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"Equal Protection" and the Neighborhood School

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*An indefinable something is to be done, in a way nobody knows how, at a time nobody knows when, that will accomplish nobody knows what.**

As a result of centuries of savagery and slavery and over a hundred years of simple racial prejudice, Negroes live apart from whites in most areas of most communities in the United States. This residential segregation and the application of a neighborhood school policy by educational authorities have resulted in the majority of white and colored children attending schools populated almost exclusively by those of their own race. To this condition has been given the name, "de facto" school segregation; the term implies an absence of laws or affirmative attempts by authorities to keep the races separate in the schools. Nevertheless, Negro plaintiffs, relying on the Fourteenth Amendment and the *Brown* decision of 1954[1], have fought for the end of "de facto" school segregation in Northern communities. Time and space prevent any detailed consideration of the growing number of cases[2], and the existence of excellent articles in other law journals makes it unnecessary.[3] This comment is

* Thomas B. Reed, Speaker of the U. S. House of Representatives, 1889-90, 1895-99.

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

[2] Early in 1963 twenty suits had been begun challenging the neighborhood school policy in various areas of the North. Kaplan, *Segregation, Litigation and the Schools,* 58 Nw. U.L. Rev. 1,157 (1963). The fullest reports on pending and threatened legal action are found in the annual reports of the U.S. Commission on Civil Rights for 1961-62-63.

[3] *E.g.,* Maslow, *De Facto Public School Segregation,* 6 Vill. L. Rev. 353 (1961); Sedler, *School Segregation in the North and West: Legal Aspects,* St. Louis U.L. J. 228 (1962); Kaplan, *supra* note 2; 9 Wayne L. Rev. 514 (1963); 57 Nw. U.L. Rev. 722 (1963).

a brief study of the cogency of constitutional arguments based on the "equal protection" clause of the Fourteenth Amendment and its historical function as a weapon against racial discrimination.

I

It is said, of course, that the whole problem of "de facto" school segregation is a "political" not a "legal" problem[4]; that the courts are ill-equipped to cope with it[5]; therefore, the proper place for it to be solved is at the polls or in the legislatures. All this is no doubt true. The courts *should* not be made to determine the policy of the community in such a controversial matter. Nevertheless, the courts are open, and Negro plaintiffs alleging serious and arguable constitutional deprivations are resorting to them. They have little choice but to hear these claims and pass on their validity.

The United States Court of Appeals for the Seventh Circuit is the highest court yet to pass directly on the claim that application of a neighborhood school policy to segregated neighborhoods deprives minority children of the "equal protection of the laws."[6] The decision was in favor of defendant-school board and against the Negro plaintiffs. In so deciding, the court took its stand with the majority of federal courts which have spoken on the problem, either because required to do so by the case at bar or because they felt dictum on the subject was required. The courts which have been forced to meet "de facto" segregation head on, however, have been few in number.[7] A reading of these decisions and other segregation cases which have adverted to the problem provides little help in finding a legal starting point from which to go at the constitutional problem. In the main the courts have contented themselves with conclusory statements, supported by little in the way of reasoning. For example:

> The court holds that the states do not have an affirmative, constitutional duty to provide an integrated education. . . . This clause [the "equal protection" clause of the Fourteenth Amendment] does not contemplate compelling action; rather, it is a prohibition preventing the states from applying their laws unequally.[8]

In carrying out, on remand, the Supreme Court's command to integrate the schools, the district court for the district of Kansas said:

[4] *E.g.*, Moore, C. J., dissenting in Taylor v. Board of Education, 294 F. 2d 36, 40 (2d Cir. 1961).

[5] *E.g.*, Kaplan, *supra* note 2, at 4.

[6] Bell v. School City of Gary, Ind., 324 F. 2d 209 (7th Cir. 1963), *affirming* 213 F. Supp. 819 (N.D. Ind. 1963). As of early March, 1964, no cases involving this issue had been docketed in the Supreme Court.

[7] Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich. 1958); Evans v. Buchanan, 207 F. Supp. 820 (D.Del. 1962); Branche v. Hempstead, 204 F. Supp. 150 (E.D.N.Y. 1962); Bell v. School City of Gary, Ind., *supra* note 6; Blocker v. Manhasset, 32 U.S.L. Week 2398 (E.D.N.Y. Jan. 24, 1964).

