Public School Desegregation and the Color-Blind Constitution

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ON May 17, 1954, the Supreme Court handed down its historic decision in Brown v. Board of Education which adjudged that "in the field of public education the doctrine of 'separate but equal' has no place." Separate educational facilities for black and white children were said to be "inherently unequal" and violative of the equal protection clause of the fourteenth amendment. Since that day, the Court has attempted to solve the uncountable practical and constitutional problems raised by the implementation of Brown in no less than twenty-eight cases in which it applied the equal protection clause to varying factual situations arising in southern public school districts. Lower courts, both state and federal, have handed down literally thousands of school desegregation decisions.

Still, the promise of Brown has not been kept. In 1973 not only does a majority of black students still attend predominantly black schools, but recent information discloses that the quality, as well as the quantity, of education offered to blacks and other minority groups is still substantially inferior to that offered to whites. The reasons for this failure of courts, legislators, administrators, school authorities, and individuals to translate the constitutional commitment to equal educational opportunity into social reality are various and complex. Unfortunately these reasons are often obscured by prejudices, half-truths, oversimplifications, and misunderstandings.
Several questions which, before and after Brown, have constantly been raised in varying factual situations are: Is or should the Constitution be “color-blind”? Does the fourteenth amendment prohibit all racial classifications regardless of their purpose or effect? Does it, more particularly, prevent state and school authorities from taking race into account in the process of implementing the Brown decision? This Article attempts to show that these questions and their answers take many forms in different factual and constitutional contexts.

Part I presents the issue of color blindness, its appearance on the constitutional and political scene, and its impact upon the school desegregation process. Part II analyzes this issue critically by studying it in the historical and constitutional context in which it arises. Both parts are concluded with a review of the empirical and legal arguments, pro and con. Part III shows that although the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education has at least attempted to answer some questions raised by the color blindness proposition, it did not, and probably could not, bar it completely from the field of public education. The conclusion attempts to determine why this is so.

I. COLOR-BLIND VERSUS COLOR-CONSCIOUS—THE ISSUE

A. Appearance of the Argument

Prior to the Court’s landmark decision in Swann, a number of Justices had, in various circumstances, advanced the view that the equal protection clause invalidates any racial classification, regardless of result and purpose. The first to propound this belief was Justice Harlan who, in his classic dissent in Plessy v. Ferguson, expressed his interpretation of the fourteenth amendment in an oft-quoted passage:

Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Today, this felicitous metaphor must be interpreted against the background of open racism sanctioned by the law at that time. It clearly relates to the deliberate use of racial criteria for purposes of invidious discrimination. The first Justice Harlan certainly did not foresee the purposes his aphorism was going to be used for some sixty years later. Whatever Harlan would have thought of the school desegregation decisions of his successors, his constitutional abstraction constitutes an easy catchword for advocates of a per se constitutional prohibition of classifications based upon race.

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2. The expression was first used by Mr. Justice Harlan in his dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896).
4. 163 U.S. 537, 559 (1896). The Court upheld a Louisiana statute requiring separate accommodations for whites and blacks on intrastate railroad carriages and enunciated the famous “separate-but-equal” doctrine.
In his concurring opinion in *Edwards v. California*, Mr. Justice Jackson stated that race was a "neutral fact" and should be "constitutionally an irrelevance." This has been interpreted as an affirmance on his part of the per se prohibition rule. The same has been said of Mr. Justice Rutledge's dissent in *Kotch v. Board of River Port Pilot Commissioners:* "Classifications based on the purpose to be accomplished may be said abstractly to be sound. But when the test ... in fact is race or consanguinity, it cannot be used constitutionally to bar all except a group chosen by such a relationship from public employment. That is not a test; it is a wholly arbitrary exercise of power." Some commentators found this language to mean an implicit acceptance by the dissenter of the "forbidden classification doctrine."

In *Bell v. Maryland*, a case involving peaceful sit-in demonstrations in restaurants not serving blacks, Justice Goldberg used the term "color-blind" to express his conviction that the Constitution prohibits American citizens from being denied access to public accommodations solely because of their race and color.

A decade after *Brown*, Justice Stewart, joined by Justice Douglas, in *McLaughlin v. Florida* said with regard to a Florida statute which prohibited the interracial cohabitation of unmarried couples in the nighttime: "I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense." Conceding that the equal protection clause might tolerate a law establishing racially segregated public records "for a statistical or other valid public purpose" he continued: "I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality

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11 314 U.S. 160 (1941). The Court struck down a California statute designed to prevent nonresident indigents from entering the state. The majority based its opinion on the commerce clause. *Id.* at 174. Justices Douglas, Black, Murphy, and Jackson concurred on the ground that the fundamental right to travel freely from one state to another, a privilege of national citizenship, was abridged by the statute. *Id.*

12 *Id.* at 185.


14 330 U.S. 552, 565 (1947). A Louisiana piloting law requiring 6-month apprenticeships under incumbent pilots who, having a large discretion, selected only relatives and friends of incumbents as apprentices, was upheld by the Court as being not an unreasonable exercise of the police power. Justices Rutledge, Reed, Douglas, and Murphy dissented.


16 378 U.S. 226 (1964). The Supreme Court vacated the judgment of the court of appeals, and affirmed the trespass conviction of the 12 Negro students for their participation in a sit-in demonstration.

17 "The dissent argues that the Constitution permits American citizens to be denied access to places of public accommodation solely because of their race or color. Such a view does not do justice to a Constitution which is color blind and to the Court's decision [in *Brown*] which affirmed the right of all Americans to public equality." 378 U.S. 226, 287-88 (1964). Justice Black, dissenting, answered to that point: "We agree, of course, that the Fourteenth Amendment is 'color blind' in the sense that it outlaws all state laws which discriminate merely on account of color. This was the basis upon which the Court struck down laws requiring school segregation [in *Brown*]." *Id.* at 342-43 n.42.

18 379 U.S. 184, 198 (1964). Asserting that the Fourteenth Amendment rendered racial classifications "constitutionally suspect," the majority refused to recognize an "overriding statutory purpose" which alone would justify a racial classification of this kind.
of an act depend upon the race of the actor, discrimination of that kind is invidious per se.\textsuperscript{19}

Concurring again in a 1967 decision in which the Court struck down Virginia's miscegenation statutes,\textsuperscript{20} Justice Stewart referred simply to his opinion in \textit{McLaughlin}. The majority, speaking through Chief Justice Warren, seemed to make a distinction between racial classifications in criminal statutes and all other classifications based upon race:

\begin{quote}
[The Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny' . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.\textsuperscript{21}

Can this language be interpreted, as one commentator did,\textsuperscript{22} as an implicit holding of the Court that all racial classifications may be unconstitutional per se? It has to be seriously doubted that the majority would have included any "benign" racial classifications in referring to a possible per se prohibition rule. It is more likely that the Justices had in mind other invidious classifications by race.\textsuperscript{23}

Whatever might be argued about the "real intentions" of the different Justices in deciding the cited cases, it is an indisputable fact that the color blindness argument has never been explicitly accepted as a constitutional doctrine by a majority of the Court.\textsuperscript{24}

However, between the landmark case of \textit{Brown v. Board of Education}\textsuperscript{25} and the \textit{Swann} decision, a number of commentators\textsuperscript{26} advanced the view that the Court had implicitly adhered to the per se rule. \textit{Brown}, according to this argument, held that state-enforced segregation of children in public schools solely on the basis of their race or color violates the equal protection clause of the

\begin{footnotes}
\item[19] \textit{Id.}
\item[21] \textit{Id.} at 11.
\item[22] Vieira, \textit{Racial Imbalance, Black Separatism, and Permissible Classification by Race}, 67 MICH. L. REV. 1553, 1595-96 (1969). The author concluded, however, that "in the face of contrary precedent and in the absence of reasoned discussion . . . [Loving] offered virtually no guidance at all for cases involving 'non-invidious' uses of racial criteria." \textit{Id.} at 1596.
\item[23] See text accompanying notes 75-76 infra.
\item[25] Justice Harlan formulated his famous color blind doctrine in a dissenting opinion and both Justices Stewart and Douglas took part in \textit{Swann}, where a unanimous Court at least implicitly rejected such a doctrine.
\end{footnotes}
fourteenth amendment. Although the Court put great weight on the importance of equal educational opportunity, it insisted upon the injurious effect of state-enforced segregations upon the minority group:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. . . . [T]his finding is amply supported by modern authority."

Of course, the mere inequality of schools does not involve any per se constitutional violation. Concluding that "separate educational facilities are inherently unequal" the Court implied that this inequality was brought about by a state-imposed separation of black and white children, in other words, by a racial classification.

Few contend" that Brown itself held all racial classifications unconstitutional per se. Such an interpretation is indeed difficult to justify, especially since Brown's companion case, Bolling v. Sharpe,1 held segregation of pupils in the public schools of the District of Columbia a discrimination which "may be so unjustifiable as to be violative of due process,"2 and explicitly found racial classification "contrary to our traditions and hence constitutionally suspect,"3 but not unconstitutional per se.

