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The Constitution and School Desegregation: An Inquiry Into the Nature of the Substantive Right

BY ROBERT ALLEN SEDLER*

INTRODUCTION**

The purpose of this article is to inquire into the nature of the substantive right conferred by the Constitution with respect to school desegregation. School desegregation refers to the operation of racially integrated schools by the state.¹ A racially integrated school is one that has both a substantial number of black students² and a substantial number of white students in attendance. The opposite of a racially integrated

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**It is particularly fitting that this article be published in a symposium honoring Professor Paul Oberst. During the years 1966-1977, when I was on the faculty of the University of Kentucky College of Law, Paul Oberst was a valued colleague, a wise mentor, and a close friend. While our friendship has continued after I left the faculty, I miss our day-to-day association very much. Many of the ideas expressed in this article, as well as many of the ideas I have expressed in other writings, were first explored in discussions with Paul Oberst. For many years, Paul Oberst has been in the forefront of the struggle for racial equality and human rights. His long history of involvement in that struggle was an inspiration to me, and he shared generously of his experience and his wisdom. I owe very much to him. This article is a small way of expressing my personal tribute and appreciation to this outstanding teacher, scholar, lawyer, civic leader—and very good friend.

¹ For constitutional purposes, it is the state that is responsible for the operation of the schools regardless of how the authority is allocated internally within the state. This article will generally refer to the “state” when discussing constitutional requirements and to the “school authorities” when discussing actions taken within a particular school system.

² The reference to black students throughout this writing is intended to include Hispanic students, since Hispanics, like blacks, have been subject to discrimination and victimization in American society because the dominant majority has perceived them as “nonwhite.” See the discussion in Sedler, Beyond Bakke: The Constitution and Redressing the Social History of Racism, 14 HARV. C.R.-C.L. L. REV. 133, 133 n.3 (1979) [hereinafter referred to as Beyond Bakke]. The combined black and Hispanic enrollment of a school properly can be considered in determining whether that school is racially identifiable. Keyes v. School Dist. No. 1, 413 U.S. 189, 197-98 (1973). Depending on the situation prevailing in the particular school system, blacks and Hispanics are likely to be attending the same schools, as in Keyes, or there may be both predominantly black schools and predominantly Hispanic schools. See, e.g., United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972).
school is a racially identifiable school, one that is attended only or almost entirely by children of one race so that it would be perceived objectively as a "one race," and in this sense, a "segregated" school. Focusing on objective racial identifiability avoids the necessity of using a racial percentage ratio for definitional purposes and accords with the situation that exists in most school systems where desegregation efforts have not been undertaken. Most of the schools in the system will either be almost entirely "one-race" schools or will have such a high percentage of children of one race that they will be perceived objectively as "one-race" schools. The relatively few other schools in the system, regardless of their particular racial percentage, may be considered as racially integrated schools.

The model for our analysis is a school system that enrolls substantial numbers of both black children and white children, so that, as regards available students, all or most of the schools in the system could be operated as racially integrated

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3 A racially identifiable black school is a school that is attended only by black children or has so few white children in attendance in relation to black children in attendance that it would be perceived objectively as a "black" school. A racially identifiable "white" school would exhibit the same attendance pattern in reverse. Since whites substantially outnumber blacks in most school systems, or where this is not so in a particular urban school system, in the metropolitan area, it takes proportionately fewer blacks than whites to integrate a particular school. So if a school system were approximately one-third black in student enrollment, for example, a school with at least 10% black students could be considered an integrated school, particularly if many other schools in the system were virtually all white. But a school with only 10% white students, in light of the black-white ratio of the school system, would be considered a racially identifiable black school.

4 "Racial balance" relates to the black-white ratio of the school system as a whole, and a school is considered to be "racially imbalanced" when it deviates from the systemwide ratio by a prescribed amount. See the discussion in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-25 (1971). As to the distinction between racial identifiability and "racial balance," see also the discussion in Sedler, Book Review, 62 CORNELL L. REV. 645, 648-49 (1977) (reviewing L. Graglia, Disaster by Decree 122-26 (1976) [hereinafter referred to as Book Review]. Racial integration, for constitutional purposes involves racial identifiability and not "racial balance."

5 In Dayton, Ohio, for example, when a school desegregation suit was filed in 1971, the school system enrollment was 44% black. Of the 69 schools in the system, 21 were 90% or more black while 28 were 90% or more white. 75.9% of the black students were assigned to those 21 schools. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).
schools. This is the model that prevails in most school systems enrolling substantial numbers of black children. However, there are some urban school systems that have now become so heavily black in enrollment that even with maximum dispersion of white students, it would not be possible to integrate very many of the schools in the system. These school systems, of course, are surrounded by predominantly or virtually all-white suburban school systems, and in all metropolitan areas, the school population is composed of a white majority. Thus, in terms of available students, the schools in the metropolitan area could be racially integrated if urban-suburban school district lines were to be crossed. How the nature of the substantive right and the state's corresponding obligation is affected by the existence of separate school districts within the same metropolitan area will also be considered. However, the basic analytical model will be the school district that enrolls substantial numbers of both black children and white children, and the analysis will develop primarily with reference to intradistrict desegregation.

The first section of this article analyzes the nature of the substantive right as it has been defined by the Supreme

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* This refers to the first year that the desegregation plan goes into effect. Under the present state of the law, there is no requirement to adjust for population changes once desegregation is achieved, even if as a result of those changes, some schools again become racially identifiable. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

7 Detroit and Atlanta are the clearest examples of this situation. See Milliken v. Bradley, 418 U.S. 717 (1974) [hereinafter referred to as Milliken I]; Calhoun v. Cook, 522 F.2d 717 (5th Cir. 1975). See also the discussion in Sedler, Metropolitan Desegregation in the Wake of Milliken - On Losing Big Battles and Winning Small Wars: The View Largely from Within, 1975 WASH. U.L.Q. 535, 538-40 [hereinafter referred to as Metropolitan Desegregation].

* In the Detroit metropolitan area, for example, the school population was approximately 80% white at the time of Milliken I. See 418 U.S. at 765 n.1 (White, J., dissenting).

* In New York City, the degree of racial concentration is so extensive that effective systemwide desegregation cannot be achieved within the school system itself. But desegregation has been ordered in Los Angeles despite its sprawling size. See Crawford v. Bd. of Educ., 551 P.2d 28 (Cal. 1976). Presumably desegregation can be achieved in most of the other metropolitan areas in the country. As to the feasibility of metropolitan desegregation, see also Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1976), cert. denied, 429 U.S. 1074 (1977) (Louisville-Jefferson County, Kentucky).
Court’s current doctrine. As will be seen, under the Court’s current doctrine, the nature of the substantive right relates to the situation prevailing in the school system in which the child is enrolled, and it is a right to attend school in a system in which there presently exist no vestiges of de jure segregation. The second part of the article focuses on the right of children to attend racially integrated schools. The inquiry is in terms of whether the values embodied in the Constitution require recognition of a substantive right relating to attendance at racially integrated schools, and if so, as to what is the scope of the state’s obligation to provide for racially integrated schools.

I. THE PRESENT NATURE OF THE RIGHT: THE SCHOOL SYSTEM AND DE JURE SEGREGATION

The Supreme Court’s current doctrine regarding the constitutionality of the operation of racially identifiable schools by the state has evolved with reference to the circumstances prevailing in the school system in which children are enrolled. The substantive right that has emerged is a right to attend school in a school system in which there presently exist no vestiges of de jure segregation. This doctrine has assimilated fully for purposes of constitutional analysis the segregation existing in school systems located in states where segregation was required by state law at the time of Brown v. Board of Education and the segregation existing in school systems located in states where it was not so required. The major components of the doctrine are de jure segregation—governmental responsibility for the existence of racially identifiable schools in the system—and the affirmative duty to

10 For a discussion of de jure segregation, see notes 52-67 infra and accompanying text.
11 The author’s “academic perspective” has admittedly been affected by his “adversary involvement” as counsel for the plaintiffs in school desegregation cases. He is currently litigating a school desegregation case in Akron, Ohio, and in the past has litigated cases in Louisville-Jefferson County, Kentucky; Lexington-Fayette County, Kentucky; Charleston, Missouri, and metropolitan Atlanta, Georgia. As to the effect of “adversary involvement” on “academic perspective,” see the discussion in Sedler, Metropolitan Desegregation, supra note 7, at 537 n.9.
eliminate fully all vestiges of *de jure* segregation from the system.

We will first consider the development of that doctrine with respect to segregation existing in school systems located in states where segregation was required by state law at the time of *Brown*, and secondly, consider its extension to segregation existing in school systems located in states where such segregation was not required. Finally, we will analyze that doctrine and query the soundness of a constitutional approach that looks to the situation prevailing in the school system in which the child is enrolled rather than to the situation of the child who is compelled to attend a racially identifiable school.

A. Segregation Required by State Law

We subsequently will discuss at length the rationale of the Court's decisions in *Brown* and *Bolling v. Sharpe*. For present purposes, it is sufficient to note that the Court held unconstitutional the state and federal laws mandating racial segregation in the schools, and the segregation resulting from those laws was considered to be *de jure* and subject to redress. In the years following *Brown*, the Court's concern was with defining what constituted an adequate conversion from the constitutionally impermissible dual school system that was mandated by state law to a unitary school system in which "state-imposed segregation has been completely removed." In *Green v. County School Board*, decided in 1968, the Court held that a "freedom of choice" plan was not an adequate means of converting to a unitary school system where it did not in fact succeed in eliminating the racial identifiability of the schools in the system. The Court's effective invalida-

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13 Id.
17 The Court emphasized that the duty of the school authorities was "to convert
tion of "freedom of choice" plans in Green and related cases\(^8\) insured that children living in nonurban school systems in the southern and border states would in fact be attending racially integrated schools, since black and white populations were generally dispersed throughout the system, and geographic attendance zoning would produce racially integrated schools. But the duty of the state was framed with reference to the situation existing in the school system rather than with reference to the right of the children to attend racially integrated schools.\(^9\)

In Swann v. Charlotte-Mecklenburg Board of Education,\(^20\) decided in 1971, the Court again framed the duty in light of the situation existing in the school system. Swann held that in a school system located in a state where segregation had been required by state law, geographic attendance zoning was an insufficient means of converting from a dual school system to a unitary one where, following assignment on that basis, a large number of racially identifiable schools remained. The rationale for the Court's holding was the relationship between the basis of the constitutional violation—state law mandating racial segregation in the schools—and the present structure of the school system, which had been established in accordance with the requirements of state-imposed segregation.

In Swann, the Court was confronted with what may be called a "remedy dilemma."\(^21\) The school authorities contended that they satisfied their obligation to convert from a

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\(^8\) The same day that the Court decided Green, it also held "freedom of choice" plans to be insufficient in two other cases. Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968). In the wake of these cases, the lower courts invariably rejected "freedom of choice" plans. See, e.g., Hall v. St. Helena Parish School Bd., 417 F.2d 801 (5th Cir.), cert. denied, 396 U.S. 904 (1969); United States v. Hinds County School Bd., 417 F.2d 582 (5th Cir. 1969).


\(^20\) 402 U.S. 1 (1971).

\(^21\) For a discussion of the "remedy dilemma" in response to Graglia's criticism of the Court for requiring a "racial mix" in the schools under the guise of remedying de jure segregation, see Sedler, Book Review, supra note 4, at 651-53.
dual school system to a unitary one by substituting racially neutral geographic attendance zoning for race as the basis of school assignment. Given patterns of residential racial segregation, even in the absence of state-imposed segregation, there would have been a large number of racially identifiable schools in the school system just as there were in urban school systems located in states where segregation was not required by state law. While this is true, however, it is equally true that this school system would not have had the particular structure that it had at the time of Brown and thereafter if it had not been for state laws requiring racial segregation in the schools. The structure of that school system necessarily developed in conformity with the requirements of state-imposed segregation, and decisions as to school construction, site location, school size, school closure, and the like had to be made with reference to those requirements. The essential structure of the Charlotte-Mecklenburg school system that had been established pursuant to the requirements of state law mandating racial segregation prior to Brown, remained in 1971, not only because the majority of existing schools were probably pre-Brown schools, but because the school authorities did not even purport to dismantle the dual school system prior to the time that the desegregation suit was filed in 1965. There was simply no way of knowing what the particular structure of the school system would have been if there had been no state laws requiring school segregation, but it is clear that it would not have had the same structure that it reflected because of those laws. The Supreme Court recognized this point in Swann, when it observed that "all things are not equal in a

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22 In effect, geographic attendance zoning was the only permissible method of student assignment after the Court effectively invalidated "freedom of choice" plans in Green.

23 See notes 49-50 infra and accompanying text for a consideration of the effect of migration of blacks to urban areas in the north on patterns of racial segregation.


25 In most urban school systems, enrollment in the post-1954 period remained relatively stable, since the extensive growth during this time was in the suburban districts. In Louisville, Kentucky, for example, 56 of the 65 schools in operation as of 1972 were pre-Brown schools. Newburg Area Council, Inc. v. Board of Educ., 489 F.2d 925, 929-30 (6th Cir. 1973).
system that has been deliberately constructed and maintained to enforce racial segregation,"²⁶ and stated that the burden was on the school authorities to establish that the racial composition of the schools was not "the result of present or past discriminatory action on their part."²⁷

The "remedy dilemma" facing the Court in Swann then was how to remedy the condition of de jure segregation existing in the school system, where the proposed means of conversion to a unitary school system would leave remaining a large number of racially identifiable schools, which were brought into being by the requirement of state-imposed segregation, but where, even in the absence of state-imposed segregation, there still would have been a substantial number of racially identifiable schools in the system. The Court's options would appear to have been as follows: (1) ignore the influence of state-imposed segregation on the present structure of the school system, and permit geographic attendance zoning as a means of converting to a unitary school system, although this would result in a large number of racially identifiable schools; (2) try to "sort out" the schools that would not have been racially identifiable in the absence of state-imposed segregation and require only the desegregation of those schools; or (3) treat the school system as being de jure segregated and require its dismantling by a plan that would "achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation."²⁸ The Court opted for the third alternative. As it stated:

The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the

²⁶ 402 U.S. at 28.
²⁷ Id. at 26.
²⁸ This is the precise test that was formulated in the companion case of Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971).
form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.29

While it has been contended that the Court based its decision in *Swann* on the social desirability of racial integration,30 and while the Court's view as to the social desirability of racial integration may have "tipped the scales" in favor of the "integration alternative," *Swann* nonetheless must be analyzed with reference to the "remedy dilemma" that confronted the Court. As will be developed more fully subsequently, the extent of the obligation imposed by *Swann* was "predominantly causal," in that the school system would be required to desegregate the racially identifiable schools that came into being while the school system was being operated in accordance with the requirements of state law mandating racial segregation. These schools would not only include the schools that were constructed prior to *Brown*, but also the schools that were constructed prior to the time that the school authorities officially abandoned racial assignment and made the "first effort" to convert to a unitary school system. For many school systems in the south, like Charlotte-Mecklenburg, there was no "first effort" prior to the time a desegregation suit was filed, so that all of their schools would be deemed to be "vestiges of state-imposed segregation," and the entire system would have to be desegregated to the maximum extent feasible.31

Some school systems in the southern and border states had made a "first effort" at desegregation by the use of geographic attendance zoning, which, in light of *Swann*, would be insufficient to convert to a unitary system where a large number of racially identifiable schools remained. However, the rationale of *Swann* would only cover the pre-*Brown* and pre-

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29 402 U.S. at 28.
31 See note 28 *supra* and accompanying text for a consideration of the Court's options when faced with a dual school system.
"first effort" racially identifiable schools in those systems and would not cover those schools that were constructed as or became racially identifiable schools thereafter. Louisville, Kentucky, for example, undertook its "first effort" at desegregation in 1955. When a post-Swann suit was filed against it in 1972, it had sixty-five schools in operation. Fifty-six of these schools were pre-Brown schools, of which thirty-five had never changed in racial composition. Of the remaining twenty-one pre-Brown schools, thirteen were pre-Brown white schools, located in close proximity to pre-Brown black schools to serve whites residing in the neighborhoods, which became racially identifiable black schools as the black population expanded into those areas. Of the nine schools constructed since 1955, six opened as racially identifiable schools. Thus, while fifty-four of the sixty-five schools were racially identifiable with respect to student composition; only thirty-five were schools that retained their pre-Brown racial identifiability. In the adjoining Jefferson County district, which covered suburban Louisville, and which had only four percent black students, there had been one pre-Brown black elementary school; after 1955, another elementary school opened as a predominantly black school, and a third school became predominantly black because of changing residential patterns.

The rationale for requiring the desegregation of those schools was found in two 1972 cases, Wright v. City Council of Emporia, and United States v. Scotland Neck City Board of Education, which concerned the formation of new school districts in states where segregation had been required by state law. The Court held that a new district could not be carved out of an existing district that had not yet converted to a unitary school system where the formation of the new district "would actually impede the process of dismantling the

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33 489 F.2d at 930-31.
34 Id. at 928.
existing dual [school] system." In so holding, the Court made it clear that until the school system had become unitary, the school authorities had the affirmative duty not to take any action that "had the effect of increasing or perpetuating segregation." Until unitary status had been achieved, the school authorities could not construct any school that opened as a racially identifiable school or permit any other school to become racially identifiable. Under the affirmative duty rationale, all of the schools that became racially identifiable after the "first effort" were also vestiges of state-imposed segregation, along with the pre-"first effort" schools. As the Sixth Circuit stated in the Louisville-Jefferson County case:

Where a school district has not yet fully converted to a unitary system, the validity of its actions must be judged according to whether they hinder or further the process of school desegregation. . . . Since the Jefferson County Board has not eliminated all vestiges of state-imposed segregation from the system, it had the affirmative responsibility to see that no other school in addition to Newburg would become a racially identifiable black school. It could not be 'neutral' with respect to student assignments at Price or Cane Run. It was required to insure that neither school would become racially identifiable.

Where the school system had been operated pursuant to state laws requiring racial segregation, therefore, all of the racially identifiable schools in the system were deemed to be de jure segregated, and the school system had to be desegregated to the maximum extent feasible.

