Denver Law Review

Volume 48 | Issue 3 Article 6

March 2021

Constitutional Law - Equal Protection - School Desegregation - Keyes v. School District Number One

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COMMENT

CONSTITUTIONAL LAW — EQUAL PROTECTION — School Desegregation — *Keyes v. School District Number One*, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 40 U.S.L.W. 3329 (U.S. Jan. 17, 1972) (No. 507).

INTRODUCTION

THE 1969 electoral race for positions on the Denver School Board centered almost entirely on the issue of whether students should be bussed to achieve racial balance in the city's public schools. Earlier in that year the Board had adopted three resolutions[1] containing busing plans which were to go into effect the following fall. The candidates who ran in opposition to these resolutions were elected, and the newly constituted Board moved quickly to replace mandatory busing with a voluntary transfer system.[2] The plaintiffs in *Keyes v. School District Number One*[3] thereupon filed a class action alleging that the State of Colorado, acting through the Board, had violated their constitutional rights by treating them unequally in regard to public school education. Through various requests for preliminary and permanent relief, the plaintiffs sought an order compelling the Board to cure the condition of segregation alleged to exist in Denver schools.

Although the rescission of the busing resolutions seems to have precipitated the *Keyes* litigation, the complaint was pitched in terms ranging far beyond this single act. From the standpoint of legal theory, the allegations fall basically under two related headings. First, plaintiffs maintained that the Board's decisions respecting school construction and attendance boundaries had historically been made pursuant to a segregative policy of which the rescission was but an obvious example. Such action was alleged to violate the equal protection rule established in *Brown v. Board of Education*.[4] Second, the court

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[1] Denver Board of Education Resolutions 1520, Jan. 30, 1969; 1524, Mar. 20, 1969; 1531, Apr. 24, 1969.

[2] Denver Board of Education Resolution 1533, Jun. 9, 1969.

[3] Due to the unusual number of opinions generated by this case, a traditional citation could only be confusing. The opinions of interest here are 303 F. Supp. 279, 303 F. Supp. 289 (D. Colo. 1969), and 313 F. Supp. 61 (D. Colo. 1970) from the trial court (the separate opinions of the trial court are treated in the text as one) and 445 F.2d 990 (10th Cir. 1971) from the appellate court. *Cert. granted*, 40 U.S.L.W. 3329 (U.S. Jan. 17, 1972) (No. 507).

[4] 347 U.S. 483 (1954).

was asked to find that Denver schools showing high concentrations of minority students offered an inferior educational opportunity; that segregation, whatever its cause, was responsible for this inferiority; and that the equal protection clause of the fourteenth amendment would not permit segregation to continue under the circumstances presented.

These arguments were accorded varying receptions in the trial and appellate courts — a situation which always invites comment. But this case is of more than usual interest. The Supreme Court has granted certiorari and will at last speak directly to the question of school segregation in states where no officially segregated school system has ever existed. Given the overwhelming social importance of this forthcoming decision, it is especially crucial that every relevant legal argument be thoroughly aired and its soundness assessed. In furtherance of this end, the discussion to follow treats the opinions of both the trial and appellate courts as they relate to each of the theories described above. Conclusions drawn from the discussion are combined to form a recommended judicial approach for any litigation involving school segregation.

I. DE JURE SEGREGATION — THE *Brown* PER SE RULE

The equal protection clause of the fourteenth amendment is, of course, the fountainhead of the legal issues involved in school desegregation cases. The basic prohibition is that no state may "deny to any person within its jurisdiction the equal protection of the laws."[5] Early cases involving the application of this prohibition to public schools concerned officially separate school systems in which there could be no doubt that the state was denying minority children the right to attend schools on a nonsegregated basis. The question was whether this segregation was a denial of equal protection.

The initial judicial response was to apply the "separate-but-equal" doctrine developed in regard to transportation facilities in *Plessy v. Ferguson*.[6] Under that theory, segregation of the races was not a denial of equal protection so long as the facilities provided each were substantially equal.[7] The *Plessy* Court explicitly rejected the idea that separation implied inferiority.

In several cases following *Plessy*, minority plaintiffs were able to force admission to all-white educational institutions by

[5] U.S. CONST. amend. XIV, § 1.

[6] 163 U.S. 537 (1896).

[7] *E.g.*, Gong Lum v. Rice, 275 U.S. 78 (1927); Cumming v. Board of Educ., 175 U.S. 528 (1899).

proving that the facilities provided for their race were not in fact equal to those available to whites.[8] The Supreme Court proved willing to consider not only tangible differences such as faculties and libraries, but also important intangibles such as the prestige of the institution in the community and the prominence of its alumni.[9]

The culmination of this trend toward increasing concern for the welfare of minority students was the landmark case of *Brown v. Board of Education*.[10] The question there presented was whether "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities?"[11] The Court answered in the affirmative, concluding that "[s]eparate educational facilities are inherently unequal."[12]

Other aspects of *Brown* are treated in more detail in Part II of this comment. For present purposes it is sufficient to say that *Brown* established the principle that any state-imposed segregation is unconstitutional per se. And it was early recognized that this prohibition was not limited to segregative statutes passed by state legislatures. Any state agency taking intentionally segregative action has violated the fourteenth amendment.[13] Therefore, if the *Keyes* plaintiffs could substantiate their claim of de jure segregation, they would need show no more.[14]

Although the de jure route leads most directly to a finding of unconstitutionality, it is by far the most difficult to negotiate. The plaintiff is saddled with the often prohibitive burden of proving intent through circumstantial evidence. He must lay before the court school board actions so rotten with segregative intent that even the judicial nose cannot mistake the odor.

In order to understand the proof of intent offered by the *Keyes* plaintiffs, it is necessary to review quickly the recent history of racial housing patterns in Denver.[15] Prior to 1950

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[8] Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

[9] Sweatt v. Painter, 339 U.S. 629 (1950).

[10] 347 U.S. 483 (1954).

