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Legislative Problems Surrouuding Racially Balanced Public Schools: A Critical Examination. of the Responses and the Prospects

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I. INTRODUCTION

An inquiry into the problems surrounding legislation relative to racial balance in public schools might appear to be an irrelevant academic endeavor. It has been argued that racial desegregation as a public ideal is passe and that segregation (currently advocated by certain Negro "separatists") represents the emergent ideal. Despite the inroads of the "new segregation," this critical survey of the legislative problems of racial balance rests on the assumption that some form of political assimilation of racial minorities remains a viable public goal for America.

For many years the political-legal attempts to implement the rights of the Negro minority in America have focused on the field of public education. It is the writer's view that current widespread confusion concerning the racial composition of public school populations forms a major obstacle to better racial relations.[1] This article is an examination of the ways in which the problem of racial concentrations of minorities in public schools has been met in a variety of forums: state legislatures, state and federal educational and civil rights agencies, and the United States Congress. The article is intended to enhance the reader's understanding of the complexities of legislating in the realm of racial relations.

II. THE CONSTITUTIONAL SETTING

A. Brown v. Board of Education and Racial Balance

The *Brown* decisions of 1954[2] and 1955[3] were concerned with

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1. For a representative description of the relevant published commentary, see J. BOLNER, RACIAL IMBALANCE IN PUBLIC SCHOOLS: AN ANNOTATED BIBLIOGRAPHY 6-38 (1968).

2. Brown v. Board of Educ., 347 U.S. 483 (1954).

3. Brown v. Board of Educ., 349 U.S. 249 (1955).

legally required racial segregation in public schools. But what did these cases teach relative to the mere concentration of pupils of a given race in certain schools? Does racial imbalance constitute a violation of the Constitution? One may find language in the Courts' opinions which supports both an affirmative and a negative view.

In the 1954 opinion, the Court quotes with approval the language of the lower court in the Kansas case:

> 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.'[4]

The court's reference to "sanction of the law," lends force to the argument that the Court was addressing itself to legally *required* segregation and nothing more. Much language in the opinion, however, suggests that the Court was striking down all nonwhite pupil concentrations regardless of cause. The Court found inequality in "separate but equal" educational facilities precisely because intangibles were at stake—intangibles such as the "feelings of inferiority" which Negro pupils experienced when they were concentrated in public schools. Viewed in this light, the "sanction of the law" to which the Court referred is merely an aggravating factor. Consider the following language, which appears after the Court has rejected "separate but equal" as an irrelevant doctrine:

> In the instant cases, that question [whether Plessy v. Ferguson should be held inapplicable to public education] is directly presented. Here . . . there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.[5]

The effect of segregation, of course, is found to be detrimental.

An important addition to the constitutional theory on racial concentrations in public schools was made in the 1955 *Brown* opinion. There the Court issued its enforcement decree embodying the "all deliberate speed" desegregation formula and directed district courts to:

> consider problems related to administration, arising from the physical condition

4. 347 U.S. at 494.
5. *Id.* at 492.

> of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system.[6]

B. Judicial Struggles with the Brown Rhetoric

There have developed two almost diametrically opposed lines of interpretation of the Supreme Court's opinions in the *Brown* cases. One may be characterized by the slogan put forward by the district court in *Briggs v. Elliot:* "The Constitution . . . does not require integration. It merely forbids discrimination."[7] The Supreme Court has allowed this view to stand by denying certiorari in *Bell v. School City of Gary*,[8] *Downs v. Board of Education*,[9] and *Deal v. Board of Education*.[10] The *Bell* and *Deal* cases reached the Supreme Court from Gary, Indiana, and Cincinnati, Ohio, respectively. Both Ohio and Indiana had policies against racial segregation in education and in no way could be charged with having maintained dual school systems. The *Downs* case arose in Kansas City, Kansas, and, despite the fact that Kansas had once permitted segregation on a local option basis,[11] the lower courts found that the concentrations of Negro pupils was the result of residential patterns and not of discriminatory school policies.[12]

The second line of interpretation rejects the *Briggs* theory and subscribes to the view that *Brown* and the fourteenth amendment

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6. 349 U.S. at 300-01.

7. 132 F. Supp. 776, 777 (E.D.S.C. 1955). It should be pointed out that the *Briggs* doctrine was specifically rejected in United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967). The Fifth Circuit's per curiam opinion declared: "The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize. . . . To the extent that earlier decisions of this Court (more in the language of the opinions, than in the effect of the holdings) conflict with this view, the decisions are overruled." *Id.* at 389. Two of the dissenting judges interpreted the majority opinion as specifically overruling *Briggs*. *Id.* at 415 (Bell, J. dissenting).

8. 213 F. Supp. 819 (N.D. Ind. 1963), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

9. 9 RACE REL. L. REP. 1214 (D. Kan. 1963), *aff'd*, 366 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

10. 244 F. Supp. 572 (S. D. Ohio 1965), *aff'd*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

11. *See* Brown v. Board of Educ., 347 U.S. 483, 486 n.1 (1954).

