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Racial Imbalance In the Public Schools: Constitutional Dimensions and Judicial Response

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NOTES

Racial Imbalance In the Public Schools: Constitutional Dimensions and Judicial Response

I. THE PROBLEM OF RACIAL IMBALANCE

A. *Racial Imbalance: Its Causes and Scope*

Eleven years after the decision of the Supreme Court in the School Segregation Cases,[1] white and Negro children remain separated in many school systems throughout the nation. In the South this racial separation has been persistently fostered by both school and public officials.[2] Since the rationale of the School Segregation Cases to the effect that official policy requiring separation on the basis of race is prohibited, this racial separation in the South, commonly known as segregation, is clearly illegal.[3]

Separation of the races in the school systems of the North and West has resulted both from devious types of racially motivated

1. Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

2. 1963 U.S. COMM'N ON CIVIL RIGHTS REP. 63.

3. In the *School Segregation Cases*, the Supreme Court held that separate but equal was inherently unequal and hence violative of the Constitution. This epochal decision invalidated statutes in seventeen states (all below the Mason-Dixon line) that compelled segregation and those in four other states and the District of Columbia that permitted it. GREENBERG, RACE RELATIONS & AMERICAN LAW 245 (1958).

action by public educational authorities[4] and from fortuitously created racial concentrations.[5] Primarily a northern problem,[6] this fortuitous racial separation in the public schools has been popularly termed "*de facto* segregation."[7] A more accurate designation of this situation is "racial imbalance."[8] Racial imbalance in the public schools results most commonly where neighborhood attendance policies[9] are superimposed on the homogenous racial populations of the large Northern cities.

The basic reason for the large racial concentration in the northern cities is the prevailing patterns of housing segregation.[10] This resi-

4. See Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y.), *appeal dismissed as premature*, 288 F.2d 600 (2d Cir.), *remedy considered on rehearing*, 195 F. Supp. 231 (S.D.N.Y.), *aff'd* 294 F.2d 36 (2d Cir.), *stay denied*, 82 Sup. Ct. 10, *cert. denied*, 368 U.S. 940 (1961), *order modified by application of school board*, 221 F. Supp. 275 (S.D.N.Y. 1963), where the unlawful segregation for which relief was ordered was found to be the result of school board action.

5. Sedler, *School Segregation in the North and West: Legal Aspects*, 7 ST. LOUIS U.L.J. 228 (1962). *The School Segregation Cases* clearly declared as invalid segregation resulting from racially motivated action by public officials; whether these decisions also declare invalid separation of the races due to purely fortuitous causes is not clear. See, *e.g.*, Note, 39 IND. L. REV. 606 (1964); Comment, 9 VILL. L. REV. 283 (1964).

6. Maslow, *De Facto Public School Segregation*, 6 VILL. L. REV. 353 (1961).

7. *Ibid.*

8. The use of the terminology *"de facto* segregation" is both semantically and logically incorrect. The term *"de facto* segregation" is popularly used to indicate the common situation where there is separation of the races on a basis other than race. "Segregation," however, implies separation on the basis of race. "Segregation" is a legal conclusion which denotes unconstitutionality. Therefore, calling separation of the races in the schools due to purely fortuitous reasons *"de facto* segregation" assumes the conclusion as to the legal validity of this problem. "The term *de facto* segregation makes the racially imbalanced school appear . . . [to be] the Northern counterpart of segregated education under the Jim Crow laws . . . . [A]s such, the term distorts reality and paralyzes thought." Fiss, *Racial Imbalance In The Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 566 (1965). As a more accurate term, racial imbalance will be used in this note to denote fortuitous racial separation in the public schools.

9. "The neighborhood school is particularly characteristic of the organization of elementary schools in urban areas. There with younger children involved, concern is felt for having the schools close at hand and available along safe routes which avoid major traffic problems . . . . A neighborhood school—however defined—reflects the economic, social, cultural, and racial characteristics of the area served." Foster, *The North and West Have Problems Too*, in INTEGRATION VS SEGREGATION 174 (Humphrey ed. 1964).

10. Attributing the cause of residential segregation to housing discrimination the Civil Rights Commission reported:

"In Phoenix, '97 per cent of practically all the Negroes live within a radius of 1 mile of the railroad tracks or the riverbed'; in Newark 'approximately 83 per cent are concentrated in 6 of Newark's 12 delineated neighborhoods. Three of these are the most deteriorated neighborhoods in the city'; in Indianapolis, '89 per cent of the Negroes . . . live in an area called center township. This is considered the inner city . . . and the structures there run from 75 years to a 100 years old.'" 1963 U.S. COMM'N ON CIVIL RIGHTS REP. 163.

In New York City a writer reports that "despite a city ordinance forbidding it, discrimination in housing is still widespread, and in any case the residential patterns

dential segregation may occur because of zoning ordinances,[11] court enforcement of racially restricted covenants,[12] or the establishment of racially segregated public housing.[13] Other reasons for the racial concentrations are the sharpened economic stratification of the population,[14] the economic disabilities of the Negro,[15] the flight of middle-class families to the suburbs,[16] and the failure of the Negro effectively to shed an existing ghettoized residential pattern.[17]

Although there is no precise definition of racial imbalance, it is most obviously indicated where a school is predominately Negro. The New Jersey Commission of Education ruled that the schools were

created by it still exist." Glazier, *Is Integration Possible in New York Schools?*, in INTEGRATION VS SEGREGATION 186 (Humphrey ed. 1964). See also 1963 U.S. COMM'N ON CIVIL RIGHTS STAFF REP., PUBLIC EDUCATION 58.

11. See Holland v. Board of Pub. Instruction, 258 F.2d 730. (5th Cir. 1958), where the court said:

"In the light of compulsory residential segregation of the races by city ordinance, it is wholly unrealistic to assume that complete segregation of the races existing in the public schools is either voluntary or the incidental result of valid rules not based on race." *Id.* at 732. This has occurred despite the fact that zoning ordinances requiring racial segregation have long been unconstitutional.

12. Prior to 1948, racially restrictive covenants were enforced with full validity. Although these covenants were rendered unenforcible by the Supreme Court in Shelley v. Kraemer, 334 U.S. 1 (1948), the effect of these covenants linger. In Woods v. Board of Educ., Civil No. 21593, E. D. Mich. 1961, racially restrictive covenants were claimed to have made the area around Thomson School in Highland Park, Michigan, exclusively Negro. U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS U.S.A.—PUBLIC SCHOOLS, CITIES IN THE NORTH AND WEST 17, 24 (1962).

13. For examples of racial imbalance allegedly caused by federal public housing, see Balabin v. Rubin, 20 App. Div. 2d 438, 248 N.Y.S.2d 574 (1964), where the court held that the rejected school zone was racially imbalanced "because of the residential segregation resulting from large public housing projects in the proposed zone." *Id.* at 441, 248 N.Y.S.2d at 577. A more subtle influence preventing correction of racial imbalance is the Federal Urban Renewal Law.

"The Federal urban renewal law requires a city to pay part of the cost of each renewal project. The city may earn credit toward its obligation by constructing new public facilities, such as schools. But if these facilities derive more than 20 per cent of their use from people living outside of the renewal area, the city loses part of the credit toward its obligation. This, discourages any local policy to locate and district a school to promote a racially heterogeneous school population, if, to achieve this objective, more than 20 per cent of the pupils would have to live outside of the renewed area and be included in the school's attendance area." 1963 U.S. COMM'N ON CIVIL RIGHTS STAFF REP., PUB. EDUCATION vi n.2.

14. NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL, DE FACTO SEGREGATION IN PUBLIC SCHOOLS 4 (1964).

15. Foster, *supra* note 9, at 173.

16. "The Negroes have pointed out that although the primary cause of racial imbalance in the schools may be the private residential discrimination, the very imbalance in the schools also aids in furthering housing discrimination . . . . Toleration of racial imbalance in the schools often requires white residents of a changing area who might otherwise stay, to move to other districts. Being thus driven from their former neighborhood may induce them the next time to fight more effectively against any Negro occupancy." Kaplan, *Segregation Litigation and The Schools—Part III: The Gary Litigation*, 59 NW. U.L. REV. 121, 169 (1964).

17. Fiss, *supra* note 8, at 585.

racially imbalanced when they were 96.2 per cent,[18] 98 per cent,[19] and 99 per cent[20] Negro. On the other hand, New York's Commissioner of Education considered a racially imbalanced school "as one having 50 per cent or more Negro pupils enrolled."[21] Because of these widely varying views, any definitive assessment of racial imbalance requires an examination of the entire school system.[22] A predominantly Negro school in a predominantly Negro school system is not racially imbalanced. Thus, in addition to the "predominantly Negro" criterion, the proportion of Negroes in the school must drastically exceed the proportion of Negroes in the other public schools in the system. A school is racially imbalanced only when it is "both predominantly Negro and literally imbalanced."[23]

When racial imbalance is defined in this manner, the scope of the problem in the school systems of the North and West is staggering. It was reported that in 1961, 75 of New York City's 570 schools were 90 per cent Negro and Puerto Rican. In Chicago, 87 per cent of the Negro elementary pupils attended practically all-Negro schools. In Detroit, 45 per cent of 107,000 Negro children were in schools where 80 per cent of the school population was Negro. In Philadelphia where 47 per cent of the students were Negro, 38 schools had Negro enrollments of 99 per cent. Los Angeles had 43 elementary schools that were at least 85 per cent Negro.[24]

Although northern Negroes have protested racial imbalance since even before the *Brown* decision,[25] their success was minimal[26] until the early sixties when the civil rights movement gained momentum. At this time Negro protests changed from petitions and personal appearances before school boards to various types of public demonstrations as well as recourse to both state and federal courts.[27]

18. Booker v. Board of Educ., 8 RACE REL. L. REP. 1228 (1963).

19. Spruill v. Board of Educ., 8 RACE REL. L. REP. 1234 (1963).

20. Fisher v. Board of Educ., 8 RACE REL. L. REP. 730 (1963).

21. Memorandum to All Chief Local School Administrators and Presidents of Boards of Education, N.Y. State Comm'r of Educ., June 14, 1963, 8 RACE REL. L. REP. 738, 739 (1963).

22. For an enumeration of the criteria California considers important, see CAL. ADM. CODE tit. 5, § 20 ii.

23. Fiss, *supra* note 8, at 565.

24. Maslow, *supra* note 6, at 354-55. See, *e.g.*, 1963 U.S. COMM'N ON CIVIL RIGHTS STAFF REP., *supra* note 10, at 62-63.

25. Although Negro protests against racial imbalance were few in number, they did result in the formation of the now-famous Princeton Plan which was developed in Princeton, New Jersey in 1948. Kaplan, *Segregation Litigation and The Schools—Part I: The New Rochelle Experience*, 58 NW. U.L. REV. 1, 3 (1963).

26. Before *Brown* "the movement in this direction, however, was hardly perceptible, and in those Northern areas where Negroes did protest over education, their efforts were directed either to improving the quality of education in the Negro schools or to preventing methods they regarded as deliberate segregation." *Ibid.*

27. Professor Kaplan argues that despite some successes the scope of racial imbalance

Protests in Metropolitan New York City have included demonstrations, picketing, sit-ins, and school boycotts since 1961. Englewood, New Jersey, has also been a center of protests which included periodic rallies featuring Negro celebrities, boycotts, sit-ins, and picketing at the Governor's office in Trenton. Picketing has been utilized for protest in Philadelphia, Boston, Chicago and St. Louis.[28] "As of June 1963, the NAACP reported active investigation and protest of racial segregation in the public schools of 64 school districts in 18 states[29] of the North and West."[30] In a number of these school districts relief was being sought either in the courts or by administrative appeals under state law.[31]

B. *Racial Imbalance: Its Effect on Negro Children*

The protests against the racially imbalanced schools of the North and West are based on the proposition that the Negro child is harmed by attending this type of school. The most obvious evidence of this proposition is the academic inadequacy of the racially imbalanced school. There seems to be general agreement that the racially imbalanced school is in the lowest stratum of the educational system.[32] These schools are ordinarily located in the slum areas of the city, the cultural level of the student body is exceedingly low, the physical plants are usually out-of-date and overcrowded, discipline is a continuous problem, the teaching staff usually is inexperienced and class size is generally disproportionately large.[33] "In general the Negro schools tend to be the worst by almost every method of measurement."[34] A not unexpected result of these conditions is that the educational level of the children in racially imbalanced schools "is markedly below that of their white peers."[35]

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in the North and West has not been lessened to any great degree. This failure is attributed to the priority given by Negro political leaders to attacks on discrimination in other facets of life rather than in the schools. *Id.* at 4.

28. 1963 U.S. COMM'N ON CIVIL RIGHTS REP. 53 "In Boston, some 3,000 junior and senior high school students stayed out of school for a day and attended workshops in neighborhood churches and social centers where they were instructed in Negro history, U.S. Government, and civil rights, and the principles of nonviolence. In St. Louis 30 parents and ministers blocked the departure from a West End school of 12 buses containing about 500 children who were being transported to under-utilized white schools miles away, where they would attend all-negro classes." *Id.* at 53-54.

29. "The 18 states were: Arizona, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Washington." 1963 U.S. COMM'N ON CIVIL RIGHTS STAFF REP., *supra* note 10, at 4 n.14.

30. *Id.* at 4.

31. *Ibid.*

32. Kaplan, *supra* note 25.

33. Fiss, *supra* note 8, at 569-70.

34. Kaplan, *supra* note 25.

35. Maslow, *supra* note 6, at 356. See Fuller v. Volk, 230 F. Supp. 25 (D.N.J.

The unresolved question, however, is whether this academic deprivation results from racial separation or merely from the fact that the racially imbalanced school is ordinarily a slum school. There are a number of proponents of the argument that there is a causal relationship between racial imbalance and depressed motivation and achievement in the Negro child. Fiss points out "that students in such schools are also deprived of the intellectual stimulation that comes from the exchange of ideas and the development of personal relationships in a racially and socially heterogeneous context."[36] Professor Kaplan argues, however, that this causal relationship is far from clearly established. "Indeed the only careful study reported showed that when correction was made for social class, intelligence, and other variables, the Negro child in an all-Negro school achieved every bit as much as the Negro child in an integrated school."[37] This difference of opinion indicates that the evidence of a causal relationship between racial imbalance and academic deprivation remains unestablished. Certainly, a logical argument can be made that the concerted improvement of the schools, both racially imbalanced and balanced, in the economically depressed areas of these cities might solve many of these problems of academic deprivation.[38]

Another widely accepted belief is that the Negro child is psychologically harmed by attending a racially imbalanced school. Confinement to a predominantly Negro school is felt to cause feelings of inferiority that hamper subsequent development of the Negro child's personality. Because the Supreme Court in *Brown* found that "to separate them (Negroes) from others of similar age and qualifications solely because of their race generates a feeling of inferiority . . . unlikely ever to be undone,"[39] proponents of racial balance in the

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1964), where the court indicated that in the racially imbalanced school "among the Negro pupils . . . achievement scores were lower, retentions in grade were higher, high school records of graduates were poorer, and drop-outs among graduates were higher, as compared with the Negro and white pupils in other elementary schools." *Id.* at 31. See also Tillman, *The Case Against De Facto Segregated Education in the North and West: A Contemporary Case Study*, 33 J. NEGRO EDUC. 371, 377 (1964).