However, beginning in 1956, the argument appeared again with more strength, when, in a series of per curiam decisions,4 the Court struck down racial segregation in public golf courses,5 public beaches6 and parks,7 buses,8 and, some years later, in courtrooms9 and prisons.10 If Brown were based at least partly on the denial of equality of educational opportunity in segregated public schools, and if all the subsequent per curiam cases invalidated segregation of public facilities by a simple reference to Brown, there must necessarily be some showing of inequality and of a resulting injurious effect upon the blacks from segregation on beaches, in buses, on golf courses, and so forth. Thus, it must be demonstrated that all blacks are injured through use of segregated golf courses and beaches as much as black children are injured in

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89 Id. at 495.
92 Id. at 499.
93 Id.
94 Wechsler, supra note 27, at 22, 23, severely criticized this use of per curiam decisions.
segregated public schools. And if, the argument continues, this difficult demonstration cannot be made successfully, we have to interpret the *Brown* decision in the light of the subsequent per curiam cases and come, necessarily, to the conclusion that *Brown, Bolling*, and the per curiam cases simply, but strictly, prohibit any classification based upon race.\footnote{See P. Kauper, *supra* note 27, at 218-19: [The] per curiam decisions ... make it safe to predict that the Court will be inevitably carried by the force of its decision to outlaw all segregation legislation and to adopt the Harlan view that the Constitution is color-blind, and that no classifications based on race or color can be accepted consistent with the imperative of Equal Protection. ... Classification based on race no longer has a place under our Constitution.} In other words, Harlan's powerful dissent in *Plessy* has, after almost sixty years, implicitly become the unanimous opinion of the Supreme Court. Differences in race may no longer justify a different treatment by the law. Race as an "unalterable trait over which an individual has not control"\footnote{Developments in the Law—Equal Protection, *supra* note 13, at 1127.} becomes an illegitimate criterion for governmental action.

At the first glance, the argument seems fair and promising. The law, for a long time, subjected the Negroes to a brutal and dehumanizing system of slavery. Monstrous civil, social, and political inequalities enjoyed the full sanction of law for almost 200 years. In such a society, the credo of those, blacks and whites, who want to put an end to two centuries of injustice can be only: "[T]he law ... shall be the same for the black as for the white; ... all persons, whether colored or white, shall stand equal before the laws ... ."\footnote{Strauder v. West Virginia, 100 U.S. 303, 307 (1880).} In order "to enforce the absolute equality of the two races before the law,"\footnote{Plessy v. Ferguson, 163 U.S. 537, 544 (1896).} no "legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved."\footnote{Id. at 554-55 (Harlan, J., dissenting).} It was the object of the Civil War Amendments to remove "the race line from our governmental system,"\footnote{Id. at 555.} and it took the Supreme Court more than fifty years finally to interpret the Constitution as prohibiting racial classifications, according to the above-mentioned view of *Brown*.

The apparent logic and simplicity of the argument has had little effect upon the Supreme Court's more recent decisions. The Court has not altered its position that racial classifications are: "in most circumstances irrelevant,"\footnote{Id. at 101.} but "not wholly beyond the limits of the Constitution";\footnote{Id. at 104.} "subject ... to the most rigid scrutiny"\footnote{Hirabayashi v. United States, 320 U.S. 81, 100 (1943).} but may be justified by "pressing public necessity";\footnote{Id. at 101.} "contrary to our traditions and hence constitutionally suspect"\footnote{Korematsu v. United States, 323 U.S. 214, 216 (1944).} such that only an overriding statutory purpose and not simple rationality may justify them.\footnote{In these instances, known as the *Japanese Relocation Cases*, the Supreme Court upheld an 8 p.m. curfew imposed on enemy aliens and persons of Japanese ancestry as well as a statute which excluded these persons from certain West Coast areas as a valid exercise of the National Government's war power.}

Before attempting to scrutinize the color blindness proposition, its under-
lying assumptions, and future implications, and determine if and to what extent *Swann* really put an end to it, it is necessary to examine briefly its practical impact upon the school desegregation process.

**B. Impact Upon the School Desegregation Process**

Seventeen years after *Brown v. Board of Education* condemned state-imposed segregation by race in public schools, the Supreme Court acknowledged that "[n]othing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then." Certainly, desegregation problems are not solved even today. There can be no doubt that *Brown* was decided within the framework of the "state action" doctrine. Although it held that "[s]egregation . . . has a detrimental effect upon the colored children" and that separate educational facilities are inherently unequal," it cannot be read as holding unconstitutional all segregation whether state-imposed or accidental. The problem of so-called "de facto segregation," which is the result of the assignment of pupils to their neighborhood school in areas with residential segregation, was not present in *Brown*.

Until recently, the Supreme Court has consistently denied certiorari in school desegregation cases which raise the uneasy questions of the constitutionality of de facto segregation, or of the limits of governmental responsibility for public school segregation. Another important point which the Supreme Court has not yet decided clearly is the question of when a dual school system is sufficiently desegregated so as to be unitary in the sense of the Court's more recent decisions.

The proposition that the fourteenth amendment prohibits the use of color as a basis for governmental decision affects not only the choice of the permissible tools of school authorities essential to "eliminate from the public schools all vestiges of state-imposed segregation," but also the constitutionality of their voluntary efforts to dismantle dual school systems and to achieve racial balance in circumstances of de facto segregation.
**De Jure Segregation.** In the de jure context, the issue can be framed this way: Once a determination has been made of whether a constitutional violation consisting of racial segregation has occurred, what does the equal protection clause require the state and school authorities to do in order to comply with the mandate of *Brown*? Advocates of the color blindness rule would argue that the fourteenth amendment itself limits the states' power to remedy a past violation of the fourteenth amendment. In response to those who ask school authorities and courts to take race into account in shaping a remedy for the constitutional violation they argue that "two wrongs will not make a right" and that a constitutional offense cannot properly be corrected by unconstitutional means. But, the other side responds, the constitutionality of racial classifications cannot be decided independently of their result and effect. *Brown* unequivocally prohibited only *invidious* discrimination and left open the question of *benign* racial classifications and, a fortiori, the problem of "compensatory" or "preferential treatment." But what if compensatory discrimination in favor of one group entails an invidious discrimination against another? Who decides what classifications are "benign" or "invidious"? As will be seen, the courts have attempted to answer almost all of these questions. It is, nevertheless, interesting to note the far-reaching implications of the color blindness proposition.

**De Facto Segregation.** Where racial imbalance results not from deliberate segregation of the races, but from adherence to a racially neutral student assignment policy in a community with segregation in residential patterns, the question is somewhat different: Absent a previous violation of the Constitution, does the equal protection clause permit school authorities to put an end to de facto segregation and to achieve racial balance? Is the elimination of racial imbalance a valid governmental concern? If it is, do the state legis-

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62 E.g., to assign pupils on a racial as opposed to geographical basis by quota requirements for individual schools, gerrymandering of school district lines, "pairing" of schools, consolidating school districts, transportation of students, etc. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Bradley v. School Bd., 338 F. Supp. 67 (E.D. Va.), rev'd, 462 F.2d 1058 (4th Cir. 1972), aff'd per curiam by an equally divided Court, 93 S. Ct. 1952, 36 L. Ed. 2d 771 (1973).

63 Senator Byrd, supra note 30, at 10.


66 When the population of a community, or a public school system is predominantly Negro, a school can be predominantly Negro and yet not be considered racially imbalanced. Moreover, a predominantly white school is not deemed racially imbalanced when the proportion of Negroes in the school substantially exceeds the proportion of Negro children in all of the public schools of the same grade level in the community. Although the proportion of Negroes in such a school may exceed the proportion of Negro children in all of the public schools of the same grade level, common usage does not apply the term 'racially imbalanced' unless the school is also predominantly Negro, for only when a school is both predominantly Negro and literally imbalanced is it viewed as a segregated school.

lators or school authorities have power to classify by race to achieve racial balance? It is in this context, to which the Supreme Court has not yet spoken, that the color blindness argument has its greatest and most far-reaching impact. If the view prevails that governmental decisions cannot be influenced by racial considerations, all efforts of school authorities to eliminate or alleviate racial imbalance would be unconstitutional.

The precedents of the lower courts all point in one direction. While several cases hold that, in the absence of discrimination, school boards have no affirmative duty to correct de facto segregation, state statutes requiring or permitting boards to alleviate racial imbalance, as well as the school authorities' own determination to do so, have constantly been upheld by state and lower federal courts.

There is little doubt that the extreme view that all racial classifications are unconstitutional will never be adopted as such by any court. The question is one of the scope of judicial review: Is the benign racial classification "constitutionally suspect" and, therefore, subject to the strict standard of review which requires the state to prove a compelling interest for classifying racially, or is the test simply one of reasonableness?

Furthermore, if racial imbalance is unavoidable because of the uniracial composition of the community, can the state be required to act affirmatively to aid the disadvantaged children by providing "compensatory education sufficient at least to overcome the detriment of [de facto] segregation"?

One can see that the color blindness idea, advocated either as a pure and simple constitutional prohibition of any racial classification or attenuated in the requirement that the courts strictly scrutinize such classifications, even if they are intended to be favorable to the disadvantaged minority, constitutes a serious challenge to all aspects of the long process of school desegregation.

C. Color Blindness: Empirical and Legal Arguments Pro

"Benign racial classifications" and "compensatory treatment" of disadvan-

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taged minorities have been justified by commentators as constitutional means "to prevent discrimination being perpetuated and to undo the effects of past discrimination." Viewed from this perspective, Justice Harlan's aphorism, far from prohibiting racial classifications per se, embodies no more than the principle of a constitutional prohibition of racial discrimination, and is clearly violated when blacks are singled out in order to separate them from the dominant race or to impose burdens, restrictions, or obligations upon them. But as a valid exercise of the legitimate governmental purpose of realizing effectively the fourteenth amendment's principle of equality, benign racial classifications, and even compensatory treatment, do not necessarily fall within the reach of this prohibition. In other words, the constitutionality of racial classifications can only be determined by looking at the objective they serve and the result they produce.

Still, as will be demonstrated, there are strong arguments against the benevolent use of racial criteria by the state. Implicitly, if not explicitly, these arguments tend to support the view that, in spite of all the social and political inequalities of our society, government can be but neutral with respect to such dangerous criteria as race or color. Notwithstanding these inequalities, the Constitution should be color-blind.

