One difficulty, though not the most important, is that the argument does not establish the inferiority of black

schools to white schools but rather establishes the uniform inadequacy of all racially homogeneous schools to the task of promoting good race relations. The very feature that makes the argument so appealing at the level of political action—that it does not cast black people as the sole victims of segregation—embarrasses it in the constitutional context. For the value it sees jeopardized by segregation is neither liberty nor equality, but fraternity, which, unlike its sisters, has no express constitutional reference point.

This objection is not fatal. A classification may violate the equal protection clause not only when it treats one class more favorably than another but also when it treats two classes differently to their mutual or common detriment. This is plain enough where the classification is based on race, less clear where the classification criterion is not constitutionally suspect. Yet even in the latter case, to require a showing that the differentiated groups have been treated unequally can produce theoretically unacceptable results. Suppose, for example, that children are assigned to separate classrooms on the basis of ability and it is found that all children assigned to the "slow" group would be substantially better off in a heterogeneous classroom. If this finding were otherwise sufficient to invalidate the classification under the equal protection clause, could one argue that the classification's constitutional impartiality is restored because children in the "fast" group were similarly disadvantaged? The answer is obviously no. Perhaps it is wise to think of a classification that results in the physical separation of two groups, *A* and *B*, who would gain substantial benefit from contact with one another (such as blacks and whites, rich and poor, high achievers and low achievers) as involving two distinct discriminations or inequalities. One denies group *A* equal access to group *B*; the other denies group *B* equal access to group *A*. This, it may be argued, is not equality but the "indiscriminate imposition of inequalities"—and, as such, does not meet the requirements of the equal protection clause.[288]

The racial fraternity theory, however, has a more serious weakness: it is hard to argue that the particular educational interest invaded here rises to constitutional dignity. Can segregation really be said to deny the child a fundamental right if the only harm done is to preserve his racial stereotypes intact? Although each man is surely poorer for his prejudices and suffers from anything which makes him less humane and narrower in outlook, and although the interests of society are importantly served if schools succeed in fostering friendly racial attitudes, it is exceedingly difficult to dress these social values in constitutional attire.

288. Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

Psychological harm. The constitutional force of the argument that de facto segregation, like its de jure counterpart, inflicts painful feelings of inferiority suffers the same infirmities as the racial fraternity argument just examined. As we shall see,[289] the empirical foundation of this argument is doubtful. In addition, it is difficult to conclude that a bare finding of psychological pain unaccompanied by any visible behavioral impairment makes an all-black school so educationally inferior as to deny constitutional equality. If equal educational opportunity qualifies as a preferred interest by virtue of its relationship to self-government, economic opportunity, and social mobility, the contention that something fundamental is denied merely because two schools may differ in their psychological effects is not persuasive.

Social competence. The effects of school segregation must be viewed against the background of a society that is dominated by white cultural attitudes. The failure of the racially isolated ghetto school to teach its students social skills—the ability to speak and behave in the same way as the dominant white group that controls access to most opportunities in society—rings with constitutional force. A school in which white middle-class "models" are plentiful is apt to be more successful in its mission of acculturation than one in which those models are absent. And the experience in dealing with white peers on a day-to-day basis is likely to affect the black students' self-confidence and performance in integrated situations after graduation.

Grounds such as these formed the basis for the Court's decision, four years before *Brown*, that the opportunities for legal education that Texas offered blacks in a separate black law school were not equal to those offered whites in the regular state university law school.[290] The black school, the Court stressed, "excludes from its student body members of the racial groups which number 85% of the population of the State and includes most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar."[291] While racial isolation of the black child in primary and secondary schools does not entail the immediate professional disadvantage noted above, it still deprives him of contact with members of the dominant racial group with whom he will inevitably be dealing, and with whom he must learn to get along to achieve success.

Unlike the racial fraternity and psychological harm arguments, the social competence theory focuses directly on one of the goals that marks

289. See text accompanying notes 387-401 *infra*.
290. Sweatt v. Painter, 339 U.S. 629 (1950).
291. *Id.* at 634.

public education as fundamental: its role in preparing children for successful competition in the employment market. Yet, in doctrinal terms, social as opposed to academic learning through peer-group interchange is not the central, general goal of the public schools. To the middle-class white child, such learning comes, if at all, as an incidental byproduct of classroom associations that are merely extensions of the child's out-of-school social life. True, for the ethnic minority student, such assimilation and acculturation effects are among the more significant ends of public education, and are not merely accidental fallout. But, as a doctrinal matter, it is by no means clear that constitutional inequality results if a school system fails to perform an incidental service to all students, even though one segment might gain greatly by it. More importantly, as an empirical matter, there is no solid quantitative evidence as to how much difference for black students the presence or absence of white students makes in the acquisition of social skills, or how important those skills really are in the world beyond the schoolhouse. A persuasive showing on these factual premises seems a reasonable prerequisite to judicial imposition of a constitutional duty of compulsory desegregation on social competence grounds.

Academic performance. The essential premise of this argument is that a black child learns more in a white or racially balanced school than in a black school similarly financed, staffed, and equipped. These assumptions are not self-evident. Part IV of this Article reviews and assesses the significant research findings concerning the relationship between school racial and social composition and black academic performance, examines the three principal theories advanced to explain or predict that relationship, and concludes that the effect of segregation upon student achievement is, on present evidence, highly uncertain, variable, and probably small.

(iii) Proving denial of unequal educational opportunity. Given the uncertainty that academic performance is impaired, or other inequality results, under de facto segregation, a question arises involving proof: What level of certainty must the courts have in order to find that a legislative classification results in a denial of equal educational opportunity; should close empirical questions be called in favor of the asserted constitutional right or in favor of the state's action? Second, how general must the incidence of disadvantage be in order to support a constitutional finding of unequal educational opportunity?

The decisions of the Court cast surprisingly little light on the first question. A series of first amendment cases in which the restriction of constitutionally protected activity was clearly the consequence of the state's action are inapposite. When a law disqualifies members of the Communist Party from holding public employment or traveling

abroad,[292] or denies unemployment benefits to persons who refuse, albeit on religious grounds, to accept available work,[293] the chilling effect on constitutionally shielded activities requires no statistical demonstration, for a law imposing a tax or fine on constitutionally protected speech would clearly violate the first amendment even if no one were in fact silenced by it; it is enough that free speech not deterred is penalized.[294]

This analysis is not confined to first amendment cases. It applies also to a case like *Shapiro v. Thompson*,[295] in which the deterrent effect of the welfare residency requirement on the right of interstate travel was open to real question. The record in *Shapiro* contained uncontradicted evidence, presented by the plaintiffs themselves, that abolition of the waiting-period requirements, would not significantly increase the number of welfare applicants. It might then have been inferred, as both dissenting opinions noted, that the requirement did not deter an appreciable number of persons from moving interstate. Yet Justice Brennan, writing for the majority, concluded that the waiting period requirement served to penalize interstate travel and therefore must be justified by a compelling state interest.[296]

This cavalier treatment of the empirical issue might suggest that where fundamental rights are at stake and a commonsense basis exists for believing these rights are impaired, the Court neither requires nor gives much weight to hard data on the question but instead resolves factual doubt in favor of the asserted right, and passes immediately to the issue of justification. However, such an interpretation misreads the welfare residency case. Justice Brennan's assertion that the residence

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292. Aptheker v. Secretary of State, 378 U.S. 500 (1964).

293. Sherbert v. Verner, 374 U.S. 398 (1963).

294. This may be true even in cases where the detriment incurred by those engaged in protected activity is merely incidental to the statutory purpose. In *Sherbert v. Verner*, for example, the denial of unemployment benefits to Seventh Day Adventists would not have been saved from unconstitutionality by a finding that no Adventist was prepared to disobey his religion in order to get the benefits; the bare fact that they were put to the choice was enough to bring the first amendment into play.

In some first amendment cases, however, there is room for doubt not only as to whether the state's action does in fact inhibit speech or association but even as to whether it penalizes those activities in the sense just discussed. A statute that requires an unpopular organization (such as the NAACP in the South) to disclose its membership list is not calculated on its face to discourage the associational activities of the group and its members; disclosure is not necessarily a detriment, and its chilling effect on those activities might not be regarded as self-evident. In such cases, the Court does seem to have taken seriously the empirical question of the statute's impact on the first amendment activities. *See* Bates v. Little Rock, 361 U.S. 516, 523-25 (1960); NAACP v. Alabama, 357 U.S. 449, 462-63 (1958).

295. 394 U.S. 618 (1969).

296. *Id.* at 650, 671-72.

requirement serves to penalize the right to travel did not rest upon the empirically questionable premise that a large number of indigents had been dissuaded from migrating interstate but upon the empirically unquestionable premise that those who did migrate had been denied benefits essential to life. The basis for concluding that the waiting-period provision served to penalize interstate travel was that it denied welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction[297]—a judgment independent of any empirical assumption as to the chilling effect of the residency requirement upon interstate travel. The constitutionally relevant harm inflicted by the statute was measured, not, as Justice Harlan suggested,[298] by the number of persons deterred from moving, but by the severity of the hardship manifestly imposed on those, like the appellants, who refused to be deterred. It was this penalty, not the presumed burden on interstate movement, that the state was required to justify. By putting indigents to a choice between changing residence or continuing to receive welfare assistance in their home state, the state impaired their individual right to travel whichever choice they might make.

On this interpretation, *Shapiro* is no model for handling the kind of empirical question presented by de facto school segregation. In that case, the Court had only to find impairment of one individual's rights in order to prescribe an individual remedy—entry on the welfare role; in the school case, the Court must find a general deprivation of equal rights in order to prescribe a general remedy, for a remedy affecting only individuals is impossible.

The problem of uncertainty, therefore, must be approached without authoritative guidance. One possible position might be modeled on Justice Stewart's statement, in another context, that laws which "serve a legitimate state interest but are said to have some impact on First Amendment activity" should be invalidated only if it is determined "that application of the statute . . . would clearly result in a considerable impairment of those rights."[299] If this exacting standard if appropriate in dealing with rights explicitly protected by the constitution, it would seem more fitting when, as here, the interests asserted have their source in the more subjective notions of fundamental rights. Thus, the extreme uncertainty and incompleteness of our present knowledge concerning the educational consequences of racial imbalance would preclude a constitutional finding that assignment to an all-black school denies the black child equal educational opportunity; the question of the substantiality of the competing state interests would not arise. This po-

297. *Id.* at 634.
298. *Id.* at 671-72.
299. Williams v. Rhodes, 393 U.S. 23, 57 (1968).

sition, in addition to deciding the issue of certainty of proof, necessarily assigns the burden of proof to the integrationist.

Several considerations support this view. First, the interest at stake here—equal educational opportunity—is at best a fringe member of the class of fundamental rights, one neither expressly nor implicitly guaranteed in the constitutional text and having no longstanding history of judicial recognition. Second, the conspicuous absence of any special judicial competence in empirical issues of this sort, and the theoretically greater competence of the professional educators and specialized boards to whom the public has assigned responsibility for the educational enterprise makes this an especially unappealing occasion for the exercise of judicial power. While judges may properly use intuition in matters closer to their experience or more amenable to intuitive judgment, they should refrain from doing so in a matter as foreign to them as this. Third, the constitutional decisions of the Court are far less amenable to revision in the light of developing empirical knowledge than are the policy choices of an administrative or legislative body; for practical purposes, the Court speaks irreversibly and therefore should speak only when its factual ground is solid. This is especially so in an area where both the factual situation itself and our empirical knowledge of it are in a state of great flux. A decision declaring racial imbalance educationally harmful might either inhibit further necessary research or quickly be discredited by it.[300]

The opposing position is that, in view of the importance of the constitutionally protected interest in educational equality, serious empirical doubt as to the fact and extent of its impairment should be resolved in favor of the right rather than against it, and the state should have the burden of persuasion. That conclusion is reinforced by the Court's declaration that de jure segregation is harmful to the black child; there is little reason to suppose de facto segregation more benign. A constitutional distinction so profoundly affecting the day-to-day life of the average family, and one bound to divide the country on sectional lines, ought not be based on a difference in toxicity between southern-style

300. This last point bears elaboration. The Court's finding in *Brown* that school segregation generates feelings of inferiority in black children has not, I believe, been borne out by subsequent research; as we have seen, there is some evidence the other way. In addition, the new surge of pride and self-appreciation in the black community has given an entirely new dimension to the question of the effects of racial isolation upon the black child's self-image. No one, at present, can say with assurance whether the presence of white students helps or hinders the process of black self-realization. This scarcely seems the moment for the Court to enter with an Olympian pronouncement concerning the psychological ill-effects of assignment to an all-black school, especially when the consequence of such a finding may be to foreclose promising alternative approaches to the problem of upgrading the ghetto schools, approaches such as decentralization and community control.

and northern-style segregation, unless that difference is clearly and affirmatively demonstrated.

No less troublesome than the uncertainty of segregation's impact is the question of its variability. The educational consequences of de facto segregation vary from child to child and situation to situation, and the neighborhood school policy, though harmful to many black children, may be harmless or even beneficial to others. This factor of variability seems no serious obstacle to the conclusion that black children are entitled at least to freedom of choice: If a black school environment is bad for some, good for others, indifferent for the rest, each family should be able to choose for itself. The problem of variability is more acute, however, when we come to the question of compulsory desegregation. A constitutional interpretation requiring, in the name of educational equality, that children be forced to attend biracial schools outside their neighborhoods would be unjustifiable if a substantial number of children belonging to the very class supposedly discriminated against would not benefit from that requirement.

The critical question is this: How general must the incidence of harm inflicted by segregation be in order to support a constitutional finding of unequal educational opportunity? Theoretically, one could argue that because rights created by the equal protection clause are personal rights, belonging to men as individuals,[301] a classification substantially impairing the educational opportunity of even a single student by compulsory assignment infringes that child's right to equal educational opportunity regardless of its impact on others receiving objectively identical treatment. Obviously, the interests of the group cannot be ignored; if it were certain that for every black child who gains from desegregation another loses an equal measure, the latter's interest would be sufficient, without more, to supply the needed justification for the neighborhood school plan. The most that can be claimed is that harm to one or some blacks spells a prima facie denial of equal protection and casts upon the state the burden of proving these children atypical.

This position, though tenable in theory, would have extraordinary consequences. After all, any system of classification that groups children homogeneously in separate classrooms is sure to benefit some children and disadvantage others in each of the groups differentiated. There are bound to be some children, and usually a great many, who would be better off if the differentiation had not been made. Consider, for example, the familiar practice of grouping children by age in kindergarten or first grade and then advancing them in lockstep year by year.

301. Reynolds v. Sims, 377 U.S. 558, 561 (1964); Shelley v. Kraemer, 334 U.S. 1, 22 (1948); McCabe v. Atchison, Topeka, & Santa Fe Ry., 235 U.S. 151, 161-62 (1914).

Many children would find school a more stimulating place if they were grouped, for instance, not with their chronological age mates, but with their mental age mates. Yet we do not ordinarily think of such persons as victims of discrimination or recipients of unequal treatment.

III

FREEDOM OF CHOICE: THE MANY FACES OF VOLUNTARISM

The analysis to this point has been based on the assumption that assignment to the neighborhood school was mandatory for all children, raising five different theories questioning the constitutionality of such a policy in light of the de facto segregation that results. We have considered the pros and cons of each argument, without determining whether any one of them is "correct." Indeed, the only determination that seems warranted is that the egalitarian interest propounded by integrationists has not been so established, empirically or doctrinally, as to clearly override the libertarian interests of those who support the neighborhood school concept.

Yet what if both egalitarian and libertarian interests were to coincide, as they may well do under a freedom-of-choice solution to de facto segregation? Is there enough validity in the above arguments to compel a constitutional right to free transfer when egalitarian and libertarian interests do not conflict? The following sections argue an affirmative reply to this question and proceed to show why compulsory desegregation is not constitutionally required.

A. Is Freedom of Choice a Minimum Constitutional Requirement?

1. Must black children be permitted to choose?

a. Where space is available. To consider the easiest case first, must the state, at a constitutional minimum, open the doors of middle-class schools with unused capacity to black children in disadvantaged neighborhoods who wish to attend them? Let us take the case of a black child living in the ghetto who requests a transfer to a middle-class white school outside the ghetto. Simplifying further, assume the child is able to provide his own transportation and that the transferee school has available space. We shall refer to this as the "voluntary situation" and to the plaintiff as the "volunteer," to distinguish it from the "compulsory situation" in which the plaintiff (the "enforcer") seeks a wholesale redistribution of students, typically through forced two-way busing. In the latter case, the enforcer's interest in educational equality is countered by the interest of other children—black and white—in educational freedom of choice. Given the impirical uncertainties concerning the

effects of integration,[302] a court might well conclude that resolution of the conflict should be left to school authorities, who have been elected for precisely that purpose and are in a better position to assess the interests involved.

In the voluntary situation, on the other hand, the balance of competing interests strongly favors the asserted constitutional right of free access. Liberty and equality are allied, and neighborhood school values are not adversely affected since the admission of the black transfer applicants will not prevent any child from attending his neighborhood school. The nature of the competing state interests will be examined shortly,[303] but at a distance they do not appear imposing.

If it were known beyond reasonable doubt that racially isolated education is inferior education, the volunteer's combined claims of liberty and equality would be irresistible, especially in the absence of strong countervailing interests. The empirical uncertainty weakens his case, but not nearly so much as it weakens the case for enforced desegregation. This is true for two reasons: first, the probability that segregation harms is much greater for the self-selected subgroup of black children who apply for transfer than for black or slum children generally; second, the probability that segregation harms need not be as great to support a constitutional duty to honor the individual's choice for integration as it would have to be to support a duty to assign all children involuntarily to biracial schools.

The first point is especially significant. There is, very likely, a strong relationship between the desire for biracial education and the ability to profit from it. The parents who volunteer their children for busing are, by and large, middle class or middle-class-minded, upwardly aspiring, educationally ambitious, and therefore better able to provide the support the child needs in order to do well in a biracial school. Indeed, the very act of choice (whether it be the child's or the parent's) displays the qualities of motivation, interest, and self-confidence that promise success. Moreover, the parent is in an advantageous position to make an individualized judgment as to the kind of educational atmosphere that best suits his child's particular needs, abilities, and personality; and since the transfer option is renewed each year, a continued preference for a biracial school is a judgment informed by experience—the judgment of a satisfied customer. But, it may be said, the voluntary transferee, though better prepared for integration, is also less in need of it, less damaged in mind and spirit by racial isolation, more likely to perform well even in a segregated environment. This

302. See text accompanying notes 286-481 *infra*.
303. See text accompanying note 305 *infra*.

rejoinder is empirically dubious; the data presented by the Civil Rights Commission[304] indicates that the advantaged black student gains, on the average, twice as much from attending a middle-class school as the disadvantaged student, black or white. Thus, while it may be true that those who "choose segregation" are likely to be the ones most in need of an improved educational environment, they are also the ones for whom the academically competitive middle-class school is least likely to provide such an environment.

Second, the probability of harm need not be as high to support a constitutional requirement of free and equal access to white or biracial schools as it need be to support a requirement that all schools be made biracial. Given the weakness of the competing state interest and the strength of the allied libertarian interest, the claims of equality may be weighty enough to prevail even heavily discounted for uncertainty. Even the highly pessimistic assumption that black transferees lose as often as gain from integration—an assumption that would certainly rule out a constitutional duty to force children into racially balanced schools—would not negate a duty to provide them choice. The interest of the child hurt by volunteering for integration is in no way commensurate with that of the child hurt by forced segregation (de facto or de jure). The volunteer can escape his plight; regretting his choice, he can reverse it at the first annual opportunity. Gain or lose, he benefits from the choosing, from the act of self-determination. And, having assumed the risk, he has less moral basis for protesting the outcome. Thus, while the transfer privilege would not, on our pessimistic assumption, result in net educational benefit for the community, it would relieve many children from the harmful effects of segregation to which they have not consented, while exposing to harm only those who voluntarily assume the risk.