12. Downs v. Board of Educ., 9 RACE REL. L. REP. 1213, 1216 (D. Kan. 1964).

prohibit all Negro pupil imbalances.[13] This interpretation is premised on the theory that the community, either through its discriminatory housing policies or its general economic discrimination against minorities, is responsible for isolating the Negro. Those adopting this position generally support the view that school authorities are constitutionally required to take steps to assimilate minorities into the community. The Court has given some tacit support to this approach by denying certiorari in *Taylor v. Board of Education*.[14] This case—the so-called *New Rochelle* case—brought into question the school authorities' past policies of racially gerrymandering attendance zones. The federal district court ordered the local school authorities to transport certain pupils to specified schools on the theory that *Brown* granted Negro children a constitutional right to associate with white children.[15]

The most exhaustive statement of the policy and constitutional justification for the doctrine of positive racial balance was provided by the District Court for the District of Columbia in *Hobson v. Hansen*[16] in 1967. In *Hobson* the court ordered school authorities of the District of Columbia to adopt a plan which would bring together pupils of different races, as well as pupils of different economic and social backgrounds. The court went considerably beyond any prior judicial statement to assert a positive constitutional necessity for racially (as well as socially and economically) balanced classrooms. In order to correct a system which minimized socio-economic and racial integration, the court ordered faculty desegregation, the abolition of optional attendance zones and ability grouping, and transportation for children from overcrowded school districts into underpopulated ones.

The *Hobson* court's premises are apparent from the following findings of fact:

> 1. Racially and socially homogeneous schools damage the minds and spirit of all children who attend them—the Negro, the white, the poor and the affluent—and block the attainment of the broader goals of democratic education, whether the segregation occurs by law or by fact.

13. Two influential scholarly statements supporting this view are Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965), and Sedler, *School Segregation in the North and West: Legal Aspects*, 7 ST. LOUIS U.L.J. 228 (1963).

14. 191 F. Supp. 181 (S.D.N.Y. 1961), *aff'd*, 294 F.2d. 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961).

15. The following language of Judge Kaufman illustrates the tenor of his opinion: "In a community such as New Rochelle, the presence of some 29 white children certainly does not afford the 454 Negro children in the school the educational and social contacts and interaction envisioned by Brown." 191 F. Supp. at 193.

16. 269 F. Supp. 401 (D.D.C. 1967).

2. The scholastic achievement of the disadvantaged child, Negro and white, is strongly related to the racial and socio-economic composition of the student body of his school. A racially and socially integrated school environment increases the scholastic achievement of the disadvantaged child of whatever race.[17]

In a related development the Supreme Court has refused to consider racial balance cases upholding the power of state authorities to take steps to effect racial balance in schools. [18] In these cases local authorities had taken steps designed to alter the neighborhood school patterns in order to bring white students and nonwhite students into contact with each other; the action was challenged by white parents.

Despite the rather confusing posture of the post-*Brown* constitutional rules applied in the nonsouthern state and federal jurisdictions, the Court has been quite clear in its rulings insofar as Southern schools are concerned. In the important case of *Green v. School Board of New Kent County*,[19] the Court adopted the position of the Federal Office of Education and declared constitutionally suspect any "freedom of choice plan" which did not actually result in substantial racial mixing. The county school board in question operated two schools; one was formerly the school which whites were required to attend, and the other was formerly the school which Negroes were required to attend. The authorities did not use attendance zones and each school served the entire county. Under the freedom of choice plan "each pupil, except those entering the first and eighth grades, may annually choose between New Kent and Watkins schools and pupils not making a choice are assigned to the school previously attended; first and eighth grade pupils must affirmatively choose a school."[20] The Court found that this scheme violated its ruling in the 1955 *Brown* case because in a three year period "not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system."[21] The Court mentioned the establishment of geographic

17. *Id.* at 406.

18. The most notable cases are those arising in New York. *See, e.g.*, Vetere v. Allen, 15 N.Y.2d 259, 206 N.E.2d 174, 258 N.Y.S.2d 77, *cert. denied sub nom.*, 382 U.S. 825 (1965); Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964); Addabbo v. Donovan, 22 A.D.2d 383, 256 N.Y.S.2d 178 (Sup. Ct.), *cert. denied*, 382 U.S. 905 (1965).

19. 391 U.S. 430 (1968); *see* the companion cases of Raney v. Board of Educ., 391 U.S. 443 (1968), and Monroe v. Board of Comm'rs, 391 U.S. 450 (1968), in which the Court applied the *Green* test.

20. 391 U.S. at 434.

21. *Id.* at 441.

zones as one way of "realistically" converting "promptly to a system without a 'white' school and a 'Negro' school, but just schools."[22]

The constitutional rules relative to racial balance in public schools may be summarized as follows: (1) Those communities (Southern and nonsouthern) that wish to launch programs aimed at promoting racially balanced schools have earned the Court's constitutional blessing. (2) Because of the South's segregationist past, Southern school districts must show actual desegregation in terms of percentages of whites attending schools with nonwhites. (3) The Supreme Court has not definitely ruled that racial imbalance per se in nonsouthern school districts is contrary to the Constitution.

III. THE PROBLEM IN THE STATE LEGISLATURES

At the time of this writing, Massachusetts is the only state that has taken legislative action to remedy racial imbalance.[23] For at least two reasons, it is unlikely that any additional state laws will be enacted on the matter. First, in most states where public opinion would support such legislation, action taken by administrative officials has made legislative action largely unnecessary. Second, in legislation dealing with civil rights and with federal aid to public education, Congress had adopted policy statements designed to discourage racial imbalance. This state administrative action and congressional legislative policy will be examined below.

The Massachusetts law referred to above was enacted in August 1965 and has survived a constitutional challenge in the Commonwealth's Supreme Judicial Court.[24] The law was the product of a complex political situation, with the leaders of the political parties in Massachusetts competing to have their respective parties

22. *Id.* at 442. On the authority of *Green* the Court of Appeals for the Fifth Circuit ordered 37 school districts in Louisiana to abandon freedom of choice schemes in favor of pupil and staff assignment plans which would result in racially heterogeneous schools for the 1969-70 school year. N.Y. Times, May 29, 1969, at 16. On August 28, 1969, HEW secured a postponement of the deadline for integration plans (originally set for September 1) to December 1, 1969, insofar as Mississippi schools were concerned. A stay of this order was reluctantly denied by Supreme Court Justice Hugo Black. *Id.*, Sept. 6, 1969, at 16, col. 3. During the summer of 1969 the administration of President Nixon adopted a "go slow" attitude toward desegregation and shifted the responsibility for implementing desegregation from HEW to the Justice Department; the administration was allegedly planning to rely more heavily on litigation and less on withholding funds to effect desegregation during the 1969-70 school year. *Id.*, Sept. 17, 1969, at 18, col. 1.