The different arguments which follow are based less on legal than on policy considerations. But one must realize that, "in this area . . . there is very little difference between the constitutional and the policy approaches." First, it is argued, a statute which treats individuals differently solely on the basis of race violates the constitutional principle that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights . . . ." It is evident that the fourteenth amendment does not require the government to treat all persons alike; but unless there is a relevant distinction between individuals, they should not be treated differently. Race and color, any more than wealth, alienage, residence, sex, or status of birth, should not be relevant to a legitimate governmental purpose. Under a strict interpretation of the rule, benevolent programs would violate "fundamental notions of individualism".

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56 See, e.g., Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564 (1965); Fiss, supra note 60; Wright, supra note 65.
58 372 F.2d 836, 876 (5th Cir. 1966).
59 Kaplan, supra note 65, at 381.
60 Shelley v. Kraemer, 334 U.S. 1, 22 (1948). See also McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151, 161-62 (1914): "[T]he essence of the constitutional right [of equal protection] is that it is a personal one . . . . It is the individual who is entitled to the equal protection of the laws . . . ."
61 E.g., Hirabayashi v. United States, 320 U.S. 81, 100 (1943).
65 Reed v. Reed, 404 U.S. 71 (1971).
67 Developments in the Law—Equal Protection, supra note 13, at 1111.
by treating persons differently according to their race.

A second important objection to this kind of racial classification is that it weakens the role of law as an educative force. The inconsistency of asserting on one hand that race is generally irrelevant and on the other that it is, nevertheless, in some circumstances important is likely to create both confusion and distrust in the sincerity of government and law. Law should constantly attempt to shape the behavior of its subjects in a way which eventually will bring about a completely color-blind society, in which past social inequalities are erased and individuals are not judged by their color but by their worth. "[I]n the completely color-blind world of the future, the educative force of principled action by the government in the racial area may no longer be important. In today's world, however, constant education in color blindness is essential." The general interest of law in promoting every principle necessary and proper to bring about this ideal society in a future not too remote outweighs the particular interest of satisfying the immediate needs of the disadvantaged groups.

In administering a benevolent program which treats persons differently on the basis of their race, the government has no choice but to determine the race to which individuals belong. This "dirty business" of determining an individual's race is both morally degrading and scientifically difficult, for it seems that "the concept of the American Negro is a social concept and not a biological one"; social scientists are capable only of roughly classifying groups according to race, but not of classifying individuals. However courts resolve this problem, they will have to adopt one definition or another. Looking for precedents, they will verify that "the only real experts on determining who is a Negro are the racists . . ." Southern legislators and courts have had a long experience in handling this, and have used a variety of tests.

There are other sources which might be drawn upon, such as the apartheid classifications used in South Africa today, or the definition of the aboriginals

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87 Kaplan, supra note 65, at 379-80; Vieira, supra note 22, at 1614-15; Developments in the Law—Equal Protection, supra note 13, at 1113.
88 Kaplan, supra note 65, at 380.
89 Bittker, supra note 27, at 1422.
90 G. MYRDAL, AN AMERICAN DILEMMA 136 (1944).
91 See generally Bittker, supra note 27, at 1421; Elden, supra note 15, at 607.
92 Kaplan, supra note 65, at 379.
93 E.g., "[A]ll negroes, mulattoes, mesticoes, and their descendants, having any African blood in their veins, shall be known in this state as 'persons of color.'" Ch. 40, § 1, [1865-66] Tenn. Laws 65. Arkansas relied on appearance: "Persons in whom there is visible any distinct admixture of African blood shall, for purposes of this act, be deemed to belong to the African race." No. 17, § 4, [1891] Ark. Acts 17. A Georgia statute, as late as 1927, was even more generous: "All negroes, mulattoes, mesticos, and their descendants, having any ascertainable trace of either Negro or African, West Indian, or Asiatic Indian blood in their veins, and all descendants of any person having either Negro or African, West Indian or Asiatic Indian blood in his or her veins, shall be known in this state as persons of color." No. 317 [1927] Ga. Laws 272.
94 Daniel v. Guy, 19 Ark. 121 (1857); cf. People v. Dean, 14 Mich. 406 (1866); Monroe v. Collins, 17 Ohio 665 (1867); and, for a more recent decision, Miller v. Allen, 104 Okla. 29, 229 P. 152 (1924). The Supreme Court was somewhat more decent in Alberry v. United States, 162 U.S. 499, 501 (1896).
95 According to the Population Registration Act No. 30 of 1950, § 1, the population of South Africa is to be classified as White, Coloured, or Native:
(a) a 'White' person means a person who in appearance obviously is, or who is generally accepted as, a white person, but does not include a person who,
adopted by Australian legislators. In any event, awkward problems are likely to be presented to the courts and one would certainly agree that the law should avoid litigating the race of an individual.

Assuming that racial classifications are unconstitutional if designed to keep minority groups in an inferior social and political position, but permissible if beneficially motivated, the crucial question arises as to what constitutes "benign" or "benevolent" and what constitutes "hostile" treatment. As attitudes change, what seems benign today may be regarded as invidious tomorrow. Furthermore, minority groups tend to be no more homogeneous than the dominant majority, particularly with regard to measures which single them out on the basis of their distinctive features. It is not surprising, therefore, that the black community has always been, and still is, deeply divided over the question of integration. An increasing number of radical groups reject it violently as a subterfuge for the maintenance of white supremacy, a threat to their cultural heritage, and a recuperative technique of the establishment. Yet their demands for "autonomous" black studies and "community control" deserve a careful constitutional analysis free of misleading emotions. Others, without rejecting the principle of integration as such, might assert that for them as individuals a particular desegregation program represents a burden and not a favor.

although in appearance obviously a white person, is generally accepted as a Coloured person; (b) a 'Native' means a person who in fact is, or is generally accepted as a member of any aboriginal race or tribe of Africa; (c) a 'Coloured' person means a person who is not a 'white' person or a 'native.'

See INTERNATIONAL COMMISSION OF JURISTS, SOUTH AFRICA AND THE RULE OF LAW 22 (1960). For a review of the abuses and practical difficulties arising from this legislation, see E. BROOKES, APARTHEID—A DOCUMENTARY STUDY OF MODERN SOUTH AFRICA 22-25 (1968).


Definition of aboriginals. The following persons shall be and be deemed to be 'aboriginals' within the meaning of this Act, namely—(i) Any aboriginal native of the mainland of Australia or of any islands in the territorial jurisdiction of Australia; (ii) Any person who has a preponderance of the blood of aboriginals as defined in paragraph (i) hereof; (iii) Any half-blood declared by a judge or police magistrate or two or more justices after trial to be in need of the protection of this Act, and who is ordered to be so protected; (iv) Any half-blood who lives as wife or husband with an aboriginal as hereinbefore defined, or who habitually associates with aboriginals as so defined; (v) Any resident of a reserve other than an official or person authorised by the protector; (vi) A child living on a reserve with a mother who is an aboriginal as hereinbefore defined: Provided that an islander shall not be deemed to be an 'aboriginal' within the meaning of this Act unless he is residing on a reserve.


9 See, e.g., Vieira, supra note 22, at 1618-25.

100 See Norwalk CORE v. Norwalk Bd. of Educ., 298 F. Supp. 213 (D. Conn. 1969), aff'd, 423 F.2d 121 (2d Cir. 1970), where black plaintiffs alleged that closing an all-black neighborhood school and bussing to white schools denied the students equal protection. The claim was dismissed.

98 Compare the nonviolent "strength through love" doctrine of Dr. Martin Luther King with the harder line of James Baldwin and Le Roi Jones, and especially with the violent, revolutionary cries of Malcolm X, Eldridge Cleaver, Stokely Carmichael, and George Jackson. Bardolph 333-52. Today there seems to be a lack of leadership in the black community. NEWSWEEK, Feb. 19, 1973, at 33.
The judicial task of deciding if differential treatment can be objectively regarded as benevolent is certainly not an easy one, and it has been doubted that this question will ever lend itself to objective judicial resolution.\(^{101}\)

Some commentators have tried to demonstrate that the double standard of prohibiting invidious racial classifications and permitting or even requiring compensatory discrimination to overcome the effects of past discrimination is a double-edged sword.\(^{102}\) Again one is reminded that the equal protection clause confers rights to persons and not to groups. According to this principle, any benevolent school quota denies equal protection to those students, black and white, who are refused admission on the grounds that their presence would destroy the required racial balance.\(^{103}\) The objection follows a simple but convincing logic: "To extend a right to some is by implication to deny it to similarly situated persons to whom it is not extended."\(^{104}\) For those individuals who are denied admission to a particular school solely because they are black or white, it is little comfort to know that they are heroically sacrificing their own constitutional rights for the alleged benefit of their respective racial group. They would not agree that they alone should pay the price for the past inequalities imposed on the Negro race.

Hence, it appears that a strict administration of a program which discriminates in favor of one group, often, if not always, entails discrimination against another group. It is submitted that the best and perhaps the only solution to this dilemma would be a return to the color blindness rule.

It is generally assumed that it is the white majority which has to bear the expense of compensatory treatment granted to Negroes. But is such a program still justified if it can be shown that discrimination in favor of the Negroes brings additional discrimination against other equally underprivileged minority groups? American Indians, Mexican-Americans, Puerto Ricans and, to a lesser extent, Orientals, suffer from similar deprivations for very much the same reasons as Negroes.

It has been convincingly demonstrated that, at least in the area of employment, these groups and not the middle class whites assume the major burdens of any preference given to Negroes.\(^{105}\) Moreover, the line between those who participate in the benefits of our society and those who suffer from it is not necessarily a racial line. Poor whites in Appalachia, for instance, or in metropolitan areas, are no better off than Negroes, and can no more be expected to pay the price for the compensatory treatment granted to Negroes than can other minority groups. In fact, unless they also receive preferential treatment, all these underprivileged groups would vigorously oppose any such program, with a resulting dangerous growth of racial tension.

If the social sciences can prove beyond any reasonable doubt that the present

\(^{101}\) *Developments in the Law—Equal Protection*, supra note 13, at 1114.