If the interests of the individual are weightier in the voluntary situation than in the compulsory situation, the counterbalancing interests of the state, as suggested earlier, are weaker. The purposes of the residential assignment policy, such as safety, economy, and peer group continuity, seem adequately served as long as no child is compelled to attend a school outside his neighborhood. If a parent and child are prepared to waive these benefits, and if the transfer would not deprive any other child of the opportunity to attend his neighborhood school, there is no sufficient reason to deny it. True, one can conjure up additional state interests—the ease of enforcing the truancy laws when all students live in the neighborhood, the desirability of convenient home visits by teachers, the burdens of administering a system of free transfers.[305]

304. See text accompanying note 44 *infra*.

305. The difficulty of administering a voluntary plan has been cited by integra-

But these considerations are marginal and would carry the day only under a deferential application of the rational basis standard.

An additional societal interest looms before one can decide that blacks have a right to freedom of choice in education. While benefiting the more motivated students, free transfer may damage other, needier, black children by skimming off their most stimulating classmates; the program would help the few black students who transfer at the expense of the many who do not. At the policy level, the "skimming the cream" argument is unpersuasive. For one thing, the fear that ghetto schools will become even drearier places if the yeasty middle-class students are siphoned off is probably unwarranted. Empirical evidence, though inconclusive, suggests that the presence in a lower-class school of an advantaged few has little effect on the performance of the disadvantaged many.[306] This, plus the further evidence that middle-class blacks are the largest losers from segregation,[307] puts the equities firmly on the side of freedom of choice. Empirical considerations aside, there can be little moral justification for denying some members of a disadvantaged minority the opportunity for a beneficial unsegregated education so that their presence might benefit others who have declined that opportunity.[308] Such a policy treats children as means, not as ends; it makes conscripts of them.

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tionists, and even by federal judges, as a reason for rejecting freedom-of-choice plans in the South. *E.g.*, Moses v. Washington Parish School Bd., 276 F. Supp. 834, 851-52 (E.D. La. 1967).

306. See text accompanying note 362 *infra*.

307. See text accompanying note 446 *infra*.

308. It may be said that the moral position of the black is no different from that of the white in the usual busing situation. If it is morally and constitutionally acceptable to bus advantaged white students to ghetto schools in order to enrich the learning environment there, it should also be permissible to force middle-class black students to remain in those schools for the same purpose. Yet the comparison is subject to criticism on a number of counts; first, it is one thing to assign all middle-class students, black or white, to slum schools as part of a systematic program to achieve a uniform racial and social-class blend in all schools; it is another to require only some middle-class students, white or black, to remain in or be bused to ghetto schools while others enjoy the advantage of superior fellow-students. The latter policy—requiring that some students sacrifice their own equality to bring equality to others—would raise serious constitutional questions. Second, the assignment of white students to predominantly black schools can be justified as a means of achieving greater racial balance, an end that has social value beyond its questionable educational consequences; the confinement of black students to black schools has no such justification. Third, middle-class white students generally outrank middle-class blacks on the achievement ladder; their needs are less pressing and therefore, it may be argued, more reasonably sacrificed. Similarly, middle-class whites are less affected by the characteristics of their fellow students; their sacrifice would therefore be less. Fourth, middle-class whites are better protected by the political process than middle-class blacks, and legislative decisions adverse to their interests should therefore, as a matter of constitutional jurisprudence, be looked upon more benignly by the courts. Ultimately, however, the distilled answer is this: while the state may be morally and constitutionally

To summarize, where a black child requests a transfer to a middle-class white school with unused capacity, his interest, combining the claims of educational freedom and educational equality, is especially strong; the interest of the state in confining him to the ghetto school is especially weak; and the empirical uncertainties regarding the overall effects of segregated schooling are largely beside the point. Even under the rational basis test as traditionally administered, the state finds it difficult to justify refusal of the option; under the compelling state interest standard, refusal of the option is far less defensible.

Up to now, we have assumed that the black volunteer was able to provide his own transportation. Plainly, for the great majority, that is not the case. If the transfer privilege is to be meaningful, if access to favored schools is to be truly equal, the state must supply the carriage.[309] The only perceivable justification for not doing so is saving transportation costs, and the Court has been notably unreceptive to fiscal excuses when important individual rights are at stake.[310] Seldom, one suspects, would the cost of transporting volunteers a reasonable distance to schools outside the ghetto approach a level at which the courts would consider it an overriding concern.

b. Where space is unavailable. A more difficult question is whether the transfer option may validly be made to depend upon the availability of space in the receiving school. Must a black child from disadvantaged neighborhood *B* be admitted to a school in advantaged neighborhood *W* even if that school is already enrolled to its normal capacity?[311] School officials in *W* can plausibly claim that denial of the transfer option is justified by a compelling state interest—the avoidance of overcrowding and its attendant educational woes. To this argument at least two replies may be offered: first, a mild degree of overcrowding is not too much to ask of advantaged white students in order to make biracial education possible for disadvantaged blacks; second, overcrowding can, in any event, be avoided by other means less damaging to the constitutional interests at stake.

(i) Is avoidance of overcrowding a sufficiently compelling state inter-

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justified in coercing the most advantaged children of the community to their minor detriment in the interest of improving the peer group climate of slum schools, it is neither morally nor constitutionally justified in invoking that same interest to coerce less advantaged children to their major detriment.

309. In the case of de jure segregation, the Court has held that an optional transfer arrangement—itself an "indispensable remedy"—must provide free transportation to children seeking transfer. Swann v. Board of Educ., 402 U.S. 1, 27 (1971).

310. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 633 (1969); Carrington v. Rash, 380 U.S. 89, 93-94 (1965); Sherbert v. Verner, 374 U.S. 398, 407 (1963).

311. In the de jure segregation context, an acceptable transfer plan must make room for the applicant in the school to which he desires to move. Swann v. Board of Educ., 402 U.S. 1, 26-27 (1970).

est? To begin with, such terms as "normal capacity" and "overcrowding" are not inflexible concepts. Plainly, a school board could not plead overcrowding if the pupil-to-teacher and pupil-to-space ratios were lower in school *W* than in school *B*. Nor would it be on strong ground if school *W* were statistically less heavily attended than the average school in the district or than ghetto schools other than school *B*; authorities who have long tolerated overstuffed schools in disadvantaged neighborhoods are in a poor position to plead space limitations as an excuse for denying black applicants the opportunity for biracial education otherwise rightfully theirs.

But even without these elements of estoppel, it is by no means clear that the interest of neighborhood *W* students in uncrowded quarters outweighs the competing libertarian and egalitarian interests of the transfer applicants. One could argue that no child in school *W* should be allowed to object to overcrowding so long as the ghetto school now underenrolled is open to him. Parents in both neighborhoods apparently prefer the overcrowded white school because of its academic superiority. If so, the mechanisms of consumer choice (between the larger class size in school *W* and the less favorable racial balance in school *B*) would strike a constitutional balance: when the advantages of school *W* began to be offset by its overcrowded condition, net transfers to *W* would cease and equal educational opportunity be achieved.

This argument would be more persuasive were it not for the empirical uncertainties surrounding the effects of racial or social composition of a school on academic performance. If it was clear that neighborhood *B* students would benefit significantly from the transfer (and suffer corresponding detriment from its denial), one would have little difficulty acknowledging the priority of their interest. But that benefit is uncertain even when schools *B* and *W* are assumed to be of equal density, and it becomes more conjectural when one adds the factor of overcrowding, a factor that narrows whatever margin of superiority school *W* might otherwise have. It would be dubious equal protection doctrine to require school authorities to inflict a sure educational detriment on some children to secure so unsure a benefit for others.

(ii) Can overcrowding be avoided by less discriminatory means? Yet even if the avoidance of overcrowding is deemed an overriding public interest, it need not follow that school officials are justified in limiting the enrollment of school *W* to children who live in the neighborhood. Crowding can perhaps be avoided by means less diseriminatory. For example, the appropriate number of vacancies could be created in school *W* by the reverse busing of neighborhood *W* children to the now-underenrolled school *B*. Whether this alternative is less discriminatory than denial of the transfer option depends on which of several

theories underlies the right of transfer. If the constitutional basis for requiring the transfer option for black students from neighborhood *B* to school *W* is that they would otherwise be victimized by the joint operation of the neighborhood school policy and private racial discrimination in housing,[312] space limitation in school *W* is no justification for denying the option. For overcrowding can be avoided without damage to the constitutional rights of either black or white children by adding the transfer applicants to the pool of students otherwise eligible for school *W* and then shaving the sum on a random or other nonracial basis. Some students from neighborhood *B*, along with some from neighborhood *W*, would be assigned involuntarily to school *B*; but, unlike the situation to be remedied, this would not be a direct or indirect consequence of race.[313]

Reverse busing is not, however, a less discriminatory alternative if the sole constitutional objection to a compulsory neighborhood school plan is that it results in inferior educational opportunities for the child who lives in a disadvantaged neighborhood, since under this theory even a middle-class white student would be educationally disadvantaged if forced to attend a school where most of his classmates are economically disadvantaged. The children from neighborhood *W* bused to the ghetto would therefore have essentially the same constitutional grievance as those whose places they would be taking, a grievance compounded by exclusion from their own neighborhood school.

If we assume that middle-class whites are relatively unaffected by school-to-school variation, the reverse busing alternative again appears less discriminatory, yielding a net gain for educational equality. But even on that assumption, the case for the existence of a constitutional right of transfer is inconclusive. The exchange of students could not be supported on libertarian grounds since each neighborhood *B* student whose choice was honored would be matched by a neighborhood *W* student whose choice was not. Given the empirical uncertainties concerning the relative impact of slum schooling on black and white, poor and unpoor, respectively, judges should indeed be hesitant before undertaking to constitutionalize the method by which the limited space in school *W* must be allocated.[314]

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312. See text accompanying notes 138-79 *supra.*

313. The same argument for adoption of this less onerous alternative applies if the constitutional basis for the transfer option is that otherwise the black child will incur educational and psychological harm of a "racially specific" nature. [See text accompanying notes 126-37 *supra.*] The involuntary assignment of a randomly selected contingent, drawn from a pool that includes the transfer applicants from neighborhood *B*, would both avoid the obstacle of overcrowding and minimize the number of black children who suffer on account of their race.

314. Overcrowding could also be avoided, of course, without subjecting any child to an inferior educational environment, by a comprehensive plan of uniform racial and

2. Must White Children, Too, Be Permitted to Choose?

According to the preceding discussion, equal protection might dictate that a black child be admitted and transported to a middle-class school outside the ghetto, at least where space permits. Under a majority-to-minority transfer plan, the white child is denied the privilege of moving from a predominantly black school to a predominantly white school, while the black child at a white school is denied the reverse option, though in both cases the child's classmates of the other race are free to make this transfer. This type of plan, repeatedly approved by the federal courts and held mandatory in the southern context by the Supreme Court in *Swann*,[315] presents a delicate constitutional dilemma. The equal protection clause may plausibly require, or just as plausibly forbid, the optional transfer of white students (along with blacks) from predominantly black to predominantly white schools. On the one hand, permitting such transfers further imbalances the racial composition of the sending school, depriving its black students of what few opportunities they have for cross-racial association, while also reducing the number of vacancies available to black students in the receiving schools. On the other hand, to confine the white student in a school that may also be inferior for him discriminates against him vis-a-vis both white students in other neighborhoods and black students in his own neighborhood. A school board may use either of these arguments to justify whichever course it chooses. The present section deals with the first question, whether freedom of choice is constitutionally required for whites as well as for blacks. The second question—whether freedom of choice for whites is constitutionally forbidden—is explored in the following section.

Under a majority-to-minority plan, the white child in a predominantly black and lower-class school has two arguable constitutional grievances: (1) unequal educational opportunity vis-a-vis white children in other neighborhoods, and (2) racial discrimination vis-a-vis black children in his own neighborhood. In both contentions, he must concede that the majority-to-minority limitation does have a rational basis. It may serve several legitimate state interests in assuring either that no child is denied access to the public school of his choice as an indirect consequence of racial discrimination in housing, that no child is forced to attend a school whose color scheme causes him to feel inferior on account of his race, or that no child is denied ample oppor-

economic balance in all schools. Under this course, equality would be achieved in full, liberty and neighborhood sacrificed in full. It may be that the equal protection clause demands such a remedy even in circumstances where all black transfer applicants can be accommodated without overcrowding or displacement.

315. Swann v. Board of Educ., 402 U.S. 1, 26 (1971).

tunities for companionship across racial lines. All of these interests would be retarded by allowing white students to transfer from predominantly black to predominantly white schools.

The white parent may argue, however, that, under emerging equal protection doctrine, rational basis is not enough; that neither discrimination—vis-a-vis white children outside the neighborhood or black children within it—is constitutionally acceptable without a more compelling justification than is here possible. For example, the justification that the majority-to-minority limitation reserves the short supply of vacancies in middle-class schools for black transferees, whose interest in racial integration outweighs that of the white student in economic integration, is lost when the receiving schools have room enough for all. Similarly, it is insufficient to justify a majority-to-minority plan in order to keep the sending schools from becoming even more segregated, for the empirical data suggests that the presence of a few white students is of no educational value to black students in a predominantly black school.[316] Finally, if biracial education for black students is deemed a compelling state interest, it may be more effectively achieved by a means that does not discriminate against the white slum child: comprehensive and compulsory racial balancing.

These arguments fail on several counts. The notion that white students, like blacks, are denied equal educational opportunity when surrounded by disadvantaged classmates is contrary to empirical data suggesting that the test performance of white children, as a class, is less influenced by school and peer group and more influenced by home and parents than that of black children.[317]

The second constitutional argument for white freedom of choice alleges racial discrimination vis-a-vis black schoolmates in the white child's neighborhood, and the absence of any compelling state interest to justify that discrimination.[318] The counterargument is that school authorities do not need a compelling justification for excluding white students from a transfer program designed to provide racial integration.[319] Whatever may be true of "benign" racial classifications gener-

316. See text accompanying note 362 *infra*.

317. See text accompanying notes 364-65 *infra*.

318. True, eligibility to transfer is not based solely on the applicant's race but also on the racial makeup of the sending and receiving schools. That alone, however, does not insulate the plan from constitutional objections. A black child initially assigned to a predominantly black—and supposedly inferior—school in his neighborhood will still, upon request, be granted asylum in the middle-class white school of his choice, whereas a white child, in identical circumstances, will be refused.

319. It is possible to argue that benign classifications generally are not subject to the compelling state interest test that governs invidious racial discriminations because they are in harmony with the historic purpose of the fourteenth amendment and have neither the insulting overtones nor the susceptibility to majoritarian abuse that

ally, the majority-to-majority transfer plan has two saving features that argue for its constitutionality even in the absence of a compelling reason for disqualifying whites. First, a white child denied an exit visa from a predominantly black school is not substantially worse off than if no transfer privilege had been granted anyone. He loses, perhaps, some valuable black classmates; he loses, too, some competitive ground to the transferees, nothing more. But the majority-to-minority limitation, unlike racial discrimination generally, and unlike the typical benign quota in housing, employment, or education, does not tangibly reduce a pool of opportunities that would otherwise be open to the disqualified group. Second, the racially restrictive transfer option is narrowly related to a specific remedial purpose. Unlike many other benign classifications, its aim is not merely to compensate blacks for distantly related past wrongs suffered at private or official hands, but to exempt them from a racially discriminatory burden—compulsory neighborhood assignment—placed on them by the very neighborhood assignment policy to which the exemption is appended. That the exemption may be essential to the constitutionality of the neighborhood assignment policy merely strengthens the argument for its validity.[320]

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characterize racial discrimination against blacks. This generalization, however, is too broad. For one thing, the suggestion that all segments of the white majority are adequately protected by the political process and therefore do not need constitutional safeguards against racial discrimination is unfounded: the impact of racial quotas in housing, education or certain categories of employment (for example, unskilled labor) is apt to fall primarily on the white poor, who may be even less potent politically than the black minority. A transfer plan excluding whites is a case in point; it need not encounter the united opposition of the white community, since middle-class families in the receiving neighborhoods might believe it an advantage to restrict the transfer option, hoping thereby to minimize the number of lower-class students entering their schools.

For general discussions of the pros and cons of "reverse discrimination" *see* Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962); Kaplan, *Equal Justice in an Unequal World*, 61 NW. U.L. REV. 363 (1966).

320. A first amendment analogue may clarify this point: the establishment and free exercise clauses jointly prohibit discrimination for or against religion or particular religions, just as the equal protection clause generally prohibits discrimination for or against particular races. Yet many statutes of evident validity make special provision for religion in order to protect it from the burdensome and inhibiting effects the statute might otherwise have upon its free exercise. A notable example is the exemption of Sabbatarians from the Sunday closing laws. In Braunfeld v. Brown, 366 U.S. 599, 615 (1961), Justice Brennan, concurring and dissenting, indicated that a non-Sabbatarian merchant has no valid constitutional complaint when denied the exemption from Sunday-closing granted his Sabbatarian competitor. Similarly, the white school-child should not have a valid complaint when denied the exemption from neighborhood assignment granted his black classmate. In both cases the exemption is designed to achieve a restorative end, religious or racial, and in neither case is it broader than that purpose requires. In fact, the rejected white transfer applicant suffers less measurable competitive injury as a result of exempting his black counterpart than does the non-Sabbatarian merchant. *Cf.* Zorach v. Clauson,

3. *May White Children Be Permitted to Choose?*

The preceeding analysis suggests that a black student does, and a white student does not, have a constitutional right to choose and, if need be, receive transportation to a white-majority school outside his neighborhood. Yet while the equal protection clause does not require white freedom of choice, does it even permit it? A strong case argues not; it runs as follows:

Whether or not a school board has an affirmative constitutional duty to alleviate racial imbalance resulting from segregated residential patterns, it should at least be required to refrain from assignment policies that increase racial imbalance to a level not required by geography. Having no obligation to enrich the ghetto school by importing middle class students from other neighborhoods, nevertheless, it ought not to impoverish that school by skimming off the cream of its student body. Thus, the option must be limited to transfers that either improve racial balance in both the sending and receiving schools or leave it unaltered. In other words, white children must not be permitted to transfer from predominantly black to predominantly white schools.[321]

The settled constitutional principle condemning private acts of racial discrimination in which the state is "significantly involved"[322] supports the position that state-permitted transfer of white students from

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343 U.S. 306 (1952) (upholding public school released time programs for off-premises religious instruction).

Another analogue may be found in Katzenbach v. Morgan, 384 U.S. 641 (1966), where the Court upheld the validity of a federal statute suspending state English literacy tests for voting, but only exempting citizens educated in American-flag schools. In both *Morgan* and the school transfer cases, the statute exempts some, but not all, from a restriction (the English-literacy requirement, the neighborhood residence requirement) that would place all at a competitive disadvantage. In both situations, the objection is essentially the same: the state, having placed one group of citizens at a competitive disadvantage, must exempt all segments of the group from the burden if it relieves any. Yet the Court sustained the classification in *Morgan* on the ground that since Congress was expanding, not restricting, the franchise, it was free, under the traditional equal protection standard, to proceed "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id.* at 657. So, in the case of school transfer, since the transfer option expands rather than contracts educational opportunity, the school board is free to deal with the part of the problem it believes most acute (the black disadvantage) without having to worry about others whose plight may be generically similar but not identical.

321. This limitation is of major practical importance. In many communities, especially in the South, the races are well dispersed and a school assignment policy based on geography would produce reasonably integrated schools. In such communities, the availability of a transfer option to white students simply "resegregates" those schools formerly reserved for blacks.

322. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (refusal of a restaurant operating in a state-owned building to serve blacks held a denial of equal protection).

predominantly black to predominantly white schools violates the equal protection clause. First, the decisions of white students to desert the ghetto school, while not acts of racial discrimination in the strictest sense, are at least partly motivated in most cases by racial considerations. Second, a school board is, in a variety of ways, a state agency significantly involved in these racially motivated private decisions. This involvement is most easily demonstrated in the South. The past policy of legally enforced segregation must still significantly influence the present school preferences of both white and black parents. White parents are still strongly attracted to the schools that they have come to recognize as their own, even when located outside their immediate neighborhoods. Moreover, longstanding official segregation has provided a model for discriminatory private decisionmaking, encouraging white parents and pupils to believe that blacks, and therefore black schools, are inferior and to be avoided. Having thus guided the white parents in their choice of schools in the past, the state cannot disclaim significant responsibility for that choice in the present.

While the argument for state involvement is particularly strong in the Southern case, elements of state involvement are apparent in the North, too. By adoption of a white transfer plan, the school board affirmatively authorizes white parents to remove their children from black schools. This power to assign pupils to public schools is a function traditionally governmental in nature, the performance of which, even when delegated to private individuals, remains subject to the restraints of the equal protection clause. Under this view, the state is no less responsible for the private, racially motivated assignment of white children who refuse to attend a black public school than it is for the discriminatory decisions of private individuals operating a company town,[323] a primary election,[324] or a park.[325] That the delegated function (school assignment), just as the operation of the park in *Evans v. Newton*,[326] and the conduct of primary elections in *Smith v. Allwright*,[327] was previously, and remains partially, performed by the state strengthens the analogy to the governmental function precedents. That the state "ratifies" the discriminator's action by granting his transfer application, as the county operating a primary ratified the result of the preprimary election in *Terry v. Adams*, makes the parallel stronger still.[328]

The state action argument is not quite so easily made, however. First, it is easier to conclude that the Constitution forbids private in-

323. Marsh v. Alabama, 326 U.S. 501 (1946).
324. Terry v. Adams, 345 U.S. 461 (1953).
325. Evans v. Newton, 382 U.S. 296 (1966).
326. *Id.*
327. 321 U.S. 649 (1944).
328. 345 U.S. 461 (1953).

dividuals with state authorization to *exclude* blacks on racial grounds from facilities they have a right to use than that the Constitution forbids private individuals to *withdraw* from situations in which they might be thrust into association with blacks. For example, while whites may not refuse to sell housing to blacks, it has not been argued that the fourteenth amendment bars white families, when motivated by racial aversion, from moving out of integrated neighborhoods. Proponents of the state action argument may, however, maintain that a freedom-of-choice plan does more than merely permit or even invite white withdrawal; rather it actively facilitates it by providing both transportation and the haven at the end of the bus ride, all at public expense and all within the boundaries of a publicly conducted enterprise.

The second rebuttal to the state action argument is more powerful: The integrationist position outlined above takes too simplistic a view of the white parent's motives in seeking transfer of his child from a lower-class to a middle-class school, and therefore too narrow a view of the private and public interests served by granting him that opportunity. To say that such a parent acts from racial prejudice overlooks the educationally detrimental effect to white students as well as black of assignment to a lower-class school, whatever its racial complexion. If so, the white parent, rather than exercising racial prejudice, has precisely the same incentive to transfer as does the black parent: opportunities for educationally beneficial association with middle-class students regardless of race. Whether or not the white child's interest rises to the status of a constitutional right, a school board, duly sensitive both to the educational and the racial dimensions of the problem, might well conclude that it would be unfair to deny a white child living in a disadvantaged neighborhood the opportunity afforded his black classmate to enroll in an out-of-neighborhood school that both believe to be superior. The board may feel that the bitterness and divisiveness such a denial would produce is an evil more to be feared than any residual educational loss the black child who chooses to remain in the ghetto school may suffer by the departure of the white minority. These reasons may be weighty enough to justify, even if they do not constitutionally require, the inclusion of white students in whatever transfer plan is adopted, at least in the usual situation where the sending school is overwhelmingly lower-class black even before any white transfers.[329]

329. The question is closer in the unusual situation where the sending school is evenly balanced, both racially and economically, prior to transfers and the exodus of white students turns a truly biracial school into a segregated one. Here the educational loss to the black students who stay behind is greater if the school substantially deteriorates in quality. In addition, the educational gain to the white students who transfer, who already have ample contact with middle-class peers, is smaller, and thus

B. *Is Freedom of Choice Constitutionally Sufficient?*

1. *The prima facie case for liberty*

A strong case can be made that the equal protection clause demands no more than that black children have voluntary access to biracial public education. Indeed, an assignment policy that offers a neighborhood school or an integrated school, and the freedom to choose between them, may seem, on first reflection, above constitutional reproach. Liberty is served, neighborhood is served, and even equality is not served badly. True, most black children still end up in schools that are primarily black and therefore, for some of them perhaps, inferior. But they do so by choice, and that is significant. For one thing, the empirical question—what are the psychological and educational effects of racial isolation—becomes even cloudier under a freedom-of-choice plan than before. The children most apt to profit from transfer to an integrated school will probably do so. In addition, a child who selects his own school is not so likely to be ashamed of it, to feel an outcast in it, as he might if racial isolation, either de jure or de facto, were forced upon him. Against these speculations, there are the probabilities that even fewer white and middle-class students will attend predominantly black schools under a voluntary than under a compulsory plan, and that desertion of those schools by white students who live near them may have an especially demoralizing effect upon the black students who remain. The net effect of these conflicting contingencies is a matter of surmise. In a school attendance area where white and economically advantaged students are in small supply, their departure will likely have little effect upon education outcomes; in a neighborhood with reasonably good racial balance, the impact of the transfer privilege will likely be greater. All in all, it would be hazardous to generalize that those black parents who choose not to have their children bused are doing their children a disservice. In addition freedom of choice is itself a positive value and therefore a counterweight to the greater racial blend produced by mandatory integration. Finally, whether or not a given child would benefit from biracial education, the choice is open to him and continues to be open in the future; this certainly mitigates his demand that other children be redistributed in wholesale fashion.

Compulsory assignment of blacks to a biracial school entails costs as well as benefits, and for some children the former may out-

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their motives more suspect. Furthermore, the argument that black students can avoid the detriment of which they complain by joining the exodus is less persuasive in a context where, already being integrated, they would have no incentive to assume the burdens of busing were it not for the desertion of their white classmates.

weigh the latter. When the state assigns children, willing or not, to objectively different educational environments, it may be appropriate, however difficult, for a court to make its own determination whether the biracial school is truly preferable. In contrast, when all children are given equal access to all schools, the requirements of equality are fully met and the judicial function is merely one of assuring that the choice is informed and voluntary. Indeed, the argument continues, equality of treatment, properly understood, is better served by individual option than by forced desegregation. The reason is that, since a racially representative classroom is not equally suited to every child, and not at all suited to some, the state may best treat black children equally by giving them equal opportunity to choose, rather than by imposing upon them an objectively uniform school environment with subjectively variable consequences.

Outside the field of education, the decisions of the Court offer no support for the notion that even de jure segregation may be remedied only through judicially enforced racial mixing. Other municipal facilities—beaches,[330] golf courses,[331] and so on—have been ordered desegregated without a hint that anything more was required than the removal of racial barriers—that is, freedom to choose.[332] Nor has anyone suggested that the proper antidote for a racially restrictive zoning ordinance is a judicially-fashioned "checkerboard ordinance" reserving a portion of each block or neighborhood to members of one or the other race to assure mixed residency. While the constitutionality of such a quota system if prescribed by legislation is a matter of controversy, it is virtually unthinkable that a court should impose it as a constitutional mandate. True, compulsory assignment of black and white students, through busing and other means, has been required of public schools,[333] and proponents of compulsory assignment may argue that de facto school segregation can be rectified only by those curative measures required for post de jure school segregation. Unlike recreation, housing, and other activities, they would argue, public education is an area in which official compulsion is pervasive and private initiative so exceptional that we have ceased to regard personal choice as a significant value.

To this argument there are two replies. First, custom is not the measure of constitutionality, especially where the state is expanding, rather than contracting, the area of individual choice. The contrary view would have startling implications. It would suggest, for example, that

330. Mayor v. Dawson, 350 U.S. 877 (1955).
331. Holmes v. Atlanta, 350 U.S. 879 (1955).
332. *See* Bittker, *supra* note 319.
333. Swann v. Board of Educ., 402 U.S. 1 (1971).

truancy laws are constitutionally required, that the state is not only constitutionally obliged to make education available to all, but must make it mandatory for all. In rejecting such implications, it follows that state repeal of truancy laws would not violate the equal protection rights of children whose parents choose not to send them to school. And if a state has no constitutional duty to require children to go to school at all, so long as it offers schools to those who wish them, it follows further that a state has no duty to require children to attend a biracial school so long as it offers biracial schools to those who wish them.

Second, there are signs that the day of monopolistic state control over the operation of publicly financed education may be drawing to a close, and personal choice is being regarded as an important element in the new systems being proposed. Many education reformers now see the best hope for improving the quality of schools, especially for disadvantaged children, in the expansion of opportunities for seller competition and consumer choice. Under a variety of proposed schemes,[334] parents would be provided education vouchers or credits that they would be free to spend either in the private market or in state-operated schools (if those continued to exist).[335] The schools in which the vouchers are used would neither be alike nor, by the usual criteria, equal; the very purpose of the voucher system is to offer variety, and schools are apt to become increasingly different.[336] There is little doubt that these plans are permissible under the equal protection clause even though they produce inequality; nor has it been urged that the courts should reexamine the wisdom of the parental choice.

If we view the parent's decision to forgo his child's constitutional right to a biracial education as analogous to the concept of waiver, we reach a similar conclusion. Unwaivable constitutional rights are rare; even explicit guarantees, such as the rights to trial by jury and assistance of counsel in criminal cases, are subject to voluntary relinquishment by one who makes a knowing and intelligent waiver.[337] If the consti-

334. *See generally* CENTER FOR THE STUDY OF PUBLIC POLICY, EDUCATION VOUCHERS (1970); Symposium, *Vouchers and Public Education*, 54 NEW LEADER 7-16 (1971).

335. The United States Office of Economic Opportunity has recently funded such a project on an experimental basis. Janssen, *Education Vouchers*, 6 AM. EDUC. 9, 11 (Dec. 1970). And the California legislature is currently giving serious study to the voucher approach. California Assembly Bill AB 150 (Assemblyman Ryan).

336. Indeed, one of the most imaginative of the family choice proposals would, after equalizing the educational purchasing power of each family through appropriate subsidies, permit each family to express its interest in education relative to other consumables by selecting among schools of varying expense. Coons & Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CALIF. L. REV. 321 (1971).

337. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942). *See also* Von Moltke v. Gillies, 332 U.S. 707 (1948); Johnson v. Zerbst, 304 U.S. 458 (1938); Patton v. United States, 281 U.S. 276 (1930).

tution permits these vital safeguards to be dispensed with even when the judge, in his expert opinion, believes the accused to be making a mistake, a fortiori it should permit the waiver of the inexplicit and less basic right of biracial education, in respect to which the judge has less expertise than the parent.[338] If trial by jury, which confers burdens as well as benefits, can for that reason be waived notwithstanding the mandatory language of Article III (apparently making it the sole method of guilt determination in criminal cases)[339] nothing less should be true here, where the nettles among the roses are, if anything, more obvious. If, even in the coercive atmosphere of the stationhouse, a suspect is permitted to forgo the assistance of counsel[340]—a right which many believe an unambiguous advantage in those circumstances[341]—a fortiori, a parent should be permitted to renounce, in circumstances less coercive, the mixed blessing of biracial education.

To hold that biracial education must, as a constitutional requirement, be imposed uniformly upon black families would be an extraordinary assertion of judicial power, one difficult to justify under even the most dynamic conception of the Court's role. Traditionally, that role has been to define the boundary between public authority and private autonomy, to allocate decisionmaking power, to determine whether choices must be left to the individual or may properly rest with public officials acting on behalf of the community. When the state attempts to regulate private conduct—be it speaking, smoking, or practicing birth control—the question for the Court is whether the decision to engage or not engage in that conduct shall be made by the individual or the state; the Court does not decide whether the speech shall be spoken, the marijuana smoked, or the contraceptive used. School desegregation is the rare, if not unique, exception in which courts are asked to hold

338. To be sure, not all constitutional rights are subject to waiver. The most pertinent exceptions are those that by their very nature cannot be secured to the individuals who claim them unless secured to all. Thus, an individual's right to equal legislative representation cannot be denied by a majority of the voters in a state [Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964)], or even, one assumes, by a majority of the voters in his own under-represented district. The controlling principle is that no man may waive another's rights along with his own. Similarly, freedom from state-sponsored religious activities in the public schools cannot be denied a protesting individual merely because everyone else in the school wants those activities conducted. In both situations, enforcement of the right on behalf of the complaining individual necessarily entails thrusting it upon others. These conditions are absent in respect to the "right" to biracial education: any black family wishing to send its child to a predominantly white school can do so, under a transfer scheme, without forcing others to go along; and, conversely, any family can waive that right without denying it to others.

339. *See* Patton v. United States, 281 U.S. 276, 293-98 (1930).

340. Miranda v. Arizona, 384 U.S. 436 (1966).

341. *See* Kuh, *Some Views on Miranda v. Arizona,* 35 FORDHAM L. REV. 233, 234-35 (1966).

that neither the individual nor the state is competent to make the underlying substantive decision—what kind of school the child shall attend—and that judges alone can be relied upon to make that choice.

Admittedly, parental consent is not always a valid defense when educational classifications are challenged under the equal protection clause. Courts have repeatedly held, and rightly so, that segregating black children explicitly on the basis of race cannot be excused merely by allowing them to transfer to white schools.[342] Yet rejection of the waiver concept in the de jure cases can be explained on grounds inapplicable to the de facto case. Explicit racial classifications, held to serve no proper governmental purpose, stand condemned on moral and constitutional grounds quite apart from the importance of the particular interest denied by the discrimination. Though the interest be as inconsequential as admission to a municipal golf course,[343] or the location of one's seat in a courtroom,[344] official racial discrimination is strongly disfavored. Therefore, waiver of that interest by the victim does not eliminate the evil. In contrast, compulsory neighborhood school assignment promotes legitimate public ends, is morally inoffensive, and is constitutionally questionable only because of its ancillary effects, which are, in any case, highly uncertain. Furthermore, whereas the black child who declines to transfer to a de jure white school by no means consents to the racial classification itself, the black child who declines to transfer to a de facto white school outside the neighborhood arguably does consent to the residential classification. Finally, even if the former child's decision to remain could be interpreted as consent to the racial classification, his consent alone is not enough, for the racial stigma is a bitter affront not only to him but even to the children who do transfer—indeed to all blacks.[345] The residential classification, on the other hand, presents no such general symbolic affront; its only offense, one can argue, is the possible harmful impact upon black children within the de facto segregated classroom, and it is that objection which refusal of the transfer option fairly waives. Thus, while the concept of constitutional

342. See cases cited in note 55 *supra.*

343. Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir.), *vacated,* 350 U.S. 879 (1955).

344. Johnson v. Virginia, 373 U.S. 61 (1963).

345. There may also be other educational discriminations, such as unequal distribution of educational resources in violation of the equal protection clause, that could not be saved by a transfer option. For example, a school board that spent $1000 per pupil in one school but only $100 per pupil in another might not be able to defend this discrimination on the ground that all children were free to choose their school. Such an irrationally unequal distribution of the educational pie could not be justified merely by giving each family its choice of slices. For one thing, in such a situation it would be difficult to persuade a court that the consent was freely and understandingly given. Moreover, a court could readily conclude that the child's right of equal educational opportunity should not be sacrificed on the altar of such clear parental folly.

waiver does not support the adequacy of the transfer option under a system of de jure segregation, it well may do so in the context of a bona fide neighborhood school plan.

2. The Egalitarian Response

There are two main arguments against the sufficiency of freedom of choice as the only constitutional requirement of biracial education. The first calls into question the capacity of the black parent to make an enlightened choice. The second questions the adequacy of the alternatives presented.

a. The incompetence of the chooser. The first counterargument holds that the black parent, his attitudes misshapen, his vision blurred by years of segregated schooling and segregated living, and his judgment swayed by subtle or blatant pressures exerted both by whites and fellow blacks, either cannot appreciate, or will not seize, the opportunity for integration. The child ought not have to bear the consequences. The courts should protect him from timid, inert or misguided parents as well as from hostile or uncaring lawmakers.

(i) The surrogate factor. Indeed, this line of argument begins with a more fundamental point: the decision which leaves the black child in an inferior ghetto school is rarely his own. For the younger child, choice is impossible; for the older child, it comes too late, after segregation has already claimed its victim. The critical decision, then, is the parent's. The value to be weighed against equality of educational opportunity for the child is not self-determination, but *power*—not the child's freedom but the parent's power to direct the rearing and education of his child. In sum, the principle of self-determination—that in matters touching only himself, a man should be allowed to live his own life, make own mistakes—presupposes a mature and competent individual acting in his own behalf; it is misplaced in the context of primary education. The fact is that real libertarian interest at stake—the child's present and future freedom of association—is better served by an assignment policy that offers him daily opportunities to decide for himself whether to associate with children of other races, and a basis in experience for making such judgments in the future, than by a policy which forecloses that choice and denies that experience to all children whose parents opt for segregated neighborhood schools.

Plainly, the case against freedom of choice cannot rest on this ground alone. For one thing, parental control over the upbringing and education of children is itself a weighty interest, one which in *Pierce v. School Committee*[346] the Court held worthy of constitutional protec-

346. 322 F. Supp. 957 (D. Mass. 1971).

tion. And even more important than the parents' interest in family choice is the child's own interest. Parental option in respect to children's education is not identical to self-determination, but it does yield the child very similar benefits. In comparison to public authorities, a parent is in a favorable position to ascertain the child's wishes and to judge educational alternatives with an eye to his peculiar needs and interests. In brief, parental choice is apt to fit the child more snugly than any other prescription. Self-determination is prized partly in the conviction that an individual, knowing himself better than others, is a sounder judge of his own needs and what will satisfy them. It follows that in those cases where the individual cannot choose for himself, the decision is wisely vested in someone close who is cognizant of his wishes and needs and aware of any relevant special circumstances. This conclusion can be referred either to the principle of liberty or, more accurately perhaps, to what has happily been termed the principle of subsidiarity—that "government should ordinarily leave decisionmaking and administration to the smallest unit of society competent to handle them."[347] In either case, the implication is clear: Parental choice in school selection is an interest to which a school board may properly give weight in fashioning its assignment policies.

(ii) The influence of pressures and prejudices on the chooser. Although the extreme view that discredits freedom of choice solely because school selection is not truly self-determinative is surely unacceptable, that the choice is made by the parent is not without constitutional bearing. When the state makes an individual's access to a constitutionally guaranteed opportunity depend upon the yea or nay of a third person, the courts are entitled to assurance that this surrogate is, for the particular purpose at hand, a fit proxy. In the context of education, it is reasonable that courts be satisfied that the waiver of integration, by consenting to segregation, is a discerning independent judgment based upon the parent's special knowledge of the child's particular needs, talents, and preferences, and not merely a mindless expression of the same community pressures and prejudices that have produced the established system of segregated education. Once the propriety of this judicial inquiry is recognized, one can reasonably conclude that on the question of segregation the black parent is so likely to be swayed by custom, prejudice, and social pressures (both black and white) that he is less a surrogate for the child than for the society. Therefore, his decision cannot deprive the child of a constitutionally guaranteed desegregated education any more than the decision of state or society can. Finally, the argument concludes, these observations are so universally accurate

347. J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 14 (1970).

as to call for an irrebuttable presumption against discerning and dispassionate parental choice.