23. MASS. GEN. LAWS ANN. ch. 71 §§ 37C, 37D (Supp. 1967). *See also id.* ch. 15, §§ 11-1K. For a discussion of this statute see Note, *Massachusetts Racial Imbalance Act*, 5 HARV. J. LEGIS. 83 (1967).

24. School Comm. v. Board of Educ., 352 Mass. 693, 227 N.E.2d 729 (1967).

remembered as the "party of civil rights."[25] The State Board of Education welcomed this support from the party leadership, and as its own contribution to the passage of the law, established the Kiernan Blue-Ribbon Committee on Racial Imbalance in Public Schools—a body made up of leaders in industry, labor, civic affairs, the clergy, and the professions generally. The Committee presented a report[26] that may best be described as a hastily compiled sketch of research findings, legislative proposals, and editorial statements all in the spirit of the United States Commission on Civil Rights' 1967 publication, *Racial Isolation in Public Schools*.[27] With only slight changes, the text of the law suggested in the Committee's report was enacted by the legislature.

The Massachusetts Racial Imbalance Law of 1965 contains the following provisions:

(1) It is declared to be "the policy of the commonwealth" to promote racial balance and to correct racial imbalance in public schools. The prevention or elimination of racial imbalance is prescribed as "an objective in all decisions involving" determinations of attendance zones and selection of school locations.[28] (2) School committees (boards) are required to conduct racial censuses as directed by the state commissioner of education. If these reveal racial imbalance, the state board of education shall notify the local committee, which shall then prepare a plan designed to eliminate racial imbalance. "Racial imbalance" is defined as:

> a ratio between non-white and other students in public schools which is sharply out of balance with the racial composition of the society in which non-white children study, serve and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of non-white students in any public school is in excess of fifty per cent of the total number of the total number of students in such schools.[29]

(3) State funds are withheld from any school committee which fails to "show progress within a reasonable time in eliminating racial imbalance."[30]

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25. For an enlightening legal analysis of the law, see Note, *The Massachusetts Racial Imbalance Act*, 5 HARV. J. LEGIS. 83 (1967). The political and constitutional context of the law is examined in Bolner & Shanley, *Civil Rights in the Political Process: An Analysis of the Massachusetts Racial Imbalance Law of 1965* (Amherst, Mass.: University of Massachusetts Bureau of Government Research, 1967).

26. MASS. STATE BOARD OF EDUCATION, ADVISORY COMMITTEE ON RACIAL IMBALANCE AND EDUCATION, BECAUSE IT IS RIGHT-EDUCATIONALLY (1965).

27. U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967).

28. MASS. GEN. LAWS ANN. ch. 71, § 37C (Supp. 1967).

29. *Id.* § 37D.

30. *Id.* ch. 15, § 11.

(4) "Whenever the board of education is satisfied that the construction or enlargement of a schoolhouse is for the purpose of reducing or eliminating racial imbalance" the state will increase the amount of state construction funds to 65 percent of the cost.[31]

The Massachusetts law was designed to deal with tense racial situations such as that existing in Boston's Roxbury ghetto, by requiring the city's school committee to close selected schools, redistrict attendance zones, and bus a limited number of students. One provision of the law, adopted as a concession to the antibusing forces,[32] bears a close similarity to the language of the 1968 federal legislation discussed below. The language of this provision was considered a victory for "civil rights" because it was thought unlikely that parents would file the objections to which the provision referred. The provision reads:

> No school committee or regional school district committee shall be required as part of its plan to transport any pupil to any school outside its jurisdiction or to any school outside the school district established for his neighborhood, if the parent or guardian of such pupil files written objection thereto with such school committee.[33]

IV. THE PROBLEM AT THE LOCAL LEVEL: THE BERKELEY MODEL

By late 1968 a number of communities had embarked upon programs designed to effect racial balance in public schools.[34] The best known experiment in this direction was not in Massachusetts or New York, but in Berkeley, California. Beginning in the fall of 1968 that community's schools were entirely reorganized on the theory that the high educational value of racially balanced learning situations justified the revamping. The factor that distinguishes Berkeley's plan from its predecessors is the deliberate attempt to bring pupils into contact with peers of heterogeneous backgrounds. The redrawing of attendance zones was motivated by a desire to bring "better socio-economic balance to the zones." The grouping of children within the classrooms was to follow to the letter the court's admonitions in *Hobson v. Hansen*.[35] A publication of the Berkeley school officials declared:

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31. *Id.*

32. *See* Bolner & Shanley, *supra* note 25, at 55-56.

33. MASS. GEN. LAWS ANN. ch. 71, § 37D (Supp. 1967).

34. *See, e.g., Hearings Before the Special Subcomm. on Civil Rights*, 88th Cong., 2d Sess., ser. 23, at 198-200 (1966) [hereinafter cited as *Hearings*]; R. CRAIN, THE POLITICS OF SCHOOL DESEGREGATION 13-27, 59-71, 81-101 (1968).

35. 269 F. Supp. 401 (D.D.C. 1967).

