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Public School Segregation: Does the Fourteenth Amendment Require Affirmative Integration

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NOTES AND COMMENTS

PUBLIC SCHOOL SEGREGATION: DOES THE FOURTEENTH AMENDMENT REQUIRE AFFIRMATIVE INTEGRATION?

NEW ROCHELLE DECISION

The question of so-called "de facto segregation", or the predominance of Negro students in a school due not to legal factors but rather due to the concentration of Negro population living in the neighborhood, has been a

matter of increasing interest to the N. A. A. C. P. in the last several years.[1] In the recent case of *Taylor* v. *Board of Education of the City of New Rochelle*,[2] a federal court for the first time condemned a school board for "de facto segregation" based on the factual finding that the district lines of a school with a predominantly Negro student body were drawn with the object of segregating Negro students and that the continuation of such initial gerrymandering was impelled by the same motivation. However, the district court also held the Fourteenth Amendment contains a requirement for affirmative integration, and that whenever a neighborhood school becomes overwhelmingly Negro, even though through the influx of Negroes into the neighborhood, this amounts to segregation in fact, and imposes a duty upon the school board to integrate students by altering school district lines or permitting transfers to schools outside the district. This comment will discuss the legal aspects of this novel decision.

The facts as found by the district judge were that in 1898, before the City of New Rochelle, a suburb of New York City, had any Negro residents, Lincoln School was built. By 1930, due to an influx of Negroes into the Lincoln School district area, a majority of Negro students were attending that school.

From that time to 1961 the district lines of the Lincoln district were adjusted to enclose only the growing Negro residential area and exclude white communities without regard to their proximity to the school building. The only justification expressed was that the school, being a Negro school should be utilized by the Negro community as a meeting place after regular school hours. Those isolated white pupils who resided within the district were allowed to transfer to adjoining schools up until 1949, when the students in attendance were 100 percent Negro. In that year the transfer policy ended. The termination of the transfer policy resulted in white residents leaving the district, and the district and neighborhood became all Negro. During the eleven years between 1949 and 1960, although a few white residents returned to the area, the school board was subjected to numerous pressures, demands and complaints from various organizations alleging that the situation was one of harmful racial imbalance which was detrimental to the education the Negro pupils were obtaining.[3]

In 1957, the "Dodson Report" was issued. The report recommended that the Lincoln School be rebuilt as a larger school, that the neighborhood

[1] Greenberg, Race Relations and American Law, at 249-255 (1959).

[2] 191 F. Supp. 181 (S. D. N. Y. 1961), appeal dismissed, 288 F. 2d 600 (2d Cir. 1961), 195 F. Supp. 231 (S. D. N. Y. 1961), aff'd., 294 F. 2d 36 (2d Cir. 1961), stay denied, 82 Sup. Ct. 10, cert. denied, 7 L. Ed. 2d 339, 82 Sup. Ct. 382 (1961).

[3] Supra note 2, 191 F. Supp. 181.

school policy be less rigidly enforced, and that there be extensive redistricting. The aim of the recommendation was to offer a comprehensive plan to desegregate the Lincoln School by enlarging the school to accommodate nearby white residents as well as the Negro population. However, the board secured funds to build a smaller school which was sufficient only for the predominantly Negro enrollment.[4]

In 1960, the Lincoln student body was 94 percent Negro; however two thirds of all the Negro elementary school pupils were attending other New Rochelle schools which were predominantly white. The high schools in the city were fully integrated.

An action was brought by eleven Negro pupils, to enjoin the construction of the new school and to enjoin the board from refusing to allow these students to register other than in Lincoln, and from requiring them to register at Lincoln, in the United States District Court for the Southern District of New York against the New Rochelle School Board. The plaintiff pupils alleged that the school board had deliberately created and maintained a racially segregated school, thus violating the Fourteenth Amendment and the principles enunciated in *Brown* v. *Board of Education*.[5]

Judge Irving Kaufman, in deciding the case, held that the board, prior to 1949, had intentionally created the school as a racially segregated school by gerrymandering the district lines and by transfers of white children out of predominantly Negro schools.