[8] Evans v. Buchanan, *supra* note 7, at 823.

> If it is a fact, as we understand it is, . . . that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live.[9]

In sum:

> The Constitution, in other words, does not require integration. It merely forbids discrimination.[10]

This propensity for flat statements is the more remarkable when one begins to realize the logic of the plaintiffs' constitutional claims, how the problem can be made to fit the terms of the Amendment.

Accepting as true the sociological arguments that it matters not, in terms of harm to the child, wheher school segregaion is imposed by governmental authorities or arises from private residential patterns[11], one must conclude that the existence of racially segregated schools denies the minority child an opportunity for an education equal to that of the child who happens to belong to the majority race. Is the state involved in this process? More importantly, can a legitimate causal connection be drawn between this "state action" and the existing inequality?

Through its operation of the school system, the state (more properly, the municipality and its agent, the school board) is obviously involved. It fixes school boundaries, compels attendance within those boundaries, collects taxes to support the system as established. Moreover, it is this very fixing of the boundaries that would be sufficient to establish a direct cause-effect relationship between the government's involvement and the Negro child's unequal treatment. But it is said that the primary cause of the separation between dominant and minority races is private action, the individual choices of people as to where they want to live. This is the "real" cause, and it is not such individual action but state action which is limited by the Constitution. Such metaphysical distinctions, however, just will not do. Suffice it to say that, without the application of a neighborhood school policy by the school boards, without the compulsion to attend the school closest to the child's home, all the private attempts to keep the races separate in the schools would fail. In short, without state action, private action would be ineffective.[12]

[9] Brown v. Board of Education, 139 F. Supp. 468,470 (D.Kan. 1955).

[10] Briggs v. Elliott, 132 F. Supp. 776,777 (E.D.S.C. 1955).

[11] This contention itself has not been free from challenge. See, *e.g.*, Kaplan, *supra* note 2, at 174-75.

[12] Some may object that, even were city-wide enrollment adopted, people would still send their children to the school nearest home. Thus, the neighborhood school policy is not to blame for racial separation. The first answer is that this conclusion is not quite so certain, given the present Negro drive for closer contacts with whites. The second answer is that, even without judicial enforcement of racial restrictive covenants, people might still effectively keep Negroes out of their residential area by voluntary adherence to the covenant. Yet, this was not enough to keep the Supreme Court from forbidding the state action inherent in such judicial enforcement. Shelley v. Kraemer, 334 U.S. 1 (1948).

In addition, the reapportionment case of *Baker v. Carr*[13] offers a rationale in this area. Through inaction the states have failed to overcome inequalities in the effectiveness of their citizens' votes. Assuming the original districting was done reasonably, to afford fairly accurate representation, shifts of population from country to city have resulted in disproportionate power in the hands of rural voters. This has placed upon the states the constitutional obligation to redistrict. Similarly, here, assuming the original school districting was done reasonably, from considerations of convenience and safety, shifts of population to the suburbs and into the ghettos now result in racial separation in the schools. Should not the inaction of the cities and school boards call down on them the same constitutional command to overcome this inequality?

It is difficult to avoid the logic of these positions and, therefore, difficult to understand the rather cavalier treatment given them by the courts to which they have been presented. The constitutional claims are at least prima facie valid and deserve serious consideration, especially in view of what is at stake: the adequate education of a substantial body of future citizens. Nevertheless, traditional theories of "equal protection of the laws" seem to militate against these arguments, and while the early segregation cases depart from the traditional path of reasoning, their deviation is not such as will aid the constitutional argument against "de facto" school segregation. The next few paragraphs will attempt to illustrate these propositions.

II

The earliest cases construing the Fourteenth Amendment agree that its dominant purpose was to secure equal treatment for the recently emancipated Negroes.[14] Even *Plessy v. Ferguson*[15] recognized this, but the Court there did not believe that Congress could have meant to outlaw *all* segregation based on race[16], and upheld a Louisiana statute requiring "equal but separate" accommodations for whites and Negroes on railway cars and imposing fine or imprisonment on one who refused to occupy that part of the train reserved for his race. Moreover, although the Supreme Court in *Brown* found the legislative history of the Fourteenth Amendment "inconclusive" on the question of its application to the schools[17], it had no doubts concerning the Amendment's basic, general thrust.[18]

[13] 369 U.S. 186 (1962).