> Pupils will be assigned to classes so that groups will be heterogenous by race, sex, academic performance and, if possible, by socio-economic level. Principals, with staffs, may use additional criteria, such as age, emotional patterns, interests and pupil leaders or followers to maintain heterogeneity.
>
> Within the classrooms, we will continue to strive to individualize instructions by using flexible instructional groups. These will be formed and re-formed during the day, week, or school year to teach particular skills in cluster groups within the classroom structure or between individual classrooms. Maximum effort will be made to avoid racially segregated groups within the classrooms and in school activities.[36]

The plan's implementation necessitated the busing of 3,400 children and cost 530,290 dollars for the initial year, approximately 38 percent of which was to be devoted to transportation and another 38 percent to meet "Fire Marshall requirements."[37]

Berkeley's geographical characteristics and population statistics make it a likely candidate for relatively successful racial balancing along the lines of its original plan. It is not large (about ten square miles) and is quite compact in configuration. Its population of 121,000 is nicely balanced between whites (51 percent), Negroes (41 percent), Orientals (7 percent) and one percent "other." The city is atypical in that about half of the nonwhites own their own homes and the level of education exceeds that of the country generally.[38]

One potential problem area in the Berkeley plan is the altered status of the public school classroom teacher. The new Berkeley policy now calls for interracial school staffs whose interracial proportions will approach those of the school population itself.[39] This means that teachers will ordinarily be assigned on the basis of administrative decisions rather than choice. It is quite possible that this factor might well lead to teacher dissatisfaetion.

V. The Problem in the Realm of Administrative Law-Making.

It was pointed out that the State Board of Education played a role in securing enactment of the Massachusetts Racial Imbalance Law. One may safely make the following generalization: the chief impetus for racially balanced schools has come from state and federal administrative officials rather than from the legislative branches. In New York, New Jersey, and California the state commissioners of

36. Integration: A Plan for Berkeley, at 20 (a report of Neil V. Sullivan, Superintendent of Schools, to the Berkeley Board of Education, 1967).

37. Berkeley Unified School District, *Fact Sheet on Integration* no. 8, at 3 (August, 1968).

38. *Berkeley School Report-No. II: Desegregation '68*. at 2 (March, 1968).

39. Berkeley Unified School District, *Speakers Fact Sheet* 2 (Mimeo., 1968).

education have taken positions favoring racially balanced schools.[40] In each of these states administrative laws aimed at the promotion of racial balance in schools have been promulgated. In most cases the actions taken by the state education commissioners were manifestations of the dominant position which these authorities have within the state. Indeed, one may make a compelling argument that a statute was needed in Massachusetts precisely because the tradition of local school autonomy was so strong. In the other states where action has been taken, the tradition was one of "state centralism" in education-administrative matters.[41]

The numerous Civil Rights Commission studies and reports have been indicative of that federal agency's policy of promoting racial integration, as opposed to merely eradicating segregation. Its study on *Racial Isolation*[42] is a comprehensive research and policy statement designed to provide the foundation for a policy of racial balance in the nation's schools.

What stands out in all of this administrative action is that many federal and state administrative officials have taken the position, either on grounds of constitutional interpretation or public policy, that racial balance is a policy so eminently in the common interest that it is worth pursuing even at great social and economic cost. As the discussion of the legislative battles over racial imbalance below will show, this is not a position shared by most contemporary federal legislators.

Finally, one should note that the Attorney General of the United States has invoked Title IV of the 1964 Civil Rights Act[43] to institute suits in nonsouthern states despite language in the 1964 law which would appear to bar such suits. Title IV authorizes the Attorney General to sue for relief of complainants alleging racial discrimination by public educational authorities, but a limiting proviso reads:

> [N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.[44]

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40. For illustrative actions by state education officers see New York Commissioner of Education Memorandum of June 14, 1963, *Racial Balance in Schools* (Allen Memorandum) 8 RACE REL. L. REP. 738-39 (1963); New Jersey Commissioner of Education (Ruline), Spruill v. Board of Educ., 8 RACE REL. L. REP. 1234 (1963); Statement of the California authorities in 7 RACE REL. L. REP. 1267-69 (1962).

41. For a discussion of this point, see Note, *supra* note 23, at 96-98.

42. UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 27.

43. 42 U.S.C. §§ 2000c to c-9 (1964).

44. 42 U.S.C. § 2000c-6 (1964).

Despite this language, the Department of Justice has brought five suits against school authorities in nonsouthern states charging "discrimination in the assignment of students and teachers."[45] The announcements of the Department take great pains to stress that the authorities in question had engaged in "Southern-style" discrimination. It is, of course, highly probable that if the Department undertakes to pressure large numbers of nonsouthern school districts to stop what the Department terms segregation, the protest in the communities will find its way into Congress just as the protest over the HEW desegregation guidelines in the South found its way into Congress.

The energetic efforts of the Office of Education within the Department of Health, Education, and Welfare (HEW) at the federal level will be discussed in the following section. In addition to support from the Federal Civil Rights Commission, HEW has strong allies in the federal judiciary and the state judiciary outside the South.[46]

VI. Racial Balance Legislation in the United States Congress

Before discussing racial balance legislation in the United States Congress it is necessary to explain briefly how "racial imbalance" figures in the legislative struggle. In 1968 Southern legislators attempted to legislate a prohibition on the use of funds for the purpose of requiring children to go to certain schools without the consent of their parents.[47] The response of nonsouthern forces has been to "compromise" by accepting a prohibition on the use of funds "to overcome racial imbalance." Consequently, the Office of Education is barred from using funds or withholding funds for the specific purpose of requiring or forcing racial balance programs upon local school agencies. But at the same time HEW officials are free to withhold funds to force busing of students, to close schools, or to redraw attendance zones over parental objection if the purpose of the program in question is to overcome racial segregation and not to overcome racial imbalance.