36. Fiss, *supra* note 8, at 569-70.

37. Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U.L. REV. 157, 175 (1963). The study referred to by Professor Kaplin is, St. John, *The Relation of Racial Segregation in Early Schooling to the Level of Aspiration and Academic Achievement of Negro Students in a Northern High School*, 1962 (thesis presented to the Faculty of the Graduate School of Education of Harvard University).

38. "It is my belief that satisfactory education can be provided in all all-Negro schools through the expenditure of more money for needed staff and facilities." CONANT, SLUMS AND SUBURBS 28-29 (1961). Professor Kaplan also suggests that racial imbalance is "a class problem rather than a racial problem." Kaplan, *supra* note 37, at 207.

39. Brown v. Board of Educ., *supra* note 1, at 494.

schools argue analogously that racial imbalance also breeds inferiority. This inferiority,

> 'stems both from the compelled association with people only of the same low social status and from a widely shared belief that the racially imbalanced school is the school with the lowest status in the community.'[40]

Also, it is suggested that the Negro child may believe that the zoning which produces the racially imbalanced school is in fact a tacit form of segregation.[41]

It is sufficient to note that the controversy surrounding this argument on whether this *Brown*-type inferiority develops because the races are separated or because racial classifications are employed to separate the races. If racial classification is the determinative factor, then there is no causal relationship between racial imbalance and this alleged psychological harm.

A more damaging aspect of racial imbalance relates to a purpose of education which although less emphasized is fully as important as developing the potential ability of individual pupils. This corollary goal of education "is . . . to induct the young person systematically into the culture and society to which he is an heir and in which he should be a partner."[42] The Supreme Court recognized the importance of this adjunct to the academic purpose of education in *Brown*. "Today it (education) is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[43] It seems clear that regardless of the cause of the separation of the races the isolation of a minority race will prevent the achievement of this educational goal.[44] In the racially imbalanced school as well as in the segregated school, the racial minority is deprived of equal educational opportunity due to the lack of "educational and social contacts and interaction"[45] with pupils of the majority race. The relevence of racial balance in the schools to equal educational opportunity was emphasized by a report of the Advisory Committee on

40. Fiss, *supra* note 8, at 569.

41. "It is true that in a situation where the Negro helieves that racial zoning was used by the school authorities but is unable to prove it, one would expect that some harm might occur—the same type of harm that may occur to anyone who incorrectly believes that his rights have been violated." Kaplan, *supra* note 37, at 175.

42. FISCHER, WASHINGTON CONFERENCE 13, reported, 1963 U.S. COMM'N ON CIVIL RIGHTS STAFF REP., *supra* note 10, at 76.

43. Brown v. Board of Educ., *supra* note 1, at 493.

44. 1963 U.S. COMM'N ON CIVIL RIGHTS STAFF REP., *supra* note 10, at 78. "Only if the ethnic composition of the schools reflects in some degree the community of which their pupils will be a part upon the completion of their schooling, can the schools prepare them to take their places in the world of work on terms of equality." *Ibid.*

45. Taylor v. Board of Educ., 191 F. Supp. 181, 193 (S.D.N.Y. 1961).

Human Relations and Community Tensions to New York state's Commissioner of Education.

> The common school has long been viewed as a basic soeial instrument in attaining our traditional American goals of equal opportunity and personal fulfillment. The presence in a single school of children from varied racial, cultural, socio-economic, and religious backgrounds is an important element in the preparation of our young people for active participation in the social and political affairs of our democracy.[46]

II. Does the Constitution Require Elimination of Racial Imbalance?

A. *Racial Imbalance Caused By Racially Motivated Conduct*

The *Brown* decision clearly held unconstitutional segregation imposed by sanction of law. The Supreme Court further held in *Cooper v. Aaron*,[47] that the fourteenth amendment prohibitions against racial discrimination in the public schools,

> extend to all action of the state denying equal protection of the laws: whatever the agency of the state taking the action . . . or whatever the guise in which it is taken . . . and that the constitutional right of a student not be discriminated against in the public schools on grounds of race or color . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuosly.'[48]

The question of evasive action by school officials resulting in racial imbalance was raised in the context of a racially imbalanced school in *Taylor v. Board of Education*.[49]

The city of New Rochelle has an elongated shape, with its length from north to south being almost four times its average width. The southern section of the city was populated first while the northern section had only developed in recent years. Both the southern and northern ends of the city are predominantly white while the south central portion of the city is the major area of Negro population. The Lincoln School District lies in the center of this Negro area.[50]

In 1930, a policy of gerrymandering was instituted which led to the confining of Negroes within the Lincoln School District by redrawing the district lines to coincide with Negro population move-

46. N.Y. State Comm'n of Educ.'s Advisory Comm'n On Human Relations And Community Tension, Guiding Principles For Securing Racial Balance In Public Schools, 8 Race Rel. L. Rep. 739-40 (1963).
47. 358 U.S. 1 (1958).
48. *Id.* at 17.
49. *Supra* note 45.
50. *Id.* at 185.

ments, with the result that in 1949 Lincoln School was 100 per cent Negro.[51] In 1949, the School Board adopted a neighborhood school policy by refusing further transfers and admitting new students only to the school of the district in which they reside. Although this policy had been in force for some time, permissive transfers had nullified its effectiveness. Rigid enforcement of this neighborhood school policy resulted in Lincoln School's population being 94 per cent Negro at the inception of this suit.[52]

Although several studies of school district lines by experts both in and out of the New Rochelle School System called for extensive redistricting and a more flexible use of the "neighborhood school policy,"[53] the Board took no action except to propose rebuilding the Lincoln School on its present site. "In the light of the Board's policy of refusal to allow children to transfer to schools in other districts this would mean a freezing of segregation at Lincoln."[54] After this proposal was carried by referendum vote of the New Rochelle voters in May, 1960, this class action was instituted to restrain the School Board from constructing the new school on the same site and also to enjoin the Board from refusing to allow Negro students to register in schools not segregated as well as requiring Negro students to register in a segregated school.

In affirming the grant of the relief sought, Judge Clark clearly differentiated the Lincoln School situation from the school which is racially unbalanced due to a combination of residential patterns and the "neighborhood school policy."

> The Board considered Lincoln as the 'Negro' school and . . . district lines were drawn and retained so as to perpetuate this condition. In short, race was made the basis for school districting, with the purpose and effect of producing a substantially segregated school.[55]

The conduct of the School Board in gerrymandering school district lines on the basis of race was held to have violated the fourteenth

51. "Around 1930, an area of several blocks, occupied by whites, was carved out of the Lincoln District and added to the Daniel Webster District, even though this area was adjacent to the Lincoln School and was a relatively long distance from the Webster School. When Negroes later moved into this area it was restored to the Lincoln District. . . . It also appears that until 1949 the Board allowed white children within the Lincoln District to transfer to other schools . . . ." 294 F.2d at 38.

52. *Ibid.*

53. A professional team from Teachers College, Columbia, and the School of Education of New York University made a report entitled "Racial Imbalance in Public Education in New Rochelle, New York" which made strong recommendations that the School Board act toward resolving the problems of racial imbalance in the school system. *Ibid.*

54. *Id.* at 39.

55. *Ibid.*

amendment as interpreted in the *Brown* case. There is no distinction between "segregation established by the formality of a dual system, as in *Brown*, and that created by gerrymandering of school district lines and transferring of white children as in the instant case."[56]

The basic conflict between the litigants as to the meaning of the *Brown* decision clearly illustrates the confusion which surrounds this case. The Board argued that Lincoln School was not a component of a dual system of education because the school was only ninety-four per cent Negro. Judge Kaufman in the district court held that this argument was based on a misconception of the underlying premise of the *Brown* rationale.

> That opinion . . . was premised on the factual conclusion that a segregated education created and maintained by official acts had a detrimental and deleterious effect on the educational and mental development of the minority group children. The court further emphasized the necessity of giving these minority group children the opportunity for extensive contact with other children at an early stage in their educational experience, finding such contact indispensable . . . .[57]

Thus, although Lincoln School was six per cent white, it must be considered segregated under the premise of the *Brown* decision. 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*."[58]

Judge Kaufman summarily disposed of the neighborhood school policy argument advanced by the Board without considering its constitutionality. The neighborhood school policy is not examined in the abstract but only in the context that it was used by the Board to perpetuate segregation in Lincoln School.

> The neighborhood school policy certainly is not sacrosanct. It is valid only insofar as it is operated within the confines established by the Constitution. It cannot be used as an instrument to confine Negroes within an area artificially delineated in the first instance by official acts. If it is so used, the Constitution has been violated and the courts must intervene.[59]

This case must be viewed as holding only that if a Board of Education enters into a course of conduct motivated by a purposeful desire to perpetuate and maintain a segregated school, the constitutional rights of those confined within this segregated establishment have been violated. This decision does not deal with segregation resulting

56. 191 F. Supp. at 192.
57. *Ibid.*
58. *Id.* at 193.
59. *Id.* at 195.

from fortuitous residential patterns. Thus, the court leaves undecided the constitutionality of "*de facto* segregation."[60]

This principle was reaffirmed by a federal district court in Illinois in *Webb v. Board of Education.*[61]

> It would appear that the only basis for equitable relief in this case must be found in the form of an intentional design on Defendant's (School Board) behalf to maintain segregation in the public schools.[62]

An even more recent case dealing with intentional gerrymandering of school districts is *Downs v. Board of Education.*[63] The complainant charged the School Board with attempting to cause racial segregation by the drawing of a boundary line between two junior high school attendance districts. Also, the complainant protested the adoption and implementation of a pupil transfer system which allowed a student to transfer from a school where the majority of the students are of a different race. The Federal District Court of Kansas held the transfer system invalid because it recognized race as a factor in the determination of the school a student shall attend.[64] As to the relocation of the attendance lines, the court found that the Board had acted in good faith to make the most efficient use of facilities by balancing the enrollment between the two schools.[65] The court found that, with the exception of the transfer system, the overall policy of the Board has served to effectuate a non-discriminatory school system where each child will attend the school within the district of his residence without regard to race.[66] Therefore, the court dismissed the complaint in all respects except that of the transfer policy. The Tenth Circuit[67] affirmed the action of the district court, holding

60. In a footnote the district court distinguishes "*de jure*" and "*de facto*" segregation. "*De jure*" refers to segregation created or maintained by official act. "*De facto* segregation" is segregation resulting from fortuitous residential patterns. The court emphasized that this decision did not determine whether "*de facto*" segregation is violative of the Constitution. *Id.* at 194 n.12.

61. 223 F. Supp. 466 (N.D. Ill. 1963).

62. *Id.* at 468.

63. 9 RACE REL. L. REP. 1214 (D. Kan.), *aff'd,* 336 F.2d 998 (10th Cir. 1964), *review denied,* 380 U.S. 914 (1965). See also Craggett v. Board of Educ., 234 F. Supp. 381 (N.D. Ohio), *aff'd per curiam,* 338 F.2d 941 (6th Cir. 1964), where the court also found no intent on the part of the school board to segregate. It is important to note in this case that the court held that the school officials were presumed to have properly discharged their duties.

64. Downs v. Board of Educ., 9 RACE REL. L. REP. 1214 (D. Kan. 1963). See also Goss v. Board of Educ., 373 U.S. 683 (1963), where the Supreme Court declared that transfer provisions of this type not only lend themselves to the perpetuation of segregation, but can only work toward that end. Consequently, they promote racial discrimination and violate the equal protection clause of the fourteenth amendment to the Constitution. *Id.* at 687.

65. *Ibid.*

66. *Ibid.*

67. Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964).

that the School Board was not engaged in gerrymandering of attendance area lines nor was it using arbitrary assignment procedures to perpetuate segregation.[68] While recognizing that racial imbalance exists in the city schools, the court found that this condition had resulted from a good faith implementation of a neighborhood school policy.[69]

The intent of the School Board as manifested by their actions is the crucial consideration under the *Taylor* doctrine. If the intent is racially motivated, then the action of the School Board is unconstitutional. But if the court finds the acts of a School Board not racially motivated as in *Webb* or *Downs*, then the court will sustain its action.[70]

B. *Fortuitous Racial Imbalance*

1. *The Constitutional Violation.*—The question of whether the racially imbalanced school violates rights protected by the Constitution encompasses a highly controversial area of Constitutional law. From a duty oriented approach the question is whether the Constitution imposes a duty on the public educational authorities to aet to ease fortuitous separation of the races. However, approaching the problem by considering the rights of the parties involved, the question is whether the Negro child has a constitutional right to attend racially balanced schools. The solution to these questions depends on an interpretation of *Brown* considered in the context of prior decisions by the Supreme Court dealing with segregated education.

In *Brown*, the Supreme Court clearly held that segregated schools were unconstitutional. This decision, as were *Sweatt v. Painter*[71] and *McLaurin v. Oklahoma State Regents*[72] which preceeded *Brown*, was predicated on the theory that the equal protection clause of the fourteenth amendment prohibited the denial of equal educational opportunity because of race. In the cases preceeding *Brown*, tangible deprivations of this equal educational opportunity were readily apparent. In *Sweatt*, the superiority of the all-white law school as to "nnmber of faculty, variety of courses and opportunity for specialization, size of the student body, scope of library, availability of law review and similar activities,"[73] was an unquestioned violation of equal educational opportunity. Turning to intangible factors in *Sweatt*, the

68. *Id.* at 996.
69. *Id.* at 997.
70. In Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich. 1958) and Sealy v. Department of Pub. Instruction, 159 F. Supp. 561 (E.D. Pa. 1957), *aff'd*, 252 F.2d 898 (3d Cir.), *cert. denied*, 356 U.S. 975 (1958), the courts also sustained action taken by the respective school boards after finding that the acts contested were not racially motivated.
71. 339 U.S. 629 (1950).
72. 339 U.S. 637 (1950).
73. Sweatt v. Painter, *supra* note 71, at 633-34.

