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SCHOOL SEGREGATION IN THE NORTH AND WEST: LEGAL ASPECTS

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The purpose of this study is to examine the legal aspects resulting from segregation in the schools where the schools had not previously been segregated on the basis of race prior to the decision in Brown v. Board of Education\(^1\) or where they have been officially desegregated since Brown. It is a matter of common knowledge that residential patterns often fall on racial lines; this coupled with other factors may result in actual segregation by race.\(^2\) This paper will deal with the legal questions presented in such a situation.

**Preliminary Considerations**

Our concern is with actual racial segregation in the schools not required or sanctioned by positive law, that is, legislation.\(^3\) In the areas where such segregation was required or sanctioned by legislation, the cases are controlled by the Brown decision and the remedies prescribed by the second Brown case.\(^4\) Districts that have failed to change their policies are ordered to do so "with all deliberate speed." In the situation dealt with in this paper legislation does not require a policy of segregation, but for one reason or another segregation exists in fact. There has been unfortunate confusion in the use of the terms, "de jure" and "de facto" segregation. One way of defining "de facto" segregation would be as the opposite of "de jure," namely segregation not required or sanctioned by legislation, literally segregation in fact. This would include the situations where segregation is maintained by board policy as evidenced, for example, by "gerrymandering" of school districts or is the result of racial concentration when the

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2. For graphic illustration as to the extent of actual segregation in a city like New York see, American Jewish Congress, From Color Blind to Color Conscious 7-9 (1959).

3. The constitutional inhibition extends to legislation permitting segregation (and hence approving it as state policy where the state is regulating) as well as that requiring it. McCabe v. Atchison, T. & S. Ry. Co., 235 U.S. 151 (1914) (permitting railroads to deny equal dining facilities to Negroes).

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board employs the neighborhood school policy without intention to maintain a policy of segregation.

However, there has been the belief that unless the segregation is labelled, "de jure," it raises no legal questions. As a result "de jure" has been defined as "segregation created or maintained by official act, regardless of its form." Because of the confusion resulting from their use and the fact that these terms represent incomplete and imprecise explanations, they will not be used. For purpose of analysis, we will draw the distinction between segregation required or sanctioned by positive law and segregation not required or sanctioned by positive law. This is not to say that the latter does not raise many legal questions, but merely that those legal questions lend themselves to a different solution and analysis than those that exist when segregation is required or sanctioned by legislation.

Another source of confusion here has been the intimation that the question is one of state action as that term has been traditionally understood. Here the state action is the operation of the public schools and/or compelling attendance at such schools. Questions of what is state action arise in basically two situations. The first is whether the action of the particular state official or agency can be deemed the action of the state in the particular instance. This may arise where the acts of the state official were illegal under state law or where acts of the judicial arm in enforcing private arrangements violate the constitutional rights of those adversely affected by those arrangements. There is no question that school officials are acting as the state; hence their action is state action within the meaning of the Fourteenth Amendment.

5. See, e.g., 1961 Education, United States Commission on Civil Rights 100.
7. See e.g., the reference to "expanding concept of state action" in reference to the New Rochelle case in Moslow, De Facto Public School Segregation, 6 VILL. REV. 355, 358 (1961).
10. This point has been assumed beginning with Brown v. Board of Education, 347 U.S. 483 (1954).
The second is where action by private persons is deemed to be equivalent to actions of the state because of the circumstances in which they are acting. Thus, political parties, proprietors of a company owned town, and lessees of governmental property, have been deemed to be acting as the state in certain situations.

In the area of actual school segregation the question is not whether segregation is due to the acts of private persons or is due to the state. The question is under what circumstances the state action in operating the public schools on a factually segregated basis violates the constitutional rights of minorities such as Negroes, even though such segregation is not required or sanctioned by positive law. This point was recognized by the court in Branche v. Board of Education of Hempstead, where the court observed that the educational system was publicly afforded and compulsory; therefore, it refused the board’s motion for summary judgment despite the board’s claim that it was not responsible for the racial segregation that existed in the schools.

Some courts, however, seem to proceed on the premise that it must be the state action that causes the segregation in order for a constitutional question to arise and talk in terms of the issue being one of state action in the traditional sense. For example, in Henry v. Godsell, the court refused to enjoin the building of a school in a certain location, even though the effect would be to cause the school population to be entirely Negro; in Holland v. Board of Education of Palm Beach, the court held that a complaint alleging racial segregation should not have been dismissed despite the board’s claim that actual segregation was the result of neighborhood residential patterns, where neighborhoods were unconstitutionally segregated racially. The court in In re Skipwith distinguished these cases on the ground that in the Godsell case the segregation was the result of private action

14. As Shelley indicates, the state may not directly make acts of private persons in discriminating effective. It reinforces such acts, however, when it insures that if private persons are able to keep the neighborhoods residentially segregated, the state will do so in the operation of its schools.
17. 258 F.2d 730 (5th Cir. 1958).
and in Holland it was the result of the state action in zoning the neighborhoods racially. This ignores the fact that in both cases state action was present in the form of the board’s operation of the schools. The action challenged was the state’s operation of the schools, not the action of a private person in discriminating. The same type of reasoning is found in the language of the court in Borders v. Rippey, observing that “the equal protection and due process clauses forbid any state action requiring segregation on account of race.” This type of language is misleading, as it could indicate the problem is to be viewed in terms of the private action—state action distinction, which is inapplicable due to the fact that the state is acting in its operation of the schools. The question then is not one of state action, but when the state’s operation of the schools in such a manner resulting in racial segregation offends the due process and equal protection clauses even in the absence of legislation requiring or sanctioning racial segregation. This is not to say that analogies to the question of what is state action may not be relevant in determining whether the board has acted unconstitutionally, but that the question should not be treated as one of state-created or privately-created segregation.

Next it is necessary to consider the holding in Brown v. Board of Education, and the ratio decidendi of that case. The holding—defined in its relation to stare decisis as that portion of the decision which the court must follow or overrule in the future—was that compulsory segregation in the public schools due to the requirements or sanction of positive law violated the rights of Negro pupils to equal protection. In the companion case of Bolling v. Sharpe, it was held that compulsory segregation under those circumstances likewise was a denial of liberty without due process.

More significant was the ratio decidendi of the case to the effect that segregation in the publicly operated schools causes feelings of inferiority due to race and denies equal educational opportunities by preventing contact with white students. By the same
token, racial classification serves no legitimate governmental purpose, hence offending the due process clause. The corollaries of Brown furnish the rationale that racial segregation in any governmental facility is harmful to the minority race and thus constitutes an unreasonable classification.

As a result of Brown there are two aspects to the denial of equal protection due to race. Prior to Brown it was well established that a state could not deny a benefit to a person because of his race. Examples of this would include the right to be tried by a jury on which members of his race had an opportunity to serve, the right to vote, the right to use property, and facilities equal to that furnished the other race.

By destroying the concept of separate but equal the court recognized that segregation was segregation against the Negro and not mutual segregation between Negroes and whites. As a result the facilities were inherently unequal, because such segregation caused the Negro to suffer feelings of inferiority due to his race and denied him the opportunity for sharing educational experiences with the members of the other race. The inhibiting effect on the learning process was clear. Since compulsory segregation in the schools had these effects, it was unconstitutional; moreover, such segregation was not necessary to accomplish any legitimate governmental objective. The corollaries extend the principle to any governmental facility, which is sound, since the government cannot cause feelings of inferiority due to race nor deny the opportunity for contact with the predominant race—the rationale in Brown. If the state then operates any activity in such a way as to cause feelings of inferiority due to race and the denial of contact, the rationale in Brown would indicate that the state might be acting unconstitutionally, even though the means by which such harm was done involved methods other than compulsory racial segregation.

23. See also the following cases where the Court voided segregation in per curiam opinions in reliance on Brown: Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1956) (public bathing beach); Holmes v. City of Atlanta, 350 U.S. 879 (1956) (public golf course).
In summary, it must be recognized that (1) state action exists by the fact of operation of the public schools and (2) the rationale of Brown is that if a state causes feelings of inferiority due to race and denies opportunity for contact, questions as to the constitutionality of such action arise. Compulsory segregation required or permitted by legislation is but one way of accomplishing the wrong.

**Constitutional Problems Raised by Actual Segregation in Schools Not Required or Sanctioned by Positive Law**

**Unequal Facilities**

Evidence indicates that where there is actual segregation, though not required or sanctioned by positive law, often the schools in which the members of the minority race predominate tend to be inferior in various respects relating to the quality of education furnished. Some of these include the pupil-teacher ratio, qualifications of teachers, course of study offered and physical facilities. The question is posed as to the extent to which unequal educational facilities existing in fact though not because of separate schools on a racial basis are unconstitutional.

Obviously there must be some degree of equality in the quality of education furnished by the state; as there must be in any benefit the state chooses to provide. Where children cannot transfer from one school to another, they should not be forced to accept an inferior education when the state has chosen to provide it based on the happenstance of the school to which they are assigned. Just as obviously every school cannot be substantially as good as every other school in the system.

Under the separate but equal concept, however, the Negro schools did have to be substantially as good as the white schools. Otherwise there would be a denial of a tangible benefit based on race and the principles in the jury exclusion or the voting rights or the use of property cases would be applicable. Since the state had chosen to classify because of race, such classification was justifiable only where no denial of tangible benefit would

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29. As to education itself the state cannot offer only some children education by closing districts where integration has been ordered. James v. Almond, 170 F.Supp. 331 (E.D.Va. 1959).

30. Supra, notes 11, 12 and 13.
result. In our situation, assuming the state has not chosen to classify on racial grounds, the principles developed under the separate but equal doctrine are inapplicable.

At the same time it should be noted that state courts have insisted that school boards furnish the pupils in their district substantially the same quality of education. Thus where the school board, which was required to educate pupils who did not pay tuition, put those pupils in a separate room and furnished only a first grade teacher, though many students were in a higher grade, the court enjoined this practice as a matter of state law. Where the board closed a high school in one section of the county, sending the children by bus to a school in an adjoining county, and put most of the revenues into improving the school in the other section of the county, the board was ordered to reopen the school it had closed and insure that the quality of education was substantially the same in both schools. This concept of equality is to some extent carried over into the equal protection clause, though the standards are not the same because of the latitude afforded to the state under the equal protection clause when the use of facilities was not based on race.