The Court's decision in Swann relating to the school authorities' obligation to convert to a unitary school system necessarily defined the nature of the substantive right recognized in Brown. It was the right to attend school in a school system from which all vestiges of de jure segregation had been elimi-
nated, which would not be considered to have occurred until the school system had achieved the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." While the nature of the substantive right is thus framed with reference to the situation existing in the school system, the extent of the obligation to convert to a unitary school system insures that most of the children enrolled in the system will in fact be attending racially integrated schools. As a result of Swann, there has been a great deal of actual desegregation in the states in which racial segregation was formerly required by state law, with the rather anomalous consequence that in those states today a much higher proportion of black children in fact are attending racially integrated schools than in those states where segregation was not required by state law.

The extent of the obligation imposed on the state by Swann is "predominantly causal" in the sense that the racial identifiability of most of the schools in the system can be traced structurally to the operation of the school system in accordance with the requirements of state law mandating racial segregation. The operation of the school system in accordance with those requirements was deemed to be the cause of the racial identifiability of all the pre-Brown and pre-"first effort" schools. Although in the absence of state-imposed segregation there would still have been a substantial number of racially identifiable schools because of residential racial segregation, the Court in Swann, as discussed earlier, re-

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41 402 U.S. at 37.

42 In some circumstances, however, considerations of practicability may result in the retention of some racially identifiable schools within the school system. See, e.g., Medley v. School Bd., 482 F.2d 1061 (4th Cir. 1973), cert. denied, 414 U.S. 1172 (1974); Goss v. Board of Educ. 482 F.2d 1044 (6th Cir. 1973), cert. denied, 414 U.S. 1171 (1974). Considerations of practicability are analyzed in terms of the duty to dismantle the dual school system. More might be demanded if the substantive right related to attendance at a racially integrated school. Moreover, to the extent that interdistrict remedies are precluded, most black children enrolled in a predominantly black school system such as Detroit or Atlanta will be unable to attend a racially integrated school.


44 School segregation and residential segregation, however, are to some extent mutually reinforcing. See the discussion of this point by the Court in Swann, 402
fused to try to "sort out" the schools that would not have been racially identifiable from those that would have been. It took the position that state law requiring racial segregation caused the school system to have the particular structure that it had, and that the state was required to dismantle fully the structure that came into being because of unconstitutional governmental action to the maximum extent possible. The "normative" extent of the obligation related only to those relatively few schools that were constructed as or became racially identifiable between the time of the "first effort," if any, and the final desegregation order. Therefore, it can be said that the extent of the obligation imposed by Swann is "predominantly causal" rather than predominantly "normative," since the state is required to eliminate the racial identifiability of schools that was deemed to have been caused primarily by unconstitutional governmental action.

Swann then made it clear that the substantive right of school children enrolled in a school system located in a state where segregation was required by state law is the right to attend school in a school system in which there presently exist no vestiges of de jure segregation, and the school system has the corresponding obligation to eliminate racially identifiable schools to the maximum extent feasible. For a great many black children in these states, recognition of this right and corresponding obligation has in practice meant attendance at racially integrated schools.

B. Segregation Produced by School Board Action

The etiology of school segregation in school systems located outside of the southern and border states, where segregation was not required by state law, differs somewhat from


45 In such systems, however, the school authorities also may have taken actions that contributed to the racial identifiability of these schools. See, e.g., Jefferson v. Board of Educ. of Fayette County, 344 F. Supp. 688 (E.D. Ky. 1972), aff'd mem., 486 F.2d 1405 (6th Cir. 1973).
that existing in the southern and border state systems, particularly in relation to residential racial patterns and to demographic change. Although there always had been extensive residential racial segregation in the southern and border systems, school segregation existed independently and in a sense was superimposed on residential patterns.\textsuperscript{46} Where school segregation was not required by state law, however, the actual segregation existing in the schools had to be directly related to residential racial segregation, and this residential racial segregation was the predicate for the existence of racially identifiable schools. In challenges to school segregation existing in these systems, the essential contention is that the school authorities have built on patterns of residential segregation to maximize school segregation and to bring about the existence of racially identifiable schools instead of racially integrated schools.\textsuperscript{47} But since state law did not require school segregation, if it were not for patterns of residential racial segregation, there would have been nothing that the school authorities could do, short of the most blatant racial gerrymandering,\textsuperscript{48} to bring about racially identifiable schools.

In addition, since World War II, there has been a very substantial movement of black population from the southern and border states to urban areas outside of the south.\textsuperscript{49} This movement would result in an initial increase in the black population of the urban school systems, and a further increase in the black enrollment percentage of those systems, as some whites "fled" to the suburban areas. Apart from any action by school authorities to maximize actual segregation, the increased black population in the system, interacting with residential racial transition, would change the racial composition of some schools from predominantly white to predominantly black, and the construction of new schools in the portions of the system into which blacks were moving often would pro-

\textsuperscript{46} One method utilized for this purpose was dual attendance zones.
\textsuperscript{48} An example is Clemons v. Board of Educ., 228 F.2d 853 (6th Cir.), cert. denied, 350 U.S. 1006 (1956).
duce racially identifiable schools. In the typical urban school system outside of the south, therefore, many of the racially identifiable black schools were constructed or became racially identifiable post-Brown, and a number of the racially identifiable black schools once would have been predominantly white or racially integrated schools. The different etiology of school segregation in school systems located outside of the south could affect the analysis of the nature of the substantive right and the corresponding obligation of the state.

The evolution of the Court's doctrine regarding the constitutionality of school segregation existing in school systems located in states in which segregation was not required by state law, however, can be seen in retrospect as tracking—although not always evenly—the evolution of the Court's doctrine with respect to the constitutionality of segregation existing in school systems located in states where segregation was so required. It is clear in retrospect that the Court has been trying to develop a doctrine that would assimilate the two situations for constitutional purposes. The unifying element in the assimilative process has been the concept of *de jure* segregation. The Constitution has not been interpreted as prohibiting the states from maintaining racially identifiable or "factually segregated" schools, even where it would be feasible to desegregate the schools by departing from strict geographic attendance zoning. What the Constitution has been interpreted as prohibiting is intentional racial segregation in the operation of the school system, resulting in the maintenance of racially identifiable schools. In school systems located in states in which segregation was not required by state law prior

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50 In Akron, Ohio, for example, all of the present racially identifiable black schools, except for a small elementary school constructed in 1968, were at one time predominantly white—in some cases all-white schools. There was another black elementary school, since closed, that was racially identifiable as of 1940, the first date for which figures were available.

to Brown, intentional segregative action of school authorities has been equated for constitutional purposes with state laws requiring segregation. Where such action has been shown, de jure segregation exists in the school system. The school system is deemed to be a dual school system in part, which, as regards the obligation to dismantle the dual system, is equated with the obligation to dismantle a system as a whole that was produced by state laws requiring school segregation.

The concept of de jure segregation was developed primarily in lower federal court cases involving challenges to the maintenance of racially identifiable schools in systems where segregation had not been required by state law. The plaintiffs in those cases contended that since the harm caused to minority children from required attendance at racially segregated schools, which the Supreme Court recognized in Brown, was the same regardless of how those schools came into being, the state had the affirmative duty to operate desegregated schools. The courts uniformly rejected this contention on the ground that what the Supreme Court found unconstitutional in Brown was compulsory school segregation, pursuant to state law, rather than the operation of schools that were in fact racially identifiable. What emerged from these cases was

52 See notes 197-204 infra and accompanying text for a consideration of Brown.
53 It was this thesis that the author developed some years ago, focusing on the "feelings of inferiority" aspect of Brown, in Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis U.L.J. 228, 250-71 (1963) [hereinafter cited as School Segregation]. The thesis was developed very tentatively and was not related sufficiently to constitutional values. Moreover, since the courts had not yet ordered student transportation to overcome de jure segregation, my view of the "duty to integrate" did not include student transportation. Id. at 268-69. While the earlier writing is superseded by the present work, some of the analysis set forth in the present work has its genesis in the earlier work.
54 See note 51 supra for cases which reject this contention. This was a clearly legitimate reading of Brown. As Professor Fiss has noted, in Brown the Court was confronted with the phenomena of both racial assignment and a demographic pattern by which all the white students were in some schools and all the black students were in other schools, and the phenomena were causally related. It was not necessary, therefore, for the Court to "determine whether the principal vice was the racial assignment or the segregated schools." Fiss, School Desegregation: The Uncertain Path of the Law, 4 Phil. & Pub. Aff. 3 (1974). Since state law required racial assignment in Brown, the courts could explain Brown on that basis and take the position that the harm caused by attendance at racially identifiable schools was irrelevant in the absence of state laws mandating compulsory assignment to those schools.
the principle that school authorities could not require the segregation of the schools, but that they had no duty to integrate the schools. It may be noted that the "no duty to integrate" notion had been accepted by some lower federal courts prior to Green and Swann, in dealing with the obligation to dismantle the dual school system, when they upheld ineffective "freedom of choice" plans and geographic attendance zoning that resulted in the continued maintenance of a large number of racially identifiable schools. If there was no duty to integrate in that situation, there clearly would be no basis for finding such a duty in states where segregation had never been required by state law.

On the other hand, where it was obvious that the school authorities were deliberately trying to maintain racial segregation in the system, such as where they had employed discontiguous attendance zones to put all of the black children in a single school, or had altered attendance zones to coincide with black population movement and had permitted white children to transfer from a predominantly black school, the courts had no difficulty in equating the intentionally segregative actions with state laws requiring racial segregation.

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55 This is the path which the Fourth Circuit followed when Green and Swann were before it. See also Goss v. Board of Educ., 406 F.2d 1183 (6th Cir. 1969). The "classic" statements of "no duty to integrate" are found in Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955), overruled on this point, United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (6th Cir. 1967), and Thompson v. County School, 144 F. Supp. 239, 240 (E.D. Va.), aff'd, 240 F.2d 59 (4th Cir. 1966), cert. denied, 353 U.S. 910 (1957).


57 See Clemons v. Board of Educ., 228 F.2d 853 (6th Cir. 1956).


When it became clear that the lower federal courts would not recognize an affirmative duty to integrate and that the Supreme Court was not disposed to consider the question at that time, the de jure segregation doctrine was accepted, so to speak, and lawyers for the plaintiffs developed their cases within the framework of the doctrine.

The doctrine required a showing that school authorities were practicing a policy of segregation, building on existing residential racial segregation to maximize school segregation and the number of racially identifiable schools in the system. A policy of segregation could be inferred from a pattern of discretionary decisions made by school authorities with respect to the redrawing of attendance zones, the setting up of optional zones, school construction and closure, teacher assignment, and the like, which maximized racial segregation and contributed to the racial identifiability of schools in the system. In the late 1960's and early 1970's, the courts were concluding that segregative intent was present in case after case on the grounds that (1) the discretionary decisions of the school authorities showed a pattern of maximizing racial segregation and causing schools to become racially identifiable, and (2) these decisions could not be explained consistently in terms of racially neutral criteria or the criteria that the school authorities purportedly were applying. As the Sixth Circuit put it in one case, the school board's decisions “more often than not tended to perpetuate segregation,” and any attempt to justify those decisions in terms of purportedly neutral cri-

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60 The Court's refusal to confront the question was evidenced by its denial of certiorari in the cases in which the question was presented. See note 51 supra for cases which reflect the refusal to recognize the duty to integrate.

61 Most of the cases in the north, as well as the south, were sponsored by the NAACP, which furnished the lawyers and financed the litigation.

62 See the discussion of the policy of segregation concept in Sedler, School Segregation, supra note 53, at 239-47.

63 As to proof of a policy of segregation, see Dimond, School Segregation in the North: There Is But One Constitution, 7 Harv. C.R.-C.L. Rev. 1, 20, 32 (1972).

64 See, e.g., United States v. Board of School Comm'rs, 474 F.2d 81 (7th Cir.), cert. denied, 413 U.S. 920 (1973); Kelly v. Guinn, 466 F.2d 100 (9th Cir. 1972), cert. denied, 413 U.S. 917 (1973); Davis v. School Dist., 443 F.2d 573 (6th Cir.), cert. denied, 404 U.S. 913 (1971); United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1968).
teria would usually require "inconsistent application of those criteria." So while it was necessary to show segregative intent to render the resulting segregation de jure and thus unconstitutional, the standard of segregative intent was the objective or "tort" standard, and in practice it usually was not difficult to satisfy this standard.

What is important for present purposes is that segregative intent was assimilated to state laws requiring school segregation, so that doctrinal continuity with Brown, reflected in the doctrine of de jure segregation, was maintained. While there was still no constitutional right to attend a racially integrated school, it was possible, by showing a policy of segregation on the part of the school authorities, to bring about school desegregation in school systems located in states where segregation had not been required by state law.

In terms of the extent of the school authorities' obligation to remedy the constitutional violation, however, there is an important "causation difference" between the situation in which the existence of de jure segregation is premised on a policy of segregation and in which it is premised on state laws requiring racial segregation in the schools. As discussed earlier, where school segregation was not required by state law, the existing segregation was related more directly to residential racial segregation, in that the structure of the school system did not require school segregation regardless of residential racial patterns. But precisely because residential patterns were racially segregated, geographic attendance zoning, without manipulation, could produce a substantial number of ra-

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65 Davis v. School Dist., 443 F.2d at 576.
67 But see Higgins v. Board of Educ., 508 F.2d 779 (6th Cir. 1974), in which the court found an absence of "many of the more commonly used or classic segregative techniques found in other cases," and held that a policy of segregation had not been established. Id. at 787.
68 See Fiss, supra note 54, at 36-38.
69 See notes 46-50 supra and accompanying text for a discussion of the impact of residential racial segregation on the structure of the school system.
cially identifiable schools in most systems. In practice, the intentional segregative actions usually occurred in areas experiencing residential racial transition or in areas where blacks and whites lived in fairly close proximity. And because of changing residential patterns, it could be argued that some of the schools affected by the segregative acts at an earlier time would have become racially identifiable at a later time regardless of those acts.\textsuperscript{70}

Since state law did not require systemwide segregation and since school segregation was more directly related to residential segregation, the "sorting out" problem and the "remedy dilemma" that confronted the Court in \textit{Swann} would not be present when \textit{de jure} segregation was premised on a policy of segregation. It would be possible to identify those areas of the school system where no segregative acts occurred, and at least to some extent, those schools that could not have been affected by the segregative acts occurring elsewhere, namely those schools located in areas of extreme racial concentration. There could also be a question as to how much the segregative acts contributed to the racial identifiability of a particular school at a given time, and whether the school would have become racially identifiable at a later time anyway because of changing residential patterns. Therefore, the Court's resolution of the causation question in \textit{Swann} and its rationale for ordering systemwide desegregation to the maximum extent feasible to remedy the \textit{de jure} segregation premised on state laws requiring segregation is logically inapplicable to the situation in which \textit{de jure} segregation is premised on a policy of segregation. In the latter situation there is necessarily a question as to how much of the actual segregation in the system is traceable to the constitutional violation and as to how much of it the state is required to remedy. More concretely, the question is whether the requirement is to desegregate all of the racially identifiable schools in the system to the maximum extent feasible, and if not, which of the racially identifiable

\textsuperscript{70} This refers to the racially identifiable black schools, where changing residential patterns made the areas served by schools predominantly black. While blacks move into formerly white residential areas as a part of the process of "expanding ghettoization," whites generally do not move into black residential areas.
schools must be desegregated.

This was the issue that confronted the Supreme Court in *Keyes v. School District Number 1*, decided in 1973, which was the first case presenting the Court with segregation in a school system located in a state where segregation was not required by state law. Like similar cases involving challenges to segregation existing in such school systems, the plaintiffs in *Keyes*, "apparently concede[d] for the purposes of this case that in the case of a school system like Denver's where no statutory dual school system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." In Denver, the black and Hispanic population historically was concentrated in the "core city," which was located in the north-central part of the school district. In the 1950's, the black population expanded eastward, and close to forty percent of the black school population resided in the northeast portion of the school district known as Park Hill. At the time of the trial, there were twenty-five racially identifiable minority "core city" schools and five racially identifiable black schools in the Park Hill area. The plaintiffs introduced evidence of intentionally segregative acts in the Park Hill area and as to five of the "core city" schools. The district court found that the acts affecting the "core city" schools were not undertaken with segregative intent, but that segregative intent had been proved with respect to the Park Hill area. However, it ordered the desegregation of the "core city" schools as well on the ground that they were "educationally inferior" to the predominantly Anglo schools. That portion of its judgment was reversed by the Tenth Circuit on the ground that desegregation could not be ordered unless the segregated condition of the schools was shown to have been pro-

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72 413 U.S. at 198.
73 The Court held that the combined black and Hispanic enrollment of a school was to be considered for the purpose of determining whether the school was "segregated." 413 U.S. at 197-98.
74 Id. at 192-93.
75 Id. at 193-94.
duced by intentionally segregative acts. The Supreme Court granted certiorari to review the Tenth Circuit's judgment as it pertained to the "core city" schools.

The Supreme Court reversed, holding that the segregation existing with respect to the "core city" schools could be found to be *de jure* and subject to redress. Once segregative intent had been proved in regard to a "substantial portion of the school system," there was a presumption of the existence of a dual school system, which shifted the burden to the school authorities to demonstrate that the segregated character of the rest of the system was not also the result of their intentionally segregative actions. There was a twofold justification for this presumption. First, since the different parts of a school system generally are not administered separately, the segregative acts in one portion of the system could have an effect on schools located in other portions of the system. Second, if segregative intent was present in the operation of part of the system, it would likely be present in the operation of the remainder. The case was remanded for further proceedings in regard to the school authorities' responsibility for the segregated character of the "core city" schools. On remand, the district court found that the Park Hill area was not administered separately from the rest of the school system, and held that the school authorities had not succeeded in proving that its actions with respect to the Park Hill area had no effect on the racial composition of the "core city" schools. Since this was so, it did not matter whether their actions with respect to the "core city" schools were undertaken with segregative intent. The court's decree ordering systemwide desegregation was affirmed by the Tenth Circuit, and the Supreme Court denied review.

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76 Id. at 194-95.
77 Id. at 195. The Court denied the school board's petition for certiorari to review the findings with respect to the Park Hill schools.
78 Id. at 208-09.
79 Id. at 201-05.
80 Id. at 207-09.
According to one critic of Keyes, the school authorities were "subject to a kind of shell game and found to have lost." This criticism is valid if the underlying premise is that the state is only required to remedy that portion of the actual segregation that is traceable, from a causation standpoint, to the proven policy of segregation. The Supreme Court assumed that the school authorities' segregative actions with respect to the Park Hill schools caused those schools to become racially identifiable. It did not require the plaintiffs to show the extent to which those actions contributed to the racial identifiability of those schools or that those schools would not have become racially identifiable if those actions had not occurred. However, those actions were at least a contributing cause to the racial identifiability of those schools at a given point in time, and if the schools would have become racially identifiable even in the absence of those actions, the burden should be on the school authorities so to demonstrate.