He further held that in maintaining the same school boundaries and a rigid neighborhood school policy whereby the students residing within each district were required to attend the school within that district except in extraordinary circumstances the school board had failed to implement in good faith the principles enunciated in *Brown* v. *Board of Education* requiring a racially desegregated school policy.

However, Judge Kaufman went on to condemn the neighborhood school policy when such policy results in the necessity of Negroes attending schools which are predominantly Negro. He declared that "The neighborhood school policy certainly is not sacrosanct . . . It cannot be used as an instrument to confine Negroes within an area artificially delineated in the first instance by official acts."[6]

Of even more significance was his decision that permitting Negroes to transfer out of these schools when other students lacked the same

[4] Id. at 196.

[5] 349 U. S. 294 (1955).

[6] Supra note 2, 191 F. Supp. 181, at 195.

privilege was not a denial of equal protection of the law. Thus, the school board argued that ". . . it would be violative of the law to accord Negroes special privileges not allowed to other minority groups." It pointed to the fact that several other elementary schools in New Rochelle have student bodies which are primarily of one religious or national origin group and argued that ". . . if permissive zoning privileges were afforded to the Lincoln pupils, the same privileges would have to be given to these other minorities." It concluded that such wholesale permissive transferring would produce chaos in the school system.

The district judge first noted that no other ethnic groups were currently seeking transfers. However, he went on to hold:

> "The Constitution is not this color-blind. The Brown decision dealt only with Negroes; it was based on factual findings which may not be applicable to other minority groups. . . . There are instances where it is not only justified, but necessary, to provide for such allegedly 'unequal treatment' in order to achieve the equality guaranteed by the Constitution."[7]

After a premature appeal to the Court of Appeals, which was dismissed,[8] the district judge ordered the school board to permit all pupils to transfer from Lincoln School to other schools at will.[9] This privilege has in fact been exercised by a majority of the students there, denuding the Lincoln School and overcrowding the surrounding schools.[10]

On appeal, two judges out of a three judge Second Circuit panel affirmed the district judge's decision on the basis of intentional gerrymandering of the Lincoln School.[11] In a lengthy and forceful dissent, Judge Moore first pointed out that the record was devoid of any competent evidence of original segregation, gerrymandering, or other intentional districting motivated by racial considerations prior to 1949,[12] and that the school board's failure to affirmatively integrate the Lincoln School after 1949 might have been motivated by any number of valid non-racial considerations.[13] Asserting that there was no affirmative duty to decree

[7] Id. at 196.

[8] Supra note 2, 288 F. 2d 600.

[9] Supra note 2, 195 F. Supp. 231.

[10] Out of 485 Lincoln pupils the parents of 350 requested transfers. N. Y. Times, June 15, 1961, p. 37, col. 1. In the end 267 pupils were transferred by the board, leaving only 187. The percentage of Negroes fell from 94% to 90%. N. Y. Times, Sept. 7, 1961, p. 29 col. 1.

[11] Supra note 2, 294 F. 2d 36.

[12] Id. at 46 (Moore, J., Dissenting).

[13] Id. at 48.

"enforced integration and compulsory racial mixture according to Federal court formula in every city and hamlet of the country,"[14] Judge Moore also condemned the preference being shown to Negro students in Lincoln School.[15] He concluded that ". . . the effect and implications of the decision below are to place the operation of the schools in the hands of the Federal courts or a single judge."[16]

Although the denial of certiorari by the Supreme Court was, as usual, without opinion,[17] Justice Brennan's memorandum in refusing a stay clearly indicated that the denial was based on the narrow finding of fact below.[18] Accordingly, the twin questions decided below, whether there is an affirmative duty to integrate, and whether this duty is imposed only in favor of Negroes, by the Fourteenth Amendment, remains open.

