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COMMENTARY

THE DESEGREGATION DILEMMA: A VOTE FOR VOLUNTARISM

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Professor Kurland's discussion of the Supreme Court's desegregation decisions is both elegant and incisive. In the main, I share his dissatisfaction with the Court's performance in this area, but wish to add my thoughts on what the Court should have done—and yet should do—to resolve the painful dilemmas posed by the desegregation issue.

I agree with Professor Kurland and, I believe, most other commentators that the *opinion* in *Brown*, as opposed to the *decision*, left a great deal to be desired. The Court said both too little and too much—not enough in elucidating the basic nature of the constitutional violation, but far more than it had any need or right to say about the empirical effects of school segregation on the hearts and minds of black children. The Court's "findings"—if that is not too formal a term—had little support from the authorities cited, and even today remain highly debatable despite a generation of research. These "findings," moreover, have fostered unfortunate consequences. The Court's superficial treatment of the harmful impact of school segregation on the education of blacks was taken to have settled the question once and for all, foreclosing thorough consideration of the issue in later cases that, unlike *Brown* itself, truly hinged upon it. The emphasis on the detrimental educational and psychological effects of "segregation" also led some judges and commentators to conclude erroneously that the underlying constitutional evil is racial imbalance per se, rather than its roots in official action intended to segregate.

The deficiencies of the opinion in *Brown*, however, are of far less importance than the decision, which not only was correct, but surely deserves its place of honor among the Court's greatest contributions to a just society. The weaknesses of the opinion can be excused, at least in

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part, by the political sensitivity of the issue and the Court's felt need for unanimity.

What disturbs me far more than the shortcomings of the *Brown* opinion is the Court's failure in subsequent cases either to clarify the nature of the wrong or to fashion an appropriate remedy. The cases that chiefly trouble me are the three decided in the "racial balancing" period between 1968 and 1972—*Green*,[1] *Swann*,[2] and *Keyes*.[3] In these decisions, as Professor Kurland explained, the Court established the principle that a school district found guilty of de jure segregation must, by way of remedy, adopt a pupil assignment plan calculated to produce a heterogeneous racial mix in as many schools as possible.[4] "Maximum feasible racial balance" (my term, not the Court's) became the order of the day. I have two principal criticisms of this remedial principle. First, the remedy does not fit the wrong as the Court defined it. Second, the remedy implicitly rests upon controversial empirical premises concerning the educational and psychological effects of school racial composition, which the Court scarcely bothered to mention, let alone defend.

If the Court had been prepared to hold that racial imbalance per se (de facto segregation) is unconstitutional, racial balancing clearly would have been an appropriate, perhaps the only appropriate, remedy. In fact, however, the Court defined the violation more narrowly. In the 1977 *Dayton*[5] case, it confirmed what most, but by no means all, lower courts and commentators had assumed all along: school segregation, or racial imbalance, is unconstitutional only when generated by racially motivated official action. Given this definition of the wrong, it is not self-evident that the remedy should be anything other than abandonment of a racial assignment policy for a neutral one such as neighborhood schools or freedom-of-choice. If a colorblind neighborhood school policy, even though it produces nothing but one-race schools, is constitutionally permissible in a school district not guilty of de jure violations, then why should that policy be impermissible in a district where such violations have occurred in the past but now have been terminated?

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1. Green v. County School Bd., 391 U.S. 430 (1968).

2. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970).

3. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

4. *See* Kurland, "Brown v. Board of Education *Was the Beginning*," 1979 WASH. U.L.Q. 309, 358-66.

5. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977), *on remand*, 583 F.2d 243 (6th Cir. 1978), *aff'd*, 99 S. Ct. 2971 (1979).

