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Should Congress Define Racial Imbalance

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under the auspices of the Interstate Commerce Act, could transport passengers from one terminal to another. In *Public Util. Comm'n v. United States* the conflict between the California Public Utilities Code and the federal procurement regulations also is analogous to the conflict in the *Avocado* case. The state statute was held preempted—it could no longer dictate rates to be paid by the agencies of the United States when the agencies could negotiate their own rates pursuant to federal legislation.

The *Atchison* and *Public Util. Comm'n* cases are extremely valuable to our analysis of the conflict in the *Avocado* case. They illustrate similar conflicts where state economic legislation was held preempted when it purported to impose regulations over subject matter regulated by federal legislation.

After examining the policy of the Agricultural Adjustment Act it is evident that its purpose was to secure greater economic benefits to the farmer. The exclusion of many tons of Florida avocados annually undoubtedly inflicts economic hardship on the Florida grower and frustrates the purpose of the federal act. Here an often quoted statement from one of the leading cases on preemption is pertinent.

> If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.[44]

In light of the foregoing comparison between the *Avocado* case and the *Atchison, Northern Natural Gas Co.*, and *Public Util. Comm'n* cases, where the Court found preemption in analogous fact situations, and in light of the frustration of the clear congressional policy embodied in the Agricultural Adjustment Act, it is surprising that the Supreme Court did not hold the state maturity regulations preempted.

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[44] Savage v. Jones, 225 U.S. 501, 533 (1912).

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SHOULD CONGRESS DEFINE RACIAL IMBALANCE?

The neighborhood school is as traditional in America as public education itself. Although there are other methods of placing pupils in specified schools, by far the most prevalent is that of assigning them along neighborhood lines.[1] In the nearly twelve years since *Brown v. Board of Educ.*,[2] however, the concept of the neighborhood school has met with increasing criticism and in many

[1] In Bell v. School City of Gary, 213 F Supp. 819, 829 (N.D. Ind.), *aff'd*, 324 F.2d 200 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964), Judge Beamer said, "The neighborhood school which serves students within a prescribed district is a long and well established institution in American public school education. It is almost universally used, particularly in the large school systems. It has many social, cultural, and administrative advantages which are apparent without enumeration."

[2] 347 U.S. 483 (1954).

cases modification,[8] all in the interest of eliminating "racial imbalance" in the public schools. Thus far the attacks on the neighborhood school have originated in the courts,[4] state legislatures,[5] state departments of education,[6] and local school boards.[7] But the history of the Civil Rights Act of 1964[8] indicates that the entry of the federal government into the field of *de facto* segregation[9] may be forthcoming.

The 1964 Act expressly prohibits federal activity in the *de facto* area, but the Administration's *proposed* bill[10] contained references to "racial imbalance."[11] These references were deleted by the House Judiciary Subcommittee.[12] The definition of "desegregation in public education," as submitted to the House by the Judiciary Committee was "the assignment of students to public schools without regard to their race, color, religion, or national origin."[13] Opponents of the bill were fearful that silence on the issue of racial imbalance would be interpreted by some as including it within the Act. So they introduced an amendment which added to the definition the phrase: "[B]ut 'desegregation' shall not mean the assignment of students to overcome racial imbalance."[14] The Act grants to the Attorney General and the United States Commissioner of Education certain powers to enforce the provisions on education.[15] The section delineating these powers was amended in the Senate to the effect that "nothing herein shall

[3] See generally Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964); Hyman & Newhouse, *Desegregation in the Schools: The Present Legal Situation*, 14 BUFFALO L. REV. 208, 220 (1964); Kaplan, *Segregation Litigation and the Schools*, 58 NW. U.L. REV. 1, 157 (1964).

[4] *E.g.*, Bell v. School City of Gary, 213 F Supp. 819 (N.D. Ind.) *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); Taylor v. Board of Educ., 191 F Supp. 181 (S.D.N.Y. 1961). See generally Bickel, *supra* note 3; Hyman & Newhouse, *supra* note 3; Kaplan, *supra* note 3; Milbourn, *De Facto Segregation and the Neighborhood School*, 9 WAYNE L. REV. 514 (1963); Comment, *Equal Protection and the Neighborhood School*, 13 CATHOLIC U.L. REV. 150 (1964); Comment, *De Facto Segregation—The Elusive Spectre of Brown*, 9 VILL. L. REV. 283 (1964).