[11] *Id.* at 493.

[12] *Id.* at 495.

[13] Cooper v. Aaron, 358 U.S. 1 (1958).

[14] *Id.*

[15] The summary to follow in the text is taken from a segment of the trial court's opinion in 303 F. Supp. at 282.

the black population was centered around an area of the core city known as "Five Points." Through the intervening years the black community has expanded eastward along a corridor having relatively stable boundaries on the north and south. By 1960 this expansion had reached Colorado Boulevard, a large north-south thoroughfare which the trial court referred to as "a natural dividing line," and by 1969 had moved on eastward well into the fashionable Park Hill area. As the trial court noted, the trend of population movement had become quite apparent long before it reached Colorado Boulevard.

The plaintiffs catalogued the significant Board decisions with regard to attendance boundaries and school construction which were made during this period and superimposed them on the state of expansion current when each was made.[16] The effect of these decisions had been to prevent the gradual influx of minority students into formerly all-white schools. Attendance zone boundaries tended to follow housing patterns and to keep minority students concentrated in certain schools. When these schools became intolerably overcrowded, boundaries were shifted so as to attach another school to the minority neighborhoods and exclude the still-white areas which that school formerly served. Optional zones around schools in transition allowed white students to "escape" to still-white schools.

As previously mentioned, the Board in 1969 adopted Resolutions 1520, 1524, and 1531 which were designed to achieve racial balance primarily in the Park Hill schools.[17] However, in response to what was considered a voter mandate, these resolutions were rescinded in June of that year, just after two new members were elected to the Board.

The trial court considered the evidence adduced in regard to the Park Hill schools, including the rescission of Resolutions 1520, 1524, and 1531, separately from that relating to the schools in the older core-city area. Judge Doyle found segregative intent in the Board actions affecting the former, but refused to find de jure segregation in the core city. It is submitted that a careful analysis of the construction and attendance decisions in the two areas will not reveal factual distinctions sufficient

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[16] The broad-brush review of the facts set out in the text is a condensation of the trial court's factual analysis in 303 F. Supp. at 290-94 and 313 F. Supp. at 69-73. The reader is urged to go to the opinions themselves and form an independent judgment as to the validity of the conclusions reached in the text.

[17] These resolutions did affect some schools west of Colorado Boulevard. True racial balance could not be achieved by dealing only with schools in Park Hill proper.

to account for this result.[18] Granted, there was in the core city no "legislative action similiar to the rescission of Resolutions 1520, 1524, and 1531,"[19] but this factor cannot have been crucial. Judge Doyle repeatedly indicated that the rescission was not necessary to his finding of a constitutional deprivation: "The policies and actions of the Board *prior to the adoption* of Resolutions 1520, 1524, and 1531 . . . constitute de jure segregation."[20] Indeed, the circuit court found it unnecessary to even consider the rescission once it had affirmed the finding quoted above.[21]

The true source of Judge Doyle's seemingly inconsistent findings is not the facts, but his approach thereto. He undertook to justify this difference when he turned to the core-city schools:

> The evidentiary as well as the legal approach to the remaining schools is quite ditferent from that which has been outlined above. For one thing, the concentration of minorities occurred at an earlier date and, in some instances, prior to the *Brown* decision by the Supreme Court. Community attitudes were different, including the attitutes of the School Board members. Furthermore, the transitions were much more gradual and less perceptible than they were in the Park Hill schools.[22]

Unfortunately, Judge Doyle did not indicate just exactly how the judicial approach should change in response to these factors or, for that matter, why these factors necessitated any change at all. Some insight may be gained by examining the court's treatment of the two points which it felt the plaintiffs had failed to prove in the core city — intent and causation.

The standard for finding purposeful action in the Park Hill area is reflected in the following language:

> We do not find that the purpose here included malicious or odious intent. At the same time, it was action which was taken with knowledge of the consequences, and the consequences were not merely possible, they were substantially certain. Under such conditions the action is unquestionably wilful.[23]

Yet when the court considered the core-city schools, something more was evidently required:

> In examining the boundary changes and removal of optional zones in connection with the several schools which are discussed

[18] The opinions themselves must be studied to fully appreciate the extent of the similarity between the two sets of facts. If anything, the evidence relating to the core city schools seems stronger. 303 F. Supp. at 290-94; 313 F. Supp. at 69-73.

[19] 313 F. Supp. at 69.

[20] 303 F. Supp. at 295 (emphasis added).

[21] 445 F.2d at 1002.

[22] 313 F. Supp. at 69.

[23] 303 F. Supp. at 286 (footnote omitted).

> above, we do not find any wilful or malicious actions on the part of the Board or the administration (in relationship to elementary schools). As to these schools, the result is about the same as it would have been had the administration pursued discriminatory policies, since the Negroes and, to an extent the Hispanos as well, always seem to end up in isolation.[24]

The court attributed this result to the failure of the Board to take integrating action and to the already established housing patterns. However, it is evident just from the text of these two quotations that the Park Hill standard would have dictated a de jure finding in the core city. The evidence clearly showed that the segregative effects of each proposed core-city decision were brought forcefully to the attention of the Board. Apparently the court would be satisfied here with nothing less than proof of malicious intent.

This notion that time somehow renders intent constitutionally harmless reappears throughout the opinion. For example, the following statements were made after a review of the Board actions affecting core-city schools:

> It should also be kept in mind that prior to Brown v. Board of Education, *supra,* it was apparently taken for granted by everybody that the status quo, as far as the Negroes were concerned, should not be disturbed because this was the desire of the majority of the community. Time and again the Board members testified to the fact that in making decisions they held hearings and finally bowed to the community sentiment. Thus, they say they did not intend to segregate or refuse to integrate. They just found the consensus and followed it.[25]

The same argument was accorded much different treatment when advanced in relation to the Park Hill schools:

> The defendants have alluded to the fact that Resolution 1533 represents the will of the people, and that any action taken by this Court which would adversely affect the Resolution would frustrate that will. But as we have seen Brown v. Board of Ed. and all of the subsequent cases hold that equal protection of the laws is synonymous with the *right* to equal educational opportunities and that segregated schools can never provide that equality. The constitutional protections afforded by the Bill of Rights and the Fourteenth Amendment were designed to protect fundamental rights, not only of the majority but of minorities as well, even against the will of the majority. The effort to accommodate community sentiment or the wishes of a majority of voters, although usually valid and desirable, cannot justify abandonment of our Constitution.[26]

The distinction seems to center around the timing of the

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[24] 313 F. Supp. at 73.