It may be asked at this juncture of what significance it is that the inferior schools are predominantly populated by a racial minority. This brings us to a consideration of In re Skipwith, which involved a prosecution for child neglect due to the failure of the parents to send their children to school as required by law. The defense was that the children, Negroes, were required to attend a school where all the students were Negro or Puerto Rican. Moreover, it was alleged that schools in which the Negro and Puerto Rican pupils predominated were deficient both in terms of physical plant and quality of instruction furnished. The court permitted the defendants to raise the question of the chi-

31. See an interesting discussion of this question applicable to Skipworth in Note, 107 U. Pa. L. Rev. 1058 (1959). The author's worry about New York City's teacher problems seems a bit excessive.
32. Moore v. Brinson, 170 Ga. 680, 154 S. E. 141 (1930). This was based on the constitutional provision requiring a free education in the public schools.
33. Wooley v. Spalding, 293 S.W.2d 563 (Ky. 1956). There was a religious aspect to this case, as the county was divided on religious lines and the board favored the school serving the majority religion.
34. As to the state's latitude in classification for equal protection purposes see the discussion, infra, note 142 and accompanying text.
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dren's constitutional rights. It found that the fact that all the children were Negro or Puerto Rican was not per se a denial of equal protection and that the board did not have a policy of racial segregation.

In determining the quality of education it looked not at the school in question compared to other schools in the system, but at the schools in which Negroes and Puerto Ricans predominated compared to those where they did not. It adopted the classification of X and Y schools, X being an elementary school where the Negro and Puerto Rican population was 90% or a junior high school where such population was 85% or more. The elementary and junior high schools were established on a neighborhood basis. It found a number of inequalities in physical facilities, class size and the like, but the most glaring defect was that the X schools had a substantially higher proportion of unlicensed teachers than the Y schools. This resulted from the board's policy of permitting teachers to choose their own schools, more specifically, to refuse assignment to a particular school while retaining their eligibility. Naturally, many refused to teach in the slum neighborhoods, largely inhabited by Negroes and Puerto Ricans. The inferior education furnished was found to be a denial of equal protection to the students in the X schools and therefore the parents were justified in refusing to send the children to such schools.

The approach taken by the court would indicate where there is actual segregation though not due to the policy of the board, the pre-Brown test is applicable. The court looks to the “non-white” schools as a whole and determines whether in fact the children attending them are receiving the same quality of education as the children attending white schools.

It is submitted that where, as here, the court found no policy

36. We are not concerned here with whether the unequal facilities should be a defense to prosecution for failure to obey compulsory attendance laws. As the later discussion will indicate, we are assuming that the state can require the child to attend school despite unequal facilities or actual segregation. The more desirable action on the part of disaffected parents would be a suit for declaratory and injunctive relief so as to eliminate the harm.

37. This was based on the Public Education Association Report, supra, note 28.

38. Accord: Dobbins v. Commonwealth, 198 Va. 967, 96 S.E.2d 124 (1956), where the inferiority of the Negro school was asserted as a defense. The board had not desegregated and the child had been refused admittance to the white school because of his race. The court emphasized, however, the inferiority of the Negro school.

39. For a discussion of the legal approach to the rights of Negroes as a "group" see Greenberg, Race Relations and Group Interests in the Law, 15 Rutgers L. Rev. 503, 504 (1959).
of segregation such an approach is questionable. Unequal facilities in the schools where members of the minority race predominate may be strong evidence of a policy of segregation. If so, as will be discussed in the next section, this policy is in itself unconstitutional. Moreover, if the board, though it does not have a policy of segregation, denies equal facilities to the schools on racial grounds, this is unconstitutional in the traditional sense, since benefits have been denied to persons because of their race.\(^40\)

A sounder explanation of \textit{Skipworth} on racial grounds is closer to the latter situation. The board permitted the teachers, agents of the state, to choose their assignments and the evidence was that they made the choice in part at least, on racial grounds. The board had the power to prevent their agents from discriminating by adopting a method of teacher assignment that prohibited such action. That this was a motivating factor in the court’s decision is indicated by the following language:

“That the Board of Education is entirely responsible for the existing discrimination in teacher assignments, there is, in my opinion, not the slightest doubt. What the Board did was to let the teachers themselves establish the discriminatory pattern. But this was action by the Board’s employees, and action by employees, who, regularly licensed teachers, were subject to such assignments as the Board chose to make. Having put the power of assignment in the hands of the teachers by default, as far as their choosing or not choosing to teach in an ‘X’ school—a euphemism which nowise changes the fact of de facto school segregation—the Board is bound by the acts of its servants.”\(^41\)

The Court’s analogy to \textit{Rice v. Elmiore},\(^42\) is therefore, quite apt. There, the state’s failure to prevent private persons from discriminating in the electoral process when the state had abandoned it was held to be unconstitutional. Here the case was stronger, as the parties discriminating were by their own position state agents. This appears to be the real basis of the decision. These children were denied the opportunity to be taught by qualified teachers because of their race. Even though separate schools were not required by positive law, the teachers took advantage of the

\(^{40}\) The rationale is the same as where segregated schools are required, since in that situation the board is charged with the duty to provide equal facilities.

\(^{41}\) 180 N.Y.S.2d at 871.

\(^{42}\) 165 F.2d 387 (4th Cir. 1948), \textit{cert.denied}, 333 U.S. 875 (1948).
fact that the schools were in fact segregated to refuse their services and the board which operated such schools permitted its agent to deny an equal education to those children because of their race.

This explanation of *Skipworth* leaves unanswered the basic question—assuming that there is no evidence that decisions as to the quality of education were based on race, when does actual inequality of educational facilities deny equal protection. The pre-Brown tests are inapplicable, because there is no requirement of separate facilities due to race. Rather, the children are denied equality due to the fact that they are required to attend a particular school that does not measure up to the quality of other schools in the system. How far does the equal protection clause require equality of facilities when the students are not separated on racial lines?

Here too, *Skipworth* may suggest the answer. It is to be found by looking to the nature of the inequality and the ability of the state to eliminate it. The inequality the court emphasized centered around the qualifications of teachers and the teacher-pupil ratio. This goes to the essence of the educative process. Moreover, the board could easily eliminate such inequality by controlling the assignment of teachers. The fact that there was a teacher shortage, as the court pointed out, did not relieve the board of its duty to insure that its teaching resources were equitably distributed. In order to induce the teachers to teach at the “X” schools, it could have provided incentives in the form of higher salaries and the like. It is in the board’s discretion what it wishes to do, but it cannot avoid its duty to treat students at the different schools within its jurisdiction equally and distribute teaching resources accordingly. Of course, what constitutes actual inequality is a question of fact and a matter of degree, as in the pre-Brown situations. In *Skipworth*, the deficiency was glaring.

Another area going to the essence of the educational process is curriculum. Let us say the board fails to furnish courses in certain schools which are necessary for the student to have in order to be eligible for higher education. For example, it might decide that it will not offer an academic course of study in schools in poorer neighborhoods where only a small percentage of the stu-

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43. See the Public Education Association Report, *supra*, note 28.
44. In the particular school only two out of the eleven mathematics teachers were licensed, for example. In the “X” schools the percentage of unlicensed teachers was 48.8%; in the “Y” schools it was 28%. As to the situation in other cities see 1961 *Education*, *supra*, note 5 at 113-115.
dents go on to college. This is clearly a denial of equal protection to a student who desires to go to college if the board does not permit transfer to a school offering an academic curriculum. This has been recognized in a case involving exceptions to a plan of desegregation. In *Pellett v. Board of Education of Hanford*, the student's father wished him to take an academic curriculum in order to prepare for college. None was offered at the all-Negro school which he had been attending. The grade in which the child was had not been desegregated under the "stair-step" approach, but the court ordered his admission to the "white" school. The same reasoning would apply when any child was denied this opportunity to have the same qualitative education offered to others within the system. This does not mean that every course offered in one school must be offered in every other, but merely that the state cannot offer one child an education preparing him for college and deny another child within the school system that same opportunity.

Another situation might be where the board has put the bulk of its funds in one school in the district and "starved" the others so to speak, or has "starved" one. This was involved in *Wooley v. Spalding*, which has been discussed previously. Equal protection does require the state to treat schools within the system substantially equal in regard to the amount expended per pupil unless some pupils have special needs. In all these situations the board's power to control the situation without disruption of the school system is clear.

The area where the lack of equal facilities is least likely to be a denial of equal protection is that of the physical plant. As a practical matter, there will be old schools and new ones—otherwise the board could not build one new school unless it replaced every building. Moreover, physical facilities are not nearly as important in the learning situation as the matter of teachers and curriculum. Where separate schools were established on the basis of race, there was justification for requiring substantial equality; otherwise persons would be denied a benefit because of the state's segregating them by race. No such consideration exists when the state is not operating two school systems, so to speak.

Where unequal facilities do become significant is where this is likely to have an adverse effect on the learning process. In Chi-

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46. 293 S.W.2d 563 (Ky. 1956), and *supra*, note 33 accompanying text.
cago, for example, there are double shifts in some schools and unfilled classrooms in other schools. Ignoring the fact that the schools on double shifts are predominantly in Negro neighborhoods and the unfilled classrooms in white, the denial of equal facilities in such a situation can materially affect the learning process. Moreover, the board can easily remedy the harm by bussing the children to the nearby empty classrooms. In such a situation, there has been a denial of equal protection irrespective of any question of race.

In the event that it is found students have been denied equal educational opportunities the remedy should be in the discretion of the board. It should be able either to eliminate the disparity in the school within a reasonable time or transfer the complaining student to a school where he will receive equal educational opportunities. This remedy was often employed in the pre-Brown situation. In this manner the court minimizes its interference with the operation of the school system. The board may adopt the course of conduct best suited to its needs while at the same time the constitutional right of the student to equal treatment is fully protected.

It should be noted that state law often provides a remedy for the denial of equal educational opportunities. This is despite the fact that state courts give the board great discretion in the operation of the schools. The test in the state court may be less stringent, as the requirement of equal educational opportunities may be based on statute or a provision in the state constitution such as one requiring the state to operate a free public school system. In this context particularly state remedies should not be ignored.