Court also indicated that the Negro student received unequal treatment in that the white law school "possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school."[74] In *McLaurin*, the Supreme Court considered restrictions which forced a Negro graduate student to remain apart from students of other races in the classrooms, library, and cafeteria.[75] These restrictions were held to violate the principle of equal educational opportunity in that the enforced separation impaired "his ability to study, to engage in discussions and exchange views with other students, and, in general to learn his profession."[76]

In *Brown*, however, none of these tangible deprivations existed, thus the Supreme Court was forced to consider "the effect of segregation itself on public education."[77] The Court reached the obvious conclusion that public education was of such importance to the cultural, professional and environmental development of the child that where the state has undertaken to provide educational opportunity, this opportunity is "a right which must be made available to all on equal terms."[78] The Court then posed and answered the question that is the very crux of this landmark decision.

> Does 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 the children of the minority group of equal educational opportunities? We believe that it does . . . .
>
> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[79]

The Supreme Court concluded this decisional analysis by holding that "separate educational facilities are inherently unequal."[80]

Eleven years after the *Brown* decision, the controversy concerning the specific rationale by which the Supreme Court decided *Brown* rages anew. Imposition of a duty to alleviate racial imbalance depends on what *Brown* held to constitute a deprivation of equal educational opportunity. The fact that legal scholars have not agreed as to what constituted the violation of equal educational opportunity in *Brown* explains their varying posture as to the duty to act to ease

74. *Id.* at 633.
75. McLaurin v. Oklahoma State Regents, *supra* note 72, at 640.
76. *Id.* at 641.
77. Brown v. Board of Educ., 347 U.S. 483, 492 (1954).
78. *Id.* at 493.
79. *Id.* at 493-94.
80. *Id.* at 495.

racial imbalance.[81] A later examination of decisions from the state and federal courts dealing with racial imbalance will reveal this same division of opinion as to the meaning of *Brown* with the comcommittent variance of opinion as to the validity of the racially imbalanced school.

One view of the *Brown* rationale emphasizes the Court's examination of the tangible and intangible inequalities of segregated education in *Sweatt, McLaurin* and *Brown.* Under this theory, a showing of substantial and unjustified inequality is necessary to establish a violation of the equal educational opportunity espoused in *Brown.*[82] Obviously the validity of the sociological evidence of inequality resulting from segregated education assumes great importance under this theory.[83] The logical transition to the racially imbalanced situation is provided by the statement in *Brown* that "separate educational facilities are inherently unequal."[84] The argument is then advanced that since it is separate education that breeds inequality, the racially imbalanced school fails to provide this constitutionally required equal educational opportunity. Where there is such a clear showing of inequality between the racial imbalanced and balanced schools of a community that the use of geographic criteria for zoning cannot be justified, the public educational authorities would have a duty to attempt to ease racial imbalance. "The school board is obliged to remedy only the harmful imbalance that is also unjustified."[85]

The opposing theory as to the rationale of the equal educational opportunity principle is that the decisions in *Sweatt, McLaurin* and *Brown* all rest on the principle that separation by race is an inherently arbitrary classification that may not, within the confines of constitutional equal educational opportunity, be employed by government to separate one group of students from another.[86] Proponents of

81. See Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 HARV. L. REV. 564, 590-95 (1965); Kaplan, *supra* note 37, at 171-74.

82. "In each case a court will be called upon to decide whether the racial imbalance that exists in the schools of a particular community results in a systematically and substantially inferior educational opportunity for Negroes. No matter how conscientious the court that decides this question, an irreducible amount of uncertainty will remain." Fiss, *supra* note 81, at 595-96.

83. Although the sociological evidence presented in *Brown* assumes crucial importance under this theory, Professor Kaplan argues that this evidence "was by no means sufficiently definite, unambiguous, uncontradicted, or sweeping to allow the court to find as a fact, irrefutable in all future cases . . . even deliberate state-imposed segregation in schools would work such harm on Negro children as to require a finding of unconstitutionality." Kaplan, *supra* note 37, at 173. *Accord,* Black, *The Lawfulness of the Segregation Decisions,* 69 YALE L.J. 421 (1960).

84. *Supra* note 80.

85. Fiss, *supra* note 81, at 613.

86. For the best statement of this theory see Kaplan, *supra* note 37, at 171-74. For a different interpretation of this theory, see Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. PA. L. REV. 1 (1959).

this theory argue that the language indicating tangible and intangible inequality in *Sweatt, McLaurin,* and *Brown* was used for two reasons. First, because the Court was not prepared to overrule *Plessy v. Ferguson,*[87] it was necessary to show the Negro plaintiffs in these cases would prevail under the *Plessy* rule. Second, this sociological evidence of inequality was used merely to buttress the holding that inherently arbitrary classifications violated equal educational opportunity. In relegating the showing of inequality in *Brown* to the background, Professor Kaplan maintains that,

> The Supreme Court has never held that in the absence of some racial classification the mere inequality of one school compared with another involves a constitutional violation. In many communities one school is clearly better in terms of faculty, student body, physical facilities, and prestige than others, yet no one has suggested that this inequality raises a federal constitutional question. If pure inequality were the essence of the constitutional violation, such schools might in some ways be much more unequal and inferior than many schools segregated by force of law.[88]

Under the rationale of *Brown,* there would seem to be no duty to act to alleviate fortuitous racial imbalance because in the racially imbalanced school the separation of the races is not a result of racial classification. Thus, under the inherently arbitrary classification theory, mere racial imbalance does not constitute a deprivation of equal educational opportunity.

While the latter rationale of the *Brown* decision has been utilized in the majority of courts that have examined the validity of racially imbalanced schools, a few courts have followed the view that separation of the races with attendant, unjustified inequality violates a constitutional mandate for equal educational opportunity. In most instances the action of this small minority of courts seems to have been motivated by extremely strong findings of educational inequality in these imbalanced schools.[89] Thus, until the Supreme Court clarifies this controversy as to the basis of the *Brown* decision, the possibility of a court finding a duty to reduce racial imbalance depends to a great degree on the ability of the plaintiff's attorneys to emphasize

87. 163 U.S. 537 (1896). This case established the famous "separate but equal" doctrine that was used to test validity of the segregated school until the *Brown* decision.

88. Kaplan, *Segregation Litigation and the Schools—Part II: The Great Northern Problem,* 58 NW. U.L. REV. 157, 172 (1963). Supplementing this argument is the fact that subsequent to the *Brown* decision the Supreme Court struck down segregation in golf courses, Holmes v. City of Atlanta, 350 U.S. 879 (1955), and in parks, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958), without expressly or impliedly finding any of the type of harm which some writers feel was determinative in *Brown.*

89. See Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1962).

from the academic, psychological, and cultural standpoints, the inequalities of the racially imbalanced school. A closer examination of the cases will reveal, however, that several courts have found no constitutional violation where the racially imbalanced school is found grossly unequal in all respects to neighboring racially balanced schools.

2. *The Judicial Response*—(a). *Presumption of Unconstitutionality.* —In *Evans v. Buchanan,*[90] Negro children petitioned for an order allowing them to transfer from their all-Negro school to an integrated school. The court found that because this was an all-Negro student and faculty school administered by its own separate Boards of Trustees, and surrounded by predominantly white attendance areas, "the controlling public attendance plan is subject to careful scrutiny and the promulgators of the plan should have the duty of justification."[91] The court placed the burden of proof on the Delaware State Board of Education, holding that "a presumption of unconstitutionality arises under this set of facts."[92] The court justified this extra burden for the defendant on two grounds that, "first, the basic facts are highly probative of the presumed fact. Secondly, the evidence, in great part, rests in the hands of those who conceived and implemented the plan."[93]

After the State Board of Education presented its proof,[94] the court found the evidence did not rebut the presumption of unconstitutionality by showing that the plan of school attendance areas was justified as rational and nondiscriminatory. Therefore, it was ordered that the petitioning school children be admitted to the integrated school.

The *Evans* court squarely rejected the petitioners' arguments that the School Board must take affirmative action to provide Negroes with an "integrated education" or even that they must consider the factor of race in setting up school districts.[95] The court held that de facto segregation was not prohibited by the Constitution and that the state had no affirmative duty to integrate.[96]

90. 207 F. Supp. 820 (D. Del. 1962).

91. *Id.* at 825.

92. *Ibid.* The Court suggests that this type of presumption is not limited to this set of facts. It might be employed in other factual circumstances. The court indicates that the one fact of an all negro student body might be sufficient to justify the invocation of the presumption, however, the court makes no decision as to this question. *Id.* at 825 n.12.

93. *Id.* at 825.

94. The Board's only witness testified that only facilities, location and access roads were considered in drawing up the plan. This was, in essence, all the Board offered in justification. *Id.* at 825 n.14.

95. *Id.* at 823.

96. This holding was based on an interpretation of the equal protection clause of the fourteenth amendment as a "prohibition preventing the states from applying their laws unequally" rather than a clause which compelled affirmative action. *Ibid.*

Although this decision does not vitiate true de facto segregation, it makes official segregation disguised as de facto segregation no longer possible. The crucial result of this decision was to make the constitutionality of the Board's zoning action a question of fact[97] reserved for detailed scrutiny. Simultaneously, the presumption of unconstitutionality shifts the burden of justification to the School Board.[98]

Although official action by public officers, including school boards, is ordinarily presumed to be legally performed,[99] courts in segregation cases have been less willing to accept school desegregation plans without an independent analysis of the factors involved. Although acceptance or rejection of the plans has not been phrased in terms of presumption or burden of proof, the approach is analogous to *Evans*.[100]

Although pure de facto segregation will not be prevented by the *Evans* approach, this approach avoids the evidentiary problems of showing an intent to segregate, and it strikes at discrimination, the results of which are similar to de facto segregation. It may also provide a stimulus for school boards to meet and deal with these problems. But the effect of the opinion on segregationist practices will depend upon the burden placed upon and evidence required of the Board. The court failed to specify adequately the facts upon which the presumption will arise and did not consider whether the burden of persuasion or only the burden of production had been shifted to the Board. The court spoke only of the duty of justification required of the Board.[101] If only the burden of production was shifted and petitioners retain the burden of persuasion, they gain little advantage, for this is the position they would normally occupy if they had merely presented enough evidence for the court to draw an inference of segregation.

(b). *No Duty To Ease Racial Imbalance.*—The basic question left unanswered in the *Brown* case was whether the states have an affirmative duty to provide Negroes with an integrated education. The first

97. *Id.* at 825.

98. See MCCORMICK, EVIDENCE 641 (1954); 9 WIGMORE, EVIDENCE § 2534 (3d ed. 1940).

99. See, *e.g.*, Northcross v. Board of Educ., 302 F.2d 818 (6th Cir. 1962); Jones v. School Bd., 278 F.2d 72 (4th Cir. 1960); Mapp v. Board of Educ., 203 F. Supp. 843 (E.D. Tenn. 1962).

100. For example, in Northcross, *supra* note 99, the court held the Tennessee Pupil Assignment Law inadequate to convert a segregated system into a nonracial one. *Id.* at 821. The burden rested with school authorities to initiate desegregation, and Negro children were not required to apply for that to which they were entitled as a matter of right. The court found that a segregated school system existed in fact and that the Board had not acted under the assignment law toward establishing nonracial schools. *Id.* at 823. The Board was to submit a realistic plan for the organization of its schools on a nonracial basis. *Id.* at 824.

101. Evans v. Buchanan, *supra* note 90, at 825.

case which directly considered this question was *Evans v. Buchanan.*[102] The Federal District Court of Delaware held in this case that the states were not required by the equal protection clause of the fourteenth amendment of the Federal Constitution to provide an integrated education for Negro children.[103] This conclusion was based on a narrow interpretation which restricted the *Brown* rationale to situations in which Negroes were separated solely on the basis of their race.[104] Therefore, the court concluded that if races are separated because of geographic or transportation considerations or other similar criteria, it is no concern of the federal constitution. Thus, discrimination is forbidden but integration is not compelled.[105]

Despite the *Evans* holding that the *Brown* decision did not affirmatively require integration, the court deemed it necessary to consider the fact of separation of races because the crux of the *Brown* decision was involved with the harmful effects on Negro children of being forced to attend separate schools. The court dealt with this problem in three ways. First it indicated that the harmful psychological effects probably did not result where Negroes "have not been discriminated against, as such, but who merely live near each other."[106] The tenuous nature of this proposition is emphasized by the absence of any authority supporting it. Secondly, the court pointed out that if any of these deleterious effects are suffered by the Negro children they are outweighed by "the dangers of children unnecessarily crossing streets, the inconvenience of traveling great distances and of overcrowding and of other possible consequences of ensuring mixed schools."[107] The court seems here to invent straw men and then destroy them for none of these problems were raised in this case. The problem of crossing streets does not seem insurmountable, nor does that of providing additional methods of transportation. The court does not

102. *Supra* note 90. Before this case the duty to racially balance the schools had only been referred to in dictum in the context of litigation involving the southern school. See Thompson v. Arlington School Bd., 144 F. Supp. 239 (E.D. Va.), *aff'd*, 240 F.2d 59 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957), where the court said:

"It must be remembered that the decisions of the United States Supreme Court in Brown v. Board of Education do not compel the mixing of the different races in the public schools. No general reshuffling of the schools in any school system has been commanded. The order of that court is simply that no child shall be denied admission to a school on the basis of race or color." 144 F. Supp. at 240.

103. 207 F. Supp. at 823.

104. This interpretation is based on Chief Justice Warren's statement in the *Brown* case, where speaking for the court he said: "To separate the Negroes from others . . . *solely* because of their race generates a feeling of inferiority as to their status in the community that may never be undone." 347 U.S. at 494 (1954) (Emphasis added).

105. 207 F. Supp. at 823-24.

106. *Id.* at 824.