[5] Mass. Acts 1965, ch. 641, §§ 1, 2; MASS. GEN. LAWS, ch. 15, §§ 1H, 1I, 1J, 1K, ch. 71, §§ 37C; ILL. ANN. STAT. ch. 122, §§ 10-21.3 (Smith-Hurd 1963).

[6] CAL. ADM. CODE Title 5, §§ 2010-11; New York State Comm'r of Educ., *Memorandum to all Chief Local School Administrators and Presidents of Boards of Educ.*, 8 RACE REL. L. REP. 738 (1963).

[7] See, *e.g.*, U.S. CIVIL RIGHTS COMM'N, CIVIL RIGHTS U.S.A./PUBLIC SCHOOLS NORTH AND WEST 1962, at 7.

[8] 78 Stat. 241 (1964) (codified in scattered sections of 28 and 42 U.S.C.).

[9] The accepted distinction between *de jure* and *de facto* segregation is: " '[D]e jure' should refer to segregation created or maintained by official act, regardless of its form. 'De facto' should be limited to segregation resulting from fortuitous residential patterns." Taylor v. Board of Educ., 191 F Supp. 181, 194 n.12 (S.D.N.Y. 1961).

[10] *Hearings on H.R. 7152 Before the House Committee on Rules*, 88th Cong., 2d Sess., pt. 1, at 2 (1964) [hereinafter cited as *Hearings*].

[11] *Id.*, at 20-22. The terms "racial imbalance" and "*de facto* segregation" will be used interchangeably throughout this note.

[12] *Ibid.*

[13] *Id.* at 51

[14] 110 CONG. REC. 2280 (1964) (remarks of Representative Cramer of Florida).

[15] 79 Stat. 248 (1964), 42 U.S.C. § 2000c.—6(a)(2) (1964).

empower any official or court of the United States to issue any order seeking to achieve racial balance."[16]

In light of such facts one might conclude that the Civil Rights Act of 1964 put an end to the idea of federal entry into the *de facto* area. But there are other factors which indicate that the contrary may well be true, and that it is not unreasonable to assume that federal legislation dealing with the problem of racial imbalance may be near at hand. It seems unlikely that the 1965 Voting Rights Act[17] will be the last civil rights legislation to be considered and approved by Congress. The increasing federal activity in voting rights since 1957,[18] taken together with the present Administration's stated policy on civil rights[19] and the Administration's tremendous success in getting congressional approval of legislative programs,[20] could indicate that other civil rights problems will receive the attention of Congress during the next few years. The problems of *de facto* segregation are most acute in our large urban areas, and one of its major causes is discrimination in housing. One example of the Administration's abundant interest in this particular cause of *de facto* school segregation is the recent creation of a cabinet post designed to deal exclusively with housing and urban development.[21]

There is then at least a strong possibility, if not a probability, that there soon will be an appeal from the executive branch requesting congressional assistance in the effort to overcome racial imbalance in public schools. It is the purpose of this note to suggest that if Congress reconsiders the problem of *de facto* school segregation, serious attention should be given to the formulation of a uniform definition of "racial imbalance."

In order to explore the possibility of arriving at an adequate definition we

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[16] 110 CONG. REC. 11929 (1964) (remarks of Senator Dirksen). It is interesting to note that, while the amendment to the definition of "desegregation in education" was introduced by opponents of the bill in the House, the amendment to this section was introduced by *proponents* of the bill in the Senate as part of minority leader Dirksen's substitute bill. This move can best be explained by the fact that the substitute bill was a compromise measure designed to please several factions. See N.Y. Times, June 20, 1964, p. 11, col. 1.

[17] 79 Stat. 437, 42 U.S.C. § 1973.

[18] Civil Rights Act of 1957, 71 Stat. 634, 42 U.S.C. § 1971, Civil Rights Act of 1960, 74 Stat. 86, 42 U.S.C. § 1971; Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. § 1971.

[19] Although a strong attitude in favor of civil rights is borne out by the President's public statements (*e.g.*, N.Y. Times, June 20, 1964, p. 1, col. 8; July 3, 1964, p. 9, col. 2) perhaps the best illustration of this policy is the fact that scarcely two weeks after President Kennedy's assassination, Mr. Johnson decided to press for passage of a strong civil rights bill despite opinions of his advisors that odds were sixty-forty against passage. Time, Jan. 1, 1965, p. 25.