**Policy of Segregation**

Even where segregation is not required or sanctioned by positive law, a board may, nonetheless, have a policy of segregation with respect to the entire system or a particular school within the system. Since the action of the board is state action, the result is the same as if segregation were required or sanctioned by positive law, and therefore, is unconstitutional. The problem then is to determine when the board is maintaining a policy of segregation.

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47. *1961 Education, supra,* note 5 at 115.

48. We are concerned with the rights of the students as individuals irrespective of race. The same principles would be applicable to any child denied equal educational opportunities.
In the first place, a board may not operate a system of segregated schools even if it also has integrated schools and attendance is voluntary at either. The problem has arisen in proposed desegregation plans. The Nashville board of education proposed a plan by which an annual census would be taken to determine preferences of parents and authorizing separate schools for members of each race whose parents desired that they attend school only with members of their own race. The other schools were to be open on an integrated basis. In *Kelly v. Board of Education of Nashville,*\(^{49}\) such a plan was invalidated. As a practical matter, it could prevent integration if, as was expected, the great majority of white parents would choose to have their children attend the segregated school. As the court observed:

"It is the denial of the right to attend a non-segregated school that violates the child's constitutional rights. It is the exclusion from such a school that 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."\(^{50}\)

The court pointed out that the doctrine of *Brown* applied to an individual school as well as an entire system. The board cannot maintain a policy of segregation in any school, even though other schools in the system are integrated.\(^{51}\)

Nor may the board maintain dual attendance areas based on race, even though the effect is to have children assigned to schools nearest their homes. This was involved in *Wheeler v. City Board of Education.*\(^{52}\) It was immaterial that in the absence of a policy of segregation the plan might be sustained as a "neighborhood school" plan. The operation of dual attendance areas was unconstitutional, because the board could not act under a policy of segregation.

A similar plan was voided in *Evans v. Buchanan.*\(^{53}\) Under that plan the child could attend either the school nearest his home or the school which he attended previously. These attendance areas would have prevented integration if the white children chose to go to the schools they formerly attended. The court indicated

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50. 270 F.2d at 229.
51. Accord: *Boston v. Rippey,* 285 F.2d 43 (5th Cir. 1960); but there the court also invalidated the transfer plan.
that such a plan may have been evidence that the board was continuing a policy of segregation, since the schools formerly attended by the white students could never be integrated: the Negroes could not go there, because they did not live closer to them than the schools which they had been attending and had not attended them previously. The effect would be to maintain those schools as segregated, which may have been evidence of a policy of segregation.

Further, the existence of a policy of segregation precludes the requirement of resorting to remedies under pupil placement acts. Often what the board has done under such a plan has been to assign all Negroes and all whites to separate schools and then require that the child request a transfer. Where the board has done such acts, this is conclusive proof that a policy of segregation exists and the remedies provided by the pupil placement acts need not be exhausted, but the plaintiffs can enjoin the operation of the schools on a segregated basis.54 The court observed in the Gibson case that

"Unless some legally non-segregated schools are provided, there can be no constitutional assignment of a pupil to a particular school."55

The policy of segregation is the basis for the decisions in the "gerrymandering" cases. The question is not was segregation caused by the actions of the board,56 but did the board have a policy of segregation as evidenced by its actions. In a case such as Clemons v. Board of Education of Hillsboro,57 there could be no doubt that such a policy existed. The board had established zones. The zone for the Lincoln school, to which all Negroes were assigned, was divided into two separate parts, one in the Northeast section of the district and the other in the Southeast section. Some of the Negro plaintiffs had to pass the other schools in order to reach the Lincoln School. The reference to "subterfuge to segregate" simply means that the evidence is clear that the board has adopted a policy of segregation. The evidence

54. See e.g., Hill v. School Board of City of Norfolk, 282 F.2d 473 (4th Cir. 1960); Gibson v. Board of Public Instruction of Dade County, 272 F.2d 763 (5th Cir. 1959).
55. 272 F.2d at 767.
56. See the discussion as to state action, supra, notes 7-20, and accompanying text.
57. 228 F.2d 853 (6th Cir. 1956), cert.denied, 350 U.S. 1006 (1956).
was equally clear in *Webb v. School District #90*,\(^{58}\) where the
board "meandered up streets and alleys" in establishing school
districts so that all the Negro children would be in one district
and all the whites in another.

In *Holland v. Board of Education of Palm Beach*,\(^{59}\) there was
no evidence of gerrymandering, but the case indicates that a policy
of segregation can be proved in other ways. The court found
that the board employed the compulsory residential segregation\(^{60}\)
as a device to maintain a system of segregated schools. The fol-
lowing language is indicative of the court's conclusion:

"In light of the compulsory residential segregation of the
races by city ordinance, it is wholly unrealistic to assume that
complete segregation existing in the public schools is either
voluntary or the incidental result of valid rules not based on race.

It is not necessary to review piecemeal the district court's find-
ings of fact and conclusion of law, for the record as a whole
clearly reveals the basic fact that by whatever means accom-
plished, a completely segregated public school system was and is
being maintained and enforced. No doubt that fact is well known
to all the citizens of the county, and the courts simply cannot
blot it out of their sight.\(^{61}\)

The court also observed that the Fourteenth Amendment pro-
hibited only "governmentally enforced segregation," which the
court found existed in Palm Beach.

Therefore, it is submitted that explanations of the case with
reference to the unconstitutionality of the housing ordinance as
satisfying the requirement of state action\(^{62}\) are inaccurate except
as the existence of the ordinance relates to proof of the board's
policy of segregation. The case would seem to hold that whenever
the board chooses to maintain a segregated school system, it
is acting unconstitutionally, even though in the absence of such
policy, the classification of the schools' attendance areas would be

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\(^{58}\) 167 Kan. 395, 206 P.2d 1066 (1949). The decision was based on state law.
Segregation was not authorized in the particular district.

\(^{59}\) 258 F.2d 730 (5th Cir. 1958).

\(^{60}\) This was invalid, as it was the denial of a benefit based on race. Buchanan
v. Warley, 245 U.S. 60 (1917). Apparently the ordinance here had never been
challenged.

\(^{61}\) 258 F.2d at 732.

\(^{62}\) In re Skipwith 14 Misc.2d 325, 180 N.Y.S.2d 852 (1958). See *supra* note 18,
the accompanying text. This explanation was also made in Meador, *Pupil Assign-
valid. It would follow that if the court found a board established a neighborhood school policy to further a policy of segregation, as the board intended to maintain segregated schools, the board's determination would be one based on a consideration of improper factors and hence unconstitutional.

_Taylor v. Board of Education of New Rochelle,_ also was decided on the basis that the board operated the Lincoln School as a segregated school. The court found that prior to 1949 a policy of gerrymandering was instituted, which led to the confining of Negroes within the boundaries of the Lincoln School district. As the Negro population movements shifted their residential areas, the school lines were altered to coincide with those shifts. Until 1949 white children were permitted to transfer from Lincoln to other elementary schools. In 1949 the board "froze" the districts and prohibited any transfers. In 1949 Lincoln had become 100% Negro; at the time of suit it was 94% Negro.

Even assuming that since 1949 the board did not maintain a policy of segregation (which it was found it did), the court held that the maintenance of the status quo—originally based on a policy of segregation—was invalid as constituting a continuance of that policy. The analogy can be drawn to a continuing trespass, which remains wrongful until abated. As the lower court observed:

"Having created a segregated school, the Constitution imposed upon the Board the duty to end segregation, in good faith, and with all deliberate speed. It is patently clear that this obligation has not been fulfilled."

Where a policy of segregation has been maintained in the past then, the board has a duty to change the policy of segregation created by its predecessors and its failure to do so is a denial of equal protection.

Moreover, the court found as a fact that since 1949 the board continued to have a policy of segregation with regard to Lincoln School. It was noted that the board ignored the recommendations of experts which it had hired; the rebuilding of the Lincoln

63. Attendance areas cannot be based on race. Wheeler v. Board of Education, 196 F.Supp. 71 (M.D.N.C. 1961). The principle is equally applicable when attendance areas have been chosen by the board on that basis.


School could only have the effect of continuing racial segregation there. The board attempted to influence the voters to approve the proposal to rebuild Lincoln School. The court found as a fact that the board's actions were motivated by a "purposeful desire to perpetuate and maintain a segregated school." The Court of Appeals referred to this as "crucial finding" and held that it was supported by the record. It is the second half of the decision that relates to the board's state of mind. As in Holland, if the court finds as a fact that the board chose a particular method of assignment, e.g., the neighborhood school system, with the intent to operate a segregated school system, its action in doing so is unconstitutional, because the board has a policy of segregation. As in Holland, it was immaterial that the neighborhood school policy would be a valid method of assignment absent the improper intent. The lower court's reference to "acts generally lawful becoming unlawful when done to accomplish an unlawful end" is particularly apt.

New Rochelle then holds two things. First, when a policy of segregation has been maintained in the past, it is a continuing wrong, which a future board must eliminate. The neighborhood school policy could not be used as "an instrument to confine Negroes within an area artificially delineated in the first instance by official acts." Secondly it recognizes that a policy of segregation involves unconstitutional action even if the particular action would be valid absent such a policy. The court must examine the purpose of the board in districting as it did, and if it finds that the purpose of the board's action was to maintain a segregated school or a segregated school system, it is acting unconstitutionally. Here proof of a policy of segregation is more difficult than in the gerrymandering situation where the illegal purpose of the board is obvious. But the underlying principle is the same—it is illegal for a board, acting as the state, to maintain a policy of racial segregation by whatever means in the operation of the school system or of a particular school.