\(^{103}\) "A benevolent school quota of seventy whites to thirty blacks . . . is open to criticism, not only on the abstract ground that in principle it is indistinguishable from tokenism, but also because it discriminates solely on the basis of color against both the seventy-first white student and the thirty-first Negro student." Vieira, *supra* note 22, at 1612. See also McAuliffe, *supra* note 65, at 79.

\(^{104}\) *Developments in the Law—Equal Protection*, supra note 13, at 1110-11.

\(^{105}\) Kaplan, *supra* note 65, at 373-74.
inequality of educational opportunity is not solely or primarily the result of racial factors, it would certainly be erroneous to use racial classifications to achieve equal educational opportunity. The two most authoritative surveys in this area are interpreted very differently by both social scientists and legal scholars. Some read them as demonstrating that mere racial integration of schools will bring about better performances of black students as compared to their respective performances in all-black or overwhelmingly white schools. Others insist that the problem is one of socio-economic class and not of race. The Coleman Report stated that "the apparent beneficial effect of a student body with a high proportion of white students comes not from racial composition per se, but from the better educational background and higher educational aspirations that are, on the average, found among white students." Some emphasize that classifications based on socio-economic class would better serve the goal of equal educational opportunity and that benign racial classifications create more problems than they solve. This view is supported by the somewhat disappointing experiences with compensatory education programs. Moreover, the Coleman Report failed to establish a causal relationship between the social and racial background of a student's classmates and higher achievements; it merely suggests an association between the two. Therefore, its findings must not be exaggerated. The argument logically concludes that no court should require, and no school board initiate, any compensatory program until its effectiveness has been conclusively proved by scientific data.

Finally, the most important objection to any differential treatment because of race is probably that such treatment, even if benevolently intended, still implies the inferiority of the classified group.

No man, woman, or child likes to be singled out as needing special assistance; every individual wants to stand on his own two feet, and compensatory treatment beyond a certain point is an affront to pride and an insult to dignity. Particularly this is so when race is involved, and each minor example of preference is a continued reminder of racial differentiation.

Assessments of capacities, achievements, or needs of underprivileged minority groups are usually based upon the values and value-measuring system of the dominant white majority. The conclusion that some groups need special care and special treatment in order to reach the desired standard might well be viewed by beneficiaries of such treatment as somewhat hypocritical and paternalistic. Equality includes the right of self-determination of goals and of

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107 E.g., Report of the National Advisory Commission on Civil Disorders 427 (Bantam ed. 1967); Elden, supra note 15, at 640.

108 Freund, Civil Rights and the Limits of Law, 14 Buff. L. Rev. 199, 204 (1964); McAuliffe, supra note 65, at 82-83.


111 Wolf, supra note 110, at 168.

the means by which to attain those goals. It does not include being told what their needs and aspirations are, or what "preferential treatment" they are to enjoy. The underlying assumption that blacks are simply not capable of finding their appropriate place in the mainstream of American society is likely to give support to and reinforce private racial prejudice which will be difficult, if not impossible, to eliminate.

These are some of the most important arguments against the governmental use of race as a criterion for differential treatment of individuals. They may explain why the color blindness proposition cannot easily be disarmed with "compensation-for-past-inequalities" arguments, and why it constantly reappears wherever remedies to racial problems are discussed. However, a critical view of its historical origin, purposes, and implications will show that there are at least equally strong arguments against it. The balance of pro and con should provide a valid basis for determining to what extent the color blindness argument is relevant to future school desegregation cases.

II. CRITICAL EVALUATION OF THE COLOR BLINDNESS PROPOSITION

A. The Courts and the Color Blindness Argument 1954-1971

The first school desegregation decisions118 must be read and interpreted against a historical background of open color consciousness. Not until these other decisions gave real meaning to the equal protection clause did the idea appear that the clause itself might contain an inherent restriction upon means intended to aid in the realization of its command.

Condemning separate educational facilities as inherently unequal, the Warren Court made a major effort to translate the general and still somewhat dormant equality provision of the Constitution into social reality. It did not deal with what today is labeled de facto segregation, but was concerned only with state-enforced segregation. Likewise, it did not give an answer to the abstract and, at that time, academic question of color blindness, but rested largely upon inequality of educational opportunity resulting from invidious racial classification.119 The most that can be assumed is that the dicta of the Japanese Relocation Cases that race is "in most circumstances irrelevant" and "subject to the most rigid scrutiny" constituted one, but by far not the most important, factor which determined the outcome of the Brown case.

Although it cannot be seriously contended that Brown answered the question of color blindness, there is the stronger contention that the per curiam de-
cisions following Brown indicate an implicit adherence by the Court to a principle of absolute prohibition of racial classifications. This contention may be tested by analyzing the long struggle for desegregation and the way the Court itself, in later cases, interpreted its first desegregation decisions.

De Jure Segregation. The Warren Court was well aware that the implementation of desegregation was going to raise problems of considerable complexity. Therefore, it shifted the responsibility for solving them to the school authorities and delegated the supervision of the implementation to the federal district courts, which "because of their proximity to local conditions... can best perform this judicial appraisal." The task before them was gigantic; over ten-and-a-half million children, mostly white, were affected by the decision. Seventeen states and the District of Columbia required segregated schools by law, and four states permitted it, leaving the option to local authorities. Recalcitrance, open as well as hidden, obliged state and federal courts to face hundreds of desegregation suits. All of the early Supreme Court desegregation cases arose in southern school districts where, prior to 1954, segregation was required by law. As before mentioned, in the de jure context the question is: What does the Constitution require these states to do in order to comply with the Brown holding? The considerable number of cases and widespread confusion show the answer is not easy. Lower federal courts in the South, however, were probably less confused when they attempted to interpret the Brown decision as narrowly as possible. The most often quoted example is certainly the 1955 case of Briggs v. Elliot:

[...]

There are obvious elements of the color blindness argument in this view. All the states must do and can do is repeal the unconstitutional provisions and laws requiring segregation—and Brown's mandate is fulfilled. There would be no more state action, even if white children continued to attend white schools and blacks "their" schools. They are acting, presumably, on their own free will and "the Fourteenth Amendment is a limitation upon state or state agencies, not... upon the freedom of individuals." This kind of reasoning,

118 See notes 34-42 supra, and accompanying text.
120 E. SWEET, CIVIL LIBERTIES IN AMERICA 218 (1966).
121 For a detailed enumeration of the numerous constitutional and legislative provisions requiring, permitting, or prohibiting segregation in public education, see Leflar & Davis, Segregation in the Public Schools—1953, 67 HARV. L. REV. 377, 378-79 n.3 (1954).
123 Id.
coupled with similarly mitigating legislative action and other legal devices, dominated the southern "desegregation" scene during the first decade after Brown. The direct and obviously desired result was minimum desegregation.

The United States Supreme Court, however, has never accepted the alleged desegregation/integration dichotomy. Examining for the first time a specific implementation plan in Goss v. Board of Education, the Court struck down the minority-to-majority transfer provision of Knoxville, Tennessee, and made it clear that racial classifications which facilitate transfer only from desegregated to segregated schools are unconstitutional:

Classifications based on race for purposes of transfer between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment. Not only is race the factor upon which the transfer plans operate, but also the plans lack a provision whereby a student might with equal facility transfer from a segregated to a desegregated school.

Similarly, when the Court reversed one year later the judgment of the Fourth United States Court of Appeals that the school board of Prince Edward County, Virginia, had not violated the equal protection clause in closing down its public schools rather than desegregate them, it held that "grounds of race and opposition to desegregation do not qualify as constitutional."

The Fifth Circuit explicitly overruled Briggs and all that it stood for in United States v. Jefferson County Board of Education, thus sounding the death knell for tokenism of all kinds. Before approving the HEW Guidelines as constitutional minimal standards for a free-choice desegregation program, the court clarified some terminology: "We use the terms 'integration' and 'desegregation' of formerly segregated public schools to mean the conversion of a de jure segregated dual system to a unitary, non-racial (nondiscriminatory)

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134 Shortly after the Brown decision, ten states enacted pupil placement laws, which transferred the complete responsibility for assigning students to local school boards and listed a variety of factors—all non-racial—which they were authorized to take into account, such as health, morals, general welfare, size of schools, location, psychological factors, effect on community, among children, etc. See Bardolph 390. For references to the legislative enactments of the ten states, see Note, Busing—A Permissible Tool of School Desegregation, 49 J. Urban L. 399, 402 n.13 (1971). Most of these statutes were declared unconstitutional, e.g., Bradley v. School Bd., 317 F.2d 429 (4th Cir. 1963) (Virginia); Bush v. Orleans Parish School Bd., 308 F.2d 491 (5th Cir. 1962) (Louisiana); Northcross v. Board of Educ., 302 F.2d 818 (6th Cir. 1962) (Tennessee); Dove v. Parham, 181 F. Supp. 504 (E.D. Ark.), aff'd in part, vacated and remanded in part, 282 F.2d 256 (8th Cir. 1960).

126 Several courts held that because the school system was in transition, individual suits were premature, e.g., Avery v. Wichita Falls School Dist., 241 F.2d 230 (5th Cir. 1956).

128 In 1964, only 6% of the southern schools were desegregated. U.S. Commission on Civil Rights, Clearinghouse Publication No. 27 (1971).

130 372 F.2d 836 (5th Cir. 1965), aff'd en banc, 380 F.2d 385 (5th Cir.), cert. denied, 389 U.S. 840 (1967).

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system—lock, stock, and barrel: students, faculty, staff, facilities, programs, and activities.\

School authorities now have an affirmative constitutional duty to come forward with a desegregation plan whose constitutionality shall be judged by its effect: "The only school desegregation plan that meets constitutional standards is one that works." The court bluntly faced the issue of color blindness because it realized that in some circumstances, a desegregation plan can only work by taking into account racial criteria. The apparent legal dilemma was resolved, again, by a result-oriented approach:

To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden, must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.

