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# DE JURE INTEGRATION IN EDUCATION

BERNARD E. GEGAN\*

NOT INFREQUENTLY in the growth of the law a phrase initially employed in defense of some right has its strongest and most enduring influence, not in nurturing the right, but in definitively limiting or crippling it against later and more carefully aimed attacks. Perhaps the most prominent instance of this process began with Mr. Chief Justice Waite's use of the phrase "business affected with a public interest" in sustaining the first state regulations of the rates of railroads and grain storage warehouses.<sup>1</sup> The artless invocation of a phrase used more than two hundred years earlier by Lord Chief Justice Hale as but one ground of public regulatory power soon became the vehicle for severe restriction of state competence to legislate in these areas.<sup>2</sup> No doubt further examples immediately come to the reader's mind.

A similar process seems to have manifested itself in a recent article in *The Catholic Lawyer* by Professor Charles E. Rice entitled "The Legality of De Facto Segregation."<sup>3</sup> The article analysed the constitutionality of the various measures that have either been proposed or undertaken to remedy the disadvantages thought inherent in racially imbalanced schools. Such measures include strategic site selection, open transfer plans, non-geographic attendance zoning, the Princeton Plan of paired schools with a correspondingly larger attendance zone, and school busing.

With the possible exception of an open transfer plan, the conclusion reached by Professor Rice was that measures of the kind sketched above are violative of the fourteenth amendment's requirement of equal protection of the laws. The main text invoked in support of the thesis

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<sup>1</sup> *Munn v. Illinois*, 94 U.S. 113 (1877).

<sup>2</sup> *Wolff Packing Co. v. Court of Indus. Rel.*, 262 U.S. 522 (1923); *Ribnik v. McBride*, 277 U.S. 350 (1928); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). Not until the decision in *Nebbia v. New York*, 291 U.S. 502 (1934), was the balance restored with the upholding of New York's milk industry regulations.

<sup>3</sup> Rice, *The Legality of De Facto Segregation*, 10 CATHOLIC LAW. 309 (1964).

was the now famous dissent of Mr. Justice Harlan (I) in *Plessy v. Ferguson*,<sup>4</sup> in which he said: "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."<sup>5</sup> As formulated by Professor Rice, "the issue is whether we should strive for a color-blind society or accept one in which, for some purposes, we officially sanction an attitude of color-consciousness."<sup>6</sup> The reference in Mr. Justice Harlan's opinion is thus seen as a constitutional "first principle" limiting the power of any state to weigh the racial factor in determining educational or other policy, notwithstanding the intended or probable social effect of the measure adopted. Nor would Professor Rice limit judicial scrutiny to cases where the law in its actual administration classifies individuals according to race—as typified by school segregation before *Brown v. Board of Educ.*<sup>7</sup> Principle demands evenhanded adherence to the line of cases invalidating legislation nonracial in form but having a "dominant purpose" of racial segregation or disenfranchisement. If the equal protection rule invalidates gerrymandered districts resulting in segregated education, then so does it prohibit districts drawn to strike a racial balance.

Thus has Mr. Justice Harlan's dissent rewritten itself. I do not wish to be understood, however, as saying that some early defensive formulation of a principle is never the final measure of its place in the law. It may well turn out to be such a maximum; and not the less so because ad-

vocated by those who question its judicial recognition as a minimum.<sup>8</sup> Accordingly, it is to the merits that we now turn.

### Equal Protection: The Principle

Since Professor Rice relies on Mr. Justice Harlan's contemporary exposition of the equal protection clause, it is appropriate to begin here with other judicial expressions of the "original" understanding.<sup>9</sup> Speaking of the Civil War Amendments, Mr. Justice Miller confidently wrote in *The Slaughter-House Cases*:

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. . . . Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.<sup>10</sup>

Coming to the equal protection clause, the Justice said:

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes re-

<sup>4</sup> 163 U.S. 537 (1896).

<sup>5</sup> *Id.* at 559.

<sup>6</sup> Rice, *supra* note 3, at 317.

<sup>7</sup> 347 U.S. 483 (1954); see also *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

<sup>8</sup> "And, although a decent regard for the essentials of our system of divided powers would have counselled, if not commanded, that the elimination of the 'separate but equal' pattern be accomplished by constitutional amendment rather than by judicial decree, nevertheless we can all rejoice that our law no longer countenances the institution of legal segregation." Rice, *supra* note 3, at 318.