[20] See Newsweek, July 19, 1965, p. 20; U.S. News & World Report, April 26, 1965, pp. 41-42.

[21] Housing and Urban Development Act of 1965, 79 Stat. 451, 12 U.S.C. § 1749aa. Named to head the newly created department was Robert C. Weaver, first Negro to hold a cabinet post and former chairman of the board of the NAACP (1960). The Senate confirmed Mr. Weaver's nomination on Jan. 17, 1966. 112 CONG. REC. 341 (daily ed. Jan. 17, 1966). The President made specific reference to the problems of education in the cities when he spoke to Congress requesting passage of the Housing and Urban Development bill. Presidential Message, 111 CONG. REC. 3812 (1965).

must first look into the legislative history of the 1964 Civil Rights Act to ascertain what treatment was there given to the problem of *de facto* segregation. Next it will be necessary to turn to the practical problem of formulating a definition of "racial imbalance" which can be applied uniformly from community to community. And finally, in any discussion of attempts to legislate concerning *de facto* school segregation a look at the constitutional aspects is inescapable.

Treatment of Racial Imbalance in the Proposed Bill—1963-1964

The definition of desegregation in public education, as submitted to the members of the House by the Judiciary Committee,[22] could be construed as including the elimination of racial imbalance. In addition to this language there were provisions in the proposed bill which actually included the term "racial imbalance." These dealt with technical assistance to school boards,[23] training institutes for teachers and other personnel to deal with problems of racial imbalance,[24] grants to school boards,[25] grants to teachers,[26] and grants for the employment of specialists on the subject of racial imbalance.[27] As already noted, these references were deleted in committee.[28] The amendments passed by the House and Senate, respectively, and incorporated into the Act, went beyond silence to forbid expressly any congressional assistance in alleviating racial imbalance. One of the reasons given for this hands off policy was that no adequate definition of the term could be found.[29] This problem of definition—deciding what concentration of a minority group constitutes racial imbalance—was reported by the United States Commission on Civil Rights as one of two basic difficulties involved in the attempt to combat racial imbalance in the schools.[30] The reasons why individual members of Congress rejected the proposals concerning *de facto* segregation were not to be found in searching the committee reports and the *Congressional Record.* In the words of one legislator, "for some, no doubt, there was an aversion to the imposition of Federal remedies to deal with 'racial imbalance' in public education. For others there may have been concern that inclusion of such a provision would endanger the passage of the entire civil rights bill."[31] It seems clear, however, that a workable definition of "racial imbalance" would have increased the chances of extending the Act to deal with *de facto* segregation.

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[22] *Hearings* 51.
[23] *Id.* at 20.
[24] *Ibid.*
[25] *Id.* at 21.
[26] *Ibid.*
[27] *Ibid.*
[28] *Id.* at 20-22.
[29] 2 U.S. CODE CONG. & AD. NEWS, 88th Cong., 2d Sess., 2508 (1964).
[30] 1963 CIVIL RIGHTS COMM'N REP. 55. The second difficulty noted by the commission was that the Supreme Court has not made a definite ruling on the question of whether the equal protection clause imposes a duty on the school board to eliminate *de facto* school segregation.
[31] Letter From the Hon. Emanuel Celler, Chairman, House Judiciary Committee, to the *Hastings Law Journal,* Nov. 3, 1965. The then Senator Hubert Humphrey, floor manager of the bill in the Senate, expressed the opinion that problems of racial imbalance are best handled by the local school boards and the courts. Senate debate on Title IV, Desegregation in Public Education, 110 CONG. REC. 13344-45 (1964).

A Workable Definition: The Reapportionment Analogy

Since the legislative reapportionment cases deal with unbalanced legislative districts, they may offer a useful analogy in an attempt to achieve a practical definition of "racial imbalance." But there are two important differences which must be taken into account. First, where legislative reapportionment is the problem we are dealing with just one category of person—the voter. In the school cases we deal with at least two—black and white—and sometimes more. Second, legislative district lines can be drawn in a much more arbitrary fashion than school district lines, even when the possibility of "bussing" is considered. Polling places are portable; schools are not. Where a shift in population from country to city has caused unequal weighting of rural votes, the entire reason behind the original districting is destroyed, and new legislative districts are required. But where a similar shift causes *de facto* segregation in the schools, the use of the neighborhood school plan still promotes the same values of safety and convenience as when the original districting was done. That is, it remains the most economical and practical way to run a large school system.[32]