If necessary, in order to fulfill its obligation to desegregate, a school board may take into account the race of the students it has to assign. The Tenth Circuit, shortly after Jefferson, came to the same conclusion: "[C]learly [a school board] may consider race in disestablishing their segregated schools without violating the Fourteenth Amendment's equal protection clause."\

Fourteen years after Brown the Supreme Court, too, began to lose patience and adopted stronger language. Instead of merely examining desegregation plans in the light of the broad Brown II standards, the Court turned towards their result. In Green v. County School Board it ruled on the constitutionality of "freedom of choice" plans. Such plans were not held unconstitutional per se, but the Court indicated that when their effect was to perpetuate a prior system of segregated schools they would be in violation of the Constitution. The Court refused to go as far as the Fifth and Tenth Circuits, but it nevertheless stressed the affirmative duty of school boards to "take whatever steps might be necessary to convert a unitary system in which racial discrimination would be eliminated root and branch." On the other hand, the Court in Green did not attempt to define positively what particular steps make a desegregation plan constitutionally acceptable. Its message is "a negative one—that a school board does not fulfill its duty to convert to a unitary system by substituting for a racial criterion one that is innocent on its face." This implicitly means that neutral color blindness cannot in all circumstances satisfy the command of the equal protection clause as applied to public education.

In 1969 the Supreme Court had to decide whether the deliberate use of percentage requirements in disestablishing de jure segregated schools—a step

132 372 F.2d 836, 846 (5th Cir. 1966).
133 Id. at 847.
134 Id. at 876. But see Wanner v. County School Bd., 357 F.2d 452 (4th Cir. 1966).
139 Fiss, supra note 60, at 699.
which obviously involves racial classification—is constitutional. In *United States v. Montgomery County School Board* Justice Black, speaking for a unanimous court, upheld the specific ratios ordered by the district court because he viewed them as being not "absolutely rigid and inflexible." While the ordered ratios could be enforced through a racially neutral faculty assignment plan because of the relative equilibrium between white and black teachers in the country, the decision of where to assign teachers required a consideration of their race. The same year, the Court reiterated the strong *Green* standard in *Alexander v. Holmes County Board of Education* in unmistakably clear words: "[t]he obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."

This per curiam decision is important, not so much because it reaffirmed *Green*, but because it did so under the new Chief Justice Burger, whom President Nixon had just appointed, at a time when his new Administration announced the break with the strong civil rights policy of the Johnson Administration. However, in the specific decree which followed the short decision, the Court defined a unitary system as one "within which no person is to be effectively excluded from any school because of race or color." This phrase, a variant of the color blindness rule, created much confusion. As an absolute command of the equal protection clause, when taken out of the *Alexander* context, it may very well substantially restrict and even contradict the other command, that the school districts operate only unitary schools. In many circumstances, the latter goal can only be attained by violating the former and vice versa. In metropolitan areas with strong residential segregation, for example, any desegregation plan ordering bussing denies both black and white pupils solely on the basis of race the right to attend their neighborhood school.

Thus, in the de jure context, the crucial question to be decided by the Supreme Court was which of the two commands had priority.

**De Facto Segregation.** As noted above, the tension between color blindness and color consciousness has probably the most far-reaching impact in the context of de facto segregation. It constitutes a serious challenge to all efforts to compel school authorities to correct racial imbalance as well as to all voluntary steps initiated by them to that end. A complete analysis and evaluation of all the highly complicated and obscure constitutional and policy problems arising out of this context would exceed the scope of this Article.

In the absence of any Supreme Court decision facing directly the issue of de facto segregation, one is left with a series of often contradictory lower court decisions...
cases, state and federal. At the outset, two situations must be distinguished: in one, individuals—usually Negroes—attempt to compel passive school boards to eliminate or alleviate de facto segregation; in the other, individuals—usually, but not necessarily, white—try to prevent active school boards from voluntarily taking such measures. The issue in the first situation is whether school authorities have the constitutional duty to act and in the second situation, whether they have the constitutional permission to act. The courts are in disagreement particularly as to how to decide the first issue.

In Bell v. School City of Gary it was held that the fourteenth amendment does not require "that a school system developed on the neighborhood school plan, and honestly and conscientiously constructed with no intention or purpose to segregate the races, must be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites." School authorities, in other words, are under no affirmative duty to eliminate de facto segregation and there is no constitutional right to be integrated with persons of other races. The Tenth Circuit came to the same conclusion one year later, and the First and Sixth soon followed. In the absence of any discriminatory action of state authorities, federal courts cannot, therefore, impose upon them an affirmative duty to correct racial imbalance by ordering, for example, bussing of students from one district to another.

On the other hand, as early as 1961 a lower federal court in New York granted relief in a suit on behalf of Negro children against school authorities, holding that the neighborhood school plans were constitutional only if they obeyed the command of the fourteenth amendment, and that school authorities are responsible for school segregation resulting from housing patterns if they do nothing to mitigate the inadequacies resulting from it. Similarly, a constitutional violation was found when school authorities were fully aware of the almost 100 percent segregation of their district, but continued their passive policy. A California court went even one step farther when it held that "the right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps insofar as reasonably feasible to alleviate racial imbalance regardless of its cause."

The 1967 decision in Hobson v. Hansen is probably the most far-reaching...
desegregation decision rendered by a federal court. Suit was brought on behalf of black and poor white children against the school authorities of the District of Columbia. Justice Skelly Wright ruled that de facto segregation is no less unconstitutional than segregation by statute: “Racially and socially homogenous schools damage the minds and spirit of all children who attend them—the Negro, the white, the poor and the affluent—and block the attainment of the broader goals of democratic education, whether the segregation occurs by law or fact.”

He concluded that poor Negro children had been denied equal educational opportunity and ordered several remedial measures including bussing, compensatory education, and assignment of teachers on a color-conscious basis.

The lower courts are more unanimous in dealing with suits to block active school boards from ending de facto segregation and the issue of whether the Constitution permits them to take voluntary measures to cure de facto racial imbalance. That race may constitutionally be taken into account, along with other factors, in shaping a remedy, has been held several times by state and federal courts.

Where state legislatures have enacted statutes barring racial imbalance from public education, the courts have often been asked to declare them unconstitutional on the grounds that they require school boards to classify by race. At issue is the standard to be applied by the court: Must the state show a compelling interest to permit school boards to use “benign” racial classifications in order to alleviate de facto segregation, or is the test simply one of reasonableness? In the cases previously cited where voluntary action of school authorities has been upheld, it was also held that legislators have statutory power to prohibit racial imbalance and that such statutes violate the Constitution only when they are arbitrary or unreasonable. The same relaxed standard of review was applied by the Supreme Court of Illinois when it had to decide upon the constitutionality of the Illinois racial imbalance law.

No court has subjected benign racial classifications to the strict standard of review nor is there a fortiori any case adopting the view that racial classifications, whether invidious or benign, are always unconstitutional. Thus, it appears

that, in spite of its importance, the color blindness argument has not received much explicit consideration by the courts dealing with de facto segregation.

B. Swann v. Charlotte-Mecklenburg Board of Education

In Swann the Supreme Court attempted to define "in more precise terms... 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" and to provide guidelines by reviewing several conflicting plans to desegregate the Charlotte-Mecklenburg school system.

The Court reaffirmed that "the objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." Chief Justice Burger then refused to accept the argument of the school authorities that title IV of the Civil Rights Act of 1964 was intended by Congress to restrict the existing remedial powers of federal courts in shaping a remedy for state-imposed segregation. The Act was interpreted to apply only to the context of de facto segregation, an issue which the Court once more avoided: "The basis of our decision must be the prohibition of the Fourteenth Amendment that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.'"

The Court then considered the adequacy of student assignment plans, and divided this central issue into four major problem areas. First, the racial balance requirement imposed by the district court was held to be within its equitable remedial discretion because "the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement." But the Court clearly indicated that it would disapprove a requirement, as a matter of substantive constitutional right, of any particular degree of racial balance or mixing.

Second, the Court examined the constitutionality of one-race schools. Their existence in small numbers was held not to be unconstitutional per se, but in a system with a history of segregation, school authorities have the burden of showing that desegregation plans which contemplate the continuing existence of one-race schools are "genuinely nondiscriminatory." Optional and majority-to-minority transfer provisions were upheld as "a useful part of every desegregation plan."

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162 402 U.S. 1, 6 (1971).
163 Id. at 15.
164 "Desegregation means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. § 2000(c) (1970).
[N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

165 Id. at § 2000(c)-6(a) (1970).
166 402 U.S. 1, 18 (1971).
167 Id. at 25.
168 Id. at 24.
169 Id. at 26.
170 Id. at 27.
The two remaining problem areas considered by the Court were remedial altering of attendance zones, and transportation of students, both measures involving a benign racial classification by school authorities. The constitutional basis for permitting school authorities to assign pupils on the basis of their race is the unconstitutionality of dual school systems. The Court subsequently upheld gerrymandering of district lines, pairing, clustering, and grouping of noncontiguous school zones, as well as bussing, as permissible tools for achieving desegregation. Thus, race is no longer a constitutional taboo for school authorities in the exercise of their affirmative duty to dismantle dual school systems; the color blindness argument has no place in the de jure context. Racially neutral assignment plans are no longer constitutional per se. Rather, they may be inadequate because they "may fail to counteract the continuing effects of past school segregation . . . ." The color blindness argument was more explicitly disarmed in one of Swann's companion cases:

[T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement, against the background of segregation, would render illusory the promise of Brown v. Board of Education . . . . Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems. In other words, the constitutionality of racial classifications in the field of public education can only be determined by looking at their result. If the classifications produce segregation they are clearly unconstitutional, but if their effect is to promote desegregation they are permissible.