Pre-Brown Decisions and the Brown Doctrine

The legislative history of the Fourteenth Amendment shows that it was not intended to affect the then prevailing racial segregation in public schools.[19] All of the early cases which discussed the Fourteenth Amendment specifically held that school segregation was not unconstitutional,[20] and even those few state cases which forbade segregation did so based on particular statutes and not on the federal constitution.[21] Indeed, the "separate but equal" doctrine of *Plessy* v. *Ferguson*[22] had even Mr. Justice Harlan's approval in *Cummings* v. *County Board of Education*[23] when

[14] Id. at 51.

[15] Id. at 50.

[16] Ibid.

[17] Supra note 2, 7 L. Ed. 2d 339, 82 Sup. Ct. 382.

[18] Supra note 2, 82 Sup. Ct. 10.

[19] Avins, Review, 58 Colum. L. Rev. 428, at 430-1 (1958). See also Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955).

[20] Bertonneau v. Board of Directors of City Schools, 3 Fed. Cas. 294 (1878); Tape v. Hurley, 66 Cal. 473, 6 Pac. 129 (1885); Ward v. Flood, 48 Cal. 36 (1874); Cory v. Carter, 48 Ind. 327 (1874); Roberts v. Louisville School Board, 95 Ky. 621, 26 S. W. 814 (1894); Chilton v. St. Louis & T. M. Ry. Co., 114 Mo. 88, 21 S. W. 457 (1893); State v. Duffy, 7 Nev. 342 (1872); People v. Gallager, 93 N. Y. 438 (1883); Dallas v. Fosdick, 40 How. Pr. 249 (N. Y. 1869); McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330 (1890); State v. Board of Education of Cincinnati, 7 Ohio Dec. Reprint 129 (1876); State v. McCann, 21 Ohio St. 198 (1871); Martin v. Board of Education of Morgan County, 42 W. Va. 514, 26 S. E. 348 (1896).

[21] Wysinger v. Crookshank, 82 Cal. 588, 23 Pac. 54 (1890); People v. Board of Education, 127 Ill. 613, 21 N. E. 187 (1889); Chase v. Stephenson, 71 Ill. 383 (1874); Ottawa Board of Education v. Tinnon, 26 Kan. 1 (1881); Pierce v. Union District School Trustees, 46 N. J. L. 76 (1884); People v. Board of Education of Detroit, 18 Mich. 400 (1869); Kaine v. Commonwealth, 101 Pa. 490 (1882).

[22] 163 U. S. 537 (1896).

[23] 175 U. S. 528 (1899).

applied to public schools, and Mr. Justice Holmes' approval in *Berea College* v. *Kentucky*[24] when applied to private schools.

Brown v. *Board of Education*[25] ended the "separate but equal" doctrine in education. In this case, the Supreme Court required school boards to shift to a non-racial school districting policy. No consideration was henceforth to be given to the racial background of the student. In the only other Supreme Court decision, *Cooper* v. *Aaron*,[26] this doctrine was reaffirmed. Indeed, *Shuttlesworth* v. *Birmingham*[27] underlines the limited scope of the Brown doctrine by permitting pupil placement and assignment based on a wide variety of non-racial factors.

Affirmative Duty to Integrate

Lower court cases have been in accord that there is no affirmative duty to integrate. In *Briggs* v. *Elliott*,[28] one of the cases that was remanded by the *Brown* decision, the court therein stated:

> ". . . It is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the Federal Courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided is that a state may not deny to any person on account of his race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the constitution is involved, even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, 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 to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."[29]

[24] 211 U. S. 45 (1908).
[25] 347 U. S. 483 (1954).
[26] 358 U. S. 1 (1958).
[27] 358 U. S. 101 (1958).
[28] 132 F. Supp. 776 (E. D. S. C. 1955).
[29] Id. at 777.