The major thrust of the "causation criticism" of Keyes, however, revolves around the absence of a link between the school authorities' actions in the Park Hill area and the racial identifiability of the "core city" schools. This criticism seems valid since regardless of who had the burden of proof on this issue, there simply was no significant link. It was undisputed that the "core city" schools had become racially identifiable before blacks had begun to move into the Park Hill area. Consequently, it is very difficult to see how the school authorities' actions in the Park Hill area could affect the racial identifiability of the "core city" schools at all. Even assuming the maximum reciprocal effect of the school authorities' actions on residential patterns, the most that their actions in the Park

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83 L. Graglia, supra note 30, at 161.
84 This is Professor Graglia's position. L. Graglia, supra note 30, at 73-74.
85 And, therefore, it can be argued that the duty to desegregate the school becomes fixed at that point in time and is unaffected by population shifts that may have changed the racial composition of the school. See Newburg Area Council, Inc. v. Board of Educ., 489 F.2d 925, 931 (6th Cir. 1973).
86 This is so particularly in light of the reciprocal effect that school assignment can have on residential patterns. See note 44 supra and authorities cited therein concerning residential segregation.
Hill area could have done was to cause whites to move into that part of the Park Hill area served by the predominantly white schools and to avoid that part of the Park Hill area served by the racially identifiable black schools. Whites were not living in the "core city" area, and would not have moved there regardless of what the school authorities did in Park Hill. And even if the school authorities' actions discouraged blacks from moving into Park Hill from the "core city," this result would not affect the racial identifiability of the "core city" schools, which were such because the population of the "core city" area was overwhelmingly black and Hispanic.88

From a causation standpoint, the question should not have been, as the district court assumed on remand, whether the different parts of the school system were separately administered, but whether there was any relationship between the school authorities' actions in the Park Hill area and the racial identifiability of the "core city" schools. Here there was not, since the "core city" schools became racially identifiable before the school authorities did anything in the Park Hill area. Perhaps the district court erroneously restricted the scope of the inquiry on remand,89 but given the district court's original finding as to the absence of segregative intent with respect to the "core city" schools, and the clear absence of a link between the school authorities' actions in the Park Hill area and the racial identifiability of the "core city" schools, the state here was required to remedy segregation that was not traceable to the constitutional violation.

The actual result, however, is not unfair, since the district court probably erred in finding that the school authorities did not undertake segregative acts with respect to the "core city" schools. At the trial the plaintiffs introduced evidence of segregative acts as to five of the twenty-five racially identifiable "core city" schools, occurring between 1951 and 1962. The district court's finding that these acts were not undertaken with

88 Id.
89 The Tenth Circuit held that the district court's findings were not "clearly erroneous," and that insofar as the district court may have failed to interpret the Supreme Court's remand order properly, its findings "support a ruling favorable to the plaintiffs under a correct reading of the High Court's opinion." 521 F.2d at 472-73.
segregative intent seems highly questionable under the objective standard of segregative intent that is generally followed by the courts. If the district court had made a finding of segregative intent, it would have been reasonable to assume that those actions affected the other “core city” schools as well, unless the school authorities could show otherwise.

But the basis for the imposition of a systemwide desegregation remedy in Keyes did not depend on a finding of intentionally segregative actions with respect to the “core city” schools. The effect of Keyes was to hold that where a school system located in a state in which segregation was not required by state law has been found to have practiced a policy of segregation with respect to a “substantial portion” of the school system, it is in the same position as a school system located in a state in which segregation was required by state law with respect to the obligation to desegregate. Since it was presumed that the segregative actions in that portion of the school system affected the racial composition of the schools in other portions of the school system, with the school authorities having the virtually impossible burden in practice of rebutting that presumption, they would be required to desegregate all of the racially identifiable schools in the system to the maximum extent feasible. The lower courts were so interpreting Keyes, and once they found a policy of segregation, they were ordering systemwide desegregation.

Keyes therefore turns out to have tracked Swann, both doctrinally and pragmatically. For purposes of the constitu-

90 F. Supp. at 73-76.

1 See note 66 supra and cases cited therein for an application of the standard. The district court appeared to be using a subjective standard, confusing “motivation” with “intent.”

2 In such a case, the Keyes presumption would come into play.

3 This is illustrated by the result in Keyes on remand. See the discussion of this point in Fiss, supra note 54, at 22-25.

tional violation, segregative intent was assimilated to state laws requiring school segregation under the concept of de jure segregation. As regards the scope of the obligation to redress the constitutional violation, the doctrine propounded in *Keyes* had the same practical effect as the doctrine propounded in *Swann*. In *Swann*, the school system as a whole was deemed to be de jure segregated because of the state law requiring racial segregation, while in *Keyes* the school system as a whole was presumed to be de jure segregated because of the policy of segregation affecting a "substantial portion" of the school system. But since the *Keyes* presumption appeared to be very difficult to rebut in practice, the practical effect was the same in both situations, and all of the racially identifiable schools had to be desegregated to the maximum extent feasible. Again, the substantive right would be the right to attend school in a school system in which there presently exists no vestiges of de jure segregation, and in most instances implementation of this right would result in attendance at desegregated schools.\(^5\)

In *Dayton Board of Education v. Brinkman (Dayton I)*, however, decided in 1977, the Court indicated that the obligation to desegregate might differ where the constitutional violation was premised on a policy of segregation rather than on state law requiring school segregation, and that in this circumstance, the plaintiffs might be required to show a stronger connection between the policy of segregation and the racial identifiability of the schools in the system. *Dayton I* arose in a somewhat unusual posture. The district court found that the school authorities had engaged in some segregative acts affecting a few schools, and it imposed a limited desegregation remedy. On appeal the plaintiffs contended that the district court erred in not finding that a number of other actions had been undertaken with segregative intent. The Sixth Circuit, with-

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\(^5\) As a practical matter, this would likely be so for all of the black students in the school system, since the focus would be on eliminating the racially identifiable black schools. It might not necessarily be so for all of the white students, depending on the racial composition of the school system. As a practical matter most white parents are not likely to object if the school that their children are attending is not integrated.

out considering this contention, indicated that systemwide relief was required, and the district court finally ordered a systemwide desegregation plan, which the Sixth Circuit approved. The Supreme Court held that systemwide relief was inappropriate in light of the only violations found in the record, and that there was no showing that systemwide relief "was necessary to eliminate all vestiges of the state-imposed school segregation." According to the Court, in a school system such as Dayton, located in a state in which school segregation was not required by state law, it was necessary first to identify those actions of the school authorities that were undertaken with segregative intent, and then to "determine how much incremental segregative effect those violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." The desegregation remedy "must be designed to redress that difference and only if there has been a systemwide impact may there be a systemwide remedy."

Dayton I appeared to be a retreat from Keyes in regard to the school authorities' obligation to desegregate where de jure segregation was premised on a policy of segregation. The Court was somewhat vague, however, in regard to the meaning of "incremental segregative effect." School board lawyers were likely to argue that it meant that the Court had to determine how much effect each segregative action had on the racial composition of the schools directly affected by that action, both at the time that it occurred and at the present time. In that connection they were likely to contend that if, as a result of changing residential patterns, the school would be racially identifiable at the present time, regardless of the past segregative actions, the state was not required to desegregate that school. What Justice Rehnquist, the writer of the

97 Id. at 408-09.
98 Id. at 417.
99 Id. at 420.
100 Id.
101 Justice Brennan, in a concurring opinion, insisted that there was no retreat from Keyes. Id. at 421-22.
102 This argument was raised by counsel for the school board in the Akron case.
Court's opinion in *Dayton I*, was saying was that at a minimum, it was necessary to show how the segregative actions contributed to the racial identifiability of each school in the system, and that the desegregation of a particular school could be ordered only if those actions substantially contributed to the racial identifiability of that school. He clearly meant to exclude from the desegregation remedy those racially identifiable schools located in areas of racial concentration, where geographic attendance zoning, without manipulation, was the primary cause of racial identifiability.\(^{103}\)

If the Supreme Court was trying to send a "behavioral message" to the lower federal courts in *Dayton I*,\(^{104}\) telling them to "back off" from ordering systemwide desegregation, the courts did not "get the message," and generally adhered to their prior decisions, taking care to bring them within the scope of the "incremental segregative effect" test.\(^{105}\) This is what the Sixth Circuit did when the *Dayton* case was remanded to it, and in another case involving the Columbus, Ohio school system.\(^106\) The Supreme Court granted certiorari in both cases. The stage was thus set for the 1979 *Columbus-Dayton* decisions and the final step in the evolution of the Court's current doctrine.\(^{107}\)

In *Columbus Bd. of Educ. v. Penick*\(^{108}\) and *Dayton Bd. of\...

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\(^{104}\) As to the "behavioral messages" of Supreme Court decisions, see the discussion in Sedler, *Metropolitan Desegregation*, supra note 7, at 573-76.


the Court assimilated even more fully than in Keyes a "policy of segregation" to the situation where state laws required segregation. The assimilation was effected by holding that the existence of a policy of segregation, like state laws requiring school segregation at the time of Brown, gave rise to a dual school system for constitutional purposes. In both Columbus and Dayton the Court looked to the existence of de jure segregation in the school system as of 1954, when Brown was decided. The lower courts found that at that time the school system was maintaining four black schools that had become racially identifiable as a result of intentionally segregative action. In Columbus, the finding was that at that time the school authorities intentionally had maintained "an enclave of separate, black schools on the near east side of Columbus." The Court held that the existence of de jure segregation in a part of the school system as of 1954 made the school system a dual school system, or as I would classify it, a dual school system in part. Where a dual school system exists, there is not only a continuing and affirmative duty to dismantle the dual school system, but until satisfaction of that duty, there is also the affirmative duty "not to take any action that would impede the process of disestablishing the dual school system and its effect." This principle had been recognized earlier in the context of the obligation to desegregate school systems located in states where segregation was required by state law, but as pointed out previously, it was of limited importance in that situation, since most of the racially identifiable schools in the school system were pre-Brown schools or were constructed as racially identifiable

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109 99 S. Ct. 2971 (1979). The cases were heard in tandem and the opinions likewise should be read in tandem.

110 This was in response to the approach of the NAACP as counsel for the plaintiffs in both cases. The approach was to focus on the segregation existing as of 1954 and to argue that such segregation rendered the school system a dual one for constitutional purposes.

111 99 S. Ct. at 2977-78.

112 Id. at 2946.

113 Id. at 2979.

114 See the discussion at notes 35-40 supra and accompanying text, and the Court's discussion in Dayton, 99 S. Ct. at 2979-80 for further explanation and citation to relevant cases.
schools before the “first effort,” if any, at desegregation was undertaken.\textsuperscript{116} It was of great significance, however, in regard to segregation existing in urban school systems outside of the south, such as Columbus and Dayton, where most of the racially identifiable black schools were constructed as or became so after 1954, and a number of these schools were once predominantly white schools.\textsuperscript{116} The Court discussed the evidence regarding post-1954 segregative acts which was introduced by the plaintiffs in both cases, but, as Justice Rehnquist charged in his dissent, given the affirmative duty requirement of Columbus-Dayton, this discussion was “gratuitous anyway.”\textsuperscript{117}

Once a dual school system is shown to exist, in whole or in part, then the affirmative duty takes over, and until the dual school system has been dismantled, it is unnecessary to demonstrate segregative intent with respect to the schools that have subsequently become racially identifiable. As the Court stated in Dayton:

\begin{quote}
But the measure of the post-Brown conduct of a school board under an unsatisfied duty to liquidate a dual system is effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system. As we clearly established in Keyes and Swann, the Board had to do more than abandon its prior discriminatory purpose. The Board has had an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices “are not used and do not serve to perpetuate or re-establish the dual school system,” and the Board has a “heavy burden” of showing that actions that increased or continued the effects of the dual system serve important and
\end{quote}

}\textsuperscript{115} See the discussion in notes 44-45 supra and accompanying text for prior reference and supporting materials.

\textsuperscript{116} In Dayton, when the suit was filed in 1971, 21 schools had become racially identifiable black schools, 99 S. Ct. at 2975 n.1, and in Columbus, as of 1975-76, according to the district court, there were 49 racially identifiable black schools. 583 F.2d at 800. It may be noted in this regard, however, that the district court’s definition of “racially identifiable” was based on a plus or minus statistical variation of the black enrollment in the system and thus in part was related to “racial balance.” Id. at 799. However, there were 32 schools that were 80% black, 22 schools that were 90% black, and 14 schools that were 96% black. Id. at 800.

\textsuperscript{117} 99 S. Ct. at 2982.
Since the board could not satisfy that "heavy burden" in either case, all of the actual segregation—the existence of racially identifiable schools—that occurred after 1954 had to be remedied as well.

Although the Court continued to refer to the Keyes presumption of systemwide intent and systemwide effect,119 the continuing and affirmative duty principle, reaffirmed in Columbus-Dayton and applied to the schools that became racially identifiable after 1954, renders irrelevant any question of systemwide intent and "incremental segregative effect." Where intentionally segregative actions have created a dual school system in part, the continuing and affirmative duty principle operates with the same strength as where state law has created a dual school system as a whole. The obligation of the school authorities to dismantle the dual school system is the same in both circumstances;120 until the dual school system has been dismantled fully, the school authorities are responsible for the subsequent racial identifiability of any school in the system.

Dayton I was distinguished as a case in which, on the basis of findings actually made, "[t]here were only isolated instances of intentional segregation, which were insufficient to give rise to an inference of systemwide institutional purpose and which did not add up to a facially substantial systemwide impact."121 In other words, on the basis of the findings in Dayton I, there was no predicate for finding the existence of a dual school system in part. But since it was shown that the Dayton school authorities were operating four racially segregated black schools at the time of Brown I, there was a dual school system in part at that time, and, coupled with the failure of the school authorities to fulfill their affirmative duty to prevent further segregation,122 systemwide relief was neces-

118 99 S. Ct. at 2979-80 (citations omitted).
119 Id. at 2978-79.
120 Id. at 2946 n.5.
121 Id. at 2980.
122 Id. at 2980. The Court listed a number of breaches of this affirmative duty, most particularly the pattern of school construction, in which 22 of the 24 schools
sary to dismantle fully the dual school system. And while the statement in *Dayton I* regarding the necessity for determining the "incremental segregative effect" of the school authorities' constitutional violations is literally true, the constitutional violations for these purposes include not only the actions in establishing the dual school system in part, but the breach of the affirmative duty to prevent further segregation. Stated simply, once a dual school system in part was shown to exist in 1954, the school authorities were required to remedy all of the actual segregation existing at the present time and to eliminate all of the racially identifiable schools in the system to the maximum extent feasible.\(^{123}\)

Justice White wrote for the Court in both cases, and his opinion was joined by Justices Brennan, Marshall, Blackmun and Stevens. The dissenting justices, while emphasizing different points to some extent,\(^{124}\) all disagreed with the affirmative duty rationale of the majority opinion and argued that it was necessary to show a causal link between segregative actions and the racial identifiability of particular schools. Justice Stewart saw *Dayton I* as making it clear that "unless a school was affected by the violations, it should not be included in the remedy."\(^{125}\) Justice Rehnquist would require a "causal relationship between acts motivated by such a [discriminatory] purpose and a current condition of segregation in the school system."\(^{126}\) As he stated in a strong dissent:

The Court suggests a radical new approach to desegregation cases in systems without a history of statutorily mandated separation of the races: if a district court concludes —employing what in honesty must be characterized as an

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\(^{123}\) This was accomplished in the desegregation plans that were ordered by the lower courts in both cases.

\(^{124}\) The Chief Justice and Justice Stewart concurred in *Columbus* and dissented in *Dayton* on the ground that the findings of the district court in both cases—a finding of systemwide *de jure* segregation in *Columbus* and of the absence of systemwide *de jure* segregation in *Dayton*—should be upheld. 99 S. Ct. at 2983-88. Justices Powell and Rehnquist dissented in both cases.

\(^{125}\) *Id.* at 2987. As stated previously, this is the author's interpretation of what Justice Rehnquist was saying in *Dayton I*. See note 103 *supra* and accompanying text for an interpretation of Rehnquist's view.

\(^{126}\) 99 S. Ct. at 2953.
irrebuttable presumption—that if there was a "dual" school system at the time of Brown I, it must find post-1954 constitutional violations in a school board's failure to take every affirmative step to integrate the system. Put differently, racial imbalance at the time the complaint is filed is sufficient to support a systemwide, racial balance school busing remedy if the district court can find some evidence of discriminatory purpose prior to 1954, without any inquiry into the causal relationship between those pre-1954 violations and current segregation in the school system.\(^{127}\)

Justice Rehnquist continued by distinguishing Swann from Keyes, or more precisely, by distinguishing between the scope of the state's obligation where the predicate for de jure segregation is state law requiring segregated schools and where the predicate is the school authorities' own policy of segregation.\(^{128}\) In the latter situation, said Justice Rehnquist, the plaintiffs should have to show a "causal nexus between intentional segregative actions and the conditions they seek to remedy."\(^ {129}\) Implicit in Justice Rehnquist's argument is that the Court employed a causal analysis in Swann to determine the extent of the state's obligation to desegregate the school system. As has been discussed previously, given the "remedy dilemma" confronting the Court in Swann, the extent of the obligation imposed there can be viewed as being "predominantly causal."\(^ {130}\) This "remedy dilemma" does not confront the Court when dealing with de jure segregation predicated on a policy of segregation, and in that situation it is possible to identify at least to some degree the extent of the actual segregation that is traceable to that policy.\(^ {131}\)

The Court, however, consistently has tried to develop a doctrine that would assimilate for constitutional purposes the segregation existing in school systems located in states where

\(^{127}\) Id. at 2954.

\(^{128}\) Id. at 2955-58.

\(^{129}\) Id. at 2958.

\(^{130}\) See notes 44-45 supra and accompanying text for prior discussion and citation to the relevant language in Swann and background materials.