The Court also responded to the objection mentioned above, that measures involving benign racial classifications in favor of one group often entail discrimination against another: "The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some: but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." Nor did the Court subject the measures taken by the federal court to a strict standard of review simply because they now may involve racial classifications. The test remains one of reasonableness, and the measure of any desegregation plan is its "effectiveness"—unfortunately, a term which the Court did not define.

Finally, Swann resolved the problem created by the fact that the two com-
mands formulated in *Alexander v. Board of Education*\(^{176}\) may often contradict each other\(^{178}\) by correcting and restating the objective: "Our objective . . . is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race . . . ."\(^{177}\) However, *Swann* failed to clarify many important issues, the most basic being that of de facto segregation and the extent of government responsibility for it.

C. Color Blindness: Empirical and Legal Arguments Contra

As the discussion above points out, the school desegregation decisions cannot honestly be invoked to sustain the conclusion that the Constitution and the law should be color-blind. Moreover, in the last twenty years, the argument has too often been associated with efforts by reluctant state and school authorities to thwart or to slow down the long-promised desegregation. Those who invoke it today, at a moment when the task is still far from being accomplished, are at least suspect of opposing for one reason or another the desperate attempts of minority groups to undo their chains and of denying their right of equal access to the benefits and responsibilities of contemporary American society. There is a presumption of bad faith against them, but it is, of course, rebuttable.

This is not to say that the motives of those who advocate a color blindness rule cannot be pure and even laudable. "All men are created equal" means that all distinctions and discriminations on the basis of race, color, religion, and the like are evil, and these bases should never be criteria for differential treatment. We all, and particularly government, should act and think as if there were but one race. This, of course, is a great and desirable attitude. However, it must be remembered that "we live in a fallen world where distinctions have long been made and where the effects of such distinctions persist."

The simple statement that all men are naturally equal and should be bound together in brotherhood, irrespective of race or culture, is not very satisfactory to the intellect, for it overlooks a factual diversity which we cannot help but see; and we are not entitled, either in theory or in practice, to behave as if there were no such diversity, simply because we say that it does not affect the essence of the question . . . .

Out of this observation grows a strong moral argument in favor of benign racial classifications and compensatory treatment (and, implicitly, against color blindness).\(^{179}\) Once we acknowledge that today's society is everything but color-blind and that blacks, like many other minority groups, are still in an inferior social and political position, we must admit that adherence to the color blindness doctrine means justification and perpetuation of the status quo. Furthermore—and this is one case where history might give us some guidance.

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\(^{176}\) See text accompanying notes 145-46 supra.
\(^{177}\) 402 U.S. 1, 23 (1971).
\(^{178}\) Elden, supra note 15, at 651.
\(^{179}\) C. LÉVI-STRAUSS, RACE AND HISTORY 12 (UNESCO 1952).
—since the white society has exploited the Negroes for centuries and substantially enriched itself at their expense, it is only fair to recognize their special need and to compensate them for past inequalities. We have inherited from our past policy of discrimination hard and complex problems which we cannot solve simply by closing our eyes, but which require affirmative action in favor of those who are still suffering from the continuing effects of such discrimination. Such a policy of compensation is certainly not entirely new to our social and legal system. We accept special treatment of the handicapped, we accept progressive taxation, we accept welfare payments, and we accept a whole variety of social programs which give special assistance to the needy members of our society.

An equally appealing but less emotional argument in favor of special treatment is advanced by Professor Kurland.181 It derives from a somewhat theoretical observation of the philosophical and constitutional basis of our institutions. It is a basic proposition of democracy that it is the majority who speaks through the legislator. It is also a basic proposition that the majority cannot treat the minority as it pleases but that it must guarantee the minority equality in the laws and before the laws—this is the essence of equal protection. The majority is constitutionally bound, therefore, to treat the minority exactly as it treats itself. It is evident that the majority cannot abridge the right of the minority to be treated equally. No one can waive someone else’s right. But the majority is certainly entitled to renounce voluntarily its own right to be treated equally, “as with almost every other constitutional right, it should be treated as waivable by knowing affirmative action. Enactment of legislation favoring a minority may be treated as such a waiver by the majority of its right to equal treatment.”182 Thus, it follows, legislators may constitutionally pass laws which favor a minority, and the principle of equality is not violated, even if such laws impose burdens on individual members of the majority. If, one day, the burdens should become too heavy or the burdened too many, the majority is free to change their representatives in the legislative branch, which may, of course, at any time withdraw the waiver and impose again a rule of “full” equality.

On the other hand it is true that this argument does, at the same time, deny the right of the courts to order such preferential treatment, because “[t]he Court is the voice of the Constitution; it is not the voice of the majority.”183 However, the Supreme Court will have the final word in deciding the constitutionality of such legislation. It is submitted that the enabling clause of both the fourteenth and the thirteenth amendments—as interpreted in recent cases—could provide a valid constitutional basis for upholding these legislative enactments.184

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182 Id. at 675.
183 Id.
184 With regard to the fourteenth amendment it is sufficient to recall Justice Brennan’s language in Katzenbach v. Morgan, 384 U.S. 641, 651 (1966): [T]he *McCulloch v. Maryland* standard is the measure of what constitutes ‘appropriate legislation’ under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to
In evaluating the argument that discrimination in favor of one group often entails discrimination against another, and that the only solution to this legal dilemma is a return to the color blindness rule, it must be determined what factors—rights—are involved in each situation and a decision made as to which of these factors are relevant to equal protection and which are not. If, for example, a white child is denied the right to attend a school near his home by a desegregation plan providing for crossbussing of white and black children out of their uniracial neighborhood to integrate schools, the courts will have to decide if a denial of the right to attend the neighborhood school solely because of race amounts to a denial of equal protection of the laws.

Contending that, in the context of public education, the Supreme Court has constantly defined equal protection to mean equality of educational opportunity, one commentator pointed out that, therefore, "[t]he only factors . . . that are relevant to equal protection . . . are those touching upon the learning and self-fulfillment of individual children." He concluded that absent a showing that bussing children impairs their health or significantly impinges upon the educational process, the "right" to attend a neighborhood school is irrelevant to equal protection.

One could be tempted to apply a similar technique to the situation where legislation in favor of blacks causes conflicts between their rights and the rights of other minority groups. For although it is undoubtedly true that Mexican-Americans, Puerto Ricans, Indians, poor whites, and, to a lesser extent, Orientals are generally not better off than Negroes in our society, it is equally true that the Negroes are in a unique and hardly enviable position in this country. They alone have been enslaved so brutally and so completely and exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

Similarly, the power of Congress to enforce the thirteenth amendment has been given expansive meaning in Jones v. Alfred Mayer Co., 392 U.S. 409 (1968), where the Court stated that the enabling clause clothed Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. Id. at 440-41, quoting Civil Rights Cases, 109 U.S. 3, 22 (1883). This is the factual situation suggested by McAuliffe, supra note 65, at 66.

The Courts seem to have avoided this issue. See School Comm. v. Board of Educ., 352 Mass. 693, 700, 227 N.E.2d 729, 734 (1967), appeal dismissed, 389 U.S. 572 (1968): "Until a pupil has been in fact excluded from a public school on account of race, we are unimpressed with the argument that the act [the Massachusetts racial imbalance law] works a denial of equal protection." Tometz v. Board of Educ., 39 Ill. 2d 539, 237 N.E.2d 498 (1968), is another case where race was the only factor in a school assignment plan. Fiss, supra note 115, at 578, passed on the issue simply by saying "[j]udgment can be passed on that situation when it arises."

Note, supra note 7, at 1110. See also Fiss, supra note 115, at 583. This theory suffered a serious blow in San Antonio School District v. Rodriguez, 411 U.S. 1 (1973). The Court reversed a lower court decision which invalidated the Texas system of financing public education from local property taxes. "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution." Id. at 35.

See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30-31 (1971): "An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge upon the educational process."

Indians were the first to become slaves of white settlers during the seventeenth and eighteenth centuries but they did not adapt themselves easily to the hard work on the farms. White convicts were then shipped from the crowded English prisons to the colonies and became "indentured servants." But the supply could soon no longer satisfy the demand, so the planters fell upon the African Negro to exploit. See W. FOSTER, supra note 97, at 33-35.
they alone have so long been subjected to a whole variety of repressive legislation. On the other hand, as pointed out earlier, exclusion of other minority groups from compensatory programs granted to Negroes would inevitably stir racial tensions, and resurrect old and bitter rivalries. Moreover, besides creating practical difficulties, it would be totally unnecessary, for no constitutional provision nor any other reason prevents us from extending the benefits of such legislation to other, equally needy minority groups. At least since Swann, benign quotas for Chicanos in the West and Southwest and for Puerto Ricans in New York, for example, enjoy the same constitutional protection—and the same limitations—as benign quotas for blacks.

Finally, a practical argument against color blindness grows out of the result-oriented approach to school desegregation adopted somewhat tentatively by the courts in recent years. Instead of satisfying a desire for simplicity and symmetry of constitutional doctrines by prohibiting completely any classifications based upon race, or by permitting them all, the courts have shifted their attention to the immediate results these produce and the effects they have upon interracial relations. If they tend to perpetuate segregation, they are clearly unconstitutional. If, however, their effect is to promote desegregation, racial classifications, at least "as interim remedial measures" are admissible and even constitute a "tool absolutely essential [for school authorities] to fulfillment of their constitutional obligation to eliminate . . . dual school systems." There is, after all, a fundamental difference between racial classification as a basis for friendly legislation which at least attempts to cure past wrongs and racial classification which is clearly intended to confine blacks to the ghettos. In the words of Professor Freund: "[T]here is an ethical sense in which discrimination in favor of a minority is not to be equated with a discrimination against it . . . if this is a sound moral judgment, it is relevant to the judgment of the law as well as for equal protection of the law is at bottom the embodiment of a moral standard."