In essence, then, although the HEW officials are barred by the 1968 amendment from using or withholding funds to achieve forced

45. *See* United States Department of Justice Press Releases for April 25, 1968, May 31, 1968, and November 19, 1968.

46. Steamer, *The Role of the Federal District Courts in the Desegregation Controversy*, 22 J. OF POLITICS 417 (1960); Vines, *Southern State Supreme Courts and Race Relations*, 18 WESTERN POLITICAL QUARTERLY 5 (1965). Vines presents statistical evidence tending to show that Negroes "win" more cases than they "lose" in Southern state supreme courts.

47. 114 CONG. REC. (daily ed. June 26, 1968).

racial balance, they are free to use or withhold funds to force "desegregation." The position of the Office of Education has consistently been that Southern schools are vestiges of "dual school systems" and are not necessarily to be characterized as "racially imbalanced."[48] In addition, its approach has been to encourage nonsouthern districts to engage in racial balance programs. In those localities of the nonsouth where the local community is prepared to engage in the experiment, HEW officials will use and withhold funds to achieve racial balance.

A. The Pre-1968 Struggle Over Racial Balance

The pre-1968 struggle over racial balance centered around the debates over the Demonstration Cities and Metropolitan Development (Model Cities) Act of 1966,[49] the Elementary and Secondary Education Amendments of 1966,[50] and the HEW-Labor authorization legislation for 1967.[51] The present discussion is confined to a brief general analysis of the developments and the controversy.

1. *The 1964 Civil Rights Act.*—Racial imbalance made its legislative debut in President John F. Kennedy's initial Civil Rights Act proposal in 1963.[52] In that bill the phenomena of racial imbalance and segregation were treated in the same way. As finally enacted, however, the 1964 Civil Rights Act defines segregation in a way that distinguishes it from racial imbalance:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.[53]

This definition was the result of an attempt by the bill's Senate managers to garner a sufficient number of votes to secure cloture. The bill's managers, Senator Hubert H. Humphrey in particular, argued that this definition would create a legal basis for cutting off federal funds to those Southern schools that refused to desegregate, while barring the Office of Education from treating mere homogeneous

48. For an instructive exposition of the positions of the Office of Education and former Commissioner of Education Howe, see *Hearings, supra* note 34, at 4.

49. 42 U.S.C.A. § 3301 (Supp. 1969).

50. 20 U.S.C. §§ 238, 241 (F) (Supp. III, 1965-67).

51. 20 U.S.C. § 886 (C) (Supp. III, 1965-67).

52. H.R. 7152, 88th Cong., 1st Sess. (1963).

53. 42 U.S.C. § 2000c (1964).

concentrations as repugnant to the law.[54] This maneuver was something of a conciliatory gesture toward Southern colleagues—a declaration that while the law was designed to end the subsidization of segregation, it would not force "integration" on those localities that made it possible for Negroes to attend schools without discrimination.

In short, Senator Humphrey and the proponents of the 1964 Civil Rights Act accepted the interpretation of the 1954 and 1955 decisions which held that although the Constitution prohibited discrimination, it did not require integration.[55] There is, of course, nothing necessarily defective in the use of judicial interpretations as the building material of legislative history. If the judicial doctrines are as unsettled as they are and were in this area, however, their value as building material is questionable.

In interpreting the Civil Rights Act the Office of Education and the courts have attempted to further racial mixing in schools by treating freedom of choice plans that fail to result in actual interracial contacts as manifestations of bad faith on the part of the school administrators. The guidelines of HEW reflect this view; they declare:

> In districts with a sizable percentage of Negro or other minority group students, the Commissioner will, in general, be guided by the following criteria in scheduling free choice plans for review:
>
> (1) If a significant percentage of the students, such as 8 or 9 percent, transferred from segregated schools for the 1965-66 school year, total transfers on the order of at least twice that percentage would normally be expected.
>
> (2) If a smaller percentage of the students, such as 4 percent or 5 percent, transferred from segregated schools for the 1965-66 school year, a substantial increase in transfers would normally be expected, such as would bring the total to at least triple the percentage for the 1965-66 school year.
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> (3) If a lower percentage of students transferred for the 1965-66 school year, then the rate of increase in total transfers for the 1966-67 school year would normally be expected . . .
>
> (4) If no students transferred from segregated schools under a free choice plan . . . it will normally be required to adopt a different type of plan. [Omission of subparagraph (4) was the only relevant amendment made in the guidelines issued for the 1967-68 school year.][56]

Given this language, disclaimers by HEW that it had no intention of requiring a certain "racial balance" were viewed by its critics as less than sincere. The federal courts, including the Supreme Court, have supported HEW's philosophy. The Court of Appeals for the Fifth

54. *See* 110 CONG. REC. 13,819-21 (1963).

55. See cases cited notes 5-7 *supra* and accompanying text.

56. 31 Fed. Reg. 5623, 5629 (1966); the text for these and other guidelines are conveniently collected in *Hearings*, *supra* note 34, at A6-A39, A93. *See also* Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824 (1968).

Circuit in 1966 and 1967 carefully and clearly embraced the HEW guidelines and declared that the rate of desegregation they prescribe must be taken by federal district courts as the minimum constitutionally acceptable standards.[57] In *Green*[58] the Supreme Court adopted the position of the Office of Education by declaring that those Southern school districts that had been segregated de jure could employ freedom of choice plans only if they actually resulted in desegregation. In doing so it aligned the federal judiciary with HEW and the Federal Civil Rights Commission, which has consistently taken the position since 1954 that nonwhites have a constitutional right to associate with whites.