[25] *Id.*

[26] 303 F. Supp. at 287-88.

acts in relation to the *Brown* decision.[27] In effect, the court excuses decisions made in the 1950's on the basis that school authorities were not then aware of the extent of their responsibilities. They assumed that their decisions were constitutional and given this legal purity of heart it would not now be fair to attribute to them an unconstitutional intent. But what relevance can this possibly have? Were not the defendants in *Brown* equally true to what everyone regarded as the mandate of the fourteenth amendment? From a legal standpoint, the factors mentioned cannot possibly justify the different standards used to gauge intent.

The second requirement which received inconsistent application with respect to the two school areas was causation. In order to support a finding of de jure segregation, the plaintiffs must prove that there is "a causal connection between the acts of the school administration complained of and the current condition of segregation."[28] Judge Doyle found no such causal connection in the core city since the housing trend had passed completely beyond these schools, and they would have become segregated regardless of the actions of the Board. The court felt that, even assuming intent, "it would be inequitable to conclude de jure segregation exists where a de jure act had no more than a trifling effect on the end result which produced the condition."[29] On its face this argument has considerable merit. It does seem a bit absurd to hold the Board responsible when the present situation would be no better had it behaved differently. But the assumption here is deceptive. Who can say what would have happened if the Board had not made decisions which abruptly changed the racial character of each school in the line of eastward expansion from predominantly white to predominantly minority? As the plaintiffs pointed out in their appellate brief,[30] these sudden shifts in racial composition may well have been a powerful force in driving white families out of the neighborhood.[31] At the least, the Board actions must have been a contributing cause. A finding of no causation, which allows continued segregation, cries out for more convincing support than it was given here.

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[27] It is interesting to note that all save one of the acts complained of were post-*Brown*. 313 F. Supp. at 69-73.

[28] 313 F. Supp. at 73.

[29] *Id.* at 74.

[30] Opening brief for cross-appellants at 46, Keyes v. School Dist., 445 F.2d 990 (10th Cir. 1971).

[31] *See* Fiss, *The Charlotte-Mecklenburg Case — Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971).

The most interesting point arising out of the causation question concerns the lack of consistency with which it was treated in the core city and Park Hill areas. As with the core-city schools, several of the Park Hill schools are considerably behind the forefront of current black expansion. Yet Judge Doyle's findings do not exempt them from the de jure category on the basis of lack of causation. As though aware of this incongruity, a footnote to the causation discussion[32] indicates that even non-causal segregative acts may be probative of the intentionally segregative nature of later decisions and gives as an example several Park Hill schools which were discussed in connection with the rescission of Resolutions 1520, 1524, and 1531. However, the footnote fails to mention that in a prior opinion it was specifically held that the construction and attendance boundary decisions affecting these schools constituted de jure segregation.[33] It was this finding, rather than that relating to the rescission, which was later affirmed by the circuit court.

In sum, there are two glaring discrepancies in the court's treatment of the core city and Park Hill areas. By applying different standards of intent and causation, different conclusions were reached on essentially identical facts. The only apparent justification was that attitudes had radically changed since the core-city decisions were made. Upon looking at the more recent Board decisions in Park Hill, one wonders just how great the change has been.[34]

The district court decision was appealed by both sides.[35]

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[32] 313 F. Supp. at 74-75 n.18.

[33] 303 F. Supp. at 295.

[34] It might be appropriate at this point to question the trial court's separation of the core city and Park Hill schools. If, as the court freely admitted, the process of black expansion was a single continuing trend, what possible reason could there be for dividing it at Colorado Boulevard and viewing the resulting areas separately? The reason is very possibly to be found in the court's heavy reliance on the recission of the resolutions designed to integrate the Park Hill Schools. Having treated only the areas covered by those resolutions in the original opinion, the core city formed a "residue" which could be treated separately if for no other reason than that the Park Hill area had already been disposed of.

But why does this separation justify different treatment? As a matter of pure speculation, it may have been that Judge Doyle, as a resident of Denver, was aware of the more dramatic nature of the black expansion into Park Hill — dramatic not so much because of its speed, but because of the socio-economic status of the Park Hill residents. As Judge Doyle pointed out, Colorado Boulevard serves as a natural dividing line. Park Hill had always been insulated from the core city by this wide six-lane thoroughfare. When the barrier was breached, the white panic so common to transitional neighborhoods set in with a vengeance. Racist thoughts were blooming where none had grown before. Perhaps these recent events strengthened the impression of intent when the evidence relating to Park Hill was reviewed.

[35] Keyes v. School Dist., 445 F.2d 990 (10th Cir. 1971).

The Tenth Circuit, through Judge Hill, approved the trial court's treatment of the de jure question. Applying the clear error rule,[36] Judge Hill saw sufficient evidence in the record to support a de jure finding in Park Hill and a finding of no intent in the core city. He did not mention the inconsistency in the intent and causation standards applied below. It is obvious that if Judge Doyle was in error in applying these different standards, Judge Hill's use of the clear error rule was inappropriate. For until the proper legal standard has been determined, it is impossible to determine whether a particular factual finding is supportable. For example, what would be clear error under a malicious intent standard might be perfectly acceptable if a man is deemed to intend the foreseeable consequences of his acts.