III. REACTIONS TO SWANN: TRENDS AND OUTLOOK

The unanimous April 20, 1971, decision of the Supreme Court has received considerable attention by numerous commentators and by divided public
opinion. Not surprisingly, it has been both widely applauded and harshly criticized, with characterizations ranging from “a way-station,” to the adoption of an “increasingly result-oriented” approach to school desegregation, to “monster of impetuous justice.”

For our purposes, it is interesting to note that, although Swann seems to have settled the color blindness question in the de jure context, some critiques based their objections on a color blindness rule. Absence of consideration of the results of racial classifications and eloquent simplification of the Brown holding characterize the following statement delivered by Senator R. C. Byrd (West Virginia) in the U.S. Senate on September 8, 1971:

In Swann . . . the Court, speaking through the Chief Justice, stated that—

Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis.

Prior to the year 1954, the assignment of students on a racial basis did not constitute a constitutional violation. But the 1954 decision in Brown against Board of Education made it unconstitutional to assign students to public schools on the basis of race. Now the Court, in April 1971, maintains that if there is a constitutional violation—growing out of the previous State-enforced system of assignment of students on the basis of race—the courts may judicially order assignment of students on a racial basis. In other words, two wrongs will make a right.

Senator S. I. Ervin (North Carolina), a member of the Senate Committee on Equal Educational Opportunity, came to the same conclusion.

Much more serious and considerably more complicated was the strong reaction of both the Nixon Administration and Congress against the Swann holding that bussing is a permissible remedy for school segregation. President Nixon requested congressional passage of two measures which were both designed to “place firm and effective curbs on busing.” The Student Transportation Moratorium Act would have barred all court- or HEW-ordered bussing until July 1, 1973, or until Congress enacted the second proposed measure, the Equal Educational Opportunities Act. In its central provisions, the Court says there is a duty to ignore race in assigning schools, but when you don’t ignore race in assigning children to schools, you can be required to consider race as a primary objective in assigning children to schools. That’s the reason I say that in the Swann case the Supreme Court, in effect, laid down the decision where a school board violates the equal protection clause by assigning children to schools on a nonracial basis. It can be required by the Court to further violate the equal protection clause by assigning them to schools on a racial basis.

Hearings, supra note 30, at 5407.


H.R. 13916, 92d Cong., 2d Sess. (1972). The bill has never been reported by either the House or Senate committee to which it was assigned.

the Equal Educational Opportunities Act would have prevented any court, department, or agency of the United States from implementing a desegregation plan for elementary students "that would require an increase . . . in (1) either the average daily distance to be traveled by, or the average time of travel" or in (2) "the average daily number of students . . . over the comparable averages for the preceding school year." The bill received strong support in the House of Representatives where it passed. However, it did not pass the Senate and was dropped for that year.

On June 23, 1972, President Nixon signed the Education Amendments of 1972 into law. This measure does not prohibit court-ordered bussing per se but provides in its central section 803 for a postponement of implementation of court orders requiring transfer or transportation of students "for the purposes of achieving a balance among students with respect to race . . . until all appeals in connection with such order have been exhausted or . . . until the time for such appeals has expired."

The proposed and partly enacted antibussing legislation raises fundamental constitutional questions such as the separation of powers, judicial supremacy, and the power of Congress under article III to thwart appellate jurisdiction of the Supreme Court and under section five of the fourteenth amendment—"to enforce, by appropriate legislation," the equal protection clause as well as the guarantee of due process of the fifth amendment. All these constitutional principles are violated by the proposed measures, according to former Supreme Court Justice Arthur J. Goldberg, who characterized them as "a current example of . . . Parkinsonian law." Whether the Supreme Court will declare them void is another question.

Still, opponents of bussing felt that legislation was not sufficient and pro-

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200 Id. § 403(a).
201 The bill passed on Aug. 17, 1972, by a vote of 282 to 102 in an amended version which provided for even stronger restrictions on bussing that the Administration had proposed. Pupil transportation was barred except to the closest or next closest school, other remedies had to be shown to be ineffective before bussing was permitted, and all previous bussing orders by federal courts were subjected to re-evaluation to bring about compliance with the bill's provisions. 118 CONG. REC. H.7884 (1972).
202 After substantial parliamentary maneuvering, the bill was filibustered to death by a coalition of liberal Senators. Id. at S.17695.
204 Id. § 1653.
207 One writer argues that because the congressional proposals are less far-reaching than the Administration originally wanted, the Court will probably uphold the Education Amendments of 1972. Note, Moratorium on School Busing for the Purpose of Achieving Racial Balance: A New Chapter in Congressional Court-Curbing, 48 NOTRE DAME LAW. 208, 230-31 (1971).

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posed several antibussing constitutional amendments.\textsuperscript{211} The most popular was proposed by Representative Norman F. Lent (New York) and reads: "No public school student shall, because of his race, creed or color be assigned to or required to attend a particular school."\textsuperscript{212} As its sponsor declared before a House Judiciary Subcommittee, the resolution is clearly intended to reverse the Swann decision and to restore the rule of the Brown case which, again, is interpreted as declaring color blindness the law of the land.\textsuperscript{213} If adopted—which is highly unlikely—the amendment would not only undermine all school desegregation efforts of the last twenty years, but would, in effect, constitute a return to the separate-but-equal doctrine of Plessy. Not unjustifiably, it has already been characterized as the "Back to Jim Crow Amendment."\textsuperscript{214} Clearly, the proposed amendment shows how far the opponents of bussing are willing to go, and how well the doctrine of color blindness serves their ends.

The Supreme Court, in the 1971 term, reluctantly confirmed the results-oriented approach to school desegregation cases announced in Green and Swann. The City of Emporia, Virginia, attempted to carve out a new district from an existing school district which was in the process of dismantling the dual school system. This would have resulted in a substantial increase of the racial imbalance. The district court held that the proposed secession would impair the desegregation process and enjoined the city from seceding.\textsuperscript{215} The Fourth Circuit overruled that decision and denied the authority of the district court to enjoin.\textsuperscript{216} The Supreme Court, in Wright v. Council of the City of Emporia, reversed and followed the district court in focusing on the effect of the proposed withdrawal: "Desegregation is not achieved by splitting a single school system operating 'white schools' and 'Negro schools' into new systems, each operating unitary schools within its borders, where one of the two new systems is, in fact, 'white' and the other is, in fact, 'Negro.'"\textsuperscript{217} However, the four Nixon-appointed Justices felt that the Court went too far, and broke with the rule of unanimity in school desegregation cases.\textsuperscript{218}

\textsuperscript{211} The most important is H.R.J. Res. 620, 92d Cong., 2d Sess. (1972); the most recent are H.R.J. Res. 361, 379, 383, 93d Cong., 1st Sess. (1973).

\textsuperscript{212} H.R.J. Res. 620, 92d Cong., 2d Sess. (1972).

\textsuperscript{213} The Brown decision's mandate pioneered this policy of color blindness in the field of education, and I believe it should continue to be retained in our law. The principal thrust of the court, in Swann, on the other hand, is to require the assignment of students to the public schools in this nation on the basis of race, in order to achieve racial balances or quotas. I believe it is difficult to reconcile these two cases. Where is the line to be drawn between allocating people by law to schools or other institutions or facilities according to color to promote segregation, and doing the same thing to promote integration? The underlying principle in both cases is racism! If it was wrong in 1954 to assign a black child to a particular school on the basis of race, it is just as wrong to do the same thing to other children in 1972. This 'Jim Crowism' in reverse, as practiced by our courts, is what House Joint Resolution 620 is aimed at stopping.


\textsuperscript{214} Author Harry Golden before House Judiciary Subcommittee No. 5, on Mar. 9, 1972.\textit{Hearings, supra note 209, pt. 2, at 641.}


\textsuperscript{216} Wright v. Council of the City of Emporia, 442 F.2d 570 (4th Cir. 1971).

\textsuperscript{217} 407 U.S. 451, 463 (1972); \textit{see The Supreme Court, 1971 Term, 86 HARV. L. REV. 62 (1972).}

\textsuperscript{218} In the companion case, United States v. Scotland Neck City Bd. of Educ., 407 U.S.
There is a great deal of confusion in the lower courts. While the Swann standards requiring affirmative action to dismantle dual school systems have been followed by many courts in deciding upon the constitutionality of desegregation plans in the southern de jure context, its limits and restrictions are uncertain. How much bussing can be required and how relevant is previous bussing experience in determining its extent? When is a desegregation plan reasonable? When is a dual school system sufficiently desegregated to become unitary? Who bears the burden of desegregation? These are just a few questions which lower courts must face in the long process of implementing the Swann standards and they deserve a more careful analysis than is possible in this Article.

However, the Swann Court's refusal to discuss the de facto segregation issue has raised by far the most complicated problems and has greatly divided the courts. The classical argument announced in Bell v. School City of Gary has often been followed; there is no substantive constitutional right to any particular degree of racial balance or racial mixing of pupils, and imbalance resulting from housing patterns or other factors not resulting from deliberate school policies does not violate the equal protection clause.

Several courts, on the other hand, have attempted to redefine this narrow concept of state action; where racial imbalance regardless of its cause denies to a minority group equal educational opportunities, school boards have the constitutional duty to take steps, insofar as reasonably feasible, to alleviate it. Likewise, the Fifth Circuit seems to interpret Emporia as overruling the view that state action is a necessary prerequisite to the establishment of a constitutional violation in the field of public education.