The most frequent contention along these lines is that the black parent, in declining to bus his child, yields to duress from the white community. The main evidence for this generalization comes, not surprisingly, from the South. In a 1966 report dealing with southern school desegregation, the United States Civil Rights Commission observed that

> fear of retaliation and hostility from the white community continue to deter many Negro families from choosing formerly all-white schools [;that in some areas] Negro families with children attending previously all-white schools under free choice plans were targets of violence, threats of violence and economic reprisal by white persons; and that Negro children were subjected to harassment by white classmates notwithstanding conscientious efforts by many teachers and principals to prevent such misconduct.[348]

In southern cases where pressures of this sort have been documented, federal courts have invalidated freedom-of-choice plans as illusory.[349]

Nonetheless, this was not the basis for the Supreme Court's invalidation of freedom-of-choice plans. No particularized showing of intimidation was made in *Green v. County School Board,*[350] and Mr. Justice Brennan, though quoting the findings of the Civil Rights Commission, expressly declined either to adopt or reject them.[351] If the Court was not prepared to take judicial notice of white duress in the South, where many believe it endemic, it will be even less likely to do so in the North, where the blatant coercion reported by the Civil Rights Commission is probably rare.

There is another obstacle in relying upon the "white duress" foundation to reject parents' antitransfer decisions. If a black parent chooses against a formerly all-white school because he fears mistreatment of his child by white classmates, this is hardly a reason to force him there. It is one thing to say the doors of a white school may not be barred to black pupils because of threatened violence; it is quite another to suggest that black pupils must be pushed through those doors against their will.

White duress, however, is not the only social factor that may dissuade the black parent from busing his child to a biracial school. Another frequent deterrent is the disapproval of other blacks—not only of separatists and black power ideologists, but also of tradition-minded

348. UNITED STATES COMMISSION ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION, 1966-1967 at 88 (1967).

349. *See, e.g.*, Coppedge v. Franklin County Bd. of Educ., 394 F.2d 410 (4th Cir. 1968). *See also* Bowman v. County School Bd., 382 F.2d 326-27 (4th Cir. 1967).

350. 391 U.S. 430 (1968).

351. *Id.* at 440 n.5.

friends and neighbors who see desertion of the ghetto school as an act of disloyalty. Most important, the argument continues, the average black parent brings to the choice of his child's school a set of assumptions and expectations shaped in part by his own segregated education—assumptions that blind him to the possible benefits of biracial schooling while making him overly sensitive to the hazards. Conditioned by years of racial isolation to believe himself and other Negroes inferior, he shrinks from exposing his child to competition with supposedly superior whites on the latter's home ground and clings instead to the safe and familiar neighborhood school. Thus, the black child becomes the victim of his parent's attachment to the status quo. Since that attachment is the product of the parent's segregated education, the parent is not a surrogate for the child, but a surrogate for the state. "Freedom of choice" becomes merely a euphemism for a system that delegates the pupil assignment power to black parents "programmed" by the state to exercise it in favor of segregation. The state is so significantly involved with the black parent's "discriminatory" school assignment of his child that the decision is subject to the strictures of the fourteenth amendment.

The persuasiveness of this series of contentions depends on one's philosophy of judicial review, the value one places on family choice, and, not least important, the view one takes of the underlying empirical question. A conviction that biracial education is beneficial and uniracial education harmful to the great majority of black children may lead one to believe that a parent who feels otherwise has a distorted perception of the issue and is incompetent to decide it. He may feel that just as the child needs judicial protection from an uncaring school board, so he needs shelter from timid or apathetic parents whose allegiance to the neighborhood school is, like the board's, the offspring of pressure and prejudice. He may conclude that a court prepared to override the judgment of both professional and popularly elected educational policymakers owes no greater deference to the judgment of parents. If, on the other hand, one believes that the effects of racial composition are still uncertain and, in any case, highly variable, that the black parent who opts for the neighborhood school may be making a reasonable judgment for his own child, he will take a dimmer view of this judicial paternalism. Indeed, whatever one's view of the empirical question, he may find unpalatable the notion that black parents must be placed under a judicial protectorate because of their limited capacity for intelligent choice. It is one thing to be pessimistic about the long-run ability of the black community to persuade the white majority of the wisdom and justice of a measure the latter believes to be strongly against their interest. It is quite another to despair of the ability of black parents themselves to perceive the advantages of integration as unfolding experience brings these advantages to light. Such a view is deeply de-

meaning. It treats the black parent as no better than the child, as a dependent. It smacks of the distrustful paternalism many find offensive in other contexts—when displayed, for example, by welfare officials who believe recipients of aid must be closely watched lest their children be stinted.

b. The inadequacy of the choice. The second, and probably more persuasive, argument against freedom of choice as a sufficient constitutional means of providing biracial education finds no fault with the parent's judgment. Instead, it puts in issue the adequacy of the alternatives presented to the chooser. The thrust of the argument is that the transfer privilege, however free, informed and competent its exercise, does not equalize the educational opportunities of children in advantaged and disadvantaged neighborhoods. First, the black child, to gain access to the favored middle-class school, must pay a price not demanded of those who live in the white neighborhood: He alone must give up the comfort and security of the neighborhood school. He alone must endure the inconvenience of busing. He alone is cut off from children of like background and from the cultural milieu in which he feels at ease. In these circumstances, rejection of the transfer option cannot be interpreted as a waiver of the right to integration, for students unwilling to accept the burdens of unilateral busing and isolation from neighborhood friends may yet be eager to attend the integrated school. Second, even those black students who do elect to transfer find at the end of the bus ride a learning environment less favorable to them than to their advantaged white schoolmates. Since relatively few black students take advantage of the transfer option, those few find themselves a small and conspicuous minority in an overwhelmingly white classroom. The resulting psychological strain dilutes the benefit that might otherwise be gained from exposure to middle-class peers. In addition, the academic handicaps of ghetto living may be too great to overcome in a classroom where the overwhelming majority of students come from advantaged homes and where the style and pace of instruction is geared to the average student's level of preparation.[352]

352. The significance of this point may be more clearly seen in the parallel context of ability grouping. See text accompanying notes 455-81 *infra*. The child assigned to a "slow" track claims not that he would be better off in the "fast" one but that he would be better off if there were no track at all. What he seeks is not the freedom to choose between two equally unsatisfactory homogeneous groups but the dissolution of the homogeneous grouping system in favor of one that treats children alike. Similarly, what the ghetto child seeks in challenging the residential grouping policy is not a choice between two equally unsatisfactory neighborhood schools—one black and poor, the other white and rich—but the abandonment of residential grouping altogether in favor of a system that creates a racially and socially representative school. Since the transfer plan does not offer this option, it cannot, according to this view, be said either that the students who transfer receive equal educational opportunity or that those who decline have waived their right to it.

The anti-voluntarist argument just framed is not wholly persuasive. First, insofar as the black child's claim of inequality rests on the fact that he—and not his white counterpart—must forego the neighborhood school and submit to busing, it rings ironic. The interest in the neighborhood school is the very one which supporters of compulsory desegregation usually denigrate. If, as the compulsory integrationist generally argues, abandonment of the neighborhood school is a small price for society to pay for the overriding benefits of biracial education, why is it not also a small price for the disadavantaged child to pay? If busing is a trivial burden for students generally when required as part of a compulsory desegregation plan, why is it not also a minor burden for the ghetto child when undertaken as part of a voluntary plan? Granting that even a small burden may be objectionable when unfairly distributed, and that the least impediment becomes questionable when it discourages the exercise of a truly important right, is the equal protection clause such an iron rule as to condemn an otherwise satisfactory method of pupil placement solely because some children have farther to travel than others?

Second, the contention that too many white classmates may be no better than too few founders on empirical shoals. The available data do not indicate that black children are more successful in a closely balanced racial setting than in a heavily white setting. On the contrary, some data suggest that there may be a minimum proportion of white students—roughly 50 percent—below which the presence of white classmates becomes educationally unproductive, if not harmful.[353] These data suggest that a black child living in a predominantly black school district would benefit more in an overwhelmingly white school than in a representative school mirroring the racial composition of the district. In other words, there is no educational magic in the concept of a representative racial composition; rather, it appears that whether a classroom mix reflecting the community helps or hinders black youngsters depends on what that mix is.

This presents, for opponents of voluntarism, a constitutional dilemma. If, as the anti-freedom-of-choice argument maintains, black children cannot learn effectively in a classroom where whites outnumber them four-to-one, how may it be claimed that the four-to-one ratio is constitutionally mandatory in communities where that is the composition of the general student population? And if, conversely, the four-to-one ratio is deemed educationally beneficial, hence constitutionally required, in the latter case, how can it be denied that the same ratio (in the transferee school) is constitutionally acceptable in a district where blacks are much more numerous? It may be that, even under these cir-

353. See text accompanying note 362 *infra*.

cumstances, an administrative policy calling for a uniform racial composition in every school or classroom would have a valid educational basis. Perhaps the perceived discrepancy between the compositions of the school and of the community is a datum that affects the child's self-image and ability to learn; or perhaps an effective approach to teaching children, both black and white, how to live and work together in a multi-racial community is to make the classroom a microcosm, a laboratory model, of that community. At the policy level, such considerations are reason enough to reject freedom of choice in favor of compulsion; at the constitutional level, one must be pardoned some doubt.

3. Procedural Requirements for a Valid Freedom of Choice Plan

Even if the libertarian position is accepted in principle, there remains a procedural problem that could undermine it in practice. How must the choice of schools be expressed? One can plausibly argue that no parent should be permitted to relinquish his child's right to biracial education through ignorance, inadvertence, or indifference; that the choice to remain in the ghetto school can validly be honored only if it is express, affirmative and intelligent. According to this view, a valid optional transfer plan must meet at least two conditions: that parents be adequately advised of the transfer option and its potential benefits and that no child be assigned to a de facto segregated school in which his race is greatly overrepresented without his parent's express prior consent.

The constitutional basis for these conditions is the well-established principle that the voluntary abandonment of constitutional rights, though permitted, is strongly disfavored, that judges must indulge every reasonable presumption against it, scrutinizing the circumstances of each case to be sure that the individual really intended to surrender the right in question and fully understood the value of what he was giving up.[354] For example, a valid waiver of jury or counsel in criminal cases must be expressed; it cannot be inferred from silence or acquiescence.[355] Thus, if failure to choose an integrated school is viewed as a waiver of the constitutional right to unsegregated education, and if its validity is to be tested by the same general criteria that apply to the waiver of other rights, one can reasonably argne that a valid transfer plan must meet the two conditions specified above.

A ruling that acknowledged the principle of voluntarism but imposed these stringent procedural conditions might not be unwelcome to the compulsory integrationist, for the requirement of express prior con-

354. Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

355. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 277-78 (1942).

sent could make a voluntary transfer scheme unworkable. A high proportion of black parents who fail to apply for transfer probably has no affirmative preference for the ghetto school but is either indifferent or unwilling to have their children singled out as one of a small and isolated minority. If, pursuant to the above conditions, the children of parents who indicate no preference were assigned to biracial schools, others, now reassured that their children would have ample company, might be more inclined to request transfer. With the ranks of transferees swelled by addition of both these groups, the receiving schools might no longer have enough space to accommodate the influx without displacing a large number of white students regularly assigned to them, thus forcing abandonment of the voluntary scheme in favor of compulsory busing.

Notwithstanding this danger, the insistence that no black child be relegated to a ghetto school unless his parents expressly so request seems reasonable so long as one accepts the premise that equal, and therefore unsegregated, education (de facto as well as de jure) is a basic constitutional right. To be sure, there are important differences between waiver of such rights as jury trial and counsel in a criminal trial and waiver of unsegregated education. While no good reason appears why the state should not be required to elicit from the individual an explicit expression of choice before denying him a jury trial or legal counsel, there may be sound reasons for not establishing such a prerequisite to waiver of the transfer privilege. It may be exceedingly difficult to obtain an identifiable expression of choice from each of the thousands of parents whose children are enrolled in the school system, many of whom, if pressed for an answer—at great administrative expense—would opt for their neighborhood school anyway. Under the traditional presumption against waiver, this would mean that, unless the state undertook the burden of securing individual answers in all cases, many children would be transferred simply by reason of their parents' default in responding. If the interest of this latter group alone were involved, it would seem too insubstantial to justify nontransfer of those children whose parents would, if specifically put to the decision, choose integration. But, whereas giving a jury trial or assigning counsel to a non-responding criminal defendant affects no individual interest but his, treating children of all non-responding parents as though their parents had expressly applied for transfer may so enlarge the impact of the voluntary plan as to render it unworkable and thus deny its benefits to all. Yet these considerations by no means compel the conclusion that the usual presumption against waiver should be discarded. It may forcefully be argued that while it may be difficult for schoolmen to elicit a response from all parents, the best assurance that they make the effort is to put the constitutional onus on their shoulders by

requiring transfer in all cases where they fail; that a child ought not be denied integrated education on the assumption that his parents know best when in fact the parent has not cared enough to say anything at all; that an express waiver should be required, not because it is probable that the silent parents would, if pressed, opt for integration but because their very silence, and the indifference it implies, disqualifies them from deciding. In sum, if voluntarism requires, in order to be viable, that the chance for integration be denied to black children whose parents do not feel strongly enough about the neighborhood school to make an affirmative request for it, then voluntarism has small claim to preservation.

IV

RACIAL COMPOSITION OF SCHOOLS AND BLACK ACADEMIC PERFORMANCES

This section examines and evaluates the empirical evidence for the proposition that racial imbalance adversely affects black academic achievement. Discussion of the data may be put in helpful context by first briefly listing the three hypotheses most frequently offered to explain the relationship. First, racially segregated education, even of the de facto variety, has damaging affects upon the self-image of the black child, causing him to feel inferior and thereby weakening his motivation and ability to learn. Second, segregation deprives the black child of contact with stimulating, academically minded white peers and of access to a normative climate conducive to successful academic performance. Third, the generally deficient level of academic performance in the segregated ghetto school deprives the black child of high-quality teaching, for it discourages able and experienced teachers from accepting assignments in those schools and demoralizes those who do, causing them to relax their demands and lower their expectations, with predictably damaging effect upon the child's motivation and self-image.

A. Direct Evidence: An Evaluation of the Coleman Report

The most important source of information concerning the impact of biracial education upon student achievement is the comprehensive nationwide survey conducted under the auspices of the United States Office of Education by a team of investigators headed by Dr. James S. Coleman.[356] Published in 1965, the "Coleman Report" was based

356. COLEMAN REPORT, *supra* note 130.

The Coleman Report, however, is by no means our only source of information about the efficacy of integration. In recent years, many communities have experimented with busing, sending pretested groups of black children to integrated schools and measuring their achievement gains against those of black children in segregated

on a sample of more than 4,000 schools and 645,000 pupils. It compiled an unprecedented wealth of data concerning the staff, facilities, curricula, and grouping practices of the schools, the ethnic and social class composition of student bodies, the family background of the individual students, and the effect of each of these factors upon the achievement and aspirations of members of various ethnic groups. It has been described by Professor Daniel P. Moynihan as "an enterprise of near Promethean daring . . . perhaps the second largest in the history of social science."[357] While no brief summary can do justice to this vast and complex study, the essential findings, greatly simplified, were these:

i.) A child's academic performance (measured by standardized achievement tests) is strongly related to his own social-class status (measured chiefly by parents' educational background).[358]

ii.) Achievement is related somewhat to teachers, only slightly to school quality factors, and scarcely at all to curriculum and facili-

schools. The pattern of results is, once again, mildly encouraging but inconclusive. According to a 1971 tabulation of results from 22 local integration studies, integrated black children outperformed their segregated control groups in eight of 19 verbal comparisons, five of 11 reading comparisons, and seven of 17 mathematics comparisons. In only two instances (one verbal, one reading) did the segregated children excel. Light and Smith, *Accumulating Evidence: Procedures for Resolving Contradictions among Different Research Studies*, 41 HARV. EDUC. REV. 429, 442 (1971). The variety of research techniques was enormous and, the authors concluded, "the contradictions among the studies are more striking than the similarities." *Id.* at 443.

A year earlier, in reviewing a number of post-Coleman busing studies, Nancy Hoyt St. John wrote:

> Investigators in five of the nine bussing studies here reviewed found greater gains for desegregated children than for segregated children, but the case for the beneficial effect of desegregation is marred by several methodological shortcomings. The numbers involved were not large, and (more serious) in all cases the number tested is considerably smaller than the number bussed. This alone would jeopardize the randomness of the sample, even if the experimental and control groups were randomly drawn from the same pool, but in no case is there assurance on this point. Staff selection or parental self-selection always played a part . . . . Therefore, it is possible and likely that more favorable home background and "achievement press" explains the somewhat better performance of bussed pupils. In none of the studies was there a careful attempt to evaluate the equality of education in integrated and segregated classrooms. In the Boston, Rochester, and Hartford experiments there was the further complication of bussing out of a central school district into suburban districts where schools have benefits that ampler budgets provide. Therefore, there is no way of comparing the effects of the rival independent variables of school quality and school ethnic or economic composition. The short duration of most of the programs—too short to offset the stimulation or trauma of transfer—is another reason for concluding that *the over-all effectiveness of desegregation via bussing programs has not yet been demonstrated and must await further evidence.*

St. John, *Desegregation and Minority Group Performance*, 40 REV. EDUC. RESEARCH 111, 125-26 (1970) (emphasis added).

357. Moynihan, *Education of the Urban Poor*, 12 HARV. GRAD. SCHOOL EDUC. ASSOC. BULL. 3 (Fall 1967).

358. COLEMAN REPORT 298-302.

ties.[359] The school "appears unable to exert independent influences to make achievement levels less dependent on the child's background—and this is true within each ethnic group, just as it is between groups."[360]

iii.) Among school quality factors, the one with the greatest influence on Negro performance levels is the social-class makeup of the student body, measured by the educational aspirations of fellow students and the educational background of their parents. This factor —school social class—accounted for much more variation than did the quality of the school's facilities, and slightly more than the quality of its teachers.[361]

iv.) The racial composition of the school, as distinct from its social-class composition, has no independent effect upon Negro achievement. While Negro children fare better in predominantly white than predominantly black schools (though no better in half-white or less than half-white than in all black schools), the relationship between school racial composition and individual achievement disappeared when school social class was held constant.[362]

> Thus the apparent benefical effect of a student body with a high proportion of white students comes not from racial composition per se, but from the better educational background aud higher educational aspirations that are, on the average found among white students. The effects of the student body environment upon a student's achievement appear to lie in the educational proficiency possessed by that student body, whatever its racial or ethnic composition.[363]

v.) In respect to variations in school milieu, and especially in school social class, the smaller the minority group the greater the benefit to achievement.[364] Sensitivity to school factors was greater for Negroes than for whites, for Southern Negroes than for Northern Negroes, and for Mexican-Americans and Puerto Ricans than for any other group.[365] Thus, "it is those children who come least prepared to school, and whose achievement in school is generally low, for whom the characteristics of a school make the most difference,"[366] and, conversely, it is those whose family background is most solidly supportive who are least affected by school variations.

vi.) The variable that showed the strongest positive relationship to Negro achievement was an attitude that has come to be called "fate

359. *Id.* at 312-19.
360. *Id.* at 297.
361. *Id.* at 302-04.
362. *Id.* at 307.
363. *Id.* at 307, 310.
364. *Cf. id.* at 307.
365. *Id.* at 296-97, 303.
366. *Id.* at 297.

control"—the child's sense of control over his environment, as indicated by his responses to such statements as "good luck is more important than hard work for success." This factor was positively related to school social class and accounted for a larger proportion of the variance in student achievement than any single school or background factor, nearly as much as all student body characteristics combined.[367] Another attitudinal variable, the child's self-rating as a student, was negatively related to school social class and less strongly associated with achievement.[368]

The main findings of the Coleman Report were endorsed by the United States Civil Rights Commission in its 1967 report, *Racial Isolation in the Public Schools*,[369] addressed exclusively to the causes and effects of school segregation. The Commission's discussion of the impact of segregation upon the achievement and aspirations of Negro students drew almost entirely upon an analysis of the data compiled by Coleman and, not surprisingly, its findings closely paralleled his. The Commission, however, made use of the entire survey population rather than the limited subsample upon which Coleman had performed his statistical operations, and it focused upon the racial and social composition of the classroom rather than of the school. In consequence, its findings differed in two major particulars. First, the Commission found that the racial characteristics of fellow students did have an independent effect upon the achievement of the Negro student even when their social-class characteristics were held constant.[370] Second, it found that the characteristics of fellow students were chiefly effective at the classroom level rather than at the school level; the racial and social composition of the classroom, rather than of the school, exerted the stronger influence upon student achievement.[371]

The most serious objection to the Coleman study is that it failed to disentangle the influence on achievement of school variables (including student-body composition) from the influence of the student background variables, the two being closely correlated. As a result, one cannot say with even moderate assurance whether the observed association between school social class and individual achievement is a true causal relationship or merely a statistical artifact. This problem is characteristic of any nonexperimental survey that examines the relationships among a nnmber of variables at a particular point in time without having any laboratory control over the conditions in which those

367. *Id.* at 319-20 (Table 3.26.3).
368. *Id.* at 320, 323-24.
369. RACIAL ISOLATION, *supra* note 131.
370. 1 RACIAL ISOLATION 89-91; 2 RACIAL ISOLATION 40-41, 66-67.
371. 2 RACIAL ISOLATION 41-42, 86-87.

variables are operating or the circumstances that account for the presence of the subjects in the situation under investigation.