In *Rippy* v. *Borders*,[30] the Fifth Circuit disagreed with a District Court's decision in a school segregation case wherein part of its decree enjoined the defendants from "requiring or permitting segregation in any school under their supervision." The Court of Appeals declared as follows:

> "We have emphasized the words 'or permitting segregation of the races' in the District Court's order because that expression might indicate a serious misconception of the applicable law and of the mandate of this court. Our mandate . . . had been carefully limited so as to direct the entry of a judgment restraining and enjoining the defendants from requiring segregation of the races in any school under their supervision. Likewise in our opinion, we had pointed out that it is only racially discriminatory segregation in the public schools which is forbidden by the Constitution. That point was emphasized in the Arlington, Virginia Case, in which Chief Justice Parker of the Fourth Circuit quoted with approval the apt language of the District Judge Bryan: 'It must be remembered that the decisions of the Supreme Court of the United States in *Brown* v. *Board of Education*, . . . do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of the court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court. Consequently, compliance with that ruling may well not necessitate such extensive changes in the school system as some anticipate.' "

The above statements were approved and followed in *Avery* v. *Wichita Falls Independent School District*,[31] wherein an action for a declaratory judgment was brought based on the assumption that the plaintiffs were entitled to attend the public elementary schools nearest their respective homes without distinction as to their race or color. The court succinctly stated "The constitution as construed in the school segregation cases . . . forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races."

[30] 250 F. 2d 690, 692-3 (5 Cir., 1957).

[31] 241 F. 2d 230, 233 (5th Cir. 1957).

Under these authorities the constitutional proscription of the use of state or local power to enforce segregation cannot be extended so as to hold or imply a constitutional compulsion to create integration.[32]

In answering the general question the problem has also arisen as to whether the construction of a new school in a predominantly all Negro or all white area could be enjoined. In *Sealy* v. *Department of Public Instruction*,[33] a school district comprised two non-contiguous areas by reason of the division of the township. Before any litigation was instituted the junior high school serving both of these areas was located in the southern portion of the township. The Board of Education was about to abandon the old school and construct a new school. The location of the new school would be in the upper section, a predominantly white area, though the school was to serve both white and Negro students. An action was brought to enjoin the construction of the school on the ground that the selection of the site amounted to discrimination. The court refused the application. The Board in reaching its decision regarding the site had taken into account the influx of school age population, requirements of school facilities, the population census of both districts, a projection of the school population, and the consideration that many students now attending private schools would attend the public school upon the completion of the new school. The court decided that the plaintiff's complaint rested primarily on inconvenience, and made the following statement regarding the discretion lodged in the school board:

> "It may well be that the final determination is not the best site that could be selected, but this court has no authority to review the actions of the local school authorities in selecting a site for the location of the school, since the location of the school is primarily a question to be decided by the Local Board of School Directors, and even a state court could only interfere when there is such a manifest abuse in the action of the board as amounts to arbitrary will and caprice."[34]

The lower court's opinion was affirmed on appeal, and the appellate court also commented as follows upon the discretion of the school board: "The location of the schools assuredly is one for state school authorities

[32] Boston v. Rippey, 275 F. 2d 850 (5th Cir. 1960), cert. denied, 352 U. S. 878 (1960), rev'd. and reman'd., 285 F. 2d 43 (5th Cir. 1960); City of Montgomery, Alabama v. Gilmore, 176 F. Supp. 776 (N. D. Ala. 1959), modified and aff'd., 277 F. 2d 364 (5th Cir. 1960); Allen v. County School Board of Prince Edward County, Va., 164 F. Supp. 786 (E. D. Vir. 1958), rev'd. and reman'd., 249 F. 2d 462 (4th Cir. 1957), cert. denied, 355 U. S. 953 (1958).