Notwithstanding the differences, however, there are notable similarities. In reapportionment, assuming that the original districting was reasonable and provided equal representation of all the voters in the beginning, the movement of population from country to city has given the rural voters disproportionate legislative power. The city voters have been denied equal representation by the failure of the state to redistrict. Similarly, if the original school zoning was done reasonably and resulted in equal educational opportunity for all children, the movement of population out to the suburbs and into the ghettos has resulted in racially segregated schools. The ghettoized children have been denied equal educational opportunity by the failure of the school board, as an arm of the state,[33] to rezone the schools. Since the *Brown* decision[34] segregated schools have been recognized as inherently unequal.[35] But more often than not the school which contains a disproportionate number of colored students suffers from additional specific inequalities such as overcrowded classrooms, worn-out facilities, and higher pupil-teacher ratios.[36]

The recent reapportionment case of *Silver v. Brown*[37] is especially helpful in our search for a practicable definition of "racial imbalance." It was an action brought by a citizen of California seeking a writ of mandate to require certain State officials to enforce equal protection of the laws in the election of State senators and assemblymen. The court found that the State had a population of 15,693,338, and that an "ideal" assembly district should contain one-eightieth of the total population or 196,167 persons. At the time of the suit the largest district was 56.1 per cent larger than the ideal district, and the smallest was

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[32] See Comment, *Equal Protection and the Neighborhood School*, 13 CATHOLIC U.L. REV. 150, 156 (1964) where the author discusses and rejects the reapportionment analogy for these reasons.

[33] Since the *Brown* decision it has been assumed that the school board is an organ of the state government. *Cf.* Cooper v. Aaron, 358 U.S. 1 (1958) (fourteenth amendment prohibits discrimination in public schools whatever agency of the state takes action).

[34] 347 U.S. 483 (1954).

[35] *Id.* at 495.

[36] MYRDAL, AN AMERICAN DILEMMA 339, 833, 947 (2d ed. 1962).

[37] 63 A.C. 278, 46 Cal. Rptr. 308, 405 P.2d 132 (1965).

63.2 per cent smaller. The court decided that no legislative district could deviate more than 15 per cent from the ideal district even though the United States Supreme Court in *Reynolds v. Sims*[38] and *Roman v. Sincock*[39] had "eschewed establishing rigid mathematical standards for evaluating legislative apportionment."[40] In *Reynolds* Chief Justice Warren, speaking for the majority, had said, "Mathematical exactness or precision is hardly a workable constitutional requirement."[41] In *Roman* the Chief Justice, also speaking for the Court, said, "[I]t is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state reapportionment scheme under the Equal Protection Clause."[42]

It is clear the California court believed it could limit the deviation factor to fifteen per cent in either direction without being too rigid and requiring mathematical exactness. Chief Justice Traynor, who wrote the opinion, noted that in the *Reynolds* case the Supreme Court had held that some deviation from the requirement of establishing equally populous districts may be justified on the ground that it is important to have compactness and contiguity and to maintain the integrity of political subdivisions. Applying that doctrine to the *Silver* case the California court said that "the policies underlying the requirements of compactness and contiguity and the maintenance of integrity of political subdivisions cannot justify such extensive departures from population-based representation as exist in the case of the Assembly."[43] And "we deem it only fair to the Legislature to set forth limits within which an apportionment would at least carry a strong presumption of validity under the equal protection clause and beyond which it would be seriously suspect."[44] The California Chief Justice also noted that the figure of fifteen per cent was the same as that adopted by the United States House of Representatives[45] in establishing guidelines for congressional reapportionment.[46] (The bill establishing such guidelines had been passed by the House on March 16, 1965,[47] and was being considered by the Senate at the time of *Silver*.)[48]

Can a mathematical formula similar to the one used in *Silver* to define an unbalanced legislative district be feasibly applied to define a racially imbalanced school? It should be remembered that *whenever* an attempt is made to deal with *de facto* school segregation a decision has to be made whether or not the particular school under scrutiny is in fact racially imbalanced. That is, a conclusion must be made that the presence of a certain percentage of minority

[38] 377 U.S. 533 (1964).

[39] 377 U.S. 695 (1964).

[40] 63 A.C. at 287, 46 Cal. Rptr. at 314, 405 P.2d at 138.

[41] 377 U.S. at 577.