<sup>9</sup> See generally Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

<sup>10</sup> 83 U.S. (16 Wall.) 36, 67-68 (1873).

sided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.<sup>11</sup>

In *Strauder v. West Virginia*,<sup>12</sup> after declaring that the law must be the same for black as for white, the Court gave the reason why as follows:

The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.<sup>13</sup>

Again in *Ex Parte Commonwealth of Virginia*: “They [the Amendments] were intended to take away all possibility of oppression by law because of race or color.”<sup>14</sup>

This brief canvass may be appropriately closed with an admonition of Mr. Justice Harlan in *The Civil Rights Cases*:<sup>15</sup>

I cannot resist the conclusion that the substance and spirit of the recent amendments to the Constitution have been sacrificed by a subtle and ingenious verbal criticism. “It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul.”<sup>16</sup>

And further on in his opinion:

If the constitutional Amendments be enforced, according to the intent with which,

as I conceive, they were adopted, there cannot be, in this republic, any class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freeman and citizens because of their race, color or previous condition of servitude.<sup>17</sup>

These are all, of course, rather spacious observations, and do not necessarily refute the construction Professor Rice has placed upon the equal protection clause. They do, however, have a different emphasis and reflect less abstract objectives than an isolated reference to Mr. Justice Harlan’s “color-blind” phrase might otherwise suggest. Clearly, the amendments are not so specific in intent as to be confined in their operation to the Negro race, as was at first intimated.<sup>18</sup> There has been, however, running throughout the course of the adjudged cases, the notion that only “hostile” or “discriminatory” legislation is barred by the equal protection clause. In *Yick Wo v. Hopkins*,<sup>19</sup> an ordinance of the City of San Francisco was invalidated because it was so administered as to make irresistible the conclusion “that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is *therefore*, illegal. . . .”<sup>20</sup> Even in the breach was this rule honored. In upholding an Alabama statute that punished with increased severity adultery or fornication between Negro and white, the

<sup>11</sup> *Id.* at 81.

<sup>12</sup> 100 U.S. 303 (1880).

<sup>13</sup> *Id.* at 307-08.

<sup>14</sup> 100 U.S. 339, 345 (1880).

<sup>15</sup> 109 U.S. 3 (1883).

<sup>16</sup> *Id.* at 26 (dissenting opinion).

<sup>17</sup> *Id.* at 62 (dissenting opinion).

<sup>18</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67-72 (1873).

<sup>19</sup> 118 U.S. 356 (1886).

<sup>20</sup> *Id.* at 374. (Emphasis added.)

Court conceded that the purpose of the equal protection clause "was to prevent hostile and discriminating state legislation against any person or class of persons."<sup>21</sup> And in *Plessy v. Ferguson* the Court felt obliged to commit the memorable statement:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.<sup>22</sup>

Another protestation of adherence to the "no hostility" version of the equal protection clause came in *Korematsu v. United States*,<sup>23</sup> in which the Court found no discriminatory purpose in the wartime exclusion of Japanese-Americans from their homes in designated areas of the West Coast. "Pressing public necessity may sometimes justify the existence of such restrictions," the Court said, "racial antagonism never can."<sup>24</sup> Nor was the landmark decision in *The School Segregation Case*<sup>25</sup> a departure from the equal protection doctrine as theretofore understood. It was simply a recognition that legal segregation was nothing more than the imposition of disadvantages because of race, *i.e.*, hostility—an everyday fact of life, the overdue recognition of which became the focus of controversy because of the Court's insistence on "that elaborate demonstration

of the obvious by methods that are obscure which is the hallmark of so much current social science. . . ."<sup>26</sup>

It is against this background that for the first time in our history we see the adoption of measures that truly come within the animating spirit of "no hostility"—measures designed to upgrade the social position of the Negro without any implication of antagonism toward the white majority. After long adherence to the "no hostility" formulation through so many instances of *de facto* hostility toward minorities, this perspective is of some weight in evaluating the argument now made that the old understanding be abandoned in favor of withdrawal to the high ground of psychological color-blindness.