107. *Ibid.* Here the court seems to be justifying racial imbalance on the basis of these factors. This procedure is consistent with Fiss's theory of equal educational opportunity.

reveal what these "other consequences" of mixing the races are, but it is obvious that they did not concern the Supreme Court in the *Brown* case. Thirdly, the *Evans* court concluded that the cure for this problem "rests in elimination of its roots. The problems in this case grew out of segregated housing."[108]

The effect of the *Evans* decision is weakened somewhat by the fact that the court allowed the transfer from the imbalanced school despite holding there is no duty to integrate. Regardless of the language employed by the *Evans* court, the use of the presumption of unconstitutionality results in a duty to integrate which may be negated only by the positive showing that racial discrimination was not a factor in establishing school zones.

A similar view that there was no affirmative duty to integrate was adopted in *Bell v. School City*,[109] where the plaintiffs brought an action for declaratory judgment against the city of Gary, Indiana, seeking a determination as to whether they "have a constitutional right to attend racially integrated schools and whether the defendant has a constitutional duty to provide and maintain a racially integrated school system."[110] The federal district court answered most emphatically in the negative, finding *Brown* applicable only to racially motivated assignments.

In the school year 1961-1962 there were 43,090 students enrolled in the Gary public schools, 53.5 per cent of whom were Negroes. They were distributed among the forty schools in the school system as follows:

> 10,710 of the students . . . attended fourteen schools which were 100 per cent white; 16,242 attended twelve schools which were populated from 99 to 100 per cent by Negroes; 6,981 students attended five schools which were from 77 to 95 per cent Negroes; 4,066 attended four schools which had a range from 13 to 37 per cent Negro; 5,465 attended five schools which had a Negro population from one to five per cent.[111]

The court rebutted the plaintiff's contention that there was an affirmative duty to integrate, holding that "the fact that certain schools are completely or predominantly Negro does not mean that the defendant maintains a segregated school system."[112] Rather,

108. 207 F. Supp. at 824.

109. 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). See Kaplan, *Segregation Litigation and the Schools–Part III: The Gary Doctrine*, 59 NW. U.L. REV. 121 (1964), for an excellent discussion of this case.

110. 213 F. Supp. at 820.

111. *Ibid.*

112. *Id.* at 828. This view is reiterated in Webb v. Board of Educ., *supra* note 61. This was a class action by parents of Negro children for injunctive relief against the maintenance of racially segregated public schools. The court overruled the injunction

a segregated school is one to which admittance is compelled or denied on the arbitrary basis of race.[113]

The court also looked to the social, cultural and administrative advantages of the neighborhood school system and, although admitting that this system causes racial imbalance, suggests that,

> nothing in . . . the law requires that a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, must be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites. On the other hand, there are many expressions to the contrary, and these expressions lead me to believe that racial balance in our public schools is not constitutionally mandated.[114]

After considering the *Brown* decision[115] and its implementing decisions,[116] the court held "that the Supreme Court intended that the desegregation policy was to be carried out within the framework

because there was a substantial question of fact as to whether the segregation complained of is the result of an active and intentional design. The court followed the *Bell* case and held that a showing of *de facto* segregation did not sustain plaintiff's burden. "School segregation resulting from residential segregation, alone, is not a violation of any right over which this court can take cognizance." *Id.* at 468.

113. Bell v. School City, *supra* note 109, at 829. It is significant to note that Judge Beamer did not employ the *Evans* view of the burden of proof. Rather in *Bell* as to the motivation of the School Board the plaintiffs had the burden of persuasion. Due to the closeness of the facts in *Bell*, if the fact of racial imbalance had shifted the burden to the School Board, it is not mere conjecture to suggest that the result might have been different.

114. 213 F. Supp. at 829.

115. In the original *Brown* opinion, the Supreme Court considered the case for further argument as to how its decision should be implemented. One of the questions for re-argument was:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment.

'(a) would a decree necessarily follow providing that within the limits set by normal geographic districting, Negro children should forthwith be admitted to schools of their choice.' " 347 U.S. at 298 n.2.

116. In carrying out the instructions of the Supreme Court, a three-judge District Court in Kansas said:

"It was stressed at the hearing that such schools as Buchanan are all colored schools and that in them there is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color." Brown v. Board of Educ., 39 F. Supp. 468, 470 (D. Kan., 1955).

In Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955), one of the original segregation cases, the court on remand merely enjoined the Board from refusing to admit any child otherwise qualified to any school under its supervision on account of race. The court indicated that this was all *Brown* required and stated in dicta, since widely quoted, that "the Constitution . . . does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power for enforced segregation." *Id.* at 777.

of 'school districts and attendance areas.' "[117] Citing language from the *Evans* case indicating that integration is not compelled where only racial imbalance is involved, the court concluded that there is no support for the plaintiff's contention "that the defendant has an affirmative duty to balance the races . . . regardless of the residence of students involved."[118] The Seventh Circuit affirmed on appeal in an opinion adopting the general thesis and some of the language of the district court.[119]

A federal district court in Ohio adopted the *Bell* rationale in *Lynch v. Kenston School District.*[120] The court held that the plaintiffs have no right to attend an affirmatively integrated school and that de facto segregation caused by good faith adherence to a neighborhood school policy violates no constitutional rights.

> Plaintiffs have a constitutional right not to be objects of racial discrimination, and they can vindicate that right in an action before this court but they do not have a constitutional right to attend or to refrain from attending a particular school on the basis of racial considerations when there has been no actual discrimination against them.[121]

The most recent case expounding the *Bell* view that there is no affirmative duty to integrate is a Tenth Circuit decision, *Downs v. Board of Education.*[122] In this case the court clearly recognized that there was drastic racial imbalance in the public schools of Kansas City.

> The record shows that, as of April 13, 1962, there was a total of 7,467 Negro children in the elementary, junior high, and senior high schools. Almost 73 per cent of these children, or 5,405, attended the nine schools which were predominantly Negro. The remaining 27 per cent, or 2,062 children, attended 26 integrated schools . . . . The schools located the nearest to the concentration of Negro population had the highest percentage of Negro pupils and the schools the greatest distance away from that concentration were composed entirely of white students.[123]

The complaint in the class action brought by fifteen Negro children against the school officials alleged that the "total policy" of the School Board tended toward the maintenance of a discriminatory

117. 213 F. Supp. at 830.

118. *Id.* at 831.

119. 324 F.2d 209 (7th Cir. 1963).

120. 229 F. Supp. 740 (N.D. Ohio 1964).

121. *Id.* at 744.

122. *Supra* note 63. For even more reeent decisions finding no duty to act to reduce racial imbalance, see *Bradley v. School Bd.*, Civil No. 9626, 4th Cir. April 7, 1965; *Gilliam v. School Bd.*, Civil No. 9471, 4th Cir., April 7, 1965.

123. 336 F.2d at 996.

school system.[124] This argument was rejected by Judge Hill with an exception as to the transfer policy which was enjoined.[125] The appellants then argued that despite the court's finding that the Board was not employing a policy of intentional segregation, there was segregation in fact in the school system and that the *Brown* decision imposed an "affirmative duty to eliminate segregation in fact as well as segregation by intention."[126] With the *Bell* decision as precedent the court maintained that the fourteenth amendment is a prohibition against segregation but not a mandate for integration of the races in public schools. "Negro children have no constitutional right to have white children attend school with them."[127] The court suggests, as did the *Bell* court, that where racial imbalance is caused by the neighborhood school plan[128] the School Board need not abandon the system as long as there is no intention to perpetuate segregation.[129]

(c). *A Duty To Ease Racial Imbalance.*—(1) *Administrative Decisions.*—Until 1963, administrative decisions concerning racial imbalance had uniformily held that affirmative measures to overcome racial imbalance were not legally required.[130] Then, on May 15, 1963, the New Jersey Commissioner of Education handed down the landmark decision of *Fisher v. Board of Education.*[131] This decision maintained that "extreme racial imbalance[132] . . . at least where means exist to prevent it, constitutes under New Jersey law[133] a deprivation of educational opportunity for the pupils compelled to attend the school."[134]

Soon after the *Fisher* decision, the New Jersey Commissioner of

124. *Id.* at 994.

125. *Supra* note 64.

126. 336 F.2d at 998.

127. *Ibid.* See also Kelley v. Board of Educ., 270 F.2d 209 (6th Cir.), *cert. denied,* 361 U.S. 924 (1959); Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 35 (5th Cir. 1964); Evers v. Jackson Mun. Separate School Dist., 328 F.2d 408 (5th Cir. 1964); Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960).

128. "Neighborhood school systems . . . by which admission to the school is determined upon the basis of similar criteria such as residence and aptitude, are in use in many parts of the country. They have been successfully challenged on constitutional grounds where operated in such a way as to discriminate against students because of their race or color. . . . In the absence of a showing that such school systems are being used to deprive a student of his constitutional rights, they are not objectionable on constitutional grounds." 336 F.2d at 995.

129. See also Northcross v. Board of Educ., 302 F.2d 818 (6th Cir.), *cert. denied,* 370 U.S. 944 (1962); Norwood v. Tucker, 287 F.2d 798 (8th Cir. 1961).

130. See In the Matter of Bell, 77 N.Y. DEP'T R. 37 (Comm'n Educ. 1956).

131. 8 RACE REL. L. REP. 730 (1963).

132. Oakwood School was found by the court to be 99% Negro. *Id.* at 733.

133. The court was referring here to the New Jersey Constitution.

"No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin. N.J. CONST. art. 1, § 5.

134. 8 RACE REL. L. REP. at 734.

Education rendered two decisions, *Booker v. Board of Education*[135] and *Spruill v. Board of Education*,[136] which closely followed the *Fisher* rationale. In *Booker*, the Commissioner held that the school board has a duty to eliminate racial imbalance in schools in regard to which a reasonable remedy consistent with sound educational and administrative practice exists.[137] Considering the effect of this policy of preventing racial imbalance, on the neighborhood school policy, the Commissioner in *Spruill* maintained that the neighborhood school policy "is not to be applied inflexibly when other considerations outweigh its values."[138]

During this same period the New York Commissioner of Education also ruled in *Mitchell v. Board of Education*,[139] that local school boards had a duty to act to reduce racial imbalance. On the basis of recommendations of a special advisory committee, the Commissioner ruled that imbalance itself constitutes a deprivation of equality of educational opportunity contrary to state policy.[140] This determination was tested in the New York courts and held invalid at the trial court level in *Vetere v. Allen*.[141] The Commissioner's original decision, however, was sustained by the Appellate Division in *Vetere v. Mitchell*.[142]

(2) *Judicial Proceedings.*—Although the majority of courts have found that racial imbalance per se presents no question of constitutional deprivation, contentions to the contrary are found in both federal and state decisions. This minority view is expounded by the federal courts in two opinions of the United States District Court for the Eastern District of New York, *Branche v. Board of Education*[143] and *Blocker v. Board of Education*,[144] and in a recent decision by the Federal District Court of Massachusetts, *Barksdale v. Springfield School Comm.*[145] In the state courts, a similar decision has been reached by the California Supreme Court in *Jackson v. Pasadena City School District*.[146]

These cases are the sole judicial support for the theory that school administrators have a constitutional duty to take steps to alleviate racial imbalance even where it is not caused by racially motivated

135. 8 RACE REL. L. REP. 1228 (1963).
136. 8 RACE REL. L. REP. 1234 (1963).
137. 8 RACE REL. L. REP. at 1231.
138. 8 RACE REL. L. REP. at 1238.
139. 8 RACE REL. L. REP. 735 (1963).
140. *Id.* at 737.
141. 41 Misc. 2d 200, 245 N.Y.S.2d 682 (Sup. Ct. 1963).
142. 21 App. Div. 2d 561, 251 N.Y.S.2d 480 (1964).
143. 204 F. Supp. 150 (E.D.N.Y. 1962).
144. 226 F. Supp. 208, *remedy considered on rehearing*, 229 F. Supp. 709 (E.D.N.Y. 1964).
145. 237 F. Supp. 543 (D. Mass.), *reversed.*
146. 59 Cal. 2d 876, 382 P.2d 878 (1963).

conduct. The strength of this authority is weakened somewhat because in both New York district court opinions there was some indication that the racial imbalance was a result of racially motivated conduct. In the *Jackson* case the conduct was clearly racially motivated, and thus the statement that the "school boards must take steps . . . to alleviate racial imbalance in schools regardless of its cause . . ."[147] was merely dictum.

Branche v. Board of Education[148] was an action by Negro residents of Hempstead, New York. The complaint alleged maintenance of racially segregated schools with restriction of Negro children to these schools, and sought an injunction against these practices. More specifically, the plaintiffs sought to enjoin enlargement of two predominantly Negro schools in the district.[149] The Board of Education had adopted official school zone boundaries in 1949 when Jackson and Franklin Schools were respectively 16.5 and 14.3 per cent Negro. By 1961 the percentage had shifted to 77 and 78 per cent respectively. Defendants' contention, supported by the affidavit of the Superintendent of Schools, was that defendants had not in any way been responsible for maintaining segregated education in the district through gerrymandering of school boundary zones or any other method. It was argued that the racial imbalance resulted solely from the residential pattern of the district.[150]

The case came before the court on defendant's motion for a summary judgment. In denying this motion the court said:

> Defendants show facts compatible with an absence of responsibility on their part for the racial segregation that exists in the schools but these facts do not demonstrate that there has been no segregation beeause of race. Segregated education is inadequate and when that inadequacy is attributable to state action it is a deprivation of a constitutional right.[151]

Because of the conflicts in the facts and because there was a real question as to whether racial segregation existed in this school district, the court properly dismissed the motion. However, in dictum the court went much further, indicating that there is an affirmative duty to alter racial imbalance. "That it is not coerced by direct action of an arm of the state cannot, alone, be decisive of the issue of deprivation of constitutional right."[152] Further expounding this theory, the court states:

147. *Id.* at 881, 382 P.2d at 882.
148. *Supra* note 143.
149. *Ibid.*
150. *Id.* at 151.
151. *Id.* at 153.
152. *Ibid.*

> So here, it is not enough to show that residence accounts for the face of segregation and to contend that therefore segregation is ineluctable. The effort to mitigate the consequent educational inadequacy has not been made and to forego that effort to deal with the inadequacy is to impose it in the absence of a conclusive demonstration that no circumstantially possible effort can effect any significant mitigation. What is involved here is not convenience but constitutional language.[153]

Although this is seemingly strong language requiring affirmative action, Judge Dooling robs it of its clarity with several statements which indicate that the School Board's inaction was perhaps a manifestation of an intent to maintain a racially unbalanced system.