[14] Slaughter-House Cases, 16 Wall. 36 (1873); Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Ex parte Virginia, 100 U.S. 339 (1880). See Kauper, *Segregation in Public Education: The Decline of Plessy v. Ferguson*, 52 MICH. L. REV. 1137 (1954).

[15] 163 U.S. 537 (1896).

[16] *Id.* at 544.

[17] *Supra* note 1, at 489.

[18] *Id.* at 490. See Frank and Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131 (1950). The authors' pre-*Brown* analysis of the Congres-

Recognizing the establishment of equality of races before the law as the goal of the Fourteenth Amendment, and, in particular, the "equal protection" clause, does it require *absolute equality, no matter what the costs?* Neither the historical judicial approach to the general meaning of "equal protection" nor the earliest application of the principle to racial discriminations nor even *Brown* and its progeny seem to be precedents for such an approach.

Most often the "equal protection" clause has been used to judge state classifications among its citizens for the purpose of regulation.[19] Obviously, the amendment could not be held to require only legislation applicable to *all* citizens of the state; proper government regulation of health, safety and the general order of the state must require laws applying specifically to certain classes whose unregulated activity might cause injury to the general populace. A ready example is the setting of standards and qualifications for those wishing to practice a given profession or occupation.[20] And it is in one of these latter-type cases that perhaps the best statement of the validity of "special" legislation appears. Upholding a statute prescribing certain hours of work for commercial cleaning establishments (plus other regulations as to the condition of premises and equipment), the Supreme Court said:

> But neither the amendment [the Fourteenth Amendment]—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people. . . . Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions.[21]

The test evolved by the Court was one of reasonableness—Was there a reasonable relation between the harm to be prevented and the classes singled out for special treatment? If so, there was no constitutional violation; if not, the Fourteenth Amendment demanded treatment equal to that accorded all other citizens.

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sional debates and the public statements of the members of Congress most active in support of or opposition to the Amendment agrees with the Court's conclusions, both as to the basic purpose of the Amendment and the absence of specific reference to its application to education.

[19] Tussman and tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

[20] Barbier v. Connolly, 113 U.S. 27 (1885).

[21] *Id.* at 31.

The early race cases fit easily into this pattern. There was obvious classification, a line drawn between black and white for various purposes.[22] Susceptible to the traditional challenge of unreasonableness, these classifications, nevertheless, were not invalidated because the Court found them unreasonable. Rather, they were struck down because of their very nature, as discriminations on the basis of race, regardless of any arguments on behalf of the states that they were reasonable.[23] This judicial behavior has been explained as illustrating the existence of a class of criteria which a state is forbidden to use for classification purposes.[24] The condition of being black or white is what Mr. Justice Jackson would have called "constitutionally an irrelevance",[25] like poverty or religious belief or social status. No government can make legal distinctions among its citizens on these bases. In the case of race, this principle gains added weight when one remembers that the very purpose of the post-Civil War amendments was to abolish any legal distinctions between black and white.

To recapitulate a bit, "equal protection of the laws" was not held to require absolute equality among citizens. For purposes of regulation, certain classes of citizens suffered greater restraints than others, and these impositions were upheld if reasonably related to the evils sought to be avoided. Racial distinctions, however, were invalid *per se*. Moreover, when legislation was found to have been prompted solely by prejudice against a group, the existence of this bias was enough to invoke the "equal protection" clause to upset the classification.[26] Coming down to the present, the conclusion seems inevitable that none of these lines of reasoning can support constitutional nullification of an honestly arrived-at and conscientiously administered neighborhood school policy.

The classification of citizens which calls into play the "equal protection" clause is not obvious in the "de facto" segregation cases. By definition, there is no statutorily commanded distinction between black and white; both races are compelled to follow the neighborhood school policy. The only classification is into residential areas; those living in one area attending one school, and those in a different section attending another, closer to their homes. Taking into account the considerations of safety and convenience which support such an arrangement, it is difficult to find such classification anything but eminently reasonable. Therefore, the challenge of unreasonableness can be

[22] *E.g.*, Strauder v. West Virginia, *supra* note 14 (jury selection); Plessy v. Ferguson, *supra* note 15 (railway accomodations); Buchanan v. Warley, 245 U.S. 60 (1917) (ownership of property).