\(^{131}\) See notes 46-50 supra and accompanying text for a discussion of the absence of the "remedial dilemma" in de jure segregation cases.
Segregation was required by state law at the time of *Brown* to that existing in states where it was not so required. Concerning the existence of a constitutional violation, the Court accomplished the assimilation by equating intentionally segregative action on the part of school authorities with state laws requiring racial segregation in the schools, which is reflected in the doctrine of *de jure* segregation. In *Columbus-Dayton*, it achieved the same assimilation with respect to the obligation to remedy *de jure* segregation. In *Swann*, the obligation was held to be the elimination of racially identifiable schools throughout the system to the maximum extent feasible. In *Keyes*, the Court tried to extend the obligation to school systems where the predicate for *de jure* segregation was a policy of segregation rather than state law requiring segregation. It did so by invoking a presumption of systemwide intent and systemwide effect on the basis of a showing of *de jure* segregation with respect to a "substantial portion" of the school system, which in practice was very difficult to rebut. *Dayton I*, however, cast some doubt on whether the Court really meant to do what it appeared to be attempting in *Keyes*, and indicated the need for a more direct showing of cause and effect in school systems where segregation was not required by state law. If the Court's intention in *Dayton I* was to take a "predominantly causal" approach to the extent of the state's obligation to remedy *de jure* segregation, that approach, as stated previously, would be consistent with the approach taken in *Swann*. But it also would mean that in practice the state's obligation to achieve actual desegregation and to eliminate racially identifiable schools would be substantially less in school systems where the predicate for *de jure* segregation was a policy of segregation than it would be in school systems where the predicate was state law requiring school segregation.

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132 The Court left open, however, the broader question of whether the Constitution imposes an affirmative duty on the state to operate racially integrated schools.

133 See note 28 *supra* and accompanying text for a consideration of this obligation.

134 See notes 93-94 *supra* and accompanying text for lower court cases in which systemwide desegregation was ordered.
It was this result which the Court strongly abjured in *Columbus-Dayton*. As it stated:

Our decision in *Keyes v. School Dist. No. 1*, plainly demonstrates in the educational context that there is no magical difference between segregated schools mandated by statute and those that result from local segregative acts and policies. . . . *W*e fail to see why there should be a lesser constitutional duty to eliminate that system than there would have been had the system been ordained by law.  

The Court succeeded in imposing the same duty in both situations by (1) treating for constitutional purposes a dual school system in part the same as a dual school system as a whole, (2) and by invoking the normative part of the obligation to desegregate that had been recognized in *Wright and Scotland Neck* as applied to school systems located in states where segregation had been required by state law to school systems where the predicate for *de jure* segregation was a policy of segregation.

In *Keyes*, the Court relied on the finding of *de jure* segregation in a “substantial portion” of the school system to establish a presumption of systemwide intent and systemwide effect. In *Columbus-Dayton*, it put aside that presumption and held that, for constitutional purposes, a finding of *de jure* segregation in a “substantial portion” of the school system gave rise to the existence of a dual school system in part. The obligation of the state to dismantle a dual system in part was the same as the obligation to dismantle a dual school system as a whole, and included the affirmative duty to avoid increasing or perpetuating segregation until the dual school system had been fully dismantled. While the affirmative duty principle was of limited importance in dealing with school systems where segregation was required by state law, since the racial identifiability of most of the schools in the system would have been established before the “first effort,” if any, toward desegregation was undertaken, the principle had been recognized. Therefore its invocation in the policy-of-segregation situation, while of much more practical importance, did manage to

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135 99 S. Ct. at 2946 n.5 (emphasis added).
maintain doctrinal consistency with the past.

Thus, Columbus-Dayton returns the Court to where it appeared to want to be at the time of Keyes with respect to the obligation to eliminate de jure segregation in school systems located in states where segregation was not required by state law, but with a much firmer doctrinal foundation for that position.138 The Court's present doctrine with respect to the obligation on the part of such school systems to remedy de jure segregation may be summarized as follows. Where school authorities have, by intentionally segregative acts, created racially identifiable schools at the time of Brown,137 or I would submit, at any time thereafter,138 there is a dual school system in part for constitutional purposes. The school authorities have the affirmative obligation to dismantle the dual school system, and until that obligation has been carried out, they also have the affirmative obligation to prevent any other school in the school system from becoming racially identifiable. These conditions being present, all of the racially identifiable schools in the school system, both those existing at the time the dual school system was first established and those developing thereafter, are, for constitutional purposes, vestiges of de jure segregation. The present obligation of the school authorities, viewed in light of their failure to perform

136 Dayton I must be seen as an aberration of the Court's institutional behavior in this regard.

137 It is not clear how much of a "dual school system" must exist in order for the affirmative duty to be invoked. The Sixth Circuit has indicated that a single racially identifiable black school may be sufficient. See notes 34-39 supra and accompanying text for further explanation and citation to relevant Supreme Court decisions.

138 As Justice Stewart observed, a school system that was violating the Constitution in 1964 or 1979 has the same duty to remedy that violation as one that was violating the Constitution in 1954. 99 S. Ct. at 2984. In the unlikely event, for example, that a state enacted a law requiring school segregation after Brown, school systems complying with that law would be under the same duty to dismantle the dual school system as they would be if the law had been enacted prior to 1954. Cf. Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), aff'd mem., 368 U.S. 515 (1962). So too, where intentionally segregative actions on the part of school authorities have resulted in the establishment of a dual school system for constitutional purposes after 1954, there should be the same affirmative duty to dismantle the dual school system as there would be if the dual school system had been established prior to 1954. In Reed v. Rhodes, 607 F.2d 714, 716-17 (6th Cir. 1979), the Sixth Circuit specifically held that the affirmative duty to desegregate applied when the system was found to be dual as of 1964.
their obligation in the past, including their permitting other racially identifiable schools to come into existence, is to desegregate the entire school system by eliminating racially identifiable schools to the maximum extent feasible. *Columbus-Dayton* then turns out to track *Swann* fully with respect to the extent of the obligation to eliminate *de jure* segregation.

As is clear from the foregoing discussion, however, the extent of the obligation imposed by *Columbus-Dayton*, unlike the extent of the obligation imposed by *Swann*, is “predominantly normative” rather than “predominantly causal.” In *Columbus* and in *Dayton* the finding of *de jure* segregation was predicated on school board action causing a few schools to become racially identifiable black schools at a time when the black population was concentrated in one part of the school system. Most of the schools that were racially identifiable at the present time became so after the dual school system in part was first established, and the school authorities’ obligation to desegregate those schools is based on the fact that they had the affirmative duty to prevent those schools from becoming racially identifiable, not that they caused them to become racially identifiable by intentional segregative actions. As Justice Rehnquist noted in *Columbus*: “Here violations with respect to five schools, only three of which exist today, occurring over 30 years ago are the key premise for a systemwide racial balance remedy involving 172 schools—most of which did not exist in 1950.”

Be that as it may, *Columbus-Dayton* accomplishes in the segregation policy situation what *Swann* accomplished in the situation in which segregation was required by state law. The assimilation process is now complete, both with respect to the existence of the constitutional violation and with respect to the obligation to redress that violation. Regardless of how the *de jure* segregation came into being, the substantive right is the right to attend school in a school system in which there presently exist no vestiges of *de jure* segregation.

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139 99 S. Ct. at 2962.
C. The Present Nature of the Right: A Retrospective View

Under the present state of the law, then, the nature of the substantive right relates to the situation prevailing in the school system in which children are enrolled, rather than to the situation of the child who is compelled to attend a racially identifiable school. It has thus been assumed that where de jure segregation cannot be established, the school authorities can constitutionally maintain racially identifiable schools, even where it would not be impracticable to desegregate them. The focus on the situation prevailing in the school system emerges very clearly in Milliken v. Bradley. While Milliken I concerned only the remedial powers of the federal courts to impose interdistrict desegregation in order to eliminate effectively the condition of de jure segregation found to exist in the urban school district, and while an inter-district remedy may be imposed in some cases, the Court made it clear that the black children residing in the de jure segregated urban school system had no substantive right to attend a racially integrated school. As the Court stated:

The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in the district. . . . The view of the dissenters, that the existence of a dual system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent.

The desegregation of many of the racially identifiable schools in the Detroit school system by a remedy involving the adja-
cent suburban school systems would have been fully practicable. But since the nature of the substantive right relates to the situation prevailing in the school system in which the child is enrolled, rather than to attendance at a racially integrated school, this practicability had no effect. So even where the system in which the child is enrolled is a *de jure* segregated school system, and even where it would not be impracticable to desegregate the schools in that system by a remedy involving adjacent school systems, children enrolled in that system may still attend racially identifiable schools.

Defining the nature of the substantive right with reference to the situation prevailing in the school system in which the child is enrolled and making the existence of the right and extent of the obligation depend on a finding of *de jure* segregation raises serious questions of what may be called "comparative justice," both from the standpoint of children wanting to attend racially integrated schools and the school system wanting to avoid being forced to integrate its schools. As previously stated, in light of patterns of residential racial segregation in urban areas, where the black population is primarily concentrated, "neutral" geographic attendance zoning as the basis of school assignment would result in a large number of racially identifiable schools, totally apart from state laws requiring racial integration or intentional school board action trying to maximize such segregation. Similarly, be-

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146 See the discussion of this point by the dissenters in *Milliken I*. As Justice White noted, the majority left "unchallenged the District Court's conclusion that a plan including the suburbs would be physically easier and more practical and feasible than a Detroit-only plan." 418 U.S. at 767. Justice Marshall pointed out that seventeen of the suburban systems included in the plan were contiguous to Detroit, and the remainder were no more than eight miles outside Detroit's city limits; the maximum one-way travel time under the plan was forty minutes. 418 U.S. at 813. In *Swann*, the Court had approved a desegregation plan involving one-way travel time of up to thirty-five minutes. 402 U.S. at 30.


148 For a discussion of the objection to racial integration made by school systems, see notes 285-91 *infra* and accompanying text.

149 See notes 49-50 *supra* and accompanying text for demographic factors affecting residential segregation.

150 This assumes the maximum reciprocal effect of school segregation and resi-
cause of patterns of urban-suburban racial concentration in metropolitan areas, there may be a predominantly black urban school system with a large number of racially identifiable black schools surrounded by predominantly white suburban school systems with a large number of racially identifiable white schools, totally apart from any actions of the school authorities. I have discussed elsewhere the question of whether governmental responsibility for existing patterns of residential racial segregation and concentration renders the resulting school segregation unconstitutional and subject to redress, and will not repeat that discussion here. The point to be emphasized at this juncture is that it is the patterns of residential racial segregation, interacting with geographic attendance zoning, that must be seen as the primal cause of school segregation today. If it were not for patterns of residential racial segregation, the invalidation of state laws requiring school segregation in Brown and of so-called "freedom of choice" plans in Green would have been sufficient to bring about desegregated schools in states where segregation was required by state law. If it were not for those patterns, school authorities in states where segregation was not required by state law would not have been in a position to engage in intentionally segregative acts designed to maximize actual segregation, and probably would not have been motivated to do so. Once we acknowledge that it is the patterns of residential racial segregation, interacting with geographic attendance zoning, that are the primal cause of school segregation, we may properly inquire whether the nature of the substantive

dential segregation. See note 44 supra for a discussion of this reciprocal effect and citation to supporting authorities.

See generally U.S. COMM. ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA (1974).

See notes 7-9 supra and accompanying text for examples of this situation and various judicial responses to it.

See the discussion in Beyond Bakke, supra note 2, at 151-53, and in Sedler, Discussion of Papers, 10 URB. REV. 149, 153-54 (1978).


The desire on the part of whites for racially and socially homogeneous schools is reflective of their desire for racially and socially homogeneous residential neighborhoods.
constitutional right should be defined with reference to state
laws dealing with school segregation or the actions of school
authorities, as reflected in the concept of de jure segregation.

Another problem with the concept of de jure segregation
as the basis of the substantive right is that it makes the
constitutional entitlement of children to attend, and the obliga-
tion of the state to provide, racially integrated schools at the
present time depend in large measure on what happened in
the school system at some time in the past. In states where
school segregation was required by state law at the time of
Brown, the discrimination effected against other children in
the past entitles children now enrolled in the school system to
attend racially integrated schools to the maximum extent fea-
sible.\textsuperscript{155} In other states, the entitlement of children to attend
racially integrated schools depends on whether at some time
in the past, the school authorities caused a relatively small
number of the schools in the system to become racially identi-
fiable by their intentionally segregative actions. Thus, in Co-
lumbus, because as of 1954 the school authorities maintained
an “enclave of separate, black schools on the near east side of
Columbus”\textsuperscript{156} consisting of five black schools, only three of
which remained in operation at the time the litigation arose,
they were required to adopt a desegregation plan involving
some 172 schools;\textsuperscript{157} in Dayton, since in 1954, the school au-
thorities were maintaining four black schools that had become
so as a result of intentionally segregative actions.\textsuperscript{158} They were
required to desegregate the forty-seven racially identifiable
schools in the sixty-eight school system.\textsuperscript{159} Again, the inten-
tional segregation practiced against black children prior to
1954 redounded to the benefit of children attending school in
that school system in the 1970’s. On the other hand, children
enrolled in the Grand Rapids, Michigan school system in the

\textsuperscript{155} As pointed out previously, in those states today a much higher proportion of
black children in fact are attending racially integrated schools than in states where
segregation was not required by state law. See note 43 supra for citation to support-
ing authority.

\textsuperscript{156} 99 S. Ct. at 2946.

\textsuperscript{157} 99 S. Ct. at 2962 (Rehnquist, J., dissenting).

\textsuperscript{158} 99 S. Ct. at 2978.

\textsuperscript{159} Id. at 2980-81.
1970's were not able to compel the school authorities to desegregate the schools, because there was no showing that the school authorities in the past had engaged in intentionally segregative acts.\footnote{Higgins v. Board of Educ., 508 F.2d 779 (6th Cir. 1974).} Children enrolled in the Lansing, Michigan school system and the Kalamazoo, Michigan school system were more fortunate in this regard, because they could make the requisite showing of past intentional segregation.\footnote{Oliver v. Kalamazoo Bd. of Educ., 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975); NAACP v. Lansing Bd. of Educ., 559 F.2d 1042 (6th Cir.), cert. denied, 434 U.S. 997 (1977).} It is difficult to see why the right of children to compel the desegregation of the schools, and in all likelihood, to be able to attend racially integrated schools, should depend on things that happened before most of the children were born.\footnote{See the discussion of the "past discrimination strategy" in Fiss, supra note 54, at 37-39. See also Yudoff, supra note 107, at 81.} Finally, the \textit{de jure} segregation doctrine, as regards its application to dual school systems in part, as illustrated by \textit{Columbus-Dayton}, does not even purport to redress the present segregation that was "predominantly caused" by the past unconstitutional action. Most of the segregation required to be redressed in these circumstances is that which has come about because of the school authorities' subsequent breach of their normative obligation to prevent other schools from becoming racially identifiable.\footnote{And even where \textit{de jure} segregation has been shown, as in Detroit, black children may still not be able to attend racially integrated schools, if the system is predominantly black, notwithstanding that it is surrounded by predominantly white school systems, and that desegregation on a metropolitan basis would be feasible. See notes 141-46 supra and accompanying text for an explanation and citation to illustrative cases.}

All of this suggests that it is appropriate to make a further inquiry into the nature of the substantive right, and to ask whether the focus should be on a right of children to attend racially integrated \textit{schools} rather than on a right of children to attend school in a system in which there presently exists no vestige of \textit{de jure} segregation. What is lacking in the \textit{Columbus-Dayton} opinions, as was absent in \textit{Swann} and in \textit{Keyes}—perhaps because the question was not directly raised in any of these cases—is an explanation of why the right of a
child to attend a racially integrated school today should depend upon the situation existing in the school system, as well as upon a showing of intentional racial segregation on the part of the state or the school authorities in the past. Rather, the Court focused on past segregation creating a dual school system, as a whole or in part, which the state had the continuing and affirmative duty to dismantle, including the duty to prevent any other racially identifiable schools from subsequently developing. The past discrimination and affirmative duty analysis may explain the state's obligation to remedy the constitutional violation, but this analysis does not explain why the existence of the constitutional right should be predicated on a showing of past discrimination in the first place.

The focus, it is submitted, should be on the right of children to attend a racially integrated school, and the obligation of the state should be defined with reference to that right. Under the present state of the law, it is just the reverse. The issue is whether a violation exists with respect to the school system, and the entitlement of children to attend a racially integrated school depends on the existence of that violation. The interest of the children in attending racially integrated schools is not factored into the constitutional equation, and if children do get to attend racially integrated schools, it is because they are the "incidental beneficiaries" of a violation found to exist with respect to the school system. This result is particularly anomalous since the predicate for the constitutional violation is past discrimination, occurring before most of the children now enrolled in the school system were born, and which in a realistic sense was not the primal cause of much of the actual segregation existing in the school system at the present.

The deficiencies inherent in defining the nature of the substantive right with reference to the situation prevailing in the school system and in premising the existence of the right on a finding of de jure segregation have long been recognized, both by those who favor constitutionally required school desegregation and by those who do not. Professor Fiss, a strong
proponent of constitutionally required school desegregation, has contended that in cases in which the Supreme Court has come down with decisions furthering desegregation, its concern has been with the "segregated pattern itself" rather than with the past discrimination:

In Swann and Keyes there are incidents of past discrimination; but no one truly believed they were of much significance—they were merely window dressing. In truth, responsibility was attributed to the school board for the segregation because that demographic pattern was a foreseeable and avoidable consequence of using geographic criteria for student assignment. Only this theory could fully explain the Court's actions in Swann and Keyes.

His view in this regard seems fortified by Columbus-Dayton, in which the Court tied the demographic pattern to the school authorities' affirmative duty to dismantle the dual school system in part, which was produced by their past discrimination. Therefore, the great bulk of the segregation that they were required to remedy was that resulting from their breach of their affirmative duty rather than that resulting from their past discrimination.

Professor Graglia, who strongly disagrees with the Court's decisions in Swann and Keyes, attacks the requirement of "segregative intent," and argues that, "a requirement of integration must be of nationwide application, and justified, on its own merits, as such." He contends that:

[When an action, such as the use of neighborhood assignment in a racially imbalanced neighborhood, has both desired and undesired consequences, a value judgment as to gains and losses is unavoidably involved. To purport to test the legality of the action by "intent" is only to make the

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165 Fiss, supra note 54, at 35.

166 L. Graglia, supra note 30, at 116-26, 161-97.

167 Id. at 84.
basis of that judgment obscure.\textsuperscript{168}

Professor Fiss makes the same point when he says that "[c]onsistency can only be achieved if we abandon the illusory search for the incidents of past discrimination and address in a direct and explicit way the hard question—is a segregated pattern of student attendance harmful, and if so, how harmful?"\textsuperscript{169} It is this question which the Court has not yet addressed.