> Failure to deal with a condition as really inflicts it as does any grosser imposition of it . . . . It is unavoidably the responsibility of the courts, however, to isolate forbidden principle and require its exclusion from the action of the educational authorities . . . . It cannot be said at this stage that the 1949 adoption of the geographical rule of school attendance was necessarily free of an unpermitted effect on constitutional interests or that adherence to it in changing circumstances that perhaps increased segregation has not become an infringement of constitutional interests.[154]

These statements permit a reasonable argument that Judge Dooling's holding was directed toward a racially motivated school system. At least one court, the Northern District Court of Illinois in *Webb v. Board of Education,*[155] has so interpreted the *Branche* case. There the court held that *Branche* indicted the "passive refusal to redistrict unreasonable boundaries"[156] and that the *Branche* case clearly indicated that "mere residential segregation is not enough."[157]

In *Blocker v. Board of Education,*[158] the School Board of Manhasset, New York, had assigned children to schools in accordance with a rigid neighborhood school plan. However, due to residential patterns which developed after the attendance zones were established, the enrollment in one of the three elementary schools was 99 per cent Negro while the other two were attended solely by white children.[159]

The plaintiffs contended that regardless of the cause of the segregation the racial imbalance in the Valley School was segregation of the type declared unconstitutional by the *Brown* decision. They contended that this segregation resulted because of the rigid application of the defendant's neighborhood school policy and operated to

153. *Ibid.*
154. *Ibid.*.
155. 223 F. Supp. 466 (N.D. Ill. 1963).
156. *Id.* at 468-69.
157. *Ibid.*
158. *Supra* note 144. See Kaplan, *supra* note 109, at 161-62.
159. 226 F. Supp. at 211.

deprive children of minority groups of equal educational opportunity.[160] The defendants maintained that in this factual situation the theory of the *Brown* case did not apply. In Manhasset, they argued, the neighborhood school policy is color blind and any racial imbalance which might occur is a fortuitous circumstance resulting solely from the pattern of housing. Thus, the School Board maintained that the plaintiffs showed no violation of their constitutional right.[161]

Judge Zavatt viewed the mandate of the *Brown* decision much more broadly than did the *Briggs* court in its implementing decision. Recognizing that *Brown* involved a factual situation different from that before this court, Judge Zavatt said:

> The Fourteenth Amendment does not cease to operate once the narrow confines of the *Brown* type situation are exceeded . . . . Viewed in this context then, can it be said, that one type of segregation, having its basis in state law or evasive schemes to defeat integregation, is to be proscribed, while another having the same effect but another cause, is to be condoned? Surely, the Constitution is made of stronger stuff.[162]

Judge Zavatt then examined the neighborhood school and, although recognizing its advantages[163] in certain circumstances, concluded that both educators and courts have agreed that in other circumstances the advantages of the neighborhood school policy are outweighed by its disadvantages, and rigid adherence thereto must yield.[164]

Despite Judge Zavatt's language in interpreting the *Brown* decision and in considering the neighborhood school policy which indicates that there might be an affirmative duty to integrate, Judge Zavatt dispells this conclusion in finding that the Manhasset School District is segregated.

> The facts in the instant case present a situation that goes far beyond racial imbalance. It is not unreasonable to draw from the evidence in this case the inference that the small nucleus of white children at the Valley School will soon disappear. But upon the facts as they exist today, the separation of 100% of the Negro children, from 99.2% of the white children approximates closely the total separation condemned in *Brown*. . . . Neither

160. *Id.* at 217.
161. *Id.* at 218.
162. *Id.* at 223.
163. *Ibid.* The court maintains the most obvious advantages of the neighborhood school policy are easy access and the feasibility of lunch at home. Although the administrative officials of the Manhasset School System argued strongly that a homogenous student body was an advantage of the neighborhood school policy, this theory was contradicted by the view of the teaching staff which felt that each elementary school should have a culturally, socially and economically heterogeneous student population. *Id.* at 223-24.
164. The "other circumstances" Judge Zavatt alludes to in this case are extreme imbalance and gross educational inequality.

> *Taylor* . . . nor *Bell* . . . presented a separation of the races that even approaches that existing in the Manhasset School District.[165]

The distinctive factor in this case seems to be in the factual interrelationship between segregation and racial imbalance in the Manhasset School District. Here the court found that this racially imbalanced school was segregated but not simply because it was racially imbalanced. Judge Zavatt determined that racial imbalance added to school board passiveness was tantamount to segregation.

> On the facts of this case, the separation of the Negro elementary school children is segregation. It is segregation by law—the law of the School Board. In light of the existing facts, the continuance of the Defendant Board's impenetrable attendance lines amounts to nothing less than state imposed segregation.[166]

The court further indicated exactly what it intended to decide and not to decide.

> The court does not hold that the neighborhood school policy per se is unconstitutional. It does hold that this policy is not immutable. It does not hold that racial imbalance and segregation are synonymous or that racial imbalance not tantamount to segregation is violative of the Constitution. It does hold that by maintaining and perpetuating a segregated school system the defendant board has transgressed the prohibitions of the Equal Protection Clause of the Fourteenth Amendment. The court does not hold that the Constitution requires a compulsive distribution of school children on the basis of race in order to achieve a proportional representation of white and Negro children in each elementary school within a school district. There is no authority to support the claim of the plaintiffs. There is not presented here the question as to whether or not such compulsive distribution, though not required, may be permitted under the Constitution or by state law.[167]

It is difficult to assess the effect of this decision on the affirmative duty to integrate. Some writers[168] have indicated that this decision does not recognize an affirmative duty, but follows the *Taylor* rationale. The court's analysis of its own decision adds to this view. However, it is significant that the court never clearly indicated any acts that were racially motivated. Here there was only a sharp separation of the races compounded by the failure of the School Board to act to correct this imbalance. Although the court indicated that the failure of the School Board to act could have been racially motivated, this was not established other than by an implication due

165. 226 F. Supp. at 225.
166. *Id.* at 226.
167. *Id.* at 230.
168. See Note, 50 COLUM. L. REV. 464 (1964).

to the gross racial imbalance in this school district. Although the court purports to adhere to the *Taylor* theory, this case seems to weaken the test for racially motivated conduct to a level co-existent with an affirmative duty to integrate where a school district has grossly disproportionate racial imbalance.

However, an unequivocal decision was reached by the Federal District Court of Massachusetts in *Barksdale v. Springfield School Committee.*[169] Although the question of deliberate intent on the part of the school authorities to segregate the races was raised as in *Branche* and *Blocker*, unlike those cases Judge Sweeny clearly found no such deliberate intent to segregate. "If segregation exists, it results from a rigid adherence to the neighborhood plan of school attendance."[170]

Evidence was introduced to show that due to the organization of attendance zones according to the neighborhood plan, seven of Springfield's thirty-seven elementary schools had a majority of colored students. Also, Negro students were concentrated in one of the eight junior high schools. This imbalance was particularly revealing because eighty per cent of Springfield's total population is white. As a result of these facts, Judge Sweeny held that "a non-white attendance of appreciably more than fifty per cent in any one school is tantamount to segregation."[171]

In addition to evidence of imbalance, evidence was also introduced to show the detrimental effects of racial imbalance on Negro children.[172] On the basis of this evidence, Judge Sweeny made the crucial finding that the Negro child in the racially imbalanced school is deprived of equal educational opportunities.

Since the court found both racial imbalance and ensuing harm caused by racial imbalance, the only remaining consideration was whether this amounted to a constitutional violation. Judge Sweeny

169. *Supra* note 145.

170. 237 F. Supp. at 544.

171. *Ibid.* Where the general population of a school district is more racially imbalanced, most likely the definition of racial imbalance would have to be changed to reflect the realities of the situation. For example, the definition used in this case simply would not be adequate in some school districts in New York City. "*Three-quarters* of the school children of Manhattan are Negro and Puerto-Rican; *two-fifths* of the school children in greater New York are Negro and Puerto-Rican." Glazier, *Is Integration Possible in the New York Schools?*, in INTEGRATION VS. SEGREGATION 186, 190 (Humphrey ed. 1964).

172. "I find that those schools in which the vast majority of Negro students are enrolled consistently rank lowest in achievement ratings. . . . Those students, when transferred to other schools, had difficulty keeping abreast with their contemporaries. Special programs in science and French for gifted children who have attained a high achievement level have had few, and sometimes no, Negro participants." 237 F. Supp. at 546.

answered this question by the manner in which he phrased the question.

> The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system. While *Brown* answered that question affirmatively in the context of coerced segregation, the constitutional fact—the inadequacy of segregated education—is the same in this case and I so find. It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors. . . . This is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact.[173]

The rationale of this case illustrates that a strong showing of inequality in the racially imbalanced school may well result in a violation of the principle of "equal educational opportunity." Under this theory where the protesting parents can show a causal relationship between racial imbalance and inferior educational opportunities, school officials may be required to act to alleviate racial imbalance.

On one occasion plaintiffs protesting racial imbalance in a state court were also successful. Thus, in *Jackson v. Pasadena City School District*,[174] the Negro plaintiff sought to transfer away from a racially imbalanced school and alleged in his complaint that defendant School Board had arbitrarily gerrymandered school zone boundaries for the purpose of perpetuating and intensifying racial segregation.[175] The Supreme Court of California followed the *Taylor* reasoning and held that the complaint alleged a clear violation of a constitutional right.[176] Then the court added gratuitously that,

> even in the absence of gerrymandering or other affirmative discriminatory conduct by a school board, a student under some circumstances would be entitled to relief where, by reason of residential segregation, substantial racial imbalance exists in his school. . . . Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause.[177]

173. *Ibid.*
174. *Supra* note 146.
175. *Id.* at 878, 382 P.2d at 880.
176. *Ibid.* "The averments with respect to racial segregation and gerrymandering should be treated on general demurrer as allegations of ultimate facts and not mere conclusions of law." *Ibid.*
177. 59 Cal. 2d at 881, 382 P.2d at 881-82.

Although this statement is dictum, it seems clear that the California court will, if presented with a case of racial imbalance devoid of racial motivation, declare, as it suggested in this case, an affirmative duty to integrate. In such a case the court would weigh a number of competing factors in reaching its decision.

> Consideration must be given to the various factors in each case including the practical necessities of governmental operation. For example, consideration should be given on the one hand, to the degree of racial imbalance in the particular school and the extent to which it affects the opportunity for education, and on the other hand, to such matters as the difficulty and effectiveness of revising school boundaries so as to eliminate segregation and the availability of other facilities to which students can be transferred.[178]

These considerations indicate that this duty to integrate is not of the same nature as the *Brown* duty to not segregate. Although the court recognized the evil of de facto segregation, it also recognized that in some situations the problems to be entailed in reducing this racial imbalance have no simple solution.[179] The question whether racial imbalance in California can be resolved under the Jackson rationale, however, is yet to be decided.

III. May Educational Authorities Voluntarily Eliminate Racial Imbalance?

A. *The Colorblind Constitution*

Since the New Rochelle litigation in 1961, many school officials have become aware of the educational problems stemming from racial imbalance. In most cases, the racially imbalanced school is inferior in physical plant, facilities, and in the ability and number of its teachers. The schools in which the vast majority of Negro children are enrolled consistently rank lowest in achievement tests. Also there is a strong sociological belief that this racial separation is particularly harmful to the minority race. Due to a cognizance of these adverse results of racial imbalance, a number of school systems have voluntarily acted to eradicate the racially imbalanced school. This action has been taken on the level of the local school system as well as by state school boards and even state legislatures.[180] Because of these attempts to

178. *Ibid.*

179. See Keller v. Sacramento City United School Dist., No. 1465, Calif. Super. Ct., Sacramento County, Oct. 8, 1963. "The Board obviously has many alternatives in alleviating *de facto* segregation. . . . Unless there are violations of legal guide lines courts should not attempt to supervise the administration of schools. Rather, this is the proper function of the community's edueational policy makers elected by the community." *Id.* at 6. This case is important because it is the first lower court decision following *Jackson.*

180. Most of the voluntary action taken to ease racial imbalanee has occurred in

eliminate racial imbalance, a number of questions are raised as to the validity of such voluntary action. Are constitutional rights violated when Negro children are bussed into non-contiguous school zones so that the schools are racially balanced? Are constitutional rights violated when school zones are altered because of racial considerations? Are constitutional rights violated when new schools are placed in certain areas to achieve racial balance?

These constitutional questions are raised most frequently in actions challenging the validity of the school board's action. The basic argument advanced is that no student can validly be required to attend

New Jersey, California, New York and Maryland. This footnote summarizes the most important developments taken to secure racially balanced schools in these states.

(1) *New Jersey*—On March 16, 1962 the Newark, New Jersey, Board of Edueation adopted a resolution establishing an Optional Pupil Transfer Policy. This policy permitted students to transfer from schools in which there was an "unduly high ethnic concentration" to other schools with uncrowded facilities and a better "ethnic balance." The resolution provided that this policy was not to be deemed in degrogation of the usual practice of attendance zones based on the neighborhood school policy. Also the transfer policy did not include transportation financed by the School Board. 7 RACE REL. L. REP. 269 (1962).

(2) *California*—The California State Board of Education in a statement made on June 14, 1962 announced the state's policy against *de facto* segregation in the public schools. The statement declared that "in all areas under our control or subject to our influence, the policy of elimination of existing segregation and curbing any tendency toward its growth must be given serious and thoughtful consideration by all persons involved at all levels." 7 RACE REL. L. REP. 1267 (1962).

Accordingly, the state administrative code was amended to provide for the establishment of attendance areas and new school location polieies which would tend to cause a balancing of the races. The regulation adopted by the California Superintendent of Public Instruction on September 28, 1962, required a consideration of both the present and future ethnic composition of an area in selecting school sites. CAL. ADM. CODE tit. 5, § 2001.

An even more significant regulation was adopted by the State Board of Education on October 18, 1962. The regulation amended the code to provide for the establishment of school attendance areas in school districts.

"For the purpose of avoiding, insofar as practicable, the establishment of attendance areas which in practical effect discriminate upon an ethnic basis against pupils or their families or which in practical effect tend to establish or maintain segregation on an ethnic basis, the governing board of a school district in establishing attendance areas in the district shall include among the factors considered the following:

(a) the ethnic composition of the residents in the immediate area of the school.

(b) The ethnic composition of the residents in the territory peripheral to the immediate areas of the school.

(c) The effect on the ethnic composition of the student body of the school based upon alternate plans for establishing the attendance area.