There are many perspectives from which to appraise evenhandedness in the law and we must never forget that the moral force of the rule of law depends fully as much upon giving the appearance of doing justice as upon the various theories of justice itself. Of course, appearances do not determine constitutional realities; yet what student of the Court's work would say that they have not had their constructive place in the timing and content of "principled" decisions.

As noted above, the Court in *The School*

<sup>21</sup> *Pace v. Alabama*, 106 U.S. 583, 584 (1882).

<sup>22</sup> 163 U.S. 537, 551 (1896).

<sup>23</sup> 323 U.S. 214 (1944); see also *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>24</sup> *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

<sup>25</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>26</sup> Freund, *Civil Rights and the Limits of Law*, 14 BUFFALO L. REV. 199, 200 (1964). See Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 430 n.25 (1960): "The charge that it is 'sociological' is either a truism or a canard—a truism if it means that the Court, precisely like the *Plessy* Court, and like innumerable other courts facing innumerable other issues of law, had to resolve and did resolve a question about social fact; a canard if it means that anything like principal reliance was placed on the formally 'scientific' authorities, which are relegated to a footnote and treated as merely corroboratory of common sense."

*Segregation Case* did not put its decision on the ground of constitutional colorblindness. Rather, the opinion is instinct with the judgment that the pretext of separate-but-equal could no longer disguise the hostility and racial antagonism inherent in segregation by law. Whatever criticisms may be levelled at the Court's opinion as an example of the judicial art, there is wisdom in its explicit application of the formal doctrine to the existing social situation. It was no sport of history that the *Brown* case was decided when it was. If ever there was an idea whose time had come it was the renunciation of the institution of segregation by law as America had known it for a hundred years; and the living realities had their legitimate share of the opinion. Surely, to whatever people whose archeologists may examine our State Papers in some future time, the decision as it is written will convey a truer aspect of our law than would a more abstract or detached exposition of the equal protection doctrine.

Nothing said here implies disagreement with the insistence of distinguished scholars that the Supreme Court must judge with neutrality of principle.<sup>27</sup> If some proposition is given constitutional sanction then it must be applied to all who come within its terms, however differently and passionately we might value them on scales of a different order. Typical are Professor Wechsler's examples: "a labor union or a taxpayer, a negro or a segregationist, a corporation or a communist. . . ."<sup>28</sup> Unless the difference can be translated into terms of the principle—and this by criteria of relevance inferable from or at least con-

sistent with the principle itself<sup>29</sup>—they must be ignored or the principle abandoned. Neutrality of principle, however, tells us not so much about deriving the principle in the first place as about the limitations principles impose on those institutions that try to be governed by them. A reading of the vital principle of *The School Segregation Case* as necessarily resting on the social effect of segregation as we knew it<sup>30</sup> is not lacking in neutrality in the somewhat elusive sense in which I from time to time understand that requirement.

It is of course possible to argue that the equal protection clause, in aiming at the long-run goal of racial justice for the Negro, shut the door on a very wide range of legislative experimentation, including measures designed to further as well as to frustrate that end. Such a drastic reading, however, has not yet been given the clause. In the most recent case involving the question, the Court was confronted with a Florida statute penalizing, without proof of intercourse, habitual nocturnal cohabitation of Negro and white.<sup>31</sup> In holding the statute unconstitutional, the Court significantly refrained from holding racial classifications per se invalid. Adhering to the approach established in previous equal protection cases, the Court concluded: "There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race."<sup>32</sup> Recognizing that the equal protec-

<sup>29</sup> See BICKEL, *THE LEAST DANGEROUS BRANCH* 58-59, 63 (1962).

<sup>30</sup> See Black, *supra* note 26, at 421.

<sup>31</sup> *McLaughlin v. Florida*, \_\_\_\_ U.S. \_\_\_\_ (1964).

<sup>32</sup> *Id.* at \_\_\_\_\_. The adherence to the purpose of equal protection is explicit: "But we deal here with a classification based upon the race of the participants, which must be viewed in light of

<sup>27</sup> Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).