[42] 377 U.S. at 710.

[43] 63 A.C. at 284-85, 46 Cal. Rptr. at 313, 405 P.2d at 137, referring to 377 U.S. 533, 578-81 and 377 U.S. 695, 710.

[44] 63 A.C. at 287, 46 Cal. Rptr. at 314-15, 405 P.2d at 138-39.

[45] H.R. 5505, 89th Cong., 1st Sess. (1965).

[46] 63 A.C. at 287, 46 Cal. Rptr. at 314, 405 P.2d at 139.

[47] 111 CONG. REC. 4960 (daily ed. Mar. 16, 1965).

[48] The bill was sent to the Senate Judiciary Committee on March 18, 1965. 111 CONG. REC. 5226 (daily ed. Mar. 18, 1965). A hearing was held on May 4, 1965, but no action has been taken on the bill since that date.

group students does or does not constitute an imbalanced situation. The New Jersey Commissioner of Education decided that schools containing 99 per cent,[49] 98 per cent,[50] and 96 per cent[51] Negro students, respectively, were racially segregated. The New York State Commissioner of Education issued a memorandum to all local school authorities on June 17, 1963, requiring immediate action to bring about racial balance in the schools of the State. He stated that "a racially imbalanced school is defined as having fifty per cent or more Negro pupils enrolled."[52] Although the commissioner directed that the definition be used for purposes of a report to be submitted to him by all local school boards, the figure of fifty per cent has been used as a guideline in New York since the issuance of the memorandum.[53]

Turning to our formula for defining racial imbalance, the ideal school should reflect as closely as possible the racial complexion of the entire school district, just as the ideal assembly district in the *Silver* case contained one-eightieth of the State's entire population to correspond with the eighty seats in the assembly. Next, to paraphrase Chief Justice Warren in *Reynolds v. Sims*, some deviation from the ideal of schools having the same proportion of nonwhite students may be justified to allow compactness and contiguity and to maintain the integrity of the school district. Therefore we cannot be so strict as to require that every school contain exactly the same percentage of a racial minority as the entire school district. Some deviation must be permitted as in *Silver*, and it must be of enough magnitude to enable the school board still to consider the customary criteria for school zoning.[54] On the other hand, to paraphrase Chief Justice Traynor's statement in *Silver*,[55] the policies underlying the requirements of compactness and contiguity and the maintenance of the integrity of the school district cannot justify the extensive departure from the racial makeup of the community which exists in some of our schools. In light of all the factors considered, the following definition is suggested:

A school is racially imbalanced if its proportion of nonwhite to white[56] stud-

[49] Fisher v. Board of Educ., 8 RACE REL. L. REP. 730 (1963).

[50] Spruill v. Board of Educ., 8 RACE REL. L. REP. 1234 (1963).

[51] Booker v. Board of Educ., 8 RACE REL. L. REP. 1228 (1963).

[52] N.Y. State Comm'r of Educ., *Memorandum to all Chief Local School Administrators and Presidents of Boards of Educ.*, 8 RACE REL. L. REP. 738, 739 (1963).

[53] See Vetere v. Allen, 15 N.Y. 2d 259, 206 N.E. 2d 174, 258 N.Y.S. 2d 77 (1965).

[54] The traditional criteria are (1) minimizing the distance from home to school, (2) avoiding traffic hazards and topographical barriers, (3) convenience of public transportation where it is necessary, (4) maximum utility of school space to avoid underutilized schools, and (5) avoidance of multiple shifting of pupils to insure continuity of instruction. Maslow, *De Facto School Segregation*, 6 VILL. L. REV. 353, 361 (1961).

[55] 63 A.C. at 284-85, 46 Cal. Rptr. at 313, 405 P.2d at 137.

[56] The task of deciding which students are "white" and which are "nonwhite" would not be an easy one. But the Supreme Court was faced with the necessity of construing the words, "white persons" in the Immigration and Nationalization Act of 1790 (REV. STAT. § 2169 (1875)) before the race restrictions were repealed in 1952. In United States v. Bhagat Singh Thind the Court said, "the words 'white persons' are words of common speech and not of scientific origin. The word, 'Caucasian,' not only was not employed in the law, but was probably unfamiliar to the original framers of the statute in 1790. The words of the statute are to be interpreted in accordance with the un-

ents is more than fifteen per cent greater, or more than fifteen per cent less, than the proportion of nonwhite to white students of the same age group in the school district as a whole.[57]

"School district" would necessarily have to be further defined, probably as the political subdivision which administers the schools under state law, whether it is the city, county, township, or otherwise.[58]

Another important question, but one beyond the scope of this note, is the application of sanctions—once a school is determined to be racially imbalanced—to enforce balancing. The most effective would no doubt be those utilized in the Civil Rights Act of 1964: federal funds could be withheld, and citizens, or the Attorney General on their behalf, could bring civil actions to compel school boards to act to bring about racial balance.