The appellate court's failure to deal with this legal issue leaves unanswered the most pressing question in de jure cases — what is necessary to prove intent? In purely practical terms, any standard more rigorous than that applied by Judge Doyle in the Park Hill area would limit the modern applications of *Brown* to unimaginably blatant cases of purposefully segregative state action. Given the importance of what potential plaintiffs have at stake, it is hardly in keeping with the protective spirit of *Brown* to require concrete proof of maliciousness.

Another solution to the problem of proving intent was offered by plaintiffs on appeal. They argued that once they had objectively demonstrated the segregative effect of the defendants' actions, a presumption should have arisen and the Board should have had the burden of persuading the trier of fact that the resultant segregation was not intended. In support of this proposition, plaintiffs cited two cases — *United States v. School District 151*[37] and *Gautreaux v. Chicago Housing Authority*.[38]

In *School District 151* Judge Hoffman made the following conclusion of law:

> The contemporaneous existence, within one system, of some schools whose faculties and student bodies are almost exclusively white and other schools whose faculties and student bodies are almost exclusively Negro creates a presumption of discriminatory faculty assignments which requires the school authorities to demonstrate the constitutionality of their procedures.[39]

[36] FED. R. CIV. P. 52.
[37] 286 F. Supp. 786 (N.D. Ill.), *aff'd*, 404 F.2d 1125 (7th Cir. 1968), *permanent injunction granted*, 301 F. Supp. 201 (N.D. Ill. 1969).
[38] 296 F. Supp. 907 (N.D. Ill. 1969).
[39] 286 F. Supp. at 797.

In *Gautreaux*, a case involving alleged discrimination in site selection for public housing, the court said:

> The statistics on the family housing sites considered during the five major programs show a very high probability, a near certainty, that many sites were vetoed on the basis of the racial composition of the site's neighborhood. In the face of these figures, CHA's failure to present a substantial or even speculative indication that racial criteria were not used entitles plaintiffs to a judgment as a matter of law.[40]

Realizing that, even with this case support, a showing of segregative effect might not be considered sufficient to raise a presumption, the plaintiffs added another factor: the "traditional doctrine often repeated by the courts . . . that where facts pleaded by one party lie peculiarly in the knowledge of the adversary, the latter has the burden of proving it."[41] This doctrine seems particularly appropriate in the present case. It is virtually impossible for the plaintiffs to produce direct evidence of intent. On the other hand, evidence of a lack of segregative purpose should be within ready reach of the Board whch presumably keeps records of its actions and the data upon which they were based. If these records fail to disclose a realistic and rational justification for its decisions, it does not seem unreasonable to assume that the Board intended what it accomplished.

Judge Hill did not agree.

> Where, as here, the system is not a dual one, and where no type of state imposed segregation has previously been established, the burden is on plaintiff to prove by a preponderance of the evidence that the racial imbalance exists and that it was caused by intentional state action. Once a prima facie case is made, the defendants have the burden of going forward with the evidence. They may attack the allegations of segregatory intent, causation and/or defend on the grounds of justification in terms of legitimate state interests.[42]

Besides being insensitive to the problems of circumstantial proof, this standard is palpably erroneous. State imposed segregation is unconstitutional per se, and no question of justification arises once it has been shown. Witness Judge Hill's earlier statement of the applicable law:

> We begin with the fundamental principle that state imposed racial segregation in public schools is inherently unequal and violative of the equal protection clause.[43]

Although this inconsistency in legal theory was not crucial

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[40] 296 F. Supp. at 913.

[41] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 318 (1954).

[42] 445 F.2d at 1006 (citations omitted).

[43] *Id.* at 999.

to the outcome of this portion of the case, it serves to re-emphasize the prevailing confusion as to the proper standard for proving de jure segregation. Until clear guidelines are supplied, plaintiffs will continue to receive irreconcilable judgments which have little apparent relation to the facts presented.

II. New Equal Protection

The second major branch of the plaintiffs' case involves a far more sophisticated equal protection argument designed to achieve the same end as a finding of de jure segregation but without the necessity of proving intent. In order to put this theory in perspective, it is necessary to undertake a brief review of the development of the doctrine of equal protection.

A. *Equal Protection in General*

Any law necessarily establishes classifications in the form of conditions precedent to its application — the elements of a crime, the requirements to obtain a license, etc. The concern of equal protection is that these classifications be rationally related to the end which the law is designed to serve.[44] However, the standard originally applied to judge rationality — popularly styled "old equal protection" — was minimal indeed. If the classification might be rational under any conceivable state of facts, the courts would uphold the law.[45] The plaintiff in such a case had an almost conclusive presumption of validity to overcome.

It was, of course, incumbent upon the plaintiff to establish some inequality of treatment that resulted from the state action of which he complained. In the normal case this requirement created no problem. The court was faced with a statute which accorded benefits or imposed punishments depending upon the presence or absence of certain traits. Persons who possessed these traits were quite obviously treated differently, in terms of the purpose of the statute, from those who did not. The court could easily judge whether the statutory criteria upon which the distinction was made formed a rational basis for the inequality of treatment received.

However, in the separate-but-equal cases, the inequality was not nearly so apparent. No matter what the student's race, he went to school. A *Plessy*-minded court could see no inequality there. The major departure in *Brown* was that sep-

[44] *E.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949); Breedlove v. Suttles, 302 U.S. 277 (1937).

[45] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

arate schools were seen as inherently unequal. This finding for the first time gave legal recognition to the inequality of educational opportunity suffered by the victims of segregation.

It is *absolutely crucial* to fully understand the causal relationship between the statutory classification in *Brown* (race) and the constitutional inequality found by the Court (an unequal educational opportunity). The inequality complained of was not the direct statutory consequence of the possession of the trait upon which the application of the statute depended. The immediate effect of the statute was segregation. But the ultimate "real-world" effect, in terms of the purpose of the law, was inequality of educational opportunity. Since the immediate effect had a causal connection to the ultimate effect, the inequality complained of was sufficiently the result of the statutory classification to entitle the plaintiffs to a judicial determination as to the rationality of the relation between classification and purpose.