In \textit{Keyes}, Justices Douglas and Powell, reasoning from different directions and reaching different conclusions as to the scope of the state's obligation to provide racially integrated schools,\textsuperscript{170} did address this question, and both urged the Court to recognize a constitutional obligation independent of the concept of \textit{de jure} segregation. Justice Douglas contended that such an obligation existed because school segregation, regardless of the particular manner in which it came about, was the "product of state actions or policies."\textsuperscript{171}

Justice Powell developed his position much more fully. He first noted that the root cause of school segregation was residential racial segregation,\textsuperscript{172} and that the existence of residential racial segregation was not related to whether or not a state had laws requiring school segregation.\textsuperscript{173} He went on to say that the concept of \textit{de jure} segregation was useful only in explaining the unconstitutionality of state laws requiring racially segregated schools, and that the concept should not be used to equate "segregative intent" with such laws, as the Court did in \textit{Keyes}.\textsuperscript{174}

But the key element in Justice Powell's rejection of the \textit{de jure} segregation concept was his view as to the nature of

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the substantive right involved in school desegregation cases.\textsuperscript{175} He contended that children possess the right to attend school in an \textit{integrated school system} rather than the right to attend school in a school system in which there presently exists no vestiges of \textit{de jure} segregation, and that the constitutional rights of black children should not depend upon a showing of \textit{de jure} segregation in the particular school district.\textsuperscript{176} He stated:

Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle. The school board exercises pervasive and continuing responsibility over the long-range planning as well as the daily operations of a public school system. It sets policies on attendance zones, faculty employment and assignments, school construction, closings and consolidations, and myriad other matters. School board decisions obviously are not the sole cause of segregated school conditions. But if, after such detailed and complete public supervision, substantial school segregation still persists, the presumption is strong that the school board, by its acts or omissions, is in some part responsible. Where state action and supervision are so pervasive and where, after years of such action, segregated schools continue to exist within the district to a substantial degree, this Court is justified in finding a prima facie case of a constitutional violation. The burden then must fall on the school board to demonstrate it is operating an “integrated school system.”\textsuperscript{177}

At the same time, however, he would not recognize a constitutional right to attend a racially integrated school, and he views the scope of the obligation to operate an “integrated school system” as being somewhat limited\textsuperscript{178}

The California Supreme Court has gone further in re-

\textsuperscript{175} As he noted: “At the outset, one must try to identify the constitutional right which is being enforced. This is not easy, as the precedents have been far from explicit.” \textit{Id.} at 225.

\textsuperscript{176} \textit{Id.} at 225-32.

\textsuperscript{177} \textit{Id.} at 227-28.

\textsuperscript{178} \textit{Id.} at 242-52; see note 170 \textit{supra} for reference to Justice Powell’s view on the limits of a school board’s duty to use transportation to accomplish integration.
jecting the concept of *de jure* segregation and has held that the equal protection clause of the California Constitution imposes on school authorities in that state "a constitutional obligation to take reasonably feasible steps to alleviate school segregation."179 The court emphasized that school segregation inflicts a "racially specific harm" on minority children which is of the same gravity regardless of how the segregation came into being.180 The court concluded:

In light of the detrimental consequences that segregated schools have traditionally imposed on minority children, and a school boards' plenary authority over the governance of its schools, a school board in this state is not constitutionally free to adopt any facially neutral policy it chooses, oblivious to such policy's actual differential impact on the minority children in its schools.181

The California electorate, however, recently has adopted an amendment to the state constitution that would appear to require a showing of "segregative intent" as a predicate for court-ordered school desegregation in that state as well.182 In any event, the opinions of Justice Douglas and Justice Powell in *Keyes*, and the position of the California Supreme Court indicate some judicial dissatisfaction with the present approach to defining the nature of the substantive right with respect to school desegregation.

This section has analyzed the nature of the substantive right as it has been defined by the Supreme Court's current doctrine. As discussed, the nature of the right relates to the situation prevailing in the school system in which the child is enrolled and depends upon a showing of intentional racial segregation on the part of the state or the school authorities. The deficiencies inherent in such an approach and the anomalies

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180 Id. at 37-38.
181 Id. at 38.
182 CAL. CONST. art. I, § 7(a), as amended by Senate Const. Amend. No. 2, West's Calif. Leg. Serv. 1979, 75-76. The thrust of the amendment is to require that the California Constitution be interpreted coextensively with the fourteenth amendment's equal protection clause "with respect to the use of pupil school assignment or pupil transportation."
that result from its application have been pointed out. Now inquiry will focus upon whether the values embodied in the Constitution require recognition of a right relating to attendance at a racially integrated school, and if so, upon the scope of the state's obligation to provide for attendance at racially integrated schools.

II. THE CONSTITUTIONAL RIGHT TO ATTEND A RACIALLY INTEGRATED SCHOOL: AN ANALYSIS AND A JUSTIFICATION

Analysis in this section will involve separate consideration of a constitutional right on the part of children to attend a racially integrated school and, if such a right is found to exist, of the state's obligation to provide for attendance at racially integrated schools. Separate consideration of the right and of the obligation is necessary because the justification that will be advanced for the recognition of the right relates to the balancing of the interests of children in attending a racially integrated school against the interests of the state in not being required to operate racially integrated schools. If such a right is found to exist, a further balancing is involved in determining the scope of the state's obligation to implement that right.\textsuperscript{183}

The source of a substantive right to attend racially integrated schools must be found in constitutional values. My submission is that these values require recognition of an interest on the part of children in attending racially integrated schools, and that in light of those values, the interest in attending racially integrated schools constitutionally outweighs any interest that can be asserted by the state to justify its operation of racially identifiable or "factually segregated" schools.

For purposes of this analysis, assume the absence of state laws mandating racial segregation in the schools or of intentional actions on the part of school authorities designed to

\textsuperscript{183} The distinction between the existence of the substantive right and the scope of the state's obligation to implement that right is illustrated by Justice Powell's view of a "genuinely integrated school system" in Keyes.
maximize actual segregation, that is, assume the absence of de jure segregation. In this regard there is agreement with the position taken by Justice Powell in Keyes that "[p]ublic schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle." As stated previously, the primal cause of school segregation in the urban school systems, in which the great majority of black children are enrolled, is residential racial segregation interacting with geographic attendance zoning as the basis of student assignment. The question thus becomes whether it is constitutional for school authorities to use geographic attendance zoning as the basis of student assignment when, because of residential racial segregation, this results in a large number of racially identifiable schools and denies many of the children in the school system the opportunity to attend racially integrated schools. This question was specifically left open by the Court in Keyes.

Where the school authorities use geographic attendance zoning as the basis of student assignment, with full awareness of existing patterns of residential racial segregation, in any realistic sense they "intend" to produce racially identifiable schools, and for constitutional purposes can be held responsible for this consequence. This is not a circumstance in

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184 413 U.S. at 227.
185 See notes 148-54 supra and accompanying text for an explanation.
186 As the Court stated: "We have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting de jure segregation." 413 U.S. at 212. However, in Swann, the Court did say that the existence of predominantly black and predominantly white schools, without more, does not offend the fourteenth amendment, 402 U.S. at 24, and it has cited Keyes for the proposition that the existence of racially segregated schools is not unconstitutional without a showing of segregative intent. Washington v. Davis, 426 U.S. 229, 240 (1976); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 413 (1977). Nonetheless, the question was left open in Keyes, and it has never been presented squarely to the Court.
187 See the discussion in Fiss, Racial Imbalance, supra note 164, at 583-85. As he puts it:
The school board's responsibility for the maintenance of imbalanced schools, even under the policies of approval or disregard, is derived from its deliberate choice to assign children to schools on the basis of geographic
which racially neutral actions produce an unintended "racially disproportionate impact" or a "racially discriminatory effect."\textsuperscript{188} The racially identifiable schools are the natural and foreseeable consequences of the use of geographic attendance zoning as the basis for student assignment when residential patterns are known to the school authorities to be racially segregated. As regards the intention to produce racial consequences, then, the use of geographic attendance zoning as the basis of student assignment can properly be analogized to state laws requiring school segregation. In both instances there is the use of what is in fact race-conscious criteria: when the school authorities make a decision to use geographic attendance zoning as the basis of student assignment, they have made a conscious decision to produce racially identifiable schools in the same manner as did the state legislature when it required school segregation by law.

The so-called "discriminatory intent" requirement is but another way of saying that the party challenging governmental action as being racially discriminatory must show that the government has in fact used race-conscious criteria.\textsuperscript{189} It is for this reason that "segregative intent" on the part of the school authorities in school systems located in states where segregation was not required by state law properly could be assimilated to state laws requiring school segregation.\textsuperscript{190} But "segregative intent" has no independent significance for purposes of constitutional analysis, and the absence of "segregative intent," as defined in the context of \textit{de jure} segregation, cannot furnish a constitutional justification for the maintenance of racially segregated schools. Because the constitutional analysis

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\textsuperscript{190} See notes 51-68 \textit{supra} and accompanying text for a general explanation of this concept.
must be in terms of constitutional values, the question is whether geographic attendance zoning as the basis of student assignment, which foreseeably results in the existence of racially identifiable schools and denies children the opportunity to attend racially integrated schools, is consistent with constitutional values.

To answer that question, consideration requires focus first on precisely why segregation mandated by state law is unconstitutional. Second, the reasons that make segregation unconstitutional when mandated by state law will be examined as they relate to making segregation unconstitutional when it is the foreseeable result of the use of geographic attendance zoning for student assignments. Third, consideration will center on the interests that the state can assert in support of the use of geographic attendance zoning and show that, on balance, those interests are constitutionally insufficient to justify required assignment to racially identifiable schools. Finally, analysis will demonstrate that the scope of the state's constitutional obligation is to provide for attendance at racially integrated schools to the maximum extent feasible, including, where necessary, the assignment of students across existing school district lines.

A. The Unconstitutionality of De Jure Segregation: Brown and Bolling in Contemporary Perspective

There has been very extensive commentary about the holding and rationale of Brown v. Board of Education. On the other hand, there has been relatively little analysis of the Court's holding in the companion case of Bolling v. Sharpe, which invalidated compulsory segregation in the District of Columbia schools. Bolling clearly was an appendage to Brown, but, as will be demonstrated, the rationale of Boll-

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191 Segregation intentionally brought about by the acts of the school authorities is included in this discussion.
194 As the Court noted: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Govern-
ing is more in accord with the Court's constitutional doctrine in regard to racial equality. The holding and rationale of Brown and Bolling will now be reexamined in light of this doctrine in order to set forth a more precise rationale for the unconstitutionality of de jure segregation.

In stare decisis terms, it is fair to say, as Justice Powell did in Keyes, that the holding in Brown was "essentially negative." He explained:

The great contribution of Brown I was its holding in unmistakable terms that the Fourteenth Amendment forbids state-compelled or state-authorized segregation of public schools. Although some of the language was more expansive, the holding in Brown I was essentially negative: It was impermissible under the Constitution for the States, or their instrumentalities to force children to attend segregated schools.\(^\text{195}\)

The rationale for the holding of unconstitutionality was that racially segregated schools were "inherently unequal," so that required attendance at such schools deprived black children of equal protection of the laws.\(^\text{196}\)

Brown was lawyered within the framework of the separate but equal doctrine.\(^\text{197}\) Building on the framework established in the graduate school cases of Sweatt v. Painter,\(^\text{193}\) and McLaurin v. Oklahoma State Regents,\(^\text{199}\) the lawyers for the black children tried to show that racial segregation in education was "unequal," because racially segregated education was harmful to black children and deprived them of some of the benefits they would receive if they were attending racially integrated schools. Since racially segregated schools were compelled by state law, the approach was to compare attendance at segregated schools with attendance at integrated schools in terms of the impact on black children. The Court in Brown

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\(^{195}\) 413 U.S. at 220 (citations omitted).

\(^{196}\) 347 U.S. at 495.

\(^{197}\) For a detailed and vivid discussion of that very careful lawyering, see R. Kluger, Simple Justice 287-540 (1976).

\(^{198}\) 347 U.S. at 495.

found that attendance at racially segregated schools produced the following harms to black children. First, relying on *Sweatt* and *McLaurin*, it found that racial segregation deprived black children of the intangible benefits connected with interracial education, which may be summarized as the opportunity to associate with white children during the educational process, to exchange ideas with them, and to learn how to live in a multiracial society.\(^{200}\) Important as these intangible benefits were in the context of graduate education, in the Court's view, they were even more important in the context of primary and secondary education.\(^{201}\) Second, the Court found that segregation in public schools, with the sanction of law, creates feelings of inferiority in black children, which, in the school setting, adversely affects their motivation to learn.\(^{202}\) Because compelled attendance at racially segregated schools produced these harms to black children, it "deprived them of some of the benefits they would receive in a racially integrated school system."\(^{203}\) Thus, racially segregated schools were "inherently unequal" and the black children required to attend them were deprived of equal protection of the laws.\(^{204}\)

The question arises as to how the Court "knew" that there were certain intangible benefits connected with interracial education and that state-imposed segregation created feelings of inferiority in black children, adversely affecting their motivation to learn. There has been much debate about the validity and significance of the social science testimony introduced by the plaintiffs in *Brown*, designed to show the harmful effects of segregated education on black children.\(^{205}\) But no social science evidence was introduced with respect to

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\(^{200}\) 347 U.S. at 493-94.


\(^{202}\) 347 U.S. at 494.

\(^{203}\) Id. at 494-95.

\(^{204}\) Id.

the intangible benefits connected with interracial education, just as no such evidence had been introduced in *Sweatt* or *McLaurin*. In *Sweatt* and *McLaurin*, however, the Justices could draw directly on their own knowledge and experience in regard to law school and graduate education. As Chief Justice Vinson stated for the Court in *Sweatt*:

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.206

Similarly, in *McLaurin*, where a black graduate student was internally segregated,207 Chief Justice Vinson observed that “[t]he result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”208 When Chief Justice Warren stated in *Brown* that, “[s]uch considerations apply with added force to children in grade and high schools,”209 he likewise was drawing

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206 339 U.S. at 634.
207 The student was required to sit apart at a designated desk in an anteroom adjoining the classroom, to sit at a designated desk on the mezzanine floor of the library, and to sit at a designated table and to eat at a different time from the other students in the school cafeteria. 339 U.S. at 640.
208 Id. at 641.
209 347 U.S. at 494.
Upon the "background knowledge of educated [persons] who live in the world," as judges necessarily must do in performing the judicial task. "Amateur wisdom" and simple common sense tell us that the denial of interracial associations during the educational process impairs the educational opportunities of children, particularly minority children. Just as law school education goes beyond learning how to read a case, primary and secondary school education goes beyond the learning of the cognitive skills and is designed to prepare children to live as adults. Children of both races do not learn how to live in a multiracial society when they are compelled to attend one-race schools. Minority children suffer the additional harm of not learning how to relate to a white-dominated society when they attend school only with other minority children. The intangible benefits of interracial association during the educational process were obvious to the Justices in Brown, just as they were obvious in Sweatt and McLaurin. It was on this basis that the Court in Brown found that racial segregation in the schools caused harm to the black children.

As to the finding that state-imposed segregation in the schools created feelings of inferiority in black children which adversely affected their motivation to learn, the Court made reference to a finding of fact in this regard by the district court in Brown. It then noted that the finding was "amply supported by modern authority," and in the celebrated footnote eleven, cited social science research, some of which was presented to the district court by the plaintiffs' expert witnesses. It should be noted in this regard that there was no finding that black children attending racially integrated schools would have higher levels of academic achievement in regard to the cognitive skills than black children attending segregated schools. No such evidence was available at that time, and as the plaintiffs' expert witnesses had testified, it

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211 Id. at 426-27.
212 347 U.S. at 494.
213 Id.
214 Cognitive skills refer to the verbal, mathematical and similar "tangible knowledge" skills.
was not possible to separate the psychologically damaging effects of segregated schools from the psychologically damaging effects of other forms of state-imposed segregation. What the plaintiffs were trying to show was that the system of state-imposed segregation contributed to feelings of inferiority in black children, and the social science testimony was introduced to support this contention.

In retrospect, the social science testimony was unnecessary. It is agreed by almost every commentator that the social science testimony had no real impact on the Court's decision—as indicated by the fact that it was only given a footnote reference. The Court simply stated that "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The Court also agreed with the district court that "the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group." The Court in Plessy v. Ferguson, it will be recalled, likewise made a finding about the effect of state-imposed racial segregation in public facilities:

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

This finding was rejected specifically by the Court in Brown when it found that state-imposed segregation denotes the in-

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215 See Clark, supra note 205, at 231.
217 347 U.S. at 494.
218 Id.
219 163 U.S. 537 (1896).
220 Id. at 551.
221 347 U.S. at 494-95.
feriority of the Negro group, and, as applied to black children required to attend racially segregated schools, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."222

The basis for the Court's finding in Brown as to the effect of state-imposed segregation denoting the inferiority of blacks was the same as the basis for its finding as to the intangible benefits of interracial association in the educational process: the background knowledge of judges living in American society. A "legal system operates within the matrix of the facts, circumstances, and value patterns obtaining in the social order."223 When the Court decided Brown, it was not analyzing an abstract question about race relations. It was deciding whether the segregation imposed by law in the twentieth century in certain American states was unconstititutional, and as Professor Black put it, it had to decide that question "on the ground of history and common knowledge about the facts of life in the times and places aforesaid."224 The Supreme Court Justices, like anyone else living in American society at that time, knew about segregation, and that it was a "massive intentional disadvantaging of the Negro race, as such, by state law."225 It was set up for the purpose of keeping a whole race of people inferior, it had come "down in apostolic succession" from slavery, and was "an integral part of the movement to maintain and further white supremacy."226 As Judge Sobeloff explained Brown: "Brown articulated the truth that Plessy chose to disregard: that relegation of blacks to separate facilities represents a declaration by the state that they are inferior and not to be associated with."227 The Court found state-imposed segregation unconstitutional, in the view of Professor

222 Id. at 494.
224 Black, supra note 210, at 427.
225 Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1, 28 (1959); Black, supra note 210, at 421.
226 Id. at 424-25. As regards segregation and "white supremacy," see also the discussion in notes 249-50 infra and accompanying text.
Black, because, "[t]he Fourteenth Amendment commands equality, and segregation as we know it is inequality."\textsuperscript{228}

The harm rationale for the holding of \textit{Brown} is twofold. State-imposed segregation in the public schools causes harm to black children in that it (1) deprives them of the opportunity for interracial associations during the educational process, and (2) causes feelings of inferiority in black children, which, in the school setting, adversely affects their motivation to learn. As Professor Fiss has observed, \textit{Brown} was decided on the basis of the principle of equal educational opportunity, and the Court made the "requisite empirical and normative judgments" necessary to find that segregated education violated this principle.\textsuperscript{229} This finding of harm, based on the background knowledge of judges, was the rationale for the holding in \textit{Brown} that state-imposed racial segregation in the public schools deprived black children of equal educational opportunity, and thus, of equal protection of the laws. While it is true, as Professor Heyman has contended, "that the opinion did not imply that absent a finding of 'harm' racial segregation would be constitutional,"\textsuperscript{230} the fact remains that this finding was essential to the Court's rationale and to the framework in which \textit{Brown} was decided.