<sup>28</sup> *Id.* at 12.

tion clause must be applied in light of the value it embodies, the Court has not yet confessed an inability to distinguish individually measures fairly aimed at nurturing the value from those expressing a rejection of it. Should the Court ever conclude that the door is shut on the former it will be because of uniquely legal considerations of administrability, not a rejection of the inner merits of the distinction. This constitutional estimate of the level of generality of formulation beneath which we cannot regard case by case winnowing as trustworthy is itself one of prudence, legal art and faith, not compromise with "principle." In whatever way this estimate, necessarily empirical, finally stabilizes itself in the cases, it will be the fruit of the Court's own best judgment, uncoerced by absolutes of "colorblindness" coming to us as logical emanations from the text of the equal protection clause. Critics of this process would do well to heed the admonition of Mr. Justice Holmes that "the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."<sup>33</sup>

### Legislation Nonracial on Its Face

Beyond the methodological limitations imposed by the equal protection clause on classificatory schemes, there is a more sub-

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the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *Id.* at \_\_\_\_.

<sup>33</sup> *Gompers v. United States*, 233 U.S. 604, 610 (1914).

stantive aspect to the clause that has been recognized by the cases. Somewhat akin to the thrust of the due process clause, it has been held to bar the accomplishment of discriminatory *ends* notwithstanding the operative "equality" of the means. The case of *Shelley v. Kraemer*<sup>34</sup> is put on this ground in an illuminating passage from Tussman and tenBroek's landmark article on equal protection:

Whatever the reasons, however, the substantive use of the equal protection clause is a fact. In this role it takes under its protection certain rights and prohibits their infringement. Thus the rights of white sellers and Negro buyers may not be interfered with, and it is no answer to say that the rights of Negro sellers and white buyers are equally interfered with. The equal protection clause is held to be violated simply by the invasion of this substantive right no matter how "equally" the invasion is conducted.<sup>35</sup>

It is significant that in the companion case to the *Brown* decision the Court, lacking an equal protection clause applicable to the District of Columbia, expressly relied on the due process clause of the fifth amendment.<sup>36</sup>

Thus, where no overtly racial classification is drawn by a statute, any challenge must rely on the substantive aspect of equal protection. For example, in *Gomillion v. Lightfoot*<sup>37</sup> the Court was confronted with an Alabama statute that changed the boundaries of the City of Tuskegee from a square to "an uncouth twenty-eight sided

<sup>34</sup> 334 U.S. 1 (1948).

<sup>35</sup> Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 364 (1949). See also Mr. Justice Black's explanation of the *Shelley* case in his dissenting opinion in *Bell v. Maryland*, 378 U.S. 226, 318 (1964).

<sup>36</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>37</sup> 364 U.S. 339 (1960).

figure” with the resulting exclusion from the city of “all save four of its 400 Negro voters while not removing a single white voter or resident.”<sup>38</sup> While resting the decision on the fifteenth amendment’s prohibition against racial disenfranchisement, the conclusion is irresistible that the equal protection clause would have sufficed had a civil right other than the ballot been denied. This indeed has been the analysis in numerous cases since *Brown, i.e.*, the finding of equal protection violations in school districts gerrymandered so as to insure segregated education.<sup>39</sup> As the late Judge Clark put it in *Taylor v. Board of Educ.*:<sup>40</sup> “In short, race was made the basis for school districting, with the purpose and effect of producing a substantially segregated school. This conduct clearly violates the Fourteenth Amendment and the Supreme Court decision in *Brown v. Board of Education of Topeka. . .*”<sup>41</sup>

The issue raised by Professor Rice and which now arises here is whether a constitutional mandate of color blindness invalidates equally all governmental action which takes race into account, however benevolent and lacking in antagonism its purpose and effect might be. To be sure, this is a broad formulation but it is not made of straw. No narrower objection can account for Professor Rice’s condemnation

<sup>38</sup> *Id.* at 341.

<sup>39</sup> *E.g.*, *Clemons v. Board of Educ.*, 228 F.2d 853 (6th Cir.), *cert. denied*, 350 U.S. 1006 (1956); *Taylor v. Board of Educ.*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961). For a history of the *Taylor* litigation, see Kaplan, *Segregation Litigation and the Schools—Part I: The New Rochelle Experience*, 58 *Nw. U.L. REV.* 1 (1964); *Jackson v. Pasadena School Dist.*, 59 Cal. 2d 876, 382 P.2d 878 (1963).

<sup>40</sup> *Supra* note 39.

<sup>41</sup> *Id.* at 39.

of the reasoning in *Balaban v. Rubin*<sup>42</sup> as “erroneous in theory and pernicious in effect.”