The same principle is demonstrated by the action of the court in Henry v. Godsell\(^6\) though there the court found as a fact that a policy of segregation did not exist. The board built a new school in an area where the school population was almost exclusively Negro. Suit was brought by the parents of Negro children who would be required to attend the new school, claim-

The court found as a fact that the selection of the school site was made in good faith and without intent to create a policy of segregation. The court observed that seventeen out of thirty-one schools in the district were attended by children of both races. It also found that in the school district whites and Negroes participated together in athletics, band, dramatics, debating, school clubs and dances. Classes for retarded and handicapped children were established on an integrated basis. Of course this would not be conclusive on the question of whether the particular school was maintained on a segregated basis; in New Rochelle, for example, some other schools were integrated, but this did not rebut the other evidence of the board's policy to segregate Lincoln School. Here the court found no evidence that the choice of the site was dictated on racial grounds. It observed that actual segregation is not in and of itself evidence of a policy of segregation, which is true. It found no evidence of gerrymandering. And it found that the selection of the particular site was a reasonable one. It observed as follows:

"It (the board) may consider such factors in selecting sites that it considers relevant and reasonable, and in the absence of a showing that the standards for selection are not relevant and reasonable and that in reality they were adopted as a sham or subterfuge to foster segregation, or for other illegal purpose, their use is within the administrative discretion of the school board." 67

In its approach then the court took the same line as was taken in Clemons, Holland and New Rochelle, but on the facts found no evidence of a policy of segregation as dictating the choice of the particular site.

Sealy v. Department of Public Instruction, 68 goes further in theory in saying that any action adopted with the purpose of discriminating against Negro students is unconstitutional, though there, too, the court found as a fact that there was no evidence of a policy of discrimination. In that case there was no question of segregation in the schools—the Negro students would be attending the same school as the white students. The school district comprised two non-contiguous areas, the one having a pre-

67. 165 F.Supp. at 90.
dominantly white population and the other a predominantly Negro population. The Negro area was much larger. The board—consisting of all Negro members, incidentally—decided to locate the new high school in the white area. The complaint was that the Negroes would have a further distance to travel and that, therefore, the new school should be located in the Negro section. The court found as a fact that the board had no intention to discriminate against the Negroes and that if the school were located in the white section only the students in the Negro section would have had to be bussed there, but if it was located in the Negro section all of the white students and many of the Negro students would have to be bussed to school.

It is interesting to note that a plan for the reorganization of the school district was also challenged in the suit. The plan would have grouped together two areas which contained a predominately Negro population even though those areas were non-contiguous and separated by another district. The court did not pass on this contention, because the plan was to be reconsidered by the state and the evidence was that it was to be dropped. The court retained jurisdiction.

The case is significant, since it recognized that a school board cannot discriminate against a child in matters such as distance to school because of his race. He cannot be required to attend school at a disadvantage because of his race, assuming the requisite intention of the board could be shown. If such action were taken with this intent, we would have a pre-Brown situation—a person was denied benefits because of his race, and the court recognized its applicability to the school situation.69

These cases were cited by the lower court in New Rochelle as authority for the proposition that where the board acts with the intention to discriminate because of race, its action is unconstitutional, though valid in absence of racial considerations. It observed as follows:

"These cases clearly imply their converse: if a Board of Education selects a school site, or otherwise operates its schools, with a purposeful desire to segregate, or to maintain segregation, the Constitution has been violated. (citing Clemons and Holland)

If such motivation is present, it makes no meaningful difference

69. See also State ex rel. Lewis v. Wilmington School Board, 137 Ohio St. 145, 28 N.E.2d 496 (1940), where a state court found that pupil assignment was not based on race.
whether the segregation involved is maintained directly through formal separation, or indirectly, through over-rigid adherence to artificially created boundary lines, as in the present case.\textsuperscript{70}

The basic problem here is one of proof of a policy of segregation. Where school lines have been gerrymandered—arranged on a non-contiguous and non-compact basis with the result that a school or schools is all Negro—or residential segregation is required or other direct action to perpetuate segregation has been taken, as in New Rochelle, proof is not difficult. References to affirmative action by the board really relate to clarity of proof. But the reasoning of all these cases and the holding in New Rochelle particularly demonstrate that when the board takes action with the intention of discriminating on grounds of race, this policy of segregation is unconstitutional. The question is not whether the existence of constitutional rights should be made to depend on the state of minds of officials,\textsuperscript{71} which will be discussed in the next section. Rather it is that where improper purpose can clearly be shown and harm to children's rights results from the action taken pursuant to that improper purpose, the action is unconstitutional.

The next question to be considered is what remedies are available where the board has practiced a policy of segregation or discrimination. The remedies must be viewed in light of the matter as to which the board has had a policy of segregation and what steps, if any, have been taken to eliminate it. The first situation is where the board has a policy of segregation throughout the system or in a particular school. The board must present a desegregation plan. Apparently the plan must be such that, while the board is not required to integrate as such, white children cannot avoid every school which Negroes are eligible to attend with the effect that complete segregation will again result. In Evans v. Buchanan,\textsuperscript{72} for example, the court refused to accept as satisfactory a plan by which the child could attend either the nearest school within the district where he resided or the school he would have attended prior to the order. This was because all the Negroes lived closer to the colored school than the white

\textsuperscript{70} 191 F.Supp. at 194.
\textsuperscript{71} See the objection to the "state of mind" test in New Rochelle, 294 F.2d 47-48 (dissenting opinion). The judge is confusing motives with intention, it would appear.
\textsuperscript{72} 173 F.Supp. 891 (D.Del. 1959).
school and had gone there previously. By permitting the white children to go to the school they previously had attended, the plan could be so operated that no Negro child would have the opportunity to attend an integrated school.

The same problem was presented in *Kelley v. Board of Education of Nashville.*\(^7^3\) The proposed plan permitted children to voluntarily transfer to schools previously serving members of the other race. It also permitted transfer on the ground that the school was attended by members of a different race. The effect would be that Negro children could transfer to schools the whites were attending, but the whites could then transfer to a school where there were no Negroes. However, the court voided a provision authorizing separate schools for Negroes and whites.\(^7^4\) By doing so it prevented white students from “escaping the Negroes,” so to speak. There was no school the whites could attend that Negroes could not enter. The court indicated that if the effect of the plan was that Negroes were denied transfers to certain schools designated as “white,” this would be illegal. While the administrative soundness of such a plan may be questioned, it still was set up in such a way that some desegregation would have to result. There were no schools that whites could attend, but not Negroes. Theoretically, at least, each Negro child would have the opportunity to attend an integrated school. In *Boson v. Rippey,*\(^7^5\) the court also voided a plan for separate schools and also voided the transfer plan.

It has not definitely been decided in the desegregation cases in the southern and border states whether the neighborhood school plan would be fully acceptable as a desegregation plan if it resulted in complete segregation. In *Evans v. Buchanan,* \(^{\text{supra}}\), there were intimations that it might not be acceptable, since the result would be that Negroes would never have the opportunity to attend an integrated school unless their parents moved to another neighborhood. It was unnecessary to decide the question, however, since giving the white students the opportunity to attend their former schools would in itself make it unlikely that any desegregation would result, as for the Negroes, the neighborhood and racial school were the same. The problem may not arise too often in those states, since in many areas there

\(^{73}\) 270 F.2d 209 (6th Cir. 1959), cert.denied, 361 U.S. 924 (1959).

\(^{74}\) 270 F.2d 209 (6th Cir. 1959), cert.denied, 361 U.S. 924 (1959); and \(^{\text{supra}}\), note 49 accompanying text.

\(^{75}\) 285 F.2d. 43 (5th Cir. 1960).
were only two schools, or at least only one colored school, and some children will live closer to the school previously attended by members of the opposite race. On the other hand, it may be that the courts will require some integration to show that the board has abandoned its former policy of segregation.

In New Rochelle, however, the court indicated that where a policy of segregation had been adopted as to a particular school, it would require that some students be given the opportunity to attend an integrated school. The court employed the transfer system to enable those who desired to leave Lincoln to attend another school to the extent facilities were available. The availability of facilities was determined with a view toward the board's present policy of maximum class size. Since Lincoln school was "stigmatized" as a segregated school, those wishing to escape the stigmata had to be given the opportunity to do so to the extent other facilities were available. This is realistic, as all children might not want to transfer.

It is interesting to note that the court did not enjoin the rebuilding of the Lincoln school. This implies that if the board chooses to operate it as an integrated school, transfers would not be necessary. The case apparently says that there must be the opportunity to "get out" where the board has maintained a school as segregated. As long as this is permitted, further adherence to the neighborhood school policy is not inconsistent with the absence of a policy of segregation. A board may return to the neighborhood school policy according to the remedy prescribed by the court only after it is clear that it has abandoned its policy of segregation. Until a board has furnished evidence of a policy of desegregation, it may not claim that it is the neighborhood school policy which results in segregation.

Where the policy of segregation has been with respect to a particular determination such as the location of a school or the employment of the neighborhood school policy, the only remedy would appear to be to require the board to reconsider its decision without taking into account racial matters. It must be remembered that when this theory is employed, there is no requirement that the board choose another alternative (the possibility of such a requirement will be discussed in the next section), merely that it not use racial considerations in making such determinations. This is analogous to the use of the remedy of mandamus to require the official to make an exercise of discretion without con-
sidering improper factors, and this remedy should be employed to require a board to make decisions on valid criteria only. Theoretically then, if the board arrived at the same result and the court found it was not influenced by racial considerations, the decision would stand, though segregation or disadvantage to the Negro pupils would result. As a practical matter, however, the court is unlikely to find as a fact that the board was motivated by a policy of segregation in matters such as site selection unless it sees that the board has chosen an obviously impartial site, which the court concludes could have been done only with the intent to effectuate a policy of segregation. In effect, it will be shown that the board failed to choose a more reasonable course of action and the only way that the board can satisfy the court that its consideration was not based on improper grounds will be to choose the more reasonable course of action.

In summary, it is suggested that it is unlikely the court will often find a policy of segregation absent overt action, either past or present, or unreasonable conduct which could be explained on no other grounds than that the board is maintaining a policy of segregation.

**Actual Segregation Due to Racial Concentration in the Absence of a Policy of Segregation**

Here we deal with the question which the court in the *New Rochelle* case observed was not in issue—"how far a public body may save itself from constitutional constraint by mere inaction." More specifically, we are concerned with whether a board, assuming good faith and the absence of a policy of segregation can ignore racial imbalance caused by racial concentration in particular neighborhoods. May the state in the operation of its schools ignore the fact that it is operating the schools in such a way that children of a minority race can associate only with members of their own race in the educative process?

Again, it should be noted that there is no question of whether it is state action that is causing segregation. The state has acted in operating a system of schools and/or requiring students to attend them. The Supreme Court has characterized this action as "perhaps the most important function of state and local governments." In fact, the state may be educating them on a

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76. 294 F.2d at 39, note 2.
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segregated basis. The question is to what extent this is unconstitutional in the absence of a policy of segregation.

