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"DE FACTO" SCHOOL SEGREGATION:

PRIVATE CHOICE OR PUBLIC POLICY?

BY

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A dissertation submitted to the Graduate Faculty
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A Ph. D. is generally (and rather ominously) described as a "terminal" degree. For me -- a product of the 1960s -- the significance of the completion of my dissertation is accentuated by the fact that it follows by several months my thirtieth birthday. Since I have spent almost twenty-six of my thirty years as a student, this occasion seems like a particularly good time to acknowledge the contributions of those who have helped me reach this point both academically and chronologically.

First, thanks go to those who contributed directly to this dissertation.

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CHAPTER ONE

INTRODUCTION: FROM BROWN TO SWANN

The twentieth anniversary of the Supreme Court decision in Brown v. Board of Education [1] coincided with a continuation and possible escalation of the controversy and resistance that had marked the desegregation struggle from its inception. The scope of the transformation of the American educational system implicit in Brown has been determined incrementally, and each step in the process appears to have precipitated new and possibly cumulative resistance. Symptomatic of this trend has been the expansion of court ordered desegregation to Boston, Massachusetts, a city that had nominally integrated schools since before the Civil War. Boston became in the Fall of 1974 a symbol of northern resistance.

Also significant is the new academic and intellectual respectability given to opponents of further integration by scholars such as James Coleman, one of the principal academic supporters of integration in the decades before. Coleman argues in essence that "forced integration" is accelerating "white flight" from the cities and thus is self-defeating. [2] The logic of his argument is simply that if, indeed, whites leave schools as they are integrated, the schools will soon be resegregated. Further efforts toward government mandated school integration are, therefore, futile.

Without at this stage commenting about the validity of the argument that forced integration produces "white flight" and resegregation, I will simply note a possible consequence for Black children. In light of the Supreme Court's refusal to date to sanction either metropolitan desegregation or equalization of school financing, [3] "white flight" could not only produce continued segregation, it could deprive cities of sufficient tax revenues to maintain even existing levels of educational quality. In sum

the result could be increased segregation and more inequitable educational opportunity.

Scholars and northern school committees were not the only source of hostility toward school integration efforts. The Congress and the Executive Branch also contributed to growing restrictions on attempts to confront racial isolation in the schools.[4] In the face of indications that the Carter Administration intended to reverse Nixon Administration policies and revitalize the provisions of Title VI of the Civil Rights Act of 1964 by withholding funds from school districts refusing to pair schools and use limited "busing" to achieve integration, the Congress began to take legislative steps to effectively remove Title VI as a tool in school desegregation efforts.[5]

The most significant restrictions, however, were set in motion by the Supreme Court. Coincident with the twentieth anniversary of Brown and culminating in the 1976-77 term of the Supreme Court, the Court began the process of refining both the definition of unconstitutional segregation and the tools available to courts in coping with such segregation. It is this trend apparent in the Court and its significance for efforts to achieve genuinely non-discriminatory public policy in the educational field that is my primary concern.

The positions that I will attempt to defend -- the theses of this study -- are: first, that the standards adopted by the Supreme Court during the mid-1970s for both identifying and remedying unconstitutional segregation, are inconsistent with important elements of prior Supreme Court decisions and with the standards adopted by District Courts in several significant cases; and second, that the current Supreme Court approach is less likely to be effective in removing race as a significant component of educational policy than alternative approaches adopted by several District Courts

and suggested in relevant literature.

The generally accepted guideline for distinguishing unconstitutional segregation from racial isolation not subject to constitutional prohibition is the de facto/de jure distinction. According to the United States Commission on Civil Rights, "De jure segregation refers to deliberate, official separation of students on the basis of race.... De facto segregation refers to racial separation that arises adventitiously, without official sanction or acquiescence."[6]

In attempting to distinguish de facto from de jure segregation, the Court must determine whether racial isolation is attributable to government action. Discussing the role of the Court in a different area of constitutional adjudication, Martin Shapiro argued that "...the Court must act as political scientist, developing a description of how another agency of government actually operates."[7] In the school desegregation field, as well, the Court acts as a political scientist because it must determine the nature and extent of government contribution to segregated schools.

Among the principal tasks of this dissertation will be to weigh the adequacy of the standards adopted by the Court for evaluating the policy making process in the field of school desegregation.

The remainder of this Chapter, together with Chapters Four and Five, will trace the evolution of Supreme Court standards for identifying unconstitutional racial segregation. In Chapters Two and Three I will outline a variety of standards adopted by district courts and suggested by relevant literature in both anticipation of, and response to, the efforts of the Supreme Court. In selecting both literature and district court decisions for review, I have largely limited my attention to scholarly arguments and court opinions which present alternatives to the standards for identifying unconstitutional segregation ultimately adopted by the Supreme Court.

Finally, in Chapter Six, in light of what a review of political science literature reveals about the nature of the policy making processes within American cities, I will seek to determine which set of standards is likely to be most effective in removing racial discrimination from public educational policy.

The Brown Decision

Before attempting to assay the adequacy of current Supreme Court standards for identifying racially discriminatory educational policy, it is necessary first to review the major Supreme Court decisions that served as the basis for subsequent debate concerning the definition of unconstitutional segregation.

Although not the first step in the process, the Supreme Court's decision in Brown [8] was the first Court decision to state unequivocally that state imposed segregation in public education is unconstitutional. Prior to that decision the accepted law was the "separate but equal" doctrine first enunciated in the Plessy v. Ferguson in 1896.[9] Although Plessy directly concerned transportation facilities and the Supreme Court never before ruled on a direct challenge to the "separate but equal" doctrine as applied to public elementary and secondary education, it is clear that the "separate but equal" doctrine was the assumed and accepted judicial guideline for public education. [10]

The assault on segregation in education, which culminated in the Brown decision, began earlier in several cases which had the effect of chipping away at the foundations of "separate but equal." The thrust of the Supreme Court's move away from Plessy took two principal directions. First, in Missouri ex rel. Gaines v. Canada and Sipuel v. Board of Regents,[11] the Court invalidated segregation on the grounds that "...tangible facili-

ties provided for Blacks were found unequal to those for whites." [12] Simply, the Court rejected separation in the absence of equality. On the surface the decision appears to be no more than a reaffirmation of the "separate but equal" doctrine but significantly taking the "equal" part seriously. It did, however, indicate that equality was a necessary condition for the state to maintain separation.

The Sweatt and McLaurin [13] cases provided an additional and more significant foundation for an assault on segregated education. In Sweatt Texas provided a law school for Blacks while refusing to admit them to the University of Texas Law School. Besides questioning the tangible equality of the two facilities, the major thrust of the Supreme Court's decision was to reject the State's right to deny Blacks access to the University of Texas Law School. "The law school to which Texas is willing to admit petitioner excludes from the student body members of the racial groups which number eighty-five percent of the population of the State and includes most of the lawyers, witnesses, jurors, judges, and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas bar." [14]

The Court reasoned that such separation limits the ability of Blacks to function effectively as lawyers in the future and thus did not provide them with "substantively equal" educational opportunities. Without ruling that segregation per se was unconstitutional, the Court said that in this instance segregation denied equal educational opportunity.

In the McLaurin case, which also involved a law school, there was absolutely no question that tangible facilities were equal. The Black student in question was segregated within the same institution, having access to the same classes but simply denied easy communication with white students. The Court concluded that "such restrictions impair his ability to study,

to engage in discussion and exchange views with other students, and, in general, to learn his profession." The Court in effect rejected "restrictions imposed by the State which prohibited the intellectual comingling of students...." [15] In effect, the Court had struck down a form of segregation.

Both of these cases involved segregated professional schools, and both rested at least in part on the capacity of these schools to prepare their students to function in the larger society. It was assumed by the Court that not only must lawyers be equipped with technical skills, but also that they must be prepared to interact with others regardless of race if they are to be successful and achieve a full legal education.

These decisions served as the basis for the Brown arguments and decision. In attacking racial segregation in the public schools, counsel for the Black students argued two basic points: (1) that in line with the reasoning in Sweatt, segregation is harmful to the minority child [16]; and (2) that racial classifications in themselves constitute "arbitrary and unreasonable legislation." [17] For these two reasons racial segregation in the public school is a violation of the Equal Protection Clause of the Fourteenth Amendment.

Using language similar to that used by the Court in Sweatt, Mr. Robert Carter, an NAACP counsel, argued before the Court that segregation placed Black children "...at a serious disadvantage with respect to their opportunity to develop citizenship skills, and that they were denied the opportunity to adjust personally and socially in a setting comprising a cross section of the dominant population of the city." [18]

Interestingly the thrust of much of the argument in Brown does not rest on alleged psychological harm to minority children. Rather the emphasis is upon the hindrances segregation places in the path of the socializing

function assumed to belong to the public schools.

The psychological evidence referred to by the Court in its decision concerns the psychological effects of segregation primarily on the minority child. The adequacy of the evidence has been subjected to some challenge, and in particular the efficacy of integration as a solution to the perceived psychological damage has not been clearly established. [19] But it does seem clear that in light of the historical relationship between the two races, the mere existence of a policy deliberately separating the minority from the dominant majority is likely to confirm the majority's own perception of its superiority while branding the minority as inferior and unworthy of interaction with the majority.

In support of this view, the NAACP Brief on Reargument quoted Senator Pease of Mississippi:

> "I say that whenever a State shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made; it is a distinction the intent of which is to foster a concommitant of slavery and to degrade him. The colored man understands and appreciates his former condition; and when laws are passed that say that 'because you are a black man you shall have a separate school,' he looks upon that, and justly, as tending to degrade him. There is no equality in that." [20]

The second thrust of petitioners' arguments concerns the validity of racial classification per se. According to Counsel for the petitioners under the "general classification test of the Fourteenth Amendment, ... the Court has required that classifications or distinctions used be based upon some real or substantial difference pertinent to a valid legislative objective." [21] The question is whether race is a proper grounds for distinction. In this instance, according to Marshall, the State is required to show that there is some fundamental difference between the learning capabilities of whites and Blacks. [22] "In a case like this ... the only way the Supreme Court, under the test set forth in this case, can sustain

that statute is to show that Negroes -- as Negroes -- are different from everybody else." [23]

In response, Mr. Moore, counsel for Virginia, presented "expert testimony" contending that there is better education in segregated schools because of lessened tension and animosity, and that this provided the basis for the classification.[24] The Court was placed in the position of deciding if the alleged existence of racial animosity could justify segregation. This same issue was raised again subsequent to Brown in Cooper v. Aaron [25] which concerned the issue of whether constitutional rights could be suspended in the face of violent opposition.

These substantive issues were not the only questions before the Court in Brown. Much of the controversy concerned the intent of the framers of the Fourteenth Amendment. Simply, was it their intent that the Fourteenth Amendment would abolish school desegregation?

In their Briefs on Reargument both sides presented impressive historical evidence in support of their conflicting positions. Among the questions debated was whether the existence of governmentally sanctioned school segregation at the time of the ratification of the Amendment demonstrated that there was no intent on the part of its framers and ratifiers to forbid segregation. The apparent importance of such an argument might be subjected to some doubt in light of a more contemporary example. There is obvious inconsistency between current government policy concerning the relative rights and responsibilities of men and women and actions directed toward the ratification of the Equal Rights Amendment. No one doubts, for example, that the ERA will invalidate the all-male Selective Service System, yet at the time of its approval of ERA, Congress still maintained the requirement of male registration for the draft. Similarly, the fact that school segregation was practiced at the time Congress proposed the Fourteenth Amendment

did not necessarily mean that segregation would be constitutional when the Amendment was ratified. Amendments to the Constitution often are meant to alter the status quo, not to preserve it.

The Court in its decision concluded that the historical debate was unresolvable -- especially in light of the changed status of public education from the post Civil War period to the present. "Today [the public school] ... is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." [26]

It was in light of this crucial socializing function that the Court, relying substantially on the reasoning in Sweatt as well as psychological arguments, concluded that "separate educational facilities are inherently unequal." [27] "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." [28]

In arriving at this conclusion the Court did mention in Footnote 11 to the decision [29] the social science evidence cited by petitioners, but as Louis H. Pollack argues, "the Court simply used the footnote to show that systematic observation of human behavior confirmed what the Justices knew intuitively -- that segregation imposed by law degrades its victims." [30] The Court was in effect accepting the arguments of the lone dissenter in Plessy, Justice Harlan.

Left unclear by Brown was precisely how desegregation was to be accomplished and what desegregation would entail. If "separate educational facilities are inherently unequal" and therefore constitutionally proscribed, what method, degree and pace of desegregation was required to make them equal? Would equality be achieved when the state merely permitted Blacks

and whites to go to school together? Or would equality only be realized when Blacks and whites were in fact educated together? Questions such as these proved very difficult for the Court to answer; and, indeed, the courts have not yet provided definitive answers to these questions.

Brown was a class action suit which meant the Court was faced with the necessity of addressing itself not only to the situations of the parties immediately involved, but also to other similarly situated parties. As Chief Justice Warren wrote, "because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity." [31]

Counsel for the Black students argued that in these cases as in Sweatt the rights in question were "'personal and present' 339 U.S. 629, 635. These rights are personal because each appellant is asserting his individual constitutional right to grow up in a democratic society without the impress of state-imposed racial segregation in the public schools. They are present because they will be irretrievably lost if their enjoyment is put off." [32] There could be no justification for postponement. Any delay would mean that students would continue to be denied equal protection and would be relegated to inferior schools.

The Court in its decree, however, accepted the government position that the process of terminating racial segregation would require a transition period. The cases were remanded to the District Courts which would "...have to consider whether the actions of the school authorities constitute good faith implementation of the governing constitutional principles." The District Courts were empowered "to take such proceedings and enter such decrees ... as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed to the parties in this case." [33]

I have devoted some time to an elucidation of some of the arguments and bases for the Brown decision in order to set the stage for a later discussion of the viability of the de facto/de jure distinction in school segregation cases. This effort has been intended to call attention to the considerable emphasis given by petitioners and indirectly by the Court to the perceived harm done by segregation to the socializing function of education.

If, indeed, public education "is a principal instrument in awakening the child to cultural values, ... and in helping him adapt to his environment," [34] can any public educational system stand which effectively isolates children from other racial groups "...with whom ... [they] will inevitably be dealing ...."? [35]

The distinction between state imposed segregation and state acquiescence in private segregation is often ambiguous. Court decisions implementing Brown often exhibit considerable uncertainty as to where government responsibility for segregation begins and ends.

Implementation of Brown

The efforts to define the meaning of desegregation and to accomplish desegregation moved very slowly. The history of Court litigation is quite adequately recounted elsewhere [36] and I need not fully repeat it here. I will, however, discuss some of the more significant Court cases in order to prepare the way for our analysis of the Court's current approach.

One of the most blatant examples of evasion and resistance and the first case to elicit from the Court a clear indication that its patience was not inexhaustible was the case of Prince Edward County, Virginia. [37] To avoid implementation of the Brown ruling, Prince Edward County closed its public schools entirely, and in 1961 the state provided tuition grants

to segregated private schools. In response the Supreme Court authorized the District Court to require the city to levy taxes "for the non-racial operation of the schools." Justice Black, in his opinion for the Court, stated that "whatever non-racial grounds might support a state's allowing a county to abandon public schools, the object must be a constitutional one, and the gounds of race and opposition to desegregation do not qualify." [38] The Court, further, enjoined the paying of tax credits while public schools remained closed.

Perhaps the most significant element of the ruling was the Court's expression of impatience and its declaration that "the time for 'deliberate speed' has run out." [39] As Justice Black observed, "The original plaintiffs have doubtless all passed high school age. There has been entirely too much deliberation and not enough speed in enforcing constitutional rights...." [40] The Court's impatience was reinforced no doubt by the fact that "only 1.2 percent of the black students in the eleven Southern States attended schools with whites in 1963-64." [41]

Still the Court did not begin to clearly define what was required of school officials in school desegregation until the Green et al. v. County School Board of New Kent County et al. (1968) case.[42] Within the New Kent County School District there were two schools serving the whole district and operating under "freedom of choice" plans. Within the district those not taking affirmative steps to choose a school were assigned to the school they previously attended under the dual school system. No whites chose to attend the Black school and 115 Blacks chose to attend the "white" school, leaving 85 percent of the Black students still in the traditionally all-Black school. There was no residential segregation within the district, and school buses travelled overlapping routes to bring students to the school of their "choice." [43]

In its decision the Court rejected the existing "freedom of choice" plan arguing that "Brown II was a call for the dismantling of well-entrenched dual systems. School boards ... then operating state-compelled dual school systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary school system in which racial discrimination would be eliminated root and branch." [44] In footnote no. 4 to the decision, the Court stressed that courts have "...the duty to render a decree which will so far as possible eliminate the discriminatory effects of past as well as for like discrimination in the future. Louisiana v. U.S., 380 U.S. 145, 154." [45] Quoting further from the decision, "the burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now." [46]

The measure of a desegregation plan was to be the degree of actual integration it produced. The mere removal of state imposed hinderances in the path of integration would not suffice. "Freedom of choice" plans, although not rejected as such, were judged in this instance at least, "to burden children and their parents with a responsibility which Brown II placed squarely on the school board." [47] Citing a report of the Civil Rights Commission, the Court noted the inhibiting effects of intimidation on parents opting to transfer under the "freedom of choice" plan. But more significantly for future adjudication and possible assaults on so-called de facto segregation, is the Court's judging as suspect any school desegregation plan that produces less actual desegregation than other potential alternatives available. The Court places the burden on the board of education "to explain its preference for an apparently less effective method" of achieving integration. The Court noted that "the availability to the board of other more promising courses of action may indicate a lack of

good faith." [48]

Three years later in the Swann [49] decision we were to see what "more promising courses of action" was to mean.

The Swann Decision

The Supreme Court decision in Swann may well have marked the climax of the Court's efforts to achieve desegregation. In the words of Chief Justice Burger, "these cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing Brown I and the mandate to eliminate dual systems and establish unitary systems at once." [50]

With the gradual rejection of "freedom of choice" plans, the next logical step in producing unitary school systems was to duplicate school districts which never required segregation. In rural areas the task was simply to consolidate the Black and white schools either by closing one or by sending all students regardless of race to the school designated to cover their grade level. In many urban areas, however, the task was a good deal more complicated. In districts where there are many schools, student assignments are often determined by geographic attendance zones. Under the dual school system all Black students would be assigned to the nearest school maintained for Blacks and whites would go to the schools assigned for whites. With the transition to a unitary school system new attendance zones would likely be required depending upon the capacities of school facilities.

Student assignment policies based on geographic attendance zones were subject to challenge on the same grounds as were "freedom of choice" plans. Simply, what happens when a neighborhood school policy fails to dismantle racially identifiable schools? Is it enough for school authorities to

disassociate themselves from segregation by allowing existing residential patterns to determine the racial make-up of school enrollments? Or are such "neutral" attendance policies to be judged by the standard of Green to eliminate racial discrimination "root and branch" [51] through utilization of the most promising methods to achieve actual integration?

The trends in Court adjudication up to Swann had placed increasing emphasis on measuring actual integration. Plans were judged by their success in placing Blacks and whites in classrooms together to the greatest possible degree. To achieve this end geographic attendance zones were often abandoned when residential patterns were segregated. Students were transported beyond neighborhood schools to accomplish a greater degree of integration than would be possible in neighborhood schools.

Swann, like all cases considered in this chapter, concerned the dismantlement of unquestionably de jure -- state imposed -- dual school systems. When the case came before the Supreme Court, the district was no longer totally and rigidly segregated. There was some integration as a result of a desegregation plan based on geographic zones which had previously been approved by a district court. [52] The principal question before the Supreme Court was whether the degree of desegregation accomplished by the plan was enough. "As of June, 1969 there were approximately 24,000 Negro students in the system" representing 29 percent of the total enrollment. Twenty-one thousand of the Black students lived within the city of Charlotte and of these approximately two thirds "attended 21 schools which were either totally or more than 99 percent Negro." [53]

The guidelines set by the Swann decision concerned student assignment policies. The task was two-fold: first, to determine the degree of integration that dismantlement of the dual school system required; and second, to outline the steps required or permitted in order to achieve the desired

degree of integration. The decision of the Court indicated that these were not independent variables, but there was to be no rigidly set formula.

Concerning the first issue, that of degree of integration, the Court had to decide whether the use of precise racial quotas was appropriate, and whether, or under what conditions, the continuation of some one race schools might be permissible. On the issues of racial quotas the Court's decision appears somewhat ambiguous. On the one hand, C. J. Burger argues that "to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing ... would be disapproved ...." [54] But the use of "mathematical ratios ... [as] a starting point in the process of shaping a remedy, rather than as an inflexible requirement," [55] is approved by the Court. The Court intimates that the use of quotas to determine failure to accomplish the dismantlement of a dual school system may be in order. Wide variance in particular schools from the overall racial make-up of the school district population may be indicative of a deliberate effort to maintain a maximum degree of segregation. But at the same time Court decrees mandating particular proportions of students in schools regardless of other factors would be unacceptable and beyond the constitutional authority of the Court.

The Court's position on the continuance of some one race schools, obviously a related issue, is slightly less ambiguous. Because the Court refuses to require racial quotas it could not require as an inflexible rule the abolition of all one race schools. But in a system with a history of de jure segregation, the burden is placed on school officials "to satisfy the Court that their racial composition is not the result of present or past discriminatory action on their part." [56] In addition, the Court appears to insist that provision be made for optional transfer with free transportation of students from schools where they are in the racial majority

to schools where they would be in the minority. Although the Court refuses to uniformly condemn one race schools, this mandating of optional transfer provisions appears clearly to imply a rejection of the notion that such segregation is adventitious.

The degree of desegregation that might be accomplished in light of residential segregation is dependent upon a willingness to abandon the concept of neighborhood schools. In Swann the Court demonstrates a willingness to sanction such a step. In a much quoted passage from the decision, Justice Burger states: "All things being equal, with no history of discrimination, it might be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation." [57] The Court concludes that school site selections and residential patterns are and have been related. Schools were located and their capacities planned to accommodate state imposed segregation. "People gravitate toward school facilities ..." [58] and the decision to open a school to all regardless of race within a neighborhood will have little meaning if the school location was chosen in the first place to serve one race which predominates in the neighborhood.

To remedy segregation resulting from the reciprocal relationship between neighborhood racial composition and school site selection decisions, the Court mandates "'pairing,' 'clustering,' or 'grouping' of schools" to alter their racial characteristics. This will sometimes involve "drastic ... gerrymandering of school districts and attendance zones" including the merger of even non-contiguous areas. [59]

To effectuate the merger of non-contiguous school attendance zones the Court approves the use of school bus transportation "as a normal and acceptable tool of educational policy." [60] Obviously the unlimited use

of Court mandated transportation could produce in every school a nearly precise reflection of the racial make-up of the district as a whole. In light of the Court's guidelines concerning the use of mathematical ratios and one race schools, the Court does not require such complete racial balance. The degree of Court ordered busing that may be required will depend on other factors as well. "An objection to transportation of students may have validity when the time and distance of travel is so great as to rish either the health of the children or significantly impinge on the educational process." [61]

In summary, the findings of the Court in Swann which were meant to define "with more particularity the responsibilities of school authorities in desegregating a state-enforced dual school system," [62] can be stated as follows. In a system with a history of de jure school segregation, the courts should attempt "to eliminate from the public school system all vestiges of state-imposed segregation" through the altering of school attendance zones and the adoption of pupil transportation programs where required to achieve the greatest practical degree of actual integration. Transportation, however, should not be required where it could risk the health or safety of children or significantly impinge on the educational process in an effort to produce any precise mathematical ratios or even the total elimination of one race schools.

The Significance of Swann

The final consideration before us in this initial discussion of Swann is where Swann left the efforts to achieve a non-racially discriminatory school system. The ultimate impact of Court efforts to dismantle the dual school system had, since the beginning of the struggle, remained uncertain. The earliest steps beginning with Sweatt and McLaurin stressed the difficulty

of obtaining equal education in a segregated environment. Education, at least at the higher levels, was seen as preparation for life outside and adequate preparation involved the opportunity to interact with the dominant majority. Brown emphasized the impact on the minority of the inescapable perception of rejection by the majority that state imposed segregation produced. In defining the remedies to de jure segregation, the courts began by seeking to abolish the apparatus of state imposed segregation, but in so doing, they gradually appeared to adopt all "practical" remedies to effectuate genuine integration within existing school systems. In effect, the requirement of a link between existing segregation and deliberate state action appears to have remained in tact only as a catalyst for a policy mandating system-wide integration. Once the "trip wire" of state responsibility is crossed, the goal appears to be the maximum degree of actual integration limited only by perceived practical constraints of time, distance, and potential hazards of transportation.

Did this stress on integration as opposed to simple desegregation mean that the Court had tacitly begun again to advance the position implicit in Sweatt, McLaurin, and Brown that racial isolation, itself, might constitute denial of equal protection of the laws? The Supreme Court's refusal to order an end to all one race schools would seem to indicate the answer is no. But the Court's continued stress on maximum integration within the constraints of practicality might indicate the answer is yes, or at least maybe.

The coup de grace to this later interpretation is delivered by Chief Justice Burger's closing paragraph:

> "It does not follow that the communities served by such a system will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year by year adjustments of the racial composition of student bodies

> once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the state has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." [63]

The "trip wire" of "state action" remained in place, but as the chapters to follow illustrate, this decision raised questions concerning how to determine state responsibility for racial isolation and what kinds of state policies might be said to influence -- "fix or alter" -- demographic patterns.

The Supreme Court sets the final limits of court intervention in the interests of school desegregation. While its decisions may be final for judicial intervention, its interpretations are certainly not the only ones possible. I will be concerned throughout this dissertation with the adequacy of existing and evolving desegregation policy. I will compare, analyse and evaluate differing interpretations of the constitutional commands found in the decisions of the Supreme Court and the district courts in a number of significant cases.

In this chapter I have discussed the evolution of Supreme Court policy to the point of its broadest reach in dealing with the desegregation of the formerly totally segregated dual school system. In the next chapter, in order to set the stage for a detailed analysis of additional court decisions, I will review a variety of approaches found in the literature for identifying the government role in school segregation.

NOTES

1. 347 U.S. 483 (1954)

2 See below, Chapter 6: also see James Coleman, Trends in School Segregation, 1968-73 (Washington, D.C.: The Urban Institute, 1975); and Coleman, "Liberty and Equality in School Segregation," 6 (Jan./Feb., 1976), 9-13

3. Milliken v. Bradley, 418 U.S. 714 (1974); San Antonio v. Rodriguez, 411 U.S. 1 (1973).

4. For an excellent discussion of the Executive and Legislative role, see Gary Orfield, "Congress, the President and Anti-Busing Legislation," Journal of Law and Education, 4(January, 1975), 81-139.

5. See "Senate Unit Opposes Califano Plan Enforcing Busing," New York Times, June 29 1977 p.A13; Adam Clymer, "Senate Votes to Block Carter from Forcing Schools to Bus Their Pupils," New York Times, June 21, 1977.

6. U. S. Commission on Civil Rights, A Report, Twenty Years After Brown: Equality of Educational Opportunity, (Washington, D.C.: Government Printing Office, March, 1975), p.4.

7. Martin Shapiro, Law and Politics and the Supreme Court(New York: The Free Press, 1964) p. 48.

8. 347 U.S. 483 (1954)

9. 163 U.S. 537 (1896)

10. See Cummings v. County Board of Education, 175 U.S. 528 (1899); Gong Lum v. Rice 275 U.S. 78 (1927)

11. Missouri ex rel. Gaines v. Canada, 305 U.S. 337(1938); Sipuel v. Board of the University of Oklahoma, 332 U.S. 631

12. Twenty Years After Brown: Equal Educational Opportunity, p.1.

13. Sweatt v. Painter, 339 U.S. 629; McLaurin v. Oklahoma State Board of Regents, 339 U.S. 637 (1950).

14. Twenty Years After Brown: Equality of Educational Opportunity, p. 2.

15. McLaurin, at 641

16. In the introduction to the published edition of the Arguments from Brown, Kenneth Clar notes that evidence was also presented to the Supreme Court on the harmful effects of segregation on whites. This

question, however, was largely omitted in oral arguments and in the Court decision. Kenneth Clark, "The Social Scientist, the Brown Decision, and Contemporary Confusion," in Argument, ed. by Leon Friedman, (New York: Chelsea House Publishers, 1969).

17. Ibid., Argument, p.80

18. Ibid., p. 13

19. For discussion of the impact of segregation and integration see James Coleman, Equality of Educational Opportunity(Washington, D.C.: Government Printing Office, 1966); Frank L. Goodman,"De Facto School Segregation: A Constitutional and Empirical Analysis," California Law Review, 60 (March, 1972); "Race and Learning: A Perspective on the Research" Inequality in Education, 26 (March, 1972);and Meyer Weinberg, Desegregation Research: An Appraisal, 2cd edition.(Bloomington, Ill.: Phi Delta Kappa, 1970).

20. Briefs on Reargument: Brown v. Board of Education, 1954, p. 136

21. Ibid., p. 31

22. Argument, p. 38

23. Ibid.

24. Ibid., p. 90

25. Cooper v. Aaron, 358 U.S. 1 (1958)

26. 347 U.S. 483, at 493

27. Ibid., at 495

28. Ibid., at 494

29. See "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement," Minnesota Law Review, 37 (1953), consisting of the Appendix to the Briefs for Appelant, Brown v. Board of Education, 347 U.S. 483 (1954).

30. Louis H. Pollack, ed., The Constitution and the Supreme Court: A Documentary History, Volume II (New York: World Publishing Co., 1966), p. 266.

Blaustein and Ferguson considered f.n. 11 to be central to the Brown decision. A. P. Blaustein and C. C. Ferguson, Jr., Desegregation and the Law: The Meaning and Effect of the School Segregation Cases (New York: Vintage Books, 1967), pp. 130-37. For other views see Frank T. Read,"Judicial Evolution of the Law on School Segregation," Law and Contemporary Problems, XXXIX(Winter, 1975); Amos Issaac, "The Issue Is Not Busing But the Fourteenth Amendment," Education and Urban Society IX (May, 1977).

31. Brown

32. Briefs on Reargument, p. 190

33. Brown v. Board of Education (II), 349 U. S. 294

34. Brown, at 493

35. Above, p. 5, note 14

36. See U.S. Commission on Civil Rights, Twenty Years After Brown: Equality of Educational Opportunity; U.S. Commission on Civil Rights, Twenty Years After Brown: The Shadows of the Past (Washington, D.C.: Government Printing Office, March, 1975); also see Loren Miller, The Pettitioners (New York: Pantheon, 1966).

37. Griffin v. County School Board of Prince Edward County, 377 U.S. 218

38. Ibid., at 231

39. Ibid.

40. Ibid., at 229

41. Twenty Years After Brown: Equality of Educational Opportunity, p. 10

42. 391 U. S. 430 (1968)

43. Ibid.

44. Ibid., at 437, 438

45. Ibid., at 439

46. Ibid.

47. Ibid.

48. Ibid.

49. 402 U. S. 1 (1971)

50. Ibid.

51. 391 U. S. 430, at 464

52. 243 F. Supp. 667; 369 F. 2d. 29

53. 402 U. S. 1 (1971)

54. Ibid., at 24

55. Ibid., at 25

56. Ibid., at 26

57. Ibid., at 28

58. Ibid., at 20

CHAPTER TWO

IDENTIFYING UNCONSTITUTIONAL SEGREGATION: THE LITERATURE

Supreme Court decisions from Brown to Swann [1] concerned the desegregation of formerly dual school systems of the Southern and Border states. Lower courts throughout the country, however, had begun to apply the principles of Brown to districts where segregation by race had not been mandated by statute. Segregation of the races caused or maintained by government action was considered to be equally forbidden by the Constitution, and the decision of the Supreme Court in Keyes [2] would explicitly uphold such findings.

To set the stage for a detailed discussion of court decisions concerning school segregation produced by means other than explicitly segregative statutes, I will review some of the literature on this question.

The Brown decision declared state enforced segregation to be unconstitutional, and Swann upheld the distinction between school segregation produced by government action and that which was either adventitious or caused by purely private action. In the passage quoted from Swann at the close of Chapter One, Justice Burger recognized that changing demographic patterns might produce segregation for which the government would not be held responsible. Burger failed, however, to provide clear guidance as to how we are to distinguish between segregation for which government is responsible (de jure segregation) and segregation which is adventitious (de facto segregation).

There is literature that addresses these issues. With one exception, the arguments outlined below post date the Swann decision. It is not that there was not significant consideration of the applicability of desegregation to the North prior to Swann, but rather that the Swann decision,

itself, raised serious questions about the continued viability of the de facto/de jure distinction. Although the Court continued to insist that it was remedying only state-imposed segregation, the nature of the remedies adopted attacked segregative phenomena equally present in the nominally integrated schools of the North. As a result, legal scholars attempted to formulate standards with which to distinguish between segregation reasonably attributable to the state and segregation resulting from purely private choice. As we will see, some would argue that there is no such distinction.

This review of the literature will be confined to pointing to similarities and differences in a variety of interpretations of the de facto/de jure distinction. As the chapters to follow will illustrate, several courts attempted as well to come to grips with the issues discussed immediately ahead, and ultimately the Supreme Court would address the issues left ambiguous by Swann and Keyes. Subsequent to the discussion of evolving case law in Chapters Three, Four, and Five, I will return to questions raised by the various interpretations of the de facto/de jure distinction in the late 1970s and its validity as a tool for assessing the governmental contribution to racial isolation in American public schools.

The "State Action" Doctrine and School Segregation

The Fourteenth Amendment as interpreted by the Supreme Court forbids racial discrimination by the states. Much adjudication concerning race in America has involved the question of exactly what constitutes "state action;" [3] that is, when can racially discriminatory action be attributed to government or public policy. Absent legislative prohibition, purely private discrimination is not considered to be illegal.

As an extensive note in the Yale Law Journal, "Reading the Mind of

the School Board," [4] argued, school segregation cases do not really involve "state action"; "The state is identified with its public schools, which it forces students to attend, and over which it exercises plenary control." [5] Specific support for such a position will be found in the opinions of Justices Douglas and Powell in Keyes. [6]

The question, then, becomes not one of state action but whether the public educational policy in question is racially discriminatory.

Based largely on the position that all public educational policy involves "state action," and in light of the Supreme Court's decision in Brown that state enforced segregation in the schools is inherently unequal, some lower courts argued that regardless of cause all racial imbalance in public schools is unconstitutional. [7] If this position had been accepted, it would have collapsed the de facto/de jure distinction. Obviously, if all segregation is unconstitutional, this distinction becomes meaningless.

Segregation and "Racially Specific Harm"

A position that all segregation is unconstitutional could rest on the grounds that all segregation is harmful to minority students and therefore for the state to permit it is to deny equal protection of the laws. As Owen Fiss's prepared statement before the Senate Select Committee on Equal Educational Opportunity argues:

> the segregated student attendance pattern alone -- without regard to the basis for assignment -- might be perceived as giving rise to an inequality. It might stigmatize the minority group, the blacks, deprive them of educationally significant contacts with the socially and economically dominant group, the whites; or result in schools that blacks attend receiving a lesser share of the community's resources simply because they are attended only by members of the minority group. [8]

Fiss's position raises two separate issues: first, that segregation, regardless of cause, educationally handicaps minorities; and second, that

segregation encourages the dominant majority to divert resources from minority schools because of the relative political powerlessness of the minority. The failure of the courts generally to accept the first basis for condemning all segregation, according to Fiss, reflects the uncertainty of the empirical evidence in support of the proposition "...that a segregated pattern of student attendance will itself make the education afforded blacks inferior." [9]

One might desire to reinforce the argument of educational inequality by arging that both Blacks and whites suffer from segregation, but even if this were the case, it would probably not support a finding of a denial of equal protection because both Blacks and whites suffer. One might conclude that segregation lessens educational quality for all, but there is no constitutional requirement of "wise public policy" -- only non-discriminatory public policy. Of course, if some schools in the same jurisdiction were "balanced" while others were either all-Black or all-white, then the argument might be made that those in the integrated schools have a better education than those in either the all-Black or white schools.

If all racial imbalance is to be condemned on the basis of the educational harm it causes, the nature of that harm must, to use Frank L. Goodman's term, be "racially specific," i.e., a policy which "...penalizes the black child to a greater extent than his white counterpart similarly situated." [10]

Fiss's second point concerning the possible resource deprivation of minority schools, or again, to use a term supplied by Goodman, "the political impotence factor," might also suffer from empirical uncertainties.