In a controlled experimental study, the influence of school racial composition upon student achievement could be isolated by selecting students at random (or matching them on all variables thought relevant to achievement), assigning them to schools identical except for their varying racial composition, and measuring their achievement before and at intervals after the move. Whatever achievement differences might emerge could then be attributed with reasonable confidence to the one feature—school racial composition—that distinguished the situations.

In a nonexperimental study such as Coleman's, such confidence is unattainable. The black children who attend majority white schools are not there by accident or the researcher's design; they are there because their parents have the money and the desire to send them there. Most black students who attend predominantly white middle-class schools come from a higher social stratum than those who attend ghetto schools. They live in better neighborhoods. They receive more encouragement from their parents. Their innate ability, as measured by conventional tests, is greater on the average than that of other black children even of the same social class, for in many instances it is the child's demonstrated academic promise in the early grades that causes selection of a middle-class school for him by parents or teachers. If, therefore, black children in desegregated middle-class schools outperform their counterparts in segregated lower-class schools, it may not be because their classmates are more stimulating or their teachers more demanding, but because they themselves are more intelligent, more highly motivated, and more effectively supported by their home environment. Unless all of the background factors suspected of influencing achievement are meticulously controlled, the apparent relationship of the school peer group to the achievement of the individual student may well be spurious, masking the impact of other causal factors.

Coleman was well aware of these difficulties,[372] and to meet the problem, he allowed for a variety of background factors, such as parental education and educational desires, size and structural integrity (chiefly father absence) of the family, and number of objects and

372. The finding that the achievement of Negro children rises with the social-class level of their classmates must, he conceded, "be subject to special scrutiny, because it may be confounded by the student's own educational background and aspirations, which will generally be similar to those of his fellow students. For this reason, throughout the analysis except where indicated, his own background characteristics are controlled to reduce such an effect." COLEMAN REPORT 303.

amount of reading material in the home.[373] The critical question is whether these controls were adequate to their purpose, whether children matched on the selected variables were sufficiently alike in the learning potential they bring to school to justify attributing the substantial differences in their actual achievement to school and student-body characteristics rather than to the home and neighborhood.

Even friends of the Report have not claimed that it wholly succeeded in this enterprise. Its critics have been much less charitable. They point out that of the three major indicators of the social class of the student himself—parents' income, occupation, and level of education—the only one that Coleman held constant was the last.[374] With white students, the omission of the first two dimensions might be considered trivial, since education, income, and occupation are so closely correlated that any of them may be used a surrogate for the others. In the case of blacks, however, the level of education is much less indicative of income or occupational level.[375] Only the man of means can afford to live in a wealthy neighborhood in order to send his child to an integrated school. Thus, no matter what the racial and social-class level of his schoolmates, the child in a ghetto school could hardly be expected to match the performance of a child from an equally educated family attending an integrated school; in reality, the socioeconomic backgrounds of the two are not equal.

Moreover, it is questionable whether the students were truly equated even on the parental-education variable. In view of the great regional local variation in the quality of black schools, it is perilous to rely, as Coleman did, on such a purely quantitative yardstick as years of school completed.

One investigator, for example, reports that in a single working-class neighborhood in Boston, graduates of black southern high schools scored no better on a vocabulary test than dropouts from predominantly black northern high schools. Black southern migrants who had attended college were on a par with black northern natives who had gone no further than high school.[376] If the high school graduate or even college matriculate in the South is no better equipped to contribute to his child's academic growth than the high school dropout in the North, and if, as seems likely, the ratio of southern migrants to northern natives is higher in segregated than in desegregated schools, the differences in achievement that Coleman ascribed to school social composition may

373. *Id.* at 298.

374. *E.g.*, Bowles & Levin, *The Determinants of Scholastic Achievement—An Appraisal of Some Recent Evidence*, 3 J. HUMAN RESOURCES 1 (1968).

375. *Id.* at 19-20.

376. Pettigrew, *Negro American Personality: Why Isn't More Known?*, J. SOCIAL ISSUES, April 1964, 4, at 9-10.

actually be due to differences in parental education not filtered by the years-of-schooling variable.

In addition, no attempt was made to control for the social characteristics of the neighborhood and the peer group influences that operate on the student outside the school. As one writer notes, "the children of middle-class Negroes often as not must grow up in, or next to the slums are therefore constantly exposed to the pathology of the (lower class) group and constantly in danger of being drawn into it."[377] Most of the middle-class children of whom this is true attend predominantly black schools. Those, on the other hand, who attend integrated schools often live in integrated neighborhoods, associating with their white schoolmates in a friendlier, more informal setting than the classroom, or even the school yard provides. These icebreaking residential encounters may well be an essential ingredient in the minority child's adjustment to the social life and value system of the school. If so, a black child bused to an integrated school each morning only to return to the ghetto each afternoon will be benefited less than the Coleman data would indicate.

Another important factor ignored by Coleman was native intelligence or ability. Black students attending predominantly white schools may be brighter than those of comparable socioeconomic status attending predominantly black schools, since the black child who shows early promise is often admitted to elite citywide high schools or selected by teachers for special busing programs. In addition, his parents have a special incentive to move into a middle-class school district. That children such as these should outperform their socioeconomic counterparts in segregated schools can hardly be credited to the influence of their classmates.

Ultimately, however, even the most refined statistical controls would not assure the comparability of the segregated and integrated black groups. The stubborn fact would remain that black students who attend white middle-class schools do so in most cases because their parents have made a deliberate decision to send them there—a decision that bespeaks the strength of their commitment to educational values. Research indicates that the quest for better schools is among the most powerful motives for the migration of families, black or white, from one urban neighborhood to another.[378] The migrants are the upwardly mobile members of their social stratum, the ones with high status goals and the will to strive for them, the ones who have adopted the values of

377. OFFICE OF POLICY PLANNING, U.S. DEP'T OF LABOR, THE NEGRO FAMILY 29 (1965).

378. Hughes & Watts, *Portrait of the Self-Integrator*, J. SOCIAL ISSUES, April 1964, 103, at 106.

the class to which they aspire rather than the class to which they belong. Obviously, parents so motivated are likely to provide more effective support for their children's academic achievement than others of the same social class who continue to live in slums and patronize slum schools.

The black parent whose children attend white middle-class schools can also be distinguished from other members of his own social class by his basic outlook on life. In a study comparing two groups of middle-class black adults, one living in the Los Angeles ghetto, the other in the predominantly white San Fernando Valley, Bonnie Bullough found that the "self-integrators" felt much less alienated, less powerless, and less despairing than those who clung to the ghetto.[379] Their greater confidence and optimism could not have been the consequence of integration, for it was characteristic even of those who had only recently left the ghetto and was manifested in many cases by their perseverance in finding homes in the Valley despite repeated rejection. The investigator concluded that these personality traits were major determinants of the decision to move.

This finding is intriguing for the light it sheds on Coleman's "fate control" variable, which closely resembles what Bullough terms "powerlessness." As noted earlier, Coleman found fate control to be one of the most influential sources of black student achievement,[380] contributing more than any single school or background factor and nearly as much as all student body characteristics combined.[381] This sense of control was more characteristic of Negro students in predominantly white schools than in predominantly black schools, suggesting to some analysts that it may be the psychological mechanism through which integration operates to produce superior academic performance.[382] Yet it is unclear why children who attend integrated schools should have this feeling in greater measure than those in segregated schools. General experience suggests that this is not the sort of attitude one would expect a child to develop through superficial contacts in the classroom. Rather, it has the look of one of those fundamental mindsets communicated to the child early on in life, usually by example of his parents and not easily instilled thereafter. Thus, the Bullough findings strongly suggest that black children acquire the sense of fate control not from

379. Bullough, *Alienation in the Ghetto*, 72 AM. J. SOC. 469 (1967).

380. See text accompanying notes 367-68 *supra*.

381. "Fate control" accounted for 5.33% of the explained variance in verbal skills among black twelfth graders. COLEMAN REPORT 322. No school or background factor contributed more than 2.61%. *Id.* at 314.

382. Katz, *Academic Motivation and Equal Educational Opportunity*, 38 HARV. EDUC. REV. 57, 65 (1968); Pettigrew, *Race and Equal Educational Opportunity*, 38 HARV. EDUC. REV. 66, 73 (1968).

school, not from classmates, but from parents; black children in integrated schools have this quality in marked degree because their parents do, and it is precisely this parental attitude which accounts for the presence of their children in integrated schools.

B. The Explanatory Hypotheses

If the theoretical foundations of the integration argument[383] were sufficiently solid, one might be inclined to discount the ambiguities of the Coleman Report and accept at face value the data's apparent relationship between school social class and student achievement. But a critical examination of the theories forwarded to explain that relationship suggests that they may be as vulnerable as the data, leading one to a healthy skepticism as to the effects of school social class on individual achievement.

1. The "Self-Image" Hypothesis

The earliest and best-known hypothesis concerning the educational effects of segregated schooling is the one endorsed by the Court in *Brown:* the isolation of Negro students "generates a feeling of inferiority as to their status in the community," which in turn "affects the motivation of the child to learn" and retards his "educational and mental development."[384] While the Chief Justice was speaking with specific reference to de jure segregation, many educators and social scientists are convinced that these demoralizing and retarding effects flow from the very fact of racial isolation whether or not produced by state racial edicts. These experts speak of "the unfortunate psychological effect upon a child of membership in a school where every pupil knows that, regardless of his personal attainments, the group with which he is identified is viewed as less able, less successful, and less acceptable than the majority of the community."[385] The black school, it is said, carries the same stigma in the eyes of the community whether the segregation is de jure or de facto.[386]

Considering the wide currency of this notion, it is surprising that it finds so little empirical support. In approaching the matter, it is use-

383. See text following note 285 *supra.*

384. 347 U.S. at 494.

385. Fischer, *Race and Reconciliation: The Role of the School,* in THE NEGRO AMERICAN 491, 493 (T. Parsons and K. B. Clark eds., Beacon ed. 1967).

386. Dr. John Fischer, President of Columbia's Teachers College, observed:

> Regardless of the quality of the building, the competence of the staff, or the size of classes, a school composed of three-fourths Negro children and one-fourth white children is viewed by members of both races, virtually without exception, as inferior to one in which the proportions are reversed . . .

Id. at 493.

ful to isolate two dimensions of self-concept: the child's academic self-image—how he perceives his ability as a student; and his deeper, more general sense of personal worth—how he evaluates himself as a human being. At both levels, the consequences of school segregation are open to conflicting hypotheses that have not as yet been empirically confirmed.

With respect to academic self-image, one possible hypothesis is that the black student in an integrated school, usually facing stricter standards of academic performance and stiffer competition from his peers, is apt to be more self-critical and more conscious of his deficiencies than his segregated counterpart, whose frame of reference is set by undemanding teachers and apathetic peers. The opposing theory is that the segregated black student also measures himself against a white yardstick, but in his case, an unrealistic, larger-than-life-sized stereotype of white superiority that, it is argued, would be suitably deflated by actual contact with whites in an integrated classroom.[387] What scant evidence exists favors the former hypothesis. In the Coleman survey, students were asked to evaluate their ability to learn and to estimate their own intelligence as compared to that of others in their grade.[388] Surprisingly, there was little difference between the response levels of Negro and white students.[389] More important for our purposes, the Negro self-concept was found to be inversely related to the proportion of white students in the school; the whiter his school, the lower the black child rated himself.[390] Though it might be argued that this lower self-rating by the integrated black child is a healthy response—an indication that he is psychologically secure enough to acknowledge his scholastic difficulties without defensiveness or fantasy—the Coleman finding casts serious doubt on the notion that segregated education generates feelings of inferiority.

The effects of school segregation upon personality and self-perception are cloudier still. Some social scientists hold that racially separate education has benign consequences for the black child;[391] others, no doubt the great majority, strongly disagree. Both groups proceed from a common set of empirical premises—a Negro child reared in a racially insular environment is better able to develop an affirmative sense of

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387. Ausubel & Ausubel, *Ego Development Among Segregated Negro Children*, in EDUCATION IN DEPRESSED AREAS 109, 121-22 (A.H. Passow ed. 1963).

388. COLEMAN REPORT 281, 287.

389. *Id.* at 323-24.

390. *Id.*

391. *See* Gregor, *supra* note 22, at 107-111; Armstrong, *Psychodiagnosis, Prognosis, School Desegregation and Delinquency*, MANKIND QUARTERLY (Oct.-Dec. 1964).

identity and personal value than one brought up in close contact with white society and daily exposed to its indignities. Only when perceiving himself through white eyes does the young black succumb to self-hatred.[392] At this point the two lines of conjecture diverge. The separationist concludes that a racially homogeneous school, at least in the early grades, benefits the black child by permitting him to develop a stable self-concept before being thrown into stressful and ego-threatening contact with white children. The very purpose of integration, he argues, is to imbue the black child with the attitudes and values of the dominant white society, including the hostile, demeaning stereotype of the Negro. The integrationist, on the other hand, maintains that blacks in the urban ghetto are thorougly exposed to white prejudice and discrimination in any event. The segregated school, far from being a refuge from the bigotry of the larger society, becomes instead an ever-present reminder and reinforcer of it.

Neither of these hypotheses can be rejected a priori. The choice between them must depend upon the results of controlled studies systematically comparing the self-concept of black children in schools of varying racial composition. Such an investigation obviously presents immense methodological problems, for the difficult task of isolating the causal contribution of the school is compounded here by the additional problems of defining and empirically measuring such shadowy psychological constructs as "self-concept," "self-image," and "self-identity."

Let us first examine the published evidence concerning the self-concept of Negro children, much of which is the result of studies designed to probe the child's awareness of and attitude toward blackness. These studies recognize that "[t]he inescapable reality of color shades and shadows the Negro child's emerging sense of self, making the development of racial identification an integral part of his total development of self."[393] The investigations employ a variety of techniques—drawings, doll play, playmate preference, and picture tests—but the basic approach is fairly standard. The most notable example is Dr. Kenneth Clark's doll test,[394] in which a Negro child is presented with white and brown dolls, identical except for skin color, and asked questions about them aimed at eliciting first his color preference (e.g.,

392. *Compare* Gregor, *supra* note 22 (a separationist's view) *with* Clark, *Effect of Prejudice and Discrimination on Personality Development, in* PERSONALITY IN THE MAKING—THE FACT-FINDING REPORT OF THE MID-CENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH 136 (H. Witmer & Kotinsky eds. 1952) (an integrationist's view).

393. Proshansky & Newton, *The Nature and Meaning of Negro Self-Identity,* in SOCIAL CLASS, RACE, AND PSYCHOLOGICAL DEVELOPMENT 178, 182 (M. Deutsch, I. Katz, and A. Jensen eds. 1968).

394. This test became familiar to students of constitutional law because of its celebrated role in the 1954 school desegregation cases.

which doll do you like best? which looks nice? which looks bad?) and then his ability to identify his own color (which doll looks like you?). The child who prefers the white doll or rejects the brown is seen as accepting the prevailing racial attitudes of the majority group and rejecting his own; if he then goes on to identify himself with the white doll, he is seen as betraying confusion, emotional conflict, and a covert desire to be white. Investigations of this general sort, usually involving preschool or early elementary school children (three to seven years old), have repeatedly revealed a strong tendency in Negro children to prefer white skin color and to misidentify their own. It was on the basis of such data that Dr. Clark testified in *Brown* to the corrosive effects of life in a segregated society on the Negro personality.[395]

Studies of this nature are open to a variety of methodological objections.[396] Their substantive interpretation is highly speculative and, at best, they do not separate the effects of the school environment from other causal influences that might as easily account for the results. But even if we assume that the doll studies may serve as a valid measure of the effect of school racial composition on black self-image, they do not bear out the hypothesis that separation is harmful. The pattern of self-rejection found to be prevalent among black children in southern segregated schools seems to be equally characteristic of children attending northern desegregated schools. Indeed, the indications are that the preference for whiteness may be even stronger in the latter group.[397] The only published study that compares the response of children from segregated and integrated schools (also by Dr. Clark, in collaboration with his wife) reported that the brown doll was more often rejected by young Negro children in racially integrated Massachusetts schools (71%) than by those in racially segregated Arkansas schools (49%).[398] With respect to the color identification questions, the two regional groups responded in roughly the same proportions, but whereas many of the northern children reacted with "open demonstrations of intense emotions" when called upon to identify themselves with the doll previously rejected, the southern children were able to do so without agitation.[399] In a related coloring test given to the same subjects, nearly 80% of the southern Negro children colored their preferences brown compared to only 36% of the northern children.[400]

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395. Record at 84-89, Briggs v. Elliott, 347 U.S. 483 (1954).

396. *See* Cahn, *supra* note 22; van den Haag, *supra* note 22.

397. Clark & Clark, *Racial Identification and Preference in Negro Children,* in READINGS IN SOCIAL PSYCHOLOGY 551, 559-60 (G. Swanson, T. Newcomb & E. Hartley eds. 1952).

398. *Id.* at 560.

399. K.B. CLARK, PREJUDICE AND YOUR CHILD 44 (1955).

400. *Id.*

The Massachusetts-Arkansas doll study is of additional interest, for it has given rise to a conflict of interpretation that poignantly illustrates the risk entailed by judicial reliance upon the results of such investigations. On the surface, the raw data suggest that inferiority feelings and psychological disturbance are more typical of black children in integrated than in segregated schools. Dr. Clark himself, however, rejected such an interpretation as "superficial," and "incorrect":

> [A]pparent emotional stability of the Southern Negro child may be indicative only of the fact that through rigid racial segregation he has accepted as normal the fact of his inferior social status [whereas the] emotional turmoil revealed by some of the northern children may be interpreted as an attempt on their part to assert some positive aspect of the self.[401]

Dr. Clark's assessment of the southern responses applies at most only to the identification question, i.e., to those students who felt compelled to identify with a brown doll after having previously rejected it. The high proportion of southern children (nearly 80% on the coloring test) who not only identified with brown skin color but also expressed a preference for it must be credited with a more positive self-image than the great majority of their northern counterparts no matter how one evaluates the stressful responses of some of the northerners to the identification question. But even as to the children whose color preference was for whiteness, Dr. Clark's interpretation of the identification data appears puzzling. The child who selects the white doll as resembling himself is said to be evading reality; the child who selects the brown doll matter-of-factly is seen to be acquiescing in his inferior status; only the child who reacts with a torrent of tears is given credit for a healthy personality, his rebellion against blackness viewed as an expression of social protest rather than of self-rejection.