Unfortunately, the Court did not undertake an assessment of rationality after it found inequality. It can only be assumed that in 1954 no one even bothered to make the gesture of arguing that race was a proper criterion upon which to decide educational matters. Be that as it may, the failure of the Court to complete its equal protection analysis has been the cause of much confusion. Courts have had to speculate as to what other considered but unmentioned factors in *Brown* were crucial to the decision. However, the nature of equal protection at that time is sufficiently clear to allow a reconstruction of the omitted steps.[46] The classification established by the statute was race. The purpose of the law was to provide public education. The ultimate effect of the classification was inequality in the educational opportunity offered. This inequality was constitutionally permissible only if the criterion upon which it was based bore some rational relation to the provision of public education. Since there could be no rational connection between a student's race and the education he should receive, the law providing separate schools was unconstitutional.

Brown, then, may be seen as embodying two principles. Generally, a classification which has the *ultimate* effect of producing inequality must be based on criteria which are rationally related, in terms of the purpose of the act, to the

[46] As will subsequently be seen, the relegation of *Brown* to the realm of the old equal protection with its minimal review standard may do it an injustice. The Court dwelt at length on the importance of education in terms quite familiar to the new equal protection ear.

difference in treatment which flows from their application. More specifically, where the facts are as they were in *Brown, i.e.,* where race is the classification, there is *always* a constitutional violation since segregation *always* results in inequality and race is *never* rationally related to the purpose of a public education statute or the unequal treatment in which it results. This latter is the per se rule of *Brown* upon which the plaintiffs in *Keyes* relied in the portion of the case first discussed herein. But this rule is not the limit of *Brown,* nor of the fourteenth amendment. As indicated by the more generally applicable first principle, the court is not relieved of its obligation to examine the classification that *was* used simply because it finds that a racial classification *was not* used, *i.e.,* that there was no intentional segregation.

At the risk of being repetitive, this last idea will be restated, for in it lies the key to understanding *Brown.* The inquiry into intent is simply a judicial effort to fix the classification which was in fact used. A finding of intent to segregate means that the state differentiated on the basis of race, an inherently impermissible classification, either overtly or in the guise of some otherwise neutral classification such as the neighborhood school system. Lack of intent means only that a racial classification was not used — it does not mean that the classification that was in fact used, *e.g.,* the neighborhood school system, is necessarily valid. That cannot be known until the full equal protection analysis has been completed.[47]

The preceding discussion has assumed that a "rational relation" between classification and purpose is all that the equal protection clause requires. In a line of cases beginning even before *Brown,* the Supreme Court has indicated that in certain situations a far more rigorous test will be applied. This "new equal protection" doctrine is called into play where the classification is based on "suspect" criteria or adversely affects a "fundamental" right. Such a classification will receive "strict scrutiny" from the bench and must be justified in terms of a "compelling state interest."[48]

The birth of new equal protection can be traced back to 1942 and the case of *Skinner v. Oklahoma.*[49] The Court was there asked to declare unconstitutional a statute requiring the

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[47] Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[48] *Developments in the Law — Equal Protection,* 82 HARV. L. REV. 1065 (1969).

[49] 316 U.S. 535 (1942).

compulsory sterilization of habitual criminals. The statutory classification "habitual criminal" was defined to include any person with a record of two or more convictions for felonies involving moral turpitude who was thereafter convicted of another such felony and sentenced to an Oklahoma prison. An exception to this classification provided that certain offenses, including embezzlement, would not be considered in applying the statute.

The Court first acknowledged that the actions of state governments carry an impressive presumption of validity. Even so, it felt that the statute could not stand:

> [T]he instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule . . . requires. We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.[50]

After discussing the potential for abuse inherent in the power to sterilize and the irretrievable loss of liberty which followed its exercise, the Court continued:

> We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that *strict scrutiny* of the classification which a state makes in a sterilization law is essential, lest *unwittingly,* or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.[51]

In strictly scrutinizing the Oklahoma statute, the Court discovered, by reference to other state criminal laws, that, *e.g.,* the difference between larceny by fraud (a felony involving moral turpitude) and embezzlement (a felony excepted by the statute) might turn on the timing of the formation of the felon's intent to appropriate the property of another to his own use. The Court could find no basis upon which to infer that such timing had any genetic significance. Therefore, the classification was insupportable.

Skinner appears to have been a significant departure from the traditional equal protection approach. Rather than imagining situations in which the classification might be rational, the Court made a detailed search for irrationalities. It looked not only at the statute in question, but also to the other laws which might affect its operation. This special approach where funda-

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[50] *Id.* at 541.

[51] *Id.* (emphasis added). The italicized word "unwittingly" is certainly inconsistent with the notion that a violation of the fourteenth amendment requires intent.

mental rights are involved was to become the cornerstone of the new equal protection.

Although *Brown* contains no reference to *Skinner*, a cursory glance at the two opinions makes it clear that the Court's view of the nature of the right involved in each was essentially similar. For example:

> Today, education is perhaps the most important function of state and local governments. . . . 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. . . . 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.[52]

It would not seem a distortion of this language to say that the Court considered education a fundamental right. The holding in *Brown* cannot be divorced from the embryonic new equal protection notion in *Skinner*, and it is therefore doubly unfortunate that the full equal protection analysis was not supplied. A clear indication of the effect which the Court's special regard for education had upon its approach to the case might have avoided much confusion.

Since these early beginnings the growth of new equal protection has been startling. The process has consisted of the incorporation of an increasing number of individual interests into the category of "fundamental rights"[53] and the development of the idea that certain classifications are inherently suspect and should be the object of strict scrutiny no matter what the right involved.[54] The following language from *McDonald v.*

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[52] 347 U.S. at 493 (emphasis added).