Fiss does not fully develop the "political impotence factor" in his testimony, but elsewhere he discusses some appropriate points of inquiry to be used in weighing the tangible derpivation of minority schools. "In

assessing alleged academic inequality, the Court should be concerned with substantial inequalities occurring in a pattern for which government can be held responsible, and not with the slight variations in academic quality found in all public schools." [11]

Without getting into the merits of such an approach, if such an inquiry did reveal a pattern of inequality, a presumption that it resulted from a disregard for Blacks in the political process might be appropriate. But it is important to remember that Brown condemned state imposed segregation even when tangible facilities were equal. A remedy for unequal facilities and resources could be found under the interpretations given to the "separate but equal" doctrine from the late 1930s to 1950. [12] Although even the "separate but equal" doctrine could serve as grounds for mandating integration in the absence of equal segregated facilities, the crucial point is that it does not necessarily require integration without first demonstrating that racially imbalanced schools are "inherently unequal." [13] If it were demonstrated that minority schools were deprived of resources, courts could order equalization of resources; but there is no basis to automatically assume that because schools are predominantly minority, they will inevitably be deprived by the dominant majority.

Goodman developed more fully than Fiss the uses made in constitutional law of the "political impotence factor." He argues that it was among the bases for Supreme Court decisions affecting out of state commercial interests and legislative apportionment where "...the beneficiaries of the Court's action were not only voiceless in a metaphorical sense, but literally voteless, wholly or partly disenfranchised." [14]

In contrast, Goodman contends Blacks in many cities approach or surpass a majority, and parents' groups and civil rights organizations "...have been remarkably successful in focusing public attention on the

issues of educational inequality and, in particular, de facto school segregation." [15] Although one might certainly challenge the empirical basis for Goodman's assessment of "remarkable success," it is difficult to contest his judgment when he argues: "If proponents of racially balanced schools have not carried the day in the political forum, it is not because their needs have escaped attention." [16]

In sum, the Courts have struck down government actions which adversely affect a segment of the population and from which that segment of the population has absolutely no recourse in the political process. Goodman contends, however, that such is not now the case for Blacks.

For the moment, then, we are left with Fiss's first point, that of "racially specific harm" arising from segregated education. It could certainly be argued, as it was in Sweatt, McLaurin and Brown, that "to deprive ... [the minority] of educationally significant contacts with the socially and economically dominant group" [17] could cripple the minority in later adult pursuits in the larger society, but Fiss asserts that the costs of desegregation may require a stronger "moral imperative." "An explanation could be couched in terms of the wrongness of sorting individuals on the basis of their race -- the classic understanding of the concept of racial discrimination -- certainly has that flavor." [18]

Indeed, in Brown the Supreme Court adopted such a position: "to separate ... [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." [19] If racial isolation were simply the result of chance, however, it might be less likely that either the majority or the minority would attach any stigma to racially isolated schools, although Fiss contends that the impact of racial isolation depends on the

interpretation given to it by the minority. [20]

To Fiss it was this element of harm alone without any additional judgment concerning educational impact that provided the basis for the Supreme Court's condemnation of state imposed segregation. "Relying on its assessment of an individual's emotional or psychological reaction to imposed separation, the Court in Brown could have found the inequality of treatment in the personal hurt, the insult, the humiliation, and the stigma without elaborating on the educational significance of the harm." [21]

In a similar vein, the authors of "Reading the Mind of the School Board" consider only those state actions that "stigmatize" or have a "potential for dignity harm" to be proscribed. [22]

Finally, although he, like others, doubts the validity of the de facto/de jure distinction, Goodman too writes of the aspect of "humiliation" involved in racial classification, [23] but he notes as well the conflicting empirical evidence on the point of psychological harm. [24]

On the basis, then, of the arguments outlined to this point, it is not the fact of racial isolation that has been accepted as harmful. Rather it is the act of segregating -- the fact of racial classification.

Racial Classification and Racially Isolated Schools

There is a long standing principle in Constitutional Law that legal classifications based on race are generally assumed not to "promote any constitutionally acceptable purpose." Classifications can be condemned on the basis that they promote inequality. Indeed, Pollack contends that there is a legal presumption "that a law that 'draws racial lines' treats the racial minority unequally." [25] But such a presumption as argued above is subject to rebuttal. It may be simpler, therefore, to focus on the motives presumably behind racial classifications than to make assump-

tions concerning the effects of racial classifications. The position as described by Goodman argues that: "Classifications founded on race *per se* express the worst in human nature. Typically, they are the offspring of prejudice, animosity, and chauvanism; they aim to preserve white supremacy and Black subordination." [26]

Approaching the question this way might not do away with the empirical difficulties presented by arguments that all segregation treats Blacks unequally, but it could shift the burden of proof. It says to those who have produced segregation: "why?" If they respond that segregation improves education, then it is they who must bear the burden of showing how segregation improves education. Failing to so prove, we can safely assume that the only remaining reason for racial classifications is prejudice and the desire for racial supremacy.

Because of the assumption that racial classifications flow from prejudice, for proponents of classifications to carry the day they have been required by the courts to show that the distinctions they draw are justified by some "compelling state interest." According to Robert Richter, a state is required to "...show not only that its objective could not be attained by a measure which did not draw distinctions, but also that the public interest involved out-weighs the detriments that will be incurred by the affected private parties." [27]

Demonstrating that in Constitutional Law racial classifications are presumed to be unconstitutional still leaves open the crucial questions of when and under what circumstances does the fact of racial separation in the schools constitute a racial classification and what would constitute a compelling state interest. How is unconstitutional segregation to be recognized?

Brown specifically condemned explicit racial assignment policies re-

sulting in a dual school system. The question as litigation moved out of the areas where schools were segregated by statute into the North and West became what situations are analagous to segregation by statute. How, if at all, can one distinguish between a segregated student assignment pattern resulting from prohibited racial classification and a similar pattern where state responsibility is deemed to be absent.

The Intent Standard: "Subjective Intent"

The clearest indicator of de jure segregation (prohibited racial classification) is evidence of "subjective intent." The Yale Law Journal note cited above observes that "Several cases, searching for some taint in the process by which decisions are made, have equated 'segregative intent' with a subjective desire to segregate on the part of decision makers." [28] Obviously in school districts segregated by statute, no problem arises in finding segregative intent. The segregative purpose of the law is clear and expressed in the statute. In school districts without legally mandated segregation, however, the task before courts applying such a standard is a good deal more complex. As Goodman notes, we are faced with the question of whose intent is relevant -- a majority of the school committee, one member, the constituents ...? [29] In "Reading the Mind of the School Board," the authors state the problem this way: "When we consider the motivation of people constituting a school board ... we are dealing with a collective will. It is difficult enough to find the collective mind of a group of legislators .... It is even harder to find the motivation of local citizens, many of whom would be as reluctant to admit that they have racial prejudice as to admit that they have no sense of humor." [30]

The significance of such inquiries into "collective will" in determining the intent of public policy will be of direct concern to us in

Chapter Six. I will seek to contrast the approaches of courts and legal scholars to this question with the approaches prevalent in political science literature.

For the moment, however, the only point that needs to be made is that, as these authors point out, a definition of de jure segregation which relies on evidence of segregatory intent or motivation entails at least two difficulties: (1) whose intent is relevant? and (2) absent an unlikely confession of segregative intent, how is intent to be recognized?

Practically speaking, because acknowledgement of segregative intent is highly unlikely, if intent is to be discovered it "...generally must be inferred from circumstantial evidence." [31] This, to the authors of "Reading the Mind of the School Board," presents a problem because in evaluating circumstantial evidence "...no set of factors compels a finding of illicit motivation; behind any act may lie a number of subjective motivations." [32]

The Intent Standard: "Cumulative Impact Theory"

There is an additional complication to the question of whose intent is relevant. Must the search for intentional segregation stop at school authorities? What if other government agencies deliberately or effectively have produced segregated neighborhoods which in turn produce segregated schools? As discussed by Derrick Bell, "This approach generally focuses upon the strict adherence of a school board to a neighborhood school policy in the face of residential segregation attributable to state action." [33]

As a way of addressing such issues, Owen Fiss outlined what Derrick Bell termed a "cumulative impact theory." According to Fiss, "...local governments need not be considered as a mere collection of autonomous or unrelated units ... [and] even if ... [a unit of government other than

school authorities] is responsible, it would not be unreasonable to think in terms of cumulative impact." Even though government policies mandating or contributing to racially segregated neighborhoods may have ceased, "Residential patterns have a tendency to become fixed and remain stable, and it is unreasonable to assume that those who in the past have been segregated by government action will or can move out of the ghetto and into a white neighborhood immediately after the racial restrictions have been removed." [34]

The addition of this factor of "cumulative impact significantly complicates any search for segregative intent. For one thing, it raises the issue of how far back courts must go in search of segregative intent. Can one presume that a deliberate government policy promoting housing segregation five, ten, or twenty years ago still projects itself into neighborhood schools today? [35]

Further discussion of the role of government in housing discrimination and its relationship to school segregation will follow in the review of court cases in subsequent chapters. For the moment, I will return to the question of how unconstitutional school segregation is to be identified absent explicit evidence of segregative intent.

Identifying Intent: Circumstantial Evidence

In searching for circumstances under which segregatory intent can be inferred absent direct evidence of segregative motive, many court decisions and much of the literature have focused on the foreseeable consequences of policy decisions. According to Robert Richter, under such a standard governments are held responsible for "...various racially neutral school board and other governmental acts that had the 'natural, probable and foreseeable' effect of keeping schools segregated." [36]

Margaret Marshall finds support for such a position in her reading of the Keyes decision, [37] which she argues "...reveals that intent can be induced from the totality of circumstances and effects where it is established that school boards act with the conscious knowledge that their actions will result in segregated schools, together with evidence of segregatory outcomes" [emphasis added]. [38]

Both Goodman and Fiss apply this principle to the context of the neighborhood school. According to Goodman, advocates of neighborhood schools in the context of residentially segregated communities cannot help but know that neighborhood schools will be segregated schools. Fiss explains the link between neighborhood segregation and segregated schools metaphorically: "An individual who starts a boulder rolling down a hill is responsible for the expected consequences, but the individual who gives the boulder the initial shove and at the same time possesses the power to stop it, or at least deflect it, at any point on its journey down the hill, is even more responsible for the outcome." [39]

The school board that establishes a neighborhood school policy in the context of a segregated neighborhood creates segregated schools. Since it possesses the power to organize its school on other than neighborhood lines, it is, like the individual who fails to deflect the boulder, fully responsible for the consequences.

These arguments, taken together, assert that consequences of public policy that are foreseeable are intentional. There is one difficulty, however; where Marshall spoke of "conscious knowledge," Goodman and Fiss merely presumed conscious knowledge. To assert that segregatory results of a particular government decision were foreseeable is, however, not necessarily proof that the segregation was in fact foreseen.

A related approach for determining whether or not observed segregation

results from intentional action focuses not so much on the foreseeability of the segregation as on the availability of alternatives to the policies which produced segregation. Obviously, in the absence of alternatives, foreseeability alone could hardly be sufficient grounds to condemn a policy as unconstitutional. If there were literally no alternatives to the existing student assignment policy, the matter would be ended.

There is, however, a difference in an approach that emphasizes the availability of alternatives and one that emphasizes the foreseeability of segregation resulting from a school board's chosen policies. Could evidence of foreseeable segregation resulting from school board actions be sufficient to infer segregative intent on the part of a school board, absent evidence of "conscious knowledge" that the course of conduct selected by the board would actually lead to segregation? It is important to note that evidence of a school board's "conscious knowledge" might be as difficult to obtain as evidence of subjective motivation. Officials would certainly be hesitant to admit that they selected policies which they knew were segregatory. And once again the issue would arise as to whose "conscious knowledge" was relevant?

An approach that focuses on alternatives, however, might well shift the burden of proof to government officials to justify their choice of a more segregative alternative when less segregative alternatives were available. Their preference for a more segregative alternative might indeed be considered to be indicative of segregatory intent.

The issue to Margaret Marshall "...is whether a particular school board was confronted with 'educationally sound and administratively feasible alternatives' the adoption of which would have resulted in a lesser degree of segregation." [40] Such a position follows logically from the Supreme Court's position in Green [41] which called on de jure segregated school districts

to justify their preference for less effective means to achieve integration. More will be said on this point shortly.

In the absence of direct evidence of subjective intent, a combination of the two related approaches discussed above -- a demonstration of the availability of alternatives combined with the foreseeability of segregation resulting from the specific alternative selected by policy makers -- would be the most promising approach for determining segregative intent.

As already argued, most of our authors certainly assumed the presence of alternative policies not having the same foreseeable effects. To Margaret Marshall: "For purposes of demonstrating racial animus, a pattern of school board decisions that reveals an exercise of choices where the foreseeable result was racially definable schools is persuasive. In the absence of demonstrable real alternatives such evidence is considerably weaker." [42] Significantly, however, Owen Fiss argues that there are always alternatives available. In discussing the prevalent student assignment system in Northern cities, the neighborhood school zone, which has been observed to produce segregated schools in the face of pervasive housing segregation, Fiss observes that "...there are alternatives to the use of geographic criteria regardless of how widespread their use." [43]

If alternatives to neighborhood schools are always available, then quite possibly the differing emphasis found in the literature between the "foreseeability" of segregation and availability of alternatives to segregation may not be terribly significant. The presence of some less segregative alternative can be assumed when schools are racially imbalanced. Simply, if some schools are disproportionately white and others disproportionately Black, a shift in student assignments would end the disproportion.

This, however, raises an additional and quite significant issue: is a district's failure to adopt the least segregative alternative available always indicative of segregatory intent and racial classification? Or, to put the question another way: just how available must an alternative be? Should the standard applied here be the same as that applied in Swann to Southern school districts in the process of desegregating school systems that had been segregated by statute? Or should the standard be less strict in districts where intentional segregation had yet to be demonstrated?

As we saw in Swann, where in the process of converting from a dual school system to a unitary system some one race or predominantly one race schools remain, the burden would be upon school officials "...to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." [44] Here the courts will presume, absent evidence to the contrary, that disproportionate racial concentrations in schools result from intentional action. Similarly, in Green we saw the Court challenge a district's "...preference for an apparently less effective method" of achieving integration. [45]

If the burden of proof belongs to the school authorities as in Swann, they would be presented with a task described by J. Harold Flannery as follows: "In addition to proving the fortuity of some unexplained segregation, the defendant district should be obliged to dispel the inference that its avoidance of desegregation manifests a policy of preserving and fostering segregation." [46]

It is, however, important to remember that the conditions that called for shifting the burden of proof in Swann and Green are not necessarily the same as the conditions here. Swann involved a statutorily segregated school system in the process of desegregating. Segregative intent had

already been demonstrated by the fact of the statute. The burden placed on the schools was to demonstrate that the continuance of imbalanced schools was not the continuing fruit of segregatory intent.

The standards discussed here, however, are methods for determining whether or not segregatory intent exists in the first place; or if the necessity of "intent" is challenged, the standards are meant to establish official responsibility for segregation.

Identifying Intent: Balancing Costs

Regardless of upon whom the burden of proof is to rest, if school officials are to be held responsible for the "natural, probable and foreseeable" [47] consequences of their actions when less segregative alternatives are available, are they in every instance required to adopt the least segregative policy option before them, regardless of cost? On this point there are significant differences in the literature.

The authors of "Reading the Mind of the School Board" developed a test designed to identify what they termed "Institutional Intent."

> The institutional intent model makes an 'unjustified' choice of a segregative policy in the face of less segregative alternatives the basis for a finding of segregative intent. A justification must be cast in terms of legitimate educational objectives.... If it can be demonstrated that the educational objectives of a school board could better have been accomplished through alternatives with less foreseeable segregative impact, the school board will be held to have acted 'as if' segregation had been one of its purposes, and the consequent racial imbalance will be held to have resulted from segregative intent.
>
> In applying the institutional intent test, the court should treat 'educational objectives' as including concerns of cost or efficiency as well as the more obvious objectives of educational quality, both cognitive and affective, and pupil safety ....
>
> The existence of institutional segregative intent would be clear, however, if the net educational merits of a

> segregative choice are significantly less than those of an integrative alternative .... The state should not be able to choose a more segregative alternative absent some legitimate goal served by the choice. [empahsis added] [48]

As this extensive quote demonstrates, the authors argue in effect that segregative student assignment policies can be justified if they serve some educational interest independent of segregation. This position is in marked contrast to the test applied by the Supreme Court in Swann to dual school systems in the process of desegregating. The Court in Swann argued that "The remedy for ... segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some ...." [49]

In sum, in the formerly dual school system there is an affirmative responsibility to achieve integration even at some cost. Under the "institutional standard" proposed in "Reading the Mind of the School Board," however, no segregative intent is assumed so long as policies creating segregation have some independent educational or financial justification. Clearly the authors reject any affirmative duty to desegregate. They merely reject policies which effectively segregate the races without some educational or financial justification equal to, or greater than, alternative less segregative policies. They make no mention, however, of any educational benefits intrinsic to an integrated education.

A second approach to identifying unconstitutional segregation was proposed by Owen Fiss. Focusing more narrowly on the issues raised by neighborhood school zones that reflect residential segregation, Fiss argues that we must balance the perceived damage done by imbalanced schools against the values furthered by geographic zones. In weighing the issues involved in such a balance, Fiss observes that "...racially imbalanced schools may

result from governmental recognition of non-discriminatory interests, like the avoidance of transportation, that in certain circumstances may justify a school board's refusal to undertake correctional measures, even at the expense of some impairment of educational opportunity." [50]

This approach differs from the "institutional intent" approach discussed above, in that Fiss assumes there is a positive value to integration which can certainly be outweighed by other legitimate educational concerns, but which is not to be ignored simply because the policy alternative selected by the school board furthers some educational interest.

An important basis for the distinction between the approach adopted by the advocates of "institutional intent" and the Fiss approach is Fiss's distinction between what he terms school board policies of "approval" and policies of "disregard."

> A policy of approval exists when the school board desires to maintain separation of the races but need not create geographic deviations to realize this desire. Advantage is taken of the established residential pattern and the school board need only persist in faithfully using geographic criteria to fulfill its purpose. With the policy of disregard, there is an absence of desire or purpose on the part of the school board to separate the races ... imbalance is considered educationally irrelevant ... [and the cost of correcting imbalance is considered to outweigh the gain]. The good faith of the school board distinguishes the two policies. [51]

Under circumstances where Fiss could detect evidence that a school board was pleased with a status quo that maintains imbalance even without manipulation, he would grant less deference to the school board's assessment of educational benefits flowing from a neighborhood school system than he would grant to a school system which accepts imbalance as educationally irrelevant. When the policy is one of "disregard" rather than "approval," he would assume some validity in a board's view that the benefits accruing to neighborhood schools outweigh the interest in correcting imbalance. However, a court may be justified in refusing to defer to the assessment of

a school board "...on the grounds that the school board does not represent the interests of the minority group affected by imbalance .... Where this is the case, the appeal inherent in a negotiated resolution of competing interests is lacking ...." [52]

It is important to stress that neither policies of "approval" nor policies of "disregard" involve manipulation of school attendance zones to maintain segregation. Such activities would be presumed unconstitutional by Fiss. Rather, Fiss outlines circumstances when a school board's failure to act to correct imbalance resulting from neighborhood schools would, itself, be unconstitutional -- when inaction equals unconstitutional action.

To Fiss, the central question is: does "the justification for the use of geographic criteria ... outweigh the imperfections in educational opportunity ...." If the answer is no, "...the school board is obliged to remedy only the harmful imbalance that is also unjustified." [53]

One obvious point of distinction between Fiss's approach and that found in "Reading the Mind of the School Board" is that Fiss assumes that racial imbalance is probably educationally harmful while the Yale Law Journal note's authors assume that racial imbalance is harmful only when there is "stigma" attached; i.e., in circumstances of deliberate racial classification. Additionally, in his distinction between policies of "approval" and policies of "disregard," Fiss assumes the availability of some evidence indicating the presence of segregative intent, while the Yale Law Journal authors are more concerned with identifying segregatory intent.

The two approaches can be summed up as follows: the "institutional" approach assumes racial imbalance is unconstitutional if a school board adopts a more segregative alternative without some independent educational

justification. The Fiss approach, on the other hand, assumes that racial imbalance is unconstitutional unless the costs of achieving racial balance are greater than the educational benefits accruing from racial balance. In instances where a school board shows evidence of some racial animus or insensitivity toward minority interests, he would be sceptical of their assessment of the costs of achieving integration. Where no evidence of "approval" of segregation is present, Fiss might defer to the judgment of the school board.

Segregative Effect Alone Is Unconstitutional

The third approach to be discussed carries Fiss's analysis a step further. Robert Richter assumes that racial imbalance produces harm comparable to that condemned in Brown in the dual school system. Richter does not abandon the standard of "state imposed" segregation discussed in Brown, but because the state usually possesses the capacity to operate non-segregated schools, he assumes all segregation is "state imposed." The standard he proposes "...avoids illusive questions of motive or causation and focuses on the ability of a school board to achieve greater integration without sacrificing other important values." [54]

As was the case with the standards outlined above, Richter assumes government responsibility for avoidable segregation when less segregatory alternatives are available. In assessing a school district's failure to adopt the least segregatory alternatives, however, Richter's "new equal protection test" would require

> the state to show a 'compelling state interest' in order to justify its conduct .... In applying this standard in contexts other than school desegregation, courts have invariably found alternatives, nondiscriminatory means of accomplishing the legitimate ends sought by the state. Consequently, a state has never succeeded in showing its interest to be compelling. In the school context, however, while the burden

> on the state would be heavy, it would not be insurmountable since it is often impossible or extremely impractical to construct a school system without racial imbalance. [55]

This standard would in effect provide a uniform national standard for school desegregation. "[T]he court's inquiry would be identical with that which should properly be made in formulating a remedy once government responsibility is established -- whether a compelling state interest precludes greater balance." [56]

Richter's application of a "compelling state interest" test to school districts not segregated by statute would, like the approaches of Fiss and the authors of "Reading the Mind ...," involve balancing costs, but the presumption in favor of integration would be greater. Also the balancing of costs and benefits would not be directed toward the discovery of segregative intent, but rather toward a determination of whether integration was practical. Only if "...the state demonstrated that the overall quality of education would suffer if desegregation were attempted" could desegregation be avoided. [57]

As in Swann, Richter would take into account the cost of "busing," but similar to the Court in Swann, he would consider the costs of "busing" to be acceptable so long as neither health and safety nor education were significantly impinged. Similarly, although abandonment of neighborhood schools involves some cost in that it could interfere with "extra-curricula activities, parent-teacher associations, ... walk-in schools, ... and associational preferences among members of a residential community," whether such interests would overcome the need for integration would depend on circumstances peculiar to particular communities. For example, "great weight" should not be placed on a white community desire to maintain a neighborhood school which reflects private residential segregation. [58]

Other costs to be considered in deciding whether steps toward integra-

tion would be required include possible "white flight" and possible consequences flowing from efforts to bypass school district lines. If a desegregation plan is likely to be defeated by white non-compliance in the form of "white flight," that would be a relevant factor that "...must be dealt with by courts in determining whether further integration is possible." [59] If genuine desegregation would require superseding existing school district lines, "...particularly where districts coincide with pre-existing municipal boundaries," Richter would treat such boundaries with great deference. But at the same time he rejects any iron-clad prohibition. [60]

Like Richter, Frank Goodman rejects any requirement that segregatory intent be found before racial isolation is considered to be unconstitutional. Those who knowingly maintain segregated neighborhood schools have "...no decisive moral advantage over those who deliberately segregate by race." Goodman contends that in both Brown and Bollings the Supreme Court assumed that Black children learn more in biracial schools. [61] Those who advocate neighborhood schools on the other hand implicitly argue "...that children learn more effectively in the comfortable, familiar, homogeneous atmosphere of a neighborhood school." Of course, issues of "...safety, convenience, economy and other noneducational values are also involved, [but nonetheless] most advocates of neighborhood schools would be embarrassed if forced to concede that their policy would result in inferior education for blacks." [62]

In sum, to Goodman the issue boils down to whether or not segregated schools are inferior, and he admits that the empirical evidence in this regard is questionable. Nevertheless, he asserts that on this particular issue, the Supreme Court in Brown has already spoken. Of course, he assumes

that the state imposed segregation discussed in Brown and state acquiescence in neighborhood segregation are equivalent.

Despite remaining doubts about the issue of harm, Goodman's "...conclusion is that the evidence of harmful educational effects is strong enough to support a constitutional requirement that black children be given voluntary access to biracial schools." [63] In essence, his argument amounts to a position that there is sufficient evidence of harm to make a state's confining of Blacks to segregated neighborhood schools an infringement on liberty and equal protection, but there is insufficient evidence to mandate racial balancing.

Summary

To sum up this discussion of various approaches found in the literature concerning how unconstitutional segregation is to be identified absent explicitly segregative statutes, the major point of distinction is whether unconstitutional segregation can be presumed if government policies have a segregatory effect or whether independent evidence of segregative motive or intent is required. This distinction itself is based on whether segregation is unconstitutional because it harms the education of minority children, regardless of the cause, or whether the harm inflicted is due to the "stigma" attached to minority children by a deliberate state policy to separate them from the dominant majority.

If segregation per se is harmful, then only proof of greater harm flowing from efforts to correct it would be sufficient to justify the continuance of racially identifiable schools. If, on the other hand, segregation is harmful only when it is the intentional product of public policy, then the state need only demonstrate that segregation is a side effect of legitimate educational policies to refute any inference of unconstitutionality.

There may be, however, instances when the presence of legitimate educational concerns could obscure a concomitant governmental desire to maintain segregation. A government policy furthering housing discrimination could be reflected in neighborhood school policy which in itself can be justified on educational grounds. A policy of neighborhood schools that on the surface can be supported by non-discriminatory justifications may mask a community's intent to maintain segregated schools -- a desire that does not escape the attention of the minority community and that has the effect of "stigmatizing" the minority community.

Fiss's distinction between policies of "approval" and policies of "disregard" may indeed be an important distinction.[64] The question left unanswered, however, is how such a policy of "approval" is to be recognized absent clear evidence of segregatory intent or the selection of particular student assignment policies unjustified by traditional educational or financial considerations. It may be that in the absence of affirmative efforts to achieve school integration, we are justified in assuming the presence of segregative intent. Support for such an assumption will be found in the discussion of some district court cases below. And a consideration of the legitimacy of such a position in light of what is known about the policy making process will be a major concern of this dissertation.

In the chapters that follow I will discuss several court decisions primarily at the district court level to illustrate how several courts have addressed issues similar to those raised in the literature. Following this survey of lower court decisions, I will review several recent Supreme Court rulings which address the issues before us. Having done so, we will be in a position to evaluate the direction of the Court in the late 1970s and the future of school integration in the United States.

Clearly, as the discussion to this point illustrates, when courts

look at the decisions of school boards and state education departments, they are involved in the analysis and evaluation of public policy. Particularly when they attempt to guage the intent of public policy, they make assumptions about the components of the policy making process. In the final chapter I will compare and evaluate the understanding of the process in the legal literature and the courts with the approaches to similar questions which are prevalent in political science.

NOTES

1. Above, Chapter One.

2. Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973); for a full discussion of Keyes, see below, pp.

3. See,for example, Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953); Shelly v. Kraemer, 334 U.S. 1(1948); and Reitman v. Mulkey, 387 U.S. 369

4. "Reading the Mind of the School Board: Segregative Intent and the De facto/ De jure Distinction," Yale Law Journal, 86 (1976), 317

5. Ibid., p. 354

6. See below, pp.

7. See Derrick A. Bell, Race, Racism and American Law (Boston: Little, Brown & Co., 1973), p. 532 ff.

8. U.S. Senate Select Committee on Equal Educational Opportunity, Staus of School Desegregation Law. Hearings--Part 11 ,Ninety-Second Congress, 1st session."Statement of Professor Owen Fiss"(Washington: Government Printing Ofiice, 1971),p. 5421

9. Ibid.

10. Frank L. Goodman,"De Facto School Segregation: A Constitutional and Empirical Analysis," California Law Review, 60(March, 1972), 275

11. Owen Fiss,"Racial Imbalance in the Public Schools: The Constitutional Concepts," Harvard Law Review, 78 (1965), 604

12. Above, Chapter One, pp.

13. For a discussion of the constitutional issues raised by the unequal allocation of resources in school districts where there is no direct evidence of state enforced segregation, see Frank Levy, Northern Schools and Civil Rights

14. Goodman, p. 312

15. Ibid.

16. Ibid., p. 313

17. Fiss, "Statement" p.5425

18. Ibid.

19. 347 U.S. 483, at 494

20. Fiss, "Racial Imbalance," p. 600

21. Ibid., p.595

22. Goodman, p. 348

23. Ibid., p. 435

24. Ibid., p. 307

25. Quoted in Fiss, "Racial Imbalance," p. 591

26. Goodman, p. 319

27. Robert I. Richter, "School Desegregation After Swann: A Theory of Government Responsibility," University of Chicago Law Review, 39 (Winter, 1972), 421.

28. "Reading the Mind," p. 321

29. Goodman, p. 285

30. "Reading the Mind," pp. 322-323

31. Ibid., p. 325

32. Ibid.

33. Bell, p. 547

34. Fiss, "Racial Imbalance," pp. 564, 584-86

35. Senator Sam Ervin in his questioning of Julius Chambers of the NAACP Legal Defense Fund noted that if one looks back far enough, all sections of the country had state enforced segregation. See U.S. Senate Select Committee on Equal Educational Opportunities, Status of School Desegregation Law, pp. 5393-5403.

36. Richter, p. 427

37. Below, Chapter Three, pp. 55-64

38. Margaret Marshall, "The Standard of Intent: Two Recent Michigan Cases," Journal of Law and Education, 4 (January, 1975), 230

39. Fiss, "Racial Imbalance," p. 584

40. Marshall, p. 232

41. Above, Chapter One, p.12 ff., note 42

42. Marshall, p.232

43. Fiss, "Racial Imbalance," p. 584

44. Swann, 402 U.S. 1

45. Above, Chapter One, p. 13, note 48

46. J. Harold Flannery, "De Jure Desegregation: The Quest for Adequacy, Journal of Law and Education, 4 (January, 1975), 141, 152

47. Above, p. 36, note 36

48. "Reading the Mind," pp. 337-342

49. Swann, at 28

50. Fiss, "Racial Imbalance," p. 609

51. Ibid., p. 565

52. Ibid., p. 610

53. Ibid., p. 613

54. Richter, p. 440

55. Ibid., pp. 441 442

56. Ibid., p. 442

57. Ibid.

58. Ibid., pp. 443-444

59. Ibid., p. 446

60. Ibid., pp. 445 446

61. Goodman, p. 436

62. Ibid., p. 318

63. Ibid., p. 436

64. Above, p. 43, note 51

CHAPTER THREE

IDENTIFYING UNCONSTITUTIONAL SEGREGATION: THE DISTRICT COURTS

In a series of decisions from 1974-1977, the Supreme Court effectively signaled a retreat from the standards for identifying unconstitutional segregation found in many district court cases and in much of the literature. The question before the Court was simply when does racial isolation in the schools amount to a constitutional violation. The answer of the Supreme Court in Swann had been when segregation is the result of deliberate state policy. This answer, however, had not resolved the issue, rather it had served as a starting point for additional questions. How do you evaluate state policy? Must the courts find specific instances of discriminatory intent or is mere discriminatory effect sufficient in itself to prove discriminatory intent? Is a disproportion of Blacks and whites in particular schools sufficient to prove discriminatory intent? Or is racial isolation only unconstitutional when it is proven by other evidence to be a deliberate end of public policy.

The variety of ways in which these and similar questions have been answered by federal courts around the country illustrate the difficulties involved in arriving at an adequate definition of government responsibility for school segregation.

The debate first surfaced nationally in the Surpeme Court decision in the Denver case. [1] Keyes pointed to the difficulties the courts would encounter in devising policy for nominally integrated school systems which nonetheless showed evidence of discriminatory practices. Before illustrating various approaches taken by district courts, I will begin with an analysis of the Keyes decision.

The Denver Decision

Keyes [2] represented the Supreme Court's first attempt to apply the principles of its prior decisions concerning school districts segregated by statute to the differing circumstances in the North and West where school segregation was in fact widely forbidden by statute. Unlike the situation in the South, the Denver school system was not absolutely segregated. Black and white children did legally attend school together. The Court here had to address itself rather to a set of circumstances resulting from government action which impeded substantial integration.

The Supreme Court accepted the District Court's finding that incidents of de jure segregation existed within the Denver school system. The issue before the Supreme Court was whether the evidence of intentional school segregation within the Park Hill section of the city was sufficient to warrant a finding that the entire Denver school system was unconstitutionally segregated. The District Court in its decision chose to isolate the Park Hill section where segregatory school board action had been proven from other sections of the city where intentional segregation had not been directly proven. To the District Court proof of intentional segregation elsewhere in the city was inadequate, and it concluded that the finding of intentional segregation in Park Hill "was not in any sense material to the question of segregatory intent in other areas of the city." [3]

The Supreme Court rejected the District Court's separation of the Park Hill section from the rest of Denver.

The thrust of the Swann decision had been to determine what degree of desegregation was required in previously segregated school systems. The Court was required to distinguish continuing racial isolation which could not be attributed to state action from racial isolation caused by state action. The clear result of Swann was that in a system where intentional

segregation was the established "legal" policy, all remaining racial isolation can be presumed to result from state action. It remained for the school authorities to show that segregation that remained once nominal integration was achieved was not the result of government action.

Swann concerned a school district that had been previously totally segregated by law. The question in Keyes was whether the same strict standards of accountability and presumption of unconstitutionality applied to a district which, although nominally integrated, had been shown to have pursued policies intended to minimize integration.

The Supreme Court concluded that the finding of intentional segregation in the Park Hill section "... did not relate to an insubstantial or trivial fragment of the school system." [4] The Court concluded that there is no requirement to prove that each and every school was deliberately segregated. "Where plaintiffs prove that school authorities have carried out a systematic program of segregation affecting a substantial portion of the system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system." [5]

The Court in this case was attempting to clarify further what is necessary to establish de jure segregation. As established in Swann, "the differentiating factor between de jure and so-called de facto segregation ... is purpose or intent to segregate." [6] It appears that school board policy directly affecting one part of town was sufficient in and of itself to establish the necessary "purpose or intent," shifting the burden to prove otherwise to the school board. "[A] finding of intentionally segregative school board action in a meaningful portion of the school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious." [7] In order

to "rebut the prima facie case ... [the school board must show] that its past segregative acts did not create or contribute to the current segregated condition of the core city schools." The difficulty of this task is illustrated by the Court's own justification for its position that concentrating Blacks in some schools through feeder systems and attendance zones has the effect of keeping nearby schools white. [8]

The requirement of a showing of segregatory intent rather than mere segregatory effect of school board actions was quite inconsistent with a number of prior court decisions upholding the validity of the de facto/ de jure distinction. [9] What is not so clear, however, is precisely what evidence must first be shown to establish intent. Is mere knowledge that a particular student assignment policy will produce disproportionate Black-white enrollment in some schools sufficient to prove intent to segregate? Or is the availability of what the Surpeme Court has termed "'educationally sound and administratively feasible alternatives,' the adoption of which would have resulted in a lesser degree of segregation," [10] sufficient to prove intent?

In a school system with a record of de jure segregation, the answers, at least until the 1976 term of the Court, were quite simple. Decisions from Green to Swann make clear that school systems in the process of desegregation are required to pursue the most effective means within the constraints of practicality. [11]

In a nominally integrated school system, however, the burden of proof is borne by those challenging the operations of the schools.

Margaret Marshall answers the issues raised by the first question by referring to the Keyes and Swann decisions, "... where it is possible to identify a 'white' school and a 'black' school simply by reference to the racial composition of teachers and staff, the quality of the school

buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the equal protection clause is shown." [12] This section of the Keyes decision is, however, not entirely relevant. Questions of funding, staffing, etc., are more directly subject to school board discretion and control than, for example, is residence within neighborhoods which indirectly can determine the racial composition of school enrollments. It is inconceivable that a genuinely 'neutral' and non-discriminatory staffing or funding policy would produce significantly disproportionate faculty assignments by race or unequal funding within school districts to the detriment of predominantly minority schools. It is, however, quite possible that absolutely neutral attendance zones or neighborhood schools could produce imbalance in the racial composition of school enrollment.