Before the court in *Balaban* was a plan of the New York City Board of Education for the construction and districting of a new junior high school. It was conceded that the site was selected and the attendance zone drawn so as to achieve a racially balanced student body. The plan was challenged by white pupils who would have attended another school had the new school not been built. The zoning, it was alleged, denied them equal protection of the laws and violated Section 3201 of the New York Education Law, which provides that “no person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin.” Noting that “boundary lines for attendance at a new school must be fixed somewhere,” the court upheld the proposal as a reasonable exercise of the Board’s discretion. Sounding a theme recurrent in the cases, the court defended the zone as having “no tendency to foster or produce racial segregation.”<sup>43</sup>

Professor Rice is somewhat off the mark when he criticizes the *Balaban* case as involving a classification by race. One is, of course, privileged to have an expansive idea of what constitutes classification by race.<sup>44</sup> Yet, the difference between overt classification by race and functionally non-racial measures adopted out of racial considerations is significant in an equal protection analysis. As the cases previously

<sup>42</sup> 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281 (1964).

<sup>43</sup> *Id.* at 199, 199 N.E.2d at 377-78, 250 N.Y.S.2d at 284; *accord*, *Jackson v. Pasadena School Dist.*, *supra* note 39.

<sup>44</sup> Rice, *supra* note 3, at 319.



discussed demonstrate, one may properly regard racial distinctions drawn by a statute as "constitutionally suspect."<sup>45</sup> One may even argue for an absolute "color-blindness" in the sense that some traits may never be the basis of a constitutional classification. But how can a classification by race be condemned as per se unconstitutional if no such classification is made? The purely formal nature of Professor Rice's version of the equal protection requirement simply cannot cope with a case in which the measure does not assume a racial form. In cases such as *Taylor* and *Balaban*, the only possible objection is that the zoning produces a constitutionally prohibited effect. Coming to the heart of the matter, *Balaban* can be disposed of on the same analysis as *Taylor* only if the judgment is made that the *de jure* promotion of desegregation (or, if you will, integration) is the same prohibited evil as segregation. Recurring to fundamentals, segregation by law is wrong essentially because it places the segregated group in an inferior position. Can the same be said of integration? Does it express a hostile suppression of the dominant group into which the minority is integrated? I do not understand Professor Rice or anyone else to say so. Without such an objective effect, of what significance is race-consciousness? As Professor Paul Freund put it in a recent lecture:

[A] legislature or a school board ought to be able to take account of the facts of segregation in the interest of promoting long-run de facto desegregation, which is surely a legitimate aim. This is the position taken by both the New York Court of Appeals and the New Jersey Supreme Court, there being no issue in the cases

of requiring integration constitutionally but only of permitting the race factor to be taken into account by a school board disposed to do so, without violating the principle of color blindness. This is a question of educational and social policy, a choice of means to a legitimate end, the encouragement of desegregation, as segregation itself would be an illegitimate end.<sup>46</sup>

A rigorous pursuit of the chimera of color-unconsciousness (as it might be more accurately called) in a *Balaban*-type situation could only result in gross absurdities. If an intentional selection of a school site in the heart of a Negro ghetto would, as well it might, be regarded as deliberate perpetuation of segregation,<sup>47</sup> and if Professor Rice's rule would condemn a similar design to integrate the attendance zone, the school board's only recourse would be to pin the tail on the donkey—hardly a rational prescription for city planning. The simple fact is, unlike the known evils flowing from segregated education, the racially balanced school zone inflicts legal injury on no one. Did the petitioners in *Balaban* have a constitutional right or a legitimate interest not to be assigned to a public school also attended by pupils of other races? Did they have a constitutional right to attend the school nearest their homes? There are, of course, many factors weighing against manipulation of the neighborhood school pattern in the name of racial balancing, such as inconvenience, transportation hazards, parental participation in school activities, and the desires of the pupil and parent to "enjoy the security of going to school with children who come

<sup>45</sup> The phrase is from *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>46</sup> Freund, *supra* note 26, at 205.

<sup>47</sup> *Taylor v. Board of Educ.*, *supra* note 39; *Jeffers v. Whitley*, 309 F.2d 621 (4th Cir. 1962).

from a similar background.”<sup>48</sup> These, and other considerations of prudence and judgment, however, are properly for the legislature or school board—not for constitutional law.