At the outset we are met by the oft-repeated assertion that the state has "no duty to integrate the schools."\(^78\) This view is exemplified by the following language in *Thompson v. County School of Arlington*:\(^79\)

"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. 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 his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school he would have attended in the absence of the ruling of the Supreme Court."

The statement of "no duty to integrate" is true so far as it goes, but represents a generalization rather than a sound analysis of the Court's holding. The most accurate observation in the above quotation is that "no general reshuffling of the schools in any school system has been commanded." That is what is meant by the fact that the board is not required to integrate. It does not have to completely alter school boundaries and to insure that every school district is mixed, even though some students will have a great distance to travel. Of course this does not mean that the board may not decide to fully integrate the schools as a matter of social and educational policy; it merely means that the holding in *Brown* does not require it to do so. On the other hand, even though the state is not required to integrate fully every school and every child, this does not mean that the state may not have certain responsibilities to children of a minority race while it is educating them, the failure to perform which may be unconstitutional.

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78. Holland v. Board of Education of Palm Beach, 258 F.2d 730 (5th Cir. 1958); Thompson v. Arlington School Board, 144 F.Supp. 299 (E.D.Va. 1956), aff'd., 240 F.2d 59 (4th Cir. 1956), cert. denied, 353 U.S. 910 (1957); Borders v. Rippey, 245 F.2d 268 (5th Cir. 1957); Meador, supra, note 62 at 528.
Next it is necessary to examine the concept of the neighborhood school. Shortly after Brown commentators assumed that this would be a proper criterion. As Professor Sutherland observed:

“Classification by residential location is a perfectly acceptable means of allotting children to schools, and where many Negro children live in one neighborhood there are bound to be many Negro children in the nearest school regardless of the state concerned.”

However, there is no automatic neighborhood. What constitutes a neighborhood for school purposes depends on what the board classifies as a neighborhood. This is particularly true is regard to elementary schools in the cities where one school may be located but a few blocks from another. Many children are practically as close to one school as to another. This is demonstrated by the report of the Public Education Association in New York. The board can decide that a neighborhood shall be classified as running north and south or east and west. It decides what fringe areas shall be included in a particular neighborhood. Where racial ghettos merge, a particular choice may result in factually segregated schools or integrated schools. As the report pointed out:

“We have noted that the New York City Schools are neighborhood schools and that the school population, therefore, reflects the ethnic composition of the school district. As long as the principle of neighborhood schools persists, in the central areas of homogeneous ethnic communities it is immaterial, from the point of composition of the school, where school district boundary lines are drawn. A school in the center of Harlem will be a Negro school.

On the other hand, in fringe areas where groups of different ethnic composition meet geographically, the individual responsible for zoning school districts is faced with these three alternatives:

1. He may select boundaries which promote ethnic separation.
2. He may ignore the ethnic composition problem.


81. Supra, note 28.
FIGURE 1

Types of Fringe Area Zoning

ZONING TO SEGREGATE

Ethnic Group B

School (B)

School (A)

Ethnic Group A

ZONING TO INTEGRATE

Ethnic Group B

School (A and B)

School (A and B)

Ethnic Group A

Note: (A) and (B) are the same geographical areas.

FIGURE 2

Use of Permissive Area to Foster Ethnic Segregation in Schools
3. He may select boundaries which encourage integration of ethnic groups."82

This demonstrates that what constitutes a neighborhood is the result of board determination and that the neighborhood policy does not mean that children logically go to one school any more than to another.

On the high school level what constitutes a "neighborhood high school" is also not automatic. There are a number of high schools in a district, let us says, and a number of elementary feeder schools. There is the possibility that even though the elementary schools are racially segregated, some are located in fringe areas that could serve as feeders to one high school as conveniently as the next. By employing certain elementary schools as feeders for a particular high school, the high school will be racially segregated. But it may be that if other, equally convenient, were employed as feeders, that high school would be integrated. By the same token, so would be the other high school to which the remaining "fringe" feeder schools are allotted. Therefore, it is clear that many schools could be biracial instead of uniracial depending on how the board classifies a particular neighborhood or how it allots feeder schools. If the board makes its selection with a view toward establishing racial segregation, then the principles discussed in the preceding section are applicable. Our concern is whether the board can ignore in good faith an arrangement which would result in integration without inconveniencing the operation of the school system. Further we are concerned with whether the board has any responsibility in the situation where any neighborhood or feeder system it selects will result in actual segregation because of the particular racial concentration in those areas.

The answers to these questions begin with a reconsideration of the rationale in Brown. As indicated previously,83 the Court held that in the operation of its educational system the states cannot adopt a policy causing feelings of inferiority due to race nor deny the opportunity for contact with members of the other race. Moreover such a policy serves no legitimate governmental purpose and hence offends the due process clause. Compulsory segregation in the operation of the schools, as in any public facility

82. *Id.* at pp. 14-15.
83. See the discussion, *supra*, notes 21-23 and accompanying text.
operated by the state, is unconstitutional for those reasons. But in the operation of its school system the state may cause feelings of inferiority due to race and deny equal educational opportunities by other means than compulsory segregation. It must be remembered that the rationale of Brown is that the state may not so act in the operation of its school system. A state obviously is not prohibited from causing feelings of inferiority due to other factors such as less ability than other students or physical or mental deficiencies. As with race there have been intimations that the state may not cause feelings of inferiority due to religion. In the instances of inferior ability or physical or mental deficiencies, such feelings of inferiority may be necessary in order for the state to educate the children in accordance with their ability and to take account of their deficiencies. In these instances it has been necessary for the state to place the child in special schools in order to educate him as efficaciously as possible. This consideration is not present where the child suffers feelings of inferiority due to race, and is denied the opportunity for contact with members of the other race.

There is nothing to indicate that actual segregation is not equally harmful to the minority child, though not required by positive law or the board's policy. To the child the segregation is required by the state just as effective as if due to a policy of segregation. He is told he must go to school with members of his own race only. He may be compelled to do this by compulsory attendance laws or this may be the terms on which he can obtain an education. The feeling of inferiority would be heightened in fringe areas, where he sees a school nearby attended primarily by white children. In New Rochelle the court found that the 94% Negro enrollment at Lincoln School “approximates closely

84. See, e.g., Barnard v. Shelbourne, 216 Mass. 19, 102 N.E. 1095 (1913) (may be assigned to special school with pupils of same level).
86. In McCullom v. Board of Education, 333 U.S. 203 (1948), where the Court invalidated the use of the public school for religious instruction, the record was full of evidence of how the plan caused feelings of inferiority in the child of the atheist plaintiff. The concurring justices emphasized that only some religions in the area offered programs, which resulted in “inculcating a feeling of separatism in the children belonging to non-participating sects.” 333 U.S. at 227-228. The causing of feelings of inferiority in the Jehovah Witness children was also noted by the concurring Justices in Barnette v. Board of Education, 219 U.S. 624, 644 (1919). And the recent case of Engel v. Vitale, 370 U.S. 421 (1962), invalidating the Regents Prayer involved children whose non-participation labelled them as “pariahs.”
the harmful conditions condemned in the Brown case." 87 In Skipworth the court observed that "The record in this case fully sustains the contention that the separation of children by race, whether it be the result of governmental action or of private housing segregation creates factors inimical to the full and equal educational opportunities." 88 The harmful effects of segregation have been stated most clearly by Judge Edgerton in language equally applicable to compulsory or actual segregation:

"Instead of serving a public purpose it (segregation) fosters prejudice and obstructs the education of whites and negroes by endorsing prejudice and preventing mutual acquaintance. Adults are not restricted in their contacts to people who live in the same block, but many children are practically restricted in their contacts to children who attend the same school. The education required for living in a cosmopolitan community and especially for living in a humane and democratic country and promoting its ideals, cannot be obtained on either side of a fence that separates a more privileged majority and a less privileged minority. 89

The need for children to associate in order to receive a meaningful educational experience is further demonstrated by state cases such as those holding that instruction of the child at home did not satisfy the statutory requirement of "equivalent instruction," since the child did not have the opportunity of free association with other children, 90 or voiding an establishment of a school district which was intended to separate different ethnic groups. 91 It is clear that actual segregation is no less harmful to the minority child than segregation required by statute or board policy.

The question then becomes at first glance whether it is unconstitutional for a state to offer or require education (we will assume that the constitutional question is the same because of the significance or education; moreover, education is more often compulsory than not, particularly on the elementary school level) under such conditions as to cause children to suffer feelings of inferiority due to their race, and to deny them contact with

87. 294 F.2d at 39. See also the reference to the Dodson report, 194 F.Supp. at 189, which also concluded that these children were suffering feelings of inferiority.
88. 180 N.Y.S.2d at 86. See also the reference to the Clark report, 180 N.Y.S.2d at 866.
89. Dissenting in Carr v. Corning, 182 F.2d 14, 32 (D.C.Cir. 1950). He contended that school segregation was unconstitutional.
91. Wisconsin ex rel. Moreland v. Whitford, 54 Wis. 150, 11 N.W. 424 (1882).
children of the predominant race. Let us assume that in an inte-
grated school signs are posted saying Negroes are inferior and
an hour per day is devoted to class discussion of the inferiority of
the Negro (we will assume this cannot be or is not taught as
"scientific doctrine"). The state clearly cannot offer education
on those terms. This follows from the holding in *McLaurnin v. Oklaho-
ma State Regents*, where the Negro student was required
to sit in the classroom at a seat specified for Negroes and eat at a
special table in the cafeteria. This obvious attempt to make the
student feel inferior was unconstitutional, even though he was
attending an integrated school. It may be asked whether actual
segregation does not accomplish the same result in that it makes
the child feel inferior due to his race. It is as if the board has
placed a sign on the school, “for Negroes only.”

However, the question posed need not be resolved on a
“either-or” basis. It need not be whether the state must give the
child an education in an integrated school or forego the power
to require him to be educated. It is not contended that the state
has a “duty to integrate” in the sense that every school must be
integrated even at great expense and inconvenience. But this
does not answer the question of can the state still educate him on
an integrated basis thus providing equal educational opportu-
nities and preventing feelings of inferiority and at the same time
effectively operate its educational system.