Perhaps the most pertinent insight to be gained from this study is the infinite malleability of the kind of data involved, the enormous element of intuition and speculation that enters into its interpretation. Dr. Clark's inferences may or may not be valid, but surely they fall short of qualifying as scientific proof. Therefore, it would be exceedingly difficult for the Court to choose between the competing interpretations as the factual foundation for a momentous constitutional rule, irrespective of what the particular doctrinal theory may be.

2. *The "Peer-Group Stimulation" Hypothesis*

The notion that segregated education is harmful because of its belittling effect upon Negro self-image has received declining empha-

401. *Id.* at 45-46.

sis in recent years. Attention seems to have shifted to another hypothesis that focuses upon the role of the "peer group culture" in affecting individual attitudes toward and standards of academic accomplishment. In a school where the majority of students come from impoverished homes, the black child who excels academically wins no laurels from his peers; indeed, he is apt to be looked upon with disapproval and derision.[402] Chances are he will succumb to the general atmosphere of hopelessness and defeat that permeates the school. The same child, this theory states, if placed among high achieving middle-class peers, would be influenced by a normative climate that favors rather than opposes academic values. The presence of college-bound, academically competent white peers would give him higher standards to compete against, skillful models to imitate, and the opportunity for greater self-understanding through cross-racial comparison.

This broadly stated assumption gains precision when framed in terms of the "reference group" theory of the sociologists.[403] Reference groups are of various types, each performing a different function and selected by the individual for a different purpose. The main functional types defined by sociologists are "normative groups", "comparison groups," "audience groups", and "role models".[404] Although for our purposes it is unnecessary to probe the discrete differences among these overlapping categories, their pertinence to the peer group culture argument for biracial schooling is easily stated.

First, his more advantaged classmates will become a normative group for the black child—a source of goals, values, and attitudes conducive to successful academic performance. Having acquired these goals (for example, the aspiration to attend college), he will try harder for academic success and achieve a greater measure of it. Second, the Negro child will use his advantaged classmates as a comparison group to provide him a more rigorous standard of performance against which to compete and in terms of which to evaluate his own efforts. Third,

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402. 1 RACIAL ISOLATION 104-05.

403. The term "reference group" has been generally defined as a "group, collectivity, or person which the actor takes into account in some manner in the course of selecting a behavior from among a set of alternatives, or in making a judgment about a problematic issue." Kemper, *Reference Group, Socialization and Achievement*, 33 AM. SOC. REV. 31, 32 (1968). *See generally* Hyman, *The Psychology of Status*, 38 ARCHIVES OF PSYCH. 15 (1942); Kelly, *Two Functions of Reference Groups* in READINGS IN SOCIAL PSYCHOLOGY 410-14 (G. Swanson, T. Newcomb and E. Hartley eds. 1952); Merton, *Continuities in the Theory of Reference Groups and Social Structure* in SOCIAL THEORY AND SOCIAL STRUCTURE 368-86 (1957); Merton & Kit, *Contributions to the Theory of Reference Group Behavior*, in STUDIES IN THE SCOPE AND METHOD OF "THE AMERICAN SOLDIER" 42-53 (R. Merton and P. Lazarsfeld eds. 1950); Shibutani, *Reference Groups as Perspectives*, 60 AM. J. SOC. 562 (1955); Turner, *Role-Taking, Role Standpoint, and Reference Group Behavior*, 61 AM. J. SOC. 316 (1956).

404. Kemper, *supra* note 403, at 31-34.

they will serve as role models, displaying academic skills and techniques that he can emulate. Finally, he will regard them as an audience group, a group by whom he believes himself observed and rated and whose applause he seeks through performance.

Although this set of hypotheses may appeal to common sense, difficulties begin to surface upon further analysis. In fact, the elements that influence black attitudes and behavior in a biracial setting are much more complicated than the simple reference group model suggests, and theory and research in this area are in a state of considerable flux and uncertainty. The reference group analysis outlined above makes two key predictions: (1) that disadvantaged black children in a biracial class will "refer" to their advantaged white classmates for goals, values, attitudes, comparison levels, and social approval; and (2) that the effects of this reference will benefit their academic performance. Both assumptions are open to serious question, and we may examine them in the context of the two traditional functional reference types.

a. Normative reference: college aspirations and black school achievement. The conclusion that black children adopt higher educational goals, such as a desire to go to college, when surrounded by white classmates rather than by fellow blacks rests upon two premises: (1) that black children, on the average, have lower educational aspirations than whites; and (2) that a disadvantaged black child in a biracial class will use his advantaged white classmates as a reference for goals and values. In fact, however, both premises are questionable, and the conclusion itself is contrary to the weight of empirical evidence.

Empirical studies tend to show that the poor child aims for college less frequently than his more affluent counterpart. Surprisingly, however, black children seem to be no less college-minded than white children, at least when the two groups are equated by social class. A number of studies have shown that formal education is the most important single criterion of prestige among Negroes, more so than for whites.[405] The proportion of students who say they desire or plan to go to college is as high among Negroes as among whites of comparable economic status;[406] according to some studies, it is even higher.[407] This re-

405. For a review of these studies, see Glenn, *Negro Prestige Criteria: A Case Study on the Basis of Prestige*, 68 AM. J. SOC. 645 (1963).

406. Two studies found no difference between black and white educational plans or preferences over the same social class: Gist & Bennett, *Aspirations of Negro and White Students*, 42 SOC. FORCES 40 (1963); Holloway & Berreman, *The Educational and Occupational Aspirations and Plans of Negro and White Male Elementary School Students*, 2 PAC. SOC. REV. 56 (1959). Another found no difference between the educational *preferences* of whites and blacks but that blacks have less ambitious *plans*. Stephenson, *Mobility Orientation and Stratification of 1000 Ninth Graders*,

sult has sometimes been reached even without allowing for the social class differences between blacks and whites.[408] The Coleman survey, for example, revealed that in all regions of the country a larger proportion of Negro than of white twelfth graders said they wanted further education beyond high school.[409] They also reported more hours of homework than whites and more often expressed a desire to be among the best students in the class.[410] At the same time, there is no evidence that such attitudes are due to contacts with white students.[411]

The second premise—that a child of the black slum, placed in a classroom with children of the white suburbs, will come to value what they value, pursue the goals they pursue, measure himself by their yardstick, seek their approval—is also debatable. As an intuitive matter, one may question how much a disadvantaged black youngster will be influenced by the presence of more affluent whites with whom he shares a classroom but very little else. Sociologists have said surprisingly little, even at the theoretical level, about the factors which

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22 AM. SOC. REV. 204 (1957).

For studies dealing with the relationship between race and occupational aspirations or achievement, see Antonovski & Lerner, *Occupational Aspirations of Lower Class Negro and White Youth*, 7 SOC. PROBS. 132 (1959) (Negroes have higher occupational aspirations than lower class whites); Boyd, *The Levels of Aspiration of White and Negro Children in a Non-Segregated Elementary School*, 36 J. SOC. PSYCH. 191-96 (1952); Rosen, *Race, Ethnicity and the Achievement Syndrome*, 24 AM. SOC. REV. 47 (1959).

407. NAM, RHODES, & HERRIOTT, INEQUALITIES IN EDUCATIONAL OPPORTUNITIES: A DEMOGRAPHIC ANALYSIS OF EDUCATIONAL DIFFERENCES IN THE POPULATION 57 (1966); St. John, *The Effect of Segregation on the Aspirations of Negro Youth*, 36 HARV. EDUC. REV. 284 (1966); Wilson, *Educational Consequences of Segregation in a California Community*, in 2 RACIAL ISOLATION 165, 193-99; Blakde, A Comparison of Intraracial and Interracial Levels of Aspiration, 1960 (University Microfilm no. 60-1616, unpublished thesis).

408. Reiss & Rhodes, *Are Educational Norms and Goals of Conforming, Truant, and Delinquent Adolescents Influenced by Group Position in American Society?*, 28 J. NEGRO ED. 252 (1959); COLEMAN REPORT 279, 283.

409. COLEMAN REPORT 279, 283. However, fewer Negroes than whites desired to finish college or go beyond. Also, fewer Negroes had definite plans for college, suggesting to Coleman "the lesser concreteness in Negroes' aspirations, the greater hopes, but lesser plans." *Id.* at 279.

410. *Id.* at 278-80.

411. Certainly, other explanations are plausible. It may be that the black child, having less access than the working-class white child to skilled or semiskilled manual jobs not requiring college education, has no realistic resting place for his ambitions short of college. Or, the black child may have fewer employed adults around to serve as blue-collar or clerical career models. It may even be that the black child's attitudes are more often shaped by women, who reportedly place a higher value on education than do men. Hyman, *The Value Systems of Different Classes*, in CLASS, STATUS AND POWER 488, 491 (2d ed. R. Bendix & S. Lipset eds. 1966). Whatever the explanation, there is a large element of fantasy and wishful thinking in the responses reported by these studies. Katz, *Socialization of Academic Motivation in Minority Group Children* 133, 174, in NEBRASKA SYMPOSIUM ON MOTIVATION (Levine ed. 1967) [hereinafter cited as NEBRASKA SYMPOSIUM].

lead an individual to choose others as referents of any type for his own attitudes and behavior.[412] It is, however, agreed that to select a group as a source of values and goals—a "normative" reference group—an individual must be able to identify with it, to assume the role of one of its members, to see the world through its eyes.[413] It is plausible that a lower-class black child will identify in this way with middle-class whites on the basis of classroom contact alone, if the interracial climate is one of fellowship and acceptance. But in many classroom situations racial tensions run high, black students are socially rejected, and little mingling takes place across racial lines. Under these conditions, black students would seldom feel enough in common with the white majority to select them as a source of values and goals.

It is also possible that black students in predominantly white schools set their ambitions not by reference to the ambitions of their white classmates but rather to their own relative academic standing in the class. A well-known study of the occupational aspirations of college seniors reported that a student's relative standing among his peers, rather than the aspirations of the peers themselves, was the dominant predictor of his seeking a prominent "high academic-performance career field; a college senior who stands high in his class is more likely to choose a high performance career than a more talented student (per scholastic aptitude tests) at a more rigorous college who stands relatively low in his class."[414] For our purposes the implication is that in a biracial classroom white peers do not serve as a normative group for blacks.

Turning from plausible inference to empirical data, we find that the available research on the specific question of whether black students in integrated schools embrace the educational aspirations of their white classmates is inconclusive. Several studies based on white or racially unspecified samples have found a positive relationship between "contextual" variables, such as the social-class level of the school or neighborhood peer group, and the college or career aspirations of individual students.[415] Whatever the educational background or occupational

412. Kemper, *supra* note 403, at 31-32.

413. Merton & Kit, *supra* note 403, at —.

414. Davis, *The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men.* 72 AMER. J. SOC. 17 (1966).

415. *E.g.*, R.M. TURNER, THE SOCIAL CONTEXT OF AMBITION (1964); Alexander & Campbell, *Peer Group Influences on Adolescent Educational Aspirations and Attainments*, 29 AM. SOC. REV. 568 (1964); Boyle, *The Effect of the High School on Students' Aspirations*, 71 AM. J. SOC. 628 (1965); Haller & Butterworth, *Peer Influences on Levels of Occupational and Educational Aspiration*, 38 SOCIAL FORCES 289 (1960); Kahl, *Educational and Occupational Aspirations of "Common Man" Boys*, 23 HARV. EDUC. REV. 186 (1953); Michael, *On Neighborhood Context and College Plans*, 31 AM. SOC. REV. 706 (1966); Sewell, Haller & Straus, *Social Status and Educational and Occupational Aspirations*, 22 AM. SOC. REV. 67 (1957); Wilson, *Residential Segrega-*

status of his own family, the individual has higher academic and career ambitions when most of his classmates come from middle-class or professional families than when they come from lower or working class families. But these studies have been criticized on methodological grounds; for example, the apparent correlation between school or neighborhood context and individual aspiration largely disappears when allowance is made for differences in intelligence.[416] Still, there is enough evidence to provide at least tentative confirmation of the "peer group stimulation" hypothesis with respect to lower-class white children.

Curiously, however, most data concerning the relationship between school or classroom racial composition and the college aspirations of black students point the other way. Desegregated schooling seems to be associated not with higher but with lower educational goals. A decade ago, Dr. Alan Wilson, in a study of college aspirations in selected Bay Area high schools, found that Negro students attending predominantly black schools more often hoped for a college education than those in predominantly white schools.[417] In a New England city, Dr. Nancy Hoyt St. John found that the college plans of black high school juniors were inversely related to the "whiteness" of the local elementary schools they had attended.[418] A more complicated but generally consistent picture emerges from Dr. David Armor's analysis of data obtained in the Coleman survey.[419] Nearly 40,000 ninth and twelfth grade black students from metropolitan schools in four major regions were classified by ability, sex, region and (in the Northeast) social class. For each group, Dr. Armor measured the relationship between school racial composition and the proportion of students having definite plans for college. He found that in nearly all categories, twelfth graders in predominantly Negro schools were more college-minded than those in predominantly white schools. The same was true of ninth grade girls

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tion of Social Classes and Aspirations of High School Boys, 24 AM. SOC. REV. 836 (1959).

416. Sewell & Armer, *On Neighborhood Context and College Plans*, 31 AM. SOC. REV. 159 (1966). *But see On Neighborhood Context and College Plans*, 31 AM. SOC. REV. 698 (1966) (interchange between Turner, Michael, Boyle, Sewell, and Armer).

417. A. Wilson, The Effect of Residential Segregation Upon Educational Achievement and Aspirations, 1960, (unpublished doctoral thesis, Univ. of California, Berkeley). *See also* Wilson, *Residential Segregation of Social Class & Aspirations of High School Boys*, 24 AM. SOC. REV. 836-51 (1959). Wilson was prompted to observe that "a segregated social minority can generate and maintain higher hopes than when integrated. It can develop its indigenous leadership, and is not demoralized by the continuous tokens of their imposed inferiority."

418. St. John, *The Effect of Segregation on the Educational Aspirations of Negro Youth*, 36 HARV. ED. REV. 284 (1966).

419. Armor, *Racial Composition of Schools and College Aspirations of Negro Students*, in 2 RACIAL ISOLATION 143.

and ninth grade boys of low verbal ability. The brighter ninth grade boys showed strong regional variation, but there was only one group—Northeasterners of lower-class background, high ability and high grades—whose college aspirations were significantly enhanced by attending predominantly white schools. Apart from this exception, the significance of which will be discussed later, the Armor results bear out the earlier indications that desegregated schooling does not whet the appetite for further education and may even quench it.

This evidence of an inverse relationship between school whiteness and black college aspirations is open to various interpretations. One possibility—consistent with black value reference to white peers—is that the white peers with whom the black subjects "integrated" came predominantly from lower-class families. But it would be unusual if the social-class status of students in racially mixed schools was lower on the average than that of students in segregated black schools. Another possibility—also consistent with black value reference to white peers—relies on the evidence that black students are (at least in their verbal responses) as college-minded as white students, if not more so.[420] Thus, the white reference group in an integrated school may well be less college-oriented than the black reference group in a segregated school.

For our purposes, however, whether or not black students in integrated classrooms refer to white peers for goals and values is less important than the apparent disconfirmation of the hypothesis that segregation depresses and desegregation lifts black college aspirations. Even this, however, does not directly address the ultimately crucial issue: Does integration enhance black educational achievement?

The data respecting the high college aspirations of blacks, combined with their lower actual college attendance figures, bear on this subject. It suggests that verbal expressions of ambition and interest may have little to do with actual striving and achievement. In part this may be due to the students' lack of appreciation of the connection between long-range college and career goals and immediate scholastic success. Even in suburban middle-class schools, a striking study reported that members of the school elite—those students with the greatest influence on their peers—combined a high frequency of college aspirations with low valuation of academic achievement. The investigators concluded that the normative climate of the school, though college-oriented, seemed to discourage scholastic effort rather than encourage it.[421] If this is true among white students, whose college goals

420. See text accompanying notes 405-10 *supra.*

421. McDill & Coleman, *High School Social Status, College Plans, and Interest in Academic Achievement: A Panel Analysis,* 28 AM. J. SOC. 905 (1963). *But see* M. ROSENBERG, SOCIETY AND THE ADOLESCENT SELF-IMAGE 256-57 (1965).

are more realistic, it may be even more true of disadvantaged students whose expressed ambitions contain so large an element of fantasy. Yet more seems to be involved here. The Coleman data showed that black students not only had higher college goals but also expressed more interest in school work than their white peers. Yet the relationship between a black child's aspirations and achievement, small and positive in the sixth grade, became nonexistent in the ninth grade and even negative in the twelfth grade.[422]

If, indeed, it is true that achievement and expressions of aspiration are often in conflict, the evidence of diminished aspiration among Negro students in desegregated schools is entirely consistent with their higher performance reported by Coleman. The findings of the Armor study[423] are particularly interesting in this context. They suggest that biracial schooling, instead of curbing ambition, infuses it with greater realism, selectively boosting it for just those students whose prospects for college are brightest. In the segregated schools surveyed by Armor, there was little difference between the college plans of good students and poor students; only in the predominantly white schools was there a match between school success and school expectations. Moreover, the one major exception to the general pattern associating desegration with low aspiration was Negro boys of high ability and achievement from disadvantaged backgrounds. These findings may suggest that for the bright, achieving student with genuine academic promise, racial isolation makes college seem more remote and unreachable than it really is, while successful competition with whites in an integrated setting awakens ambition that would otherwise have remained dormant. For the less talented, on the other hand, those with no true prospect of continuing their education, segregation obscures hard realities and prolongs wishfulness, whereas unsuccessful competition with better prepared white peers in an integrated setting scales expectations down to more realistic proportions. From a social standpoint, grounding the high-flying aspirations of the less gifted black students may be altogether desirable, for a society that stirs hopes without providing means for their fulfillment is mixing an explosive brew. But equally

422. The psychologist Irwin Katz finds support in these data for the view that "as part of his adjustment to failure, the low-achieving Negro student learns to use expressions of interest and ambition as a verbal substitute for behaviors he is unable to enact." Katz, *supra* note 411, at 175. The effect is to reduce anxiety in situations where verbal expressions alone are enough but to increase it in actual achievement situations. Hence, "as the Negro student falls increasingly behind in his school work, the expression of high verbal standards contributes to growing demoralization." *Id.* This analysis suggests the proposition that "when high standards are adopted, but not the behavioral mechanisms necessary for attainment, the relationship between verbal expressions of the standard and actual performance will tend to be an inverse one." *Id.*

423. See text accompanying note 419 *supra.*

important, the dose of realism imparted by the biracial experience may contribute to the personal and mental development of the black child himself.

This conclusion is reinforced by Coleman's fate control finding. The sense that outcomes depend on one's own efforts rather than upon chance may, above all, measure the individual's sense of realism. Black children who are low in this variable, who believe that what happens to them depends more on luck than on hard work, have no reason to ground their aspirations in reality or to take stock of their strengths and weaknesses, just as they have no reason to strive for success. It is only when they perceive a rational relation between effort and reward that they are likely to think realistically about where they are going and what they must do to get there with the assets and liabilities they bring to the enterprise. Hence, the research findings that black students in white schools have more realistic (though generally lower) aspirations, greater fate control, and lower self-rating as students all fit together comfortably, arguably consistent with the Coleman findings of higher black achievement in integrated schools.

b. Comparison reference. We turn now to the theory that black children attending integrated schools adopt white standards of performance as a basis for self-evaluation with beneficial effect on achievement. Here, too, one cannot dismiss the possibility that the black child, though exposed to high white standards, will not internalize them but will be content instead to measure himself against the presumably lower standards set by the black segment of the class. The much more serious risk, however, is that the adoption of white standards, far from stimulating motivation and achievement, tends to defeat it.