It must be emphasized again, however, that \textit{Brown} did not rest on any finding of "academic achievement" harm. That is, the Court did not find in \textit{Brown}, and there was no contention to this effect, that black children attending racially integrated schools would have higher levels of academic

\textsuperscript{228} Black, \textit{supra} note 210, at 428. As Professor Cahn put it:

So one speaks in terms of the most familiar and universally accepted standards of right and wrong when one remarks (1) that racial segregation under government auspices inevitably inflicts humiliation, and (2) that official humiliation of innocent, law-abiding citizens is psychologically harmful and morally evil. . . . For at least twenty years, hardly any cultivated person has questioned that segregation is cruel to Negro school children. The cruelty is obvious and evident. Fortunately, it is so very obvious that the Justices of the Supreme Court could see it and act on it even after reading the labored attempts by plaintiffs' experts to demonstrate it "scientifically."

Cahn, \textit{supra} note 205, at 159.

\textsuperscript{229} Fiss, \textit{Racial Imbalance}, \textit{supra} note 164, at 594-95.

\textsuperscript{230} Heyman, \textit{supra} note 201, at 105.
achievement in the cognitive sense than black children attending racially segregated schools. While it is logical to assume, as the Court did, that the feelings of inferiority resulting from state-imposed segregation would, in the school setting, adversely affect motivation to learn, such motivation is only one factor relating to academic achievement. Depending on the presence or absence of other factors, academic achievement levels of black children at particular segregated schools could be higher than the academic achievement levels of black children at particular integrated schools, and vice versa. But for the particular black child, the removal of state-imposed segregation and the resultant feelings of inferiority would contribute to improved motivation to learn. In any event, regardless of its effect on academic achievement, state-imposed segregation was found to cause specific racial harms to black children and for this reason was held in Brown to be a denial of equal protection of the laws.

The plaintiffs in Brown had challenged state-imposed segregation in the schools on both equal protection and due process grounds. Since the Court rested its decision on equal protection grounds, it was unnecessary to consider whether such segregation also was violative of due process. In Bolling, however, which involved a challenge to federally-mandated segregation in the District of Columbia schools, textual support for the invalidation of such segregation had to be found in the fifth amendment’s due process clause. At that time, the Court had not yet held that whatever would be a violation of the equal protection clause when practiced by the state was also a violation of the fifth amendment’s due process clause when practiced by the federal government, absent a countervailing federal interest that was not present when the

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231 It is thus irrelevant in school desegregation cases whether integration will or will not improve the academic achievement of black children, and evidence as to the effect of integration on academic achievement has generally been held to be inadmissible. Brunson v. Board of Trustees, 429 F.2d 820, 826 (4th Cir. 1970) (Sobeloff, J., concurring); Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55 (5th Cir. 1963), cert. denied, 379 U.S. 933 (1964); Bradley v. Milliken, 345 F. Supp. 914, 931 (E.D. Mich. 1972). See also Yudoff, supra note 216, at 439-45; Wisdom, supra note 201, at 143-45.

232 347 U.S. at 495.
state acted. But the Court did note in Bolling that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive," and stated that, "discrimination may be so unjustifiable as to be violative of due process." 

Using a due process analysis, the Court found that compulsory racial segregation in the schools involved a racial classification that implicated important liberty interests. Since "liberty" within the meaning of the due process clause "extends to the full range of conduct which the individual is free to pursue," it includes the right to attend school with children of another race and to associate with those children during the educational process. That liberty "cannot be restricted except for a proper governmental objective." The Court then stated simply that, "[s]egregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

Why, may it be asked, is segregation in public education not reasonably related to any proper governmental objective? If segregation in public education was not reasonably related to any proper governmental objective, would this not be equally true of state-imposed segregation in any public facility? But if this was so, then how could Bolling be reconciled with Plessy, which was not discussed in the Bolling opinion? In Plessy, the Court in effect did find that state-imposed segregation in public facilities advanced a "proper governmental objective": it maintained the "established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." This being so, it was reasonable, and hence, constitutional for the state to require racial segregation in

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234 347 U.S. at 499.
235 Id.
236 Id. at 499-500.
237 Id. at 500.
238 163 U.S. at 550.
public facilities.\textsuperscript{239} What happened, of course, was that \textit{Plessy} was effectively overruled in \textit{Brown}, when the Court found that state-imposed segregation "denote[s] the inferiority of the negro group."\textsuperscript{240} It cannot be a legitimate governmental purpose to promote the supremacy of one racial group by separating it from the other and "inferior" group with respect to the use of public facilities. Such a purpose is inconsistent with the equality value of the fourteenth amendment. In this sense, state-imposed racial segregation was now equated with impermissible racial discrimination: it constituted the use of race-conscious criteria that interfered with the liberty of blacks to associate with whites in the use of public facilities, which did not advance any proper governmental objective, and thus was unconstitutional.\textsuperscript{241}

In a contemporary criticism of \textit{Brown}, Professor Wechsler argued that the matter of school segregation involved a conflict between the desires of blacks to associate with whites during the educational process and the desire of whites to avoid such association, and asked whether there was "a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail."\textsuperscript{242} The answer, of course, is that the Constitution is not value neutral.\textsuperscript{243} The values embodied in equal protection and due proc-

\begin{itemize}
\item \textsuperscript{239} The Court relied on state court cases upholding school segregation laws. \textit{Id.} at 544-45.
\item \textsuperscript{240} 347 U.S. at 494. As Professor Perry has observed with respect to the "central guiding principle" of \textit{Brown}:
\begin{quote}
It is a notion of the moral equality of the races—the principle that no person is morally inferior to another by virtue of race. Because race is not a factor indicating anything about the moral worth of persons, race is morally irrelevant to state laws and policies. Therefore, state action predicated on the view that one person is by virtue of race inferior to another offends equal protection.
\end{quote}
\begin{quote}
\end{quote}
\item \textsuperscript{242} Wechsler, \textit{supra} note 225, at 276-78.
\item \textsuperscript{243} Wechsler, \textit{supra} note 225, at 31-32. See also the discussion of constitutional values and racial discrimination in \textit{Sedler, Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California}, 17 \textit{SANTA CLARA L. REV.} 329, 361-68 (1977).
\end{itemize}
ess preclude constitutional recognition of any interest on the part of whites to avoid associating with blacks in the use of public facilities. If the choice is "between two kinds of freedom of association," the constitutional values dictate that the choice be made in favor of the desire of blacks for "merged participation in public life."

The Court's due process analysis in *Bolling* is therefore somewhat different from its equal protection analysis in *Brown*. State-imposed segregation in public education was unconstitutional, not because it caused specific racial harm to black children and deprived them of some of the benefits they would have received in a racially integrated school system, but because it interfered with their liberty to associate with white children during the educational process, and because this interference with liberty was not reasonably related to any proper governmental objective.

The post-*Brown* per curiam, invalidating state-imposed segregation with respect to all public facilities, are best explained under the *Bolling* rationale. While all state-imposed segregation may be deemed to cause feelings of inferiority in black people, state-imposed segregation is necessarily unconstitutional under *Bolling* because it restricts the liberty of blacks and whites to associate with each other in public facilities, a restriction which is not reasonably related to any proper governmental objective. State-imposed segregation would be equally unconstitutional if, for example, racially segregated public facilities were required in a city in which blacks were in the political majority. It also does not matter whether a due process or an equal protection analysis is employed when confronting state-imposed segregation. It can be said that the forced separation of the races in public facilities is an invidious racial classification violative of the equal pro-

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245 Black, supra note 210, at 428. See also Heyman, supra note 201, at 114-15.
247 State imposed segregation causes feelings of inferiority in blacks because it constitutes "official disparagement." Cahn, supra note 205, at 155-56.
tection clause, or that it is an unconstitutional interference with the liberty of blacks and whites to associate with each other in public facilities, in violation of the due process clause. But whether the focus is on the racial classification or on the restraint of liberty, the injury is to the right of interracial association, and the interference with that right is unconstitutional because compulsory segregation is not reasonably related to any proper governmental objective.

This explanation of the unconstitutionality of racial segregation is fortified by Loving v. Virginia, in which the Court used both an equal protection and a due process analysis to invalidate state anti-miscegenation laws. The anti-miscegenation laws contained a racial classification that interfered with the liberty of persons to marry each other; the only purpose that the state could advance in support of the restriction—"to preserve the racial integrity of its citizens"—was found to be related to maintaining "white supremacy," an illegitimate governmental purpose.

The principle that emerges from Brown, Bolling, and the post-Brown per curiams, as reflected in Loving, then, is that compulsory racial segregation in the schools or other public facilities is unconstitutional as violative of equal protection and due process because (1) it interferes with the liberty of blacks and whites to associate with each other in the use of public facilities, and (2) such interference is unrelated to any proper governmental objective. This principle is in accord with the Court's general approach to the matter of impermissible racial discrimination and the doctrine that it has developed in regard to racial equality. What the Constitution prohibits is the use of race-conscious criteria causing detriment to persons or groups where the use of such criteria does not advance "a valid and substantial governmental interest by what the Court finds to be appropriate means."

248 See Wisdom, supra note 201, at 142-43.
249 388 U.S. 1 (1967).
250 The only interracial marriage proscribed was between whites and persons of the "nonwhite" races. Persons of different "nonwhite" races were free to marry each other. Id. at 11-12.
251 See Sedler, Beyond Bakke, supra note 2, at 141-43.
The value implicated by state-imposed segregation under this analysis is the value of racial equality. Implementation and protection of this value renders unconstitutional all use of race-conscious criteria causing detriment to persons or groups that does not advance a valid and substantial governmental interest by what the Court finds to be appropriate means. Such a use of race-conscious criteria constitutes impermissible racial discrimination which "is unconstitutional whenever practiced by the state, whether at the instance of whites or at the instance of blacks, and whether the victims of such discrimination are blacks, whites or both."\textsuperscript{252}

The fourteenth amendment, and the other Reconstruction Amendments, taken as a whole, also embody another value, that of black freedom. As Professor Kinoy has stated:

\begin{quote}
[T]he main thrust of the Thirteenth, Fourteenth and Fifteenth Amendments was the construction of a penumbra of legal commands which were designed to raise the race of freedmen from the status of inferior beings—a status imposed by the system of chattel slavery—to that of free men and women, equal participants in the hitherto white political community consisting of the "people of the United States." The constitutional right of the black race to this status of freedom was the simple central objective of the Reconstruction Amendments.\textsuperscript{253}
\end{quote}

The Supreme Court recognized the constitutional significance of black freedom when it upheld the power of Congress, under the implementing clause of the thirteenth amendment, to prohibit racial discrimination by private persons as constituting "badges and incidents of slavery."\textsuperscript{254}

In Professor Kinoy's view, \textit{Brown} was a case strongly implicating the black freedom value. As he stated:

They [the school cases] are, of course, not primarily about education. They are about freedom for the Negro. Democracy in this country cannot function without the participa-

\textsuperscript{252} Id. at 143.
tion of its Negro citizens, and it is this recognition which underlies the school decisions. By a sweeping enunciation the Court sought to fulfill its highest role. It finally felt the necessity of assuming the responsibility no other branch of the Government was prepared to meet. It sought to unclog the threshold barriers to the black man's participation in the process of democracy—the institutions of segregation inherited from slavery.  

Similarly, Judge Carter, one of the counsel for the plaintiffs in Brown, has observed that "[a]s a result of this seminal decision, blacks had the right to use the main, not the separate waiting room; to choose any seat on the bus; to relax in the public parks on the same terms as any other member of the community. This and more became their birthright under the Constitution." Under this rationale, therefore, all state-imposed segregation is unconstitutional because it is inconsistent with the value of black freedom, as embodied in the Reconstruction Amendments.

It is thus possible to divorce Brown from the harm rationale which was advanced by the Court as the basis for its decision in that case, and from the educational context in which the case was decided. Nonetheless, in Brown the Court did find that state-imposed segregation in public education caused specific racial harm to black children by (1) depriving them of the opportunity for interracial associations during the educational process, and (2) causing them to suffer feelings of inferiority, which could adversely affect their motivation to learn. That state-imposed segregation was found to cause this specific racial harm to black children also may be relevant in determining whether the operation of schools that are in fact racially identifiable is likewise unconstitutional.

A precise rationale for the unconstitutionality of de jure segregation may now be set forth. Absent any proper governmental objective, the state cannot require racial segregation in schools or in public facilities because this interferes with the liberty of blacks and of whites to associate with each other in

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255 Kinoy, supra note 253 at 429-30. See also Pollak, supra note 225 at 31-34.
those facilities. Secondly, such segregation in the school context is unconstitutional because it results in specific racial harm to black children during the educational process. In terms of constitutional values, state-imposed segregation is inconsistent with the values of racial equality and black freedom, embodied in the fourteenth amendment and the other Reconstruction Amendments when analyzed in totality. Central to this rationale, whether in terms of the interference with the liberty of blacks and whites to associate with each other, or in terms of the specific racial harm caused to black children, or in terms of implicating constitutional values, is the absence of any justification for state-imposed segregation in the public schools. Therefore, in contemporary perspective, it is not difficult to understand why de jure segregation has been declared unconstitutional. The question to which this article now turns is whether the rationale for invalidating de jure segregation also may render unconstitutional the segregation that is the foreseeable result of the use of geographic attendance zoning as the basis of student assignment.

B. The Right to Attend a Racially Integrated School: The Brown-Bolling Rationale and Constitutional Values

The inquiry in this section of the writing is whether in light of the Brown-Bolling rationale, the state may constitutionally use geographic attendance zoning as the basis of student assignment if it results in the required assignment of students to schools that are, in fact, racially identifiable. As stated previously, this analysis will involve separate consideration of a constitutional right on the part of children to attend a racially integrated school, and if such a right is found to exist, of the state’s obligation to provide for attendance at racially integrated schools. This section will focus on the existence of the constitutional right, and will assume that the state could in fact operate racially integrated schools instead of racially identifiable schools without a great degree of dislocation. Using Justice Powell’s view of a “genuinely integrated school system” in Keyes as a model,\(^\text{267}\) assume that racially

\(^{267}\) For a discussion of this model, see notes 176-178 supra and accompanying
integrated schools could be attained by a redrawning of attendance zone boundaries, by split zoning, by making school construction and closure decisions with a view toward achieving integration, and by utilizing transportation, to the extent that it is provided, to promote integration. Instead, the school authorities adhere to strict geographic attendance zoning, making no attempt to bring about integration, but not manipulating anything to bring about segregation either.\textsuperscript{258}

Much has been written about the "affirmative duty to integrate."\textsuperscript{259} The commentators generally have approached the question in terms of the harm that is caused to black children by required attendance at racially identifiable schools. It has been suggested, for example, that in order for racial integration to be constitutionally required, it would have to be shown that attendance at racially identifiable schools "inflicted the same educational harm as the statutorily-imposed segregation outlawed in Brown."\textsuperscript{260} Professor Fiss, who has long been a proponent of a constitutionally-required duty to integrate, has approached the question in terms of the denial of equal educational opportunity to a child required to attend a racially identifiable school.\textsuperscript{261} He would find a duty to integrate if it is proved that the racially identifiable school "is academically inferior, that the child compelled to attend the school is deprived of important social relationships, or that the child suffers personal harm."\textsuperscript{262} He also notes that attendance at the racially identifiable school could stigmatize the black child in the same manner as if segregation were required by state law.\textsuperscript{263} Finally, in relating integration to equality of educational opportunity, he concludes:

\textsuperscript{258} For a case such as this see Higgins v. Board of Educ., 508 F.2d 779 (6th Cir. 1974).

\textsuperscript{259} Some of the major writings are Dimond, \textit{supra} note 63; Fiss, \textit{Racial Imbalance}, \textit{supra} note 164; Goodman, \textit{supra} note 215; Yudoff, \textit{supra} note 216.


\textsuperscript{261} Fiss appears to use the term "racially imbalanced" in the sense that we use "racially identifiable." Fiss, \textit{Racial Imbalance}, \textit{supra} note 164, at 565.

\textsuperscript{262} \textit{Id.} at 567-70.

\textsuperscript{263} Fiss, \textit{The Charlotte-Mecklenburg Case}, \textit{supra} note 164, at 697.
Long familiar to the courts, this goal is linked to the furtherance of many objectives that cluster around the idea of equality—assuring an equal distribution of resources among the schools of the district, eliminating the badge of inferiority imposed by placing blacks in separate schools, furthering the social contacts between racial classes, and reducing the educational achievement gap between blacks and whites by placing blacks in a setting dominated by the educational advantages and aspirations of the majority class.264

This being so, he suggests that "the connection between the idea of equality and integration may be so firm as to make integration not only a constitutionally permissive goal but also a constitutionally favored or required one."265

The harm and denial of an equal educational opportunity approach to the constitutionality of required attendance at racially identifiable schools is based, of course, on the harm rationale of Brown.266 In Brown, as previously observed, required attendance at de jure segregated schools was found to cause specific educational and personal harm to black children by depriving them of the opportunity for interracial association during the educational process, and by causing them to suffer feelings of inferiority, which, in the school setting, could adversely affect their motivation to learn. Bolling, on the other hand, related the lack of interracial association to the restriction on the liberty of black children—and by implication on the liberty of white children—267 to have interracial associations during the educational process. Whether the interference with the interest in interracial association by state-imposed segregation is viewed in terms of specific educational harm or in terms of a restriction on liberty is unimportant for purposes of constitutional analysis. Under either analysis, the interference with the interest in interracial association by state-imposed segregation is unconstitutional under the Brown-Bolling rationale, because it is not reasonably related to any proper governmental objective.