Where a state can accomplish its object without causing inter-
ference with a recognized right, but chooses a method which,
while accomplishing the object, also interferes with that right, its
failure to choose the reasonable alternative constitutes a denial
of due process. This principle has been applied most frequently
in the area of economic regulation and free expression.

In *Weaver v. Palmer*, the legislature prohibited absolutely
the use of a material known as “shoddy” (renovated used mate-
rials) in the manufacture of bedding even when fully sterilized.
This was justified as a health measure and not one to regulate
economic competition. There was undisputed scientific evidence
that sterilized shoddy was not harmful to health. The statute
prohibited the use of other second hand materials only if not

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93. See also the material cited in note 86, supra.
94. This phrase is borrowed from Rogers, *Desegregation in the Schools*. 45 Corn.
95. 270 U.S. 402 (1926).
sterilized. It was held that the state could prevent any harm resulting from the use of shoddy by requiring that it be sterilized. If it adopted that method, the public health would be fully protected, but the defendant could continue the manufacture of shoddy—a right protected by the due process clause. By adopting the measure it did, it accomplished its purpose, but destroyed his right. It was held that the failure to adopt the reasonable alternative constituted "excessive regulation" and violated the due process clause. The state prohibited when it could have accomplished the same result by regulation.

The same principle was applicable in *Burns Baking Co. v. Bryan*, where statute fixed a maximum weight for bread, but allowed a tolerance of only two ounces per pound. As a result of this regulation, evidence showed that it was impossible to manufacture good bread in the normal way unless the bread would be wrapped to prevent evaporation. The practical result would have been to prohibit the sale of unwrapped bread. The measure was not a health measure, but was designed, according to the state, solely to prevent short-weights. The Court found that this could have been achieved through other methods equally effective which would not have had the effect of prohibiting the sale of unwrapped bread and declared the statute unconstitutional.

Another application of the principle occurred in *W. B. Worthern Co. v. Thomas*, which involved a statute exempting proceeds of life insurance policies from execution. The statute applied retroactively to policies issued prior to its enactment. The statute was enacted during the depression, and it was argued that the purpose was to give relief to debtors, relying on the fact the Court had previously upheld a mortgage moratorium statute. The Court found that the statute was not limited to accomplishing the result of protecting needy debtors, since there was no limitation as to amount, however large, nor beneficiaries, nor relationships. Most importantly it was not limited in time and would continue even after the need had passed. Considering all

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96. In analyzing a due process issue the following questions should be asked: (1) what is the purpose of the regulation; (2) does the regulation bear a reasonable relationship to the accomplishment of the purpose; (3) could the state have accomplished its purpose by action not interfering with the right asserted.


98. 264 U.S. 504 (1924). Holmes and Brandeis dissenting, agreed as to the principle, but disagreed as to its application in the instant case.


these factors, the Court concluded that needy debtors could have been protected without destroying the rights of all past judgment creditors and that the state's failure to employ a reasonable alternative violated the due process rights of the creditors.

In the free expression area the leading case involving excess regulation is *Schneider v. State*, where a municipal ordinance prohibited distribution of handbills in house solicitation or in the streets. The ordinance was applied to one distributing religious literature. The city contended that the ordinance was necessary to prevent littering in the streets and fraudulent appeals to householders. The Court invalidated the ordinance on the ground that the city could find other ways to prevent such harm without destroying the opportunity to disseminate religious information. As to the prevention of street littering the reasonable alternative would have been to punish those who threw papers on the street; this would have accomplished the city's purpose without destroying the recognized right of the distributor.

In reply to the city's argument that such prohibition was necessary to prevent fraudulent appeals, the Court held that the city could accomplish the same result by punishing the fraud; in that way the rights of the innocent disseminator could be fully protected while the state's object was accomplished. The Court observed as follows:

"Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

The city's failure to employ reasonable alternatives which would have enabled it to accomplish its object without destroying the rights of disseminators invalidated the action.

Of like import is *Talley v. California*, where the ordinance prohibited the dissemination of any handbill that did not list the name and address of the sponsor. It was argued by the city that the ordinance was designed to identify those responsible for

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103. 362 U.S. 60 (1960).
fraud, false advertising and libel. But the ordinance was not so limited. Here the burden was on the state to show that it could not accomplish its object by a less drastic method than requiring all handbills to be so identified. Unlike the other cases the Court did not indicate what the reasonable alternative was, but established the principle that the state must show it could not accomplish its object by a regulation rather than a prohibition so as not to destroy legitimate rights of those whose conduct was not related to the evil the state was trying to prevent.

An Arkansas statute requiring every teacher as a condition of employment in state supported schools to file annually an affidavit listing without limitation every organization to which he belonged within the last five years fared no better in Shelton v. Tucker. Requiring the listing of every organization was held to be an interference with freedom of association as guaranteed by the due process clause. It was admitted that the state could inquire into the fitness of its teachers and that their memberships may have had some relevance to the fitness. The statute was invalidated on the ground that it was not limited to the types of organizations that could have relevance to the teacher’s fitness. The Court clearly articulated the principle of excessive regulation as follows:

“In a series of decisions this court has held that, even though the governmental purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.”

Again the state’s failure to regulate with a view toward avoiding infringement of rights was unconstitutional, since a regulation could have been drafted which would accomplish the state’s purpose without such interference.

Other situations where the Court indicated that at least one basis for its decision was that the state could have accomplished its purpose without destroying the rights of persons were Pierce v. Society of Sisters, where it was observed that the state could regulate private schools and set standards rather than prohibiting

104. 364 U.S. 479 (1960).
105. 364 U.S. at 487-488.
106. 268 U.S. 510 (1925).
them entirely;\textsuperscript{107} and \textit{Barnette v. Board of Education},\textsuperscript{108} where the Court observed that the board could have taught patriotism by requiring courses in American history rather than by requiring children to salute the flag against their religious beliefs.\textsuperscript{109}

There are basically two conditions in the area of actual segregation. One is where the board could eliminate the harm entirely by establishing an integrated school, but has not done so, even though this could be accomplished without serious interference with the operation of its school system (we are assuming there is no policy of segregation). The second situation is where there is no choice but to operate the school as a segregated one due to racial concentration, e.g., in the center of Harlem. We are assuming that to require the board to juggle the boundaries and transport students great distances does not qualify as a reasonable alternative to operating the school on a neighborhood basis despite the fact that it causes feelings of inferiority and denies the opportunity for contact. The question is to what extent must the board take account of the harm done by actual segregation in each instance.

This discussion may be commenced with a consideration of \textit{Branche v. Board of Education of Hempstead}.\textsuperscript{110} The case did not fully explore the situation in that it arose on a motion for summary judgement. Due to racial concentration in residential patterns and the operation of the schools on a neighborhood basis at least one school was attended almost exclusively by Negroes, two others to a great degree and two schools were almost exclusively white. In suit to enjoin the operation of racially segregated schools and the denial of equal protection to the Negro students the board moved for summary judgment on the ground that the board did not have a policy of segregation and that it "had no duty to integrate."

The court denied the motion, even though there was no evi-

\begin{itemize}
\item \textsuperscript{107} The Court observed that there was no question as to the power of the state to do this. But because it could do this did not give it the power to abolish private education; rather it should employ those methods to accomplish its objective.
\item \textsuperscript{108} 319 U.S. 624 (1943).
\item \textsuperscript{109} See also the dissenting opinion of Mr. Justice Douglas in United States v. United Automobile Workers, 352 U.S. 567, 593 (1957). The majority did not pass on the question of whether Congress could prohibit labor unions from making expenditures to political campaigns. The dissent did and found it unconstitutional on the ground that Congress could prevent the evils of such contributions and protect the rights of dissenting members by regulation rather than by prohibition of such contributions. Its failure to employ those alternatives, he contended, rendered the statute unconstitutional. 352 U.S. at 596-597.
\item \textsuperscript{110} 204 F.Supp. 150 (E.D.N.Y. 1962).
\end{itemize}
dence that the board maintained a policy of segregation. With respect to that claim the court observed that:

"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 not been segregation because of race. Segregated education is inadequate and when that inadequacy is attributable to state action it is a deprivation of constitutional right." 111

More significantly the court recognized that the question was not one of state action or private action causing the discrimination. It recognized that the requisite state action was present in the operation of the school system. To that extent the state was causing feelings of inferiority when it required children to attend school on a segregated basis due to the fact that the neighborhood where they lived was segregated. The main thrust of the opinion was that the state could not ignore the harm caused by actual segregation if there was something it could do about it. It stated:

"The educational system that is thus compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted.

Failure to deal with a condition as really inflicts it as does any grosser imposition of it. How far that duty extends is not answerable perhaps in terms of an unqualified obligation to integrate public education without regard to circumstance and it is certainly primarily the responsibility of the educational authorities and not the Courts to form the educational system. . . . 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" (citations omitted). 112

The language of the court seems similar to that employed in the reasonable alternative cases. The decision, despite its limited effect due to the procedural posture of the case, is significant in

111. 204 F.Supp. at 153.
112. Ibid.
that (1) it recognizes that the state is in effect causing feelings of inferiority due to race and denying equal educational opportunities when schools are factually segregated despite the absence of a policy of segregation (2) the state must make an effort to mitigate the harmful consequences of segregation if this can practicably be done.

It is submitted, therefore, that the action of school boards must be viewed in light of the constitutional principle of reasonable alternative as embodied in the due process clause. Segregated education occasioned by racial concentration without improper motive is, from the standpoint of the minority child no less harmful than that imposed by racist motivation. Admittedly the state must be free to educate the child and to effectively operate its school system. But if it can educate the child without causing feelings of inferiority, but chooses a method, which, while educating him, causes such feelings its failure to adopt the reasonable alternative offends due process. Applying this principle to the situation where the board could practicably educate the child on an integrated basis, but has adopted a method of school attendance which results in segregated education, it has acted unconstitutionally. Earlier we considered the question of what constitutes a neighborhood. In fringe areas we have seen that attendance zones can often result in two segregated schools or two integrated schools, depending on whether the board zones north and south or east and west. No great inconvenience results from either method of zoning. By adopting one method the board could prevent feelings of inferiority due to race; by adopting the other method it causes such feelings in the operation of its school system. Both methods of zoning enable the state to educate the child. Since it could accomplish its object without causing feelings of inferiority, while not interfering with the operation of its school system, its failure to choose the reasonable alternative offends due process.