In the devising of neighborhood attendance zones or school feeder patterns, the question of the availability of reasonable alternatives becomes crucial. [13] Are school officials "...required to elect those options which result in the least amount of segregation"? In Keyes the Court took no direct stand on the question. But some of the evidence considered by the District Court in finding segregation in the Park Hills section concerned the alternatives available to policies pursued by the board -- alternatives that would have produced more integration.

It is easy, however, to exaggerate this point. [14] The Court did not find Denver guilty of intentional segregation because it did not in every instance adjust its policies, which on their face appeared neutral, so as to achieve maximum integration. Rather the Court found inconsistent application of neighborhood policies, feeder plans, etc., so as to augment segregation. The Court did not condemn a neighborhood school policy as such which had the effect of maintaining segregation, rather it condemned the

the utilization of "techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation." [15]

Reading Swann and Keyes together, we can come to some preliminary idea about the position of the Court in the early 1970's on the question of the de facto/de jure distinction. In a school district with a history of segregation imposed by law there is an affirmative duty to desegregate. In devising new pupil assigment policies the goal must be the achievement of the maximum degree of integration practicable. School districts have the burden of justifying their selection of any other than the most effective means available to accomplish integration. Continuation of either one race schools or grossly disproportionate racial concentrations within schools are presumed to be a continuance of de jure segregative practices with school officials bearing the burden of proving otherwise.

While in Southern districts segregated by law there is no need to prove segregatory intent, in nominally integrated school systems without a long history of de jure segregation, the burden rests on the plaintiffs to show that racial isolation found in the districts results from intentional governmental practices. There is, however, some ambiguity concerning exactly what is required to demonstrate intent. Without being exhaustive in compiling illustrations, it is fairly clear that where schools are racially identifiable because of the racial composition of the faculty or discriminatory allocation of educational resources, there is sufficient evidence of intent. Consistent manipulation of 'neighborhood' school boundaries to conform to the racial character of neighborhoods is also "probative in inferring racial motivation." [16]

But at least up to and including the Keyes decision, the Court does not appear to consider a district's failure to in every instance adopt only

those "educationally sound and administratively feasible..." policy options which produce maximum degrees of integration as sufficient proof of intentional segregation. Failure to adopt the most integrative options is only considered indicative of segregatory intent in districts where de jure segregation has been established by more direct evidence. Keyes and Swann did not clearly establish that such failure is, in and of itself, sufficient proof of intentional segregation in districts where other evidence of intent is lacking.

The double standard: an attack on the de facto/de jure distinction The fairness of requiring formerly legally segregated school systems to prove that continued racial isolation is not the result of intentional school policy while placing no such burden on the nominally integrated schools of the North was subject to debate within the Court itself in the Keyes case. Both Justices Douglas and Powell argued, for somewhat differing reasons, that the emphasis placed on segregatory intent was misplaced.

Justice Douglas argued that under the Fourteenth Amendment there is no difference between de jure and de facto segregation in the public schools. The Fourteenth Amendment forbids discriminatory "state action." "The school board is a state agency and the lines that it draws, the locations it selects for school sites, the allocation it makes of students, the budget it prepares are state action for Fourteenth Amendment purposes." [17]

Douglas clearly would demand that school boards in all their actions affecting the racial composition of schools select the least segregative alternatives available. His emphasis, however, is not on proving segregatory intent as apparently required by a majority of the Court, rather he insists simply that the state cannot pursue policies having a segre-

gatory effect. Quoting Judge Wisdom in U.S. v. Texas Education Agency, 467 F. 2d. 848, at 863-64, "...affirmative action to the contrary would have resulted in desegregation. When school authorities by their actions, contribute to segregation in education, whether by causing additional segregation or maintaining existing segregation, they deny to the students equal protection of the laws." [18]

Douglas finally argues that to superimpose "neutral state policy on private discrimination directly and unconstitutionally implicates the state in the private discrimination. "If a 'neighborhood' or 'geographic' unit has been created along racial lines by reason of the play of restrictive covenants that restrict certain areas to the 'elite,' leaving the 'undesirables' to move elsewhere, there is state action in the constitutional sense because the force of law is placed behind these covenants." [19]

Douglas is applying the logic of the Court's decision in Shelly v. Kramer [20] to the school desegregation field. In Shelly the courts refused to enforce racially restrictive private contracts because enforcement would have the effect of lending state support to private discrimination. Douglas, in effect, argues here that for school districts to superimpose their attendance zones on neighborhoods which are racially segregated, whether through private or public action, would implicate the state in that discrimination. He goes on to illustrate the role played by government in promoting racially segregated housing and neighborhoods, but on this point more will be said later.

Justice Powell also rejects the search for segregatory intent in school segregation cases. His view is based on at least two considerations. First, he attacks the unequal and somewhat inconsistent standards being applied to school segregation North and South. "...[T]he Court

persists in a distinction whose duality operates unfairly on local communities in one section of the country and on minority children in the other." [21] And second, he argues that emphasis on finding evidence of "segregatory intent" will lead to "subjective and conflicting conclusions. Every act of a school board and school administration, and indeed every failure to act where affirmative action is indicated, must now be subject to scrutiny." [22]

On the question of state action and the evidence necessary to implicate the state in discrimination, Powell agrees with Douglas. "Public schools are creatures of the State, and whether the segregation is State-controlled or State-assisted or merely State-perpetuated should be irrelevant to constitutional principle." [23] Contending that Swann forced the South to eliminate conditions not unique to the region or statutorily segregated districts, Powell "... would hold quite simply," that where there is substantial segregation, "there is a prima facie case that the duly constituted public authorities ... are sufficiently responsible to impose upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated school system." [24] He argues that generally the causes of racial isolation in large cities are the same throughout the country; that is, "... segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by actions of public school authorities. This is a national, not a Southern phenomenon...." [25]

The apparent broad sweep of Powell's view would not, however, necessarily produce similarly sweeping desegregatory court orders. He expresses misgivings, for example, about broad school busing orders as in Swann. His goal is "an integrated school system in which all citizens and pupils may justifiably be confident that racial discrimination is neither practiced

or tolerated." A school system would be considered integrated,

> if school authorities had taken appropriate steps to (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instructors, and curricula opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration, and (iv) locate new schools, close old ones, and determine the size and grade categories with the same objectives in mind. [26]

Powell does not call for the abandonment of "neighborhood schools," but he does note that "neighborhood school zones are constitutionally suspect when attendance zones are superficially imposed upon racially defined neighborhoods, and when school construction preserves rather than eliminates the racial hegemony of given schools." [27]

It is Powell's position, then, that any school district where there is evidence of racial isolation in the schools, be required to pursue traditional school assignment policies in such a way as to minimize school segregation. He explicitly defends the concept of neighborhood schools while recognizing that total integration cannot, and in his view, need not be achieved. In his view even after a scrupulous discharge of a school district's constitutional responsibilities, "...the fundamental problem of residential segregation would persist." He would have schools attempt to minimize the impact of residential segregation on the schools, but he would not require them to totally negate that impact. [28]

The Meaning of Swann and Keyes

Despite the concurring opinions of Douglas and Powell, following Keyes, the requirement of proof of segregatory intent and not mere segregatory effect of school board actions appeared to be intact. The nature of the proof of intent required, however, remained somewhat ambiguous.

Swann presumed that within formerly statutorily segregated school districts, continuance of one race schools or substantial racial disproportions within schools were vestiges of the dual school system. Keyes appeared to demand proof of discriminatory intent before a similar conclusion would be drawn in similar circumstances in the North. A crucial factor we must recognize, however, is that conditions comparable to those considered discriminatory in Swann were common throughout the North. The question not adequately answered by Keyes is just how much proof would be required to show intent. Manipulation of neighborhood school boundaries to maintain segregation appeared to be enough. But how is such manipulation itself proven? Building schools of limited capacities, on sites accessible to a limited community when such action would serve to produce racially homogeneous student bodies might be proof of discriminatory intent. But must there first be some evidence of conscious racial motivation before intent can be assumed?

The Swann and Keyes Decisions and the District Courts

Together the Swann and Keyes decisions produced a variety of judicial responses at the district court level. Most district courts still sought evidence of de jure segregation, but their basis for defining intent varied. While few courts completely disregarded the requirement of finding segregatory intent, often segregatory effect was itself considered indicative of discriminatory intent!

In the section to follow, I will review a number of district court decisions illustrative of the variety of approaches taken contemporaneously with, and subsequent to, the Swann and Keyes decisions. I will focus on the variety of analyses and interpretations of the de facto/de jure distinction. I will focus specifically on several fundamental questions. How do the courts define de facto and de jure segregation? How much evidence of conscious segregatory intent do they require? When is segregatory effect considered to be indicative of segregatory intent? And when is failure to pursue the least segregative options available to a school district in its pupil assignment policies considered proof of segregative intent?

I have not attempted to compile a comprehensive survey of all post-Swann decisions in the school segregation field. I have in fact largely ignored those cases which rigidly adhere to the requirement of explicit evidence of segregatory intent and which do not wrestle with the questions left ambiguous by the Swann and Keyes decisions. My goal in searching through district court cases has been to find and analyze those cases which take the most expansive views in weighing government responsibility for racial separation in the schools.

Supreme Court decisions of the mid-1970s appear to be in response to the 'innovative' approaches taken by district courts in determining

what is sufficient to prove de jure segregation. To understand the significance of those decisions, we must first look at the state of school adjudication at the district court level during the first half of the 1970s.

The controversy over the kind of evidence to show segregative intent rests in the difference between deliberate school board action which increases or sustains segregation on the one hand, and the failure to take action which might decrease segregation on the other. Or, put another way: is the failure to take affirmative steps to decrease racial isolation which was not directly caused by school board action sufficient to show segregative intent? It is simply the difference between "sins of commission and sins of omission." [29]

As previously argued, actual faculty segregation or unequal allocation of a school district's resources are considered indicative of discriminatory intent; so too is the manipulation of district boundaries to conform to the racial character of neighborhoods. The record of district court cases in a number of Northern communities provide illustrations of manipulation of attendance zones -- "neighborhood" school policy.

De facto v. de jure segregation: a sharp distinction In Spangler v. Pasadena [30] the Court provides numerous examples of the expansion of schools and building of new schools to increase segregation. Despite the district's claim of an optional school capacity of 600 students, the Court found two schools within a radius of one mile constructed with a capacity of 250 students in order to maintain segregated "neighborhood" schools. [31]

As further evidence of deliberate segregation in Pasadena, the Court noted the use of portable classrooms at Black schools to ease over-crowding "... while adjoining white schools had either fewer transportables or no

transportables in the same school year." [32] The pattern was continued elsewhere in the districts where schools were maintained "...with student enrollments that are minority Caucasian under capacity while adjoining schools that are predominantly Caucasian are overenrolled." [33]

This pattern of manipulation of school boundaries and utilization of portable classrooms was repeated in a number of other cases. [34] The Boston case [35] provides another classic example. Citing one of many such examples, the Court noted that "in allieviating overcrowding at the Cleveland Junior High School, 91 percent white, students were assigned to the already overcrowded and relatively distant South Boston High. There were closer schools with available seats but those schools were identifiably Black." [36]

In addition, the Court found that the district policy toward portable classrooms shifted back and forth "depending on whether their use was proposed as a means of reducing segregation or of correcting overcrowding at predominantly white schools." [37]

Neighborhood schools in Boston were generally found only at the elementary school level. But the actual district lines were drawn so as to maximize segregation. "Schools are not located near the center of regular, compact districts, but rather near the edges of irregular districts requiring some students to attend relatively distant schools when there is another school within one or two blocks." [38] "The neighborhood school has been a reality only in areas where residential segregation is firmly entrenched." [39]

When the neighborhood school policy operated in such a way as to leave some white students in predominantly Black schools, existing open enrollment policy "or one of the exceptions to the controlled transfer policy" virtually guaranteed the white student the right to transfer

"regardless of overcrowded conditions in the receiving school." [40]

The Boston cases provided additional evidence of discriminatory intent including explicit statements by school officials acknowledging racially motivated actions. But what was most important was the consistent pattern of actions producing racial isolation. Even without the verbalized acknowledgment of segregatory intent, the pattern of school assignment policy evident in Boston was sufficient to meet even the most restrictive reading of the Swann and Keyes decisions. As Judge Garrity argued:

> Intent ordinarily may not be proved directly, because there is no way of following or scrutinizing the operation of the human mind; but may be inferred from the surrounding circumstances .... Indirect evidence of segregatory intent would include the absence of valid educational, fiscal, administrative or other governmental justification for decisions having clearly foreseeable segregative consequences. ... The Court has looked for and weighed valid, nondiscriminatory justifications for the defendants' decisions and actions. Only when there was none or when there was clear evidence of discriminatory purpose has the Court found that the defendants' intent was segregative. [41]

Clearly, then, neither the Boston nor the Pasadena cases was decided on the basis of the district's failure to in every instance pursue the least segregative options in its student assignment policies. Nor did the District Courts assume an affirmative duty to achieve a maximum degree of integration in the absence of clear evidence of segregative intent. Rather, the cases were decided on the basis of evidence of consistent manipulation of student assignment policies producing substantial degrees of actual segregation.

"Sins of Omission": Inaction Equals Intent

The search for segregatory intent on the part of the district courts took a significantly more innovative tact in a variety of other cases in the post-Swann era. Although district courts rarely abandoned the crucial distinction between mere segregatory effect and segregatory intent -- the basis for the de facto/de jure distinction -- a number of cases clearly approached the margins of the distinction. Although in most instances segregatory effect was not itself considered actionable, it was often the principal element of evidence required to establish segregatory intent.

In our analysis of several such cases it is essential that we be prepared to distinguish mere language from evidence. That is, in contrasting the cases that follow with the Boston case, for example, it would be easy to rely upon differences in emphasis in the verbal justifications for the courts' conclusions while discounting some of the evidentiary similarities in the circumstances of the cases. Nevertheless, the stated grounds for court decisions are an essential basis for evaluating the meaning given to the de facto/de jure distinction.

One of the earliest decisions in the Swann/Keyes period concerned Pontiac, Michigan.[42] The Pontiac case appears to have been decided on the basis of the district's failure to pursue non-segregative alternatives available to it in its pupil assignment policies. The Court's decision notes that in establishing the district's original boundaries in 1954, the board "never considered the achievement of racial balance a factor."[43] Although a decision was made in 1964 to consider racial integration in locating schools, "...there has been neither an attempt nor even a consideration toward modification, alteration or realignment of boundaries."[44] Between 1954 and 1964, nine new schools were built and "...located in accord with housing developments and, thereby, readily adopted the same

segregated pattern." [45] None of the schools were located to achieve greater racial integration.

Although there is no evidence presented that the board actually contributed to the segregated housing pattern, the Court rejected the board's claim that the school segregation which resulted was de facto. "For a school board to acquiesce in a housing development pattern and then to disclaim liability for the eventual segregated characteristics that such patterns create in the schools is for the board to abrogate and ignore all power, control and responsibility." [46]

Placing emphasis on a district's affirmative duty to pursue integration, the Court asserts that

> when the power to act is available, failure to take necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance the situation. Sins of omission can be just as serious as sins of commission. [47]
> ...Once it has been demonstrated as it has in this case that attendance lines were consistently drawn in such a fashion so as to discourage achievement of integration when such need not have occurred, the presumption can be made that the results were intended. [48]

Keyes and Swann stated that once intentional segregation has been found, remaining racial isolation can be presumed intentional. Pontiac appears to argue that once avoidable racial segregation has been found, intention can be presumed. If avoidable segregation is in fact the measure, ultimately virtually all segregation is avoidable.

The case involving Kalamazoo, Michigan blends together many threads from a variety of approaches to establishing de jure segregation. Despite the existence of much evidence comparable to that outlined in the Boston case, the thrust of the decision is focused on the board's failure to confront racial imbalance in the schools. It was that failure to act as much or more than any specific action taken by the board that is considered

probative of segregatory intent.

The Court's decision came in two waves. The first case granted a preliminary injunction blocking a newly-elected Kalamazoo school board from rescinding a school desegregation plan initiated on May 7, 1971 by its predecessor board. [49] The second decision was delivered following a six-week trial on the facts of the case. [50]

Both decisions began with the Court enunciating its view that segregation, regardless of cause, is harmful; "the impact on each and every black child is the same." [51] Its position, which is supported by a brief discussion of the "tortured history of race relations," [52] is reminiscent of the arguments of the plaintiffs in Brown. And like the arguments in Brown, the Court's assertion of the harmful consequences of segregation included harm to whites. Despite these views, the Court indicated that it felt obliged to follow the decision of the Supreme Court in Keyes.

Although the multiplicity of issues raised by this case cannot be viewed in complete isolation, I will, nonetheless, attempt to break the decision down into a number of important components.

In its preliminary injunction the Court did not yet conclude that a desegregation plan was required for Kalamazoo, but it did conclude that the fact that a desegregation plan had been adopted made any decision to cancel the plan the equivalent of a deliberate attempt to foster segregation and was, therefore, unconstitutional. [53] Although later concluding that a desegregation plan was required in the first place, the Court in its final decision reaffirmed the view that the desegregation plan even if not constitutionally required, once adopted could not be constitutionally abandoned. "The May 7 plan on desegregation thoroughly conceived and conscientiously prepared, was the ultimate manifestation of the conspicuous involvement of the state authority in the matter of the racial distribution

of students. It was the crucial fact of involvement, even more than the actual specific plan adopted on May 7, 1971, for which defendants could not and cannot constitutionally retreat." [54]

The original adoption of the May 7 Plan was considered by the Court to be an admission by the State that, indeed, it determines the racial composition of the schools. If so, a government defense based on the fact of residential segregation loses credibility.

The School Board's defense that the segregation resulted from private residential segregation and not discriminatory school policy was attacked by the Court on a number of additional fronts. The Court took the conventional route of establishing that neighborhood boundaries and school capacities were frequently manipulated to produce segregation. The pattern previously discussed in the Boston case was repeated here. Standard school sizes were ignored when increased capacity would serve to isolate a racial group. [55] Portable classrooms were used "...in both Black and White schools, with the net effect of retaining Blacks in the Black schools and Whites in the White schools," [56] despite the availability of space in nearby schools of the opposite race.

> It is apparent that Kalamazoo elementary schools were not situated and boundaries were not drawn in a fashion which regularly placed students in the school closest to their homes.... This Court cannot conclude that the Kalamazoo school board resolutely and consistently followed a 'neighborhood school policy.' Policy is taken here to mean not merely what is actually done, but rather a set of general goals which are adopted for governmentally legitimate reasons, which bear a rational relation to the function to be served and which are routinely and consistently followed, unless a sufficiently compelling reason appears for departures in individual cases. The alleged 'policy' has been too often departed from to have been a firm and consistent goal of the Kalamazoo board. [57]

Even without the pattern of manipulation of neighborhood schools, however, the Court challenged the constitutionality of a school board's incorporating residential segregation into its student assignment policies

through the neighborhood school concept. "[L]ocating a school within the general area of a child's residence serves no compelling educational objective which supercedes constitutionally protected rights." [58] This position challenging the "sanctity" of neighborhood schools is further reinforced by what the Court saw as the direct collusion of the school board in assisting the creation of segregated neighborhood schools.

The Court noted the continuous consultation and cooperation between the school board and the Board of Realtors in selecting school sites in areas of new housing development. [59] When such cooperation was combined with the Realtors' announced practice of discouraging integrated housing, could the School Board claim for itself a racially neutral stance? The Court's answer was no.

> When the School Board combines with real estate developers in such a way as foreseeably and actually to create a new predominantly white neighborhood school, it cannot be heard to say that it is merely applying a racially neutral neighborhood school policy throughout the district.... [60]
> When the foreseeable and actual effect of the school construction program of the 1950's and 1960's was to contribute substantially to the creation and maintenance of segregated schools and neighborhoods, the school board's close association with a private group such as the realtors must be considered in evaluating the results of the school board's actions. [61]

This discussion brings us to the point of directly elucidating the standard considered adequate by the Court for establishing discriminatory intent. Again, I rely substantially on quotation from the decision to illustrate the direction of the Court's thinking. Relying in part on traditional legal standards in tort suits, the Court noted that "...in general, it is reasonable to infer that people intend the natural and probable consequences of acts knowingly done or knowingly omitted." [62] In this instance the crucial question is: is the segregation that exists "...either a direct result or a reasonably probable consequence of the act or omission"? [63]

Since in the regular execution of its responsibilities the school board determined school attendance zones, located schools, and added temporary classrooms, and these actions determined to a substantial degree the racial composition of student bodies,

> the board must be held responsible for any segregated condition that exists.... [T]hat the board has power to substantially reduce segregated conditions is obvious from the terms and result of the May 7 plan, all of which are within the board's operational authority. [64]

> Since 1954, 68 school construction projects and 32 attendance boundary adjustments were made in Kalamazoo.... [B]ut at no time before 1966 did the board formally and publicly consider any program, or make any decision, or implement any policy designed to positively confront the problem of racial isolation in the Kalamazoo public schools. This failure to act was itself a deliberate decision to forego the opportunity to correct the existing segregated condition and itself was an unconstitutional denial of equal protection of the laws. [65]

Another "omission" cited by the Court that ultimately had an impact on the schools was the school board's handling of the 1966 open housing referendum. Simply, the board failed to take a position on the referendum.

> For the same board to later contend, as it has before this Court, that racial segregation in the schools of Kalamazoo is purely a product of residential patterns over which it had no influence or opportunity to act is untenable .... Faced with the opportunity to act, the power to extend some influence and exclusive responsibility to provide equal educational opportunity, the Kalamazoo Board of Education was active in fostering segregation by the very virtue of the fact that it consciously and deliberately chose for itself a passive role. [66]

The District Court decision concerning Kalamazoo, Michigan assumes that school boards have an affirmative duty to pursue the least segregative policy options available to them. In this sense the Kalamazoo decision is reminiscent of the Douglas and Powell concurring opinions in Keyes. Although Powell clearly sets limits on what he sees as the practical alternatives available, both he and Douglas presumed school district responsibility for any segregation that existed. The crucial

distinction between the Powell and Douglas concurrences and the Kalamazoo decision is that Kalamazoo still assumes the need to prove segregative intent while Douglas and Powell essentially rejected any requirement to prove intent and essentially called for the abandonment of the de facto/de jure distinction.

I must emphasize that the Court in the Kalamazoo case does provide some of the traditional evidence of manipulation of neighborhood school policy, but clearly the major emphasis is on the district's failure to affirmatively pursue racial integration in its site selections for schools, in its interaction with real estate interests, and even to the point of demanding an advocacy role in the community in support of an open housing referendum over which the board had no direct control. Failure to take any one or all of these steps was considered by the Court to be indicative of segregative intent.

> In light of the clear notice of Brown I, where opportunities for positive action are presented, where the consequences of failure to act are clearly foreseeable, and where the consequences are significant contributions to the creation and maintenance of segregated schools, the failure to act is deliberate and intentional. [emphasis added] ...Plainly, where public issues are formed and questions posed which bear directly on the quality of education, a deliberate negative response from school authorities or a deliberate omission to act, can affect the shape of subsequent circumstances just as materially as can affirmative decisions and actions. State responsibility under the United States Constitution must logically be fixed in either context. [67]

Clearly then, the District Court in the Kalamazoo case considered the school district's failure to pursue the least segregative alternatives before it to be indicative of segregative intent.

An affirmative duty to pursue racial integration Both the Hoots and Husbands [68] decisions in Pennsylvania concerned a state-initiated consolidation of previously independent school districts. The question in both

cases is: does the consolidation plan's failure to relieve preexisting racial imbalance within the districts consolidated constitute de jure segregation? [69]

Pennsylvania provided for the merger of independent school districts within the State so that no one district would have fewer than 4,000 students. Plaintiffs in Hoots challenged the consolidation of three heavily Black school districts in Allegany County, Pennsylvania into a single General Braddock area school district. The newly formed district had a combined Black population of 44.98 percent. According to the Court, "it is extremely likely that the municipalities have reached the tipping point of becoming predominantly black." [70] The Court attributed the concentration of Blacks within the three newly consolidated communities to "pervasive housing discrimination." [71]

Significantly the consolidation plan approved by Pennsylvania was not the only alternative available. Other communities in the vicinity ranged from .78 percent Black to 9.6 percent Black. [72] But "the school districts in the vicinity ... continually sought to avoid being included in a school district with Braddock and Rankin because of the high concentration of blacks." [73] In fact, the Court argued that Rankin logically and geographically should be in another district. Among several alternative consolidated districts the Black population would range from 14 to 27 percent.

In light of the above, the Court concluded that the "natural, foreseeable and actual effect of combining ... [the three disproportionately Black districts] into one school district was to perpetuate, exacerbate, and maximize racial segregation within the public schools of this central portion of Allegany County." [74]

Again, however, the emphasis is not so much on deliberate action

increasing racial imbalance; all the districts involved were racially imbalanced prior to the consolidation. Rather the Court stressed the State Board's failure to take available steps to relieve racial segregation.

> This Court finds that in establishing boundary lines for school districts, the racial composition of the student body of the proposed school district is an important factor to be considered to maximize the social and educational benefits which accrue from attending a racially integrated school system and to minimize the foreseeable and avoidable adverse social and educational effects which result from attending racially segregated schools .... This Court finds that there is no educationally or other valid justification for disregarding racial criteria in establishing school district boundaries. [75]

The Court apparently did not contend that Pennsylvania was required to initiate merger of school districts where the fact of racial imbalance comes to its attention. But

> when it seeks change, it must proceed in a fashion that will lessen previously existing school segregation .... The State and County Boards' refusal to consider racial criteria in adopting the plan of organization of administrative units pursuant to Act 150 constituted an explicit racial classification in that educational matters related to racial criteria were treated differently from educational matters related to other criteria. [76]

The facts of the Husbands case were essentially the same as Hoots. "Black districts [were placed] together with other black districts and white districts with other white districts." The school board defendant in the case contended "that they had not created segregated districts from integrated districts." [77] But the plaintiffs "...allege that the defendants did, purposely and through gross thoughtlessness, so draft the reorganization as to perpetuate and compound existing imbalance and to give formal sanction to it." [78]

As has been the case in so many northern school districts, school segregation was simply grafted upon existing patterns of residential segregation. But in this case, the Court argued that in formulating school

district lines, officials must take affirmative steps to lessen the segregative impact of housing discrimination whether public or private. "Equal protection of the law means more than merely the absence of governmental action designed to discriminate .... We now firmly recognize that the arbitrary quality of thoughtlessness can be as disasterous and unfair to private rights and public interests as the perversity of a willful scheme." [79]

These two cases further reinforce the trend found in other district court cases discussed above; that is, the decision was based largely on the districts' failure to affirmatively pursue racial integration when the opportunity presented itself. The Court explicitly condemns the exclusion of racial criteria from the educational grounds used to determine the propriety of district consolidation in Pennsylvania.

Segregative effect alone is unconstitutional The final case to be discussed in this section is the Hart case [80] which concerned a community school district in Brooklyn, New York. Unlike the other cases discussed to this point, Hart included explicit statements that the Court need not find discriminatory intent to establish unconstitutional segregation.

In its decision the Court did cite some conventional evidence of actions by school authorities which had the effect of increasing or maintaining segregation. The segregation at Mark Twain Junior High School was due in part "to deliberately zoning out of the school white middle class children, enhancing segregative tendencies and leading to gross underutilization of Mark Twain's physical facilities." [81] In 1962, 81 percent of Mark Twain's students were white, but by 1973 only 18 percent of the students were white. This dramatic change was not brought about by any massive influx of Black students. In fact, during these years the actual

number of Black students at Mark Twain actually decreased at the same time that the percentage drastically increased. This rather unusual situation is explained by a decline in the utilization rate at Mark Twain from 88 percent in 1962 to 41 percent in 1973 at a time when three of the five schools in the district were overutilized. [82]

The rapid decline in white students at Mark Twain was caused by changes in the feeder pattern at Mark Twain. Students at P.S. 216 were diverted to other junior high schools having "the natural and foreseeable effect of decreasing the white enrollment at Mark Twain." [83] Efforts within the District School Board to redistrict P.S. 216 students to Mark Twain were successfully resisted. [84]

The Community School Board justified its diversion of students from Mark Twain by citing its expectation that new housing construction underway in the Mark Twain area would solve both the problems of underutilization and racial imbalance. Without delving into all the arguments involved, I will note simply that the Court concluded that the expected housing will, as a result in part of public housing policies, be itself segregated. Further, the fact that Mark Twain was then perceived as a segregated school would cause whites to avoid it and housing in the Mark Twain community, thereby assuring its continued segregation. [85]

Some minimal efforts to achieve integration at Mark Twain were attempted. Funds were provided to make Mark Twain more attractive to white students. A freedom of choice plan was instituted to permit white students from outside the district to transfer in, but uncontroverted testimony demonstrated that "there was no publicity campaign or other attempt by the community board to notify white parents within district 21 of the improvements planned for Mark Twain, and no active effort to encourage white parents to send their children there." And as the Court's decision

noted, previous experience points to the expectation that freedom of choice plans are destined to fail. [86]

Despite this evidence, the Court did not conclude that school board actions were indicative of discriminatory intent. The decision included quotes from defendants' counsel's arguments against traditional methods of desegregation: "massive infusion [of white students] ... from a contiguous neighborhood into the school will not work; ...it will be self-defeating in that those white students, over a very short period of time, will evaporate so that we will not have [an integrated school]." The Board's failure to act, then, was considered to be a result of fear of "white flight," inevitable failure, and resegregation. Nevertheless, the inaction of school authorities "...had the natural and foreseeable effect of maintaining and perpetuating severe racial imbalance at Mark Twain Junior High School." Significantly, however, the Court concluded that "this failure does not suggest that there was any intent or desire that Mark Twain be segregated. All school officials were distressed by the situation. They took some steps to reduce the number of children who would be segregated, for example, by zoning the areas immediately adjacent to Mark Twain into I.S. 303. These children were minority children .... The school officials cannot be charged with racial prejudice in their official positions or with segragatory design or intent" [emphasis added]. [87]

Although the actions of the Community School Board were similar to those found in other cases and deemed to be indicative of segregative intent, the Court rejected a similar conclusion here. Its refusal to find segregative intent, however, did not prevent the Court from finding grounds to conclude that the segregation at Mark Twain was unconstitutional.

The apparent revolutionary thrust of the Court's position may be more

apparent than real. It does emphasize segregatory effect rather than intent as the crucial variable in determining unconstitutional segregation. But the continued emphasis on the school authorities' awareness of the segregatory consequences of their actions is not inconsistent with a more conventional determination that their actions were indeed indicative of segregative intent.

This Court, like Justices Douglas and Powell in Keyes, has no difficulty in finding state action in the operations of the schools. Schools are agencies of the state and their "acts of omission as well as acts of commission constitute state action .... If a public school is operated as a segregated facility in an integrated community, the school's character results from school board action or inaction. Just as a public school would not exist but for the state, the character of the public school is determined by the school board." [88]

This position makes it clear that the Court considered it to be a responsibility of the school board to follow the least segregative student assignment policies available. "A school board which neglects to avoid racial segregation in the schools is itself causing or bringing about, as an agency of the state, racial segregation. This is so because a school board, like other legal entities, must be held accountable for the natural foreseeable, and avoidable consequences of its activities and policies." [89]

The question which remains is what school board policies have had the effect of producing segregation. We have already discussed, above, alterations in the feeder patterns at Mark Twain and its underutilization, but the Court went a step further to challenge the concept of the neighborhood school. According to the Court, "it is less important that we isolate where the vicious circle -- racially segregated schools contributing to residential segregation contributing to racially segregated schools --

begins than that the law eliminate, to the extent practical, the state's complicity in the maintenance of racially segregated schools." [90]

The fact that the Court found government housing policy to have been, itself, substantially responsible for increasingly racially segregated neighborhoods is definitely relevant here. But even if residential segregation were solely the result of private discrimination, the Court found grounds to reject a neighborhood school policy.

> When racial characteristics determine place-of-residence, as undoubtedly they often do in our society, then the school board's use of 'neighborhood' residential criteria in student assignment and school construction decisions constitutes a racial classification once-removed. The school board's use of a residential criterion effectively implicates the state in racial discrimination. The residential criterion amplifies the consequences of private discrimination, it lengthens the discriminator's arm, giving him a veto over the neighborhood public school. [91]

In citing this view the Court in effect argued that a school board's failure to compensate for private discrimination in housing patterns implicated the board in unconstitutional discrimination. When, as in this case, a court concludes that residential segregation is, itself, a result of state policy, then "the school board's use of residential criterion constitutes 'double discrimination'." [92]

While recognizing the existence of several precedents pointing to the need to prove segregatory intent, the Court contended that "this principle is not applicable to the instant case where school authorities acted or failed to act knowing that segregation would be the result of their decision." [93] Contending that it had been established Court policy in the district for ten years, "that de facto segregation which can be avoided is unconstitutional," [94] the Court concluded that "whether denominated de facto or de jure the segregation of Mark Twain is unconstitutional." Citing another Court's decision, the Court observed that

"school children 'are not so mature and sophisticated as to distinguish between the total segregation of all Negroes pursuant to a mandatory or permissive state statute based on race and the almost identical situation prevailing in their school district' without such a statute." [95]

Again we are confronted with problems of language in court decisions. The Hart Court did not consider the segregation of Mark Twain to have been the product of discriminatory purpose or segregative intent; nevertheless it condemned the segregative effect of school board actions resulting from benign racial motivation. It, however, would not be inconsistent with other court decisions discussed above to conclude that the avoidable "de facto" school segregation decision in Hart is in fact de jure segregation.

Preliminary conclusions At this point we are in a position to come to some preliminary conclusions concerning the nature and variety of standards used by the district courts in evaluating the role of public policy in producing school segregation.

At the beginning it is essential to note that since the Civil Rights Cases of 1875,[96] the Fourteenth Amendment requirement of equal protection of the laws has been interpreted to forbid discriminatory public policy. The Supreme Court in Brown concluded that state imposed school segregation constituted a denial of equal protection of the laws. In enforcing the Brown decision, the courts had to decide what constitutes state enforced segregation. Some, such as Justices Douglas in Keyes, argue that the mere existence of a pattern of segregation in public schools constitutes state enforced segregation. Simply segregative effect is enough to establish unconstitutional segregation. The dominant view within the courts, however, has been that in order to hold the state responsible for segregation,

discriminatory intent must be shown; that is, the degree of segregation found in the intended result of the policies of those ultimately responsible for the schools.

The several cases discussed in this chapter all raise related issues. All were northern cities marked by a substantial degree of racial isolation in the schools, and all were found to have segregation for which school authorities were sufficiently responsible to be required to take some remedial action. In several instances, however, there were significant variations in the nature of the court's justifications for their findings of unconstitutional segregation.

In the Boston case segregatory intent was presumed to be the basis of the observed pattern of racial isolation only in the "...absence of valid educational, fiscal, administrative or other governmental justification for decisions having clearly foreseeable segregative consequences." [97] By implication "normal" educational policies which had clear side effects of producing segregation might have been deemed acceptable by the Court without additional "clear evidence of segregatory purpose." [98]

The Pontiac and Kalamazoo cases followed directions markedly different from Boston. In Pontiac school board policies were considered unconstitutional in part because of the board's failure to consider racial balance as a factor in drawing boundaries. [99] As new housing developments were opened, schools were located in the new neighborhoods. The Court, however, did not contend that the board actively conspired with housing developers to produce segregation; rather the board's policies were condemned for effectively acquiescing in those segregated housing practices. If there were alternatives available to a "neighborhood" school plan, then the board's failure to select the least segregative alternative was sufficient to establish that the segregation was intended.

The opinion of the Court was not based on an absence of "valid educational, fiscal, administrative or other governmental justification..." [100] for the location of Pontiac schools, rather it implied an affirmative obligation to pursue school integration even in the face of segregated housing patterns. To do otherwise was considered indicative of segregatory intent.