[33] 159 F. Supp. 561 (E. D. Penn. 1957), aff'd., 252 F. 2d 898 (3rd Cir. 1958), cert. denied, 356 U. S. 875 (1958).

[34] Supra note 33, 159 F. Supp. 561, at 565.

and local school boards; for state, not national courts, unless there be a deprivation of rights guaranteed by the Fourteenth Amendment.''[35] Thus, it would conclusively appear that the mere choice of a location for a school, though it be in a predominantly all white or all Negro neighborhood, rests in the discretion of the school board.[36]

The legitimately administered ''neighborhood school'' policy was given absolute and unequivocal approval in the Michigan case of *Henry* v. *Godsell*.[37] The plaintiff claimed that the construction of a new school in an area occupied almost exclusively by Negroes, the modification of attendance areas so that the population of certain schools was almost all Negro, and the subsequent refusal to permit plaintiff to attend a public school of her own choice, disregarding the attendance area in which she lived, constituted a violation of the Civil Rights Act. The court dismissed the complaint and approved the neighborhood school policy by making the following statements:

> ''The school board has a duty to provide educational facilities to all children without regard to their color. If it builds schools in areas where need exists, without arbitrarily fixing attendance areas to exclude any given segment of the school population, it is carrying out that duty.''
>
> ''The fact that in a given area a school is populated almost exclusively by children of a given race is not of itself evidence of discrimination. The choice of a school site based on density, accessibility, ease of transportation, and other safety considerations, is a permissible exercise of administrative discretion.''[38]

The plaintiff also contended that the attendance areas in the school districts had been altered to compel or effectuate a plan of segregation.

[35] Supra note 33, 252 F. 2d 898, at 901.

[36] Shuttlesworth v. Birmingham, 162 F. Supp. 372 (N. D. Ala. 1958), aff'd. per curiam, 358 U. S. 101 (1958). The court stated they would not consider the possible unconstitutional application of the law providing for the transfer of students; the court will assume that the board will act in a non-discriminatory manner in the carrying out of transfers unless there is a positive showing of purposeful segregation. See also: Carson v. Warlick, 227 F. 2d 789 (4th Cir. 1955), mandamus denied, 238 F. 2d 724 (4th Cir. 1956), cert. denied, 353 U. S. 910 (1957); Holland v. Board of Public Instruction, 258 F. 2d 730 (5th Cir. 1958). The Holland case holds that the Fourteenth Amendment does not speak in positive terms to command integration, but negatively to prohibit governmentally enforced segregation. An infant colored child was entitled to be treated simply as another school child without regard to his race or color, and the fact that he was Negro did not vest him with the right to attend a school located in a district in which he did not reside when that geographical rule was being applied to all children alike.

[37] 165 F. Supp. 87 (E. D. Mich. 1958).

[38] Id. at 90.

The court held that the contention lacked merit and said: "In the absence of a showing that the attendance areas have been arbitrarily fixed or contoured for the purpose of including or excluding families or a particular race, the Board of Education is free to establish such areas for the best utilization of its educational facilities."[39]

The court also found that the transfer of some students to schools outside their particular residential district was not for purposes of segregation. "A few students, because of special circumstances, are permitted to attend a school not in their attendance area. Such permission is granted by school authorities upon a proper showing, based on their established standards. It conclusively appears from the testimony that the standards applicable for special transfer, which do not include any considerations of race, have been adhered to in every respect."[40]

The court then in approving the neighborhood school policy pointed out that this was in no fashion contradictory to the Constitution, but in fact was in accord and compatible with the requirements of the Constitution.[41]

Thus, the lower court decisions support the principle that the Constitution does not provide for affirmative integration of a school comprised of primarily one race when there was no state action to effectuate a policy of racial segregation.

In the Supreme Court the question has similarly been answered in the negative as to whether or not there is an affirmative duty to integrate.