The Court's answer to this question—less explicit, perhaps, than one might have wished—was essentially this: The duty of a district court in framing equitable relief is not merely to put an end to wrongdoing, but also to root out its vestigial consequences—to make the world what it would have been had the wrongdoing not occurred. The existing racial distribution of students throughout a school system itself may be a vestige of prior unconstitutional action. Yesterday's intentionally segregative laws and practices may have influenced family residential choices and contributed to the formation of today's one-race neighborhoods; hence today's one-race neighborhood schools. Significantly, the Court did not say that a school board's duty to eliminate vestigial racial imbalance is contingent upon affirmative proof of the requisite causal relationship on a case-by-case basis. Instead, with certain narrow exceptions, it treated that causal relationship as a virtually irrebuttable presumption; school boards would not be relieved of their remedial duty either by the plaintiffs' failure to prove or by their own ability to disprove the assumed causal relationship.

The trouble with this theory—and my first criticism of the Court's approach to the remedial issue—is that the supposed causal linkage between past constitutional violations and current residential segregation not only was unsupported by any evidence before the Court at the time of these decisions, but also was intrinsically dubious. Residential segregation is a universal phenomenon in American cities both in the North and the South. The main causes of one-race neighborhoods are poverty among blacks and discrimination by whites in the housing markets. School assignment policies could not have more than marginally contributed to residential segregation, and even that is highly doubtful. School segregation in the pre-*Brown* South actually may have moderated rather than intensified residential segregation by assuring white families that they need not live in lily-white neighborhoods to maintain lily-white schools. Indeed, some demographic evidence suggests that residential segregation prior to *Brown* was more acute in the North than in the South, but that this pattern has disappeared, if not been reversed, since *Brown*.

I do not wish to overstate my skepticism on the issue of causation. It is true, as the Court suggested in *Swann*, that official decisions on the size and location of schools may sometimes shape the development of neighborhoods and their racial mix. It is also true that when a school board gerrymanders attendance areas, as the Denver school board did in *Keyes*, with a view toward preserving certain schools as white en-

claves, white families elsewhere in the district, living perhaps in racially mixed attendance areas, may have an incentive to desert those areas so that their children can gain entry to the artificially maintained white schools. Although this scenario is not far-fetched, however, it is not so near-fetched that it warrants adoption without specific evidence in the particular case. In *Keyes*, for example, the record clearly shows that few, if any, whites did move into the part of the school district where de jure violations had occurred.

In the mid-1970's the Court seemed for a time to be moving away from its previous approach to causation. *Milliken v. Bradley*[6] held that desegration decrees embracing more than one district are proper only upon an affirmative showing that the underlying violations have produced "interdistrict effects;" for example, that violations within a city system have contributed to the racial polarity between the city and suburban districts. No longer was the Court simply willing to assume the critical causal relationship; it required specific proof. Three years later in *Dayton I*,[7] the Court applied the proof-of-causation requirement to a single-district situation; it appeared that offending school boards would now be obliged to eliminate only those increments of racial imbalance that plaintiffs could prove to have been caused by unconstitutional official acts and omissions. The hopes and fears aroused by *Dayton I*, however, were short-lived. Last term's decisions in *Columbus*[8] and *Dayton II*[9] reaffirmed the principles of *Swann* and *Keyes* and made clear that proof of purposeful segregation in a substantial part of a school district raises a strong presumption of systemwide segregative intent, systemwide segregative effects, or both; that the Court will view contrary evidence with the utmost skepticism. Indeed, even the most convincing demonstration that current racial imbalance in the system cannot be attributed to past unconstitutional action may not, under these decisions, relieve a school board of its systemwide desegregation duty if the district court finds that a dual system existed in the district as recently as 1954 and that the board took no steps to disestablish it.

The issue of causation is more than a doctrinal quibble. To the extent that the supposed causal relationship between unconstitutional state action and current school racial imbalance is mythical, the de

6. 418 U.S. 717 (1973), *on remand*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

7. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977), *on remand*, 583 F.2d 243 (6th Cir. 1978), *aff'd*, 99 S. Ct. 2971 (1979).

8. Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2982 (1979).

9. Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. 2971 (1979).

facto-de jure distinction, or the "maximum feasible desegregation" requirement in the de jure case, can lead to massive disparity in the treatment of similarly situated communities. Some school districts remain free to maintain systems of one-race neighborhood schools while other districts, in which de jure violations are found, become subject to burdensome and intensely unpopular busing requirements on the false premise that those violations caused or contributed to the existing racial makeup of the schools. The Court introduced a further anomaly through its holding that an offending school board is not responsible for correcting that racial imbalance which develops after a court-approved desegregation plan becomes operational.[10] Thus pre-decree and post-decree racial imbalance receive different treatment even though both stand in the same real relationship (or lack of it) to the underlying constitutional violation.

In principle, at least, the proof-of-causation requirement in *Dayton I* would have eliminated the misfit between wrong and remedy and, along with it, the practical anomalies just described. It would have created, however, new difficulties and anomalies of its own. If the Supreme Court had strictly enforced the causation requirement, district court judges would have found themselves ordering busing not on the basis of relevant educational or logistical considerations, but on the basis of inevitably speculative historical judgments about whether the racial composition of a particular school was traceable to prior constitutional violations. Busing orders thus might have been issued to some, but not all, schools within the same district. This visible and concrete disparity of treatment among children in the same district might have been worse than the more abstract disparity between districts discussed earlier.

These difficulties could have been avoided, of course, by a broader definition of the underlying constitutional violation. Had the Court been willing to hold that racial imbalance per se (de facto segregation) is unconstitutional, affirmative racial balancing would have been the inevitable remedy. My second objection to the Court's post-*Brown* decisions, however, could not have been avoided in this way, because it simultaneously challenges the use of racial balancing as a constitutional remedy and the notion that racial balance is a substantive constitutional right. The problem is an empirical one—the absence after a

10. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970).

quarter-century of research of any solid evidence about the effects, if any, of a school's racial composition on the intellectual or psychological development of children, especially minority children, who attend that school. The Court's hypothesis that black children lose self-esteem unless surrounded by a sufficient number of white classmates has not been substantiated. If anything, the weight of the evidence tips slightly, if inconclusively, toward the conclusion that the average black child has greater self-esteem in a predominantly black school than in a predominantly white one.

Another prominent theory holds that a black child will do better academically in a majority white school either because he will absorb the middle-class academic values of his more advantaged white classmates or because his teachers will expect and demand more of him in that setting. Skeptics of this theory reply that a disadvantaged black child probably will not be influenced by his advantaged white peers with whom he has little in common; that he might instead be intimidated and discouraged by competition with these better prepared white students; that what a white teacher expects academically of a black student may not depend on the racial composition of the school or classroom. An enormous body of research has failed to resolve these issues. Countless studies have yielded conflicting, inconclusive, and methodologically dubious findings concerning the relationship between school-racial composition and student achievement.

Other beneficial effects often attributed to desegregation in the public schools include more enlightened racial attitudes and a fairer distribution of educational dollars. None of these effects, however, even if supported by the evidence, affords an appropriate foundation for a constitutional requirement of racial balancing. To my knowledge, moreover, no court has adopted this view.

The issue before the Court in *Brown* did not, as I have indicated, really depend on these empirical questions. The Court could have held purposeful racial segregation unconstitutional simply because it might be harmful or, simpler yet, because it deprived black children on racial grounds of the valuable opportunity to associate with whites. Court-ordered racial balancing, however, requires a much stronger empirical premise. Even had the Court adopted the principle of strict constitutional scrutiny for facially neutral laws that differentially affect minority groups, the principle would have no application to de facto school segregation in the absence of a finding that racial imbalance does, in fact, have a harmful impact on these groups. By the same token, a

decree that orders racial balancing to eliminate the consequences of prior de jure segregation presupposes that these consequences are harmful, that the harm will be cured or alleviated by the court-prescribed remedy, and, perhaps, that the benefits of racial balancing will outweigh its obvious economic costs. Incredibly, even though the racial balance decisions implicitly rest upon the premise of a truly substantial, even overriding, harm, the Court since *Brown* has not mentioned, let alone seriously addressed, these empirical questions.