(d) The effect on the ethnic composition of the student body of adjacent schools based upon alternate plans for establishing an attendance area.

(e) The effect on the ethnic composition of the student body of the school and of adjacent schools of the use of transportation presently necessary and provided either by a parent or the district." CAL. ADM. CODE tit. 5, § 2011.

Shortly thereafter, the 1963 session of the California legislature approved the establishment of a commission in the Department of Education to assist and advise local school districts in problems related to various aspects of racial discrimination. Among the commission's duties is to "upon request from a district, advise and assist school

or excluded from attending a certain school because of his race.[181] It is contended that the equal protection clause requires that official action be "colorblind" and thus the thrust of this contention is that any correctional scheme which relies on racial considerations is violative of the Constitution.[182] This theory holds that any action based on racial considerations aimed at providing the Negro with equal educational opportunity is just as unconstitutional as action taken to restrict his opportunities.

Justice Harlan inadvertently supplied the basis for this argument opposing racial balancing in the schools by his famous dissent in

districts in problems involving the ethnic distribution of pupils and school attendance areas." CAL. EDUC. CODE § 363.

(3) *New York*—The New York State Commissioner of Education issued a memorandum on June 14, 1963, directing all local school administrators and school board presidents to re-examine racial imbalance in local schools, to declare local policy in regard to such imbalance, to report on progress made in eliminating such conditions, and to formulate plans for future corrective action. The Commissioner emphatically stated that the position of the Department "is that racial imbalance existing in a school in which the enrollment is wholly or predominantly Negro interferes with the achievement of equality of educational opportunity and must therefore be eliminated from the schools of New York State." 8 RACE REL. L. REP. 738, 739 (1963).

Reinforcing the Commissioner's conclusions as to racial imbalance, the Commissioner's Advisory Committee on Human Relations and Community Tensions issued on June 17, 1963 a statement entitled *Guiding Principles for Securing Racial Balance in Public Schools.* The Committee indicated in the statement that "a cardinal principle in the effective desegregation of a public school system is that all of the schools which comprise that system should have an equitable distribution of the various ethnic and cultural groups in the municipality of the school district." 8 RACE REL. L. REP. 739, 740 (1963).

With these pronouncements from the state policy-makers providing the impetus, a number of local school boards in New York have taken remedial action to reduce racial imbalance.

New York City's "plan for integration" prepared by the Board of Education and Superintendent of Schools is described as "the most comprehensive effort to achieve maximum integration . . . of any . . . city school system in the country." Letter of Transmittal from Calvin E. Gross to James E. Allen, Jr., reported 8 RACE REL. L. REP. 1240 (1963). This plan includes a free choice transfer policy as well as the elimination of elementary school classes in junior high schools in order to accommodate more free-choice transfer pupils and a system of rezoning in fringe areas to effect more integration. This rezoning would facilitate the use of the Princeton Plan as applied either to pairs of schools or to multiple school composites. *New York Plan For Integration,* 8 RACE REL. L. REP. 1241 (1963).

(4) *Maryland*—The Baltimore City Board of School Commissioners adopted a resolution on September 5, 1963, declaring a policy of promoting an overall principle of equality of educational opportunity for persons of all ethnic, racial, cultural and economic backgrounds. This policy was aimed at the racially imbalanced school because "racially imbalanced schools may lead to educational, psychological, and sociological problems." 8 RACE REL. L. REP. 1226, 1227 (1963). To resolve this problem "Board policies and school practice shall be reviewed to insure that they are not discriminatory or do not contribute intentionally to racial imbalance." *Ibid.*

181. Rice, *The Legality of De Facto Segregation,* 10 CATHOLIC LAW. 309, 314 (1964).

182. Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem,* 58 NW. U.L. REV. 157, 205-97 (1963).

Plessy v. Ferguson,[183] in which he said:

> But in view of the Constitution, in the eye of the law, there is in this country no superior dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[184]

Brown was considered to establish this colorblind principle for public education with the consequence that the Constitution should be considered neutral as between efforts to promote segregation and integration in that it forbids both. The only exception recognized under this theory is "where corrective action must be taken to remedy a condition created by the unconstitutional action of the official body involved in the litigation."[185]

Although the use of Justice Harlan's "constitutional metaphor" as the basis of a constitutional theory preventing racial balancing has been considered valid by some authorities,[186] the majority of legal scholars and courts have generally discredited this view.

In light of the original purpose of the fourteenth amendment,[187] the better view of this amendment is that it forbids only invidious discrimination.[188] It must be remembered that this colorblind principle was announced in the context of an attack on the "Jim Crow" Laws and was utilized in an attempt to help the Negro secure equality.[189] Certainly, it would be anomalous to use the same theory to prevent the Negro in the racially imbalanced school from attaining equal educational opportunity.[190]

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183. 163 U.S. 537 (1896) (Harlan, J., dissenting).

184. *Id.* at 559.

185. Hyman & Newhouse, *Desegregation of the Schools: The Present Legal Situation,* 14 BUFFALO L. REV. 208, 227 (1964).

186. See generally Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations,* 71 YALE L.J. 1387 (1962). See also Kaplan, *supra* note 182; Rice, *supra* note 181.

187. See generally Frank & Munro, *The Original Understanding of Equal Protection of the Laws,* 50 COLUM. L. REV. 131 (1950).

188. Goss v. Board of Educ., 373 U.S. 683 (1963).

189. "If we look at the Constitution rather than a constitutional metaphor, and at the history of the fourteenth amendment, we find that the most obvious fact about it is that it grew out of the Civil War in an effort to raise Negroes from a level of inferiority. Certainly in two situations there can be little doubt of the validity of preferential treatment of Negroes: first where public facilities are in fact unequal and there is de facto segregation placing the Negro in the unequal facilities, and second, where de facto segregation is a product in part, a remnant, of government discrimination in the past." Freurd, *Civil Rights and the Limit of Law,* 14 BUFFALO L. REV. 199, 205 (1964).

190. "The principle of color blindness cannot mean that a governmental body may not recognize that racial differences exist between individuals and that some schools are racially imbalanced while others are not. Such a principle would render even the census unconstitutional. Although the ultimate vision of society may promise that

It has been suggested that justifiable discrimination is permissible as a constitutionally valid procedure. In the *Japanese Relocation Cases*,[191] the Supreme Court upheld protective discrimination on the basis of nationality because of a determination that there were policy reasons that justified this action.[192] Where the lawful object involved is securing equal educational opportunity for the Negro, it seems clear that voluntary racial balancing should not conflict with the prohibitions of the fourteenth amendment.

The Attorney General of California states this view of the fourteenth amendment quite succinctly in an opinion upholding the consideration of race in the adoption of a school attendance plan:

> To decide that the combined thinking and efforts of persons of all races may not recognize a present inequality as the starting point in a program designed to help achieve that equality which Justice Harlan sought would be to conclude not merely that the Constitution is color-blind, but that it is totally blind.[193]

B. *The Judicial Response*

The vigorous attempts of many school authorities, particularly in New York and New Jersey, to reduce racial imbalance has been met in many communities by equally vigorous efforts to maintain the status quo. As a result of the ensuing controversies, educational policies of these communities have been scrutinized by both state and federal courts.

The school board's action is ordinarily contested by white parents who either oppose the transfer of Negro pupils to a formerly all-white school in their neighborhood, or oppose the transfer of their children to a school other than their neighborhood school. When this voluntary action has been challenged, the courts have faced an extremely perplexing question of constitutional law. There is a wide range between what is constitutionally required or prohibited and what is constitutionally permissible. Because the whole of the law on this

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racial differences among individuals will be ignored, this does not mean that government must now blind itself to a physical reality which plays an enormous role in a person's life and his social relations." Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 569, 575 (1965).

191. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

192. "The uneasiness with these cases arise not from the application of the principle that a legitimate purpose may make race a relevant concern but, rather from doubts that the needs of national security justified the totally oppressively restrictions that were chosen." Fiss, *supra* note 190, at 577.

It must be pointed out that these *Japanese Relation cases*, were determined on the basis of nationality rather than race. The importance of these cases, however, rests in the fact that the classification, on whatever basis, was upheld by the Supreme Court.

193. 42 OPS. ATT'Y GEN. 33-35 (1963), 8 RACE REL. L. REP. 1303, 1305 (1963).

latter question is contained in a number of very recent New York and New Jersey cases, these cases must be considered carefully.

1. New York.—*Balaban v. Rubin*,[194] is certainly the most publicized of the recent New York decisions. In this case, the parents of two white children brought a class suit to annul a zoning determination adopted by the Board of Education of the City of New York. This determination was made necessary by the construction of Junior High School 275 which was scheduled to open in the southerly part of an area in Brooklyn known as Brownsville in September 1963. Petitioner's children lived in East Flatbush, and had J.H.S. 275 not been built, would have attended J.H.S. 285 which was located in their own neighborhood. The school zone originally proposed for J.H.S. 275 by Dr. Morris Platnick, Assistant Superintendent of Schools in that district, was rejected by the School Board "because he had failed to accord adequate consideration to the undesirable de facto segregation of Negro and Puerto Rican children that would obtain in J.H.S. 275 if his plan had been adopted."[195] The school zone which was subsequently adopted resulted in a relative equalization of the races[196] in J.H.S. 275 and evidence indicated that this racial balance was the compelling factor which caused the Board to approve the zone finally adopted.[197]

In judging the validity of the Board's zone, in addition to racial equalization, it is important to note that this plan required no transportation of children from other school zones to J.H.S. 275, that the zone fixed for J.H.S. was reasonable and regularly shaped with the school close to the center of the zone, and that most of the children in the disputed area lived closer to J.H.S. 275 than to J.H.S. 285.[198]

The petitioner argued that the School Board's inclusion of racial

194. 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 85 Sup. Ct. 148 (1964), *affirming* 20 App. Div. 2d 438, 248 N.Y.S.2d 574 (1964), *reversing* 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct. 1963).

195. 40 Misc. 2d at 251, 242 N.Y.S.2d at 975. It must be added however that this zone was geographically irregular and the school was placed in the approximate corner of an oddly shaped area which was remote from the zone's northern area.

196. Under the Plodnick proposal the racial and ethnic composition of the incoming class would be 52% Negro, 34% Puerto Rican and 14% white; whereas, under the school zone finally approved and adopted, the percentages would be 35.2% Negro, 33.5% Puerto Rican and 31.2% white. *Ibid.*

197. See affidavits submitted by Dr. Francis A. Turner, Assistant Superintendent of Schools and Bernard E. Donovan, the Acting Superintendent of Schools which indicate clearly that the site for J.H.S. 275 was selected and attendance zones were promulgated to increase the measure of integration in these schools. *Ibid.* It must be admitted, however, that the Board took into consideration *all* of the following factors: "(1) distance from home to school; (2) utilization of school space; (3) convenience of transportation; (4) racial integration of the school; (5) topographic barriers; and (6) continuity of instruction." 20 App. Div. at 441, 248 N.Y.S.2d at 577.

198. *Ibid.*

balance as a factor in determining school zones violated section 3201 of New York's Education law as well as the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. The New York Supreme Court at Special Term, Kings County,[199] did not reach the constitutional issues raised by the petitioner in holding on the basis of section 3201[200] that the Board's action should be annulled.

Although the Board argued that the history of the statute indicated that it was intended to prohibit segregation of minority groups in public schools, the court looked only to the fact of the statute. "By its very terms (the statute) proscribes exclusion from public schools of *any* child by reason of race, creed, color or national origin."[201] Because the petitioner's children were excluded from J.H.S. 285, their neighborhood school, due to racial considerations, the statute was held to have been violated.[202]

The Appellate Division[203] reversed the decision of the trial court, holding that the School Board properly acted to reduce racial imbalance. The significance of this conclusion is diminished, however, because of the reliance by the Appellate Division on the factual circumstances of this case. The most important of these facts being that all the children involved in this litigation lived either closer to or no farther from J.H.S. 275 than from J.H.S. 285. Thus, the court concluded that J.H.S. 275 "is the school in the district of *their residence*,"[204] and section 3201 would have been violated only if these children had been excluded from this neighborhood school.

The Appellate Division then looked to the purpose of section 3201 and found it clearly an anti-segregation statute.[205] Thus, if section 3201 was used to invalidate a zoning plan that accomplishes integration it would have been turned into a segregation law—a result completely inconsistent with the purpose of the statute.

It has been argued that the rationale of this case allows the School Board to act to alleviate racial imbalance ouly as long as children

199. 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct. 1963).

200. N.Y. EDUC. LAW § 3201, which provides as follows: "No person shall be refused admission into or excluded from any public school in the state of New York on account of race, creed, color or national origin."

201. 40 Misc. 2d at 252, 242 N.Y.S.2d at 976.

202. Special term re-zoned the disputed area; that is, the area in which the fifty-one white children reside, and placed it within the zone for J.H.S. 285, in which it was previously embraced.

203. 20 App. Div. 2d 438, 248 N.Y.S.2d 574 (1964).

204. *Id.* at 443, 248 N.Y.S.2d at 579.

205. "It is thus conclusive from the history of section 3201 that its sole purpose was to . . . prevent segregation in the school system." 20 App. Div. 2d at 444, 248 N.Y.S.2d at 580 (1964).

are able to attend schools in the district of their residence.[206] If this is true, this is a very real limitation on the power of the School Board to correct racial imbalance.[207]

In considering the petitioner's constitutional objections to the School Board's action, the appellate division maintained that the *Brown* case did not require that "there *must* be an intermingling of the races in *all* school districts."[208] The court further said *Brown* did *not mean,* for example, *that white children* who live in non-contiguous or outlying areas must be 'bussed' into a Negro area in order to desegregate a Negro school.[209]

However, the court said the fact that integration is not required by the federal constitution does not prevent school boards from using racial or ethnic factors in a voluntary attempt to prevent racial imbalance. For authority to substantiate this position, the court pointed to the language in the second *Brown* decision,[210] in which the Supreme Court stated that the courts may consider problems related to . . . 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.[211]

This, the Appellate Division maintained, was "direct authority for a board of education to take race into consideration as one of the factors in the delineation of a school zone."[212]

This language expounded by the Supreme Court is valid to sustain the court's conclusion only where school zones have previously been purposely utilized to create segregation.[213] It is important to note that in this case, however, school zones had not been previously tampered with to prevent integration. Here racial imbalance had resulted simply from shifts in housing patterns. Thus, it would seem, at least under the rationale used by this court, that the language of the Supreme

206. This interpretation of *Balaban* was utilized in Strippoli v. Bickal, 42 Misc. 2d 475, 248 N.Y.S.2d 588 (Sup. Ct. 1964), and Di Sano v. Storandt, 43 Misc. 2d 272, 250 N.Y.S.2d 701 (Sup. Ct. 1964).