The same is true with other action such as selection of feeder schools for high school districts, selection of a site for a new school, tearing down an old school and the like. If one choice would prevent actual segregation and at the same time not interfere with the operation of the school system, there is no reason why the board should not adopt that choice. Its failure to choose the reasonable alternative is unreasonable in view of the harm that the choice it has made causes to the Negro students, which
harm could be easily eliminated. In other words, the reasonableness of the board's action must be considered in light of the fact that actual segregation harms the Negro students.

It is interesting to note that there is a body of state law in regard to the reasonableness of the actions of a school board despite the discretion vested in them. Division of attendance areas by gerrymandering, causing some students to have to travel a greater distance than others has been held unreasonable whether or not the division was based on race. Other unreasonable actions have included requiring a child to attend school a great distance away from home and requiring him to cross a dangerous place to attend; establishing a school district in a location where many children could not attend regularly due to the condition of the roads; constructing new facilities which were unnecessary in relation to cost; transferring children from a district with the result that the district would greatly have to increase taxes to operate schools. The principal of reasonableness had been carried over into the due process clause even prior to Brown and Bolling. Thus, in Westminster School District v. Mendez, it was held that acts of school district officials in segregating children of Mexican descent violated due process in view of fact that state law prohibited segregation. The board contended that language deficiencies justified the segregation, but the court found that they were not so widespread that they could not be corrected by another method. This is another example of where the failure to adopt a reasonable alternative was a factor in invalidating the action.

The only change that has been proposed is the formal recognition that the reasonableness of the board's action must be viewed in light of the harm done to Negro children by actual segregation. This test would be applicable to all board action. For example, let us say that the board busses children in Negro neighborhoods in order to relieve crowded classrooms. White schools are nearby, but instead the board busses them to Negro

113. Myers v. Board of Supervisors of DeSoto County, 156 Miss. 251, 125 So. 718 (1930).
118. 161 F.2d 774 (9th Cir. 1947).
schools at a great distance. The failure to choose the reasonable alternative, which would have accomplished the board's purpose of educating the children, but not have caused the feelings of inferiority nor denied them contact with white children is unreasonable and in violation of due process. Another example might be bussing Negro children to white schools to relieve overcrowdedness, but setting up the schedule so that they have no opportunity to be in contact with white children. The failure to provide such contact, which involves no inconvenience to the operation of the school system, is unreasonable, since the providing of this contract could have eliminated the inequality and feelings of inferiority that result from segregated education while at the same time not interfering with the state's accomplishment of its educational objective.

We may now consider what objections may be made to the requirement of the board's acting with a view toward choosing the alternative which will prevent the feelings of inferiority caused by actual segregation. The first may be that the board would have to prevent ethnic concentration, that is, it would have to choose alternatives preventing concentrations of Italian or Jewish or Irish or Polish students, which would make operation of an effective school system impossible. The answer is that there is no evidence that other groups suffer feelings of inferiority or are denied equal educational opportunities due to their ethnic concentration. The efforts have been primarily to keep Negroes segregated from whites more so than to keep other ethnic groups separated from the dominant ones. This was recognized by the court in New Rochelle, which pointed out that "Brown was based on factual findings which may not be applicable to other minority groups." If there was any evidence that other groups suffered feelings of inferiority from being segregated due to ethnic composition, the same principles would come into play. In New York, for example, the Brown principles are probably applicable to the Puerto Ricans. The point is that the discrimination due to race has been directed against the Negro as it has not been against any other group. Therefore, the Court found that Negroes suffer feelings of inferiority due to being required to attend school only with members of their own race. The board cannot excuse its failure to consider the situation of the Negro by saying it is not considering the situations of other groups, as

119. See 1961 Education, supra, note 5 at 106.
120. 191 F.Supp. at 196.
to which there is no evidence that they are similarly due to segregation as is the Negro.

The second objection is that the "Constitution is color-blind." This represents a glib generalization and like most glib generalizations is inaccurate. As Judge Kaufman pointed out, "The Constitution is not this color-blind." The guarantee of equal protection is that a person shall not be denied a benefit because of his race or made to suffer feeling of inferiority due to race as a result of action by the state. Where race has been used to justify a denial of rights to a person because of his race, then it may be said that the Constitution is "color-blind." Even there, the Constitution is not color-blind, where the denial of benefits due to race is necessary to accomplish a legitimate governmental objective. Thus, due to military necessity the government was permitted to require Americans of Japanese ancestry to be relocated en masse.

On the other hand where failure to consider differences in needs due to race results in injury to the minority race, putting it at a disadvantage with the majority race, the failure to consider race becomes unreasonable. Because of constant discrimination minority groups have different problems. This was recognized in Meredith v. Fair, in considering a requirement of the University of Mississippi that each candidate for admission furnish certificates from alumni that he was of good moral character. The court held that the requirement denied equal protection to Negro students, as they would find great difficulty in obtaining such certificates due to their race. The court was most "color-conscious" in observing as follows:

"We hold that the University's requirement that each candidate for admission furnish alumni certificates is a denial of equal protection of the laws in its application to Negro candidates. It is a heavy burden on qualified Negro students because of their race. It is no burden on qualified white students.

The fact that there are no Negro alumni of the University of Mississippi, the manifest unlikelihood of their being more than a handful of alumni, if any, who would recommend a Negro for the University, the traditional social barriers making it unlikely, if not impossible for a Negro to approach alumni with a request

121. Ibid.
123. 298 F.2d 696 (5th Cir. 1962).
for a recommendation, the possibility of reprisals if alumni should recommend a Negro for admission, are barriers only to qualified Negro applicants." 124

The court clearly recognized the effects of discrimination as justifying its color-conscious.

The courts have constantly recognized such differences in needs as a result of discrimination. In Sweatt v. Painter, 225 the Court emphasized that most of the lawyers and judges in the state were white, justifying the Negro's need for contact with white lawyers, even though white lawyers did not need such contact with Negro lawyers. Similarly in Lane v. Wilson, 226 the Court voided a statute which gave persons who had not previously been eligible to vote (previous eligibility was based on the unconstitutional grandfather clause) about twelve days to register or be disfranchised. It observed that "the restrictions imposed must be judged with reference to those for whom they were designed" and that "we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise." 227 It has also been suggested that trusts in which the state is involved should be validated, though exclusively for the benefit of Negroes. As Professor Clark has observed:

"Classification by race is altogether different in psychological origin and effect from other methods of classifying beneficiaries. It is designed to hurt, not to benefit, and sociologists tell us that such is the effect. The malevolence of racial selection is the antithesis of charity, and therein might be found the basis for a legal distinction. But such an approach encounters the difficulties which fostered the traditional rule of restraint. Should a trust for the exclusive benefit of Negroes, for example, be distinguished from other types of racial selection? It can be argued that the second-class status which has been forced on the Negro by the dominant white majority provides an affirmative reason for such a classification." 228

127. Id. at 272.
128. Clark, Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard, 66 Yale L.J. 979, 1001 (1957). However, he doubted whether the court would draw a distinction.
The Courts have clearly recognized that the Negro has different needs due to the years of discrimination, both private and public. Therefore, it is no answer to say that the board cannot be required to choose the reasonable alternative preventing feelings of inferiority due to race, because "the Constitution is color-blind." A more accurate slogan if one is needed, would be that "the Constitution is color-blind when discrimination is practiced against persons because of their race, but color-conscious when persons have special needs as a result of discrimination due to their race."

Where the board has failed to choose the reasonable alternative, the remedy is not, of course, to enjoin the operation of the schools, but to require the board to take the reasonable alternative. When the court finds that the board could have prevented segregation by zoning differently, then the remedy is a mandatory injunction ordering the board to rezone in accordance with that alternative. The means of performance are left to the board's discretion, so long as the net result is that the schools are integrated; note that previously this will have been found to be practicable. The same is true with feeder districts; the board can choose whatever particular districts it wishes to assign to each school so long as the effect is that not all the Negro feeder districts are assigned to one school and all the white districts to another; again, it will have previously been found a mixture is possible.

Now we shall consider the situation where there is no question of integrating the schools as a reasonable alternative, that is, that racial concentration is such in relationship to the available schools, that the board could not achieve an integrated school without seriously disrupting the operation of its school system. The due process and equal protection clauses cannot be said to require the state to seriously disrupt the operation of its school system, transporting pupils at great distance and the like, in order to achieve actual integration. However, a reasonable alternative in such a situation would be to permit the child who so desired to transfer to an integrated school to the extent such facilities were available.

In this connection it must be remembered that we are dealing with the substantive right of an individual child to have equal educational opportunities and not the rights of Negro children as a class. The fact that many of the desegregation suits are instituted as class actions should not obscure this fact. It is also no
answer for the board to say that if it permits one child to transfer, it must permit all Negro children to do so with the resulting disruption of the school system. The simple fact is that not all children will want to transfer.

This was emphasized by the court in *Evans v. Ennis*, where the board was ordered to speed up integration despite a claim that this would result in overcrowded schools. The court observed that it was "common knowledge that a large number of Negro children do not seek integration even when offered the opportunity." The same rationale is applicable in regard to transfers from a school where actual segregation is unavoidable. To the extent facilities in other schools are available, those children who wish to transfer must be granted the opportunity to do so in order that they not suffer educational disadvantage. The reasonable alternative of permitting transfers where feasible must be employed, since the result will be that the state educates the child on an integrated basis while at the same time not seriously disrupting the operation of its school system. It would be a defense that it was not feasible to permit the particular transfer either because of the overcrowding of other schools or because of the excessive distance involved. Moreover, there would be no requirement that the state bear the cost of transportation to the integrated school. The remedy in such a case is a mandatory injunction ordering the board to indicate a school to which the child can transfer and permit such transfer, once it has been demonstrated that facilities are available at other schools. The conditions of the decree in the *New Rochelle* case could serve as a model.