Thus, Professor Rice fails to give due weight to a fundamental point when he supports his constitutional attack with the following:

Nor is racial balancing essential for the improvement of public education. There is no necessary correlation between integration as such and the quality of education received in a school (citing articles in *The National Review* and the *New York Times Magazine*).<sup>49</sup>

First, it is irrelevant that there may be no *necessary* correlation between integrated schools and superior education. Nor need integration be *essential* to quality education. As long as there may be such a correlation, the legislature may, under familiar principles, act on such a belief. Secondly, even if a state wishes to use its public schools as tools for the accomplishment of otherwise legitimate social goals apart from education in the conventional sense, the question is one of state policy, not constitutional necessity.

### Benevolent Racial Classifications

There is an appealing symmetry in the statement in the Virginia District Court case quoted by Professor Rice: “The Federal Constitution is color blind. It is equally as unconstitutional to discriminate against a white man as it is to discriminate against a colored man. . . .”<sup>50</sup> Yet, firmly believ-

<sup>48</sup> Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 567 (1965).

<sup>49</sup> Rice, *supra* note 3, at 319.

<sup>50</sup> Rice, *supra* note 3, at 318 n.52, quoting from

ing the final justification of law to be not in its symmetry but in its effect on the people and the common good, and further, appreciating the difference in effect on the subject of a racial distinction depending on whether he is black or white, I must confess doubt. First, there is clearly no moral equivalence. When dealing with a benevolent quota or a racially schematized pupil transfer plan, the distinctions there drawn stand on the same contingent moral ground as taxing the rich more than the poor or providing public food for the hungry but not for the well-fed.

It may well be that refined moral gradations that justify *Sub specie aeternatis* some racial distinction should not find expression in civil law by way of explicit racial qualifications for certain purposes, but it isn't necessarily so and the Supreme Court has not yet said it is so. In *McLaughlin v. Florida*, decided only last December, the Court restated the historic policy against *discrimination* that underlies the equal protection clause and then canvassed its rule on explicit racial classifications:

This strong policy renders racial classifications “constitutionally suspect,” *Bolling v. Sharpe*, 347 U.S. 497, 499, and subject to the “most rigid scrutiny,” *Korematsu v. United States*, 323 U.S. 214, 216, and “in most circumstances irrelevant” to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States*, 320 U.S. 81, 100.<sup>51</sup>

Yet the Court drew short of outlawing all legislative classifications along racial lines. There is no purpose to a “rigid scrutiny” unless there are cases that might survive it. Should the scrutiny reveal a non-discrim-

*Dixon v. Duncan*, 218 F. Supp. 157, 160 (E.D. Va. 1963).

<sup>51</sup> \_\_\_\_ U.S. \_\_\_\_ (1964).

inatory or benevolent purpose, the policy of equal protection is not violated. It may be forcefully objected that the courts will thereby become engaged in a hopeless mire of legislative psychoanalysis, probing for hostility of motive or a "realistic racism, which desires to continue as much compulsory segregation as the authorities can be brought to tolerate."<sup>52</sup> The courts may, however, cope with "tokenism" and delay without abandoning the enterprise of individual "rigid scrutiny" by use of the presumption of invalidity clearly indicated in *McLaughlin*.<sup>53</sup>

Statutes governing the use of racial classification for selected purposes may, of course, impose tighter restrictions than the equal protection clause. Section 3201 of the New York Education Law, construed in the *Balaban* case, states flatly that "no person shall be refused admission into or be excluded from any public school on account of race, creed, color or national origin." This is very positive language and its mandate seems to leave little room for recourse to the anti-hostility purpose of the fourteenth amendment as an aid to interpretation. If, in administering some quota system, an individual should apply to a school and be informed that he is of the wrong race under the quota allocations,

<sup>52</sup> BICKEL, *op. cit. supra* note 29, at 62.