A widely cited article written in 1964 by the psychologist Irwin Katz identifies some of the important motivational factors influencing Negro performance in the racially mixed classroom.[424] Drawing on his own experimental research and upon a wide-ranging review of the pertinent theoretical and empirical literature, Katz specifies four situational determinants that may be present in the integrated classroom, one favorable and, three unfavorable, to black achievement. On the favorable side of the ledger, acceptance of Negroes by white peers and teachers "should have a *social facilitation* effect upon their ability to learn, by motivating them to adhere to white standards or academic performance; anticipation that high performance will win white approval should endow scholastic success with *high incentive value.*"[425] This, in sub-

424. Katz, *Factors Influencing Negro Performance in the Desegregated School,* in SOCIAL CLASS, RACE, AND PSYCHOLOGICAL DEVELOPMENT 254 (M. Deutsch, I. Katz, and A. Jensen eds. 1968).

425. *Id.* at 283 (emphasis in original).

stance, is a rough equivalent to the reference group notions outlined earlier. On the unfavorable side, three possibly present factors are identified: social threat, low probability of success, and failure threat.

Social threat is the converse of social facilitation: given the prestige and power of the white majority group, rejection of Negro students by white classmates or teachers should tend to elicit emotional responses (fear, anger, and humiliation) that are detrimental to intellectual functioning.[426]

> Mere indifference on the part of white peers may frustrate their needs for companionship and approval, resulting in lowered self-esteem and the arousal of impulses to escape or aggress. In more extreme instances, verbal harrassment and even physical hazing may elicit strong fear responses. These external threats are likely to distract the minority child from the task at hand, to the detriment of performance.[427]

The second possible negative influence on Negro motivation in the desegregated school is the lowered probability of success.

> Where there is a marked discrepancy in the educational standards of Negro and white schools, or where feelings of inferiority are acquired by Negro children outside the school, minority group newcomers in integrated classrooms are likely to have a low expectancy of academic success; consequently, their achievement motivation should be low.[428]

In this analysis, Professor Katz was building on well-established foundations in motivation theory. Most modern authorities[429] agree that the strength of an individual's motivation to achieve, the vigor and persistence with which he strives for success in a given task, depends on two situational factors: the value he places on accomplishing the particular task ("incentive strength"), and his assessment of the likelihood of his accomplishing it ("subjective probability"). These two factors are often thought to be inversely related; the more difficult the task, the greater the incentive to achieve it, but the lower the expectancy of doing so. Thus, the task that calls forth the maximum effort is one of intermediate difficulty, demanding enough to challenge but not so demanding as to intimidate.[430] For the lower class black child, it is plau-

426. *Id.* at 256.
427. *Id.*
428. *Id.* at 283.
429. *Id.* at 258.
430. Professor John Atkinson has refined this insight to the point of developing a formal model that posits (at least for individuals with a basic disposition to avoid failure) that motivation is at peak strength when the perceived probability of success is exactly .50, becoming weaker as the probability of success rises to unity or declines to zero. Among the many hypotheses he and his associates derive from this model is that "homogeneous ability grouping should provide a competitive achievement situation

sible to speculate that both the pace of instruction and the normative climate in a desegregated classroom may increase the incentive value of academic success but may also lower the perceived probability of it. Whether the net effect of these opposing tendencies upon motivation is plus or minus—whether the black child would "try harder" or "try less" in an integrated than in a segregated school[431]—depends on a number of objective and subjective factors that vary from person to person: the child's actual ability to meet the prevailing standard of performance, the extent of his environmental handicaps, his prior experience of success or failure, the competitiveness of his personality, the amount of self-confidence he has, how highly he rates his own ability in relation to that of his classmates, the value he places on academic success in relation to other available goals, and so on. The only conclusion to draw is that the individual's "incentive-expectancy" schedule, and hence the strength and direction of his motivational response to the integrated environment, will be very different for different students; no generalization can accurately describe anything but a statistical average.

The use of higher white standards as a comparison reference for black students in integrated classrooms may, for a different reason, tend to inhibit rather than stimulate academic performance and achievement. Professor Katz, in a later article, has suggested that academic failure among minority students may be associated, not with low or unstable standards of achievement, but with overly self-critical standards "so stringent and rigid as to be utterly dysfunctional."[432] He attributed this excessive self-disparagement to anxiety generated by the punitive and unrewarding practices of Negro parents[433] and, paradoxically, by

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more nearly approximating one of intermediate probability of success, or intermediate difficulty, than the traditional heterogeneous class" and hence that both "effort and anxiety should be more apparent when ability grouping is employed." Under this view, one would expect that in a racially and socially heterogeneous classroom, characterized by a wide range of abilities and levels of preparations, standards of performance geared to the average student would either be too easy or too difficult for a large proportion of the class, in either case causing less than optimum interest and performance.

431. In Atkinson's model, the issue is whether his subjective probability of success is closer to or further from the magic .50. See note 430 *supra.*

432. Katz, *supra* note 411, at 164. *See also* Katz, *Academic Motivation and Equal Educational Opportunity*, 38 HARV. EDUC. REV. 57 (1968), where many of the same ideas are recapitulated. In a small pilot study of fifth- and sixth-grade Negro pupils in a virtually all-black school in Detroit, Katz found that low-achieving boys were much more self-critical than high achievers even on a task (assembling a picture from variously shaped pieces of paper) in which independent evaluators could detect no objective differences in the performance of the two groups. *Id.* at 159-62. "If standards are to be inferred from a predisposition to criticize one's self, then our low-achieving Negro boys had very high standards indeed." *Id.* at 164.

433. *Id.* at 168-70.

the inordinately high demands for academic achievement that most Negro parents make upon their children—demands that, according to some research,[434] are higher even than those imposed by middle-class white parents.[435] Assuming all this to be so, the danger exists that if the stringent parental and self-imposed demands that now inhibit the performance of these low-achieving ghetto children were reinforced by the exacting comparison standards of white peers in an integrated setting, the result would be a further increase in anxiety and still greater paralysis of effort.

Again, however, one must reckon with paradox. Just as there are indications that the biracial classroom experience may induce the ghetto child to abandon his defensive overaspiration and to adopt a more realistic self-assessment as a student, so, too, it may in some subtly complex fashion release the low-achiever from standards that crush rather than encourage performance. Thus, Professor Thomas Pettigrew, a leading writer on desegregation, speculates that "the high comparison levels set by predominantly white schools may serve paradoxically to lower and make more realistic the internalized standards of many poorly achieving Negro pupils."[436] That is, the very stiffness of the competition in white schools—the low perceived probability of success—may provide an excuse for failure that relieves the child's tension and actually enhances his performance.[437]

Pettigrew himself advances a related hypothesis:

> [M]any of the consequences of interracial classrooms for both Negro and white children are a direct function of the opportunities such classrooms provide for cross-racial self-evaluation . . . the integrated class and school are unique in the range of opportunities they provide Negro children for minimal self-evaluation against higher comparison levels.[438]

He does not explain in what ways these opportunities enhance Negro

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434. Bell, *Lower Class Negro Mothers' Aspirations for Their Children*, 43 Soc. Forces 493 (1965); Keller, *The Social World of the Early Slum Child: Some Early Findings*, 33 Am. J. Orthopsychiatry 823 (1963). Katz suggests that these aspirations, usually accompanied by strict verbal rules and regulations concerning classroom conduct, are seldom implemented by effective aid and encouragement of children's academic efforts; yet they "somehow get conveyed to the child as expectations he is supposed to fulfill."

435. Katz, *supra* note 432, at 57, 62; Katz, *supra* note 411, at .

436. Pettigrew, *Social Evaluation Theory: Convergences and Applications*, in Nebraska Symposium, *supra* note 411, at 241, 290.

437. This conclusion is consistent with Atkinson's theory of achievement motivation, which predicts that for those children in whom the fear of failure is stronger than the hope for success, motivation is strongest not when the probability of success is at an intermediate level but when it is either very high or very low. See note 430 *supra*.

438. Pettigrew, *supra* note 436, at 287-88.

achievement if the cross-racial comparisons are unfavorable and the standards too high. It may be, however, that the mere availability of feedback concerning his own standing in relation to white peers is a positive motivational factor regardless of whether the news is good or bad. Knowing precisely where he stands, the child is in a position to set his sights at realistic levels and to compete with those of his peers, both white and black, with whom at any given time he feels himself most closely matched.

3. *The Teacher-Expectation Hypothesis*

This view holds that student-body characteristics influence the individual's achievement through their effects upon the quality of teaching received. It contends that able and experienced teachers will not accept assignments in slum schools heavily attended by students they imagine to be unteachable. Poor academic performance of their students is reportedly the major cause of dissatisfication among slum teachers[439] and, one may infer, the prime reason why so many seek transfers at the earliest opportunity. If this is so, then by distributing white, middle-class, academically oriented students more uniformly throughout the school system, it is a fair assumption that teaching talent and experience would likewise be more evenly distributed.

Under this view, the character of the student-body determines not only who teaches in slum schools but also how well they teach. It dictates the distribution of the teacher's time between discipline and instruction; in many ghetto schools three-quarters of every classroom hour is spent in keeping order.[440] It affects the teacher's morale and self-image; one who sees his role primarily as custodial brings to it less of the energy and creativity that good instruction requires. Indeed, the teacher's estimate of the general level of ability and interest in the class enters into every aspect of his work: the time devoted to preparation, the amount and difficulty of material sought to be covered, the pace and pitch of classroom instruction, the level of performance demanded of students, and the personal interest taken in the progress and problems of individual children.[441] Finally, the teacher who believes his students unteach-

439. 1 R. HERRIOTT & N. ST. JOHN, SOCIAL CLASS AND THE URBAN SCHOOL 88-92 (1966). The typical career pattern of public school teaching is not one of upward mobility from teaching to administration but one of horizontal mobility from schools in slum areas to schools in more desirable neighborhoods.

440. *See* M. DEUTSCH, MINORITY GROUP AND CLASS STATUS AS RELATED TO SOCIAL PERSONALITY FACTORS IN SCHOLASTIC ACHIEVEMENT 23 (Society for Applied Anthropology Monograph 2, 1960).

441. *See* Becker, *Social-Class Variations in the Teacher-Pupil Relationship*, 25 J. EDUC. SOC. 451, 453-55 (1952); R. HERRIOTT & N. ST. JOHN, *supra* note 439, at 84-102; A. Wilson, *supra* note 417, at 181.

able inevitably conveys that sense of hopelessness to the children themselves; the resulting loss of self-esteem cripples the child's performance and thus works to fulfill the teacher's prophecy.[442] In effect, the child acts out the role in which he believes the teacher has cast him.

What of the validity of this thesis? That disciplinary problems would be fewer and thus time for instruction and special help more ample in a socially heterogeneous classroom than in one filled exclusively with lower class children can hardly be doubted. Whether black children would profit from the more rigorous demands made upon them by teachers in a middle-class school is a more difficult question, essentially that discussed in preceding sections.[443] Nor is it easy to predict how far integration would protect the black child against prejudiced or unsympathetic teachers or against those who believe him incapable of learning. Teachers in a middle-class school do tend to be better satisfied with their work and may therefore be able to approach the problems of the minority student in a more giving and sympathetic spirit. Moreover, many teachers, though unable to cope with the overwhelmingly adverse conditions in ghetto schools, are still genuinely interested in the needs of disadvantaged children and might well find a more fruitful atmosphere for their efforts in an integrated school. On the other hand, there is no assurance that the unfavorable impression of black students which many white teachers hold would not be displayed just as visibly in a biracial classroom as in an all black one—and perhaps with even more demoralizing effect because of the added element of invidious comparison and the embarrassing presence of a white audience.[444] By the same token, the theory of self-fulfilling prophecy does not argue unambiguously for desegregation. The level of performance a teacher expects of a particular student may rise or fall not with the general ability level of the class but with the comparative standing of the individual student within the class. More may be expected of, and therefore elicited from, a child who stands above the average in a relatively poor class than one who stands below the average in a stronger group. This possibility is suggested by the results of a recent study of self-fulfilling prophecy in a single class of ghetto schoolchildren during

442. For a general discussion of self-fulfilling prophecies see R. ROSENTHAL & L. JACOBSON, PYGMALION IN THE CLASSROOM (1968). *See also* Marburger, *Consideration for Educational Planning*, in EDUCATION IN DEPRESSED AREAS 298, 306 (A. Passow ed. 1963); Ravitz, *The Role of the School in the Urban Setting*, in EDUCATION IN DEPRESSED AREAS 6, 19-20 (A. Passow ed. 1963); Rist, *Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education*, 40 HARV. EDUC. REV. 411 (1970).

443. If the demanded level of performance were felt by the child to be beyond his ability, the effect might be to weaken his motivation or to arouse in him debilitating anxiety.

444. Rist, *supra* note 442.

the kindergarten, first and second grade years. The observer found that the kindergarten teacher assigned children almost immediately to separate reading groups apparently on the basis of dress, behavior, physical appearance, and information available to the teacher about their socioeconomic status. These groupings persisted throughout the early years of elementary school and the teacher's differential behavior toward the groups seemed to be reflected in their performance. It may well be that if children in the ghetto school has been assigned instead to desegregated classrooms composed primarily of economically advantaged white students, fewer of them would have been placed in high reading groups and fewer therefore would have benefited from favorable teacher expectations. Whether this factor would be offset, or more than offset, by the teacher's generally higher level of expectation for the class as a whole is a matter of conjecture. On the whole, one has to conclude that the teacher-expectation theory of desegregation—the theory that more will be demanded of, and therefore more achieved by, the black child in a predominantly white middle-class school than in a ghetto school—is an intuitively appealing but still untested hypothesis.

C. Evaluation and Conclusions: The Variability and Uncertainty of the Effects of Segregated Schooling

The burden of the preceding discussion may be summed up in three propositions: First, the influence of biracial schooling upon the achievement of black students is highly *uncertain.* The Coleman findings tentatively suggest a favorable effect, but the availability of plausible alternative explanations for the relationships observed by Coleman and the fragility of the sociopsychological bases of integration theories leave the issue cloudy.

Second, whether or not the influence of biracial schooling upon Negro achievement is favorable, the mechanisms through which that influence is brought to bear are unexpectedly *complex.* The attractiveness of the integration thesis as a constitutional premise depends largely upon its simple and straightforward appeal to common sense. That thesis holds that integrated schooling enables the Negro child to achieve greater success in society by improving his self-image, lifting his aspirations, raising his self-imposed standard of performance, and working harder. But if the evidence surveyed suggests nothing else, it advises that this set of assumptions is greatly oversimplified and even sometimes false. If racially mixed schooling does promote achievement, it is through a process much more intricate and paradoxical than that postulated. The available evidence seems to indicate that black students in segregated schools do not underaspire but overaspire; that desegregated schooling usually does not send aspiration soaring but brings

it to earth; that it may not raise but lower the child's self-esteem, at least his academic self-rating. The value of biracial education for the black child may very well lie in the greater realism it instills, the opportunities it affords for self-understanding through cross-racial comparison. It is through these processes, still only vaguely understood, that the child may become a more effective academic performer (though that remains to be proven)—processes so subtle and sophisticated at every twist and turn as to make the thesis a highly debatable basis on which to rest a constitutional holding against de facto segregation.

Third, and perhaps most important, the effects of racially isolated education seem to be extremely *variable* both in magnitude and direction. Desegregation may be beneficial to some children and harmful to others, depending on the circumstances. This factor of variability is of special importance to the constitutional analysis and merits further elaboration.

1. Personal Variables

The effect of desegregation depends first upon the characteristics of the child. Scholastically able black students tend to raise their sights under the influence of integration while the less able tend to lower theirs.[445] The student's responsiveness to the biracial setting also seems to depend on his social-class background. Data from the Coleman survey[446] indicate that the advantaged Negro twelfth grader whose classmates are predominantly white outperforms his counterpart in a segregated classroom by two full grade levels in reading achievement, whereas the disadvantaged Negro, disadvantaged white, and advantaged white in a classroom with a majority of advantaged whites outscores his counterpart in a classroom with a majority of disadvantaged blacks by only a single grade level. This outcome may be explained by the thesis that the academic environment of a white middle-class school is determined jointly by factors of "dependency" and "preparation." That is, the lower-class Negro child, having no supportive home environment, is heavily dependent on the school and therefore sensitive to variations in its quality, yet is ill-prepared to take full advantage of it. Having little in common with his middle-class white peers, he is less likely to use them as a reference group for either normative or comparative purposes. The middle-class white is well equipped to profit from whatever strengths the high status school may have, but at the same time he is less dependent on it. The high floor established by his home environ-

445. See text following note 423 *supra*.

446. The data is presented in the statistical appendices to the United States Civil Rights Commission's 1967 report, 2 RACIAL ISOLATION 67 (Table 4.2), 134-35, 137 (Tables 8.1, 8.2, 8.6).

ment and the low ceiling imposed by the mediocrity of even the better public schools leave only modest room for school-to-school variation. The lower-class white student holds an intermediate position on both dimensions; he is probably better prepared but less dependent than the lower-class black, more dependent but less prepared than the middle-class white. Only the middle-class black is both heavily dependent on the school, and equipped to seize its opportunities.

2. *Situational Variables*

The impact of desegregation depends not only upon the particular child but also upon features of the school and classroom situation. The most important of these is the climate of interracial acceptance. As the research of Professor Katz suggests, the performance of black children in newly integrated schools may be impaired by social threat—fear of rejection by white classmates or teachers—and by the anger and humiliation elicited thereby.[447] Conversely, the acceptance of Negroes by white peers and adults should have a social facilitation effect on their achievement, motivating them to adopt white achievement standards and to seek white approval through successful performance.[448] These theoretical observations, based in part upon empirical research, are reinforced by the Civil Rights Commission's findings, in reanalyzing the Coleman data, of a clear relationship between student attitudes and achievement and the degree of interracial friction reported by teachers.[449] It is doubtful whether school systems that desegregate only under court order are willing or able to make the painful efforts necessary to bring harmony and mutual respect to the biracial classroom.

Even if conditions for desegregation were otherwise optimal, there is evidence that biracial schooling upgrades the performance of black students only in classrooms where the percentage of white students exceeds 50 per cent. For example, as noted earlier,[450] Coleman found that black children in all black classes fared as well as or better than those with some, but less than a majority of, white classmates.[451] Thus,

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447. Katz, *supra* note 424, at 256.

448. See text accompanying note 425 *supra.*

449. The Commission warned that the success of school desegregation "depends on the degree to which adminstrators and teachers are able to create conditions under which Negro and white students who are brought together in the school and the classroom are able to understand and accept each other." 1 RACIAL ISOLATION at 157.

450. See text accompanying note 362 *supra.*

451. This finding may be misleading, since schools in which white students are outnumbered by blacks are often located in lower-class or transitional neighborhoods and may not differ much in their socioeconomic composition from all-black schools in the heart of the ghetto. In view of Coleman's further finding [see text accompanying note 363 *supra*] that it is the social class of his fellow students rather than their race that influences black achievement, the low scores of black students in racially mixed

busing a handful of white students, whatever their social class, into a lower-class black school may have no appreciable effect upon the normative climate of the school or upon the attitudes and expectations of teachers—factors supposed by integrationists to be the critical determinants of achievement. Indeed, the unsettling racial tensions generated by the presence of the white minority may outweigh whatever advantages are gained by leavening the school population with a relatively small number of highly motivated white students.