[53] *See* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716, 743-44 (1969), where the following "basic rights" are listed as having received new equal protection treatment since *Skinner*:

(1) voting [Reynolds v. Sims, 377 U.S. 533 (1964)];

(2) marriage [Loving v. Virginia, 388 U.S. 1 (1967)];

(3) fairness in the criminal process [Gardner v. California, 393 U.S. 367 (1969); Anders v. California, 386 U.S. 738 (1967); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956)];

(4) education [Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), with additional support from *Brown*];

(5) interstate travel [Shapiro v. Thompson, 394 U.S. 618 (1969)]; and

(6) the intimate familial relationship between parent and child [Levy v. Louisiana, 391 U.S. 68 (1968)].

[54] *See* Karst, *supra* note 53, at 740-43. Mr. Karst considers wealth, Griffin v. Illinois, 351 U.S. 12 (1956), and race, *Brown*, to be firmly established as suspect classifications and indicates that sex and student status may receive similar treatment in future cases.

Board of Election Commissioners[55] summarizes these developments in regard to voting rights:

> [W]e have held that because of the overriding importance of voting rights, classifications "which might invade or restrain them must be closely scrutinized and carefully confined" where those rights are asserted under the Equal Protection Clause . . . . And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.[56]

The Court has not insisted that the suspect classification be explicitly set out in the statute. It is enough that the harsh effect of the law falls on some class for which the law has a special solicitude. For example, in *Griffin v. Illinois*[57] the Court considered a statute which allowed appellate review in criminal cases as a matter of right, but required that the defendant furnish certain documents to the appeals court which sometimes could not be prepared without a stenographic transcript of the trial. Because of the cost of obtaining such a transcript, the *effect* of this statute was to discriminate against the poor when they attempted to exercise the right to appeal criminal convictions. The Court treated the statute exactly as though it had established a classification based on wealth,[58] and required the state to devise some means of providing appellate review to those who could not afford a transcript. Thus, even a technically nondiscriminatory classification may be traced in its effect to see where the burden falls.[59]

The growth of the new equal protection has not been confined to the factors which give cause for its application. It has recently become apparent that the Court is no longer satisfied with the *Skinner* approach of strictly scrutinizing a classification to see if any irrationality exists in its relation to the purpose of the statute. The focus has shifted to the *effects* of the classification. That is, the Court will require that the state demonstrate some "compelling state interest" which is furthered

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[55] 394 U.S. 802 (1969).

[56] *Id.* at 807 (citations omitted). The language is essentially dicta since the Court found that the facts presented did not fulfill either of the requirements for the application of the new equal protection standard.

[57] 351 U.S. 12 (1956).

[58] The Court here was considering the wealth classification to judge its rationality in relation to purpose rather than as a factor calling for the new equal protection approach. However, *Griffin* is generally considered to have established a principle which is fully applicable in the latter context. Hobson v. Hansen, 269 F. Supp. 401, 507 (D.D.C. 1967), *modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[59] Hobson v. Hansen, 269 F. Supp. 401, 506-07 (D.D.C. 1967), *modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). *See* Douglas v. California, 372 U.S. 353 (1963).

by the classification in order to justify the infringement on the rights of the plaintiff.[60]

This approach is well illustrated in *Shapiro v. Thompson*.[61] The fact situation involved statutes imposing a 1-year residency requirement on eligibility for welfare assistance. The Court held that there is a constitutional right to travel interstate and that this residency requirement chilled the exercise of that right. Defendants offered as justification four governmental objectives which were allegedly served by the 1-year requirement. All four were administrative or economic concerns. Before assessing their merit, the Court had this to say:

> 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 . . . . [A]ppellees 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.[62]

In examining the justifications offered, the Court made it clear that the term "compelling" was used advisedly. Each of the four was rejected either because the classification did not in fact promote the proffered objective or because there was a less onerous alternative for accomplishing the same end.

The net effect of new equal protection is to strip state action of its presumptive validity. If the plaintiff can show some harm in the form of unequal treatment under a suspect classification or in respect to a fundamental right, the state must show that the public benefit flowing from the classification established is great enough to justify the harm suffered by the plaintiff. It becomes a balancing exercise — individual harm (most often a whole class of individuals) v. public benefit.

B. *Equal Protection in* Keyes

With this background in general equal protection theory, we may proceed to examine the second portion of the *Keyes* opinions. The plaintiffs first sought to establish a legal injury for which relief could be granted. They introduced evidence that the Denver schools with high concentrations of minority students offered an educational opportunity which was inferior to that available at the predominantly Anglo schools. Each

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[60] Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[61] 394 U.S. 618 (1969).

[62] *Id.* at 634.

school was rated on five indicia of quality: (1) average scholastic achievement of pupils; (2) teacher experience; (3) teacher turnover; (4) dropout rates; and (5) age and size of school facilities.[63] The trial court found that schools with 70 to 75 percent black or Hispano students consistently rated below Anglo schools in each of these categories and that this was sufficient proof that an inferior educational opportunity was being offered in the minority schools.

Plaintiffs then introduced expert testimony which persuaded the trial court that the correlation between inferiority and minority concentrations was not fortuitous.[64] Judge Doyle concluded that "segregation, *regardless of its cause,* is a major factor in producing inferior schools and unequal educational opportunity."[65] "Many factors contribute . . . but the predominant one appears to be enforced isolation imposed in the name of neighborhood schools and housing patterns."[66]

Having found the requisite factual inequality, the court proceeded to a discussion of the traditional equal protection standard still applicable to economic regulation, and then introduced the new equal protection theory:

> The courts . . . have jealously guarded the rights of disadvantaged groups such as the poor or minorities, and have held that where state action, even if non-discriminatory on its face, results in the unequal treatment of the poor or a minority group as a class, the action is unconstitutional unless the state provides a substantial justification in terms of legitimate state interest . . . . This general principal of constitutional law is fully applicable to school segregation cases.[67]

Already the court has accomplished two important tasks. First, and foremost, it recognized that the general principles of equal protection must be applied even after a lack of intentional segregation has been found, *i.e.,* that the *Brown* per se rule is not the limit of the fourteenth amendment in school segregation cases. Second, it applied the *Griffin* principle that the classification need not be overtly racial in order to elicit the new equal protection response.[68] However, the opinion fails to take advantage of the other branch of new equal pro-

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[63] The court's discussion of these five factors and the significance of each is found in 313 F. Supp. at 79-81.