How would the definition work? Assume a school district in which there are 2,000 students. Assume that 400 or 20 per cent of these are nonwhite. The ideal school in this district should contain 20 per cent nonwhite students. If school *A* has 1,000 white students and school *B* has 600 white and 400 nonwhite students, school *B*'s student body is 40 per cent nonwhite or 5 per cent in excess of the allowable deviation, while school *A*'s student body has no nonwhite students, also 5 per cent in excess of the permitted deviation.[59]

Now suppose the same school district has four schools. Each school has 500

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derstanding of the common man from whose vocabulary they were taken. It may be true that the blond Scandanavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences today The question for determination is not, therefore, whether by the speculative process of ethnological reasoning we may present a probability to the scientific mind that they have the same origin, but whether we can satisfy the common understanding that they are now the same, or sufficiently the same, to justify the interpreters of a statute—written in words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category as white persons." 261 U.S. 204, 208-10.

[57] Compare a sociologist's definition in Bell v. School City of Gary, 213 F Supp. 819, 829 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

It should be noted that if Congress were to enact legislation dealing with *de facto* segregation it would, in all probability, pass an omnibus bill covering many facets of the *de facto* problem. The scope of this note is restricted to suggesting a definition of "racial imbalance."

[58] The school district is commonly regarded as a geographical subdivision of the state created specifically for educational purposes. Board of Educ. v. Elliot, 319 Mich. 436, 29 N.W.2d 902 (1947) (legal division of territory created for educational purposes with powers of state agency); Baldwin v. Board of Educ., 76 N.D. 51, 33 N.W.2d 473 (1948) (territory which is political or civil subdivision of state and which administers public schools). NEB. REV. STAT. §§ 79-101 (1958) (the territory under the jurisdiction of single school board).

Any attempt to gerrymander school districts to create or perpetuate racial segregation is clearly prohibited by the fourteenth amendment, which forbids any official action which discriminates by subterfuge. Goss v. Board of Educ., 373 U.S. 683 (1963); Holland v. Board of Pub. Instruction, 258 F.2d 730 (5th Cir. 1958); Taylor v. Board of Educ., 191 F Supp. 181 (S.D.N.Y. 1961), *cert. denied*, 368 U.S. 94 (1961).

[59] There are two methods of applying the factor of 15% to our illustration. One is to use 15% of the number of nonwhite students in the *ideal school*, which would be 30

students. School *A* has 499 whites and one nonwhite. Schools *B*, *C*, and *D* have 367 white and 133 nonwhite students each. Schools *B*, *C*, and *D* have approximately 26.6 per cent nonwhite students or a deviation of only 6.6 per cent from the ideal school. But school *A* is imbalanced because it has only .02 per cent nonwhite students and it would have to have at least 5 per cent nonwhite students to come within the maximum allowable deviation. If the definition of racial imbalance did not include the provision of 15 per cent less as well as 15 per cent more, school *A* in the above example could remain the type which the New York Commissioner desired to correct when he issued his memorandum of June 17, 1963: "When a neighborhood school becomes improperly exclusive in fact or in spirit, when it is viewed as being reserved for certain community groups it does not serve the purposes of democratic education."[60]

Finally let us consider a school district where the percentage of nonwhite students is small—1 per cent for example. As in the examples above, there are 2,000 students in the school district, and 4 schools, each containing 500 students. But there are only 20 nonwhite students and all 20 are in the same school. It can be persuasively argued that it would be absurd to require that the 20 nonwhites be divided among the 4 schools. Under the suggested definition there would be no need to distribute them in this manner because in no case does the deviation approach 15 per cent from the ideal school.[61]

The definition would work preemptively not only in those states which have no definition of their own,[62] but also in New York, since it is quite possible for the proportion of nonwhites in a particular school to exceed the allowable 15 per cent deviation, though the total number of nonwhites in the school is less than 50 per cent. Likewise it is possible for the proportion of nonwhites in a school to be well within the 15 per cent deviation though the school has more than 50 per cent nonwhite students.