The Kalamazoo decision, while including evidence of manipulation of student assignments for racial purposes, included a direct assault on the concept of neighborhood schools when they stand in the way of substantial integration. The Court noted that neighborhood schools "serve no compelling educational objective ...." The school board was challenged for its consultations with private realty interests presumably responsible for residential segregation, and for its failure to actively campaign in support of an "open housing" referendum. As the Court itself concluded, "the Kalamazoo Board of Education was active in fostering segregation by the very virtue of the fact that it consciously and deliberately chose for itself a passive role." [101]

The Hoots and Husbands decisions raise similar issues. Essentially the Courts found the two consolidation plans to be unconstitutional because of the failure of school officials to include increased integration among the criteria used in devising consolidation schemes. In Hoots the Court found "that there is no educationally or other valid justification for disregarding racial criteria in establishing school district boundary lines." [102] In Husbands the Court concluded that in failing to select consolidation plans alleviating pre-existing racial imbalance, the defendants were assuming responsibility for it. Summing up its position on the role of public officials in school segregation cases, the Court argued: "we now firmly recognize that the arbitrary quality of thoughtlessness can

be as disasterous and unfair to private rights and public interests as the perversity of a willful scheme." [103]

Finally, the Hart case, like Boston and Kalamazoo, included some evidence of manipulation of student assignment policies in order to zone out white students and thus effectively increase segregation. What is interesting about Hart is the different approach taken in defining segregatory intent. Despite the fact that increased segregation was "the natural and foreseeable" effect of decreasing white enrollment at Mark Twain Junior High School, the Court did not consider school authorities to be guilty of segregative intent. For one thing, school officials took some action to decrease segregation elsewhere in the district and to limit the number of students in segregated schools. But most significantly, the Court found the principal motivation for school board actions to be fear of "white flight." Their efforts were seen in effect as bowing to the inevitable while seeking to keep as many whites in the district schools as possible.

Nevertheless, despite the lack of segregatory intent, the Hart Court did find school officials constitutionally responsible for the segregation that exists at Mark Twain. It specifically rejected the use of "neighborhood schools" within segregated neighborhoods. "The school board's use of residential criterion effectively implicates the state in racial discrimination." [104] All that need be proved to establish governmental responsibility for school segregation is that school officials know that segregation would be the result of their acts or omissions. In sum, avoidance of segregation is an affirmative duty of school districts in the exercise of their educational responsibilities.

In the first five cases, the Courts used the language of segregative intent to support their findings of government responsibility for school

segregation. In Boston intent was only presumed in the face of essentially complete absence of non-racial justification for policies having clear segregative effect. In Pontiac and Kalamazoo, on the other hand, segregatory intent was assumed largely because of the foreseeable segregative effect of standard student assignment policies chosen when other assignment policies having less segregative impact were available. Despite some evidence of manipulation of neighborhood policies, the emphasis in the Courts' decisions was clearly on the availability of less segregative alternatives available. Failure to pursue the alternatives was considered sufficient evidence of segregative intent.

In Hart, however, the Court refused to find segregative intent. It based its decision solely on the fact of segregative effect of school board policies.

Multiple Standards for Identifying "De Jure" Segregation: The District Courts and the Literature

Both the district courts discussed in this chapter and the legal scholars discussed in Chapter Two attempted to devise standards for distinguishing unconstitutional segregation from racial isolation for which government could not be held responsible. With one exception, they acted without clear guidance from the Supreme Court. [105] Most had the benefit of the Supreme Court decision in Swann which specified that only intentional segregation was unconstitutional, but neither the Supreme Court decision in Swann nor its decision in Keyes specified any clear standard for distinguishing intentional segregation from the purely adventitious.

Despite some similarlities between the approaches of some legal scholars and the district courts, their efforts are most interesting because of the variety of the standards formulated.

Like the authors of the Yale Law Journal note, "Reading the Mind of

School Board," [106] the Courts in the Boston and Pasadena cases considered racially isolated schools to be unconstitutional only if there was no independent educational justification for student assignment policies which effectively isolated minority students.

In an approach reminiscent of both Bell and Fiss,[107] the Courts in the Hart, Hoots, Husbands, Kalamazoo, and Pontiac decisions condemned, to varying degrees, the "cumulative impact" of housing discrimination on the racial make-up of the schools. All condemned the superimposition of neighborhood attendance zones and school district boundaries on residentially segregated communities. And, like Richter, the Kalamazoo Court equated the adoption of a neighborhood school policy in a residentially segregated community with a racial classification justifiable only by some "compelling educational objective."

In our discussion of the literature in Chapter Two the question of the circumstances under which segregation is harmful served as an important basis of distinction between those scholars who considered all segregation regardless of cause to be unconstitutional and those who condemned only intentional segregation. While the authors of the Yale Law Journal note, "Reading the Mind of the School Board," assumed segregation to be harmful only when it "stigmatizes" the minority child and that occurs only when segregation is intentional. To both Goodman and Richter segregation can produce harm even when it is unintentional.

In the District Court decision discussed in this chapter, distinctions concerning harm from segregation are not nearly so sharp.

Reference to harm from segregation regardless of cause can be found in the Kalamazoo, Hart, Hoots, and Husbands decisions, but the significance assigned to such harm as the basis for a finding of unconstitutional segregation varies from case to case. Although in the Kalamazoo decision the

Court asserted that there is no difference in impact on Black children between intentional and effective segregation. [108] The Court, nonetheless, assumed that the Supreme Court required it to find evidence of segregative intent.

In the Pontiac decision the District Court found evidence of segregative intent in the school district's failure to avoid segregation in the schools resulting from housing segregation -- a situation the Court described as "harmful." What is unclear, however, is whether the segregation is condemned as harmful because it is seen as the intentional result of school committee inaction, or whether school committee inaction is condemned because segregation itself is harmful.

The Hoots and Husbands decisions were based largely on the failure of authorities to consider the interest in racial integration among other educational concerns in devising school district consolidation plans. If racial integration is, itself, an educational concern, then it can be presumed that the District Court considered racial segregation to be educationally harmful. Explicit language to that effect can be found in Hoots. [109]

Finally, in the Hart decision the District Court rejected the argument that only intentional segregation is harmful, arguing that school children themselves would fail to distinguish identical situations resulting from different causes. [110]

In short, to all District Courts segregation was considered to be harmful, but even for those that sought to demonstrate segregatory intent, it is unclear whether it was the intentional policies themselves that produced the harm or whether a decision to pursue harmful yet avoidable policies was deemed proof of segregatory intent.

The positions adopted by the District Courts and legal scholars are important because they all were in some sense consistent with the major Supreme Court decisions from Brown to Keyes. Although Brown condemned only state imposed segregation, its discussion of the harm flowing from segregation can be seen as applying to all segregation. [111] And although Swann and Keyes directly condemned only intentional segregation, the broad sweep of the remedies countenanced by these decisions attacked student assignment policies that essentially reflect residential segregation found in virtually all American urban centers. [112]

The apparent blurring of the de facto/de jure distinction appears to have elicited a response from the Supreme Court in its 1976-77 term. We will have to weigh the relative adequacy of the still evolving Supreme Court standards with those found in these and other district court cases and in the literature to see which best confronts the true contribution of government to continuing racial isolation in the schools.

In this chapter I have attempted to illustrate a variety of approaches for determining the role of public policy in producing school segregation. The apparent weakening of the requirement that intent to segregate be proved before government policy is deemed unconstitutional appears to conflict with some of the language in the Swann and Keyes decisions. In order to adequately assess the importance of these developments, however, it would first be appropriate to investigate further the Supreme Court's position(s) concerning the scope of the remedies for segregation. It is on this issue concerning scope of remedies that the Supreme Court began the process of reining in the district courts in their handling of racial isolation in the schools. And significantly, I will argue, it is on this question of remedy that the Court began the process of devising a uniform national standard for dealing with or failing to deal with segregation

which still existed over twenty years after Brown.

NOTES

1. Keyes v. School District No. 1 Denver, Colorado, 413 U.S. 189 (1973)

2. Ibid.

3. 313 F. Supp. 61, 73 (1970)

4. Keyes, at 199

5 Ibid., at 201

6. 402 U.S. 1, 17-18

7. Keyes, at 208

8. Ibid., at 211

9. Margaret H. Marshall, The Standard of Intent: Two Recent Michigan Cases," Journal of Law and Education, 4 (January, 1975), 227

10. Ibid., p. 231; quoting from U. S. v. School District, 151 U. S. at 798.

11. See Chapter One

12. Marshall, p. 231

13. Above, Chapter Two, pp. 38-41

14. On this point I disagree with Marshall's interpretation of Keyes. In Keyes the availability of alternative student assignment policies was not the principal basis of the decision.

15. Keyes, at 212

16. Marshall, p. 230

17. Keyes, Douglas concurring, at 215

18. Ibid.

19. Ibid. at 216

20. Shelly v. Kraemer, 334 U.S. 1 (1948)

21. Keyes, Powell concurring, at 253

22. Ibid. at 234

23. Ibid. at 227

24. Ibid., at 234

25. Ibid., at 223

26. Ibid. at 226

27. Ibid., Powell cites Keyes, 445 F. 2d. 990; U.S. v. Board of Education, Tulsa, 429 F. 2d. 1258-59, Ibid, at 241

28. Ibid., at 249

29. Davis v. School District of the City of Pontiac, Inc. 309 F. Supp. 734 (1970), at 741

30. 311 F. Supp. 501 (1970)

31. Ibid., at 517, 518

32. Ibid., at 518

33. Ibid.

34. See for example: Soria v. Oxnard School District Board of Trustees, 328 F. Supp. 155 (1971); Davis v. School District of the City of Pontiac, Inc., 309 F. Supp. 734 (1970); Johnson v. San Fransisco Unified School District, 339 F. Supp. 1315 (1971); U.S. v. School District of Omaha, State of Nebraska, 367 F. Supp. 179 (1973); Oliver v. Kalamazoo, 368 F. Supp. 143 (1973); Morgan v. Hennigan, 379 F. Supp. 410 (1974); and Hart v. Community School Board, 383 F. Supp. 699 (1974).

35. Morgan v. Hennigan, 379 F. Supp. 410 (1974)

36. Ibid., at 427

37. Ibid.

38. Ibid., at 473, 474

39. Ibid., at 478

40. Ibid., at 473, 474

41. Ibid., at 478

42. Davis v. School District of City of Pontiac, Inc., 309 F. Supp. 734 (1970)

43. Ibid., at 739

44. Ibid.

45. Ibid., at 740

46. Ibid., at 742

47. Ibid., at 741

48. Ibid., at 744

49. Oliver v. Kalamazoo, 346 F. Supp. 766 (1972)

50. Oliver v. Kalamazoo, 368 F. Supp. 143 (1973)

51. 346 F. Supp. 766, at 771

52. 368 F. Supp. 143, at 153

53. 346 F. Supp. 766, at 780

54. 368 F. Supp. 143, at 192

55. Ibid., at 174

56. Ibid., at 172

57. Ibid., at 165, 166

58. Ibid., at 165

59. For a fuller discussion of the implications of housing discrimination, see Chapter Six, below.

60. 368 F. Supp. 143, at 172

61. Ibid., at 169

62. Ibid., at 161

63. Ibid., at 160

64. Ibid., at 163

65. Ibid., at 179

66. Ibid., at 180

67. Ibid., at 168

68. Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807 (1973); Husbands v. Commonwealth of Pennsylvania, 359 F. Supp. 925.

69. A full discussion of the issues involved in court ordered school district consolidations follows in Chapter 4. Since Hoots and Husbands concern state initiated mergers of school districts, these cases differ from those in which courts order consolidation as a remedy for inner city segregation.

70. Hoots, at 814

71. Ibid.

72. Ibid., at 816

73. Ibid., at 817

74. Ibid., at 821

75. Ibid., at 818

76. Ibid., at 823, 824

77. Husbands, at 931

78. Ibid., at 932

79. Ibid.

80. Hart v. Community School Board, 383 F. Supp 699 (1974)

81. Ibid., at 706

82. Ibid., at 711, 712

83. Ibid., at 715

84. Ibid., at 717

85. Ibid., at 723, 724, 725

86. The Court cites Green v. County School Board, 391 U.S. 430 (1968); and U. S. Commission on Civil Rights, Racial Isolation in the Public Schools (Washington, D. C.: 1967), pp. 66-70, 147-148.

87. Hart, at 720, 721

88. Ibid., at 733

89. Ibid., at 734

90. Ibid., at 737

91. Ibid., at 737; quoting from Goodman, "De Facto School Segregation: A Constitutional and Empirical Analysis," California Law Review, 60 (1972), 275, 320.

92. Hart, at 737; quoting from U.S. v. Texas Education Agency, 467 F. 2d. 848, 864 n. 22 (5th Cr. 1972).

93. Ibid., at 741

94. Ibid., the Court cites Buanche v. Board of Education of the

Town of Hempstead, 204 F. Supp. 150, 153 (EDNY 1962); Blocker v. Board of Education of Manhasset, N.Y., 226 F. Supp. 208, 229 (EDNY 1964).

95. Blocker, at 229

96. 109 U.S. 3 (1883)

97. Above, p. 68, note 41

98. Ibid.

99. Above, p. 68, note 43

100. Above, p. 68, note 41

101. Above, p. 74, note 66

102. Above, p. 77, note 75

103. Above, p. 78, note 79

104. Above, p. 82, note 91

105. "Reading the Mind of the School Board," Yale Law Journal, 86 (1976), 317 followed the Supreme Court decision in Washington v. Davis, 426 U.S. 229 (1976); see below, Chapter Five.

106. Ibid.

107. Above, pp. 35-36 ff.

108. Above, p. 71, note 51

109. Above, p. 77, note 75

110. Above, p. 83, note 95

111. Above, Chapter Two, pp. 47-48 ff.

112. Below, Chapter Six

CHAPTER FOUR

METROPOLITAN DESEGREGATION AND THE DE FACTO/ DE JURE DISTINCTION

Following the Supreme Court's decisions in Swann and Keyes, the Court's position concerning the limits of government responsibility for racial isolation in the schools and the scope of the remedies to be required for particular constitutional violations remained uncertain. Both scholars and district court judges understood and applied Supreme Court standards for identifying unconstitutional segregation in a variety of ways. District courts grappled as well with the question of the appropriate remedies once unconstitutional segregation had been found.

These issues are directly related for as the Supreme Court in Swann argued, "...the nature of the violation determines the scope of the remedy." Court decisions about the nature of the remedies to be required determine not only the extent of racial integration but serve as well as indicators of the courts' judgments about the extent of government responsibility for racially isolated schools.

The Supreme Court's decision in Milliken v Bradley[1] was the first in a series of recent Court decisions placing limits on the remedial powers available to district courts in school desegregation cases. Whether this decision represents an actual retreat or simply a block to further advance in school desegregation efforts has been a subject of some dispute.[2] For the moment we will withhold judgment.

Our analysis of the Milliken decision will focus on the inter-relationship between definitions of de jure segregation and the scope of

the remedy. The question in the Detroit case was when, if ever, may courts order metropolitan solutions for inner city segregation; that is, when can they order either the merger of city and suburban school districts or the transfer of students between school districts?

The importance of this question cannot be overemphasized because of the increasing concentration of minorities in the central cities and "white flight" to the suburbs. Simply, integration will become impossible within cities if their student populations are almost one hundred percent minority.

In addition to an extended analysis of the Milliken decision, this chapter will explore two additional district court decisions ordering metropolitan school desegregation and a Supreme Court decision upholding a metropolitan housing desegregation plan. A review of these decisions could contribute to our understanding of the true significance of the Detroit case.

The Case For Metropolitan Desegregation: Detroit

On the fundamental questions regarding the responsibilities of state authorities and the appropriateness of a metropolitan remedy for segregation within Detroit, the District Court's decisions and that of the Appeals Court will be treated as a unit.[3] Taken together these decisions provide the justifications for the consideration of a metropolitan remedy. The Appeals Court supported the conclusions of the District Court on state responsibility for Detroit segregation. It differed only on the need to allow suburban districts to be heard before their inclusion in a metropolitan desegregation plan. There was no significant conflict over the overall justification for consideration

of a metropolitan remedy.

Following an outline of the District and Appeals Court decisions, I will turn to the Supreme Court response.

Since the existence of de jure segregation within Detroit was affirmed at all court levels and since the evidence follows the pattern illustrated by the Boston decision[4] already outlined at some length in Chapter 3, I will only briefly summarize that evidence here.

Among the practices cited by the courts as indicative of de jure segregation within Detroit was the gerrymandering of school attendance zones along racial lines. "(T)he board has created and altered attendance zones, maintained and altered grade structures and created and altered feeder patterns in a manner which has had the natural, probable and actual effect of containing black and white pupils in racially segregated schools....There has never been a feeder pattern or zoning change which placed a predominently white residential area in a predominently black school zone or feeder pattern."[5] In areas undergoing racial translation, optional attendance zones were instituted allowing "white youngsters to escape identifiably 'black' schools."[6]

Testimony before the District Court showed that when Black schools became overcrowded, Black children were often transported past under-utilized white schools to other predominently Black schools.[7] In instances where Blacks were transported to white schools, "(f)or some years it was Board of Education policy to transport classrooms of black children intact to white schools where they were educated in separate classes."[8]

These actions which were inexplicable on any purely educational grounds combined with evidence of manipulation of school site selection[9] and evidence of discriminatory allocation of resources, including sub-

stantially greater overcrowding in Black schools than in white schools,[10] serve as the basis for the courts' finding that the Detroit public schools were unconstitutionally segregated -- a finding later confirmed by the Supreme Court.

The remainder of the Court decisions concerned the design of an appropriate remedy for the segregation that existed and that task, in turn, demanded additional discussion of the locus of responsibility for the segregation found in Detroit.

On the basis of statistical evidence and demographic projections for the future, the Courts concluded that a Detroit only desegregation plan would effectively produce a virtually all Black school system in the very near future.[11] To confine desegregation to the corporate limits of Detroit would "...lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs...overwhelmingly white...."[12] At the time of the Court decision, the district was already 81 percent Black and the Appeals Court agreed with the District Court's conclusion that a Detroit only plan would lead to additional "white flight" and would"... call up haunting memories of the now long discredited 'separate but equal doctrine' of Plessy v. Ferguson."[13]

Despite the real expectation that desegregation confined to Detroit would simply continue and even exacerbate racial isolation, the Courts nonetheless felt constrained to provide additional justification for their willingness to extend desegregation efforts beyond the city boundaries. The Courts discussed evidence provided to them on the role of the State government in contributing to the segregation found in Detroit and of the availability to the State of means to overcome Detroit

segregation.

A metropolitan remedy involves the crossing of state subdivision lines. If evidence could be assembled which cast doubt on the inviolability of state subdivision lines in other legitimate governmental endeavors, then a similar disregard for these boundaries in the cause of school desegregation might stand on firmer ground.

The State Government and Inner-City Segregation To begin, how was the State of Michigan involved in the operations of Detroit's schools?

Under the Michigan Constitution primary responsibility for the public schools is assigned to the state legislature. "Article VIII, Section 2, provides, in part as follows: "The Legislature shall maintain and support a system of free public elementary and secondary schools ad defined by law."[14]

The Appeals Court relied substantially on rulings of Michigan's own courts concerning the responsibility of the State for the schools. Quoting from Attorney General v. Lowrey,[15] "The School District is a State agency. Moreover, it is a legislative creation...." And in another case, Attorney General v. Detroit Board of Education,[16] "The Supreme Court of Michigan...adopted lower court language which read: Education in Michigan belongs to the State. It is no part of local self government inherent in the township or municipality, except as the legislature may choose to make it such. The Constitution has turned the whole subject over to the legislature."[17]

Additional Michigan Court cases were cited to support the contention that in Michigan ultimate responsibility for the schools resided in the State government.[18] But should the evidence of constitutional respon-

sibility be insufficient to negate any assumption that schools were the primary responsibility of local government, the Courts pointed to legislative actions operationalizing State control. Under the authority of Public Act 289, which required all school districts to institute K - 12 systems, 1438 public school districts were consolidated into 738 districts, "...meaning that 700 school districts in Michigan have disappeared since 1964 through reorganization."[19] Other mergers were apparently instituted in Michigan for the purposes of broadening local tax bases, some of which included mergers across county lines.[20]

In the districts included under the District Court's metropolitan desegregation plan, the State of Michigan's contribution to the education budget in the 54 districts averaged 34 percent. In eleven of the 54 districts contributions exceeded 50 percent, in eight districts the contributions exceeded 40 percent.[21]

The evidence, then, pointed to a pattern of the State's superceding school district boundaries in the interests of administrative convenience and as a means to expand tax and population bases to support schools. Additionally the State was shown to have played a substantial direct role in the financing of school operations. Clearly, then, if the State had so chosen it could have played a major role in breaking down racial segregation in its schools.

The Courts, however, took their inquiry into the State's role one step further. They pointed to a direct link between State government policy and the segregation found in Detroit. In 1970 there had been some tentative steps within Detroit to reverse the ever increasing racial isolation in its schools. On April 7, 1970, the Detroit Board of Education adopted a plan for a "more balanced distribution" of Black and

white students in the senior high schools.[22] In response to this plan, the Appeals Court noted that "...the State exhibited its understanding of its powers over local school districts by the adoption of Act 48 of the Public Acts of 1970 which repealed.../the/ high school desegregation plan previously adopted by the Detroit Board of Education."[23]

Further, to the degree that school construction policy within and without Detroit contributed to school segregation, responsibility can be imputed to the State because all school construction in Michigan must be approved by the State. "Prior to 1962 the State Board also had specific statutory authority to supervise school site selection."[24] The District Court found that

> school construction...throughout the metropolitan area have added to and reinforced the pattern of segregation....Although there were vacant seats throughout the city to which students could have been assigned at lesser cost and with the achievement of integration, continued sums were expended for construction of new schools designed to service particular areas of racial concentration, and such schools opened as and have continued to be racially identifiable in violation of the Fourteenth Amendment.[25]

Because of the evidence cited above showing instances where the State was willing to disregard district lines for reasons of convenience and financial viability, the District Court appears to conclude that the failure to do likewise here is indicative of deliberate segregation. Evidence concerning school construction is "...therefore largely applicable to show state responsibility for segregative results."[26]

State provision of transportation might have aided Detroit in overcoming the effects of neighborhood segregation and school site selection, but Detroit was specifically denied State school transportation funds, "...although such funds were made generally available for students

who lived over a mile and a half from their assigned schools in rural Michigan."[27]

Finally the one instance of interdistrict segregatory action, the busing of Black students from a suburb outside Detroit to Black schools within Detroit, required the expressed approval of the State Board.[28]

Clearly the State did have an active role in the operation of the school systems of Michigan, and in several instances there is evidence of a direct role in the creation and maintenance of segregation within the Detroit public schools. But even in the absence of such direct evidence the Courts might well have concluded that the State government was responsible for the segregative actions of the Detroit board. "School districts in the State of Michigan are instrumentalities of the State and subordinate to its State Board of Education and Legislature.... Hence the segregative action and inaction of the Detroit Board of Education... are the actions of an agency of the State of Michigan."[29]

Housing Segregation And Its Impact On The Schools Still another consideration before the Court was the question of the causes of the racial differences between the population of Detroit and its suburbs.

The District Court decisions recognized that the causes of residential segregation both within and without Detroit were several and complex.

> The city of Detroit is a community generally divided by racial lines. Residential segregation within the city and throughout the larger Metropolitan area is substantial, pervasive and of long standing. Black citizens are located in separate and distinct areas within the city and are not generally to be found in the suburbs....
>
> Governmental actions and inaction at all levels, federal, state and local, have combined, with those

> of private organizations, such as local loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area.[30]

The Court noted elsewhere that the interaction between housing segregation and school segregation has long been recognized and, indeed, formed the basis of federal housing policies. In support of its position the Court quoted from an FHA 1936 Manual's discussion of the relationship between the demographic make-up of a neighborhood and schools: "If... children...are compelled to attend school where the majority or a good number of the pupils represent a far lower level of society or an incompatible racial element, that neighborhood under consideration will prove far less stable and desirable than if the condition did not exist." (emphasis added)[31]

According to the Court segregated housing is not solely the result of private initiative or choice. In this case the District Court confined its conclusions to the role of the school board. "The affirmative obligation of the defendant board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporating into the school system the effects of residential racial segregation."[32]

The Appeals Court while noting the evidence of a substantial government role in housing segregation confined its judgement upholding the finding of constitutional violations by both the Detroit and State defendants to the part that the "...school construction program /played in helping/ ...cause and maintain such segregation."[33] Whether or not state housing policies themselves were unconstitutional, the grafting of school attendance zones on segregated residential areas was unconstitutional.

A Metropolitan Remedy To this point the courts have concluded that there was a substantial discrepency between the racial make-up of the population of Detroit and its surrounding suburbs and that the responsibility for the schools of Detroit was not the exclusive province of the Detroit Board of Education but was shared by the State of Michigan. The question still to be answered is: does the fact of a racially isolated Detroit school system combined with a considerable State role in Michigan education mandate a remedy that only the State can provide, i.e., one which by-passes state subdivisions.

According to the District Court an integration plan confined to Detroit was destined to fail,[34] and the Appeals Court found that it was "...impossible to declare 'clearly erroneous' the District Judge's conclusion that any Detroit only desegregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all its schools, surrounded by a ring of suburbs...overwhelmingly white..."[35] In support of this judgment the Appeals Court argued that a plan confined to Detroit "...would change a school system which is now Black and White to one that would be perceived as Black, thereby increasing the flight of Whites from the city and the system, thereby increasing the Black student population."[36]

In fashioning a remedy, therefore, the Courts went beyond the boundaries of Detroit. In doing so they moved outside the jurisdiction of Detroit school officials. But as already noted, "the record establishes that the State has committed de jure acts of segregation and that the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts."[37]

Metropolitan approaches to various governmental functions are

quite common in Michigan.[38] There is nothing inherent in the educational process that mandates that it be treated differently. The Court concluded, therefore, that "...there has been no showing that the existing school district boundaries are rationally related to any legitimate purpose, and the Court finds that the particular welter of existing boundaries for 86 school districts is not necessary to the promotion of any compelling state interest."[39]

Finally the Court argued:

> If a state is constitutionally forbidden to institute a system of racial segregation by the use of artificial boundary lines, it is likewise forbidden to perpetuate a system whose effect is to maintain segregation. There is no legally vested interest in segregation. If there were, the Brown v. Board of Education and the numerous decisions based on that case would be pointless. Courts will not say in one breath that public school systems may not practice segregation, and in the next that they may do nothing to eliminate it.... The historic fact is that existing conditions are based on a design to segregate the races. To hold that segregation, once accomplished, is sacrosanct and beyond Constitutional reach, is to say that the U. S. Constitution and its amendments, and their provision for equality, are mere rhetoric.[40]

This quotation from the District Court's opinion highlights two fundamental issues which would later come before the Supreme Court in its review of this case. First, although there was little question that the segregation within Detroit was de jure was the disparity in racial population between the schools of Detroit and its suburbs similarly a result of a "design to segregate the races?" And second, if the Supreme Court would not be satisfied that de jure segregation between Detroit and its suburbs was proved, would it nonetheless accept a metropolitan remedy as within the power of the State to provide and therefore required

to achieve "maximum feasible desegregation?"

As already argued the existence of unconstitutional segregation within Detroit was affirmed by Courts at all levels. The question now before the District and Appeals Courts is the specific justification for a metropolitan remedy. Evidence has been outlined earlier concerning State support for school construction in the suburbs when space was available in Detroit schools. Additionally there was one instance of interdistrict transportation of Black students from a suburb to a Black school in Detroit -- bypassing nearer available white schools. Both the District and Appeals Court noted the role of various governmental entities in furthering housing discrimination and thus indirectly school segregation. But the Appeals Court specifically confined its condemnation to the interaction between school construction policies and neighborhood segregation without making a judgment about the propriety of the governmental role in housing decisions themselves.

With the possible exception of the transfer of the Black suburban students to Detroit, there appeared to be no direct evidence of intentional government action to maintain or increase segregation between the schools of Detroit and its suburbs. There was, however, clear evidence of a failure by the State to take the least segregative steps available in its supervision of the schools of the Detroit metropolitan area.

As described in Chapter Three, similar evidence when presented concerning the internal governance of a school district was in several instances deemed sufficient to find segregative intent. In this case one could argue that "the natural, probable, forseeable and actual effects..." of state approved school construction decisions and state

allocation of school transportation funds made integration difficult within Detroit and "white flight" from Detroit to the suburbs probable.

Although school officials, themselves, are not directly responsible for housing discrimination, the discussion in Chapters Two and Three provided possible grounds for nevertheless holding them responsible for the effects of housing segregation on the racial make-up of the schools. According to the "cumulative impact" theory outlined by Derrick Bell and Owen Fiss school officials cannot escape responsibility for school segregation by adopting a neighborhood school policy and attributing the resulting segregation to residential segregation over which they exercise no control. Similarly, in Hart v. Community School Board, the District Court concluded that the use of residential student assignment criteria even in communities where housing is segregated by purely private action "...constitutes a racial classification once-removed."[41]

In the first of several decisions concerning the Detroit case, the District Court addressed this question with specific reference to segregated neighborhoods within Detroit but nonetheless applicable as well to segregation between Detroit and its suburbs.

> The policies persued by both government and private persons and agencies have a continuous effect upon the complexion of the community -- as we know, the choice of residence is a relatively infrequent affair... The conditions created continue. While it would be unfair to charge the present defendants with what other government officers and agencies have done, it can be said that the action or failure to act by responsible school authorities, both City and State, were linked to that of other government units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition which exists.[42]

To understand what alternatives were potentially available to school officials, we need only note evidence already cited of state

consolidation and reorganization of school districts for purposes other than integration. For example, the State could have continued to utilize available space in Detroit schools rather than providing new schools in the suburban ring to absorb (and possibly attract) "white flight" to the suburbs. In any case in light of its powers over school districts, the Court concluded that the State could not "...escape its constitutional duty to desegregate the public schools of the City of Detroit by pleading local authority."[43]

The conclusion, then, was clear, since the State government was itself, in part, responsible for segregation within Detroit because of the actions of its agents, its approval of school construction plans, and rescission of the voluntary desegregation plan, and since it had the power available to it to remedy the situation, the State was required to avail itself of those remedies.

There was, however, a final consideration occasioned by the District Court's explicit recognition that it had "...taken no proofs with respect to the establishment of the boundaries of the 86 public school districts..., nor on the issue of whether, with the exclusion of the city of Detroit School District, such school districts have committed acts of de jure segregation."[44] In light of this fact was it nonetheless appropriate to supersede those boundaries in fashioning a remedy for segregation within Detroit? The Court's answer was yes, and the Appeals Court supported this conclusion by refering to the Supreme Court decisions in the United States v. Scotland Neck City Board of Education and Wright v. Council of City of Emporia cases[45] in which "the Supreme Court has held that school boundary lines cannot be changed or new school systems created where the result is a larger

imbalance in racial ratios in school systems where all vestiges of enforced racial segregation has not been eliminated (Scotland)...This is true regardless of 'dominant purpose.' (Wright)"[46]

The purport of the Appeals Court's position was that if maintenance of existing school boundaries would impede the elimination "root and branch /of/ the effects of state-imposed and supported segregation,"[47] then the boundaries must fall regardless of the purpose behind their establishment.

Metropolitan Desegregation Rejected: The Supreme Court's Detroit Decision

The decision of the Supreme Court focused on the justifications for the broad scope of the remedy prescribed for segregation within Detroit. The fact of de jure segregation within Detroit was affirmed, and the existence of some State responsibility for that desegregation was not denied. But the Supreme Court majority rejected any necessary link between a finding of State government responsibility for segregation within Detroit and a requirement that the State devise a remedy which includes districts outside Detroit.

I will begin my analysis of the majority opinion by reporting the Court's analysis of the role of the State government in Detroit segregation. To begin the Court did not deny that the State had played some role in the segregation of the Detroit public schools, but Chief Justice Burger asserted that the State's discriminatory action was largely confined to one district and therefore, there was no justification for applying a remedy which went beyond that district.[48]

Burger responded to what he described as five factors mentioned in the Appeals Court decision which amounted to unconstitutional State

government action. First, the Appeals Court held that states are "derivatively responsible" for the violations of their subdivisions. Burger did not contest this, but he asserted that this alone did not establish a requirement of a remedy involving more than the subdivision in which the discriminatory action was found.

Second, he noted that the lower courts' contention that Black students had been transported with State approval from a suburb beyond nearby white schools to Black schools in Detroit, but he asserted that this single example affecting one suburban school district did not justify a desegregation plan involving 51 districts.

Third, the State's rescision of the Detroit school board's desegregation plan in 1970 directly affected only 12 of Detroit's 21 High Schools,[49] but regardless of the number of schools involved, it had only an intradistrict effect.

On the question of the State's role in school construction and site selection, Burger contested the Appeals Court position that construction policies had "fostered segregation throughout the Detroit Metropolitan area" arguing that such a conclusion was not supported by the evidence produced at the trial "which confined evidence to segregation within Detroit."

Finally, the majority per Burger rejected the Appeals Court's reliance on District Court's findings that "...financial limitations, such as those on bonding and the workings of the State aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effect, have created and perpetuated systematic educational inequalities."[50] He argued simply that there had been no showing how this affected the racial character of the schools.

The Court's refusal to judge the factors cited above as sufficient grounds for an interdistrict remedy was based on its reading of Brown II and more particularly Swann in which Burger asserted that "...a federal remedial power may be exercised 'only on the basis of a constitutional violation' and "as with any equity case, the nature of the violation determines the scope of the remedy."[51]

Burger argued that the District Court's metropolitan remedy was based not on a metropolitan wide policy of de jure segregation, but on a belief that a remedy confined to Detroit would not have produced "the racial balance which they perceived as desirable"[52] despite the fact that Swann had clearly rejected a requirement of a "rigid racial balance."[53] His conclusion was simply that "...without an interdistrict violation and an interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."[54]

Finally it was the contention of the Burger majority that a metropolitan remedy would produce practical problems and would be contrary to the American tradition of local control of education. Despite the findings by the District and Appeals Courts of substantial state involvement in Michigan education, Burger asserted: "Local autonomy has long been thought essential both to the maintenance of community control and support for public schools and to the quality of the educational process."[55] Referring to the earlier Supreme Court ruling rejecting any constitutional requirement for the equalization of financing among a state's school districts, Burger argued that "...in San Antonio School District v. Rodriguez, 411 U.S. 1, 50, we observed that local control over the educational process affords citizens an opportunity to participate in decision making, permits the structuring of school programs to fit

local needs, and encourages 'experimentation, innovation and a healthy competition for educational excellence.'"[56]

In emphasizing the importance of local control over education Burger in effect contested the District Court's conclusion that existing school district boundaries had not been shown to be "rationally related to any legitimate purpose."[57] To Burger local control over education might be essential to educational quality.

Additionally, for a Court to attempt to supersede such local authority would raise a series of practical difficulties. Some examples cited by Burger involve questions of taxing authority, drawing of attendance zones, purchasing school equipment, and locating and constructing new schools.[58]

Burger failed to mention that such problems are in many ways analogous to those faced by courts in dismantling dual school systems throughout the South. But undeniably the scope of the undertaking would likely be greater in a single metropolitan area the size of Detroit. Under these conditions the Court expressed concern that the District Court would assume the role of a "de facto legislative authority."[59]

In effect the Supreme Court majority rejected the position of the District Court that school district boundaries were a mere convenience.[60] Rather local authority over schools was deeply rooted in the American system. Without a clear showing of an interdistrict violation, there would be no interdistrict remedy. "The remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occuppied in the absence of such conduct."[61] By implication, then, Chief Justice Burger concluded that had there never been any State governmental action fomenting or maintaining

segregation in Detroit, there would still be a largely Black central city surrounded by a predominently white suburban ring.

Before considering the views of the dissenters in Milliken, I will first briefly review the concurring opinion of Justice Stewart. Stewart's concurrence was less sweeping in tone than the opinion of Burger, and it is widely interpreted as outlining the kinds of evidence which the Court might accept as sufficient to order metropolitan relief for segregation. Stewart appears to have placed less emphasis on the importance of local control of the schools than did the Chief Justice.

According to Stewart, the only issue in this case was "the appropriate exercise of federal equity judgment," and like Burger he concluded that in this case a metropolitan remedy was "not commensurate with the constitutional violation."[62] He went on, however, to outline conditions under which such a remedy would have been appropriate: "Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines...; by transfer of school units between districts..., or by purposeful racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or restructuring of district lines might be appropriate."[63]

He specifically noted that evidence had not been produced to support any conclusion that Blacks had been confined to the central city by state action. Like Burger, he concluded that sufficient evidence of interdistrict effect of state action had not been shown.