[64] 313 F. Supp. at 81-82.

[65] *Id.* at 82 (emphasis added).

[66] *Id.* at 83 (footnote omitted). This thinly veiled implication that Denver's neighborhood school policy was a sham is difficult to reconcile with the earlier finding that no intent to segregate was evident in the core city.

[67] *Id.* at 82.

[68] *See Griffin* discussion, note 58 *supra.*

tection which was clearly available. There is no discussion of education as a fundamental right.

And this is but the first unfortunate aspect of the opinion. After the groundwork had been so nicely laid, the new equal protection analysis was not completed. Instead, the court moved rather more directly to the conclusion that a constitutional violation existed by way of a modern version of the old Plessy argument. To wit, although the school board need not take affirmative action to eliminate de facto segregation, it is under a constitutional duty to insure that its schools offer an equal educational oportunity. Since the court had previously held that the minority schools in Denver were inferior, it naturally concluded that the Board had failed to discharge this duty. And since segregation, even though de facto, was the cause of this failure, the appropriate remedy was desegregation.[69]

Judge Doyle seems to have lifted this theory directly from the opinion of Judge Wright in *Hobson v. Hansen.*[70] Indeed, that is the only case cited. However, the qualification which accompanied the theory in *Hobson* was not discussed in *Keyes.* Judge Wright noted that a strict application of the *Plessy* argument would always dictate unconstitutionality when inequality was discovered.[71] But in this modern context where no de jure segregation is present, Judge Wright felt that "no court would advance so absolutist an approach."[72] The state must be allowed an opportunity to justify its actions. A thorough discussion of the justification issue in the trial court's opinion would have made the analysis much stronger.

Despite Judge Wright's indication in *Hobson* that the *Plessy* argument as there applied was something of a first, when put in proper perspective the illusion of uniqueness is dispelled. It is merely a restatement of the new equal protection. The state can run its school system according to any nonracial classification it chooses, even if the effect is segregation. However, if an inequality of educational opportunity results, the state must justify its choice of classifications by showing that they yield some positive social benefit sufficient to offset the harm from the inequality. Since segregation always results in inequality, the state will always need to justify its classifica-

[69] 313 F. Supp. at 82-83.

[70] 269 F. Supp. 401 (D.D.C. 1967), *modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[71] Cases cited note 8 *supra.*

[72] 269 F. Supp. at 497.

tions where they produce segregation. Thus, there is no difference in substance or result between new separate-but-equal and new equal protection. However, it is always a sad event when a new label is thrown into an area as confused as this. One has to regret Judge Wright's inclusion of this theory, especially since he presented a detailed and complete analysis in the more usual terms of new equal protection later in his opinion.[73] Even more to be regretted is Judge Doyle's decision to adopt the former rather than the latter.

The 10th Circuit Court of Appeals could not agree with the separate-but-equal approach.[74] Although the details of the analysis are sometimes hard to follow,[75] it is evident that the reason for reversal was lack of intent:

> However, then, in the final analysis, the finding that an unequal educational opportunity exists in the designated core schools must rest squarely on the premise that Denver's neighborhood school policy is violative of the Fourteenth Amendment because it permits segregation in fact. This . . . cannot be accepted under the existing law of this Circuit.[76]

The only reasonable interpretation of this statement is that no constitutional violation is possible if the segregation was not intentional, *i.e.*, resulted from good faith adherence to a neighborhood school policy. The court appears to have been caught in the confusion surrounding the *Brown* per se rule which is here seen as the limit of the fourteenth amendment in school cases. The neighborhood school policy is transmuted into a principle of constitutional law which, if religiously adhered to, offers complete protection no matter what its factual results.

If our prior discussion of equal protection theory has any semblance of validity, this cannot be the law. There is not now, nor has there ever been, an intent requirement in the fourteenth amendment. Yet this court and others like it[77] con-

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[73] *Id.* at 506-08.

[74] 445 F.2d at 1002-05.

[75] This portion of Judge Hill's opinion is genuinely difficult to interpret. For example, at one point he indicates that he can see no reason why an unequal educational opportunity would not be a constitutional violation "provided the state has acted to cause the harm without substantial justification in terms of legitimate state interest." 445 F.2d at 1004. If the reference is to intentional state action, it is difficult to reconcile the opportunity given for justification with the holding in *Brown* that de jure segregation is per se a violation of the fourteenth amendment. If no intent is contemplated, then the ultimate decision that there was no constitutional violation is in direct conflict with this statement since no discussion of justification was undertaken which would account for that result.

[76] 445 F.2d at 1004.

[77] *E.g.*, Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 380 U.S. 914; Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

tinue to treat school cases as though they were sui generis to be decided under a separate constitutional amendment enacted in *Brown*. The effect, of course, is that the whole body of equal protection law which the Supreme Court has been at such pains to develop in order to protect individual liberties is lost to minority children seeking to equip themselves to survive in modern society.

III. A Recommended Approach

Neither of the *Keyes* opinions appears to be an exemplar of legal theory. On the de jure question the trial court used inconsistent standards to judge intent and causation in the two areas of Denver considered. The appellate court failed to note this inconsistency. In considering new equal protection, Judge Doyle certainly arrived at the appropriate result, but he failed to perform the necessary step-by-step analysis. The appellate court mistook the *Brown* per se rule for the fourteenth amendment. In view of the confusion engendered by these and similar opinions, it seems appropriate to attempt to combine the lessons learned in the foregoing discussion into a recommended approach to equal protection problems in any state where no dual school system has ever existed.