In the first *Brown* v. *Board of Education*[42] decision, in 1954, no view was expressed when pupils are not assigned solely on the basis of the locality in which they reside. The court stated: "Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities? We believe that it does."[43] The court did not go any further than this.

Then in the second opinion in 1955, in remanding to the district courts involved, the court said: "The courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision

[39] Ibid.
[40] Id. at 91.
[41] Ibid.
[42] 347 U. S. 483 (1954).
[43] Id. at 493.

of local laws and regulations which may be necessary in solving the foregoing problems.''[44]

But it was the final result in the *Brown* case that points up the fact that there is no affirmative duty to integrate; for the final plan approved by the district court read as follows: ''If it is a fact, as we understand it is with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live.''[45] As a matter of fact in the City of Topeka today 11 out of 60 of the schools are still all Negro, after five years of desegregation in the city where the model for desegregation was laid down.[46]

The result based on the Supreme Court decisions to date, and the lower court opinions, leave us with an interpretation of the Fourteenth Amendment that requires desegregation where there has in fact been racial segregation on the part of the state or its agents in a state supported school, but that there is no affirmative duty to integrate or desegregate a school or schools whose student body represent primarily a single race where the reason for the minority group's primary representation in the school is not due to a state's intentional plan or scheme to effectuate racial segregation.

Thus, the *Taylor* decision cannot constitutionally be interpreted to stand for the premise that whenever a state supported school is represented primarily by a single racial group there is an affirmative duty to desegregate, or integrate. It must then follow that the designation of the school an individual is to attend based on a non-racially motivated neighborhood school policy is not in contravention of the United States Constitution.

Quota Systems and Affirmative Integration

An important basis of the district court's decision in the *Taylor* case is a finding that constitutionally required equality in schooling cannot be achieved unless there is not merely some integration but some considerable proportion of white children mixed with Negro children. Thus, the district judge in his findings of fact criticized the school board because ''. . . in these eleven years, it has taken no action whatsoever to alter the racial imbalance in the Lincoln School.''[47] He quoted extensively and

[44] 349 U. S. 294, at 300 (1955).

[45] 139 F. Supp. 468, at 470 (D. C. Kan. 1955).

[46] Taylor v. Board of Education of New Rochelle, 294 F. 2d 36, at 47 (2d Cir. 1961). (Moore, J., Dissenting).

[47] 191 F. Supp. 181, at 187 (S. D. N. Y. 1961).

with obvious approval a report advocating eradication of ". . . the imbalance of races in the Lincoln School."[48] He interpreted *Brown* as holding that the ". . . necessity of giving these minority-group children the opportunity for extensive contact with other children at an early state in their educational experience"[49] was constitutionally mandatory. He held that "The fact that the Lincoln School contains approximately 6% whites surely cannot divest Lincoln of its segregated character. In a community such as New Rochelle, the presence of some 29 white children certainly does not afford the 454 Negro children in the school the educational and social contacts and interaction envisioned by *Brown*."[50] And finally, he reemphasized his view that only Negroes were entitled to such a quota system by rejecting the school board's argument that to permit Negro students to transfer when members of other groups could not would ". . . accord Negroes special privileges" by stating that "the Constitution is not this color-blind" and that the "*Brown* decision dealt only with Negroes."[51]

The issue was drawn even more sharply in the Court of Appeals. In his first dissent, Judge Moore asked ". . . how many additional white children will be required to accomplish the result" of an adequate racial balance?[52] He also stated that " '. . . when all the racial, religious, and other imbalances' have been thoroughly aired . . . the hope is expressed that somehow the American philosophy, that constitutional rights are the vested heritage of all our citizens and not the exclusive property of any racial or religious group to be used for their own particular interests, may find its way into the plan—even if only in a footnote."[53]

In his second dissent, Judge Moore declared that ". . . the trial court turned the case from a segregated school case into an integration case" because ". . . there was no proof whatsoever of segregation; there was proof of racial imbalance in various sections of the city."[54] Pointing out that one school was over 90% Jewish and one over 90% Italian,[55] Judge Moore declared:

> "The 'equal protection' rights of all the other school children of New Rochelle are completely disregarded. How can a permissive transfer

[48] Id. at 189.
[49] Id. at 192.
[50] Id. at 193.
[51] Id. at 196.
[52] Taylor v. Board of Education of New Rochelle, 288 F. 2d 600, at 607 (2d Cir. 1961) (Moore, J., Dissenting).
[53] Id. at 607.
[54] Supra note 46, at 43.
[55] Id. at 42.

policy be granted only to one out of twelve districts? . . . If concentration of any one group is 'segregation' (and hence a constitutional violation), why should not the Jewish or Italian child be given equal privileges to transfer? If, as represented, Columbus is in a depressed economic area and over 90% Italian, is not the proper education of a child as important to a resident of the Columbus district as the Lincoln district?''[56]

Thus, the underlying issue in *Taylor* was sharply drawn as to whether there is a constitutional requirement that the school board use a "quota system" whereby there would be a fixed percentage of Negroes and whites in each school, and whether only Negroes are entitled to the benefits of this quota system.

As to the first branch of inquiry, Supreme Court decisions leave little doubt that quota systems are constitutionally obnoxious. In *Hughes* v. *Superior Court*,[57] Mr. Justice Frankfurter declared:

"To deny California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. States may well believe that such constitutional sheltering would inevitably encourage use of picketing to compel employment on the basis of racial discrimination.''[58]

Likewise, in *Cassel* v. *Texas*,[59] the Supreme Court stated that "proportional representation of races on a jury is not a constitutional requisite" and that since there can be no discrimination because of color, "proportional limitation is not permissible.''[60] The same thing was condemned in *Brown* v. *Allen*.[61]

Quota systems have also been condemned by both cases and legal commentators.[62] In a recent decision, a federal district court in Illinois observed:

[56] Id. at 50.
[57] 339 U. S. 460 (1950).
[58] Id. at 464.
[59] 339 U. S. 282 (1950).
[60] Id. at 286-7.
[61] 344 U. S. 443 (1953).
[62] Note, 107 U. Pa. L. Rev. 515, 540-50 (1959); 70 Yale L. J. 126 (1960); Taylor v. Leonard, 30 N. J. Super, 116, 103 A. 2d 632 (1954).

"A controlled integration plan with discriminatory restrictions . . . would amount to a quota system of housing and that is just as illegal as the quota system of employment that a group of Negroes sought to enforce on a department store in . . . *Hughes* v. *Superior Court* . . . in that case, the Supreme Court . . . (said):

'If petitioners were upheld in their demand then other races, white, yellow, brown, and red, would have equal rights to demand discriminatory living on a racial basis. Yet that is precisely the type of discrimination to which petitioners avowedly object.' . . .

True, plaintiffs' plan may appear attractive to Negroes at the particular moment in a particular place, but it would constitute a strait jacket. It is but a mess of pottage offered in exchange for a birthright of equality."[63]

The second branch of inquiry is equally free from doubt. The Civil Rights Act of 1866, from which the Fourteenth Amendment is derived, "applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same Civil Rights."[64] The legislative history of the Fourteenth Amendment is thus clear on this point. And in one of the earliest cases interpreting the equal protection

[63] Progress Development Corp. v. Mitchell, 182 F. Supp. 681, 707 (N. D. Ill., 1960); modified on other grounds, 286 F. 2d 222 (1961).

[64] Statement of Senator Lyman Trumbull of Illinois, Cong. Globe. 39th Cong., 1st Sess. 599 (1866). Senator Jacob Merritt Howard from Michigan stated when arguing for the adoption of the last two clauses of Sec. 1 of the proposed Fourteenth Amendment to the United States Constitution:

"[The Fourth Article and the sixth of the first ten amendments to the United States Constitution] . . . stand simply as a bill of rights in the Constitution without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the states and compell them at all times to respect these fundamental guarantees."