These results have significant implications both at the legislative and judicial levels. They suggest that in a school district where a majority of the students are black, a decree requiring that the racial composition of each school mirror that of the total school population would have no beneficial effect upon black performance.[452] In fact, where blacks predominante, the effort to achieve a favorable racial balance for all would result in a favorable balance for none and perhaps even create an unfavorable balance for those black students who live in integrated neighborhoods or who wish to transfer to out-of-neighborhood schools that are predominantly white.

One possible conclusion is that, whatever the case might be in majority-white schools. Thus, in a district where the total school enrollpelled in majority black districts. Another possibility is that racial balancing is mandatory, but the desegregation decree should require only that the maximum possible number of black students be enrolled in majority-white schools. Thus, in a district where the total school enrollment was 60 per cent black and 40 per cent white, no more than two-thirds of the black students could be assigned to racially balanced schools.[453] A third possibility might require courts, in holding de facto segregation unconstitutional, to expand certain school district boundaries—for example, from city lines to suburbs—to increase the ratio of white students to blacks.[454]

3. *Existence of Tracking*

Among the many variables that determine the impact of school desegregation upon black student achievement, one deserves fuller con-

but predominantly lower-class schools are predictable and in no way rule out the possibility that black students might significantly benefit from the presence of a white minority as long as that majority comes from middle-class homes.

452. This situation is by no means uncommon; indeed, it is highly characteristic of the nation's largest urban school districts.

453. While this approach might be the most politically feasible, it has limited appeal as a constitutional dictate. Even if the case against de facto segregation were far stronger than it is, a court might well hesitate to require, in the name of equality, state coercion that for many black children (those who remained in black schools) would mean only a further deterioration in their relative position.

454. Wright, *Public School Desegregation: Legal Remedies for Defacto Segregation*, 16 W. RESERVE LAW REV. 478, 497-99 (1965).

sideration, not only because of its importance to the desegregation question, but also because it presents a closely parallel constitutional issue in its own right. That variable is the racial and social composition of the *classroom*, which may be quite different from that of the school as a whole. The source of this discrepancy is the increasingly widespread practice in schools with heterogeneous student bodies of grouping students homogeneously in separate classrooms on the basis of intelligence tests or other measures of ability.[455] Since Negro and lower-class students, heavily handicapped by their environment, are disproportionately represented in the lower ability groups, homogenous grouping results in racially and socially segregated classrooms even within desegregated schools.

The Civil Rights Commission, as we have seen, found that it is within the classroom that the educationally relevant peer-group effects take place[456] and that "Negro students in segregated classrooms apparently do not derive any benefit from attending majority white schools", but rather suffer from it.[457] This may be because a black classroom in a black school comprises the full gamut of abilities, whereas a black classroom in an integrated school represents only the lower end of the spectrum. However, the Civil Rights Commission offers another, quite persuasive, explanation: the stigma of inferiority felt by Negro students who, though attending a predominantly white school, "are accorded separate treatment, with others of their race, in a way which is obvious to them as they travel through the school to their classes."[458] If separation from faceless white students in other schools and other neighborhoods on the impersonal ground of residence is damaging to a Negro child's self-esteem, the daily experience of being isolated from white students in his own school on the highly personal and pejorative ground of ability must be infinitely more so. Thus, a desegregation decree requiring the redistribution of students from school to school to secure racially balanced student bodies without also requiring a similar redistribution within each school in order to secure raeially balanced classrooms may fail to accomplish its educational purpose.

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455. A United States Office of Education survey, published in 1960, indicated that about 16.9 per cent of the participating urban school districts had a basic policy of homogeneous gronping in grades 1 through 6 and about 34.4 per cent in grades 7 and 8. About 40 per cent of the heterogeneous schools expressed a preference for homogeneous grouping, and it was generally agreed that this practice would become increasingly widespread in the future. S.E. DEAN, ELEMENTARY SCHOOL ORGANIZATION AND ADMINISTRATION 69, 72 (U.S. Office of Education Bull. No. 11, 1960).

456. 2 RACIAL ISOLATION 42, 86-87. For a similar finding, see McBartland, *The Relative Influence of School and Classroom Desegregation on the Academic Achievement of Ninth Grade Negro Students*, 25 J. SOC. ISSUES 93 (1969).

457. *Id.* at 42.

458. *Id.*

Many argue—and one distinguished federal judge has held[459]—that grouping students in separate tracks by ability unconstitutionally discriminates against the slower children without regard to the resulting racial and social mix of the classrooms. The constitutional bill of particulars against ability grouping (even in an all middle-class school) closely parallels that against neighborhood grouping: it stigmatizes children in the lower tracks causing them to feel inferior; it denies them the benefit of stimulating peers; it induces teachers to underrate these children and to expect and demand too little of them; it becomes, therefore, a self-fulfilling prophecy. These effects are allegedly compounded when ability grouping has the further consequence of isolating the poor and the black in de facto segregated classrooms. On the other hand, the declared purpose of ability grouping is to provide instruction better geared to the particularized needs of students, both above and below the average—in short, to promote, rather than to impede, equality of educational opportunity. Supporters of homogeneous grouping[460] maintain that when the range of ability in a classroom is narrow, the teacher is better able to adapt the pace and content of instruction to the needs of a larger proportion of the students. Furthermore, the absence of ability extremes reduces the time required for special planning and instruction and therefore makes teachers more available to the average student; finally, they argue that children have more realistic criteria against which to measure themselves and are neither bored nor disheartened by having to compete with others far duller or far brighter than they.

The empirical validity of these conflicting assertions remains undetermined. Although no issue of educational policy has been more intensely controverted or copiously researched, a prolific flow of experimental studies across four decades has produced a chaos of discordant and inconclusive results.[461] The studies, all based upon white, or racially unspecified, samples, differ widely in method, purpose, scope, and duration, and most are poorly designed and methodologically deficient. The overwhelming impression received from summaries of the research literature over the years,[462] and especially from several major studies of the last decade,[463] is that homogeneous grouping per se—the

459. Hobson v. Hansen, 269 F. Supp. 401, 511-14 (D.D.C. 1967) (Wright, J.).

460. M. GOLDBERG & A. PASSOW, THE EFFECTS OF ABILITY GROUPING 150 (1967).

461. For a comprehensive review of the research literature, see M. GOLDBERG & A. PASSOW, *supra* note 460, at 1-22.

462. The studies are summarized *id.* at 3-11.

463. W. BORG, AN EVALUATION OF ABILITY GROUPING 101-06 (U.S. Office of Education Cooperative Research Project No. 577, 1964) (grouping patterns have no consistent general effects on achievement; evidence favors ability grouping for superior students, random grouping slightly favored for slow students); M. GOLDBERG & A.

narrowing of the range of abilities in the classroom—has little effect on achievement one way or the other. It is only when accompanied by appropriate tailoring of curriculum content and teaching methods that ability grouping appears to pay off.[464] As for the hypothesis that homogeneous grouping stigmatizes the slower student, generating feelings of inferiority, the weight of evidence suggests that freedom from competition with vastly superior students may actually heighten the self-esteem and academic expectations of students assigned to the low-ability groups.[465]

If the empirical record is no ringing testimonial to the virtues of ability grouping, neither does it lay the basis for a constitutional indictment. To condemn tracking because it is beneficial only when other conditions are also present would be no more justified than to condemn desegregation on the same ground. At least in an all-middle-class community it cannot persuasively be disputed that classification of students on the basis of their present level of academic proficiency is reasonable, if not demonstrably wise, educational policy.

But it may be argued that a classification affecting the interests of politically defenseless minorities in a matter as fundamental as public education is not entitled to the usual presumption of constitutionality; to be sustained, ability grouping must rest on grounds more substantial than a rational basis and must also be indispensable to some overriding state interest. The difficulties that would confront a court in attempting to constitutionalize the issue of tracking are well illustrated by the widely discussed case of *Hobson v. Hansen*,[466] a landmark decision in the application of constitutional principles to complex sociological data

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PASSOW, *supra* note 460, at 157-58 (narrowing the range of ability, without program specialization, does not enhance achievement; if anything, it slightly impairs it); E. Drews, The Effectiveness of Homogeneous Ability Grouping in Ninth Grade English Classes with Slow, Average, and Superior Students, 1962 (unpublished manuscript, Michigan State Univ.) *cited in* M. GOLDBERG & A. PASSOW, *supra* note 460, at 16 (ability grouping had no significant effect on achievement); J. Wilcox, A Search for the Multiple Effects of Grouping upon the Growth and Behavior of Junior High School Pupils 5-6, 1961 (unpublished doctoral dissertation, Cornell Univ.) *cited in* M. GOLDBERG & A. PASSOW, *supra* note 460, at 12 (curriculum differentiation, ability grouping had no consistent effect on achievement; favorable for some subject areas, unfavorable for others).

464. Millman & Johnson, *Relation of Section Variance to Achievement Gains in English and Mathematics in Grades 7 and 8*, 1 AM. EDUC. RES. J. 47, 51 (1964) (grouping, absent curriculum differentiation, had no significant effect on achievement).

465. *See* M. GOLDBERG & A. PASSOW, *supra* note 460, at 157-58 (homogeneous grouping has positive effect on self-estimate and expectations of academic success for slow pupils, negative effect for bright and average pupils); Wilcox, *supra* note 463, *cited in* M. GOLDBERG & A. PASSOW, *supra* note 460, at 12 (homogeneous grouping has positive effect on self-attitude of low-ability students). *But see* W. BORG, *supra* note 463, at 300-02 (homogeneous grouping lowers self-concept and self-acceptance of all ability groups but does not breed feelings of inferiority).

466. 269 F. Supp. 401 (D.D.C. 1967), *aff'd*, 408 F.2d 175 (D.C. Cir. 1969).

in which Judge J. Skelley Wright, sitting as a trial judge, outlawed the tracking system of the District of Columbia as an arbitrary and irrational classification resulting in inferior education for children assigned to the lower tracks.

The system in the District was supremely vulnerable to such a thrust. Its four tracks—honors, college preparatory, general, and basic —were separate and self-contained curricula, each offering "a substantially different kind of education, both in pace of learning and in scope of subject matter."[467] The lowest track was essentially a simplified, slower-paced version of the standard curriculum, oriented toward vocational training and designed to prepare students for low-skilled blue-collar jobs.[468] Judge Wright found that, while school officials paid lip service to the need for keeping the system flexible, for compensatory and remedial programs, and for helping basic-track students overcome their academic deficiencies so as to qualify for transfer to the upper tracks,[469] the realities were very different. Cross-tracking—the election of courses above or below the assigned curriculum—was minimal,[470] fewer than 10 percent of the students assigned to the basic track ever managed to climb out,[471] and such remedial programs as existed were wholly inadequate.[472] In sum, students assigned to the basic track were permanently relegated to an education not only different from, but inferior to, that offered other students. Such discrimination could constitutionally be justified, in Judge Wright's view, only on the assumption that the students were innately incapable of benefiting from a more rigorous course of instruction. That assumption, however, was wholly unsupported by the standardized aptitude (intelligence) tests upon which the track assignments were primarily based, tests measuring not innate capacity, but learned verbal and conceptual skills that Negro and lower-class children have little opportunity to acquire. Moreover, while 93% of the students in the District school system were black, the test norms were obtained from a national cross section. In consequence, these students "rather than . . . being classified according to their socioeconomic or racial status, . . . [were classified] according to environmental and psychological factors which have nothing to do with innate ability."[473] On the basis of these findings, Judge Wright reasoned as follows:

> Since by definition the basis of the track system is to classify

467. 269 F. Supp. at 512.
468. *Id.*
469. *Id.* at 460-62.
470. *Id.* at 464-68.
471. *Id.* at 461-63.
472. *Id.* at 472-73.
473. *Id.* at 514.

> students according to their ability to learn, the only explanation defendants can legitimately give for the pattern of classification found in the District schools is that it does reflect students' abilities. If the discriminations being made are founded on anything other than that, then the whole premise of tracking collapses and with it any justification for relegating certain students to curricula designed for those of limited abilities. While government may classify persons and thereby effect disparities in treatment, those included within or excluded from the respective classes should be those for whom the inclusion or exclusion is appropriate; otherwise the classification risks becoming wholly irrational and thus unconstitutionally discriminatory. It is in this regard that the track system is fatally defective, because *for many students placement is based on traits other than those on which the classification purports to be based.*[474]

The scope of the decision is uncertain. Judge Wright was careful to point out that the "issue here is not whether defendants are entitled to provide different kinds of students with different kinds of education." The general concept of ability grouping, he assumed, could "be reasonably related to the purposes of public education."[475] It is unclear just which of the many dubious features of the District of Columbia system the court would have deemed sufficiently unrelated to educational purpose in order to find the system unconstitutional. In particular, it is unclear whether, in Judge Wright's view, the fourteenth amendment bans all systems of ability grouping in which classification is based on culturally biased test scores, all overly rigid and inadequately remedial systems such as the District of Columbia's or only those systems in which the two features are combined. The important point is that, even on the narrowest reading, it is doubtful whether the *Hobson* decision stands as a general condemnation of tracking schemes.

Judge Wright's conclusion that ability grouping based upon culture-bound I.Q. and aptitude tests was unconstitutional rested upon the premise that the school board's purpose in drawing the classification was to differentiate among students, not on the basis of their present level of academic development but on the basis of their "innate capacity to learn."[476] From that premise it followed that a classification founded upon tests that purported to, but did not in fact, measure innate potential bore no reasonable relationship to the legislative purpose.

The difficulty in extending Judge Wright's approach lies in this initial premise. Few educators are so naive as to suppose that an I.Q. or scholastic aptitude test reveals a child's inborn potential. Most realize that the attribute measured by such tests is the joint product of en-

474. *Id.* at 513 (emphasis added).
475. *Id.* at 511-12.
476. *Id.* at 512 n.206.

dowment and experience, that the verbal and conceptual skills demanded are acquired skills, and that children of minority and lower-class background are at a disadvantage in obtaining them. But it by no means follows that such tests are an arbitrary or inappropriate basis upon which to classify students for purposes of educational grouping. Whatever may have been true in the District of Columbia, the declared purpose of homogeneous grouping in most school systems is not to pigeonhole the student on the basis of genetic potential, but to provide him an education better adapted to his present level of proficiency and better designed to meet his immediate learning problems than the standard fare he would receive in a heterogeneous classroom. So long as the aptitude or intelligence test accurately identifies those students who are not likely to do well in a heterogeneous classroom (and therefore stand to gain from a more specialized treatment) it accomplishes that purpose.

CONCLUSION

The neighborhood school policy and its stepchild, de facto segregation, invite constitutional attack along several plausible lines. The most straightforward argument would condemn de facto school segregation solely because of its racially discriminatory impact—an impact discriminatory not only in the weak sense of harming black children more frequently than whites but in the stronger sense of harming them precisely because of their blackness. The argument for thus extending the constitutional principle against racial discrimination is essentially this: what de facto and de jure school segregation have in common—their humiliating, crippling, racially specific impact upon members of a minority group that cannot realistically expect redress through the political process—is precisely the feature that, above all others, renders racial discrimination odious and constitutionally suspect. On the other hand, the features that supposedly distinguish de jure from de facto segregation—its malevolence of motive, unrelatedness to legitimate legislative purpose, judicial remediability, and symbolic offensiveness—are not important enough to support a distinction in constitutional treatment.

Thus, whatever difference in remediability there may once have been between de jure and de facto segregation has long since disappeared, the courts having now prescribed for the former the same panoply of affirmative remedies that would be required for the latter. Likewise, the frequent suggestion that racial segregation blatantly spread upon the statute books disgraces society more, and gives keener affront, than racial segregation unintentionally produced by a bona fide neighborhood school policy cannot support the distinction between forbidden de jure and permitted de facto segregation, since it is now generally agreed that the

former category includes purposeful segregation by gerrymander, however innocently disguised. To say, moreover, that grouping school children by neighborhood serves proper governmental ends while deliberately grouping them by race does not is to draw too sharp a contrast. On the factual assumption that black children learn more in a sheltered homogeneous environment, even segregation by race serves a legitimate purpose; on the contrary assumption, adopted in *Brown* and *Bolling*, that black children learn more in biracial schools, even segregation by neighborhood loses much of its purported justification. Motive, too, is a slender basis for constitutional distinction: officials who maintain neighborhood schools knowing full well that racial segregation will result but believing black children will not be harmed have no decisive moral advantage over those who deliberately segregate children by race in the same sanguine belief.

Finally, a constitutional rule broad enough to invalidate neutral classifications causing racially specific harm need not cast doubt upon the wide range of nonracial classifications that are discriminatory only in the weaker, statistical sense, though it might well reach certain instances of de facto discrimination (for example, voting and jury requirements) not heretofore considered constitutionally dubious. This argument, though not without major difficulties, is worth serious consideration.

Another line of argument against neighborhood schools invokes not the principle of racial discrimination but a second major branch of equal protection law: that classifications touching rights or interests deemed "fundamental" by the courts are invalid unless necessary to promote a compelling state interest. Here the contention is that the neighborhood school policy denies, to black children and white children alike, the "fundamental right" to equality of educational opportunity.

Both the theories just identified rest upon a highly disputed empirical premise: that racial and socioeconomic imbalance does in fact have harmful educational or psychological effects upon black or disadvantaged children. The evidence for that critical proposition, reviewed in part IV of this Article, is highly inconclusive; it suggests, on the whole, that the effects of racial imbalance are uncertain, complex, and probably variable from child to child and situation to situation. The constitutional significance of this uncertainty is debatable. Some would argue that since the Court has already declared de jure segregation harmful, and since there is little reason to think de facto segregation more benign, the doubt should be resolved against the state. Others maintain that, absent deliberate racial discrimination, nothing less than the clearest and most convincing evidence of psychological harm or educational inequality can justify a court's imposing a rigid constitutional solution to a problem of such baffling complexity in an area of professional competence so alien

to its own, an area where knowledge is still accumulating, values still in flux, and yesterday's wisdom very often today's folly. My own conclusion is that the evidence of harmful educational effects is strong enough to support a constitutional requirement that black children be given voluntary access to biracial or predominantly white schools (plus needed transportation) but not strong enough to support a requirement of mandatory desegration for all. Equal protection, that is, both requires and is satisfied by freedom of choice or transfer for black students.

Another doctrinal approach, tending to the same conclusion, focuses upon the relationship between the neighborhood school policy and racial discrimination in housing and holds the equal protection clause violated when residential exclusion by the schools combines with racial exclusion by private homeowners to deny the black child educational opportunities that, but for his race, would be his. The argument gains mightily if it can further be demonstrated that the pattern of residential segregation is in some measure the product of state action. With or without state action, the "combined effects" rationale probably entails less of a departure from existing constitutional doctrine than either of the two theories previously mentioned and, unlike them, makes no controversial assumption about the relative quality of predominantly black and predominantly white schools. Even so, it leads no further than to a constitutional requirement of free access to white neighborhood schools; it does not, very strongly at least, argue for mandatory racial balancing.

The considerations for and against the constitutional sufficiency of free choice or transfer—set forth at length in the Article—are closely balanced. My conclusion that voluntary access—however inadequate one may think it as a matter of educational or racial policy—satisfies the requirements of the equal protection clause was not reached without travail. It may well be that the delicate balance favoring this limited position is more than offset by the undesirability of a constitutional rule imposing less onerous requirements upon de facto segregated school districts than upon formerly de jure segregated districts. The appearance of sectional preference, the felt sense of injustice such a rule would be bound to create among Southerners, may be quite enough to tip the scales against freedom of choice and in favor of a nationally uniform constitutional remedy applicable alike to de facto and de jure segregation. The weight to be given this uniformity factor will perhaps be the most difficult question facing the Court when at last it addresses the problem of de facto school segregation.