264 Fiss, supra note 54, at 11.
265 Id. at 212.
266 See the discussion in Fiss, Racial Imbalance, supra note 164, at 594-95.
Regarding an explanation of *Brown* and *Bolling* in terms of constitutional values, as observed earlier, state-imposed segregation is inconsistent with both the value of racial equality and the value of black freedom, values which are embodied in the Reconstruction Amendments.\(^{268}\) Going beyond the situation of state-imposed segregation, the value of racial equality and the value of black freedom coalesce to make racial integration itself an important constitutional value. Thus, as the Court recognized in *Swann*, a school district can assign students on a racial basis for the purpose of achieving racially integrated schools.\(^{269}\) This idea was reinforced in *Regents of the University of California v. Bakke*,\(^ {270}\) in which the Court held that a public university can use race-conscious criteria in determining admission to its professional schools for the purpose of achieving a racially diverse student body.\(^ {271}\) In other words, because it is consistent with the constitutional value of racial integration, the government can require that any activity or program it operates be administered on a racially integrated basis.\(^ {272}\)

My approach to the question of the existence of a constitutional right to attend a racially integrated school is based on the *Brown-Bolling* rationale for invalidating state-imposed segregation, as it relates to the constitutional values that are implicated by required attendance at racially identifiable schools. It is my submission that required attendance at racially identifiable schools resulting from the use of geographic attendance zoning as the basis of student assignment cannot be sustained under the *Brown-Bolling* rationale for invalidating state-imposed segregation and is inconsistent with the constitutional values of racial equality, black freedom, and, of course, racial integration itself.

If this submission is correct, the distinction between the

\(^{268}\) See text accompanying notes 253-56 *supra* for a discussion of these constitutional values.

\(^{269}\) See note 56 *supra* for a discussion of this aspect of the *Swann* decision.


\(^{272}\) *Id.* at 159. A public housing authority, for example, could assign housing on a racial basis to insure that all of the sites would be integrated. *See* Otero v. New York Hous. Auth., 484 F.2d 1122 (2d Cir. 1973).
segregation required by state law and the segregation that results from the use of geographic attendance zoning as the basis of student assignment relates only to the fact that the state may be able to assert a justification for the segregation produced by geographic attendance zoning that it cannot assert for the segregation required by state law. But simply because the government can advance a justification for its action does not, of course, resolve the constitutional question. Whenever governmental action interferes with important interests and implicates constitutional values, the Constitution requires that there be a balancing of the conflicting interests in light of those constitutional values. It is thus necessary to balance the interests of children in attending racially integrated schools against the interests asserted by the state in support of the use of geographic attendance zoning. The balancing process, when undertaken in light of constitutional values, establishes that the constitutional balance must be struck in favor of a right to attend a racially integrated school.

Looking first to the Brown-Boiling rationale, we see that required attendance at racially identifiable schools interferes with the interest of black and white children in associating with each other during the educational process, causing them specific educational harm. The interference with that interest is necessarily the same whether the schools are racially identifiable because state law mandates racial segregation or because the state has used geographic attendance zoning.

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273 For a general discussion of constitutional balancing, see P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 987-96 (1975).

274 The ultimate harm is that it does not prepare them to live in a multiracial society. While this harm may be more acute for black children, since they are in the minority and must learn to live in a white-dominated society, the harm is felt by white children, too. See the discussion in Hart v. Community School Bd. of Educ., 383 F. Supp. 699, 740 (E.D.N.Y. 1974), aff'd, 512 F.2d 37 (2d Cir. 1975). In terms of learning how to live in a multiracial society, a school attended by children of both races offers a very different learning experience than a racially identifiable school. As to the importance of diversity in the educational process, see also Bakke, 438 U.S. at 311-14 (opinion of Powell, J.). As one commentator has observed: "The goal of the desegregation process is a reasonable degree of social integration and a lack of overt conflict whereby blacks and whites, given an objective important to both, can trust each other and listen to each other sufficiently well to complete the task at hand, whether it be a vocational task, an educational task or a political task." Cohen, The Effects of Desegregation on Race Relations, 39 L. & CONTEMP. PROB. 271, 273 (1975).
which interacts with residential racial segregation to produce racially identifiable schools.\textsuperscript{275} The rationale of \textit{Brown-Bolling}, then, would indicate that required attendance at racially identifiable schools, like required attendance at schools segregated by law, is unconstitutional unless the use of geographic attendance zoning advances some governmental interests, which, on balance, outweigh the interest of black and white children in associating with each other during the educational process, and in deriving educational advantage from such interracial association.

Since required attendance at racially identifiable schools interferes with the interest in interracial association and causes specific educational harm to black and white children, a constitutional basis for recognition of a right to attend a racially integrated school can be predicated on the interference with this interest and the causing of this specific educational harm. It is unnecessary, therefore, in the constitutional analysis, to consider whether such required attendance causes additional harm or in other respects denies equal educational opportunity. We need not consider, for example, whether required attendance at racially identifiable schools produces feelings of inferiority in black children in the same manner as required attendance at \textit{de jure} segregated schools.\textsuperscript{276} Nor are we concerned with whether attendance at racially integrated schools can be shown to improve the academic achievement of black children in regard to the cognitive skills. While there is substantial, although controverted, evidence showing that the academic achievement levels of black children attending racially integrated schools are generally higher than the academic achievement levels of black children attending racially identifiable schools,\textsuperscript{277} there is no evidence suggesting that the

\textsuperscript{275} The presence of a few children of the other race in the school is irrelevant, because it does not obviate the absence of the opportunity for meaningful interracial association.

\textsuperscript{276} We thus discard this part of the \textit{Brown} holding for purposes of the present constitutional analysis. Compare the earlier approach in Sedler, \textit{School Segregation}, supra note 53, at 254-56.

\textsuperscript{277} For a comprehensive review of the various studies, see Crain & Mahard, \textit{Desegregation and Black Achievement: A Review of the Research}, 42 L. & CONTEMP. PROF. 17 (1978).
higher achievement level of black children attending racially integrated schools is due to the racial mixture or to the presence of white children in the school as such. The interest-harm predicate for recognition of a constitutional right to attend a racially integrated school then, based on the Brown-Bolling rationale, is the interest of black and white children in interracial association during the educational process, and the concomitant educational harm that is caused to black and white children by the denial of the opportunity for interracial association.

Required attendance at racially identifiable schools is, of course, inconsistent with the constitutional value of racial integration, and that value is no less implicated when the racial identifiability of the schools results from geographic attendance zoning than when it results from state laws mandating racial segregation. More significantly perhaps, required attendance at racially identifiable schools strongly implicates the basic values of racial equality and black freedom embodied in the fourteenth amendment and the other Reconstruction.

Crain and Mehard, while concluding that the studies show overall achievement gains for black students attending racially integrated schools, note as follows:

All else being equal, will the mixing of races alone result in higher black achievement? That question cannot be answered because in the real world desegregation is never an "all else equal" situation. Desegregation sometimes results in better curricula or facilities; it often results in blacks having better trained or more cognitively skilled teachers, it is frequently accompanied by a major effort to upgrade the quality of education, and it almost always results in socioeconomic desegregation. When desegregation is accompanied by all of these factors, it should not be surprising that there are immediate achievement gains half to two-thirds of the time. This suggests that desegregation is sufficient but not necessary to obtain these gains, since there are other ways to achieve curriculum reform or better teaching if the political will is present.

Id. at 49.
See also Hawley, The New Mythology of School Desegregation, 42 L. & CONTEMP. PROB. 217, 238-39 (1978). As pointed out previously, in Brown, the Court did not make any finding to the effect that the academic achievement of black children at racially integrated schools necessarily would be higher than the academic achievement of black children at racially segregated schools, and there would have been no basis for making such a finding. See notes 214-15 supra and accompanying text. Thus, as one commentator has noted, "making the case for desegregation... [hinge] on whether it improves the achievement test scores of minority students is a far cry from the rationale of Brown." Levin, Education, Life Chances, and the Courts; The Role of Social Science Evidence, 39 L. & CONTEMP. PROB. 217, 238-39 (1975).
tion Amendments because it perpetuates and reinforces ghettoization and residential racial segregation, one of the most pronounced consequences of the social history of racism in this nation.²⁷⁹ Existing patterns of residential racial segregation and the ghettoization of American cities have been produced by a long history of massive racial discrimination on the part of all components of the housing delivery system,²⁸⁰ and patterns of residential racial segregation, once established, are highly resistant to change.²⁸¹ When the state assigns children to school on the basis of where the children live, therefore, it is necessarily incorporating the consequences of a social history of racism into the educational process, and residential racial segregation becomes reinforced and perpetuated in school segregation. Precisely because blacks have been confined to living in designated areas identified by the race of the occupants, black children are assigned to schools, likewise identified by the race of the students. While patterns of residential racial segregation cannot be uprooted by governmental action, it is governmental action that transforms residential racial segregation into school segregation and causes racially identifiable schools to come into being. For the state to reinforce and perpetuate this consequence of the social history of racism implicates most strongly the constitutional values of racial equality and black freedom.²⁸²

The constitutional basis for recognition of a substantive right to attend a racially integrated school, then, is as follows. Required attendance at a racially identifiable school interferes

²⁷⁹ As to the meaning of the “social history of racism in this Nation,” see Sedler, Beyond Bakke, supra note 2, at 135-41.
²⁸⁰ The housing delivery system refers to the process by which houses are built, how they come on the market, and how they are bought, sold, and financed. The government, the real estate industry, and the home financing industry are among the various components of the housing delivery system.
²⁸¹ In the first place, people make only a limited number of moves over a lifetime. Secondly, and perhaps more significant in this regard, people have become so conditioned to relating race and residence, that a great number of persons would not consider locating in places where the other race predominates or, in many instances, even in places where there is some racial integration.
²⁸² For the view that the government may not take action that perpetuates the disadvantaged position of racially disadvantaged groups, see Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 157-59 (1976).
with the interest of black and white children in interracial association during the educational process and so causes them to suffer specific educational harm. Such required attendance is inconsistent with the constitutional value of racial integration, and more significantly, strongly implicates the basic constitutional values of racial equality and black freedom by reinforcing and perpetuating residential racial segregation and ghettoization. Therefore, it is submitted, there is a strong constitutional justification for recognition of a substantive right on the part of children to attend a racially integrated school.

In this connection, it may be noted that it is the required attendance of children at racially identifiable schools that goes to the essence of the constitutional claim. It is not contended that the Constitution mandates that all of the schools within a school system in fact be racially integrated. The distinction between the required attendance of children at racially identifiable schools and the operation of all schools on a racially integrated basis is significant in terms of constitutional analysis. It is the required attendance at racially identifiable schools that interferes with the ability of black and white children to associate with each other during the educational process and causes them to suffer specific educational harm. It is also the required attendance at racially identifiable schools that strongly implicates constitutional values.

Let us suppose that a school district operates two high schools, both of which are centrally located in non-residential areas. The students are permitted to choose the school they wish to attend, and all students are provided the necessary transportation to the school of their choice. Neither school is enrolled at capacity and no student is denied a choice of schools. It turns out that the enrollment at one school is predominantly white and the enrollment at the other school is predominantly black to the point that both schools would be considered racially identifiable. Under the present analysis the state would not be acting unconstitutionally here, because no child is required to attend a racially identifiable school and thus is not denied the opportunity for interracial association during the educational process. And since the state is not using geographic attendance zoning, it is not implicating consti-
tutional values by reinforcing and perpetuating ghettoization and residential racial segregation. It is only the required assignment of children to racially identifiable schools then that under this analysis may be violative of the Constitution. 283

Required attendance at racially identifiable schools interferes with interracial association during the educational process and implicates constitutional values in the same manner as state laws mandating racial segregation. If required attendance at legally segregated schools, therefore, is unconstitutional, but required attendance at racially identifiable schools is not unconstitutional, it must be because, while state-required segregation cannot advance any valid governmental interest, 284 the state is able to set forth valid interests that are advanced by geographic attendance zoning which, on balance, outweigh the interests of children in attending racially integrated schools. It is that question on which consideration now must focus.

Geographic attendance zoning can be said to advance certain governmental interests related to the operation of "neighborhood schools." 285 Geographic attendance zoning is the most efficient method of assigning students to particular schools and minimizes or reduces the amount of student transportation required. 286 Any substantial departure from strict geographic attendance zoning likely will require at least some ad-

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283 By the same token, a school system would not be acting unconstitutionally under the present analysis if it had systemwide open enrollment at all schools, providing transportation to any school a student wished to attend, notwithstanding that some schools might turn out to be racially identifiable. It could be contended that constitutional values preclude that state from operating any activity except on a racially integrated basis, where both blacks and whites participate in that activity, but this conclusion would not follow from the present analysis.

284 See the text accompanying notes 285-97 infra for a discussion of governmental interests with regards to school segregation.

285 In the school context, as Justice Powell has observed, "neighborhood school" does not necessarily mean a "walk-in" school, but instead "refers to relative proximity, to a preference for a school nearer to, rather than more distant from, home." Keyes v. School Dist. No. 1, 413 U.S. at 245 n.25 (Powell, J., concurring in part, dissenting in part).

286 As the Court noted in Swann: "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their home." 402 U.S. at 28. See also the discussion by Justice Powell in his separate opinion in Keyes, 413 U.S. at 245-48.
ditional student transportation which will increase operating costs, and will either add to the length of the school day or will reduce the portion of the school day that is devoted to school activities. The existence of "neighborhood schools" is said to facilitate parental involvement in the schools and the ability of the parent to get to the school sooner in the event of an emergency. It has been contended that "neighborhood schools" are desirable because they "reflect the deeply felt desire of citizens for a sense of community in their public education," and that, "[c]ommunity support, interest, and dedication to public schools may well run higher with a neighborhood attendance pattern."

These interests, however, apart from the "community support" interest, are essentially "administrative convenience" interests. It is more convenient for the school authorities and for the students if the students are assigned to the schools closest to their homes, but as evidenced by widespread and ever-increasing student transportation throughout the country, transporting students to school located some distance from their homes is not considered to have an adverse effect on the educational process. It may be more convenient for parents to go to their children's school if that school is located closer to home, but it is difficult to believe that if they are otherwise disposed to become involved in the school, or that if any emergency occurs, they will not travel to the school wherever it is located.

It is these "administrative convenience" interests that must be balanced against the interests of children in having interracial associations during the educational process and the educational advantage that derives from such association.

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287 See Id. See also Fiss, Racial Imbalance, supra note 164, at 566.
288 413 U.S. at 246 (Powell, J., concurring in part, dissenting in part); Fiss, Racial Imbalance, supra note 164, at 566.
289 413 U.S. at 246 (Powell, J., concurring in part, dissenting in part).
290 See the discussion in Hawley, supra note 278, at 224-26.
291 The essential premise of school consolidation—which is occurring at a high rate in many school systems today because of declining enrollment—is that the location of the school a particular child attends will not make any difference. And as a practical matter, with an ever-increasing number of single parent and "two paycheck" families, the parent is not likely to be at home in the case of an emergency anyway.
"Administrative convenience" generally has not ranked very high on the constitutional scale, for as the Court has noted, "[t]he Constitution recognizes higher values than speed and efficiency." Moreover, the interests of children in having interracial associations during the educational process is supportive of the constitutional value of racial integration, and, as pointed out previously, requiring children to attend racially identifiable schools is inconsistent with the basic constitutional values of racial equality and black freedom. While "administrative convenience" may have relevance in some contexts, it surely cannot begin to equal in constitutional importance racial integration and interracial association during the educational process.

The asserted "community support" interest is completely speculative, since it is difficult to see any logical relationship between the method of student assignment and community support for the schools. What the asserted "community support" interest may really mean, however, is that people's support for the public schools is related to whether or not they can determine the particular school that their children will attend through their choice of residence. And, since residential neighborhoods are largely racially and socially homogeneous, what the state is saying is that people must be permitted to have their children attend racially and socially homogeneous schools as a condition for their support of the public schools. A more patent inconsistency with the equality value of the fourteenth amendment is difficult to imagine. There is no "right" to attend a "neighborhood" or racially homogeneous school, and the state cannot, consistent with constitutional

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330 See notes 259-62 supra and accompanying text for a discussion of the children's interest.
331 See notes 253-56 supra and accompanying text for a discussion of these two values.
332 For example, administrative convenience is relevant in classifications to determine eligibility for social welfare benefits. See Matthews v. Lucas, 427 U.S. 495 (1976); Weinberger v. Salfi, 422 U.S. 749 (1975); but "administrative convenience" may not be relied on to support a gender-based classification, even with respect to eligibility for social welfare benefits. Califano v. Goldfarb, 430 U.S. 199 (1977).
values, assert an interest that enables parents to avoid having their children attend school with children of a different race or socio-economic class.

It is submitted, therefore, that upon balancing the interests of children in attending racially integrated schools against the state's interest in "administrative convenience" and "community support" in light of constitutional values, the balance clearly must be struck in favor of the interest of interracial association during the educational process. If this be so, the Constitution must be interpreted to recognize a substantive constitutional right of children to attend a racially integrated school, and the state may not insist on geographic attendance zoning to compel children to attend racially identifiable schools. 287

C. The Scope of the State's Obligation to Provide for Attendance at a Racially Integrated School

This section of this writing examines the scope of the state's obligation to implement the constitutional right to attend a racially integrated school. Since the constitutional basis for the existence of the substantive right is not the state's responsibility for the maintenance of a dual school system, but the entitlement of children to attend a racially integrated school, there is no concern with desegregation of the school system. Rather, the question is whether the Constitution requires the state to provide for attendance at racially integrated schools for all children to the maximum extent feasible, 288 or whether a lesser degree of obligation is constitutionally permissible.

The state's "minimum obligation" would be that outlined by Justice Powell in Keyes in the context of defining a "genuinely integrated school system." 289 Essentially what this

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note 56 supra for additional authority.

287 This question, as noted, was specifically left open in Keyes. See note 186 supra.

288 The state must integrate schools to the maximum extent feasible when the obligation is to eliminate all vestiges of de jure segregation. See notes 28 and 40 supra and accompanying text for a discussion of this obligation.