207. If the school is racially imbalanced, the neighborhood will also likely be racially imbalanced. Thus, in most cities, balancing of the races in the schools will require bringing students from other districts.

208. 20 App. Div. 2d at 446, 248 N.Y.S.2d at 581.

209. *Ibid.*

210. Brown v. Board of Educ., 349 U.S. 294 (1954).

211. *Id.* at 300.

212. 20 App. Div. 2d at 447, 248 N.Y.S.2d at 582.

213. The cases cited by the court for authority on this point, Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y. 1961), and Clemons v. Board of Educ., 228 F.2d 853 (6th Cir.), *cert. denied,* 350 U.S. 1006 (1956), involve intentional gerrymandering of school zones. Obviously, to secure protection of constitutional rights where there has been unlawful segregation, race would have to be considered in rezoning. But considered in the context of fortuitous racial imbalance, this language in the second *Brown* case would seem to indicate that race should *not* be considered in zoning.

Court requiring admission on a "non-racial basis" is circumvented by taking race into consideration in school zoning. Perhaps in an attempt to strengthen a rather loosely written opinion, the Appellate Division additionally buttressed its conclusion by pointing out that all other zoning criteria pointed to the fact that the zone was determined in a reasonable way with due regard for the safety, convenience and better education of the children in the zone.[214]

The New York Court of Appeals affirmed the judgment of the Appellate Division.[215] The scope of the Appellate Division's opinion was neither broadened nor narrowed by the Court of Appeals' answer to the question of whether schools may correct racial imbalance. The Court of Appeals said: "The simple fact as to the plan adopted and here under attack is that it excludes no one from any school and has no tendency to foster or produce racial segregation."[216] The court also emphasized that "no child will have to travel farther to a new school 275 than he would have had to go to get to his 'neighborhood' school."[217]

While it is clear from *Balaban* that in favorable circumstances a school board may act to reduce racial imbalance, this case did not provide the requisite authority for a concerted utilization of race as a zoning criteria.

Shortly after *Balaban*, the validity of voluntary action by school boards to ease racial imbalance was again challenged in two cases involving schools in Rochester, New York. The Supreme Court of Monroe County reached decisions in *Strippoli v. Bickal*[218] and *Di Sano v. Storandt*,[219] which seriously limited the efficacy of the *Balaban* decision.

The City School District in Rochester was divided into attendance zones on the basis of the neighborhood school system. The original dividing lines had been established without considering race, color, or ethnic origin.

> Schools #3 and #30 are . . . located approximately two and one-half miles apart. By reason of fortuitous residence pattern and population changes over the years, #3 school became overwhelmingly non-white (85.3%) while #30 remained 100% white.[220]

214. It was emphasized that there was easy access to the school from all parts of the zone and also that the school was centrally located within the zone. 20 App. Div. 2d at 448, 248 N.Y.S.2d at 583.

215. 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281 (1964).

216. *Id.* at 195, 199 N.E.2d at 377, 250 N.Y.S.2d at 284.

217. *Ibid.*

218. 21 App. Div. 2d 364, 250 N.Y.S.2d 969 (4th Dep't 1964), *reversing* 42 Misc. 2d 475, 248 N.Y.S.2d 588 (Sup. Ct. 1964).

219. 22 App. Div. 2d 6, 253 N.Y.S.2d 411 (4th Dep't 1964), *reversing* 43 Misc. 2d 272, 250 N.Y.S.2d 701 (Sup. Ct. 1964).

220. 42 Misc. 2d at 476, 248 N.Y.S.2d at 591.

On November 21, 1963, the Board of Education adopted a resolution directing the completion of plans for open enrollment.[221] The resolution adopted indicated that the purpose of open enrollment was to "move forward with the implementation of its (Board of Education) policy on racial imbalance."[222] Shortly after this policy was adopted, "one hundred and eighteen (118) non-white pupils comprising all of the fifth and sixth grades in school #3 were transferred to school #30."[223] The date of the transfer, January 7, 1964, is relevant because the transfer was made in the middle of the school year.[224] The school zones were not contiguous and the pupils were transported daily by bus. Also, during this same period students were being transported from school #4 to school #40.[225]

The plaintiffs in *Strippoli* challenged specifically the action taken by the Rochester School Board in transferring Negro children from schools #3 to #30,[226] while the plaintiffs in *Di Sano* attacked the Open Enrollment Plan on the basis of its validity as city-wide policy.[227]

The School Board in *Strippoli* denied the plaintiff's claim that racial imbalance was the major factor motivating the transfers from #3 to #30. The Board argued that the sole purpose of the transfers was to relieve over-crowded conditions in school #3, and persistently maintained that racial imbalance or integration was not discussed or mentioned at any of the Board of Education meetings.[228]

After evidence was presented both by the School Board and the

221. An open enrollment plan allows a Negro child to enroll in any school where there is room, regardless of the child's attendance zone. The use of geographic criteria is not abandoned, but there is no rigid adherence to geographic zones. This in essence gives an opportunity to avoid racial imbalance if the individual so desires.

In practice, this open enrollment plan has proved to be unsatisfactory in making a real reduction in racial imbalance. This is true because the basic factors that cause racial imbalance—poverty, discrimination, lack of opportunity and housing segregation—also operate to frustrate a plan of open enrollment.

222. 43 Misc. 2d at 275, 250 N.Y.S.2d at 706.

223. 42 Misc. 2d at 476-77, 248 N.Y.S.2d at 591-92.

224. "As part and parcel of this transfer the teachers were also taken along and these 118 non-whites were deliberately co-mingled or integrated with an equal number of white pupils in the same grades. So that, some children in each grade had a permanent change of teacher in the middle of the school year." 42 Misc. 2d at 274, 248 N.Y.S.2d at 592.

225. 43 Misc. 2d at 274, 250 N.Y.S.2d at 704. These transfers were attacked specifically in *Di Sano* while the open enrollment plan was contested generally.

226. 42 Misc. 2d at 477, 248 N.Y.S.2d at 592.

227. 43 Misc. 2d at 274. 250 N.Y.S.2d at 703.

228. 42 Misc. 2d at 477, 248 N.Y.S.2d at 592. In ascertaining the School Board's motive for these transfers the court gave great weight to a report prepared by the Rochester School Board for the State Commissioner of Education. The report was entitled *Racial Imbalance in the Rochester Public Schools* and contained an analysis of *de facto* segregation as well as various proposals to be used in solving this problem. One of these proposals required the closing of school #3 over a five-year period during which students of school #3 would be transferred to schools where percentages of non-whites in attendance were low. 42 Misc. 2d at 478, 248 N.Y.S.2d at 593.

plaintiffs, the court held that the curing of racial imbalance rather than overcrowding, was the basic reason for the transfer of students from #3 to #30.

> That it was a plan to cure racial imbalance is objectively obvious beyond the possibility of other explanation. Their protestations that the sole intent was to relieve overcrowding gives rise to an inference that they feared the controversial transfer would be held illegal if made to cure racial imbalance.[229]

Thus, in *Strippoli*, a New York court was faced with adjudicating the validity of the large-scale transporting of Negro children who lived in a non-contiguous area into a white area to alleviate racial imbalance. The trial court resolved this issue by holding that the transfers from school #3 to school #30 violated section 3201 of the New York Education Law, as well as the Constitution of New York (article I, section 11), and the fourteenth amendment of the United States Constitution.

In holding that section 3201 was violated by the transfers, the court completely disregarded the language in *Balaban* which indicated the purpose of the statute was to prevent segregation. The court here relied solely on the *Malverne* decision,[230] which held that an order of the State Commissioner of Education requiring action be taken to alleviate racial imbalance violated section 3201. Since the decision in *Malverne* has since been reversed by the Appellate Division[231] it would seem that this restrictive interpretation of section 3201 will not be accepted by New York's appellate courts.

The *Strippoli* court also held that these transfers were an unconstitutional exercise of power by the School Board.

> These constitutional guarantees mean that a non-white pupil has just as much right to be educated in a public school as a white pupil, but it also means, and equally so, that a child should not be enrolled or transported to a certain schoolhouse because he is white or non-white. To apply such a test, overtly or covertly, is reverse discrimination making racial membership a qualification for such a move, when it really should be irrelevant and immaterial.[232]

The court relied on the *Bell* case for authority despite the fact that the constitutional question in that case was limited to whether

229. 42 Misc. 2d at 480, 248 N.Y.S.2d at 594.

230. Matter of Vetere, 41 Misc. 2d 200, 245 N.Y.S.2d 682 (Sup. Ct. 1963).

231. Vetere v. Mitchell, 21 App. Div. 2d 561, 251 N.Y.S.2d 480 (3d Dep't 1964). Regardless of its reversal, *Malverne* was not valid authority for the proposition for which it was cited because the issue in *Malverne* was whether the school board *must* act to alleviate racial imbalance. The issue was not, as it was in *Strippoli*, whether the school board *may* act to reduce racial imbalance.

232. 42 Misc. 2d at 485, 248 N.Y.S.2d at 599.

the School Board of Gary Indiana, was required to act to reduce racial imbalance. As for *Balaban,* the court limits the rationale of that decision to a situation in which the school board, in drawing attendance lines for a new school, can "take into consideration the ethnic composition of the children therein in order to prevent the deliberate creation of a segregated public school."[233] The court further held that the dicta in *Balaban,* which indicated *Brown* does not require the transportation of children from non-contiguous areas to alleviate racial imbalance, sustains the conclusion that the Rochester School Board may not act in this manner to ease racial imbalance.[234]

The court also looked to the sociological effects of the School Board's action.

> It is detrimental to both Negro and white children to uproot them from their communities and haul them from one school to another in order to force integration. . . . Wholesale shifts (such as in this case) are harmful to both white and non-white. . . . It threatens to reduce an individual to an integer to be shuffled about by authority without reference to his own preference or other ties of family and other social groupings . . . that innocent children of any race should be used as pawns in these weird sociological chess games is nothing short of reprehensible. . . . Our law and our courts must not become mere extensions of sociologists' work-shops.[235]

Three months after the *Strippoli* decision, the Supreme Court of Monroe County held Rochester's Open Enrollment Plan clearly unconstitutional in the *Di Sano* decision.[236] As in *Strippoli,* the court based its decision on the conclusion that the attempt by the School Board to correct de facto segregation was not "desegregation but discrimination since Negro children, with or without the consent of their parents, are denied attendance at their neighborhood school solely because of color."[237]

Not satisfied with either of these decisions, the Rochester School Board appealed. The Appellate Division reversed the judgment of the trial court in *Strippoli* thirteen days after the trial court had rendered the *Di Sano* decision.[238] The Appellate Division held that there were valid educational reasons for these transfers, giving great emphasis to the evidence of overcrowding at school #3 as well as to evidence indicating that there was vacant space which could be

233. *Id.* at 487, 248 N.Y.S.2d at 601.

234. It is important to note, however, that the New York Court of Appeals in affirming the Appellate Division in *Balaban* did not utilize this interpretation of *Brown.* Judge Desmond's opinion limited comment on *Brown* to a statement that it proscribes state imposed segregation.

235. 42 Misc. 2d at 489-90, 248 N.Y.S.2d at 603-04.

236. 43 Misc. 2d at 278, 250 N.Y.S.2d at 708.

237. *Ibid.*

238. 21 App. Div. 2d 364, 250 N.Y.S.2d 969 (4th Dep't 1964), *aff'd,* 15 N.Y.2d 1036, 209 N.E. 2d 123, 260 N.Y.S.2d 185 (1965).

utilized at school #30.[239] Although the racial aspect was clearly a factor involved in the transfer, the court maintained on the theory of *Balaban* that "a determination of the Board of Education which is otherwise lawful and reasonable does not become unlawful merely because the factor of racial balance is accorded relevance."[240]

Following the same theory the Appellate Division also reversed the trial court in *Di Sano*.[241] Considering only the constitutionality of the Open Enrollment Plan, the court held that the objective of the plan, racial balancing, was constitutional. However, the court indicated that when the plan was examined in the context of specific transfers, there might be grounds of objection if "the operation . . . of the plan is arbitrary or capricious."[242]

The rationale adopted by the Appellate Division seems to be that as long as there is some valid educational purpose which justifies the action of the school board, then that action is not invalidated merely because it has some effect on racial imbalance. In many cases, this issue is resolved as a question of fact. Was the determination of the Board of Education "otherwise lawful and reasonable"? In *Balaban*, the school zone was established consonant with sound educational standards and the protesting students actually remained in their neighborhood. In *Strippoli*, the reduction of overcrowding as well as racial imbalance sustained the transportation of Negro students to an all-white school in a non-contiguous school zone.

Recent New York decisions on the trial court level have adhered to this rationale. In *Addabbo v. Donovan*,[243] the New York City Board of Education's school pairing plan was upheld, although the court acknowledged that "the reduction of racial imbalance in our public schools" was "a very important—probably the most important—factor" in the pairing plan.[244]

The plan litigated in *Addabbo* combined adjoining public elementary schools six blocks apart and did not require transportation of the protesting children. In this case, there was a clear showing that not only would the pairing plan significantly reduce racial imbalance, but

239. "The evidence clearly established that the facilities at School No. 3 . . . were badly overtaxed. The most serious overcrowding of classrooms was found at the Fifth and Sixth grade levels, where the class size ranged from 29 to 37 students as contrasted with a city-wide average of 28.4 students and a recommended size of 26. . . .

"In comparison, School No. 30 . . . was a new school with seven vacant classrooms." 21 App. Div. 2d at 366, 250 N.Y.S.2d at 970-71.

240. *Id.* at 367, 250 N.Y.S.2d at 972.

241. 22 App. Div. 2d 6, 253 N.Y.S.2d 411 (4th Dep't 1964).

242. *Id.* at 9, 253 N.Y.S.2d at 414.

243. 43 Misc. 2d 621, 251 N.Y.S.2d 856 (Sup. Ct. 1964), *aff'd*, 33 U.S.L. Week 2380 (App. Div. 2d Dep't Jan. 11, 1965), *aff'd*, 209 N.E.2d 112 (N.Y. 1965).