Finally let us consider the situation where there is no question of a reasonable alternative even by way of transfer. The due process clause cannot be said to require either the abandoning of the attempt to educate the child or the disruption of the school system in order to prevent the feelings of inferiority the child gets from actual segregation. However, this does not mean that the state can ignore the harmful condition which it has created in its efforts to educate the child. It must attempt to mitigate the harm that its need to educate the child and employment of the neighborhood school system in doing so has caused. This was recognized by the court in *Hempstead* when it talked of the need to "make the effort to mitigate the consequent educational inadequacy." The state

129. 281 F.2d 385 (3d Cir. 1960).
130. 204 F.Supp. at 153.
must try to eliminate the harm it has caused in the carrying out of a function when it is practicable to require it to do so. This stems from the same source as the requirement to employ the reasonable alternative.

Moreover, an analogy may be drawn to the state's power to control a situation as relative to what constitutes state action. In a number of situations where the action of private persons has been deemed to be state action, it was because the state could have prevented the harm without the exercise of its police power, but did not do so. One class of cases is where the state has abandoned control of an activity which it has the power to control in the exercise of its governmental functions. In such a situation the action of the private persons who have taken over the function is the action of the state. This has been applied to its abandonment of control over elections and the public streets. The other class of cases has been where the state has leased public facilities to private operators, but has not prevented them from discriminating. Then the action of the private persons has been deemed to be that of the state, since the state—without need for exercise of its policy power—could have prevented the harm but did not. This has been applied to leases in a parking garage, a county courthouse, an air terminal, a golf course and a city owned building used as a theater. As the Supreme Court has stated:

"As the Chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by failing to discharge them whatever the motive may be. It is of no consequence to an individual denied the equal protection of the laws that it was done in good faith."

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131. See discussion, supra, note 11 and accompanying text.
132. See discussion, supra, note 12 and accompanying text.
135. Coke v. City of Atlanta, 184 F.Supp. 579 (N.D.Ga. 1960). It was immaterial that under the terms of the contract the city had no right to control the lessee.
138. 365 U.S. at 775. If the state in good faith disposes of the facility, however, the buyer can discriminate, as the state has abandoned its power to control. Tomkins v. City of Greensboro, 276 F.2d 890 (4th Cir. 1960).
These principles are more strongly applicable where the state has caused the harm itself rather than permitted private persons to do so. Granted that the state had no choice but to require the child to attend a segregated school, as otherwise the school system could not be effectively operated. But having put the child in a position to suffer such feelings, due process and equal protection also require the state to do something to prevent the occurrence of such feelings or at least to mitigate their harmful effects. Since the state has to educate the child on a segregated basis due to racial composition of the neighborhood, it must take action to indicate to the child that he is not limited to contacts with Negroes in the educative process. Therefore, it must take some action to put him into contact with white students in the process, though it is not required to integrate the schools.

The matter can best be accomplished by what is called an experimental decree. This is what was employed in the Brown case. In such a situation the court declares the rights of the parties, orders the defendant to take action to eliminate the harm and leaves the means of performance to the discretion of the defendant. As long as he acts in good faith, he will not be held in contempt. The court retains jurisdiction until it is satisfied that the harm has been eliminated. The board is not required to do any particular thing; it can do many. It can see to it for example, that the children at segregated Negro schools have the opportunity to participate in athletic competition with white schools, or have joint assemblies periodically or sponsor social events, or any method it chooses to mitigate the feelings of inferiority that are caused by segregated education. The important thing is that the board furnish the opportunity for substantial contact with children of a different race in the operation of its educational system.

Enforced Integration

Thus far we have been considering the situation where the school board is maintaining actual segregation in the operation of its educational system. Now let us examine the opposite choice. Suppose a school board is convinced that Negro children, or both white and Negro children, must attend school on an integrated basis in order to achieve a completely satisfactory educational experience. Rather than taking advantage of or ignoring adven-

titious segregation due to racial concentration, the board chooses to eliminate it in the schools. The question arises as to whether there are any constitutional issues raised by its choice of certain methods to achieve this result.

The first situation is where a board permits Negro students to transfer to all-white schools, but does not allow white children transfer privileges (it is doubtful if the request of a white child to transfer to an all-Negro school would be denied if it should ever occur). Can the board constitutionally give Negro children the opportunity to transfer while denying the same opportunity to white children, or is this a denial of equal protection to the latter? In *New Rochelle*, the dissenting judge argued that the transfer provisions violated equal protection, since a Jewish or Italian child or the like did not have the right to transfer even if a given district was predominantly Jewish or Italian. It has also been contended that a white child is denied equal protection if he is required to attend school with a Negro child against his will, as he might suffer feelings of inferiority as a result. Is it justifiable then for the board to permit only Negroes to transfer?

The answer is, as Judge Kaufman pointed out in *New Rochelle*, that the *Brown* decision found that the Negro suffered feelings of inferiority as a result of segregation. He then needs to be relieved against the segregated learning situation. There is no evidence that the white child or children of most other ethnic groups (exceptions would be Puerto Ricans in New York, Mexicans in the southwest, and American Indians in some areas) suffer any feelings of inferiority due to his race. As a result they have no need to transfer, but the Negro child has such a need.

It is well settled that a state does not deny equal protection by giving a benefit to a group that needs it while denying the same benefit to another group that does not. Thus, it is constitutional for a state to provide that cooperatives are exempted from the anti-trust law and to punish an attempt to induce persons to break contracts with cooperatives, though inducing persons to break other contracts is not punishable. The court noted that cooperatives were necessary to satisfy the special needs of agricultural producers and that cooperatives particularly needed protection of

140. 294 F.2d at 50.
the kind granted. By the same token the state can also exempt agricultural products or livestock from the operation of the anti-trust laws.\textsuperscript{143} As Justice Frankfurter observed:

"These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers. The equality at which the equal protection clause aims is not disembodied equality. The Fourteenth Amendment enjoins the 'equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units, B and C., but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. \textit{The Constitution does not require things which are different in fact or opinion to be treated in law as if they were the same.}" (emphasis added)\textsuperscript{144}

This observation is particularly apt in regard to transfer provisions for white and Negro students in the situation described, since there the Negroes are the ones who suffer feelings of inferiority due to segregation by race.

Moreover, classifications to protect constitutional rights are not unreasonable. Thus, in \textit{Packer Corp. v. Utah},\textsuperscript{145} a statute forbidding the advertising of tobacco on billboards and streetcars, but inapplicable to newspapers and periodicals, the latter prohibition having been held to be in violation of the interstate commerce clause, did not violate equal protection as applied to a billboard advertiser. The Court observed that "action taken by a State to observe one prohibition of the Constitution does not entail the violation of another." Here, transfers are granted to Negroes only so that the state will not cause them to suffer feelings of inferiority due to race. As the white children suffer no such feelings of inferiority, the state may give transfer privileges to the Negro children without giving them to the whites.

The second interesting problem arises if the state should attempt to achieve a fully integrated school system by limiting the percentage of Negro and white children that can attend a given school. It establishes a quota system for each race at a particular school, designed to insure racial balance. A Negro student seeks

\textsuperscript{143} Tignor v. Texas, \textit{310 U.S.} 132 (1940).
\textsuperscript{144} Id. at 146-147.
\textsuperscript{145} 285 U.S. 105 (1932).
transfer to another school having its quota of Negroes and is de-
nied admission because of his race. The question arises as to
whether the board has acted unconstitutionally in denying him
admission to the particular school because of his race.

In the first place, the question presented is unlike that involved
in the benign quotas in housing. There the Negro is denied a
benefit because of his race, and it can well be contended that it is
really of no consolation to him that the purpose is to benefit his
race generally. On that basis judicial enforcement of such restric-
tions have been said to constitute a denial of equal protection. 146
Here the question is not one of the “benefits” or pre-Brown aspect
of equal protection. Rather it is one of suffering feelings of in-
feriority due to race.

And this furnishes the answer to the question. It has been often
stated that Brown holds a child cannot be denied admission to a
school because of his race. But this is another generalization. This
has been applied when a child seeks admission to a white school
from a Negro school. Since the state cannot cause feelings of in-
feriority due to race, it cannot enforce a policy of segregation, and
hence cannot deny a child admission to a school on the ground
that it is to be attended by members of another race. This reason-
ing is inapplicable when the child is attending an integrated
school. Since he is attending an integrated school, the state is not
causing him to suffer feelings of inferiority due to race. Its de-
cision that he shall attend a particular integrated school and that
all schools shall be integrated in certain proportions represents an
effort by the state to give the child a meaningful educational ex-
perience. It can insist that he attend school with white children
and prevent the situation where a school becomes factually segre-
gated because of the presence of too great a proportion of one
race. Therefore, the state is not denying him equal protection,
even though he is denied admission to a particular school because
of race. 147

The case involved a suit to enjoin a conspiracy to condemn the developer's land,
which was to be used for an integrated development. The court held that the in-
junction would not lie, because of the benign quota provisions in the contracts. On
appeal this was reversed on the ground that the complaint stated a cause of action
against the state officials, even if the developer could not judicially enforce the be-
nign quotas. 286 F.2d 222 (7th Cir. 1961).

147. As the court observed in Kelley v. Board of Education of Nashville, 270
F.2d 209 (6th Cir. 1959) cert.denied, 361 U.S. 924 (1959), “It is the denial of the
right to attend a non-segregated school that violates the child's constitutional
rights.” Supra, at 229 (emphasis added).
Conclusion

The legal problems resulting from actual segregation in the north and west can be grouped into three categories: (1) unequal facilities; (2) policy of segregation; and (3) segregation due to racial concentration in the absence of a policy of segregation. Each involves different considerations and different remedies. Where facilities are unequal in respect to matters such as curriculum or teacher qualifications and this can be eliminated by the board, there has been a denial of equal protection irrespective of any question of race. The board may not constitutionally maintain a policy of segregation either in the operation of a particular school or the school system, nor may it make decisions with the intention to discriminate because of race. Finally the board must act reasonably to either prevent segregation if actual segregation is unavoidable. The test of reasonable alternative, as embodied in the due process clause, if accepted, will ensure that segregation does not exist where it could be eliminated without interference with the operation of the school system.

Finally, it must be remembered that the state is acting by operating a public school system and/or requiring attendance therein. In such operation it is subject to the requirements of equal protection and due process and cannot effectively maintain segregation merely because private arrangements have resulted in segregated residential neighborhoods.