* * * * *

"This (Sec. 1 of the Fourteenth Amendment) abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another."

* * * * *

"Ought not the time be now passed when one measure of justice is to be meted out to members of one caste while another and different measure is meted out to members of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same government, and equally responsible to justice and God for the deeds done in the body?"

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" . . . It establishes equality before the law and gives to the humblest . . . the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." Id., at 2766.

clause, the Supreme Court declared that its ". . . provisions are universal in their application . . . without regard to any differences of race, of color, or of nationality."[65]

It is obvious from the above that all persons are entitled to the same rights and none are entitled to special privileges. Negroes may not be accorded any advantage not accorded to all other persons. No matter what the semantic dressing, if the bare bones of any proposal give one iota of right more to any group not accorded to any other, the proposal violates fundamental tenets of equality. As one writer put it:

> "Likewise, Mr. Greenberg is vitally concerned because a substantial number of northern schools have a Negro majority, and he considers such schools ipso facto inferior. He would like to use all sorts of means to maintain proper racial 'balance'. But what about schools with Irish, Italian, Jewish, Polish, and other majorities? Indeed, the year this reviewer went to Columbia Law School, his class was about 60 per cent Jewish. Is Columbia University Law School a psychologically inferior institution? Are Jewish graduates thereof getting shortchanged? Must we inaugurate helicopter service from the University of Virginia to maintain proper religious 'balance'? Or are Negroes entitled to special privileges once again?"[66]

The above points were brought into sharp focus by one New York case in which a group of Negroes in New York's Harlem picketed white owned liquor stores there to replace white liquor salesmen with Negroes. In banning the picketing, a New York judge declared:

> "Insistence upon compliance with the policy of the law bespeaks consistency in application to all. It is not a one way proposition for Negroes alone, it is rather for equal application to all. There can be no two ways, one liberal policy for a single race, and for all others, to limbo. This accepted policy of the State can not be circumscribed so as to restrict its application only to those who invoke it. It applies universally to all races and creeds. In the latter respect, rightfully, no racial group may be characterized as a minority. No Constitution, no law, makes such a distinction."[67]

[65] Yick Ho v. Hopkins, 118 U. S. 356 (1885).

[66] Avins, Book Review, 27 U. Chi. L. Rev. 598, 599 (1960).

[67] In re Young, 29 Misc. 2d 817, 211 N. Y. S. 2d 621, 632-3 (1961).

Conclusion

At the present time in the City of Chicago, there is a class action brought by James and Andrea Webb as members of a class and representing the class, against the School Board of the City.[68] Almost identical with the *Taylor* case discussed above, the action in Chicago maintains the same two major premises, that the school districts are purposely altered, and were originally set up to initiate and maintain segregation; and that the neighborhood school policy when it results in primarily all Negro schools, though the result was not designed or intentional, and may be due to large groups moving into a given area, is still in contravention of the Fourteenth Amendment since there is an affirmative duty to integrate on the part of state authorities.

In the Chicago case the Superintendent of Schools has denied that the districts comprising the complained of neighborhood schools were designed to effectuate segregation.[69] Of course, these factual questions will be decided by the court and are beyond the scope of this article. However, it is believed that insofar as this, or any other litigation, attempts to urge any affirmative duty to integrate or to treat any group differently from any other group, such litigation is not well founded in law. The Constitution's color-blindedness does not admit of special spectacles for special groups.

Richard T. Buck.
Richard A. Nelson.
David M. Truitt.

68 Webb v. Board of Education, No. 61 Civ. 15689, N. D. Ill., Sept. 1961.

69 Affidavit in Answer to Affidavit of Paul B. Zuber, by Benjamin C. Willis as general superintendent of public schools of the City of Chicago, in Webb v. Board of Education, supra, n. 68.