The Court's willingness to substitute its judgment for that of a school board on these complex and debatable issues of fact and value is an extremely questionable use of judicial power. Although I do not for a moment suggest that the Court should always adopt the legislative determination of the social facts, it should make its own determination only with the utmost reluctance and on the basis of empirical evidence far stronger than any presented, or that could have been presented, in *Brown*. To argue, as some do, that a school board found to be in violation of the Constitution deserves no deference in fashioning the remedy would play havoc with traditional notions of federalism and separation of powers. The Supreme Court itself, quite understandably, never has relied upon this justification.

Not much more persuasive is a more sophisticated argument that courts should not grant legislative judgments their usual presumption of constitutionality when they injure the vital interests of a racial minority, because of the danger that the preferences and welfare of the minority group have not been fairly weighed by the political process. Whatever merit this argument has in other settings, it deserves singularly little attention in this one. Busing is not an issue that neatly divides public opinion along racial lines. Opinion surveys consistently show that whites overwhelmingly oppose busing and that blacks equally split on the issue. Furthermore, my own impression is that the segment of the black community most strongly opposed to busing is the one most immediately affected—the parents of the children who stand to be bused. Clearly, therefore, busing would be soundly defeated even in a plebiscite in which blacks and whites, as groups, were given equal voting power; its unpopularity cannot be attributed solely to the political weakness of the minority group. To defend court-ordered racial balancing, it is not enough to argue that the white majority is hostile or indifferent to the welfare of black children. One must also argue that black parents themselves either do not know or do not care what is good for their children. Paternalistic arguments, though always ques-

tionable, are particularly dubious in this context where the available evidence suggests that the parents are at least as likely as the courts to be right.

At this point, the reader may wonder just what I would have had the Court do about desegregation. Given the vagaries of the intent and causation requirements, what should the Court have done? Should it have refused to find segregative intent except in cases in which it was openly avowed or otherwise unmistakably evidenced? Should it have declined to trace the consequences of past discrimination and contented itself with a requirement of color blindness in the future? The Court, I think, correctly rejected these timid options. I believe, however, that it should have been more receptive to desegregation plans founded on the concept of choice—plans, for example, that would offer black children the option to transfer from predominantly black schools to predominantly white schools, along with free transportation. This approach would have made biracial education available to those black families who wanted it without imposing it upon those, both black and white, who preferred neighborhood schools.

A further consideration supports this approach. The educational effects of desegregation are not only highly uncertain in the aggregate, but also highly variable from person to person. Some black children will be helped, others hurt, and still others neither helped nor hurt by biracial education. No one can reliably estimate the relative proportions of the three groups or identify in advance the members of each. My guess, however, is that a parent's willingness to choose integration for his or her child is a fairly good predictor of the child's capacity to benefit from the experience. On the basis of an informed judgment about the child's needs, abilities, and personality, parents who elect busing for their children probably will be more willing and better able than most to provide the necessary support and encouragement. The converse is true with respect to parents who choose not to have their children bused. If I am right about this, it follows that the relatively small percentage of black children who ordinarily participate in voluntary busing plans derive benefits disproportionate to their numbers. On the other hand, plans that impose biracial education upon children whose parents would not spontaneously choose it may be doing many of those children a disservice.

No one pretends that voluntary arrangements would substantially reduce overall racial imbalance or the number of all-black schools. Experience shows that most black families do not avail themselves of

transfer options. In my view, however, this does not seem to be a decisive objection. Constitutional rights belong to individuals, not groups, and few rights cannot be waived.

Legitimate objections to freedom of choice do exist: the possibility of duress and intimidation; the one-sidedness of the burden placed upon black children to elect busing; the fear that the number of black children who choose to be bused will be too few to provide one another with mutual comfort and support; and the concern that this fear may deter even those few from seeking biracial education. An adequate evaluation of these arguments would overextend my comments and the reader's patience. I conclude only with the observation that the path of voluntarism, despite its many potholes, seems to me, on balance, the wisest course to follow through the thicket of desegregation.