The inquiry must first focus on the possible existence of de jure segregation. If the plaintiffs can bring themselves under the *Brown* per se rule, no further analysis will be necessary. They face the formidable task of amassing sufficient circumstantial evidence to prove intent. Ideally, a showing that segregation exists, coupled perhaps with evidence of school attendance boundary and construction decisions which had a segregative effect, would give rise to a rebuttable presumption of intent. If the defendants could demonstrate some reasonably weighty justification for these decisions the presumption would disappear.

Barring a presumption, the standard used to judge intent should be that a person is deemed to intend the foreseeable consequences of his acts. Only under this test can the subjective element of intent be rendered capable of objective proof.

As to causation, the plaintiff cannot reasonably be required to show that the present state of segregation is the direct and proximate result of any past state action. This concept of causation presents almost insurmountable problems in relatively simple tort suits. It becomes totally unmanageable when applied to anything so complex as the myriad social forces

which go into the determination of racial housing patterns. The burden should be only to show that intentional state action in the past had a segregative effect which was never corrected.[78]

If plaintiffs fail to establish that a racial classification has been used, *i.e.*, intent, then the analysis must proceed along the normal equal protection lines. Since the *Brown* per se rule is not available, plaintiffs must demonstrate some legally recognizable injury which flows from the classification established — here, the neighborhood school policy. Under the cases discussed,[79] the court must look to the "real-world" effect of the classification and not just to its statutory consequences. Therefore, the plaintiffs may establish inequality by statistical evidence and then prove that the inequality results from segregation produced when the neighborhood school policy is applied to current racial housing patterns. There is no need to show that this result was intended.[80]

Even under the old equal protection standard, proof of inequality would entitle the plaintiffs to a judicial determination as to whether there is a rational relation between the neighborhood school policy and the purpose of providing an education (or whatever other legitimate state purposes might be served). Presumably this minimal test would be met. Certainly there is an imaginable set of circumstances in which the relation might be very rational indeed.

However, the plaintiffs are not limited to the old equal protection approach. Education falls squarely within the class of fundamental rights.[81] This in itself should call for strict judicial scrutiny of the *effects* of the neighborhood school system. But it need not stand alone. For although no suspect class is overtly used, the detrimental effects attributed to this classification fall on a minority group "for which the Constitution has a special solicitude."[82] This focused effect adds great weight to the new equal protection argument.

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[78] "The school board will also have to show that its past discriminatory conduct — involving racial designation of schools, site selection, and determination of school size — is not a link in the causal chain producing the segregation." Fiss, *The Charlotte-Mecklenburg Case — Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 701 (1971). The author was speaking in the context of a state which formerly had separate school systems.

[79] Griffin v. Illinois, 351 U.S. 12 (1956); Brown v. Board of Educ., 347 U.S. 483 (1954).

[80] Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).

[81] Karst, *supra* note 53, at 743, citing Brown v. Board of Educ., 347 U.S. 483 (1954); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[82] Hobson v. Hansen, 269 F. Supp. 401, 507 (D.D.C. 1967), *modified sub nom.* Smuck V. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

Assuming that the strict scrutiny test is to be applied, the burden falls on the state to produce some compelling state interest promoted by the classification in order to justify the inequality of treatment demonstrated by the plaintiffs. "[T]he objectives . . . further[ed] must be unattainable by narrower or less offensive . . . courses; and even so, those objectives must be of sufficient magnitude to override, in the court's judgment, the evil of the inequality which the [classification] engenders."[83]

The balancing process by which the justification question must be resolved is delicate indeed. The state has important economic and administrative interests in the neighborhood school system. Any solution to segregation which is so expensive as to destroy the state's ability to perform its educational function is clearly unwarranted. However, it would be a highly unusual case in which the burden approached this level. Barring concrete proof of prohibitive expense, the economic and administrative concerns of the state are simply not sufficient to overbalance the deprivation inherent in segregated schools.[84]

But these are not the interests which weigh most heavily in favor of the neighborhood school system. The primary interest of the state is to provide a sound education to all students. Therefore, the balance is to be struck between the benefits and the burdens of mandatory integration from the students' point of view. The disadvantages of the neighborhood school system to the students, both white and black, far outweigh the advantages. Granted, there is a greater safety hazard whenever the distance between home and school is increased. There may be other drawbacks of like nature. But how do these compare to the experience of becoming a part of a heterogeneous student body where different backgrounds and outlooks interact daily in the learning process? If today's children are to avoid the racial misfortunes which have characterized modern America, they must be given an opportunity to escape the taught hatred of those years. The neighborhood school policy tends only to perpetuate the past.

It seems fitting to close with a consideration of the following statement from Judge Wright's *Hobson* opinion in which he answered the defendants' attempt to lend historical dignity to

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[83] *Id.*

[84] How many dollars must the state save to justify its failure to educate a single child?

the neighborhood school system by tracing its existence back to the principles of Horace Mann:

> [D]efendants' appropriation of Horace Mann as the supposed architect of today's neighborhood school policy . . . is singularly unjust. For Mann believed that public schools were at the source of the democratic enterprise; his faith, like that of his fellow reformers, was that the public school, by drawing into the close association of the classroom students from every social, economic and cultural background, would serve as an object lesson in equality and brotherhood and undermine the social class divisions which he and his colleagues felt were inimical to democracy.[85]

These are the highest goals of education. They were at one time served by the neighborhood school system and still are in many cities. But there can be no justification for continued adherence to the neighborhood school system where, because of changing social conditions, it operates to frustrate the principle in response to which it was designed. Any decision to abandon the neighborhood school policy as a basic plan must be legislatively made. However, the failure of legislatures to act cannot relieve the courts of the obligation to require compelling justification for state infringement upon individual rights. A dysfunctional school policy can never justify its own ill effects.[86]

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[85] Hobson v. Hansen, 269 F. Supp. 401, 505 (D.D.C. 1967), *modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (footnote omitted).

[86] This is not to suggest that justification is never possible. The point is that the courts should not assume an attitude of unthinking reverence for the neighborhood school policy before its virtues have been demonstrated.