The issues decided by the two recent cases, one of which is still in cognizance...
of the Supreme Court,\textsuperscript{22} raise a series of complicated constitutional questions directly related to the problem of color blindness. In \textit{Keyes v. School District No. 1},\textsuperscript{23} the trial court found that although some Denver schools (the "core area schools") were not segregated by state action, they provided an education inferior to that of other Denver schools, and because "segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity"\textsuperscript{24} it ordered these schools to be desegregated. On appeal, the Tenth Circuit held at the outset that, if consignment of minority races to separate schools is to be allowed, "the minimum the Constitution will tolerate is that from their objectively measurable aspects, these schools must be conducted on a basis of real equality, at least until any inequalities are adequately justified."\textsuperscript{25} However, the court was unable to find objective indicia of inferiority constituting a constitutional deprivation, and specifically rejected the trial court's conclusion that segregated schools, whatever the cause, produce lower achievement per se.\textsuperscript{26} In the absence of a firm foundation upon which to build a constitutional deprivation, it then denied the power of the federal courts to prohibit racially segregated schools established and maintained on racially neutral criteria, and reversed the lower court in that respect. The remainder of the district court's decision dealing with other parts of Denver's school system and ordering extensive bussing and compensatory education were affirmed.

The Supreme Court, for the first time, will have to determine the scope of the concept of state action in the field of public education. If it decides to follow the general trend towards a broadening of the doctrine, the Court will necessarily have to deal with the different remedies available to disestablish de facto segregated school systems, many of which will involve benign racial classifications. It is submitted that if the Court is ready to extend the scope of state action or to declare it irrelevant in the presence of unequal educational opportunities, it is highly probable that the Court will refute the color blindness argument in the de facto context. \textit{Swann} undoubtedly points in that direction. This would mean no less than that the color blindness doctrine has no place in the field of public education. If, on the other hand, the Court upholds the Tenth Circuit's decision and refuses to extend the scope of the state action doctrine, the color blindness argument will not only continue to obscure the real issues of northern school desegregation cases, but it will gain strength and might even successfully reappear in the de jure context.*

\textsuperscript{23} 313 F. Supp. 61 (D. Colo. 1970).
\textsuperscript{24} Id. at 82.
\textsuperscript{25} Id. at 445 F.2d 990, 1004 (10th Cir. 1971).
\textsuperscript{26} Id.

* Editor's Note: On June 21, 1973, the United States Supreme Court remanded \textit{Keyes v. School District No. 1} for a determination by the district court of whether there had been de jure segregation practiced against the core area schools. 93 S. Ct. 2686, 37 L. Ed. 2d 548 (1973). The Supreme Court found that the district court's finding of intentional segregative school board actions in a meaningful portion of the school system created a prima facie case of unlawful segregated design on the part of school authorities for the entire school system. The burden was, therefore, shifted to those authorities to prove that the core area schools
The most recent school desegregation case decided by the Supreme Court is *Bradley v. School Board*, where the district court ordered enforcement of a plan integrating schools in the city with those of two adjacent counties. That court held that where segregated residential patterns create contiguous racially identifiable school districts, there is "state action" where a state fails to exercise its power to consolidate those districts for purposes of student assignment and attainment of equal educational opportunities. On appeal, the Fourth Circuit, which had approved the splitting of school districts of Emporia and Scotland Neck, reversed and denied the lower court's authority to order consolidation of school districts. The court admitted that the finding of state action perpetuating segregation within the city and within the adjoining counties was not clearly erroneous. However, the court found no evidence of joint interaction between the districts for the purpose of keeping one relatively white by confining blacks to another. Comparing the demographic patterns of Richmond to those in northern and western metropolitan areas, the court acknowledged that it did not know "the root causes of the concentration of blacks in the inner cities of America . . . Whatever the basic causes, it has not been school assignments, and school assignments cannot reverse the trend." Then it deplored the housing segregation, but refused to consider it as state action by repeating the *Swann* dictum that "one vehicle can carry only a limited amount of baggage." The last vestiges of state-imposed segregation having been eliminated from the public schools in the three districts, it concluded that there was no constitutional violation and that the district court had exceeded its remedial powers.

Again, the issue before the Supreme Court was the scope of the concept of state action. Here, unlike *Keyes*, the state had a long history of de jure segregation. If the Court, like the majority in *Emporia*, had considered the effect of the proposed change of district lines on desegregation, it could well have subscribed to the finding of the trial court that consolidation of the three school districts would result in a "viable racial mix" of twenty to forty percent black students in each school, a quota which seems to correspond to the demographic pattern of the three units combined. But on May 21, 1973, were not the result of intentionally segregative actions even though the core area schools should be viewed independently.

It is also significant that the Court found that for purposes of defining a "segregated" school, Negroes and Hispanos must be placed in the same category.


*339* 462 F.2d 1058 (4th Cir. 1972).

*340* Id. at 1065.

*341* Id. at 1066.

*342* Id. at 1066.

*343* Id.

*344* The term was defined by an expert as "a racial mix that is well enough established that it will continue to prosper, . . . a desirable, reasonable mix for educational purposes." Id. at 1062.

*345* The trial court rejected the view that the percentage could be characterized as the imposition of a fixed racial quota and explained that a percentage below 20% would take the character of a token presence; one above 40% would probably pass the "tipping point" and result in rapid resegregation because of "white flight." Id. at 1063.
the Supreme Court affirmed the Fourth Circuit's decision by an equally divided Court, Justice Powell abstaining. What could well have been a landmark decision representing a new step towards the solution of the northern and metropolitan de facto segregation problem became a simple tie vote, which sets no precedent for other courts to follow. What the decision does indicate, however, is that the era of unanimous school desegregation cases is over. While the remaining Warren Court members continue to adhere to the spirit of Brown and its progeny, and to adapt it to new fact situations, the four Nixon appointees somewhat stubbornly refuse to expand its impact, not wanting the Supreme Court to take an active part in the highly politicized debate over de facto school segregation.

In 1971 the Supreme Court of California decided, in a landmark case, that a school financing system that relies substantially upon local property taxes, which results in inequalities of spending by school districts, discriminates against students in poorer school districts and violates the equal protection clause. Several lower courts followed this ruling. But the Supreme Court, on March 21, 1973, explicitly overruled such a decision in San Antonio Independent School District v. Rodriguez. The majority, formed by Chief Justice Burger and Justices Powell, Stewart, Blackmun, and Rehnquist, refused to examine the Texas local property tax school financing system under standards of strict judicial scrutiny. Since it could find no showing that such a system discriminates against a definable class of poor people nor that it results in the absolute deprivation of education, it concluded that "the Texas system does not operate to the peculiar disadvantage of any suspect class." Of greater importance, the Court held that the system does not interfere with the exercise of a fundamental right or liberty. Appellees had insisted that education is itself "a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote." But the Court was not impressed by this argument and, after expressing the view that "it is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," bluntly stated: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." For these reasons, the Court rejected the test of strict judicial scrutiny, and merely examined whether the Texas system bears some reasonable relationship to a legitimate state purpose, which it easily found. Consequently, it held that there was no violation of the equal protection clause.

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547 Id. at 28.
548 Id. at 38.
549 Id. at 35.
550 Id. at 37.
Justices White, Brennan, Douglas, and Marshall dissented. In the words of the latter, the majority’s opinion “can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potentials as citizens.”

Rodriguez is not a case directly involving racial discrimination. However, in holding that education is not among the limited rights guaranteed by the Constitution, the Court may have created a basis for a later holding that the means used to achieve the goal of racially desegregated education, such as bussing or even assignment of pupils on a racial basis in the de facto context, would occasion an unprecedented upheaval in public education and, therefore, be unconstitutional. Since the Court is so badly split on its recent interpretations of the equal protection clause and since the temptation seems to be growing to avoid a thorough analysis of the increasingly complex aspects of public school desegregation cases by subscribing to a simplifying general doctrine, a return to a color blindness rule by the Court can no longer be excluded.

IV. Conclusion

Emotions are an important and even essential part of politics. They stimulate public concern for political issues and induce people to take an active part in the political organization of society. But once aroused, they often tend to be exaggerated and lend themselves easily to deliberate manipulations for various ends. At some point, they not only obscure the very issue which created them but prevent a rational analysis of related, not less important issues. Artificially nourished emotionalism decreases understanding and can be used to avoid the problems rather than to solve them.

Since education is considered an indispensable prerequisite for personal success, all problems relating to it are particularly wrought with emotion. Failure or success in educational institutions is often identified with undisputable qualities as a human being. It is not surprising, therefore, that when sensitive racial issues are combined with educational problems, emotions grow wild. The massive and often violent oppositions to desegregation and, in recent years, to bussing are good examples of how irrational emotionalism can hide the real problem. The real problem is not desegregation and is not bussing, but is the conviction that black schools are inherently inferior because Negroes, by their very nature or because of their economic, social, or cultural environment, are less capable of learning than are whites. Therefore, integration of schools necessarily must result in a decline of quality.

The color blindness argument is not the central problem with school desegregation. It arose as a legitimate response to an overwhelmingly invidious color consciousness and was originally clearly directed against racial discrimination that deprived Negroes of equal social, political, and legal rights. But because of its appealing simplicity it has quickly been distorted and interpreted as embodying a “neutral” and “objective” approach to racial problems. In the present decisive phase of school desegregation, with the fundamental question
of the validity of the de jure/de facto dichotomy remaining undecided, adherence to a neutral color blindness rule means uncritical justification and deliberate perpetuation of the status quo.

One could venture to compare the role the color blindness doctrine played in the long and bitter history for school desegregation with the one played by the "state rights" arguments of the Tenth Amendment throughout the entire history of the United States. Both have too often been advanced to cover numerous inequalities and flagrant injustices of a given status quo. The relevance of both to a particular issue is greatly obscured by the many emotions they have raised. This is unfortunate because it would be an oversimplification to contend that neither of them can ever be justified.

An attempt has been made to neutralize the emotional aspects of the color blindness doctrine by putting it, each time it appears, into its historical and sociological context. It is left, therefore, to the reader to judge its relevance to public school desegregation.