2. *The Model Cities Act of 1966.*—Congressional disapproval of former Housing and Urban Development Commissioner Harold Howe's "integrationist" philosophy was reflected in two restrictive provisions of the Model Cities Act of 1966. The first reads:

> Nothing in this section shall authorize the Secretary to require . . . the adoption by any community of a program (1) by which pupils now resident in a school district not within the confines of the area covered by the city demonstration program shall be transferred to a school or school district including all or part of such area, or (2) by which pupils now resident in a school district within the confines of the area covered by the city demonstration program shall be transferred to a school or school district not including a part of such area.[59]

The second deprives the Secretary of authority to require the "adoption by any community of a program to achieve a racial balance or to eliminate racial imbalance within school districts."[60] It is important to note that this language came to be law through the efforts of certain nonsouthern legislators. Congressman Abraham Multer of New York City was the author of the amendments in question.[61] He, and many others similarly situated, supported the 1968 prohibition against the use and withholding of funds to promote racial balance.

3. *The Elementary and Secondary Education Act of 1965.*—Criticism of the cutoffs of federal funds following the enactment of the Elementary and Secondary Education Act of 1965[62] led to attempts to erode the authority of the Commissioner of

57. United States v. Board of Educ., 372 F.2d 836 (5th Cir. 1966), *petition for rehearing*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967); Davis v. School Bd., 372 F.2d 949 (5th Cir. 1967); United States v. Board of Educ., 372 F.2d 836 (5th Cir. 1967).

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

59. 42 U.S.C.A. § 3303(d) (Supp. 1969).

60. 42 U.S.C.A. § 3335(f) (Supp. 1969).

61. 112 CONG. REC. 26,948-50 (1966).

62. 20 U.S.C. § 821 (Supp. III, 1965-67) [hereinafter cited as ESEA].

Education from two fronts: first, by curbing his powers to withhold funds without a hearing, and secondly, by an outright prohibition against requiring pupil assignments or transportation in order to overcome racial imbalance.

The second item referred to above occasioned no great ferment, since it was introduced in 1966 by nonsouthern legislators as a clarification of the "true" Congressional understanding of HEW's position on racial imbalance. The prohibition now contained in Section 18 of the ESEA of 1965, as amended, bars HEW from using racial imbalance as a criterion in reviewing applications for funds from state educational agencies.[63] It was fashioned by Democratic Representative James O'Hara of Michigan in an attempt to respond to the charges made by his colleagues that the Department had grand designs for racially balanced schools.[64] Ironically, it was Commissioner of Education Howe who was responsible for the insertion of this and similar anti-balance limitations in federal legislation. Howe's numerous speeches expressing his "integrationist" views on education were quoted generously in the *Record* in such a way that his apologists, such as O'Hara, had no alternative but to respond with limiting amendments that prevented greater excisions from the powers of the Commissioner.[65]

The other anti-HEW tactic referred to above is somewhat more complex. It deals with an administrative restriction designed to limit

63. Section 181 of the 1966 ESEA Amendments, now in 20 U.S.C. § 884 (Supp. III, 1965-67), "Nothing contained in this Act shall be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system, or over the selection of library resources, textbooks, or other printed or published instructional material by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance."

64. For the legislative background, see 112 CONG. REC. 25,549-56 (1966).

65. Consider, for example, the amendment unsuccessfully proposed by Representative Fino as a substitute for O'Hara's amendment: "Nothing in this act shall authorize the reimbursement of any expenses, howsoever defined . . . in transporting pupils, by bus or otherwise, for the following purposes:

(1) To achieve racial balance in any school;

(2) To transfer children to a new school district where such new district shall have been drawn to achieve racial balance in any school;

(3) To attend educational parks or such other facilities as shall have been created or constructed for any reason including racial balance or socio-economic integration;

(4) To attend any other facility aided in whole or in part, directly or indirectly, by a grant under Title III of the Elementary and Secondary Education Act of 1965, which shall affect the racial composition of such facility. It is the intent of Congress to prohibit reimbursement of any expenses involving transportation of children for reasons directly or indirectly involving racial balance in any educational facility."

112 CONG. REC. 25,553 (1966).

the ease with which HEW could cut off federal funds from noncomplying districts. In the days following the promulgation of the initial set of guidelines, HEW claimed that they had not cut off federal funds to districts which had not yet complied with the guidelines, but were simply "deferring action" on the application of these districts.[66] As long as action was "deferred," the funds were not released and the pressure to comply was felt with full force. As far as HEW was concerned there appeared to have been a greater advantage to invoking "deferral," sincc an outright denial would have provoked an even more hostile legislative reaction. The limitation on the power of HEW to procrastinate on applications, therefore, required federal officials, within the limitations specified, to show their hand.

The chief proponent of the administrative tactic has been Representativc L.H. Fountain of North Carolina. In 1966 Fountain introduced an amendment to the ESEA of 1965 which would have prevented HEW from deferring action on any application for funds by local agencies "unless and until, as provided by section 602 of Title VI, there has been an express finding on the record, after opportunity for hearing,"[67] that the local agency had failed to comply with Title VI. This amendment was adopted by the House in 1966 but was softened in the conference committee.[68] Fountain's amendment also outlawed any deferral without an opportunity for a hcaring, which hearing, presumably, was to be held within the context of the administrative law regimen of section 602 of Title VI of the 1964 Civil Rights Act.[69] The language adopted offered HEW a choice; but in any event the restraining effect of the Fountain amendment was considerably diluted. As the amendment was finally passed HEW shall not

> defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated [by various federal laws] on the basis of alleged noncompliance with the provisions of title VI of the Civil Rights Act of 1964 for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given the opportunity for a hearing as provided in section 602 of Title VI of the Civil Rights Act of 1964, such hearing to be held within sixty days of such notice . . . and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of title VI of the Civil Rights Act of 1964.[70]

66. *See Hearings, supra* note 34, at 31-46.