<sup>53</sup> "Our inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by the white person and a Negro, but not otherwise. Without such justification the racial classification . . . is reduced to an invidious discrimination forbidden by the Equal Protection Clause." *McLaughlin v. Florida*, *supra* note 31, at \_\_\_\_\_. See also the use of the presumption of invalidity in Professor Pollak's reconstruction of the *Brown* decision. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

section 3201 seemingly is violated. The application of racial distinctions on an individualized basis as a criterion for admission to school is deemed impermissible without regard to the purpose and long range effect of the scheme. Whatever the constitutional requirements, there is much to be said for the wisdom of a statute which avoids the personal impact of an official informing an applicant that he is of the wrong race or color. Section 3201, if so read, also avoids embroilment in ugly administrative attempts to classify in one category or another persons of multi-racial ancestry. Statutes such as section 3201, while defensible enough as a legislative judgment regarding the use of explicit racial classifications, should not be regarded as the constitutional measure of the competence of another legislature which does essay some experiment fairly designed to further desegregated schooling; the cases leave that much open. Less still should it be regarded as having any effect on measures directed at that end that are non-racial in form and function.

The final argument marshalled by Professor Rice against the "racial balancers" is as follows: "Interestingly, the entire concept of racial balancing carries with it an inevitable implication that Negroes are inferior."<sup>54</sup> The point insisted on by the "racial balancers" is that the insinuations inherent in racial imbalance adversely affect the "ghettoized" minority; not that the members of the minority group are themselves inferior. The belief of adverse effect may or may not be well founded. However, the most that can defensibly be argued is that racial balancing in the schools is mistaken in its premises and un-

<sup>54</sup> Rice, *supra* note 3, at 320.

productive or counterproductive in its effects. One who, in addition, believes that corrective legislation "stamps the colored race with a badge of inferiority" does so, again culling from *Plessey v. Ferguson*, "solely because he chooses to put that construction upon it."<sup>55</sup>

Legislation designed to integrate racial minorities into the mainstream of society carries no connotation of inferiority not also present in any legislation enacted to assist a socially or economically disadvantaged class. And I know of no responsible person who would argue today that welfare or other anti-poverty legislation bespeaks a judgment that the recipient is an inferior being. Far from the belief of Professor Rice, I find in such measures a profound expression of faith in the capacity of the Negro people to overcome the handicaps that have been placed upon them.

#### Must Balancing Measures Be Adopted?

A survey, however fragmentary, of the problems raised by *de facto* segregation can hardly close without taking at least a passing glance at the assertion that the Constitution compels affirmative state action to eliminate *de facto* segregation.

While there is some language in the *Brown* case that might indicate that *de facto* segregation is a denial of equal protection of the laws,<sup>56</sup> it is clear that social inequalities do not per se support a constitutional claim for a governmental cure. This is sufficiently demonstrated by the subsequent proceedings in the *Brown* case—as detailed in Professor Rice's article.<sup>57</sup> Difficult problems arise when non-

racial geographic school zones are superimposed on segregated residential areas which, until recently, may have been partially maintained as such by state action.<sup>58</sup> However, a recent analysis has gone considerably beyond the cases where state sanction is but slightly removed from the *de facto* condition.<sup>59</sup> In sharp contrast to the view that adherence to traditional geographic criteria in school zoning is constitutionally permissible, a large field of affirmative state responsibility is seen as created by the *Brown* decision. Wholly apart from residual state responsibility arising from recently abandoned legal segregation, the mere adherence to geographic "neighborhood" zoning with knowledge of the attendant imbalance is said to support an attribution of "state action" to the unequal condition. A constitutional obligation to correct the inequality of educational opportunity should be found, it is argued, unless the failure to do so is "justified." Justification is to be determined by balancing the nondiscriminatory interests served by adherence to geographic zoning against the inequality of educational opportunity resulting from such adherence.<sup>60</sup> This brief summary does not, I am sure, do justice to all of the nuances of analysis supporting the thesis. Yet the attenuated character of the legal and factual inferences necessary to support the analysis must be apparent to even the casual reader. With the possible exception of instances of residual state responsibility referred to above, the

<sup>55</sup> *Plessey v. Ferguson*, 163 U.S. 537 (1896).

<sup>56</sup> "Separate educational facilities are inherently unequal." *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

<sup>57</sup> Rice, *supra* note 3, at 313-14.

<sup>58</sup> Although *Buchanan v. Warley*, 245 U.S. 60 (1917), struck down racial zoning forty-eight years ago, it was not until 1948 that judicial enforcement of racially restrictive covenants was eliminated. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>59</sup> Fiss, *supra* note 48, at 584.