Two of the three dissents were joined by all four dissenters,[64] those of Justices Marshall and White. Because of the similarities in

their arguments, I will treat them as a unit.

All the dissenters argued that the evidence was sufficient to affirm the District Court order for a metropolitan remedy. Probably the most significant difference between the dissenters and the majority was over the importance of the role of the State government. Justice Marshall contended that the trial court found sufficient evidence for its conclusions that: 1) the State government, itself, took discriminatory action; 2) school boards are agents of the State Government; and 3) that under Michigan law education is a State function -- Michigan had a state school system.[65] In the words of Justice White, therefore, "there is no acceptable reason for permitting the party responsible for the consitutional violations to contain the remedial power of the federal courts within administrative boundaries over which the transgressor has plenary power."[66]

In response to Chief Justice Burger's emphasis on the special place of local control over education in the American system, Justice White cites a reapportionment decision, Reynolds v. Sims:[67] "Political subdivisions of States -- Counties, cities, or whatever -- never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of State governmental functions."[68]

Referring specifically to Michigan, Justice Marshall observed that the schools of Michigan were "...characterized by relatively little control and a large degree of centralized State regulation, with respect to both educational policy and the structure and operation of school districts."[69] He pointed out the significant fact that of the 85 school

districts within the Detroit metropolitan area a substantial number already failed to correspond to existing local political subdivision boundaries. Seventeen of the 85 districts lie in 2 counties, 2 in 3 counties, 1 serves 5 municipalities, and other municipalities are fragmented into as many as 6 districts. Throughout the State as a whole the size of school districts ranges in size from 2,000 to 285,000 students. In sum, exact correspondance of school districts to local governmental units was not an unbroken rule.[70] It was within the existing power of the State to consolidate school districts without the consent of localities.[71]

The next task before the dissenters was to provide justification for the State to be required to use its powers to supersede district boundaries in the interest of desegregation. According to White, the Chief Justice was incorrect when he asserted that the remedial power of the courts was designed "to restore the victims of discriminatory conduct to the position they would have occuppied in the absence of such conduct."[72] Rather restoring the situation to what it would have been absent a constitutional violation was impossible according to White. The goal before the Court has been maximum desegregation, the elimination of the dual school system "root and branch."[73]

Such an effort according to Marshall's reading of Swann required district courts to "...take into account the existence of extensive residential segregation in determining whether a racially neutral 'neighborhood school' attendance plan was an adequate desegregation remedy, regardless of whether this residential segregation was caused by state action."[74] The Court need not, as Stewart contended, have inquired into whether the State had a role in residential segregation

between Detroit and the suburbs, rather the proper inquiry was whether the elimination of segregation "root and branch" was possible without compensating for residential segregation in formulating a school desegregation plan. Such, according to Marshall, had been the Court's position in Swann.

The District Court never claimed to be eliminating racial segregation in the suburbs. "Instead, inter-district relief was seen as a necessary part of any meaningful effort by the State of Michigan to remedy the state-caused segregation within the City of Detroit."[75]

According to both Marshall and White, at no point in its decision "does the majority confront, let alone respond to, the District Court conclusion that a remedy limited to the city of Detroit would not effectively desegregate the Detroit city schools."[76] In the interest of avoiding undue administrative inconvenience to the State of Michigan, the majority prefered a Detroit only remedy despite the fact that according to the unchallenged position of the District Court, an inter-district remedy "is physically easier and more practical and feasible, than desegregation efforts limited to the corporate geographic limits of the City of Detroit."[77] For example, while a Detroit only plan would require 900 new buses, a metropolitan plan would require no more than 350.[78]

In sum the dissenters argued that because of the State's involvement in segregation within Detroit, because of the availability to the State of the unquestioned power to provide a metropolitan remedy, and because of the impossibility of the effective elimination of racially identifiable schools within the confines of Detroit, a metropolitan remedy was both necessary and appropriate. In the words of Justice

White: "the Court fashions cut of whole cloth an arbitrary rule that remedies for constitutional violations occurring in a single Michigan school district must stop at the school district line."[79] Burger's formulation was, according to Marshall, "...more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantees of equal justice than it is the product of neutral principles of law."[80]

Milliken: Some Preliminary Conclusions The Supreme Court decision in Milliken clearly placed important restrictions on the scope of desegregation efforts. In order to cross the boundaries of political subdivisions, a step essential to bring substantial numbers of Black and white students together in school in the metropolitan areas of America, evidence must first be presented to show that those boundaries amount to artificial constructions of public authorities in pursuit of racial segregation.

What, if anything, did the Milliken decision indicate about the status of the de facto/de jure distinction? According to the Supreme Court, because no evidence had been presented indicating that the school district boundaries separating Detroit from its suburbs had themselves been a result of a deliberate State attempt to advance segregation, the Court would consider the disparity between the racial composition of the Detroit schools and those of the suburbs to amount to de facto segregation. The District and Appeals Courts, on the other hand, emphasized the state's acquiescence in the racial segregation and the availability of means to alleviate the segregation between Detroit and its suburbs. In effect the District and Appeals Courts argued that the failure of the State to avail itself of remedies for segregation, which the state

had helped create, would amount to a continuation of de jure segregation.

To the Supreme Court majority, the State of Michigan's desire to continue the separation of the Detroit school system from the suburban school systems was readily explainable on educational grounds, and therefore any racially segregatory side effects need not be considered indicative of segregatory intent. To the lower courts, on the other hand, because the maintenance of separate school districts would have a demonstrably segregatory effect, its continuence could only be justified by some "compelling state interest." To both the lower courts and the dissenters on the Supreme Court, the maintenance of the particular set of local school districts in the Detroit metropolitan area did not constitute a "compelling state interest."

Milliken may have marked the beginning of a Supreme Court effort to draw new standards limiting the remedies available for school segregation. In both Keyes and Swann and in the decisions of District Courts discussed in the last chapter, the Courts generally demanded a level of integration that went beyond merely compensating for past instances of segregation. That is, the Courts in those cases did not order more compensatory action for proven segregatory action rather they ordered system-wide integration on the basis of evidence of deliberate state segregatory actions substantially narrower in scope.[81] Once segregative action had been found affecting significant elements of a school system, school officials were ordered to the degree practical to end all segregation within the school system. Despite the fact that segregation was proved within Detroit resulting in part from the actions of State government officials, the Supreme Court rejected any remedial steps involving the surrounding school districts which were equally

under the jurisdiction of the State of Michigan. The Court came to this position despite the fact that the lower courts had concluded that desegregation would be physically easier and more effective were it to cross school district lines.

A question to be investigated shortly is whether the Supreme Court would go on to apply this case's limitations on the scope of the remedy to cases involving single districts in which the evidence of de jure segregation affects directly only a portion of such districts. To do so would be to significantly restrict the thrust of both Keyes and Swann.

For the moment in order to understand the true significance of Milliken it is appropriate to investigate in some detail two cases which reached the Supreme Court subsequent to Milliken, but which also involved metropolitan remedies.

Applying Milliken: Wilmington, Delaware

Subsequent to its decision in Milliken the Supreme Court was confronted with two District Court decisions ordering metropolitan desegregation. The District Court decision concerning the schools of Indianapolis, Indiana preceded the Supreme Court ruling concerning Detroit; the Wilmington, Delaware case followed the Supreme Court decision. Both District Court decisions would raise questions about not only the issue of metropolitan desegregation but about the de facto/ de jure distinction.

In both the Indianapolis and Wilmington decisions, the issue before the Courts was whether the States could justify excluding the two city school districts from general school district consolidation schemes when

to do so would leave undisturbed identifiably Black urban school districts surrounded by predominently white suburbs. Since the actual situations of the two cities are not identical, the cases will be considered separately.

The City of Wilmington was an original party to the Brown v. Board of Education decision. The desegregation process within the the city followed a pattern typical for the South and in Wilmington that process was accompanied by "white flight." Before desegregation began, the schools were 28 percent Black and 72 percent white; by 1973 the balance had shifted to 83 percent Black and 19 percent white.[82] Despite the achievement of facially neutral geographic attendance zones, "all of the pre-Brown colored schools that remained open continued to be operated as virtually all-black schools....From 1956-73, no de jure black school had a black enrollment of less than 91% in any year." As a result, the Court concluded "...that the presence of these schools is a clear indication that segregated schooling in Wilmington has never been eliminated and that there still exists a dual school system."[83]

Despite the large Black majority in the city schools, the Court did not initially rule out a "Wilmington-only" plan. In its second "remedy" decision, however, the Court took up the question of a metropolitan remedy. In so doing, however, the Court took note of the Supreme Court decision on Milliken which limited the availability of metropolitan relief. As a result of Milliken the Court considered itself "...authorized to consider desegregation relief embracing more than the Wilmington district only upon findings either that the school districts in New Castle County are not meaningfully separate and autonomous, or that there have been racially discriminatory acts of the state

or of local school districts causing interdistrict segregation."[84]

Evidence of Intercity Segregation The Court found substantial evidence that particularly in the pre-Brown days of the dual school system, the New Castle County school districts were not totally autonomous. Despite the fact that many of the current suburban school districts had "historic antecedents, "...during the period before Brown I, there was substantial interdependence of the Wilmington and suburban school systems."[85] Although some suburban Black children attended schools within the suburbs, in the pre-Brown period "...the number of black children crossing district lines into Wilmington indicates that to a significant extent, black schools in Wilmington under the de jure system were schools for black children from throughout New Castle County."[86] The Court noted that some white students as well crossed district lines during this period. On the basis of this evidence, the Court concluded that "de jure segregation in New Castle County was a cooperative venture involving both city and suburbs -- not meaningfully separate."[87]

In more recent years following steps to abolish the dual school system throughout New Castle County, the state had nonetheless continued to subsidize "...inter-district transportation of students to private and parochial schools" -- thus facilitating "white flight" from Wilmington's "desegrated" public school system.[88]

On the basis of the evidence reported thus far, the Court concluded that despite the fact that the municipal boundaries of Wilmington and its school district had been coterminous for many years and "...historic community boundaries should be given substantial weight...,the Wilmington

school district boundaries were historically permeable."[89]

The Role of Housing Segregation and White Flight Having shown an historic link between the Wilmington and suburban schools, the Court next attempted to show the link between housing segregation and school segregation. The fact was that since the 1950's the districts had operated largely as independent units. And

> /T/he suburban districts have, for the past several years, operated unitary schools for the children residing within their districts. Nonetheless, because since Brown governmental authorities have contributed to the racial isolation of city from suburb, the racial characteristics of city and suburban schools are still interrelated....
>
> /G/overnmental authorities have elected to place their power, property, and prestige' behind the white exodus from Wilmington and the widespread housing discrimination pattern in New Castle County....The specific effect of these policies was to restrict the availability of private and public housing to blacks in suburban New Castle County at a time when housing became increasingly available to them in Wilmington.[90]

As examples the Court noted that up to 1975 the Wilmington Housing Authority had the authority to build publically assisted housing up to five miles beyond the city limits. The Authority, however, actually operated 2,000 units in Wilmington and only 40 in the suburbs. At the same time the New Castle County Housing Authority which was created in 1972 failed to build any suburban units partially because of neighborhood opposition and failures to obtain necessary zoning changes.[91]

The Court observed that Blacks are three times as likely as whites to be of low income status. "Thus it is unlikely that if publically assisted housing were built in the suburbs, the units would be occupied primarily by low-income whites."[92] For this reason the failure to build low income housing in the suburbs had a segregatory effect.

The Court took note of other governmental actions and governmentally sanctioned private actions. For example, within New Castle County racially restrictive covenants were recorded in real estate deeds until 1970, and up until 1970 the state licensing agency published the "code of ethics" of the National Association of Real Estate Boards which read in part: "A realtor should never be instrumental in introducing into a neighborhood...members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values...."[93]

On the basis of this evidence the Court concluded that to "...a significant extent...the net outmigration of white population in the last two decades, resulted not exclusively from individual residential choice and economics, but also from assistance, encouragement and authorization by governmental policies."[94]

It is important at this point to once again take notice of Justice Stewart's concurring opinion in Milliken. In his opinion he stated that "...purposefully racially discriminatory use of state housing law..."[95] might make appropriate an interdistrict remedy for resulting school segregation. Whether the specific housing evidence in Wilmington, taken alone, would be sufficient for the Court to order an inter-district remedy is by no means clear, but in light of Milliken such evidence is definitely relevant.

The Feasibility of a "Metropolitan" Plan An additional concern to the Court in light of Milliken was the question of the feasibility of a metropolitan remedy for Wilmington segregation. The Court noted "language in Milliken stressing the mechanical infeasibility of inter-district desegregation in Detroit,"[96] but it also took note of the fact

that the Detroit metropolitan area had ten times the population of New Castle County.[97] That the State legislature might conclude that "reorganized school districts should not have enrollments greater than 12,000 is certainly rational," but the Court argued that "...a substantially greater maximum district size would also be rational." The State's limit on the size of school districts which effectively excluded Wilmington from consolidation plans was not, according to the Court, "sufficiently compelling to justify racial classifications."[98]

The Court obviously had concluded that the exclusion of Wilmington from consolidation plans constituted a racial classification. For the remainder of our discussion of the Wilmington case, we will focus on the question of what it was about the exclusion of Wilmington that constituted unconstitutional segregation. This discussion will be important if we are to begin to make sense out of the Supreme Court's tacit acceptance of the Wilmington decision, its rejection of the Detroit plan, and subsequent vacating and remaining of the Indianapolis plan which will be discussed shortly.

Wilmington and the "de facto"/"de jure" distinction There was little question that the State government had an historic role in the segregation of the Wilmington public schools, the question really was whether the State could withhold the one remedy that held significant promise of effectively desegregating those schools. We must keep in mind that de jure segregation had already been proven in Wilmington. Simple demographic statistics indicated the effect that the exclusion of Wilmington from metropolitan desegregation would have on segregation in Wilmington. The question then is simply is the fact of segregatory effect

sufficient grounds to establish a constitutional violation.

The Court itself stated that it could not "...conclude, as plaintiffs contend, that the provisions excluding the Wilmington district from school reorganization were purposefully racially discriminatory."[99] The legislation in question focused primarily on the fate of small weak school districts. "No language in the provisions at issue make any reference to race, nor evidently, did the legislative debates over the act contain any reference to race. Finally, all Wilmington legislators, black and white, voted for the Educational Advancement Act."[100] Nonetheless, the Court concluded that "effective, as well as intentional racial classifications...require special scrutiny under the equal protection clause..."[101]

Citing Supreme Court decisions on state electoral districting which had the effect of cancelling or minimizing the voting strength of racial minorities as well as decisions concerning facially neutral state administrative procedures having the effect of racial classifications, the Court concluded that a finding of discriminatory intent is not essential. "in sum, where a statute, either explicitly or effectively, makes the goals of a racial minority more difficult to achieve than other related governmental interests, the situation embodies a suspect classification and requires a particularly strong justification."[102]

The implication is that there is some affirmative duty of government officials to include the advancement of the specific interests of racial minorities as an integral part of its decision-making process. The Court noted that in Swann the Supreme Court explicitly recognized the propriety of school authorities considering the racial consequences of major educational policy decisions, "even though a policy favoring

integration may not be constitutionally required."[103]

Racial considerations, were, however, omitted from the criteria to be considered by the State Board of Education in reorganizing school districts.

> The Educational Advancement Act...precluded the State Board from considering the "integrative opportunities" of redistricting in New Castle County in any meaningful way....Section 10003 of the Act enjoined the Board to adopt explicit reorganization criteria in the following areas of legislative educational concern: "topography, pupil population, community characteristics, transportation of pupils, use of existing school facilities, and the capability of providing a comprehensive program of efficient and effective education." To the extent that "racial characteristics" was effectively excluded from the list of legitimate educational criteria for reorganization, the exclusion of Wilmington from the Board's power under the Educational Advancement Act constitutes a suspect classification.
>
> ...It is clear that the Act made consolidation promoting racial balance substantially less accessible than other educational strategies. Because the Educational Advancement Act, racially neutral on its face, had a significant racial impact on the policies of the State Board of Education, it constitutes a suspect classification.[104]

Ultimately what this Court decision amounts to is a judgment that the Educational Advancement Act inhibited meaningful desegregation in a de jure segregated school district. As we have seen, there was evidence linking the State and the surrounding communities to the long established policy of de jure segregation within Wilmington. What is significant here, however, in our quest to understand the limits of government involvement in segregation is the clear message of the decision, that is; that government policies which are neutral on the face; policies which have the support of both Black and white legislators, can nonetheless

be considered discriminatory when they serve to limit the availability of realistic options for integrated education. There may indeed be an affirmative constitutional duty to pursue racial integration, but certainly any government action tending to make the achievement of meaningful integration difficult or impossible is, at least, constitutionally suspect.

At this point, however, a word of caution is appropriate. Wilmington had been an indisputably de jure segregated school system, and the Court summarized evidence of both suburban and state involvement in that segregation. Despite the expansive language, it may well simply have been the case that failure to consider integrative alternatives was condemned here primarily because that failure contributed to the continuance of state enforced segregation. Standing alone, such a preemption of redistricting possibilities might have gone unchallenged by the Court.

The Wilmington decision, then, could be read narrowly as simply applying the mandate of Milliken that the scope of the remedy must be comensurate with the scope of the violation. The State of Delaware was responsible for segregatory actions having clear interdistrict effects, and State housing policies appear to have contributed to residential segregation between Wilmington and its suburbs.

Whether standing alone the interdistrict aspects of de jure segregation in Wilmington would have led the District Court to order an interdistrict remedy, however, is not at all certain. The Court seemed to place greater emphasis on the mere fact of the exclusion of Wilmington from the State's district consolidation plans. "Even though the State Board may not have been required to alter the Wilmington District, the

Court cannot find that the exclusion from the Board's powers was racially insignificant." [105]

To the Court the exclusion of Wilmington itself constituted "... an inter-district violation under Milliken." [106] Yet at the same time the Court admitted it could not "...conclude...that the provisions excluding the Wilmington District from school reorganization were purposely racially discriminatory." [107]

In sum, the constitutional violation upon which the Court based its decisions appears not simply to have been the interdistrict aspects of Wilmington segregation, rather it was the continued segregatory effect of the State's failure to include Wilmington in consolidation plans which applied elsewhere in the state and which, when denied Wilmington, had a segregatory effect.

My renewed emphasis on segregatory effect vs. segregatory intent serves as a prelude to the discussion of the Indianapolis case which follows below. The Supreme Court rejected a metropolitan remedy for Indianapolis in the absence of explicit evidence of segregatory intent. While the Wilmington decision concerned the exclusion of the City of Wilmington from a state wide policy of school district consolidations across political subdivision lines, the Indianapolis case involved the exclusion of the schools of the City of Indianapolis from a metropolitan government plan which generally merged city/suburban functions except for schools.

The Indianapolis Decision

In deciding whether Indianapolis was a de jure segregated school system, the Court ruled that the plaintiffs in the case had met the dual burden of proving that Indianapolis was a de jure segregated system at the time of Brown in 1954 and that the school board had failed to eliminate de jure segregation at the time of the initiation of this case in 1968. Again, following the now familiar pattern, the school board of Indianapolis had among other things initiated approximately 350 boundary changes in the system since 1954 and more than 90% of these changes were found to have promoted segregation.[108] Additionally the Board transported "students from overcrowded schools of one race to schools of the same race rather than to available nearby schools of the opposite race."[109]

The question before the Court in this case as in the Detroit and Wilmington cases was the scope of the appropriate remedy. A directly related question was whether or not the State's exclusion of the Indianapolis school district from a metropolitan plan of government affecting other governmental functions between Indianapolis and its suburbs constituted de jure segregation.

Despite a long standing State policy to the effect that "the boundaries of a school city and of a civil city were coterminous," the legislature of Indiana in 1961 and 1969 provided for an exception for the school city of Marion County. The so-called "Uni-Government Act" provided for the consolidation of the civil governments of Indianapolis and Marion County "into a unified, metropolitan, city government, with certain exceptions....The Uni-Government Act provides expressly that 'any school corporation, all or part of the territory or

which is in the consolidated city or county' shall not be affected by the act."[110] The effect of this action was to confine the Indianapolis school district to the original boundaries of the City of Indianapolis despite the fact that the authority of the municipal government was extended to include other areas of Marion County.

The issue before the Court was what effect this legislation would have on efforts to accomplish the desegregation of the Indianapolis Public Schools. If allowed to stand, the legislation would confine desegregation to the original boundaries of the City of Indianapolis. Would this hamper the desegregation effort?

The Court considered the likelihood of success if desegregation was confined to the city boundaries. "...(T)he easy way out for the Court and for the Board would be to order a massive 'fruit basket' scrambling of students within the School City..., to achieve exact racial balancing...There is just one thing wrong with this simplistic solution, in the long haul, it won't work."[111]

In concluding that such a plan would fail, the Court raised the related issues of "tipping point" and "white flight."[112] It is assumed on the basis of the experiences of cities around the country that when the proportion of Black students in the schools reaches a certain level whites almost inevitably leave the schools at an accelerating rate until the schools become identifiably Black. According to the Court: "The undisputed evidence in this case, agreed to by plaintiff's experts from the Office of Education, is that when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible." The Court referred to other large cities with Black majority schools which "appear to be completely beyond hope

of meaningful desegregation."[113] Atlanta, for example, went from 70 - 30 white to 70 - 30 Black in just ten years following desegregation. The Court finally observed that "once a school becomes identifiably black, it never reverses to white in the absence of redistricting."[114]

The Court decided, therefore, that a desegregation plan confined to the old city limits would cause an "immediate acceleration of white students into suburban white enclaves or private schools, so that the IPS as a whole would predictably have a black majority within a matter of 2 or 3 years." In the words of the Court: "This is not the Court's idea of a plan which promises realistically to work."[115]

The State of Indiana's Role It is within this context that the Court evaluated the role of the State government in the administration of Indiana schools and the impact of the Uni-Government Act.

On the basis of the evidence before it the Court contended that responsibility for Indiana schools rested squarely with the State. Quoting from a State Court decision, State v. Mutschuler,[116] "It was evidently the intention of the framers of the /Indiana/ Constitution to place the common schools under the direct control and supervision of the State, and make it a quasi department of the State Government, a centralized and not a localized, form of school government."[117] Citing a variety of Indiana Court cases the Court noted in addition that under the Constitution and laws of Indiana, the State 'owns the schools' and school employees work for the State. "School corporations within the System only hold title to such schools as trustees and the State has the right to change trustees by annexation at will."[118]

As a specific example of the State Government's involvement in

de jure segregation within Indianapolis, the Court noted that the Appeals Court had already affirmed a finding that site selection for Indianapolis High School constituted de jure segregation. Such site selection had the explicit approval of the State Board of Education.[119]

In light of the State's direct responsibility for the schools, the Court found the State responsible for the continued failure to correct racial segregation in the Indianapolis schools.

> The officials of the State charged with oversight of the common schools have done almost literally nothing, and certainly next to nothing, to furnish leadership, guidance, and direction in this critical area...The Court finds that the failure of the State Superintendant and the Board of Education to act affirmatively in support of the law was an omission tending to inhibit desegregation.[120]

The Exclusion of the Indianapolis Schools from the Metropolitan Government Plan The time has come to confront directly the issues raised by the exclusion of the school district from the Uni-Government plan. First, we must ask if it is the traditional policy of Indiana to exclude schools from metropolitan and other consolidation plans. A statewide reorganization plan pursuant to legislation passed in 1959 had the effect of reducing the number of school corporations by fifty percent. The Act "...created school corporations in cities, towns, and their adjoining unincorporated areas, as well as merging what had formerly been separate township systems into consolidated systems," some of which extended across county lines.[121] Additionally an 1869 law specifically provided for consolidation when there were not enough Blacks in one district to establish a school.

And in 1935 transportation was provided for Blacks to Indianapolis Black High School. A fact which caused the Court to observe with some irony: "Thus was instituted the policy of tax paid transportation of school children (bussing). [122]

In sum the consolidation of school districts was established practice in Indiana, and in the days of legal segregation both consolidation and busing were used to augment segregation.

In order to weigh the effect of excluding the schools of Indianapolis from the metropolitan government plan, the Court described the demographic patterns within these sections of Marion County outside the city limits of Indianapolis. 98.5 percent of all Blacks within Marion county lived within the central city. In the three other municipalities within Marion County and contiguous to Indianapolis School City, the number of Blacks is 19 out of a population of 13,432, 68 Blacks in 14,951 and 216 Blacks in 18,997.[123]

The Court asked rhetorically why there was "such a remarkable absence of Negro citizens from the territories of the added defendants."[124] The answer according to the Court was pervasive housing discrimination. For example, "As recently as July 4, 1963, the major Indianapolis newspapers, in their real estate want ad columns, used the designations 'for colored,' or 'colored' in describing residential properties in certain sections of the city."[125] In the past small towns in Indiana had not even permitted Blacks to stay in town overnight, and the police enforced these provisions.[126]

> Such racial discrimination, which has been tolerated by the State at the least, and in some instances has been actively encouraged by the State,...has had as its end result, the creation of an artificial unrepresentative community....At the very least it may be said

> that Negroes have consistently been deprived of the privilege of living within the territory.../of the Marion County suburbs/ by means of custom and usages of the communities embraced within such boundaries, and of the State.[127]

The net effect, then, of the State's exclusion of the School City of Indianapolis from the "Uni-Government" metropolitan government scheme was to confine desegregation efforts to the part of the metropolitan area that was becoming increasingly Black and to exclude those sections which were almost totally white. Assuming the accuracy of the Court's assumptions concerning "white flight" from districts with large Black student populations, the effect of the "Uni-Government" Act would be to cause the prompt resegregation of Indianapolis Public Schools following Court ordered desegregation within the City. "It is apparent that confining IPS to its existing territory had the effect, which continues, of making it first difficult and now impossible to comply with the law requiring meaningful desegregation."[128]

No Evidence of Suburban School Segregation In light of the Supreme Court decision in Milliken (which came after the District Court decision in this case), it is important to note that here, as in Milliken, there is no evidence of de jure segregation in the suburbs. As the Court observed, there was little opportunity for the suburban districts to discriminate against Blacks because the Black population in those districts "ranges from slight to none."[129] Did this mean that the districts were entirely blameless for the State's confining Indianapolis to the old municipal boundaries? The District Court's answer was no. "When Marion County School Reorganization Committee...made its initial and unanimous recommendation that all the school systems in Marion County

be merged into one metropolitan system, the added Marion County defendants were unanimous in their opposition to the plan (which was however favored by IPS.)" Because of the opposition, the plan was dropped.[130] Clearly, then, here as elsewhere the option of a metropolitan remedy was not only potentially available, it was explicitly rejected.

Indianapolis and the "De Facto"/"De Jure" Distinction The question which remained to be resolved was whether the demonstrated segregatory effect was sufficient to support a charge of de jure segregation against the State of Indiana. The fact of a history of de jure segregation within Indianapolis was undisputed. Because of the extensive involvement of the State in the administration of the schools of Indiana, including the power to determine locations of schools, the Court concluded that the de jure acts of IPS "...can be and are imputed to the State." The State "has practiced de jure segregation, both by commission and omission."[131] As a result the Court decided that the State was required to remedy the segregation that continues to exist. Since the Court had previously determined that an Indianapolis only plan would not work, and that the State controlled the instrumentalities whose action was necessary to remedy the harmful effects of State acts, it was up to the State to devise a metropolitan remedy promising to provide actual desegregation.[132]

At no point did the Court explicitly find that the exclusion of the IPS from the Uni-Government plan, in itself, constituted an intentional act of segregation, rather the Court found that the exclusion of IPS had the effect of inhibiting the process of desegregation in Indianapolis. It would be this failure to find that the exclusion of the School City

flowed from segregatory intent, that would bring about the Supreme Court's ultimate vacating of the metropolitan order.

Since as in Milliken the State offenses took place within one district, it seemed not unreasonable to conclude that as in Milliken the Supreme Court would only require a remedy within that district. The complicating factor, here, however, is that there was some question whether the Indianapolis school system should have been separated from the rest of Marion County. Most government function excepting schools had been consolidated throughout the county with the express approval of the State.

On January 26, 1977 the Supreme Court vacated the Indianapolis metropolitan desegregation plan and remanded the case to lower courts for evidence of segregatory intent.[133] Before the Court would approve a metropolitan remedy, it first required evidence that the Indianapolis school system was excluded from the general metropolitan government plan with a discriminatory purpose or intent. This decision was in line with other recent Supreme Court rulings on the question of segregatory intent vs. segregatory effect. These decisions themselves will be discussed at length in Chapter Five.

Metropolitan School Desegregation: Some Preliminary Conclusions

What do the Wilmington and Indianapolis cases, themselves tell us about the Supreme Court's position on metropolitan desegregation orders following Milliken?

As the Wilmington case demonstrated the Supreme Court had not completely ruled out metropolitan solutions to inner city segregation. However, the Court's failure actually to rule on the specific justifica-

tions of the District Court for its metropolitan order left unclear the precise set of circumstances under which the Supreme Court would sanction a metropolitan remedy. The District Court emphasized the segregatory effects of the State's failure to include Wilmington in state wide school district consolidation plans, and the Court found that the exclusion of Wilmington had not been the result of segregatory intent. The District Court, however, did discuss substantial evidence which showed that the school districts of Wilmington and its suburbs had not been meaningfully separate. But school districts and municipal boundaries had been conterminous since Brown and whether under these circumstances Milliken would require a metropolitan remedy is unclear.

The Supreme Court's vacating and remanding of the Indianapolis case in search of segregatory intent might cast some light on the points left unclear in the Wilmington case. Here, as in Wilmington, the effect of the exclusion of the Indianapolis schools from the metropolitan government scheme was clear. But the Court nevertheless vacated the metropolitan school plan pending evidence that the exclusion of Indianapolis schools resulted from segregatory intent. Unlike the Wilmington case, there was little evidence in Indianapolis of direct suburban participation in the segregation of the city schools. Consistent with the District Court decision in Wilmington, the Court in Indianapolis did not conclude that the separation of city from suburb resulted from segregatory intent. As these comparisons point out the sole distinguishing characteristic between the Wilmington and the Indianapolis cases appears to be the historic interaction between Wilmington and the suburban school districts and the general absence of such interaction between Indianapolis schools and those of its suburbs. Since the school systems

of Wilmington and its suburbs had cooperated in the days of segregation, they shared responsibility for alleviating that segregation. Since on the other hand there had been no showing of significant involvement of the Indianapolis suburbs in the inner city segregation, the suburbs were free of any automatic responsibility for remedying that segregation.

The Chicago Housing Case: Milliken Muddled?

Following the Detroit case the first full statement by the Supreme Court on metropolitan issues in segregation came in the Hills v. Gautreaux[134] case in 1976. In Hills Justice White, a dissenter in Milliken now writing for the majority, attempted to clarify the circumstances under which the Court would be prepared to order remedies for segregation which crossed state subdivision lines.

The issue in Hills v. Gautreaux was the scope of the appropriate remedy for housing discrimination in Chicago caused by the Chicago Housing Authority and the U.S. Department of Housing and Urban Development. Court rulings had previously found that the Chicago Housing Authority (CHA) operated racially discriminatory housing. Evidence had been presented that CHA operated four overwhelmingly white projects in white neighborhoods while "...99½% of the remaining family units /were/ located in Negro neighborhoods and 99% of those units /were/ occupied by negro tenants." HUD was found to have "...violated both the 5th Amendment and...the Civil Rights Act of 1964...,by knowingly sanctioning and assisting CHA's racially discriminatory public housing program."[135]

Without tracing in detail the decisions of the District and Appeals Courts in this case, I will simply note that the Court of Appeals for the Seventh Circuit remanded the case to the District Court to formulate

a metropolitan remedy. The Court of Appeals was aware of the Supreme Court's recent ruling in Milliken, but argued that the restrictions on the metropolitan approach found in Milliken did not bar a multi-district remedy in this case "...because of the equitable and administrative distinctions between a metropolitan public housing plan and the consolidation of numerous local school districts."[136] It rested its decision in addition on "...evidence of suburban discrimination and of the likelihood that there had been an 'extra-city impact' of the petitioner's 'intra-city discrimination.'"[137]

In summarizing the Appeals Court decision, Justice White pointed out that the Appeals Court determined "that a remedy extending beyond the city limits was both 'necessary and equitable'" on the basis of "the agreement of the parties and the expert witnesses that 'the metropolitan area is a single relevant locality for low rent housing purposes and that a city-only remedy will not work.'"[138]

HUD appealed the decision on the basis of Milliken asserting that the violation was confined to the city limits of Chicago and therefore the remedy must be likewise confined.

Distinguishing Hills from Milliken: Preserve The Integrity Of State Subdivisions The Supreme Court upheld the metropolitan remedy in this case, and Justice White for the Court majority attempted to distinguish this case from Milliken. In so doing, he provided an elaboration and review of the Supreme Court's Milliken decision. In effect he denied that Milliken amounted to an order that remedies for unconstitutional action must be exactly tailored to the scope of the violation.

> The Court's holding that there had to be an interdistrict violation or effect before a federal court could order the crossing of district boundary lines reflected the substantive impact of a consolidation remedy on separate and independent school districts. The District Court's desegregation order in Milliken was held to be an impermissable remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occured but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.[139]

Although not stated explicitly, Justice White argued that constitutionally state subdivisions are beyond federal control. Only if those subdivision lines were so drawn as to violate Fourteenth Amendment rights, could the courts exercise control over them.

In light of Milliken the question in this case was simply whether or not the courts had the authority to order HUD to take remedial action outside the city of Chicago. The Supreme Court distinguished this case from Milliken on the basis that HUD, unlike the suburban districts in Milliken, had been found to have violated the constitution.[140] Having done so, HUD was required to employ the methods necessary "'to achieve the greatest possible degree of (relief), taking into account the practicalities of the situation.'"[141]

The question remained, however, did HUD's violation within Chicago require it to disregard state subdivision lines in devising a remedy? The Court's answer was yes.

The Court supported its decision with a summary of the powers available to HUD. First, according to the Court both HUD and the CHA recognized that "The relevant geographic area for purposes of the respondent's housing options is the Chicago housing market, not the Chicago

city limits." In the administration of its housing programs the federal government recognizes that "'housing market areas'.../encompass/' the geographic areas 'within which all dwelling units...' are in competition with one another as alternatives for the users of housing."[142]

As a result of HUD's position about the relevant area of its concern the Court concluded that "An order against HUD and CHA regulating their conduct in the greater metropolitan area will do no more than take into account HUD's expert determination of the area relevant to the respondents' housing opportunities and will thus be wholly commensurate with the 'nature and extent of the constitutional violation."[143]

The Court, however, still had to deal with HUD's contention that to order a metropolitan remedy would cause interference with uninvolved local governmental units. The Supreme Court noted that its decision in this case only involved a remand to lower courts to consider a metropolitan remedy and did not, therefore, present any evidence of interference with local governmental entities not themselves implicated in unconstitutional action. But the Court also recognized that under existing law HUD was empowered in some instances to contract directly with private owners and developers to provide low income housing opportunities and thus provide "...relief to the respondents in the greater Chicago metropolitan areas without preempting the power of local government by undercutting the role of these governments in the federal housing assistance scheme."[144] In addition, the Court noted than an order to HUD to pursue integrative opportunities would be consistent with the mandate of Title VI of the Civil Rights Act of 1964 which prohibited racial discrimination in federally assisted programs.[145]

The Court cited a variety of additional federal housing statutes

and regulations the thrust of which was to require HUD to provide opportunities for minorities "...'to locate outside areas of minority concentration.'"[146] To order HUD to expand low income housing opportunities outside the city of Chicago would be only to order it to fulfill its responsibilities under its existing authority.

The power and authority of local governments would be the same as they were under existing law. Under some federal housing laws, local governments must first apply for assistance before some types of housing are built. Under more recent federal statutes, HUD is empowered to lease dwellings directly from private owners for low income citizens, and, therefore, local government approval "is no longer explicitly required."[147] Nonetheless, according to the Court, even under this program "...local governmental units retain the right to comment on specific assistance proposals, to reject certain proposals that are inconsistent with their approved housing-assistance plans, and to require that zoning and other land use restrictions be adhered to by builders."[148]

The crucial distinction, then, between this case and Milliken is that in this case "...a metropolitan relief order directed to HUD would not consolidate or in any way restructure local governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land use law."[149] Rather a metropolitan decree would merely compel HUD to exercise its existing discretionary power in such a way as to advance integration.