67. 112 CONG. REC. 25,586-87 (1966).

68. *See* H.R. 1814 and Conf. Rep. (H.R. REP. No. 2309), 89th Cong., 2d Sess. (1966).

69. 42 U.S.C. § 2000(d) (1964).

70. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, § 182, 80 Stat. 1191.

The voting pattern which emerged in response to the Fountain amendment is instructive. The vote was 221-116.[71] Republicans voted almost unanimously (103-4) for the amendment while Democrats were closely divided (118-112). Of the Deep South Representatives, only Gonzales of Texas and Pepper of Florida voted against the amendment. It will be seen below that these two were among the handful of Southern congressmen supporting a stronger role for the federal enforcement of racially balanced schools. Delegations of the states of Massachusetts, Michigan, Minnesota, and New Jersey divided precisely along party lines, with Democrats opposing and Republicans favoring the amendment. Those nonsouthern Democrats who voted in favor of the amendment apparently did so on "ideological" grounds, rather than on grounds revealed by examining constituency variables. This conclusion is based on the writer's examination of four major variables for each constituency in question: percent of district population urban, percent of district population Negro, median family income, and median years of school completed by the district population. The examination revealed that there were no marked differences between the constituencies of proponents and opponents of the amendments.

By 1967 the "racial balance" activities of the Office of Education led at least one nonsouthern "liberal" congresswoman to urge that the guidelines be applied to all the country as a way of undermining racial imbalance. Congresswoman Edith Green, Democrat of Oregon, clearly delighted her Southern colleagues with her amendment to the ESEA Amendments of 1967. It accomplished two things: (1) it required HEW and its agencies to cite "the particular section or sections of statutory law or other legal authority" which served as the basis for any "rules, regulations, guidelines, or other published interpretations or orders issued;" and (2) it required that all "rules, regulations, guidelines, interpretations, or orders shall be uniformly applied and enforced throughout the fifty States." Although the Green amendment was the subject of very enlightening debate in the House, it was accepted by voice vote.[72]

B. Congressional Action on Racial Balance in 1968

Before the survey of the 1968 racial balance battle in the Congress is presented, the reader should be admonished that the writer has no

71. 112 CONG. REC. 25,586-87 (1966). *See also* 17 CONG. Q. ALMANAC 293-94 (1966).

72. 20 U.S.C. § 888 (Supp. III, 1965-67). For the debate, see 113 CONG. REC. H5798, H5932 (daily ed., May 22, 1967).

intention of creating an oversimplified impression that the courts and the executive bureaucracy are aligned against the Congress in the matter of racial balance. In many instances Congress has given the courts and the bureaucracy as much support as constituency pressures would permit. Certain federal legislators, of course, have displayed a strong involvement with the racial balance movement as a "civil rights" issue. One may cite in this connection the measures introduced and advocated by Congressman Adam Clayton Powell[73] and by Senator Edward M. Kennedy.[74] Both of these measures would have redefined segregation to include racial imbalance. Powell's measure would have cut off federal funds whenever racial concentrations of nonwhites in any public school exceeded a 20 percent variation from the average percentage of nonwhites in the district's total pupil population. Kennedy's proposal would have provided federal funds to encourage state and local racial balance programs. Neither of these measures has elicited strong support, but they serve to illustrate the kind of policy posture favored by those legislators who have endorsed the "integrationist" stance of the bureaucracy.

The 1968 deliberations on racially balanced schools began on June 26, 1968, when the House refused to excise the "Whitten Amendments" which had been added to the Labor-HEW Appropriations bill of 1969 by the Committee on Appropriations.[75] Authored by Representative Jamie Whitten, Democrat of Mississippi, the amendments read:

> Sec. 409. No part of the funds contained in this Act may be used to force busing of students, abolishment of any school, or to force any student attending any secondary [and elementary] school to attend a particular school against the choice of his or her parents or parent.
>
> Sec. 410. No part of the funds contained in this Act shall be used to force busing of students, the abolishment of any school, or the attendance of students of a particular school as a condition precedent to obtaining Federal funds otherwise available to any State, school district, or school.[76]

The motion to strike out the amendments was voted on first by a division, resulting in a vote of 75 to 116, and then by a teller vote—with 101 ayes and 137 nays.[77] The debate was clearly defined: "liberal" nonsouthern congressmen argued that without meaningful sanctions Southern school desegregation would never be realized; Southern

73. H.R. 13079, 89th Cong., 2d Sess. (1966).
74. S. 2928, 89th Cong., 2d Sess. (1966).
75. 114 CONG. REC. H5665 (daily ed. June 26, 1968).
76. *See id.* at H5644-60.
77. *Id.* at H5665.

congressmen argued that the effect of the amendments was merely to restrain federal bureaucrats from doing what they were in principle prohibited from doing but were doing nonetheless.

As passed by the House, sections 409 and 410 of the Labor-HEW Appropriations Act of 1969 were definitely curbs on the operations of the Office of Education throughout the country. The Senate version restated section 409's House-approved language, but added the phrase: "in order to overcome racial imbalance."[78] In other words, it limited the operation of the House's amendment to "force" racial balance situations. As for section 410, the Senate amended the House's language by inserting "in order to overcome racial imbalance" immediately before "as a condition precedent . . . ." Quite significantly, however, the Senate added a requirement calling for nationally uniform enforcement of HEW guidelines. The Senate language was considerably more specific than the original Green amendment discussed above; it required the Secretary to assign as many personnel to enforce Title VI of the 1964 Civil Rights Act "in the other States as are assigned to the seventeen Southern and border States."[79] In addition, the Secretary was required to enforce the law "by like methods and with equal emphasis in all States of the Union and to report to the Congress by March 1, 1969, on the actions he has taken and the results achieved in establishing this compliance program on a national basis."[80] It is the Senate language which is in effect at this writing.