<sup>60</sup> *Id.* at 584, 608-12.

conventional doctrine is that the fourteenth amendment forbids segregation but does not require integration. The numerous cases so holding are reviewed by Professor Rice in his article and need not be restated here. The fundamental constitutional values they embody, together with a due regard for the role of the judiciary in vetoing the intolerable versus accomplishing the desirable,<sup>61</sup> point to the responsible policy-making agencies of government as the proper source of racially corrective measures having the necessary prudence, flexibility and public support.

The only forceful argument against reliance on the normal political process lies when the interests of the group to be benefited are prevented from being pressed on the political scales. Thus argues Mr. Fiss: "The Negro has strenuously exerted whatever political power he may have; to delegate further the task of making the critical empirical and normative judgments to the political process might well involve greater human and social costs than establishing a tradition of judicial review."<sup>62</sup> Such an outlook is pregnant with serious implications at any time; but appealing as it may have been a few years ago, time and events have destroyed its premises. Complaints of sectional "tokenism" and delay in implementation of the *Brown* mandate received a national response in the Civil Rights Act of 1964, not to mention

the local proliferation of affirmative measures of the sort discussed in this article. It is becoming clear that, on the whole, the course of race relations in the United States reflects a wholesome interplay between the principle-declaring role of the Court and the negotiated, measured movement of legislation. To shortcut recognized institutional arrangements for the accomplishment of specific substantive ends is bad business even when they are seriously nonproductive. To do so when they are working well is bald opportunism.

### Conclusion

If a century of social and political "standpatism" demonstrated the need for the galvanizing shock of the *Brown* decision, the broad front of corrective movement since 1954 presents a striking contrast. While the injection of judicial adrenalin into a sluggish political bloodstream may have curative results exceeding those experienced in the physical analogue, I hopefully assume that none but the most militant would desire the political patient to become an addict. The difference between curative and supportive medication is as crucial in the result as it is insidious in the transition. Unfortunately, the consequences of addiction for the body politic are no happier than for the body physical. "Holding democracy in judicial tutelage is not the most promising way to foster disciplined responsibility in a people."<sup>63</sup>

The typically American tendency, long ago noted by Tocqueville, to translate political interest into claims of legal right produces many distortions, not the least of which was remarked by Mr. Justice (then

(Continued on page 48)

<sup>61</sup> "Because the Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others, the indispensable judicial requisite is intellectual humility, and such humility presupposes complete disinterestedness." *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 557 (1949) (Frankfurter, J., concurring).

<sup>62</sup> Fiss, *supra* note 48, at 612.

<sup>63</sup> Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 229 (1955).

## DE JURE INTEGRATION (Continued)

Professor) Frankfurter: "It must never be forgotten that our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value."<sup>64</sup> Nevertheless it is on this level that issue has been joined and it is on this level that the discussion in this article has been premised. To those who have strong views on the policy of the "balancing" proposals discussed here, I can only commend an observation made by Mr. Justice Holmes in dissent that has now attained the status of a democratic axiom. He read the guarantee of free speech and thought as meaning "not free thought for those who agree with us but freedom for the thought that we hate."<sup>65</sup> In light of the lessons of our national experience one might hope for a similar reali-

zation that political democracy means reliance on the representative agencies of government not only for the measures to which we are indifferent, but also for those which we want very badly.

The Supreme Court has thus far declined to review a case that permitted corrective measures<sup>66</sup> and one that refused to constitutionally compel them.<sup>67</sup> We are therefore suspended between the extremes of those who would supplant the responsible political bodies with judicial decree and those who would straightjacket them with judicial bonds. I hopefully second the view of Professor Freund that "there the matter rests and, in my judgment, is likely to rest so far as constitutional law is concerned."<sup>68</sup>

<sup>64</sup> FRANKFURTER, *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER* 197 (1962).

<sup>65</sup> *United States v. Schwimmer*, 279 U.S. 644, 655 (1928) (dissenting opinion).

<sup>66</sup> *Balaban v. Rubin*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, \_\_\_ U.S. \_\_\_ (1964).

<sup>67</sup> *Bell v. School City of Gary*, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). The case is extensively reviewed in Kaplan, *Segregation Litigation and the Schools—Part III: The Gary Litigation*, 59 Nw. U.L. REV. 121 (1964).

<sup>68</sup> Freund, *Civil Rights and the Limits of Law*, 14 BUFFALO L. REV. 199, 205 (1964).