In a lengthy footnote to the opinion White both anticipated and attempted to answer an obvious potential challenge to his argument that the circumstances of this case and the Milliken case were distinct. Just as HUD possessed the power to exercise authority outside the city limits of Chicago, so also the State of Michigan had the power to exercise its authority outside the city of Detroit. Like HUD, "...the State of Michigan had been found to have committed constitutional violations contributing to racial segregation...,"[150] and like the State of Michigan, HUD's unconstitutional actions were judged by the Court to have been largely confined to one state subdivision. This being the case, how could the Court justify directing a metropolitan remedy for the housing violation but a "Detroit-only" remedy for the school segregation found in Detroit. The Court's answer was as follows: "In Milliken, a consolidation order directed against the State would of necessity have abrogated the rights and powers of the suburban school districts under Michigan law....Here by contrast, a metropolitan area remedy involving HUD need not displace the rights and powers accorded suburban governmental entities under federal and state law."[151]

While the distinction,itself, is relatively clear in that a school consolidation plan would effectively merge independent school districts while a housing plan need have no effect on governmental organization, one is nonetheless led to ask why a state's grant of rights and power to independent school districts is elevated to constitutional significance. Granted in one instance no unique interference with the prerogatives of local government is contemplated, but the fact remains that the State of Michigan had the power to decide to produce a school integration plan involving the Detroit metropolitan area as HUD had the power to produce

housing integration in the suburbs of Chicago.

The Court's distinction rests on little more than the fact that in housing metropolitan areas have been treated as units by federal authorities while in education independent school districts conforming to city limits had been the rule. Although as Justice Marshall's dissent in Milliken pointed out, it is a rule that has frequently been breached.

The Hills decision provides further elaboration of the significance of the Supreme Court decisions in Milliken. Rather than reading Milliken as positing a mechanical rule that the geographic scope of the remedy must be commensurate with the scope of the violation, Hills reads Milliken as providing a standard with which to balance competing constitutional interests. Although certainly subject to challenge in terms of long term effect, the Supreme Court majority in Milliken asserted that desegregation of the school system was possible within the Detroit city limits. Certainly the inclusion of the Detroit suburbs would have produced a greater degree of integration, but in light of both the Court's rejection of precise racial balance in Swann and the impact a metropolitan plan would have on local government autonomy, the Court concluded that a consolidation plan could not be justified. Despite the fact that the State was itself implicated in Detroit segregation and despite the fact that it possessed the power to institute a metropolitan remedy, interference in local autonomy was deemed inappropriate as long as the local government entities, themselves, had not been guilty of a constitutional violation.

In both the Milliken and Hills decisions the Court was balancing competing interests: obtaining the maximum degree of integration vs.

maintaining the integrity of local government. Where as in the case of Hills the threat to state subdivisions was either non-existent or minimal, the balance favored integration. Where on the other hand, the threat to the autonomy of the state subdivision was substantial, as in Milliken, and desegregation was possible (if difficult) without it, the balance favored the state subdivision.

"Metropolitan Desegregation." A Summary

The primary concern of this chapter has been to identify the standards used by courts to determine the proper scope of the remedies for unconstitutional segregation. Investigating this question, however, has shed some light on the Supreme Court's evolving definition of unconstitutional segregation.

The different results of Supreme Court review of the three metropolitan school desegregation cases appears to stem from the different levels of involvement of the suburbs in inner city segregation. While in the Milliken case virtually all state segregatory action was confined to the corporate limits of the City of Detroit, in the Wilmington case there was significant evidence of involvement of the suburbs in segregation. According to C. J. Burger in Milliken "...the nature of the violation determines the scope of the remedy."[152] Since in Milliken the violation had been shown to have encompassed only the City of Detroit, so too would the remedy. Presumably the lack of demonstrated State segregatory action affecting the suburbs of Indianapolis as well as the City served as the basis for the Supreme Court's vacating and remanding of the metropolitan remedy in that case.

The Hills decision pointed to a second ground mentioned in Milliken for restricting the remedy for segregation to Detroit; that is, the

interest in maintaining the administrative autonomy of state subdivisions. In emphasizing this second aspect of the Milliken decision Justice White, in effect, raised a point he and Justice Marshall had made in dissent in Milliken. They argued that the goal of desegregation plans was maximum desegregation and not simply compensating for specific past segregatory state action or restoring "...the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[153] When, however, the accomplishment of such a goal conflicts with a state's legitimate interest in maintaining the integrity of its subdivisions, then according to White's reading of Milliken some limit on the extent of the integration to be accomplished might be in order.

In his decision in Hills White was attempting to distinguish the conditions of that case from Milliken. In so doing he argued that one of the grounds for Burger's majority opinion in Milliken -- a concern for the integrity of state subdivisions -- was in fact the principal basis on the majority opinion. Since White had dissented in Milliken, his opinion in Hills could be read as an attempt to salvage as much latitude as possible for desegregation efforts. Just as Swann and Keyes provided remedies more sweeping in scope than the specific evidence of government imposed segregation might warrant, so to would Hills.

Although Justice White did not himself make this connection in his opinion in Hills, his interpretation of Milliken might be read as adding an additional qualification to those previously mentioned in Swann concerning the degree of desegregation to be required. Swann authorized changes in school attendance zones and mandated transportation in order to achieve maximum integration. The selection of such remedies,

however, would not be allowed to impinge on the safety of students or on the quality of education. White's reading of Milliken led him to argue in effect that there is an additional restraint on school desegregation efforts, that is, that the achievement of maximum desegregation should not be allowed to impinge on the administrative autonomy of state subdivision which themselves had not been involved in unconstitutional actions.

White's retrospective interpretation of Milliken in the Hills decision essentially denied that Milliken provided any basis for narrowly restricting remedies to the precise scope of the violations. In this sense White in effect argued that Milliken did not contradict Swann and Keyes; courts were still free order maximum feasible desegregation. Milliken only added a concern for the authority of state subdivisions to concerns for pupil safety and educational quality as constraints on the possible remedies for de jure school segregation.

As the next chapter will demonstrate, however, White's opinion in Hills would not be the last word on the question of the scope of the remedy.

Despite the fact that these cases all concern the proper scope of the remedy for clearly de jure segregation, the court decisions do provide some indication of the Supreme Court's approach to identifying unconstitutional segregation. In these "remedy" cases, the Courts were attempting to compensate for segregation attributable to government action. The Supreme Court's restricting remedies for Detroit segregation to the corporate limits of the city indicates an implicit rejection of any requirements that state governments pursue the least segregative

student assignment policies available. A state's concern for a legitimate educational interest, local school district autonomy, was deemed sufficient to overcome its duty to achieve maximum feasible desegregation.

The primary distinction between the issues in these cases and those discussed in Chapter Three was the unit of government that the District Courts held responsible for segregation. While the cases discussed in Chapter Three generally focused on the activities and responsibilities of school authorities having jurisdiction over single school districts, the cases discussed in this Chapter focused on the responsibilities of governmental authorities having ultimate responsibility over multiple state subdivisions. The question in both types of cases was: has the unit of government involved used its powers in a discriminatory manner? In effect the District Courts in the three metropolitan school desegregation cases argued that in failing to involve suburban districts subject to state control, these states would artificially limit the opportunities for integrated education.

As the next chapter will demonstrate the Supreme Court would in effect recognize that the reasoning used to justify the limits placed on state government responsibility to achieve integration in metropolitan areas could apply as well within single school districts. And just as it would not hold state governments responsible for compensating for the cumulative impact of private housing segregation on the disparities in the racial make up of the populations of city and suburban schools, it would not hold school authorities within single school districts responsible for the impact of residential segregation on neighborhood schools. The requirement that school districts pursue the least segregative alternative policies available which served as the basis for

several court cases discussed in Chapter Three and for standards to identify unconstitutional segregation discussed in Chapter Two was effectively challenged by the Supreme Court's decision in Milliken and would be clearly rejected in its decisions following Milliken.

NOTES

1. Milliken v. Bradley, 418 U.S. 717 (1974)

2. See, for examples: Michael W. Giles, "Racial Stability and Urban School Desegregation," Urban Affairs Quarterly, 12 (June, 1977), 499; Derrick Bell, "Running and Busing in Twentieth Century America;" Martin E. Sloane,"Milliken v. Bradley in Perspective;" and J. Skelly Wright, "Are the Courts Abandoning the Cities?" in Journal of Law and Education, 4 (January, 1975); U. S. Commission on Civil Rights, Statement on Metropolitian School Desegregation (Washington, D. C.: 1977); Tom Wicker, "Tightening the Ring," New York Times, January 30, 1977.

3. Bradley v. Milliken, 338 F. Supp. 582 (1971); 345 F. Supp. 914 (1972); 484 F. 2d. 215 (1973).

4. Morgan v. Hennigan, 379 F. Supp. 410 (1974); see above, Chapter Three ff.

5. 338 F. Supp. 582, at 587

6. Ibid.

7. 484 F. 2d. 215, at 227

8. Ibid., at 230

9. Ibid., at 235, 236

10. Ibid., at 224

11. 338 F. Supp. 582, at 585,586

12. 484 F. 2d. 215, at 246

13. Ibid.

14. Ibid., at 245

15. 131 Mich. 639, 644. 92 N. W. 289, 290 (1902)

16. 154 Mich. 584, 590, 118 N.W. 606, 609 (1908)

17. 484 F. 2d. 215, at 246

18. Ibid.

19. Ibid., at 248

20. Ibid.

21. Ibid., at 249

22. Ibid., at 220; see also 338 F. Supp. 582, at 584

23. 484 F. 2d. 215, at 249

24. Ibid., at 238

25. 345 F. Supp. 914, at 939

26. 484 F. 2d. 215, at 238

27. Ibid., at 239

28. Ibid.

29. Ibid., at 238

30. 338 F. Supp. 582, at 587

31. 345 F. Supp. 914, at 933

32. 338 F. Supp. 582, at 593

33. 484 F. 2d. 215, at 249

34. 345 F. Supp. 914, 917

35. 484 F. 2d. 215, at 249

36. Ibid., at 244

37. Ibid., at 249

38. 345 F. Supp. 914, at 935

39. Ibid.

40. Ibid., at 925

41. See Derrick A. Bell, Race, Racism and American Law (Boston: Little, Brown and Co., 1973), p. 547 ff.; Owen Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concepts," Harvard Law Review, 78 (1965), 564, 584-86; Hart v. Community School Board, 383 F. Supp. 699 (1974), discussed above, Chapter Three.

42. 338 F. Supp. 582, at 587

43. 484 F. 2d. 215, 244

44. 345 F. Supp. 914, 920

45. U.S. v. Scotland Neck City Board of Education, 407 U.S. 484 (1972); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972).

46. 484 F. 2d. 215, at 250

47. 345 F. Supp. 914, at 922

48. Milliken v. Bradley, 418 U.S. 717 (1974); citations are taken from the "slip opinion."

49. Ibid.

50. Ibid.

51. Ibid., at 20; quoting from Swann, 402 U.S. at 15, 16

52. Ibid., at 21

53. 402 U.S. 1, at 24

54. Milliken, at 25

55. Ibid., at 23

56. Ibid.

57. Above, Chapter Three

58. Milliken, at 23, 24

59. Ibid.

60. Ibid., at 13

61. Ibid., at 26

62. Ibid., Stewart concurring, p.2

63. Ibid., p. 4

64. Associate Justices Brennan, Douglas, Marshall and White

65. Milliken, Marshall dissenting, p. 6

66. Ibid., White dissenting, p. 11

67. 377 U. S. 533 (1964), at 575

68. Milliken, White dissenting, p. 16

69. Ibid., Marshall, p. 6

70. Ibid., p. 15

71. Ibid., p. 17

72. Ibid., Burger majority opinion, p. 26

73. Ibid., White, pp. 18-19

74. Ibid. Marshall, p. 20

75. Ibid.

76. Ibid., p. 4

77. Ibid., White, p. 5

78. Ibid., p. 7

79. Ibid.

80. Ibid., Marshall, p. 34

81. Swann, of course, concerned a school system which had been segregated by statute, but by the time of the Supreme Court decision, the totally segregated school system had been replaced by one severly imbalanced.

82. Evans v. Buchanan, 379 F. Supp. 1218 (1974), at 1222

83. Ibid. at 1223

84. Evans v. Buchanan, 393 F. Supp. 428(1975), at 432

85. Ibid., at 433

86. Ibid.

87. Ibid., at 437

88. Ibid., at 436

89. Ibid., at 445

90. Ibid., at 438

91. Ibid., at 435

92. Ibid.

93. Ibid., at 434

94. Ibid., at 433

95. Milliken, Stewart concurring, at 4

96. 393 F. Supp. 428, at 446

97. Ibid.

98. Ibid.

99. Ibid., at 439

100. Ibid.

101. Ibid., at 440

102. Ibid., at 441

103. Ibid., at 442; see Swann, 402 U. S. 1, 16

104. Ibid., at 442

105. Ibid., at 446

106. Ibid.

107. Ibid., at 439

108. U.S. v. Board of School Commissioners, Indianapolis, Ind., 332 F. Supp. 655 (1971), at 670

109. Ibid., at 669

110. Ibid., at 675, 676

111. Ibid., at 678

112. The general significance of "white flight" for school desegregation will be discussed in Chapter Six below.

113. Ibid., at 677

114. U.S. v. Board of School Commissioners of Indianapolis, Ind., 368 F. Supp. 1191 (1973), at 1197

115. Ibid., at 1198

116. 232 Ind. 580, 115 N.E. 2d. 206 (1953)

117. 368 F. Supp. 1191, at 1201

118. Ibid., at 1200

119. Ibid., at 1202, 1203

120. Ibid., at 1203

121. Ibid., at 1203, 04

122. 332 F. Supp. 655, at 663

123. Ibid., at 655

124. 368 F. Supp. 1191, at 1204, 1205

125. 332 F. Supp. 655, at 663

126. Ibid.

127. 368 F. Supp. 1191, at 1204, 1205

128. Ibid.

129. Ibid., at 1203

130. Ibid.

131. Ibid., at 1205

132. Ibid., at 1207

133. Bowen v. U. S., No. 76-515(1977)

134. Hills v. Gautreaux, 47 L. Ed. 792 (1977)

135. Ibid., at 798

136. 503 F. 2d., at 935, 936

137. Hills, at 800

138. Ibid.

139. Ibid., at 802, 803

140. Ibid., at 803

141. Ibid.

142. Ibid., at 804; quoted from Department of HUD, FHA Techniques of Housing Market Analysis 8 (Jan., 1970) quoting the Institute for Urban Land Use and Housing Studies: A Study of Theory and Methods, C 2 (1953)

143. Hills, at 805

144. Ibid.

145. Ibid., at 806

146. Ibid.

147. Ibid., at 807

148. Ibid., at 808

149. Ibid.

150. Ibid., at 804

151. Ibid.

152. Above, p.113, note 51

153. Above, p.117. note 72

CHAPTER FIVE

THE INTENT STANDARD AND RACIAL DISCRIMINATION

In two decisions from 1976-77, the Supreme Court attempted to clarify and sharpen its definition of unconstitutional racially segregatory "state action." These decisions of the Court focused on the distinction between segregatory intent and segregatory effect, and the Court reaffirmed its position that absent segregatory intent mere segregatory effect (or disproportionate racial impact) of government action is not unconstitutional. As argued in Chapter Three, however, simply stating that segregatory intent must be found raises as many questions as it answers. Before these recent Supreme Court decisions, the Court had failed to outline with any degree of precision what constitutes sufficient evidence of segregatory intent.

Contemporaneously with the decisions regarding the definition of intent to segregate, the Court began as well to state more clearly its position on the question of the scope of appropriate remedies once a constitutional violation has been found. The additional Court ruling in question served to clarify the impact of Milliken and Hills for future constitutional adjudication.

As I argued in Chapter Four, Milliken had clear implications that went beyond the question of metropolitan solutions for inner city segregation. Just as Milliken served to limit the availability of remedies for segregated city school systems by withdrawing the option of interdistrict consolidation, it might as well serve as a vehicle for limiting the scope of intradistrict efforts within cities when intentional segregative government action has been confined to a limited segment of those cities. The requirement that the "scope of remedy" should be commensurate with "the

nature of the violation" [1] assumes even more importance if the Courts raise the evidentiary threshold to prove the existence of segregatory intend and, therefore, the existence of a violation.

Two present decisions of the Supreme Court, Washington v. Davis decided June 7, 1976, and Village of Arlington Heights v. Metropolitan Housing Development Corporation [2] decided January 11, 1977, outlined more precisely than before what the Court meant by discriminatory intent.

The Intent Standard

Washington v. Davis concerned a challenge to police recruiting practices within the District of Columbia which included exams which had the effect of excluding a disproportionate number of Black applicants. "The District Court noted that there was no claim of 'an intentional discrimination or purposeful discriminatory acts' but only claim that ... [the test involved] has no relationship to job performance and 'has a highly discriminatory impact in screening out black candidates.'" [3] The District Court decided that the disproportionate racial impact was sufficient to shift the burden of proof to the defendants, but nonetheless upheld the recruitment procedures because the police department's affirmative efforts to recruit Blacks refuted any inference of discriminatory intent. In addition, the Court found the tests in question to be reasonably related to the police training program. [4]

The Court of Appeals reversed the District Court ruling on constitutional grounds, but the Court ruled that the applicable constitutional standards were the same as those governing cases under Title VII of the Civil Rights Act of 1964. The Supreme Court rejected the interchangeability of Civil Rights Act standards and those appropriate for the enforcement of the Fifth Amendment. [5] As Justice White stated in his majority opinion: "As the Court

of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring and promotion practices." But, he went on, "This is not the constitutional rule." [6]

Although not specifically required to do so by the issues of the case, the Court majority proceeded later in its decision to weigh the legality of the police recruitment practices under the stricter tests of the statute. It concluded that under the statutory rule, the procedures were legal. Since this aspect of the case is irrelevant to our concern with school desegregation, I will not further discuss it here.

Intent v. effect: the precedents The Appeals Court asserted that discriminatory effect was itself sufficient to find government action unconstitutional. In rejecting this position, the Supreme Court majority set out to explain at some length its reliance on segregatory intent. In so doing the Court took note of possible conflicts in the precedents on the issue of segregatory intent and effect.

Justice White began his survey of Court precedents by referring to the Strauder v. West Virginia decision of 1880 [7] which proclaimed the exclusion of Blacks from juries to be unconstitutional. But White noted: "...the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in tiself make out an invidious discrimination." [8] To support this position he went on to quote from another decision: "A purpose to discriminate must be present which may be proven by the systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." [9]

His decision provided additional illustrations of the application of the principle in other contexts. Wright v. Rockefeller [10] upheld a New York Congressional reapportionment statute despite the fact that it produced Congressional districts which "...were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn." Although the Court was divided in its ruling on the case, according to White, both majority and dissenters agreed "...that the issue was whether the 'boundaries ... were purposefully drawn on racial lines.'" [11]

Finally in his recitation of prior Court decisions which explicitly called for evidence of discriminatory intent and not mere racially disproportionate effect, White cited the Keyes decision that condemned only "a current condition of segregation resulting from intentional state action." [12]

Despite substantial evidence of past Court insistence on findings of discriminatory intent in order to find a violation of the equal protection clause, White acknowledged "...indications to the contrary in our cases." [13] The cases which he discussed did indeed cast some doubt upon the Supreme Court's adherence to the principle that it must not only weigh the effect of government action but it must also consider intent.

Palmer v. Thompson [14] was a 1971 Supreme Court decision that upheld the right of Jackson, Mississippi to close public swimming pools rather than operate them on an integrated basis. The City Council asserted "that the closure was necessary to preserve peace and order and that the integrated pools could not be economically operated." The Court ruled that these seemingly permissible ends "could not be impeached by demonstrating that racially invidious motivation had prompted the city council action." [15] The effect of the council action was to deny swimming facilities to both Blacks and whites equally, and the Court in effect ruled that the intent

of the action was irrelevant. In the words of Justice White summarizing the Palmer case: "The opinion warned against grounding decisions on legislative purpose or motivation, thereby lending support for the proposition that the operative effect of the law rather than its purpose is the paramount factor." Despite the clear import of the decision that legislative intent is irrelevant, White attempted to distinguish the Palmer decision from the circumstances of Washington v. Davis and school desegregation cases by noting that "...the decision did not involve, much less invalidate, a statute or ordinance having neutral purpose but disproportionate racial consequences." [16]

Although White did not so state explicitly, what the decision did was uphold a state action having neutral racial effect but discriminatory racial purpose, i.e. to maintain the separation of the races. His judgment is certainly subject to dispute on other grounds as well. The closure of the swimming pools had the effect of denying to Blacks a privilege that whites had enjoyed in the immediate past. To say that Blacks could never enjoy a privilege that whites only recently lost is hardly to proclaim equality.

Another decision which indicates that the Court in the past had not always deemed inquiry into legislative purpose as appropriate was Wright v. Council of Emporia. [17] Wright involved the division of a school district into two separate school districts subsequent to a court desegregation decree.

Justice White did not discuss this case at any great length, but it would be useful for us to review very briefly the circumstances of the case. The effect of the division of the single school district into two was not to create or maintain a segregated district; rather it was to create two new integrated districts, one of which would be relatively disproportion-

ately white and the other relatively disproportionately Black when compared to the racial proportions of the original unified school district.

Nonetheless the Court ruled that the splitting of the district had the effect of interfering with the original desegregation decree; and the Supreme Court, citing Palmer ruled that the purpose of the action was irrelevant. White did emphasize, however, that "[t]he Constitutional predicate for the District Court's invalidation of the divided district was 'the enforcement until 1969 of racial segregation in a public school system of which Emporia had always been a part.' [18] There was then no need to find 'an independent constitutional violation.'" [19]

Because of the prior existence of the dual school system, White implied that the necessary intent to segregate had already been established and therefore such intent could either be inferred in the action dividing the school district or is irrelevant if this action would in any way interfere with the dismantlement of the de jure segregated school system.

White cited a multitude of cases in the Courts of Appeals which held "that the substantially racially disproportionate impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications." [20] But he argued that such a position is one with which the Court then found itself in disagreement.

In support of his position, White made a point which, on the surface at least, appears compelling. Simply, if a rule were formulated to strike down all government actions having a disproportionate racial impact, the consequences could be far reaching indeed. Such a rule could "perhaps invalidate a whole range of tax, welfare, public services, regulatory,

and licensing statutes that may be more burdensome to the poor and to the average black than the more affluent whites." [21] Since whites are generally more affluent than Blacks, any public policy which places a proportionately greater burden on the poor is likely to have a disproportionate impact on Blacks. Such a broad based prohibition on discrimination should, in White's words, "await legislative prescription." [22]

For the moment I will withhold judgment; a more detailed evaluation will follow in the next chapter.

Standards for identifying intent The final point of interest in Washington v. Davis is White's brief discussion of how discriminatory intent is recognized. To this point the argument has focused on the requirement that courts find discriminatory intent. As the discussion in Chapters Two and Three illustrates, this emphasis on intent is not novel, but still there remains the question of exactly what constitutes discriminatory intent. On this point Washington v. Davis is somewhat vague -- a fuller discussion of this issue will follow in the Arlington Heights case.

Discriminatory intent in the North and the post-Brown South was rarely expressed on the face of statute. The courts must look, for instance, for unequal application of laws which are neutral on their face. As an example, White referred to cases of racial discrimination in jury selection in which "...the systematic exclusion of Negroes is itself such an unequal application of the law ... as to show intentional discrimination." [23] Such a pattern of racially disproportionate impact can be deemed indicative of discriminatory intent when under the circumstances it "...is very difficult to explain on non-racial grounds." But White, nonetheless, went on to argue that although "[d]isproportionate impact is not irrelevant, ... [s]tanding alone, it does not trigger the rule ... that racial classifica-

tions are to be subject to the strictest scrutiny and are justifiable only by the weightiest of considerations." [24]

The conclusion, then, was that disproportionate racial impact could be indicative of discriminatory intent, but much more was needed for the courts to reach such a conclusion. Without more, no violation of the Fifth or Fourteenth Amendments would be found.

In his concurring opinion in Washington v. Davis, Justice Stevens challenged the Court's distinction between intent and effect. It is not that he deemed intent irrelevant; rather he argued that disproportionate effect is often the best indicator of discriminatory intent.

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision making, and of mixed motivation. It is unrealistic on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decision maker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it. [25]

While understanding Justice Stevens's description of the difficulties encountered in attempting to identify the intent of policy makers, some students of political science might hesitate to accept his facile conclusion that the best indicator of intent is the result. The issues raised by this question, however, will be considered at length in Chapter Six.

For the moment, to summarize Justice Stevens's position, he felt that the distinction between discriminatory effect and intent "...is not nearly as bright and perhaps not quite so critical" [26] as the majority opinion seemed to indicate. He nonetheless supported the Court's conclu-

sion in this case largely because he felt that the evidence of racially disproportionate effect of the tests in question was not adequate. The exam under attack was widely used throughout the civil service and, although disproportionate racial impact might have been evident among the police applicants, this alone was not enough to prove that the test generally was not racially neutral. [27]

Both Justices Brennan and Marshall dissented in this case, but they confined their arguments to statutory grounds.

The Arlington Heights Case: Identifying Intent

Washington v. Davis swept away some of the ambiguity surrounding the standards utilized by the Court to evaluate government actions which have a disproportionate impact on racial minorities. Standing alone, however, Washington v. Davis provided little guidance as to how the courts are to recognize discriminatory intent. A clearer explication of the intent standard came approximately seven months later in a housing case, Village of Arlington Heights v. Metropolitan Housing Development Corporation [28] decided on January 11, 1977.

The Arlington Heights case concerned efforts by a non-profit corporation to build federally assisted low-income multi-family housing in an area zoned for single family units. The District Court upheld the right of Arlington Heights to exclude the development in order to protect both "property values and the integrity of the village's zoning plan." [29] The District Court decision was reversed by the Court of Appeals. "It first approved the District Court's findings that the defendants were motivated by a concern for the integrity of the zoning plan rather than by racial discrimination." [30] The Appeals Court ruled, however, that Arlington Heights' refusal to rezone "...would have a disproportionate impact on blacks. Based

upon family income, blacks constituted 40% of those Chicago area residents who were eligible to become residents of ... [the proposed development]." [31] And significantly, among the requirements for federal subsidies was affirmative action to assure that housing built under the federal program would be racially integrated. [32]

The Appeals Court did not assume that mere racially discriminatory effect alone would trigger the requirement that racial classifications be subjected to strictest scrutiny by the courts. Rather, relying on precedent including the Supreme Court decision in Reitman v. Mulkey, [33] the Court of Appeals ruled that the denial of rezoning must be examined in light of its "historical context and ultimate effect." Applying this test, the Court noted two factors affecting Northwest Cook County -- namely that the area had experienced a rapid growth in population and employment opportunities, "but it continued to exhibit a high degree of residential segregation. The Court argued that Arlington Heights could not simply ignore the problem. Indeed, it found that the Village had been 'exploiting' the situation by allowing itself to become a nearly all-white community, 517 F2d, at 414. The Village had no current plan for building low and moderate income housing," and no other sites zoned for multi-family dwelling were available "at an economically feasible price." [34]

According to the Appeals Court decision, such racially discriminatory effect "could be tolerated only if it served compelling interests." Neither the integrity of the town's existing zoning policy "...nor the desire to protect property values met this exacting standard." [35]

On the basis of the Washington v. Davis requirement of proof of discriminatory intent and not mere discriminatory effect, the Supreme Court reversed the Appeals Court on the constitutional issue and remanded the case to determine if Arlington Heights' failure to rezone constitutes a

violation of the Fair Housing Act.

In his majority opinion Justice Powell provided some guideposts for discriminatory intent. He argued that proof that discriminatory purpose was the sole motivating factor behind a challenged action is not required. In this he appears to have recognized the inate complexity of the policy making process. As Powell observed:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous compelling considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another compelling consideration. When there is proof that a discriminatory purpose has been a motivating factor in the discussion, this judicial deference is no longer justified. [36]

What is difficult, however, is determining what constitutes sufficient proof of racial motivation. Powell, therefore, outlined the kinds of "circumstantial and direct evidence of intent" that might be required.

The first type of evidence is simply disproportionate racial impact. "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action even when the governing legislation appears neutral on its face." [37]

As an illustration, Powell cited Yick Wo v. Hopkins. [38] The case, which Powell did not describe, concerned a San Francisco ordinance which required city approval to operate a laundry in a building made of materials other than brick or stone. In applying the statute, laundries constructed of wood and owned by Chinese were denied city certification while similar structures owned by non-Chinese were "left unmolested." The Court found that "whatever may have been the intent of the ordinance as adopted, they are applied by the public authorities charged with their administration, and representing the State itself, with a mind so unequal and oppressive as

to amount to a practical denial by the State of ... equal protection of the laws ...." [39]

A search for a pattern of discriminatory action is, of course, not required if evidence of discriminatory treatment of a single individual is clear. Such evidence is only useful when government action appeared racially neutral yet affects a class of citizens in a manner diferent from others similarly situated.

Absent such a uniform pattern of discriminatory effects, Powell argued that the courts must find other indications of discriminatory intent. In this effort we were directed next to an investigation of the historical background of the disputed governmental action. Such an investigation may "...reveal a series of official actions taken for invidious purposes." [40]

Many of the school desegregation cases discussed in Chapter Three might be included under this heading. Such actions as altering attendance zones to conform to changing neighborhood patterns, utilization of portable classrooms having the effect of maintaining racial concentrations in particular schools might constitute a series of events that taken alone might not be determinative of discriminatory intent, but when considered together provide a clear pattern.

In an investigation of the historical background, "the specific sequence of events leading up to the challenged decision may shed some light on the decision makers' purposes." In the case before the Court, if Arlington Heights officials were shown to have changed the zoning designation of the disputed area from multi-family to single family housing subsequent to learning of plans to construct integrated housing on the site, such an action would have been highly suspect. [41]

Similarly, "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." [42] Al-

though Justice Powell provided no examples, we might assume that had zoning variances been the usual province of one community body, such as a zoning board, and in the case at hand, had that body been superseded by the Town Council with the variance then being summarily refused, the Court would have considered this departure from normal procedures sufficient grounds to shift the burden to the town to prove that, nonetheless, its decision was not motivated by racial considerations.

Departures from the norm on matters of substance "...too may be relevant particularly if the factors, usually considered important by the decision makers, strongly favor a decision contrary to the one reached." [43] Again, to rely on an example not included in Justice Powell's decision, if a zoning variance had been granted to a private developer to build housing on a similar site which was not likely to be integrated, yet denied the developer of the housing subject to federal affirmative action guidelines, such an action would likely be deemed suspect.

Finally, investigation into the legislative and administrative history could reveal the presence of unconstitutional legislative motive, "especially where there are contemporary statements by members of the decision making body, minutes of its meetings, or reports. In some extraordinary instances members might be called to the stand at trial to testify concerning the purpose of the official action...." [44] It can be assumed that such inquiry might seek to determine the subjective state of mind of government officials. Yet one is left to wonder, how, if at all, one can or should distinguish between actions taken consciously for racial reasons and those stemming from subconscious racial motivation or prejudice.

This detailed, though Powell admitted, not exhaustive summary of "subjects of proper inquiry" [45] to determine if racially discriminatory intent exists indicates the complexity of the task before the Court. It is parti-

cularly curious that the list of investigative targets would be compiled by Justice Powell because Powell, himself, explicitly attacked such searches for segregatory intent in Keyes as unnecessary, arbitrary, and unfair. As already quoted above in Chapter Three, Powell argued that the search for segregatory intent would lead to "subjective and conflicting conclusions. Every act of a school board and school administration, and indeed every failure to act where affirmative action is indicated, must now be subject to scrutiny." [46] Should we expect the results in cases concerning a community's use of zoning powers to be any less arbitrary?

For the rest of his decision, Powell considered the particular circumstances of the Arlington Heights zoning decision in light of his standards for determining discriminatory intent. The evidence assembled in support of a charge of discriminatory intent included, first, the fact that some of those who testified against the development at the zoning hearings might have been racially motivated. Such evidence was, however, deemed by the Court to have been insufficient. Second, it was argued that the Village "buffer policy" had been inconsistently applied. The "buffer policy" referred to the Village's practice of zoning areas adjacent to commercial development for multi-family dwellings as a buffer between such commercial uses and single family dwellings. The Appeals Court, however, "...concluded that the buffer policy, though not always applied with perfect consistency, had on several occasions formed the basis for the Board's decision to deny other rezoning proposals" and thus was not discriminatory. [47]

Third, despite the fact that the Village's decision "...does arguably bear more heavily on racial minorities," the particular sequence of events in this case did not arouse suspicion. The area in question had been zoned for single family dwellings since the inception of Arlington Heights'

zoning plan. And there was nothing unusual about the procedures followed concerning the rezoning application. If anything, it appears those requesting the zoning change were provided with unusual opportunities to press their case. [48]

Finally, according to Powell, the statements of town officials involved in the decision "focused almost exclusively on the zoning aspects of the ... petition." [49]

In sum, the Court decided that there was no evidence to support a charge of unconstitutional motivation in the zoning decision, and "The Court of Appeals' further finding that the Village's decision carried a discriminatory 'ultimate effect' is without independent constitutional significance." [50] Absent, therefore, evidence of significant segregatory intent, the Court would not consider the impact of such zoning decisions on housing segregation.

At this point, it is interesting again to return to Justice Powell's concurrence in Keyes in which he condemned "neighborhood school zones" as "constitutionally suspect when attendance zones are superficially imposed upon racially defined neighborhoods." [51] In the Arlington Heights case, however, Powell defends the right of communities to pursue housing policies which effectively maintain racially homogeneous neighborhoods as long as those policies are not demonstrably racially motivated. In Keyes he suggested that to similarly align their schools would raise constitutional questions even absent evidence that school boundaries were intentionally drawn to maintain segregation.

In effect, the intent standard that Powell rejected in Keyes was raised to the level of scientific precision in Arlington Heights.

Together the Washington v. Davis and Arlington Heights decisions stated more clearly than before both the requirement of discriminatory

intent before a constitutional violation would be found and the constituent elements of discriminatory intent. These decisions required federal courts to analyze the decision making processes in communities in search of evidence of discriminatory intent. As I will argue shortly, these decisions, by their apparent rejection of any affirmative duty on the part of government to pursue racial integration, contradict several important prior district court decisions outlined in Chapter Three. But for the moment, I will withhold judgment concerning which judicial approach more effectively gets to the root of racially discriminatory public policy.

If the Washington v. Davis and Arlington Heights decisions served to clarify the intent standard in racial discrimination cases, the Dayton decision [52] might well serve to clarify the issue of the proper scope of the remedies for discriminatory government action.

As I argued in the preceding chapter, and as Archibald Cox argued elsewhere, [53] Milliken raised serious questions concerning the propriety of ordering district-wide remedies for segregation found in only a portion of a district. In doing so, Milliken raised some doubts about the Swann and Keyes decisions earlier decided.

The Scope of the Remedy for De Jure Segregation

The Dayton Board of Education v. Brinkman case concerned the scope of the appropriate remedy for school segregation. Unlike both Hills and Milliken, it did not raise issues of district consolidation or the crossing of district boundaries; rather Dayton addressed the issue of the scope of the remedy for de jure segregation affecting directly a limited proportion of the students of a single district. In this case the Supreme Court overturned a district-wide remedy as inappropriate in light of the limited scope of the constitutional violation found.

The District Court decision had outlined substantial and important instances of de jure segregation in the past, but such substantial violations as the physical separation of whites and Blacks in schools and discrimination in both hiring and assigning Black teachers had largely been eliminated.

> Turning to more recent operation of the Dayton public schools, the District Court found that the 'great majority' of the 66 schools were imbalanced and that, with one exception, the Dayton School Board had made no affirmative efforts to achieve racial balance within those schools. But the Court stated that there was no evidence of racial discrimination in the establishment or alteration of attendance boundaries or in the site selection and construction of new schools and school additions. It considered the use of optional attendance zones within the district, and concluded that in the majority of cases the 'optional zones' had no racial significance at the time of their creation. [54]

The District Court, however, did find that unlike the elementary zones some high school optional zones "'...have had the most demonstrable racial effects in the past.'" [55]

The District Court considered constitutionally significant an action by a newly elected school board which rescinded resolutions approved by its predecessor board "...which had acknowledged a role played by the Board in the creation of segregative racial patterns and had called for various types of remedial measures." [56] This action, combined with the existence of racial imbalance throughout the school system and the optional attendance zone policy, was deemed by the District Court to have constituted a "cumulative violation" of the Equal Protection Clause.