The next step in the analysis is to identify those nonsouthern Representatives who voted against racial balance and those Southerners who had voted for racial balance and attempt to understand their behavior in terms of major constituency factors: percent of district population urban, percent of Negro population, median family income of families in the district, and the median years of school completed by district inhabitants.[81] There were only four

78. S. Rep. No. 1484, 90th Cong., 2d Sess. 89 (1968) contains the following language: "The Committee has approved sections 409 and 410 with perfecting amendments. The sections are not intended to place restrictions on local school authorities who wish to bus school children for reasons other than to overcome racial imbalance."

79. Departments of Labor and Health, Education and Welfare Appropriations Act, 1969, Pub. L. No. 90-557, § 410, 82 Stat. 969.

80. *Id.*

81. For our purposes a nonsouthern representative was counted as opposed to racial balance if he voted against racial balance on either or both of the votes; a Southern representative was counted as in favor of racial balance if he voted for racial balance on either or both of the votes. The votes may be explained as follows: Roll Call 366: on Flood motion that the House recede

congressmen from the Deep South who voted in favor of the stronger racial balance powers of HEW. In each of the four cases it appears that the favorable vote was cast for slightly differing reasons, none of which are very illuminating as to the future of the racial balance movement. Congressman Boggs of Louisiana has a very large proportion of nonwhites in his district's population (29.2 percent). He was as anxious to preserve his pro-Administration stance in view of the approaching election in which he faced a serious challenge. The behavior of Congressmen Eckhardt, Gonzales, and Pepper is explainable in ethnic terms. All three represented districts with a high proportion of Spanish-Americans.

The voting pattern of border state congressmen on the racial balance issue was characteristically ambivalent. Representatives of Kentucky, Tennessee, and Delaware, voted unanimously with their Deep South colleagues, while in Oklahoma's delegation only Majority Leader Carl Albert was a consistent supporter of the administration position. Maryland, on the other hand, was divided six to one in favor of racial balance. Missouri and West Virginia were closely divided.

All of the nonsouthern congressional delegations, with the notable exceptions discussed below, were against the amendments which would have weakened the power of HEW to prescribe racially balanced schools. The nonsouthern opponents of stronger HEW powers in this area were primarily Republican, and in view of the saliency of the partisanship involved in these votes, one is tempted to say that other factors were of minimal significance. There are some aspects of the voting behavior, however, which deserve attention.

A relatively large number of Republicans from districts with a relatively low percentage of urban population (very often these had low percentages of nonwhites as well) were opponents of racial balance in schools. It is suggested that these constituencies and their legislators found little interest in what seemed to them a strictly urban controversy. In addition, the Senate-passed version called for an expansion of the Office of Education bureaucracy, and it is plausible that these grassroots Republicans found this distasteful.

The voting of the Representatives of the "large and divided states" of California, Michigan, Ohio, and Pennsylvania provide the most difficult interpretative challenge. Partisan considerations may be

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from its disagreement to the Senate amendment 63 and concur therein with an amendment—which would have restored the original text of Whitten's amendments; Roll Call 368: on Cohelan preferential motion that the House recede from its disagreement to Senate amendment 64 (dealing with withholding of funds) and concur therein.

called into service again, but in a number of these states—notably Ohio and Pennsylvania—there were clear deviations from a party line. In Ohio six Republicans voted with four Democrats in favor of racial balance, while the Republicans were alone in opposing racial balance. In Pennsylvania the voting pattern is not clear: two Republicans and eight Democrats were classed "for racial balance" while ten Republicans and three Democrats were "against racial balance."

VII. Summary and Conclusion

Despite constitutional confusion on the matter for the time being, a number of significant legislative steps in the direction of racially balanced public schools have been taken at the local level. One state, Massachusetts, has adopted a law requiring local school authorities to maintain nonwhite pupil concentrations below the 50 percent level in all public schools or suffer the loss of state subsidies. Several state educational authorities have acted to foster public school pupil populations which are racially heterogeneous. Finally, there are important indications that many policy-makers and legislators at the federal level support racial balance as an element of the modern liberal-democratic credo.

These manifestations of support for racial balance, however, are intermingled with contradictory trends. The preceding analysis of congressional struggles over racial balance underscores the difficulty of convincing persons of diverse backgrounds and attitudes of the advisability of racially balanced schools. Despite a certain amount of acrimony, some local and state units have approved racial balance as a public policy; but where the policy has been successful, the community in question has, for one reason or another, chosen it of its own accord. Thus far, Congress has devoted its energies toward prohibiting the executive branch from requiring racial balance. At the same time, other interests have attempted to establish the policy of permitting, but not requiring, local authorities to balance schools with federal blessing.

The examination of present federal statutory authority relative to racial balance leads to the conclusion that so long as Congress attempts to apply one standard to the South and another to the nonsouth, it will be plagued by semantical, syntactical, and theoretical embarrassments. The statutory language requiring HEW authorities to apply Title VI of the 1964 Civil Rights Act on a national, uniform basis is rendered meaningless by the treatment of "racial imbalance" as a definitional category distinct from "segregation."

Finally, the data presented in support of and in opposition to racial balance give some measure of credence to the argument that a broad spectrum of the American public is opposed to further advances in the area of Negro rights. Just as significantly, however, the data demonstrate that there are many nonsouthern Representatives with a substantial percentage of Negroes in their constituencies who genuinely favor racially balanced public schools as a public policy.