[23] Buchanan v. Warley, *Ibid.*

[24] Tussman and tenBroek, *supra* note 19, at 353-56.

[25] Edwards v. California, 314 U.S. 160,184 (1941) (concurring opinion).

[26] *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Truax v. Raich, 239 U.S. 33 (1915). This ground has not been used in the cases involving segregation of whites and Negroes.

overcome. Moreover, since there is no separation *on the basis of race,* there can be no *per se* invalidation of the arrangement; so, the test of reasonableness is the only one which can be applied.[27]

Indeed, here is the crux of the issue. Though one can find isolated phrases in some of the judicial opinions in this area appearing to support an argument that, given inequality resulting from some form of state action, that action is unconstitutional, a realistic consideration of the facts giving rise to these decisions should prevent such indiscriminate use of those phrases. There is not a case among those usually cited in support of this argument where a distinction *solely in terms of race* was not at issue.[28] *Brown v. Board of Education*[29] was nothing more than a continuation of that trend, and, thus, is no precedent for the "de facto" cases now beginning to plague the courts. Even in *Shelley v. Kraemer*[30], where the state itself made no distinction on the basis of color, Mr. Chief Justice Vinson felt it necessary to state:

> The restrictions of these agreements [the racial restrictive covenants] . . . are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; 'simply that and nothing more.'[31]

Indeed, even the analogy with the reapportionment controversy breaks down. Where the shift of population from country to city has resulted in inordinate weighting of rural votes, the whole reason behind the original districting is destroyed, and new districts are demanded. In the school cases, however, despite the racial shifts of population, use of the neighborhood school policy continues to foster the same values of safety and convenience as were aimed at originally. In short, it remains the most reasonable and economical way to run a large school system.

III

In the preceding parts of this comment, focus has been on the legal arguments for and against judging the neighborhood school policy unconstitutional when applied to racially segregated neighborhoods. Is that all there is to it? Of course, it is not. Courts are well aware of the practical difficulties faced by school administrators, difficulties of finance and operation which would be

[27] As has been emphasized throughout, this comment is not concerned with those situations in which prior prejudice of the school board is present. Some civil rights advocates have claimed that such bias has been universal. *E.g.*, Washington Post, Feb. 9, 1964, p. E1. Since this is a question of fact, however, difficult to prove, their efforts have been directed toward finding a legal theory which would require invalidation even without such a finding.

[28] Cases cited note 22 *supra.*

[29] *Supra* note 1.

[30] *Supra* note 12.

[31] *Id.* at 10.

immeasurably increased by adopting some of the more extreme "solutions" for the school segregation problem.[32] Moreover, at least one court has taken evidence on and given explicit consideration to the effect of integration plans on the temper of the community[33], and it is difficult to think any court is unaware of the emotions generated among the citizens. So, they do not consider these cases in a vacuum. But it would be wrong to say that, therefore, their decisions are or must be based on these community reactions. That they have not been is shown by the invocation of rather severe remedies in cases where a prior pattern of discrimination has been found. It is doubtful that the practical problems of the administrators or the reactions of the citizens were any less intense, yet, having found a constitutional violation, the courts took steps to remedy it.[34]

That community reaction *cannot* be the basis of judicial resolution of these questions is shown by the availability of a number of steps to mitigate the evil effects of separation of the races. A decision that practicality demands retention of the neighborhood school policy does not indicate general approval of the system as it presently works. Nor does it immunize the school board from all court orders to take whatever steps are available in its particular school district to relieve the inequality. Whether it be the adoption of the "Princeton Plan" in fringe areas[35], or moderate bussing of children from overcrowded ghetto schools to nearby, under-used "white" schools or a more permissive transfer policy, there is no reason why school boards cannot be compelled, on constitutional grounds, to make the greatest efforts, consonant with administrative and financial realities, to accord the Negro child the same opportunity as the white child for the personal advancement and enrichment which spring from education.[36] This kind of thinking best explains the district court's decision in *Branche v. Hempstead.*[37] The school board made the argument that not the board but the pattern of residential segregation was responsible for what school segregation existed. In denying the motion for summary judg-

[32] The district court in *Bell v. School City of Gary, Ind., supra* note 6, gave much explicit consideration to the practical problems faced by the defendant-school board. The circuit court referred to testimony that, under a plan submitted by the plaintiffs in that case, 6000 pupils would have to be transported by bus every day, the cost of operation of one bus amounting to twenty dollars per day. *Supra* note 6, at 212. The New York City School Board has estimated that any truly effective plan for integrating its schools would add 88 cents per day per pupil to its operating costs. America, Feb. 1, 1964, p. 161.