Justice Rehnquist, writing for the Court majority, took particular exception to the emphasis on a "cumulative violation," a phrase which he considered "unfortunately not free from ambiguity." [57] Rather than relying on this phrase, he broke down and analyzed the individual violations. Citing the Washington v. Davis decision, he dismissed the District Court's

findings concerning racial imbalance as irrelevant absent "...a showing that the condition resulted from intentionally segregatory actions on the part of the School Board." [58] Further, he argued that the findings concerning the effects of optional attendance zones, "...assuming that it was a violation under the standards of Washington v. Davis," [59] involved only the city high schools.

He devoted considerably greater attention, however, to the issues raised by the District Court's conclusion concerning the School Board's rescission of its predecessor board's resolution. He questioned the validity of the District Court's assumption that the rescission itself constituted a constitutional violation. "The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs ... but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date." [60]

He argued that the rescission itself had no constitutional significance. If the Board was required by a record of unconstitutional action to take the remedial action envisioned by the resolution, then the action merely rescinding the resolution is irrelevant. It would not be the rescission of the resolution that was unconstitutional, but the discriminatory action that led to the resolution in the first place. If the Board was not required to take the remedial action in the first place, "then the rescission of the ... [resolution] in and of itself cannot be a constitutional violation." [61]

In light of the "cumulative violation" found, the District Court initially devised a plan abolishing optional attendance zones, assuring "representative racial distribution" of faculties in all schools, and providing for transportation for students electing to attend a school

outside their residential areas.

This District Court plan produced appeals from all parties. Plaintiffs asserted that there were in fact additional constitutional violations requiring a broader remedy. The Appeals Court, however, without obtaining additional evidence, ruled that the initial finding of a "cumulative violation" was sufficient grounds to order a district-wide remedy in order to "eliminate 'all vestiges of state-imposed school segregation.'" [62]

On remand to the District Court a desegregation plan was devised requiring "...that the racial distribution in each school in the district be brought within 15% of the 48%-52% black-white population ratio of Dayton." The final plan employed such desegregation techniques as the "'pairing' of schools, the redefinition of attendance zones, and a variety of centralized special programs and 'magnet schools.'" [63]

The Supreme Court, per Rehnquist, argued that "...there had been no showing that such a remedy was necessary to 'eliminate all vestiges of state-imposed segregation.'" He recognized that the Dayton schools were generally racially imbalanced, but that such imbalance had not been shown to have been the result of the limited action included in the "cumulative violation." [64]

On the basis of his decision in this particular case, Rehnquist went on to outline what in his view was required of the District Courts. Applying his reasoning specifically to the task before the District Court in Dayton, Rehnquist argued:

> The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and in fact, discriminate against minority pupils, teachers, and staff .... If such violations are found, the District Court ... must determine <u>how much incremental segregative</u>

> effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. [emphasis added] 65

All eight participating justices concurred in the result, but Justices Brennan and Stevens wrote separate concurring opinions. Justice Stevens merely restated his position that discriminatory effect is the most important single source of evidence of discriminatory intent. Justice Brennan, however, attempted to place the Dayton decision in the broader context of other Court school desegregation cases.

Brennan's decision amounted to an attempt to read the Rehnquist majority opinion as merely a restatement of longstanding Supreme Court approaches. He supported Justice Rehnquist's contention that the Court's opinion upheld Keyes and thus denied that Dayton represented any new restriction on desegregation efforts. According to Brennan, none of the parties to the Dayton case actually contended that the specific violations cited in the District and Appeals Court decisions were sufficient to justify the sweeping remedy, but significantly he noted the contention of the respondents that additional evidence was available which could be controlling on remand.

While agreeing with Rehnquist's view that the "cumulative violations" were insufficient to justify the remedy proposed, Brennan saw the existence of these violations as possibly indicative of a general policy of deliberate segregation. "While ... [the violations] are not sufficient to justify the remedy imposed when considered solely as unconstitutional actions, they clearly are very significant as indicia of intent on the part of the school board." Quoting from Keyes Brennan notes that "...a finding of intentional segregation as to a portion of a school system is not devoid of probative

value in assessing the school authorities' intent with respect to other parts of the same system." [66]

In light of Keyes, therefore, would it not have been appropriate for the Court to have assumed that the significant racial imbalance found throughout the system resulted also from intentional segregation? As Brennan argued, "Once segregative intent is found, the District Court may more readily conclude that not only blatant, but also subtle actions -- and in some circumstances even inaction -- justify a finding of unconstitutional segregation that must be redressed by a remedial busing order such as that imposed in this case." [67]

Brennan did not go on to weigh the specific actions of the Dayton Board in this context, but in light of Keyes the Board's rescission of its predecessors' acknowledgement of responsibility for segregation in Dayton appears to take on greater significance than that assigned to it by Rehnquist. Although past school board action might not appear to present clear objective evidence of segregatory intent, can we not assume that a board's acknowledgement that it could have avoided segregation, in itself, sufficient evidence of unconstitutional segregation? If the Court did not want to consider the withdrawal of the resolution as unconstitutional, might it not have judged the fact of the original resolution as sufficient proof that the school board was responsible for segregation or was the Court assuming that the school board had acted out of an overactive sense of guilt? One might safely assume that if anyone knew who was responsible for the racial imbalance in Dayton, it was the school board itself.

This issue is not raised in an effort to come to an independent judgment of the facts in this case, but rahter to point out the real distinction between the majority opinion of Rehnquist and the concurrence of Brennan. Without having acknowledged it, Rehnquist did reject one of the

principal pillars of the Keyes decision; that is, the virtual presumption in Keyes that once segregatory intent is found affecting a significant portion of a district, one can assume segregation found elsewhere in the system also results from segregatory intent.

Rather than reading evidence of intentional segregation as shifting the burden of proof to the district to show that remaining racial imbalance was not of its making, Rehnquist called on the District Court to determine "...how much incremental segregatory effect these violations had on the racial distribution of the Dayton school population ... compared to what it would have been in the absence of such constitutional violations." Having made such inevitably difficult comparisons, the court was called upon to formulate a remedy "designed to redress that difference." [68]

Although it is certainly possible to read Dayton as reaffirming Keyes because there is nothing specific in the decision preventing a court from concluding that limited segregation had systemwide impact, clearly the thrust of the decision is to restrict desegregatory orders. A direct link between intentional segregatory action affecting a part of a school system and racial imbalance elsewhere would presumably be difficult to prove. And significantly Rehnquist omits any reference to shifting the burden of proof to school districts to show that remaining racial segregation was not intentional once some evidence of segregatory intent has been found. Only segregation directly linked to specific intentional segregative actions would be subject to judicial remedy under Rehnquist's approach. The use of language such as "incremental segregatory effect" certainly implied a careful measurement of segregation. This concern for meticulous measurement was carried forward metaphorically in the use of the term "tailor" when the Court, referring to Swann, stated: "Once a consti-

tutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the violation.'" [69]

Finally, it may not be insignificant that the majority decision was written by Justice Rehnquist, a dissenter in Keyes

From Washington to Dayton

Looking specifically at the Washington v. Davis, Arlington Heights and Dayton decisions together, the full importance of the Court's renewed emphasis on first finding that racial discrimination is caused by deliberate government action becomes clear. Only those instances of segregation which result from a governmental design to segregate the races are unconstitutional (Washington v. Davis). Such a design to segregate the races can be proved by evidence of a pattern where Blacks and whites similarly situated are nonetheless treated differently in a specific government action (Arlington Heights). It appears, however, that governments are not required to take into account dissimilarities in the situations of Blacks and whites caused by private discrimination. Local authorities are, therefore, free to select policy options before them which have the inevitable effect of reinforcing racial segregation, provided there is no proof that racial segregation was the intentional result of their policies. For example, in Dayton the fact that neighborhood schools would have student bodies which reflect segregated residential patterns was considered irrelevant by the Court. In Arlington Heights the fact that the town's refusal to grant a zoning variance would negate a significant opportunity to provide integrated housing was deemed non-discriminatory by the Court.

This refusal of the Court to take into account the natural, foreseeable, and probable impact of specific governmental decisions on the opportunities of minorities runs contrary to many of the district court cases

discussed in Chapter Two and appears as well to be inconsistent with the mandate of Swann and Keyes

Summary and Conclusions

The purpose of the discussion that follows is to arrive at some preliminary conclusions concerning how the approaches adopted by the Supreme Court in the mid 1970s relate to those found in the literature and those adopted previously by both lower courts and by the Supreme Court itself.

Washington v. Davis made it clear that disproportionate racial impact alone would not be sufficient evidence of a racial classification justifiable only by some compelling state interest. Disproportionate racial impact is only constitutionally suspect when it "...is very difficult to explain on non-racial grounds." [70] This approach requiring evidence of segregatory intent was correctly described in "Reading the Mind of the School Board" and closely paralleled the position of the District Court in the Boston case. By failing, however, to condemn policies which effectively segregated the minority, the Court in effect rejected the approaches outlined in the literature by Richter and Goodman and in the decision in the Hart case.

The points of inquiry outlined in the Arlington Heights decision similarly supported a narrow construction of the meaning of segregatory intent. The Court rejected any affirmative requirement to pursue integration or even weigh values inherent in integration. Rather, the Court required a search of the decision making processes of a community in an attempt to identify some taint of discrimination -- some deviation from the norm in terms of the sequences of decisions, procedures adopted, substantive considerations or some direct evidence of subjective discriminatory motivation.

What the Court failed to consider, however, was the possibility that the normal procedures of a community might hide a discriminatory purpose. While all but Robert Richter and the District Court in the Hart decision recognized the Supreme Court's requirement that a purpose or intent to segregate is necessary to establish a constitutional violation, several of the District Courts and legal scholars discussed earlier found such intent in the failure of school authorities to adopt the least segregative policies available to them. Such, to varying degrees, was the position of Margaret Marshall and Owen Fiss and the District Courts in the Pontiac, Kalamazoo, Hoots and Husbands decisions.

Although, as our discussion in Chapter Three indicated, many of the District Courts discussed evidence of the manipulation of neighborhood school boundaries or other irregular practices which might amount to sufficient evidence of discriminatory intent to meet even the post-Washington v. Davis requirements, clearly the standards employed by the District Courts, themselves, along with standards formulated by the constitutional scholars discussed in Chapter Two vary considerably from the standards adopted by the Supreme Court.

The foundation for the current Supreme Court approach was laid in Milliken. In the four metropolitan desegregation cases discussed in Chapter Four, the Supreme Court rejected metropolitan remedies twice, tacitly accepted another and explicitly sanctioned another. In none of these cases, however, did the Court accept evidence of the mere availability of less segregative alternative policies as sufficient indicators of unconstitutional segregation. In all four cases a metropolitan remedy was clearly within the powers of the government to provide and such a remedy would have substantially increased the opportunities for integration. But this evidence alone was insufficient. Only when it was shown in Hills that HUD

had cooperated with the Chicago Housing Authority to confine minority housing to the inner city did the Court approve a metropolitan remedy. In the Wilmington case the direct involvement of the suburbs in de jure segregation likely served as the basis for the Court's failure to overturn a metropolitan desegregation plan.

Finally, despite the discussion by the District Courts in the three metropolitan school cases of the role of housing segregation in the racial isolation of city from suburb, the Supreme Court evidently did not consider such evidence to be a sufficient basis for ordering metropolitan desegregation.

Of course, we must recognize the distinction that the Court made between remedies within a single jurisdiction and remedies which might interfere with the autonomy of separate state subdivisions. The implication, however, that the metropolitan cases laid the foundation for further restrictions on the remedial powers of the courts was later supported by the Supreme Court's ruling in the Dayton case.

In Dayton the requirement arising from Green and Swann that districts found guilty of de jure segregation pursue maximum feasible desegregation appears to have been abandoned. Now only the specific effects of proved intentionally segregatory conduct need be remedied.

The standards that the Supreme Court adopted in its decisions in 1976 and 1977 amount to a Court position that so long as school policies themselves are color blind, as long as they are not designed to exacerbate segregation, they are constitutional. School districts need not even meet the requirements outlined by Justice Powell in his concurring opinion in Keyes to pursue traditional student assignment policies in such a way as to maximize integration, and they certainly need not satisfy the standards proposed in much of the literature or the standards adopted by several dis-

trict courts which required school authorities to pursue only those potential student assignment policies which promise to produce maximum practical integration.

NOTES

1. Swann, 402 U.S. 1, 16

2. Washington v. Davis, 426 U.S. 229, 48 L Ed. 2d. 597 (1976); Arlington Heights v. Metro. Housing Corp., ___U.S.___, 50 L Ed. 2d. 450 (1977)

3. Washington v. Davis, 48 L Ed. 2d. 597, at 604

4. Ibid., at 605

5. Since this case falls under the jurisdiction of the federal government and not a state, the applicable Amendment if the Fifth not the Fourteenth.

6. 48 L Ed. 2d. 597, at 607

7. 100 U.S. 303, 25 L Ed. 664 (1880)

8. Washington v. Davis, at 607

9. Akins v. Texas, 325 U.S. 398, 403-404 (1965); Ibid. 607

10. 376 U.S. 52 (1964)

11. Quoting from Ibid., at 67; Washington v. Davis, at 607

12. Keyes, 413 U.S. 189, 205

13. Washington v. Davis, at 609

14. 403 U.S. 217

15. Washington v. Davis, at 609

16. Ibid.

17. 407 U.S. 451 (1972)

18. Ibid., at 459

19. Washington v. Davis, at 610

20. Ibid.

21. Ibid., at 612

22. Ibid.

23. Ibid., at 609

24. Ibid., at 609

25. Ibid., at 615

26. Ibid.

27. Ibid., at 616

28. Arlington Heights, 50 L Ed. 2d. 450

29. Ibid., at 450

30. Ibid., at 460

31. Ibid.

32. Ibid., at 459

33. 387 U.S. 369, 373

34. Arlington Heights, at 461

35. Ibid.

36. Ibid., at 465

37. Ibid.

38. 118 U.S. 356, 30 L. Ed. 220 (1886)

39. Ibid.

40. Arlington Heights, at 465

41. Ibid., at 466

42. Ibid.

43. Ibid.

44. Ibid.

45. Ibid.

46. Above, p. 62, note 22

47. Arlington Heights, at 467

48. Ibid.

49. Ibid.

50. Ibid., at 468

51. Above, p.63, note 27

52. Dayton Board of Education v. Brinkman, ___U.S.___, No. 76-539, Decided, June 27, 1977 (slip opinion)

53. Archibald Cox, The Role of the Supreme Court in American Government (New York: Oxford University Press, 1976), p. 84 ff.

54. Dayton,Rehnquist for the Court, p. 5.

55. Ibid., p.6

56. Ibid.

57. Ibid.

58. Ibid., p.6

59. Ibid., p.7

60. Ibid.

61. Ibid., p.7, quoting from 503 F. 2d. 684, 697

62. Ibid., p. 10

63. Ibid., p.2

64. Ibid., p. 10

65. Ibid., pp. 13-14

66. Ibid., Brennan concurring, p. 2

67. Ibid., p.3

68. Ibid., Rehnquist for the Court, p.14

69. Ibid., p. 13

70. Above, p. 165, note 24

CHAPTER SIX

IDENTIFYING DISCRIMINATORY INTENT: ANALYSIS OF THE COMPONENTS OF THE POLICY MAKING PROCESS

The standards devised by courts to identify unconstitutional segregation reflect the court's understanding or interpretation of the policy making process in American communities. Some scholars, and at least one of the District Courts studied have presumed that all segregation, regardless of cause is unconstitutional. In most instances, both courts and constitutional scholars have presumed that effectively segregatory policies were the products of segregatory intent. Some, however, including the Supreme Court, have been unwilling to presume that public authorities always intend the racial consequences of their actions. Specifically, the Court has refused to automatically condemn neighborhood school policies which produce segregated schools in residentially segregated communities.

In an attempt to evaluate the Court position, this chapter will turn away from specific court cases and constitutional questions to a discussion of some issues involved in various political science approaches to analyzing the policy making processes in American communities. The question to be investigated is: under what circumstances might one be justified in assuming that the actual results of public policy making reflect the intent of those involved in the decision making process? To frame the question in terms of the issue of school segregation: when might discriminatory effect be indicative of discriminatory intent?

Following analysis of the issues involved in interpreting the intent of policy makers, this chapter will focus directly on the issue of neighborhood school policy in residentially segregated communities. In light of available empirical evidence on residential segregation and "white flight,"

I will argue that neighborhood school policies, themselves, not only reflect residential segregation, but possibly contribute to such segregation as well.

Both in the investigation of the policy making process and of the relationship between neighborhood school policy and residential segregation, I will argue that there are sufficient grounds for presuming that effectively segregative policies reflect segregative intent. In doing so, however, I do not contend that all government actions that place disproportionate burdens on Blacks are necessarily unconstitutional. Rather, in response to the expressed concern of the Supreme Court in the Washington v. Davis decision about the possibly sweeping impact of a rule that all effectively discriminatory policies are unconstitutional, I will identify grounds to distinguish policies which effectively isolate Blacks in schools from other government policies which may have the effect of placing greater burdens on minorities than on whites.

The "Rational Actor" Model and Segregative Intent

The bulk of current litigation to determine whether a neighborhood school system which effectively segregates minority children is the product of segregative intent involves urbanized areas. In rural areas where school children are routinely bused to school, the neighborhood school system generally does not exist. In such areas the presence of a predominantly minority school in a predominantly white community would be very difficult to explain on non-racial grounds. The question that is really before us, then, is under what circumstances might we conclude that urban school authorities intend racial segregation. Or, to put the question another way: when can we conclude that the effect of the actions of public authorities is the product of their intention?

The authors of the Yale Law Journal note,"Reading the Mind of the School Board," discussed above in Chapter Two, made an assertion that to many students of political science would seem highly questionable. They stated that "...a substantial body of social theory postulates a model of institutions as unitary entities ('rational actors') that pursue their goals through purposeful action." [1]

In support of their argument, the authors cite Graham Allison's writing on the Cuban missile crisis. In relying on Allison they fail in the first place to recognize an important distinction between the decision environment of strategic planners where the consequences of error could be nuclear annihilation and the rather routine decision making of public authorities in urban governments. Equally important, however, they neglect to mention that the "rational actor" model was only one of the models discussed by Allison. And, indeed, Allison argued that the explanatory value of the model even in the foreign policy area was limited. [2]

Allison discussed two other models of decision making which, as will soon be apparent, would not support a conclusion that governmental actors act as "unitary entities" and which cast significant doubt on whether one would be justified in concluding that agencies intend the actual effects of their actions.

Without describing the elements of the "bureaucratic politics" model discussed in Allison, I will quote from his observation concerning the intent of decision makers: "Action does not presuppose intention. The sum of behavior of representatives of a government relevant to an issue was rarely intended by any individual or group. Rather, separate individuals with different intentions contributed pieces which compose an outcome distinct from what anyone would have chosen." [3]

The third model discussed by Allison, "the organizational process

paradigm," also differs markedly from the rational actor model. Without outlining the assumptions of the model in any comprehensive manner, a point of direct concern to us is the essentially conservative, routine nature of government performance under the model. Organizational activity "...does not constitute far-sighted, flexible adaptation to 'the issue' .... Detail and nuances of action by organizations are determined by routine ...." [4] Simply, policy making seen from the perspective of the organizational model conflicts with the view of political institutions as "...unitary entities ('rational actors') that pursue their goals through purposeful action." [5]

Reliance on Allison's discussion of foreign policy decision making to explain the actions of school and housing interests is questionable. Allison even denies the full explanatory value of the rational actor model in the foreign policy setting, and he notes that judgments concerning the utility of any such model "would require a typology of decisions and actions, some of which are more amenable to treatment in terms of one model and some another." [6]

As we move directly into a review of policy making models more appropriate to the urban policy setting, it will become clear that the rational actor model is not widely accepted as a tool for understanding the urban policy making process. But this fact by itself does not justify a conclusion that school authorities, for example, do not intend the "natural, probabal and foreseeable" consequences of actions that result in racially isolated schools. All it demonstrates is that such an assumption must be based on grounds other than a simple reliance on a rational actor model of decision making.

Critiques of the "rational actor" model Lineberry and Sharkansky in their study, Urban Politics and Public Policy, [7] list several reasons "...why decisions in public (or private) bodies rarely measure up to the exacting standards of pure rationality." [8] Among the reasons listed are "time pressures" and the "costs of information." Simply, most policy makers lack both the time and resources to accumulate all the information that would be necessary to survey all possible policy alternatives. Citing Anthony Downs, they note that because of the costs of obtaining information "an important degree of unpredictability is usually involved in making decisions." [9] And the costs of obtaining information often lead decision makers to cut off their search for information "...when they discover a mode of operation that involves the least profound change in then established programs." [10] Using a term supplied by Herbert Simon, [11] the search will end when the participants can "satisfice" -- when "...they find something that will work, that will provide some relief from the perceived difficulties without threatening undesirable unrest within the bureaucracy and [significantly] among other decision makers and interest groups." [12]

An additional constraint on the rationality of the policy making process is the fact that governments sometimes pursue incompatible policies simulateously; that is, one agency could pursue policies that make the immediate accomplishment of another agency's goals difficult or impossible. [13]

The final factor mentioned by Lineberry and Sharkansky is the "constraint of feasibility"; that is, the determination of what to do about a particular problem is made not on the basis of what is "rational" but by what will "sell" to the electorate and to political influentials. [14] This final factor, like those already discussed, is important not because it prevents policy makers from accomplishing an end they desire to achieve.

Rather, it is important because it affects the nature of the goals that policy makers will attempt to accomplish. Simply, policies will be designed to accommodate the perceived desires of the important segments of the community.

The non-rational aspects of the policy making process would seem to cast significant doubt on any presumption that policy makers intended the consequences or effects of their actions. [15] Lineberry and Sharkansky describe what they term "spill over effects" or the "unanticipated products of policy." Discussing specifically the urban policy environment, they observe: "Unintended impacts arise because the urban system consists of interrelated parts that influence one another and because information about all the potential effects of a policy is unavailable." [16]

Critiques of the "rational actor" model and school segregation Looking at the issues involved in school adjudication from the perspectives of the critics of the rational actor model, it might be unreasonable to assume that simply on the basis of finding a segregatory effect of particular student assignment policies that the school officials responsible for those policies intended to produce segregation. Such a position could be based on a number of grounds discussed above. First, policies often have unintended "spill over effects"; for example, a rigid adherence to a neighborhood school policy by a school board might provide a ready means of "escape" for whites seeking to avoid integration. If people know that simply by changing place of residence they can change schools, a neighborhood policy initially designed for "walk-in" convenience could have the unintended consequence of encouraging whites to shift neighborhoods and thus produce segregated schools. [17]

Another type of unintended result could be produced by the need or

desire to limit the amount of information accumulated before decisions are made. An example would be the situation of school authorities confronted with a new housing development within their district. Their immediate need would be to determine the number of potential new students which would be added to their school district's enrollment and to plan facilities for those students. A simple solution would be to build a new neighborhood school within the area of the new housing development in conformity with an existing neighborhood school policy. Limits on the authorities' ability to assemble or cope with information could cause them to simply ignore the fact that the new development would in all probability be all white either because of the income level of the tenants or because of private housing discrimination. [18]

Critics of the rational-activist model might feel that it would be unreasonable to hold school officials responsible for the racial impact on the schools of the housing development. The primary concern of school officials is, after all, education, and normal operating procedures would cause them to confine their attention to the necessary additions in school capacities to accommodate new students. The racial characteristics of housing developments are the concern of the housing officials.

This type of example could serve as well to illustrate the observed tendencies of government agencies to sometimes pursue incompatible goals. While zoning or housing authorities might either plan in a racially discriminatory fashion or tolerate racial discrimination among private housing interests, school officials might genuinely desire integrated schools. Because housing policies conflict with school goals, the desire of school authorities might be thwarted.

From the perspective, then, of some critics of the "rational actor" model of decision making, at first glance at least, it appears quite reason-

able to assert that school officials do not always intend the "natural, probable, and foreseeable consequences" of their actions. School board policies producing segregated schools might be the result of inadequate information concerning the consequences of actions selected, incompatible goals pursued by other autonomous public or private agencies, or simply, to use a term supplied by Owen Fiss, [19] a "disregard" for race as a necessary concern of school officials in planning school capacities and neighborhood zones.

Consistent with the view of the Supreme Court in Washington v. Davis and Arlington Heights, such policies would be seen as not intentionally segregative as long as they reflected normal school procedures. There was nothing in these Supreme Court opinions requiring school officials to consider the potential racial consequences of their actions. Only if they deviated from normal student assignment procedures in such a way as to effectively exacerbate racial segregation would their decisions be constitutionally suspect.

The Incrementalist Model of Decision Making and Segregative Intent

Despite the existence of valid criticisms of the rational-activist model of decision making, it may be that decision processes are not as nonrational as the discussion above would indicate. There are grounds for concluding that the results of public policy are reasonably related to the intent of decision makers.

If any single model can be said to dominate the perceptions of political scientists of the policy making process, it is the incrementalist model. [20] The primary architects of this model were Charles E. Lindblom and David Braybrooke. [21] Together Lindblom and Braybrooke developed an incrementalist view of the policy making process that, while highly critical

of the rational activist model nonetheless, contended that there were significant elements of rationality even in the piecemeal incrementalist decision making.

In outlining the incrementalist model, I will focus on those elements that emphasize rationality. I will be seeking grounds to conclude that, indeed, in the school setting government authorities can be held accountable for the consequences of their action. Under some circumstances segregatory effect is indicative of segregatory intent.

The crucial element that both distinguishes the incrementalist model from the rational model, and at the same time introduces the element of intent in incrementalist decision making, is the argument that simply policy making does not take place in a vacuum. The rational activist model in assuming that decision makers both possess the capacity and inclination to consider all relevant desired social states, neglects the real limits on human beings and the constraints present and past policies place on decision makers. Knowledge and experience of existing policy, however, enables decision makers to weigh the possible consequences of either continuing present policies or of making marginal and measurable alterations in current policy. Simply, experience provides some guidance as to the consequences of particular policy choices. [22]

The first consideration before us in reviewing the incrementalist model is to determine how it compensates for some of the practical defects of the rational actor model.

In incremental decision making problems are rarely addressed fully in one comprehensive action; rather, incremental decision making involves "small and incremental moves on particular problems ...." [23] Policy making is "serial"; that is, "it involves adaptation to the environment in a series of steps." [24] It is "remedial" in that it encourages the decision

maker "to identify situations or ills from which to move away ...." [25] Remedies to problems are identified through a process of "feedback" from prior stages providing necessary information for planning the next action. "Because of the serial nature of analysis, the [incremental] strategy ... generates the kind of information it requires." [26]

In sum, decision makers need not anticipate all possible consequences of their actions because all actions are by nature tentative and subject to later review as new information is received.

In light of this brief review of some of the significant elements of the incrementalist model, how do decision makers cope with inadequate information leading to unanticipated consequences of their actions or "spill over" effects?

First, according to Braybrooke and Lindblom, there are really two types of neglected consequences: (1) those unanticipated because of limited analysis resulting from inadequate information or the costs of obtaining information; and (2) "adverse consequences and failures at least roughly anticipated but nevertheless not permitted to influence the analysts' choice among policies." [27] Such anticipated consequences or "spill over" effects might be neglected simply because a decision maker feels able to cope with only "one problem at a time," or as we will see later, because of practical or political constraints placed on the actions of one decision maker by the actions of others.

Postponement of consideration of anticiapted or unanticiapted consequences is justifiable according to Braybrooke and Lindblom because: "... when analysis and policy making are remedial and serial, anticipated adverse consequences of any given policy can often be more effectively treated as new and separate problems than as aspects of the original problem. Unanticipated adverse consequences can often be better guarded against

by waiting for their emergence than by futile attempts to anticipate every consequence as required in synoptic [rational] problem solving." [28]

Assuming that the elements of the incrementalism discussed so far are descriptive of the policy process within urban school systems, what does this model tell us about the "intent" of decision makers? To this point the answer is no doubt little. It would, however, be appropriate to ask whether it is likely that school officials would be unaware of racial isolation produced by their policies. It is possible, as the example discussed above demonstrated, that a decision to accommodate students added to a district by a new housing development in neighborhood schools might be made without decision makers being fully aware of the racial consequences. The model, however, does assume that "spill over" effects or neglected consequences can become the subject of subsequent decision making. [29]

An additional assumption of the incrementalist model is that consequences of a decision that are neglected by one decision maker might be taken up by another agency or group. If, for example, housing officials neglect, for whatever reasons, the racial consequences of their decisions, then it is possible for school officials to take compensatory action. Rather than simply reflecting the residential patterns in the schools, they could adopt some alternative mode of student assignment. In doing so they would, to a degree at least, ameliorate the racial consequences of housing decisions.

According to Braybrooke and Lindblom, this capacity of multiple centers of decision making increases the rationality of decisions. "...[I]f the values of one analyst or one policy-making group neglect indefinitely some kinds of policy consequences, other analysts and groups whose values are adversely affected will make their neglected consequences focal points

of their own problem solving." [30] Steps are taken by a multiplicity of decision makers to compensate for the inability of any one decision maker to consider all consequences of potential policy.

Does this capacity of decision makers to compensate for the neglected consequences of the actions of others justify our concluding that the failure of school authorities to compensate for the segregatory effects of residential segregation is intentional? Although segregation would not necessarily be the intended result of a neighborhood school policy, would the failure to alleviate segregation in subsequent decisions and in the application of neighborhood school policy be sufficient evidence to show that segregation was in fact desired?

To begin to answer such questions, we must consider additional elements of, and constraints upon, incremental decision making. Crucial to this discussion will be the question of coordination and "mutual adaptation" among various public and private decision making agencies.

Coordination among multiple independent decision makers Lindblom, in Intelligence of Democracy, [31] contends that decisions of various agencies are indeed coordinated and do constitute a rational whole. In this Lindblom argues that there is policy coordination even in the absence of central coordination; that is, a situation in which coordination is imposed by a higher authority. He attempts to explain how autonomous yet interdependent decision makers influence each other's actions. According to Lindblom, "Coordination can be said to exist whenever policies respond to, or are adapted to, other policies in the set." [32]

Rationality enters the decision making process through mutual adaptation and coordination. "In a simple case we coordinate each new decision with past decisions of ourselves and others to the extent that we take the

status quo, which is the product of past decisions, as the real world to which our decision has to be adjusted .... Coordination and rationality tend to fuse ... to stress coordination is to stress rationality." [33]

The type of coordination or mutual adjustment which should concern us directly is that which might help explain the nature of the relationship between school authorities and private interests or public agencies concerned with maintaining housing segregation and directly or indirectly school segregation. [34]

It is important, however, to note that in discussing mutual adjustment and coordination among various decision makers, Lindblom is not assuming any overall uniformity of goals. Rather, he is concerned with decision making by a "partisan"; that is, "...decisions calculated to serve his goals, not goals presumably shared by all other decision makers with whom he is interdependent." [35] But significantly, the interaction among partisans is not necessarily a zero sum game; it will often be the case that "a 'solution' reached is to the advantage of all participants." [36]

Coordination among decision makers is achieved through the process of "partisan mutual adjustment." We can assume coordination has taken place "whenever any one decision is changed from what it would otherwise have been because of the direct or indirect influence of other decisions." [37]

The remainder of our discussion of partisan mutual adjustment will be directed to discovering grounds for assuming that conventional student assignment policies in residentially segregated communities result from segregatory intent.

In looking at various methods of partisan mutual adjustment, Lindblom seeks to identify "...the logically possible ways in which each decision maker might independently adjust to the others or affect others' adjustment to him." [38] He outlines two broad categories of adjustment, "adaptive

adjustments" and "manipulated adjustments." First we will discuss adaptive adjustments.

"Adaptive adjustments" are those "...in which a decision maker simply adapts to decisions around him; that is, makes those decisions that he can without first enlisting, as in negotiations, a response from another decision maker." [39] The method of adjustment of particular interest to us in trying to explain the behavior of school authorities in residentially segregated communities is "deferential adjustment." A decision maker engaged in deferential adjustment "...takes care to make no demands on the other decision maker and to impose no losses or deprivations on him." [40]

Let us consider for a moment an example suitable to the context of school segregation. We saw in Chapters Three and Four that housing authorities and interests ranging from the FHA in the near past to Real Estate brokers more recently assumed that segregated housing patterns enhance property values, are more stable, and that stability is directly related to predominantly one race schools. Keeping this context in mind, school officials in the routine performance of their duties must provide schools to serve student populations. If we assume that in so doing school officials seek to avoid imposing losses on other decision makers, we would expect them to avoid interjecting issues of racial integration into their decisions on the location of schools. That is, they would confine themselves to questions of school capacities thereby fulfilling their primary function while avoiding impinging on the known or presumed desire for segregation on the part of housing interests.

Policy coordination and segregative intent The question before us is: would such a policy of deferential adjustment amount to a policy of intentional segregation? According to Lindblom, "If a decision maker decides to forego any policies that challenge the values of another, he has immediately achieved adjustment of at least one policy to another." [41] In light of the Washington v. Davis decision, however, the Supreme Court would be unlikely to find residential student assignment policies as described above to be intentionally segregatory because the decision maker need not pursue irregular or unusual policies to avoid integration. If, however, such policies represent a routine decision to avoid impinging on other decision makers, would this not make the school board actions intentionally segregatory? Adjustments to the actual or perceived preferences of others amount to the adoption of such preferences.

This position conforms to the "cumulative impact theories" described by Fiss, Bell [42] and in the Hart [43] decision. It involves the notion that various governmental and private entities cannot be viewed in isolation. Despite the arguments in Lineberry and Sharkansky that there is significant administrative autonomy in urban governments, if Lindblom is correct, autonomy is maintained through mutual adjustment resulting in coordination. It is through such avoidance of directly contradictory policies that incremental decision making is deemed to be rational.

The link between the theory of partisan mutual adjustment and segregatory intent can be stated as follows: If all decision makers pursue their goals and if only one decision maker has as an important goal the maintenance of segregation while none simultaneously pursue integration, partisan mutual adjustment will lead to a set of decisions in which all will pursue their goals in such a way as to allow the one's interest in segregation to be realized. There need be no overall agreement on the

desirability of segregation for all decisions to be intentionally segregatory. The intent of one decision maker becomes the policy of all.

The formulation above takes into account adaptive adjustments, but the validity of the approach is even clearer in the case of manipulative adjustments. Manipulative adjustments involve situations in which a decision maker "...seeks to enlist a response desired from the other decision makers." [44] Manipulative adjustments include such methods as negotiations and bargaining, but if open bargaining were to take place over the question of segregation, it appears likely that the Supreme Court would find sufficient evidence of segregative intent. [45]

The manipulative method described as "prior decision" involves neither discussion nor negotiation. In fact, it can take place where actual bargaining would be impossible. Prior decision involves a situation in which decision maker X believes "...it is to his own advantage and to Y's that their respective decisions are coordinated. But he does not negotiate. Instead, he makes his decision before Y does, to force Y to adapt to X's decision." [46]

Again focusing on the interaction of housing and school segregation, a housing developer could produce segregated housing and present a school board with a fait accompli. The choices before the school board would be to build a neighborhood school which would be segregated or abandon traditional neighborhood school policies in order to pursue integration. To do the latter would, however, amount to a direct assault on an important interest of the housing developer and make coordination of policies impossible.

Still, one might ask why school authorities would allow their choices to be determined by the prior decisions of housing interests. Why would they not independently decide to pursue integrated schools without regard

for the preferences of housing interests? Finally, are we justified in concluding that their failure to compensate for the housing situation is indicative of discriminatory intent? Answers to such questions may be found in the nature of incremental decision making itself.

According to Braybrooke and Lindblom in A Strategy of Decision, incremental decision making is compatible with two types of changes in established policies: (1) social change which largely repeats previous change and (2) permanent small alterations. Although they contend that desegregation in the United States fits the model of incremental change, they note that "...some people would argue that [desegregation] goes beyond the incremental." [47]

Braybrooke and Lindblom wrote in 1964, a period when integration had been in progress in the South, however tentatively, for ten years. Whether they would consider the introduction of integration to be incremental is not clear. Would, for example, a decision by a school board to abandon geographic criteria for student attendance in favor of other criteria designed to assure racial segregation be deemed incremental?