244. 43 Misc. 2d at 626-27, 251 N.Y.S.2d at 862-63.

also it would effectuate a number of sound educational reforms.[245]

The New York City pairing plan was also upheld in *Schnepp v. Donovan*,[246] the trial court finding that racial imbalance was only one of the factors involved in the adoption of the plan. In this case, the inconvenience to the transferred children was, at the most, minor since the two schools involved were only five city blocks apart. Also, the court found that,

> the contemplated pairing will result in substantially-reduced class sizes, additional professional services, a better opportunity for supervisory personnel to concentrate on child development and the adaption of the curriculum and at the same time the children will be afforded an early opportunity to live and work together in a multi-racial setting.[247]

Only in *Blumberg v. Donovan*,[248] has the pairing plan been held unacceptable by a trial court. In this specific situation the plan was considered unacceptable not because racial imbalance was a motivating consideration behind the plan, but because the results of the pairing in this case were "arbitrary and unreasonable" in compelling

> the transfer of petitioner's children, who are of tender years (grades three to six) and who now attend a school across the street from where they live, to a school approximately nine-tenths of a mile away, to and from which, if they return home for lunch, they must walk a total of about four miles a day, and each of the four times they make this trip must cross twelve street intersections including two heavily trafficked streets. . . .[249]

Where the pairing does not produce arbitrary inconveniences, it seems clear that it will be upheld by the New York courts as long as it secures sound educational results.

This result was further indicated when the recent action taken by the Syracuse branch of the New York Board of Education in closing a junior high school and transferring 233 pupils to a nearby junior high was sustained in *Katalinic v. City of Syracuse*.[250] In this litigation the Board conceded "that racial imbalance was one of the factors which played a part in arriving at its decision."[251] Here again, the court found "otherwise lawful" reasons for the transfers in that the receiving junior high school had a more adequate staff and facilities and was considered better able to meet the needs of the students

245. Among other things it was clear that class size and overcrowding would be reduced by the pairing of the schools. 43 Misc. 2d at 625, 251 N.Y.S.2d at 861.
246. 43 Misc. 2d 917, 252 N.Y.S.2d 543 (1964).
247. *Id.* at 919, 252 N.Y.S.2d at 545.
248. 10 RACE REL. L. REP. 152 (N.Y. Sup. Ct. 1964).
249. *Ibid.*
250. 44 Misc. 2d 734, 254 N.Y.S.2d 960 (1964).
251. *Id.* at 736, 254 N.Y.S.2d at 962.

than was the closed junior high school. The Supreme Court, Onondaga County went even further in dicta, stating:

> [E]ven if the Court were convinced that the sole purpose in closing the Junior High School portion of Precott School and in transferring the students to Madison School was for the correction of a situation of racial imbalance, which it was not, the Court still would be of the opinion that at this time it has no power to hold that said action would be arbitrary and capricious or a Constitutional violation.[252]

Clearly this dicta is not supported by any of the New York Appellate decisions but this statement indicates the direction the courts may take when faced with a situation in which, either through naivete or ineptness, the school board can show no other motivation for its action except to reduce racial imbalance. In these circumstances, the *Katalinic* dicta indicates that the New York courts may find, as have the New Jersey courts, that the policy considerations motivating the reduction of racial imbalance may become so strong as to obviate the need for other justifications.[253]

2. New Jersey.—In New Jersey, a number of communities have attempted to deal with racial imbalance in the public schools. The constitutionality of this action has been contested and sustained before the State Commissioner of Education as well as in the state and federal court systems. In *Morean v. Board of Education*,[254] four junior high school pupils and one elementary school pupil filed a petition before the State Commissioner of Education arguing that they had been deprived of the equal protection of the laws as guaranteed them by the fourteenth amendment. This deprivation was alleged to result from action taken by the Montclair Board in closing a predominately Negro junior high school,[255] and dividing the pupils evenly among the other three junior high schools until a plan to replace all these schools with a single, centrally located new school could be effectuated. The relocation plan required the parents of the pupils being relocated to state their first, second and third

252. *Ibid.*

253. See Van Blerkom v. Donovan, 22 App. Div. 2d 71, 253 N.Y.S.2d 692 (1st Dep't), *reversing* 44 Misc. 2d 356, 254 N.Y.S.2d 28 (Sup. Ct. 1964).

254. 42 N.J. 237, 200 A.2d 97 (1964).

255. Glenfield Junior High was closed for at least two major reasons. The first was economic in nature because Glenfield was the junior high school with the smallest pupil population and the highest annual per capita cost of operation." 42 N.J. at 239, 200 A.2d at 98. This aspect of the school closing was not contested by the petitioners. The second reason for closing Glenfield was to bring about total integration in the junior high schools. There are four junior high schools in Montclair known as Hillside, George Inness, Mt. Hebron and Glenfield. "The approximate Negro population of Glenfield was then 90%, of Hillside 60%, and of George Inness 18%. Mt. Hebron had no Negro pupils." *Ibid.*

choices, and a lottery then assigned them to their first choice as long as space remained available, then to their second choice, and finally to their third choice.[256] The petitioners argued that the crux of the "equal protection" deprivation was the application of the neighborhood school policy throughout Montclair, but not to the residents who lived in the zone where Glenfield Junior High School had been closed.[257]

The Commissioner of Education dismissed the petition, holding that the Board's action was neither arbitrary nor unreasonable. After the state Board of Education affirmed the Commissioner's action, petitioners appealed to the state courts.

In affirming the decision of the administrative officials, the supreme court first recognized that "racial imbalance . . . though fortuitous in origin, presents much the same disadvantages as are presented by segregated schools."[258] Although the court's authority for this conclusion leaves much to be desired,[259] it then turns to the basic question—may school boards utilize racial criteria to control the racial balance of their schools? The court summarily rejected the petitioners' argument that "racial classifications" violate the equal protection

256. The relocation plan was considered desirable by the Board because it would achieve greater racial balance until a single junior high school could be completed in 1966. Testimony before the trial court indicated the reason the Board of Education desired to achieve racial balance in its junior highs.

"Mrs. Halligan testified that such dispersal of the Glenfield pupils among the other schools was educationally desirable since it is a distinct advantage to students to be exposed to children of all kinds of backgrounds. Dr. Hinchley testified to the same effect, noting that one of our great democratic strengths is the intermingling in our public schools of students from varying economic and social surroundings." 42 N.J. at 240, 200 A.2d at 98-99.

257. The petitioner's argue the "double standard of school assignment" violates the equal protection clause because it is racially motivated. From an economic standpoint the action of the school board seems impervious to attack. This seems to be a rather effective method of resolving the problems attendent to the relocation of pupils after the elimination of an economically unfeasible school. Also, a number of cases reveal that there is no constitutional mandate requiring the use of the neighborhood school plan. Taylor v. Board of Educ., *supra* note 213; Blocker v. Board of Educ., 226 F. Supp. 208 (1964). However, the basis of the petitioner's argument was racial motivation. The petitioner is attempting to establish first that the intention of the school board was to achieve racial balance and second that such an intention is violative of the equal protection clause.

258. 42 N.J. at 243, 200 A.2d at 100.

259. The court seems to feel that this proposition is one that has been established. Here the court assumes too much. This is one of the basic questions that plagues the courts dealing with this type of question. Although dealt with in a number of decisions, the courts rarely give a decisive answer to this question. This is indicated from the cases cited by the court to sustain this proposition. Of the six cases cited, *Jackson*, *Blocker*, and *Branche* all involve racial imbalance caused by varying degrees of racially motivated conduct. *Bell* and *Evans* clearly held that fortuitous racial imbalance did not create enough disadvantage to the pupil so as to violate his constitutional rights. Only the New York court in *Balaban* reached the same conclusion as this court.

clause of the fourteenth amendment,[260] and held that the purpose of these "racial classifications" is determinative as to their constitutionality.[261]

> Constitutional colorblindness may be wholly apt when the frame of reference is an attack on official efforts toward segregation; is not generally apt when the attack is on official efforts toward the avoidance of segregation.[262]

Thus, the court found that Montclair's plan was intended to lead to integration rather than segregation[263] and held that although the relocation plan was racially motivated, it was not violative of the fourteenth amendment.

While the State Supreme Court was considering racial imbalance in Montclair, the New Jersey Federal District Court in *Fuller v. Volk*,[264] was determining the validity of a controversial plan adopted by the city Board of Education to ease racial imbalance in Englewood, New Jersey.

Prior to the adoption of the Englewood Plan, pupils were generally assigned to the five elementary schools in Englewood on the basis of residence in the designated attendance areas. As of September 19, 1962, there was an extreme concentration of Negro pupils in Lincoln School; of the 505 pupils enrolled in Lincoln, 98 per cent were Negro.[265]

The Englewood Plan was adopted to comply with a decision of the State Commissioner of Education[266] which directed the Englewood Board of Education to reduce racial imbalance in the elementary schools. This decision was aimed primarily at Lincoln School. The plan, which was approved by the Commissioner[267] on August 1, 1963,

260. It seems that petitioner had no specific holdings which could reinforce this conclusion. Thus, petitioners were forced to resort to cases which broadly upheld the recognized principle that state discriminations against Negroes deprive them of the equal protection of the laws.

261. See Goss v. Board of Educ., 373 U.S. 683 (1963) (racial classifications for transfer purposes were declared unconstitutional).

262. 42 N.J. at 243-44, 200 A.2d at 100.

263. 42 N.J. at 244, 200 A.2d at 99.

264. 230 F. Supp. 25 (D.N.J. 1964).

265. The Englewood elementary schools, their enrollment and their racial composition were as follows:

School	*Enrollment*	*% White*	*% Negro*
Cleveland	477	99.6	.4
Liberty	418	38.0	62.0
Lincoln	505	2.0	98.0
Quarles	343	96.8	3.2
Roosevelt	345	85.5	14.5

230 F. Supp. at 27.

266. Spruill v. Board of Educ., 8 RACE REL. L. REP. 1234 (1963).

267. See letter from F. M. Raubinger to Mrs. Winifred R. Schambera, reported, 8 RACE REL. L. REP. 1239 (1963).

provided for two basic changes in the school system. First, a city-wide school would be established at Engle Street to which all sixth grade pupils in the city would be assigned. Second, all pupils of grades one through five who resided in the Lincoln School attendance district were to be assigned to the Cleveland, Quarles and Roosevelt Schools on a discretionary basis.[268] As a result of this plan, by November 12, 1963, there was no longer an undue concentration of any one ethnic group in any one of Englewood's elementary schools.[269]

The plaintiffs, as parents of white children in Englewood, contended that the plan was adopted solely because of racial considerations; that their children, because of their color, were discriminated against by being deprived of the right to attend their neighborhood schools, and thus the plan was unconstitutional.

The plaintiffs primarily relied on the authority of the *Bell* case to support their contentions. Since *Bell* held the School Board had no affirmative duty to act to prevent racial imbalance, the plaintiffs argued that conversely, the School Board could not voluntarily act to ease racial imbalance.[270] The plaintiffs were forced to rely on *Bell* because at this time no court had held that voluntary action by the School Board to ease racial imbalance was constitutionally proscribed.

Judge Augelli immediately discounted the relevance of the *Bell* case by sharply characterizing the issue before the court as "not whether a local board of education must or is constitutionally required to act, but rather whether a board may or is not constitutionally prohibited from acting."[271] Following the state courts of New Jersey and New York in *Morean and Balaban,* Judge Augelli resolved this issue by holding that "a local board of education is not constitutionally prohibited from taking race into account in drawing or redrawing school attendance lines for the purpose of reducing or eliminating *de facto* segregation in its public schools."[272]

This decision is entirely consistent with the New Jersey Supreme Court's decision in *Morean.* On the basis of these decisions, there would seem to be no constitutional prohibition aimed at voluntary action taken by school boards to ease racial imbalance in New Jersey. The use of racial criteria in formulating school assignment plans does not, per se, discriminate against white children. The court in *Fuller* points out that "only if specific provisions of the Plan do in fact discriminate against plaintiffs because of their race, could it be said to result in an infringement of their constitutional rights."[273] On the

268. 230 F. Supp. at 28.
269. *Id.* at 30.
270. *Id.* at 32.
271. *Id.* at 33.
272. *Id.* at 34.
273. *Ibid.*

basis of the court's assessment of the Englewood plan, it would seem that a New Jersey school board acting voluntarily to alleviate racial imbalance would have few problems in drafting a plan which would avoid this minor prohibition.[274]

IV. Conclusion

Until the Supreme Court ultimately resolves the basic legal questions stemming from racial imbalance in the schools, the state and federal courts will be forced to deduce from *Brown* and its progeny the validity of racial imbalance. Using *Brown* as a governing principle, racial imbalance caused by racially motivated conduct is clearly invalid. Where racial imbalance results fortuitously, there is a split of authority.

The majority view, represented by decisions of two Circuit Courts of Appeals—the seventh in *Bell* and the tenth in *Downs*—finds no requirement in *Brown* that educational authorities must act to alleviate racial imbalance. The courts which followed this view have adhered to a technical interpretation of *Brown* which emphasizes the importance of racial classification. Proponents of this view also point to the fact that there is no definite sociological proof of a causal relationship between fortuitous racial imbalance and academic deprecation or psychological harm to the Negro child.

Finding that school authorities must act to ease racial imbalance, a few courts have held that racially imbalanced schools deprive the Negro child of equal educational opportunity. The validity of this deprivation is unquestionable as regards the educational goals of inducting the pupil properly into the culture and environment in which he must live. The Negro pupil in a racially imbalanced school does not receive this educational interaction with pupils of other races so as to be properly prepared for entrance into a white-oriented culture. The possibility of this minority view being more widely accepted depends to a large degree on the ability of the plaintiff's attorneys to emphasize from the academic, psychological, and cultural standpoints, the inequalities of the racially imbalanced school.

The validity of voluntary action taken by public educational authorities, has been more consistently upheld. The New Jersey Courts have held unqualifiedly that school boards may act to racially

274. This conclusion is further sustained by the decision of the Appellate Division of the New Jersey Superior Court in Schutts v. Board of Education, 86 N.J. Super. 29, 205 A.2d 762 (1964), which upheld action taken by the Board of Education of Teaneck, New Jersey to achieve better racial balance. The court held the constitutional principles involved in this case had already been clearly decided in *Morean* so that "a local board of edueation may adopt a reasonable plan to resolve a de facto segregation situation." *Id.* at 41, 205 A.2d at 769.