[33] Evans v. Buchanan, 172 F. Supp. 508 (D.Del. 1958).

[34] *E.g.,* Taylor v. Board of Education, *supra* note 4. Even more illustrative are the original desegregation cases in the South.

[35] The "Princeton Plan" involves the drawing of school boundaries in fringe areas, where white neighborhoods meet Negro neighborhoods, so that all children, regardless of race, attend one school from grade one to grade four, and all in grades five thru eight attend the other school in the area. It is of relatively little use in the large cities where the Negro ghettos stretch for miles and miles.

[36] For a fuller consideration of the available measures, see Sedler, *supra* note 3, at 263-71.

[37] *Supra* note 7.

ment founded on this argument, the court ordered a trial on the merits at which the school board could exonerate itself only by making "a conclusive demonstration that no circumstantially possible effort can affect a significant mitigation [of the pattern of segregated education]."[38]

Therefore, even accepting the constitutional argument made above, these cases could go the other way, for the plaintiffs and against the school boards. Balancing off the Negroes' right to equality of educational opportunity (and, not to be forgotten, society's real interest in protecting that right) against what appears to be the most reasonable way to run a large school system does not demand judgment for the defendant-school boards. It is entirely possible that, more impressed with the deficiencies caused by racial separation and not convinced that the steps to equalize opportunity would result in chaos or wholesale disruption of community life, a court could cast the balance the other way.

Conclusion

In concluding, it should again be emphasized that the *ideal* place for the problem of "de facto" segregation to be met and wrestled with is in the conference rooms of the local school boards or in the legislative halls. How much better equipped than the courts are these arms of the government to weigh the sociological data and practical difficulties in this area. Nevertheless, a substantial body of the citizenry is dissatisfied with the performance of these bodies[39] and makes constitutional claims which are valid, at least on their face. It is difficult to see how the courts can legitimately avoid passing on these claims.

When they are examined, however, not only traditional "equal protection" law but also the original segregation cases themselves provide no precedent for and, indeed, argue against tagging "unconstitutional" the neighborhood school policy when applied to segregated neighborhoods. The difficulties of the school boards, financial and administrative, the limited chances of change in pupil ratio[40], and the general slowdown in the civil rights movement which

[38] *Id.* at 153. Research brings to light no subsequent judicial history of this case. It is not unlikely that some sort of settlement was reached, at least temporarily, between the school board and the plaintiffs.

[39] This dissatisfaction will not be cured by the new civil rights bill which has passed the House and is being debated in the Senate at the date of this writing. In Title IV, entitled "Desegregation in Public Education", it is provided that the term, " 'Desegregation', shall not mean the assignment of students to public schools in order to overcome racial imbalance". H. R. Res. 7152, 88th Cong., 2nd Sess. §401 (b). The result is that those provisions allowing the Attorney-General to institute suits on behalf of parents protesting school segregation (§407) and authorizing federal financial aid to local school authorities attempting to solve the problem of integration (§405) will be inapplicable to situations of "de facto" segregation.

[40] The district court in *Bell* pointed out that even the adoption of plaintiffs' plan would result in leaving two of Gary's eight high schools "segregated", one 100% Negro and the other more than 74% white. *Supra* note 6, at 831.

would be caused by community resentment of orders to integrate coming from the federal courthouse—these considerations, too, urge reluctance to apply a questionable contitutional standard. It is futile to hope that the courts will be left to decide these cases free from the pressures, legitimate and illegitimate, exerted by both dominant and minority races. Advocates on both sides are not ready to allow that. The greatest contribution the courts can make, then, is to demonstrate their ability to come to a reasoned reconciliation of the opposing interests, and to make it stick. Is it too much to hope that, in so doing, they might induce a similar effort on the part of the contesting parties themselves? Is it not likely that the advocates on both sides, if made to realize that the courts will not accede to their pressures, will adopt a more reasonable attitude when they meet to argue the issues among themselves? Such an attitude has been sadly lacking on both sides for too long a time, and without it, the judgments of courts can do little to ease the real conflict, and there is little hope for lasting progress.

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