If the school authorities in most American communities were to remove the link between place of residence and school assignment, they would likely seriously impinge on the desires of those directly involved in housing decisions. [48] As Braybrooke and Lindblom note, the normal process of incremental decision making is ill suited to such fundamental challenges to prevailing values. "In its preoccupation with increments of change, the strategy makes the most of existing constraints on policy to reduce areas on which social disagreement is possible." [49] And by implication Braybrooke and Lindblom argue that discovering the intent of decision makers pursuing incremental strategies may be quite difficult. "The strategy leaves valuation in large part tacit and promotes agreements that are minifest in be-

havior without being explicitly arranged." [50] Therefore, often the effect of policies, the actual actions of decision makers, may be the best indicator of intent.

In this survey of approaches in political science to understanding the nature of the policy making process, we have focused on those aspects of the process that might mask the intent of decision makers and, thereby, subject the Supreme Court's reliance on clear evidence of segregatory intent to challenge. The discussion to this point has sought to demonstrate that inaction by a school board in the face of housing segregation, may indicate the adoption on their part of intentionally segregatory policies. Such inaction does not necessarily reflect a school board policy that is color blind; rather it can reflect a policy that is readily adapted to the deliberate segregatory actions of others.

"Non-Decision Making" and "The Mobilization of Bias"

A final approach to understanding the policy making process that might aid us in establishing a link between segregatory effect and segregatory intent can be derived from the work of E. E. Schattschneider and Peter Bachrach and Morton Baratz. [51]

It is not my intention to enter the debate over the central focus of Bachrack and Baratz's concept of "non-decisions." [53] Their primary purpose was to identify who exercises power. Our sole concern, however, is to determine when one might conclude that the direction of public policy reflects the intent of those responsible for the policy.

E. E. Schattschneider has argued that "All forms of political organization have a bias in favor of the exploitation of some kinds of conflict and the suppression of others because organization is the mobilization of

bias. Some issues are organized into politics while others are organized out." [53]

Seen from Schattschneider's perspective, the incremental policy process described by Braybrooke and Lindblom, which is marked by mutual adaptation and adjustment among decision makers, could be seen as effectively organizing out questions of integration as contrary to the perceived interests of housing interests and thus incompatible with mutual adjustment.

Bachrack and Baratz's concept of "non-decision" making may add some additional light to this discussion. They define "non-decisions" as

> a decision that results in the suppression or thwarting of a latent or manifest challenge to the values or interests of the decision maker. To be more nearly explicit, non-decision-making is a means by which demands for change in the existing allocation of benefits or privileges in the community can be suffocated before they are voiced; or kept covert .... [Non-decision tactics] ... which are highly effective means 'to screen out' any energetic search for innovation are particularly effective when employed against impermanent or weakly organized groups. [54]

This concept of "non-decision making" is raised simply to point out that all interests are not necessarily represented in the process of mutual adjustment and adaptation among decision makers. The concepts of "mobilization of bias" and "non-decision making" might help explain why, for example, school authorities might disregard the advance of integration in their policy objectives. Indeed, several District Courts discussed in Chapter Three explicitly condemned the failure of school authorities to even consider possible benefits of integrated education. Such organizing out of questions of integration was considered by some District Courts to be indicative of intentional segregation. [55]

The standards adopted by the Supreme Court in Washington v. Davis and Village of Arlington Heights, however, did not require school authorities to pursue integration. They only forbade the active pursuit of segregation.

Decision Making Models and the Intent Standard: A Summary

In summary, despite the fact that government decision making rarely satisfies the requirements of the rational actor model, that specific policies have unintended "spill over" effects, and that at times multiple autonomous decision makers may act at cross purposes, according to the dominant incrementalist model of decision making, it would not be accurate to say that the results of government policy are unintentional. The autonomy of multiple decision makers is protected by mutual adaptation and adjustment among them permitting each to accomplish his primary goals and protecting each from losses imposed by the incompatible actions of others.

Respect for the autonomy of other decision makers is not the only explanation for the failure of individual decision making agencies to pursue innovative policies. Policy makers are also unlikely to select policies that are inconsistent with the desires of the dominant segments in a community; this can be true whether the dominant segment is a privileged elite or a popular majority.

The question which this section has addressed is whether the standards adopted by the Supreme Court to identify segregative intent would be adequate to discover such intent if it were in fact present in a government structure which pursues strategies of incremental decision making. The answer that follows from the discussion above would in many cases be no. Routine, predictable and non-innovative actions of school authorities can be, and are, readily adapted to the pervasive residential segregation found in American cities. Additionally, the existence of student assignment policies based on geographic attendance zones provide a ready framework for private and public housing interests to adapt their decisions in order to maximize both housing and school segregation.

Only a judicial standard which challenged the failure of school officials to pursue the least segregative alternatives before them would be an effective tool to identify intentional school segregation. Failure to select the least segregative alternative could well reflect a policy of adaptation to the segregatory decisions of housing interests.

In order to lend some empirical support to the arguments outlined to this point, a brief review of some of the issues and evidence involved in the question of "white flight" follows. The available evidence supports a conclusion that rigid adherence to geographic student attendance zones helps guarantee the success of private housing discrimination, assures segregated neighborhood schools and facilitates "white flight" from schools that happen to become integrated.

Geographic Student Assignment Policies and "White Flight"

The debate over the issue of "white flight" began in earnest with the publication of James Coleman's study, Trends in School Segregation, 1968-73.[56] Coleman's conclusion that forced integration produces "white flight" was challenged on the grounds that he did not study "white flight" produced by school desegregation orders, but rather "white flight" in cities in transition. According to one of Coleman's most vigorous critics, Christine Rossell, Coleman "...only measures changes in racial mixtures through a statistical measure of the proportion of Blacks and whites attending school with the opposite race, and therefore does not distinguish between ghetto expansion into a white attendance zone (ecological succession) and an actual government policy resulting in the same thing -- integration."[57]

Rossell's point is that the integration that Coleman saw as preceeding "white flight" was in fact, itself, a product of "white flight" or simply the trend of whites to move to the suburbs which is not necessarily causally

related to school integration. As the white population declines and the Black population increases, neighborhoods that had been totally or predominantly white become increasingly Black. Neighborhood schools that had served all white neighborhoods, themselves, become integrated, but as whites continue to leave the neighborhood, the schools become resegregated. According to Rossell, therefore, it was "white flight" to the suburbs that produced integrated schools, and it was continued "white flight" that produced resegregated schools.

The issue of whether or not court ordered desegregation accelerated "white flight" has not yet been resolved. [58] The phenomenon of "white flight," however, whether it preceded, follows, or is completely unrelated to court ordered school desegregation, is of concern to those seeking to lessen segregation in the schools. The question is: what aspects of public educational policy facilitate "white flight" and thus maintain or increase school segregation?

Earlier discussion of cases and the policy making process demonstrates that rigid adherence to residential criteria in assigning students to schools provides a basis for both individuals and agencies to maximize school segregation. If, indeed, school integration is produced in cities undergoing "ecological succession" -- transitional residential integration -- then segregation can be maintained by white relocation. Neighborhood school policies provide a framework for both private and public decision makers to plan housing decisions. As already noted, the known interaction between housing policy and racial make-up of schools has served as a basis for several court rulings. [59]

A simple means to lessen the impact of "white flight" and residential segregation on schools is, of course, to abandon neighborhood schools. As the area from which the student body for any integrated school is to be

drawn is enlarged, the practicality of simply moving to avoid integration is decreased. Attendance zones not directly related to place of residence would lessen the possibility that schools would be segregated in the first place.

There is evidence to support the position that the broader the scope of a desegregation plan, the greater the likelihood there will be stable integration. In a study of integration in Duval County, Florida,[60] Michael W. Giles found little evidence of "white flight" in the face of court ordered desegregation. Giles described the school district as follows: "The Duval County school system serves the consolidated city of Jacksonville and is the thirteenth largest school district in the nation. Over 120,000 students are enrolled, of whom thirty percent are black. The district covers 840 square miles, two-thirds the size of the state of Rhode Island. The pattern of residential segregation in the county is similar to that found in many metropolitan areas. The black population is concentrated in the central core city."[61]

Despite an increase of over 70 percent in the number of students bused in the district to achieve integration in each school, "white flight" was not great and what "white flight" there was might be attributed to areas on the fringe of the ghetto that were in "transition" before the start of busing.

An important contributing factor to the near absence of "white flight," according to Giles, was the fact that "Duval is a geographically large school district which virtually eliminates residential mobility as a means of avoiding desegregation ...."[62]

Adopting a similar position while attacking the "white flight" thesis of Coleman, William Taylor, et al., argue that school desegregation in large districts such as in Swann and affecting metropolitan areas such as

Nashville has been successful because the desegregation plans in these areas "...left no public schools that would serve as havens for those seeking to avoid desegregation, and integration indeed has proved stable." [63]

If these observations concerning court ordered desegregation are correct, then the message for traditional school assignment policies linked to neighborhoods is clear. A neighborhood school policy facilitates segregation by making the racial make-up of the school contingent upon the racial make-up of the neighborhood. Such policies provide a predictable framework within which those desiring to avoid integrated schools can operate. Those who desire a segregated school need only find a segregated residential area. If, however, the racial character of the schools were disassociated from place of residence, then neighborhood selection would not determine racial isolation.

Causes of residential segregation The fact of pervasive residential segregation has been well documented. [64] As reported by Reynold Farley, a study of 109 United States cities showed that from 60 to 70 percent of either white or Black families would have to move in order to produce integrated neighborhoods. [65] That such high levels of racial segregation are due to racial factors is equally clear. According to Farley,

> It is often argued that the high degree of racial residential segregation found in cities and the near absence of blacks from the suburban rings are attributable to income differences between the races. Such contentions are not valid. Most neighborhoods in the United States are economically heterogeneous. If people were racially distributed according to the value of housing they can afford, instead of according to skin color, levels of residential segregation would be low. [66]

If, however, it were shown that such segregation reflected the genuine preferences of Blacks, then the racial stigma attached to segregation might be absent and the grounds for any constitutional challenge to schools

reflecting such segregation might be diminished. [67] Survey research and poll data does not support such a contention. A number of studies have found that "...urban blacks report considerable dissatisfaction with their housing, and few blacks report a preference for all black residential areas."[68]

If neither income differences nor the preferences of Blacks explain widespread residential segregation, the only remaining explanation is racial discrimination. A study issued by the Department of Housing and Urban Development showed that a survey of 3264 tests in 40 different cities indicated "...that only one of four blacks is given the same choice as a white person when seeking an apartment." [69] And James L. Hecht, commenting on the study in the New York Times argued that the study was not designed to detect some of the more sophisticated techniques used by real estate brokers to evade anti-discrimination laws and, therefore, likely underestimated the impact of housing discrimination. [70]

The segregation between cities and suburbs, which served as one basis for the cases discussed involving metropolitan desegregation, has been well documented. [71] The role of government in advancing such segregation seems clear as well. J. Skelly Wright described the situation as follows:

> Many suburban whites purchased their homes when prices were significantly lower than they are currently, at a time when minorities were excluded by overt and officially sanctioned discrimination. Now suburban communities, acting in narrow self-interest for both racial and economic reasons have enacted restrictive zoning laws, subdivision regulations, and building codes that have effectively precluded construction of low-and-moderate income housing.... Combined with discrimination in the private sector by real estate agents, financial institutions, and home builders, this suburban discrimination has condemned minorities to the core central cities. 72

Residential segregation, then, is a product of both government action and private discrimination. The relationship between residential segre-

gation and school policy should also be clear. Simply, a neighborhood school policy which is consistently enforced not only adopts the racial character of the neighborhood; such a policy provides assurance to housing developers and home owners that if they maintain segregated neighborhoods they will have segregated schools. If some neighborhoods themselves become integrated producing integrated schools, relocation can guarantee segregated classrooms.

Although the Supreme Court has struck down optional transfer policies which effectively allow whites to abandon schools in which they find themselves in a minority, the Court has not struck down neighborhood school systems where change of residence assures access to segregated schools. Obviously shifting place of residence is more difficult than changing schools, but the effect and quite possibly the intent is the same; i.e., avoidance of integration.

Of course, the issues involved in optional transfer policies and neighborhood schools are not identical. Unlike optional transfer policies, neighborhood schools can be explained on grounds other than race; that is, the convenience of "walk-in" schools. But effectively neighborhood schools are often segregated schools. To condemn neighborhood schools would involve accepting the position that at least in this instance segregatory effect alone is unconstitutional or that segregatory effect is indicative of segregatory intent.

Washington v. Davis Revisited

In Washington v. Davis the Supreme Court rejected the position that segregatory effect alone is unconstitutional. Except for a recitation of precedents, the only significant argument contained in the majority opinion was the possibly sweeping impact that any "effects only" standard might have on a whole range of government policies which effectively have a disproportionate impact on Black Americans. A Court position striking down all policies having a disproportionate impact on Blacks could "...perhaps invalidate a whole range of tax, welfare, public services, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than the more affluent whites." [73]

Unless one is prepared to challenge all such policies, then it is necessary to find some basis to distinguish policies which effectively isolate minority from majority children in the schools from other policies which effectively place burdens on larger proportions of the Black population than of the white population.

Although the Supreme Court opinion in Washington v. Davis concerned employment standards which apparently excluded a larger proportion of Black applicants than white applicants, the principle enunciated in that case, that discriminatory effect alone is not unconstitutional, has since been applied in several school cases. [74]

The question before us then is: are the student assignment policies based on place of residence which effectively isolate Blacks and whites distinguishable from the employment, tax, and welfare policies which place disproportionate burdens on the Black population?

One basis for distinguishing school policies from the others mentioned by the Court is that tax, welfare and employment policies have the same impact on significant numbers of whites as well as Blacks. Although it is

true that a substantially larger proportion of Blacks than whites are poor, in actual numbers poor whites outnumber poor Blacks. [75] Even if one wanted to assume that policies which are detrimental to the interests of the poor are aimed at Blacks, the inclusion of equal or greater numbers of whites would make the weapons used the quivalent of a blunderbuss. The effect of such policies, therefore, is generally to place greater numbers of whites in the same category as Blacks. The impact of such policies may be racially disproportionate, but it is not racially specific. [76]

The question which follows, however, is how are student assignment policies which are based on place of residence distinguishable from the policies discussed above. The crucial point of distinction is that policies which effectively produce segregation, unlike tax, welfare and employment policies, by their nature do not place significant numbers of Blacks and whites in the same category. Racial segregation, regardless of cause, is subject to challenge precisely because it isolates Blacks from whites. One might respond that neighborhood school segregation is a function of the same economic distinctions that produce disproportionate racial impacts in other government policies, but as earlier discussion of residential segregation indicated, the evidence simply does not support such a conclusion. If economic capability were the sole basis of place of residence, then residential segregation based on race would be significantly diminished.

In communities where there is substantial racial segregation in housing, school assignment policies based on place of residence have the effect of separating whites from Blacks. In a society on the other hand, where there is considerable economic inequality and even where the Black population is disproportionately poor, policies that effectively discriminate against the poor still place substantial numbers of whites in the same

classification as Blacks.

The Supreme Court in Brown condemned state enforced racial segregation. The Court, however, has never subjected economic classifications to the same strict scrutiny to which it subjects racial classifications. In many communities school assignment policies based on place of residency enforce racial separation; in this sense they amount to racial classifications.

Summary and Conclusions

This chapter opened with a review of various approaches found in political science literature to analyzing the nature of policy making in urban governments. While granting the existence of considerable autonomy among governmental and private agencies, the principal conclusion drawn from the review is that governmental agencies cannot be viewed in isolation either from each other or from the sentiments of dominant segments of the community.

The second finding of this chapter is that the evidence assembled by such authorities as Farley and Taeber demonstrates that residential segregation in the metropolitan areas of the United States is racially specific. It is not a function of economic disadvantage that affects poor whites in the same way as poor Blacks. Rather, Blacks at all economic levels are significantly more segregated from whites of similar socio-economic status than poor whites are separated from wealthier whites.

Third, within the context of residentially segregated communities, geographic student attendance zones contribute significantly to segregated schools. When such attendance zones place within the same school children from residential areas dominated by different races or if residential areas become integrated, adherence to a neighborhood school policy provides a

framework for parents, housing officials and private housing agencies to adjust their housing decisions in order to assure segregation. Simply, a neighborhood school policy helps assure a reciprocal relationship between housing segregation and racially isolated schools. [77] As our discussion of mutual adjustment and adaptation among autonomous policy makers indicated, this reciprocal relationship can be maintained without obvious cooperation or central coordination.

Finally, in light of the significant residential segregation in American communities, it is probable that school officials can maintain or obtain maximum segregation without adopting any irregular policies or procedures which would produce judicial scrutiny under the standards of either the Washington v. Davis or the Arlington Heights cases. Simply by adhering to a rigid neighborhood school policy, school officials can maintain largely segregated schools. Certainly as neighborhoods themselves become integrated some schools will also become integrated, but the pattern of neighborhood integration found in American cities is generally described by such terms as "transition" or "ecological succession." Neighborhood schools might be integrated, but the condition is often temporary.

Because of these factors, policies which might disproportionately burden Blacks because they are generally poorer than whites should not be placed in the same categories as neighborhood school policies which effectively segregate Blacks from whites. Although regressive taxation, welfare policies and others affect a disproportionate number of Blacks, they generally affect an equal or greater absolute number of whites as well. In many American communities, however, neighborhood school policies keep Blacks and whites in largely separate cateogries. In this sense they are uniquely racial classifications.

NOTES

1. "Reading the Mind of the School Board," Yale Law Journal, 86 (1976), 317

2. Graham T. Allison, "Conceptual Models and the Cuban Missle Crisis," American Political Science Review, LXIII, No.5(Sept., 1969), p. 717

3. Ibid., p. 711

4. Ibid., p. 702

5. "Reading the Mind," p. 335

6. Allison, p.717

7. Robert L. Lineberry and Ira Sharkansky, Urban Politics and Public Policy, 2cd Edition. (New York: Harper and Row, 1974)

8. Ibid., p. 168

9. Ibid., p. 169; quoting Anthony Downs, Inside Bureaucracy(Boston: Little, Brown and Co., 1967), p. 3

10. Lineberry, p. 170

11. Herbert Simon, Administrative Behavior (New York: McMillan, 1961)

12. Lineberry, p. 170

13. Ibid.

14. Ibid., p. 171

15. For additional discussion of why "rational" decision making is deemed rare, see: Charles E. Lindblom, "The Science of Muddling Through," Public Administration Review, 19 (1959), 77-88; David Braybrooke and Charles E. Lindblom. A Strategy of Decision (New York: The Free Press, 1963); Aaron Wildavsky, The Politics of the Budgetary Process(Boston: Little, Brown and Co., 1964); Thomas R. Dye, Understanding Public Policy(Englewood Cliffs, N.J.: Prentice Hall, 1972).

16. Lineberry and Sharkansky, p. 187

17. See alternative explanation of "white flight" below, pp. 209-212, ff.

18. See discussion of housing discrimination below, pp. 212-14 ff.

19. See above, Chapter 2, p. 43, n. 51

20. James E. Anderson, Public Policy Making (New York: Praeger, 1975), p. 93

21. Thomas Dye, p. 30

22. Braybrooke and Lindblom, A Strategy of Decision, pp. 84-86

23. Ibid., p. 71

24. Ibid., p. 99

25. Ibid., p. 102

26. Ibid., p. 122

27. Ibid., p. 124

28. Ibid., p. 127

29. Ibid., p. 126-127

30. Ibid., p. 127

31. Charles E. Lindblom, The Intelligence of Democracy(New York: The Free Press, 1965)

32. Ibid., p. 24

33. Ibid., p. 10

34. See discussion of housing discrimination in Chapters 3 & 4 below.

35. Lindblom, Intelligence , p. 29

36. Ibid., p. 30

37. Ibid., p. 24

38. Ibid.

39. Ibid., p. 33

40. Ibid., p. 44

41. Ibid., p. 50

42. Above, Chapter Two, pp. 35-36 ff.

43. Above, Chapter Three, pp. 78-83 ff.

44. Lindblom, Intelligence, p. 33

45. Above, Chapter Five, p. 169

46. Lindblom, Intelligence, p. 80.

47. Braybrooke and Lindblom, p.47

48. See discussion of "white flight" below.

49. Braybrooke and Lindblom, pp. 133-134

50. Ibid.

51. Peter Bachrack and Morton Baratz, Power and Poverty: Theory and Practice (New York: Oxford University Press, 1970); E. E. Schattschneider, The Semi-Sovereign People (New York: Holt, Rinehart and Winston, 1960).

52. For a discussion of "non-decision making" see: Richard M. Merelman, "On the Neo-Elitist Critique of Community Power," American Political Science Review, LXII (June, 1968), 451-61; Geoffrey Debnam, "Non-Decisions and Power: The Two Faces of Bachrack and Baratz;" "Comment" by Bachrack and Baratz, and "Rejoinder" in American Political Science Review, LXIX, No. 3 (Sept., 1975), 889-907.

53. Schattschneider, p. 71

54. Bachrack and Baratz, Power and Poverty, pp. 44-45

55. See Hoots, Husbands, and the Pontiac decisions discuused in Chapter Three, above

56. James Coleman, Trends in School Segregation: 1968-73 (Washington, D.C.: The Urban Institute, 1975)

57. Christine Rossell, "School Desegregation and "White Flight," Political Science Quarterly, 90, No. 4 (Winter, 1975-76), pp. 675-695

58. See Diane Ravitch, "The 'White Flight' Controversy," The Public Interest, No. 51 (Spring, 1978), 135-149; Michael Knight, "Scholars in New Fight Over 'White Flight'," New York Times, June 11, 1978, p. 26.

59. Above, Chapters Three and Four; and Swann, 402 U.S. 1

60. Michael Giles, "Racial Stability and Urban School Desegregation," Urban Affairs Quarterly, 2 (June, 1977)

61. Ibid., p. 502

62. Ibid., p. 508

63. William L. Taxlor, John E. Benjes, and Eric E. Wright,"School Desegregation and the Courts," Social Policy (Jan/Feb., 1976); See also J. Dennis Lord and John C. Catau, "School Desegregation Policy and Intra-School District Migration," Social Science Quarterly, Vol. 57, No. 1 (1975).

64. U.S. Congress. Senate Select Committee on Equal Educational Opportunity, De Facto Segregation and Housing Discrimination. Hearings Part 5, 91st Congress, 1st session, 1971

65. Reynolds Farley, "Residential Segregation and Its Implications For School Integration," Law and Contemporary Problems, 39 (1975).

66. Ibid., p. 174

67. Above, Chapter Two, pp. 31-32 ff.

68. Farley, p. 190

69. James L. Hecht, "Apartment Hunting, in Black and White," New York Times, May 11, 1978, p. A23

70. Ibid.

71. See Chapter Four above; also see James Coleman, "Liberty and Equality in School Desegregation," Social Policy, 6 (Jan./Feb., 1976); and Farley, op. cit..

72. J. Skelly Wright,"Are the Courts Abandoning the Cities?" Journal of Law and Education, 4 (January, 1975), 218-226

73. Above, Chapter Five, pp. 164-65, note 21

74. Austin Independent School District v. U. S, No. 76-200, U.S. Supreme Court (Dec. 6, 1976); Bowen v. U.S., No. 76-515 (Jan. 25, 1977)

75. In 1974, for example, 7.5 million Blacks were classified as poor while 16.3 million whites were classified as poor; these figures represented 31% of the Black population and 9% of the white population. Source: U.S. Bureau of the Census, Current Population Reports, Special Studies, Series P-23, No. 54.

76. See above, Chapter Two, pp. 28-32

77. See Swann, 402 U.S. 1, at 21, and Keyes, 413 U.S. 203.

CHAPTER SEVEN

CONCLUSIONS

The effort to remove racial segregation as a significant component of public educational policy in the United States has been marked by considerable uncertainty concerning both the definition of the problem and the nature of the solution. The Supreme Court's position that only racial isolation resulting from intentionally segregative government policy is unconstitutional has become increasingly clear over the years, but its own adherence to that principle has sometimes been in doubt. [1] And the distinction between mere segregatory effect and segregative intent has been subject to a wide variety of interpretations among the courts and among students of constitutional law.

In this study I have attempted to outline, compare, and ultimately evaluate a variety of approaches found in court decisions and in the literature to resolving these issues.

The effort to end racially discriminatory public policy began with the Brown decision, [2] but that decision was itself ambiguous. On the one hand, it specifically condemned "state imposed segregation," but in so doing the Court used language that cast some doubt on all segregation, regardless of cause. [3]

Although the Supreme Court never abandoned the requirement that for segregation to be unconstitutional, it must be state imposed, in decisions subsequent to Brown the Court required school districts with a history of state enforced segregation to eliminate racial isolation even when a direct link between state educational policy and segregation in particular schools had not been established. [4] Specifically, in Swann the Court authorized mandatory busing to integrate "neighborhood schools" which reflected the

segregated residential patterns of the neighborhoods in which they were situated. The Court presumed that the schools had been located to serve the dual school system, and to allow them to continue as segregated schools would amount to the continuation of unconstitutional segregation.

In Swann the Court assumed that there was a reciprocal relationship between neighborhood racial composition and school segregation. Schools were located to serve particular areas of racial concentration and at the same time citizen decisions concerning place of residence had been influenced by the location of schools serving their race. [5]

This pattern of racially isolated schools reflecting neighborhood segregation was not confined to the formerly dual school systems of the South. The link between residential and school segregation was a national phenomenon. The question for the courts became, then, how does one distinguish between state imposed segregation reflected in segregated neighborhood schools and the same phenomenon which is purely adventitious or reflective of purely private choice?

In attempting to identify and isolate the government's role in school segregation, constitutional scholars and federal judges attempted to formulate standards for distinguishing de jure from de facto segregation. [6]

In the review of the literature and of selected court decisions, we found that most scholars and judges distinguished between policies which have merely a segregative effect and those resulting from segregative intent. Generally, only intentionally segregatory policies were considered to be unconstitutional. Those who considered all effectively segregative policies to be unconstitutional assumed that all segregation produced harm comparable to that condemned by the Supreme Court in Brown. They equated effective segregation to a racial classification which under the constitution can only be justified by some "compelling state interest." [7]

The bulk of the literature and court decisions studied accepted the Supreme Court position in Swann that "...the differentiating factor between de jure and the so-called de facto segregation ... is purpose or intent to segregate." [8] There were, however, differences among them concerning how such purpose or intent is to be recognized. Absent explicitly segregative statutes, courts generally must draw inferences from the effect of school board policies. Often the best indicator of segregative intent is the effect of policies pursued by school authorities. Most of the courts and constitutional scholars, however, were unwilling to assume that every instance of racial isolation in the schools was necessarily the product of intentional government action.

Generally, the standards used to identify segregative intent can be broken down into three categories.

The first approach assumes effectively segregative government policies are intentionally segregative only in the absence of some independent educational justification for the policies pursued. Under this standard neighborhood school policies which produced segregated schools would not be considered intentionally segregatory because the convenience of "walk-in" schools and the avoidance of transportation costs would be considered sufficient non-racial justification. Only if there was some deviation from regular neighborhood school zones that exacerbated segregation would such segregation be considered intentional.

The second approach assumes simply that school boards intend the "natural," "foreseeable," and "probable" consequences of their actions. If school boards select policies that effectively produce segregation, when less segregative policies are available, then it is presumed that the segregation is intentional. Under this standard school boards could not escape the inference that their policies are intentionally segregative by pointing

to some educational justifications for them. The only grounds which could justify the selection of policies that are more segregative than others available would be some "compelling state interest."

This second approach resembles quite closely the position of those who considered all effective segregation to be unconstitutional. It differs only in its assumption that such policies are also intentional. But, significantly, the Supreme Court in Swann was willing to make a similar assumption. This second approach essentially applies the Supreme Court's standard in Swann for determining the proper scope of the remedy to the task of determining whether intentional segregation exists in the first place.

The final approach used by courts and scholars to distinguish de jure from de facto segregation emphasizes the "cumulative impact" of both public and private housing discrimination on the racial composition of schools. When segregated neighborhood schools reflect residential segregation directly produced by government housing discrimination, there is evidence that even the Supreme Court might require school authorities to avoid incorporating such segregation in the schools. [9] A similar pattern resulting from private housing discrimination raises more complex issues. Some district courts, however, have condemned the use of geographic criteria for school attendance zones when such policies would produce segregated schools. [10] In effect, those adopting some variation of a "cumulative impact" standard were applying the logic of the Supreme Court in Swann concerning the reciprocal relationship between school location and housing segregation.

As the discussion in Chapter Five demonstrates, the Supreme Court effectively rejected the second and third approaches outlined above and adopted the first.

Beginning with its decision in Milliken,[11] the Court began placing additional qualifications and limits on the requirements of Green [12] and Swann

that school authorities responsible for de jure segregation must pursue maximum feasible integration. Possibly recognizing that its position in Swann provided grounds for assaults on all effectively segregative policies, the Court in the Dayton [13] decision appears to have abandoned the requirement of maximum feasible integration in favor of one designed solely to compensate for the "incremental segregative effects" of particular intentionally segregatory school board actions. The standards for distinguishing intentional from effective segregation announced by the Court in its Washington v. Davis [14] and Arlington Heights [15] decisions considered only those policies which lacked independent non-racial justifications, or deviated from "normal" policies and were effectively segregatory, to now be indicative of intentional segregation.

Although the impact of the Dayton decision is not yet clear, it appears that by limiting the sweep of desegregation orders to the specific impact of deliberately segregative action, the Court may have established a uniform national standard for school desegregation. Where previously school districts found guilty of intentionally segregative policies were required to eliminate segregated neighborhood schools while similarly segregated schools in communities where no proof of intent had been found were left untouched, now -- if my reading of the Dayton, Washington v. Davis, and Arlington Heights decisions is correct -- de jure segregated districts will no longer be required to compensate for residential segregation in desegregating the schools.

Judicial Standards for Identifying Segregative Intent and the Realities of Public Policy

It is obvious that the standards adopted by the Supreme Court will eliminate less racial imbalance in schools than alternative standards adopted by several of the District Courts and standards suggested in the literature. It is equally clear that the standards for determining the appropriate scope of remedies formulated by Justice Rehnquist in Dayton will, if followed, produce less effective integration than required by the Court in Swann and Keyes.

In light of the realities of the policy making processes in American cities, I have attempted to determine which approach is best designed to identify the role of race in determining public policy. As the discussion in Chapter Six indicates, a neighborhood school policy, or any student assignment policy based on place of residence, can be considered intentionally segregatory.

The evidence makes it clear that there is a reciprocal relationship between residential segregation and neighborhood school segregation; that is, residentially segregated areas produce segregated neighborhood schools and the availability of segregated schools promotes residential segregation. Residential segregation is not simply a function of economic distinctions between whites and Blacks; rather, it is directly related to race. Therefore, student assignment policies based on place of residence amount to assignments on the basis of race. In the words of Justice Weinstein in the Hart [16] case: "It is less important that we isolate where the vicious circle -- racially segregated schools -- begins than that the law eliminate, to the extent practical, the state's complicity in the maintenance of racially segregated schools." [17]

Still, it could be argued that the relationship between a neighborhood

school policy and residential segregation is an unintended consequence -- a "spill over" [18] effect -- of a student assignment policy unrelated to race. Indeed, the discussion of policy making in Chapter Six lends some support to the idea that policies sometimes have unintended consequences.

Most of the discussion in Chapter Six, however, casts significant doubt on the idea that neighborhood school segregation is merely an unintended consequence of non-racial student assignment policies. The relationship between housing and school interests seems to be a ready candidate for Lindblom's [19] analysis of policy coordination through mutual adaptation and adjustment. [20] If Lindblom's analysis is correct and if it is properly applied to the school/housing setting, then we are justified in concluding that neighborhood school segregation is intentional. A policy of neighborhood schools not only reflects private housing segregation, it encourages housing segregation. [21] Even if one were to assume that the racially segregatory effect of a neighborhood school policy was not initially intended, the chief proponents of the dominant decision making model in political science -- the incremental model -- contend that decision makers are able to compensate in subsequent decisions for the undesired consequences of past decisions. [22]

Once the segregative effect of a neighborhood school policy is manifest, a failure to change policy might be explained in the following ways: (1) the segregative effects reflect the original intent of the decision maker; (2) alternative policies are politically untenable; (3) the available alternatives are deemed less desirable than continuing segregation; and (4) simple inertia.

Looking at these explanations for school board inaction through the eyes of the Supreme Court in the Swann decision, it is obvious that none would justify inaction by a school board once intentional segregation had

been established. Both the first and second points obviously would support a charge of continuing intentional segregation. Neither the preferences of officials nor public hostility has ever served as sufficient grounds for failure to dismantle segregation. [23] On the question of the desirability of alternatives, only jeopardy to student safety or the integrity of the educational process could serve as grounds for preferring a student assignment policy that produces less actual integration than alternatives available. And, finally, school officials responsible for segregation have an affirmative duty to remove it.

In sum, none of the justifications listed for failing to alleviate segregation caused by government action would stand judicial scrutiny under the standards of Swann.

It is clear, however, that as a result of both the Washington v. Davis and the Arlington Heights decisions, a school board's inaction in the face of the segregatory effects of neighborhood school policy, would only be subject to challenge if other evidence demonstrated that the policy itself was initially designed to segregate.

In Chapter Six I demonstrated how, in routine manner, school officials could follow policies which would both accomplish segregation and mask intent. The standards adopted by the Supreme Court for identifying the intent of policy makers are simply inadequate. They are not designed to determine the presence of discriminatory intent in the decision making environment of American communities in which the interaction between decision makers and private interests is often tacit. Policy coordination among private and public decision makers is often marked by "mutual adjustment" and "adaptation" rather than by central coordination or open bargaining. [24]

If this description of the decision making process is correct, only a judicial standard that requires school authorities to pursue the least

segregative alternatives practically available will effectively remove intentional segregation from American schools. Only such a standard can effectively eliminate school board complicity in residential segregation.

Implicit in recent Supreme Court decisions is the notion that racial discrimination in some way represents a deviation from the norm of American society. The Court seems to feel that the impact of discrimination can be readily identified, measured, and removed from the policy making process, and then all will return to "normal." Implicit in my challenge of the Court's position is a very different idea that racial questions are central to American life; in particular, decisions affecting social interaction in schools and neighborhoods are influenced by race. In the end, therefore, public policy is inevitably designed to promote segregation or to promote integration. Neutrality on questions of race is impossible.

NOTES

1. See above, Chapter One, pp. 14-20

2. 347 U.S. 483 (1954)

3. See above, Chapter Two, pp. 45-47; Chapter Three, pp. 90-91

4. Swann, 402 U. S. 1(1971); Keyes, 413 U.S.189(1973)

5. See above, Chapter One, pp. 17-18; Chapter 6, pp. 209-214

6. Above, Chapter One, p. 3, note 6

7. Above, Chapter Two, pp. 45-48

8. Above, Chapter Three, p. 56, note 6; Swann, 402 U.S. 1, 17-18

9. Above, Chapter One, pp. 19-20, note 63; Chapter Four, p. 115 note 63

10. Above, Chapter Three: Hart v. Community School Board, 383 F. Supp. 699; Oliver v. Kalamazoo, 346 F. Supp. 766; 368 F. Supp. 143

11. Milliken v. Bradley, 418 U.S. 717 (1974)

12. Green v. County School Board of New Kent County, 391 U.S. 430 (1977)

13. Dayton Board of Education v. Brinkman, No. 76-539 (1977)

14. Washington v. Davis, 426 U.S. 229 (1976)

15. Arlington Heights v. Metro. Housing Corp., 50 L Ed. 2d. 450(1977)

16. Hart v. Community School Board, 383 F. Supp. 699 (1974)

17. Above, Chapter Two, p. 82, note 90

18. Above, Chapter Six, pp. 200-206 ff.

19. Charles E. Lindblom, Intelligence of Democracy.(New York: The Free Press, 1965).

20. Above, Chapter Six, pp. 200-206 ff.

21. Above, Chapter Six, pp. 209-214 ff.

22. David Braybrooke and Charles Lindblom, A Strategy of Decision. (New York: The Free Press, 1970); discussed above, pp. 196-200 ff.

23. Cooper v. Aaron, 358 U.S. 1 (1958)

24. Above, pp. 200-206 ff.

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