The Constitutional Question

The most serious problem in the analogy to reapportionment is that, while the Supreme Court has held that unequal legislative districts are a denial of equal protection,[63] it has not held that the equal protection clause imposes a duty on the school board to alleviate *de facto* segregation. This is the second of

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(15% of 200). Using this method the number of nonwhites in a particular school could fluctuate from 170 to 230. The other method is to use 15% of the *total population* of the particular school. This figure would be 150 (15% of 1,000) and would allow the number of nonwhite students in a particular school to fluctuate between 50 and 350. The second method was chosen because it allows the school board greater latitude and does not require rezoning in districts where the percentage of nonwhite students is very small.

[60] Statement Proposed by the New York State Education Commissioner's Advisory Committee on Human Relations and Community Tensions, 8 RACE REL. L. REP. 739, 740 (1963).

[61] If the first method of applying the factor of 15% were used in this illustration (see n.59 *supra*) each school could have a minimum of 4 nonwhite students and a maximum of 6. Even if the factor were increased to 50%, each school would have to have at least 2 but not more than 8 nonwhite students.

[62] Presumably this would be every state except New York. Research has uncovered no other state-made definitions.

[63] Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

the two basic difficulties of *de facto* segregation as reported by the United States Civil Rights Commission.[64] A full discussion of the constitutional issues of *de facto* segregation is not feasible here, but it has received adequate treatment elsewhere.[65] On one side is the proposition that the Constitution is "color blind"[66] and that race cannot be taken into account even to fulfill a compelling moral obligation. The *Brown* decision prohibits discrimination, but it does not compel integration where there is no state action causing segregation.[67] On the other hand there are those who claim that the equal protection clause should be construed as imposing a duty on the states to take affirmative action to eliminate school segregation regardless of its cause, simply because its effect is to deny children of racial minorities equal educational opportunity.[68]

The fact that the present status of *de facto* segregation, vis-à-vis the equal protection clause, is doubtful should be no barrier to the definitive legislation suggested, if Congress decides to legislate in this area. Such definitive legislation would put the question of constitutionality squarely before the Supreme Court.[69] Precisely in point here is a letter from President Roosevelt to the chairman of a House subcommittee a few weeks before the enactment of the Bituminous Coal Act of 1935.[70] In it he urged favorable treatment of the bill by the committee and concluded:

> Manifestly, no one is in a position to give assurance that the proposed act will withstand the constitutional tests But the situation is so urgent and the bene-

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[64] 1963 CIVIL RIGHTS COMM'N REPT. 55 (see n.30 *supra*).

[65] See generally Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964); Bloch, *Does the Fourteenth Amendment Forbid De Facto Segregation?*, 16 W RES. L. REV. 532 (1965); Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 W RES. L. REV. 502 (1965); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Kaplan, *Segregation Litigation and the Schools*, 58 NW. U. L. REV. 1, 157 (1964); Maslow, *De Facto School Segregation*, 6 VILL. L. REV. 353 (1961); *Comment, Racial Imbalance in the Public Schools: Constitutional Dimensions and Judicial Response*, 18 VAND. L. REV. 1290 (1965).

[66] This concept originated with Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896) and was the basis for the decision in Brown v. Board of Educ., 347 U.S. 483 (1954).

[67] Bell v. School City of Gary, 213 F Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). Evans v. Buchanan, 207 F Supp. 820, 824 (D. Del. 1962).

[68] The decision in Barksdale v. Springfield School Committee, 237 F Supp. 543 (W.D. Mass.), *vacated*, 348 F.2d 261 (1st Cir. 1965), squarely adopts this construction, but the First Circuit did not accept it. In *accord* with the district court's decision in *Barksdale* is Jackson v. Pasadena City' School Dist., 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P.2d 878 (1963) (dictum).

[69] In United States v. Five Gambling Devices, 346 U.S. 441, 448-49 (1953), Justice Jackson said, "The principle is old and deeply imbedded in our jurisprudence that this Court requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative. The predominant consideration is that we should be sure Congress has intentionally put its power in issue by the legislation in question before we undertake a pronouncement which may have far-reaching consequences upon the power of Congress or the powers reserved to the several states."

[70] 49 Stat. 991 (1935).