289 See notes 176-79 supra and accompanying text for a discussion of Justice
means is that the school authorities would have to do every-
thing, short of extensive additional student transportation, to
achieve maximum racial integration. It would include the
redrawing of attendance zones with reference to the race of
the students who would be attending particular schools, split
zoning, making school construction and closure decisions, and
utilizing transportation, to the extent that it is provided, with
a view toward achieving integration. Imposition of this
"minimum obligation" effectively would bring about desegre-
gation in the smaller urban school systems and would insure
that all children enrolled in such systems would be able to
attend a racially integrated school.

In larger urban areas, however, because of extensive resi-
dential racial segregation, the right to attend a racially inte-
grated school cannot be implemented for many children with-
out substantial additional student transportation. If that
right is to be fully implemented in those school systems,
therefore, the school authorities, as a practical matter, will
have to desegregate most of the schools in the school system
by student transportation in much the same manner as a
school system that is required to remedy systemwide de jure
segregation. The question then is whether the Constitution
imposes this kind of obligation on the state to implement the
substantive right to attend a racially integrated school.

This question, like the question relating to the existence
of the substantive right, must be approached in terms of bal-
ancing. It is necessary to balance the importance of the inter-
est of children in attending racially integrated schools against
the importance of the interests of the state that are adversely
affected by the requirement of substantial student transporta-
tion. The state would first contend that substantial student

Powell's opinion in Keyes.

This was my earlier view regarding the extent of the state's obligation to pro-
vide for attendance at racially integrated schools. See note 53 supra.

See 413 U.S. at 248-49.

See note 298 supra for a discussion of the maximum obligation of the state to
eliminate all vestiges of de jure segregation.

Cf. Fiss, supra note 54, at 15. ("The question that should be asked first is
whether the maintenance of segregated schools violates the Constitution. If so, then
what would be required is the elimination of that segregation or integration.")
transportation imposes a "cost and disruption burden" on the school system going beyond the "administrative convenience" that is served by geographic attendance zoning. The costs may be considerable in dollar terms, and substantial student transportation not only causes a good deal of "disruption" in the school system as a whole, but can convert the school system from a "walk-in" system to a "busing" system.

The second, and probably more significant objection made by the state, is that substantial student transportation for racial integration purposes will cause "white flight" from the public schools. It is strongly maintained by school authorities that substantial student transportation for racial integration purposes in urban school systems, which is likely to include the transporting of white students to schools located in black residential areas, will significantly reduce the white enrollment of the school system. White parents whose children are now enrolled in the system will either enroll their children in private schools or relocate in the adjacent predominantly white suburban districts, and white families with school age children who are moving into the metropolitan area will be more likely to locate in the suburban section of the area. The end result, it is claimed, will be to make the urban school district "black and poorer" and still will leave racially identifiable schools.

The matter of "white flight" due to school desegregation has been the subject of considerable empirical research. However, as in the situation where the school authorities are required to remedy de jure segregation, the time and distance of busing could not be so great as to "either risk the health of the children or significantly impinge on the educational process." Swann, 402 U.S. at 30-31.

This argument was recently advanced by Justice Powell in his dissent from the dismissal of certiorari in Estes v. Metropolitan Branches of Dallas NAACP, 48 U.S.L.W. 4118, 4121-22 (U.S. Jan. 21, 1980).


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304 But the cost of such transportation still will be small in relation to the school system's overall budget: on the average less than two percent. G. ORFIELD, MUST WE BUS 131 (1978) (quoting from SENATE SELECT COMMITTEE ON EQUAL EDUCATIONAL OPPORTUNITY, TOWARD EQUAL EDUCATIONAL OPPORTUNITY, FINAL REPORT 92:2 at 208-09 (GPO 1972).

305 However, as in the situation where the school authorities are required to remedy de jure segregation, the time and distance of busing could not be so great as to "either risk the health of the children or significantly impinge on the educational process." Swann, 402 U.S. at 30-31.

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“white flight,” particularly as to its long-term effect, it cannot be disputed that an attempt to desegregate the schools by substantial student transportation, including the transportation of white students to schools located in black residential areas, will cause at least some reduction in the white enrollment of the school system.308

Let us first consider the asserted interest in preventing “white flight.” It is submitted that this interest is a constitutionally impermissible one and so cannot be interposed in the balancing equation against full implementation of the right to attend a racially integrated school. The Court has stated, in the context of remedying de jure segregation, that a fear of “white flight” cannot “be accepted as a reason for achieving anything less than complete uprooting of the dual public school system.”309 If this is true when the right involved is the right to attend school in a school system in which there presently exist no vestiges of de jure segregation, it must be equally so when the right involved is the right to attend a racially integrated school. The asserted interest in preventing “white flight” amounts to nothing more than an accommodation of the racial prejudices and fears of white parents, and any recognition of that interest is patently inconsistent with constitutional values.310 “[T]he vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them,”311 and if implementation of the right to attend a racially integrated school results in a loss of students to the school system, this is a price that the Constitution requires the school system to bear. If the Constitution recognizes a right to attend a racially integrated school, it also re-

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308 This is indicated in all of the studies. Rossell, supra note 307, at 168-69. The disagreement is over the long-term effect of “white flight” on the black-white composition of the district.


310 The courts generally have been reluctant to take the possibility of “white flight” into account even in the context of formulating particular desegregation remedies. See the discussion and review of cases in Levin & Moise, supra note 260, at 93-98.

quires that so long as there are black and white students in the school system, they must attend school together. The matter of "white flight" will be considered more fully in connection with the crossing of school district lines but the point to be emphasized now is that the state cannot, in light of well-settled constitutional principles, resist full implementation of the right to attend a racially integrated school on the ground that this will produce "white flight."

This analysis leaves the "cost and disruption" interest as the only permissible interest to be asserted in the balancing equation against full implementation of the right to attend a racially integrated school. While this interest is not completely insubstantial, it would not seem to be sufficient to outweigh the interest of black and white children in interracial association during the educational process, an interest that is firmly rooted in and supportive of constitutional values. Again, if "cost and disruption" is not sufficient to interpose against the required transportation of students when the right involved is the right to attend school in a school system in which there exist no vestiges of de jure segregation, it is difficult to see why it should be sufficient to interpose when the right involved is the right to attend a racially integrated school. The "cost and disruption" interest is not qualitatively different from the "administrative convenience" interest relied on in the first instance to justify geographic attendance zoning as the basis of student assignment. The difference between the two interests is one of degree, and it is not unreasonable to expect a school system to bear the "cost and disruption" that is necessary to implement fully the constitutional right to attend a racially integrated school. It is submitted, therefore, that the state's constitutional obligation is to provide for attendance at a racially integrated school to the maximum extent feasible, and that it must furnish the requisite student transportation to effectuate this obligation.

The next question for consideration is whether the state's obligation to provide for attendance at racially integrated

\[212\] See a discussion of this interest by Justice Powell in his separate opinion in Keyes, 413 U.S. at 248-52.
schools to the maximum extent feasible is circumscribed by the existence of separate school districts established pursuant to state law. As discussed previously, the Court's holding in *Milliken I* with respect to the remedial powers of the federal courts to impose interdistrict desegregation orders was based on the premise that the substantive right related to the situation prevailing in the school system in which the child was enrolled, and that there was no substantive right to attend a racially integrated school. Once it is recognized that the substantive right is the right to attend a racially integrated school, the holding and rationale of *Milliken I* necessarily are inapplicable. The issue becomes whether, in the interdistrict context, the state can assert interests that, on balance, outweigh the interests of children in having interracial associations during the educational process and the educational benefit they derive from attending racially integrated schools.

The matter of crossing school district lines would arise in the case of urban school systems that have become so heavily black in enrollment that even with the maximum dispersion of white students, it would not be possible to integrate very many schools in the urban system alone. These systems, of course, are surrounded by predominantly or virtually all-white school systems in which, even with the maximum dispersion of black students, it would not be possible to integrate very many schools in those systems. We are assuming for purposes of this analysis that interdistrict desegregation would be fully practicable; that is, that the time and distance involved in student transportation between the urban and suburban districts would be substantially the same as that involved in student transportation within a large urban district or a consolidated district.

The interest that the state would interpose in opposition

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313 See notes 141-46 *supra* and accompanying text for a discussion of *Milliken I*.

314 Because of the substantially predominant white to black ratio of the metropolitan area as a whole, a school with a very high proportion of black students in the urban school system would be perceived objectively as a racially identifiable black school notwithstanding the presence of some whites. See note 3 *supra* and accompanying text for further discussion of this definition.

315 See note 145 *supra* and accompanying text for a discussion of the *Milliken I* dissents regarding transporting students for purposes of interdistrict desegregation.
to interdistrict desegregation presumably would be the interest of the local autonomy of the separate school districts, which, the state would contend, would be adversely affected by the interdistrict assignment of students. In *Milliken I* and in *San Antonio Independent School District v. Rodriguez,*\(^{316}\) the Court indicated that this interest was one that was entitled to considerable weight. The Court in *Milliken I* stated that "no single tradition in public education is more deeply rooted than local control over the operation of the schools."\(^{317}\) And in *Rodriguez,* the Court stated that local control over the educational process affords citizens "the opportunity . . . for participation in the decisionmaking process," permits "[e]ach locality . . . to tailor local programs to local needs," and encourages "experimentation, innovation, and a healthy competition for educational excellence."\(^{318}\) Of the interests asserted thus far by the state as bases for avoiding the obligation to provide for attendance at racially integrated schools to the maximum extent feasible, the interest in local autonomy is clearly the most significant.

Local autonomy, however, as related to local control over the educational process and the operation of the schools, need not be affected adversely in any way by interdistrict desegregation and can be protected in the particular interdistrict desegregation plan that is adopted. The plan could leave existing school districts intact and assign the children across the boundaries of those districts, with each child attending school for some of the years in the "home" district and for some of the years in the "receiving" district.\(^{319}\) The parents from the "sending" district could be involved with the schools in the "receiving" district during the years when their children were attending school in that district. The "sending" and "receiving" districts also could cooperate in maintaining curricular

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\(^{316}\) 411 U.S. 1 (1973).
\(^{317}\) 418 U.S. at 741.
\(^{318}\) 411 U.S. at 49-50.

\(^{319}\) In the Louisville-Jefferson County litigation, although the city system was merged into the county system, the concept of "home school" and "receiving school," with the students attending each school for some of their school years, was incorporated into the desegregation plan. See Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1976).
consistency. There also could be a metropolitan authority that would be responsible for the assignment of students and the coordination of the desegregation program. In addition, most states have established procedures for the reorganization of school districts through consolidation, merger or annexation. Existing school districts could be reorganized through such procedures, so that local control would be preserved in the reorganized district. The point to be emphasized is that interdistrict desegregation is in no way inconsistent with local control over education, and local control can be preserved in the particular desegregation plan that is adopted. This being so, the local autonomy interest cannot properly be interposed against interdistrict desegregation when desegregation is necessary so that the rights of all the children in the metropolitan area to attend a racially integrated school can be implemented fully.

The interest in the local autonomy of the separate school districts, however, may be seen as going beyond local control and relating to the perceived advantages for the students currently enrolled in the suburban school districts. Those districts are generally racially and socially homogeneous, and the residents of those districts “may be willing to tax themselves at a higher rate, knowing that the money will be spent for the education of their own children and not for the education of lower-income children.” Interdistrict desegregation will result in the abolition of the present racially and socially homogeneous schools and will require at least some degree of sharing of educational resources between the urban and suburban school districts. If local autonomy relates to the perceived advantages for the students currently enrolled in the suburban school districts, then local autonomy clearly will be adversely affected by interdistrict desegregation.

Recognition of the interest in local autonomy in this

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321 See Sedler, supra note 7, at 552-53.
322 Id. at 553.
323 Id. at 553-54.
sense is clearly constitutionally impermissible. It would mean that the white children who were living in the suburban school districts would for this reason avoid association with the black children who live in the urban school district during the educational process.\footnote{324} Since the state cannot affirmatively act to enable whites to avoid association with blacks in public facilities,\footnote{325} it cannot assert an interest related to enabling whites to avoid interracial association in opposition to its obligation to provide for attendance at racially integrated schools.

It is submitted, therefore, that the state cannot advance any valid local autonomy interest that would be adversely affected by interdistrict desegregation. This being so, the state's obligation to provide for attendance at racially integrated schools cannot be circumscribed by the existence of separate school districts.

A final point in consideration of the scope of the state's obligation to provide for attendance at a racially integrated school concerns the impact of anticipated "white flight" on the implementation of that obligation. While, as discussed previously, the asserted interest in preventing "white flight" properly cannot be interposed against the state's obligation to provide for attendance at racially integrated schools to the maximum extent feasible,\footnote{326} the fact that desegregation is likely to cause some reduction in the white enrollment of the school system may be relevant to a determination of precisely how the state's obligation is to be implemented in a particular situation. It is clear that "white flight" is directly related to the black proportion of the school system and to the proportion of white students who must be reassigned to schools lo-

\footnote{324} As emphasized, the right to interracial association during the educational process is a right that belongs to white children as well as to black children. Here, however, the parents of white children and possibly the children themselves do not wish to exercise that right and are in effect asserting a right not to associate with black children during the educational process.

\footnote{325} See notes 242-45 supra and accompanying text for a discussion of the lack of a constitutional recognition for the right of whites to avoid associations with blacks.

\footnote{326} See notes 306-11 supra and accompanying text for a discussion of the state's interest in avoiding "white flight."
cated in black residential areas.\textsuperscript{327} This being so, "white flight" is most pronounced in urban school systems surrounded by accessible white suburbs and least pronounced in large metropolitan systems surrounded by minimally developed rural areas.\textsuperscript{328} It could be contended, therefore, that where the black proportion of a school system is sufficiently high, so that, in view of anticipated "white flight," it will not be possible to integrate effectively many schools in the system, at least for very long, an interdistrict desegregation remedy should be imposed instead of limiting desegregation to the urban system alone.

It is submitted, however, that the court should not take into account anticipated "white flight" in formulating the initial desegregation remedy, because the court is not foreclosed from imposing an interdistrict remedy subsequently, should this become necessary. Since the nature of the substantive right relates to attendance at a racially integrated school rather than to the existence of \textit{de jure} segregation in the school system, the corresponding obligation of the state to provide for attendance at a racially integrated school is ongoing and would not be terminated at the time the initial desegregation plan went into effect. Under the present state of the law, since the obligation is to eliminate all vestiges of \textit{de jure} segregation in the school system, the state satisfies its obligation when those vestiges are eliminated and it is not required to take any further action when subsequent population shifts result in schools again becoming racially identifiable.\textsuperscript{329} But where the nature of the substantive right gives rise to an ongoing obligation, if subsequent population shifts make it impossible to achieve effective desegregation within the urban district alone, the court can then impose an interdistrict remedy in order to implement fully the substantive right.

This is the wiser course of action to follow, since the long-term extent of "white flight" resulting from school desegregation is unclear.\textsuperscript{330} Even data purporting to establish the exis-

\textsuperscript{327} See Rossell, \textit{supra} note 307, at 154.
\textsuperscript{328} See Armor, \textit{supra} note 307, at 9, 18.
\textsuperscript{330} Dr. Armor maintains that there is a significant long-term effect. As he states:
tence of long-term “white flight” show that its effect on the white enrollment of the school system is not that great. For example, in a recent study surveying a number of school systems in which long-term “white flight” is claimed to have occurred, the highest percentage loss of white students in any school system—the difference between the projected and actual white percentage of the school system—was only sixteen percent. Such a percentage decline is not likely in most school systems to make the proportion of white students too low to integrate effectively most of the schools in the system. As a practical matter, long-term “white flight” due to

The effect is strongest in the first year of desegregation, with average white losses accelerating by factors of 2 to 4 in most cases. But the projections also show that many districts suffer anticipatory white losses, usually between the initial legal activities and the actual start of desegregation. More important, the method also shows that in most districts the accelerated white losses last for prolonged periods up to four or five years or more. Sometimes these longer-term effects are boosted by subsequent court actions taken to broaden desegregation. It is important to stress that not all white losses are attributable to the court actions. Nonetheless, the extra white losses caused by court-ordered mandatory desegregation are very substantial, in most cases amounting to over half of all white losses over periods of six to eight years.

Armor, supra note 307, at 41. Rossell, however, contends that:

Analysis of the long term effect in a sample of 113 school districts indicates that the implementation year effect is offset in postimplementation years in less than normal white enrollment losses. . . . Secondly, the effect of desegregation on white enrollment is negative only in the year of implementation and the first postdesegregation year. There is a positive relationship between the extent of desegregation in the year the plan is implemented (T + 0) and changes in white enrollment by the end of the second year of the plan (T + 2). In other words, the greater the amount of desegregation when the plan is initially implemented, the smaller the decline in white enrollment two years later.

Rossell, supra note 307, at 163-64.

Armor, supra note 307, at 32.

331 Armor, supra note 307, at 32.

332 It will be recalled that the definition of a racially integrated school utilized herein is a school where a substantial number of black students and a substantial number of white students are in attendance and does not depend on any racial ratio. See notes 3-6 supra and accompanying text. It may also be noted in this connection that even with extensive “white flight,” desegregation accomplishes the objective of substantially increasing interracial association during the educational process. As Professor Rossell explains:

The evidence indicates that every desegregation plan, even the most extensive, has a net benefit—that is, benefits exceed costs. Paradoxically the net benefit in black interracial contact with whites is greatest in school dis-
school desegregation will only be a problem when there is also a significantly greater loss of white students than black students due to differential birth rates, so that the school system becomes heavily black. If and when this occurs, the court can then impose an interdistrict remedy.

D. The New Right

Previous sections of this article have set forth the justification for recognition of a substantive constitutional right to attendance at a racially integrated school and have defined the scope of the state’s obligation to implement that right. It may be queried how recognition of a substantive right to attend a racially integrated school would affect the Court’s present doctrine with respect to school desegregation, which is predicated on the existence of a right to attend school in a school system in which there presently exist no vestiges of *de jure* segregation. It would not affect existing court-ordered desegregation plans, since the scope of the state’s obligation is the same under either theory of the nature of the substantive right: to achieve the greatest degree of actual desegregation, taking into account the practicalities of the situation.\[^{333}\]

It would change the present state of the law with respect to the imposition of interdistrict desegregation remedies, since it would require the crossing of school district lines where this is necessary to effectively desegregate the schools in the urban districts with 35 percent or more black enrollment, despite the fact that when desegregation occurs these school districts undergo the greatest declines in white enrollment. In short, even the most extensive plan is effective in obtaining the instrumental goal of black interracial contact with whites, and this net benefit continues at least as long as four years after implementation of the desegregation plan.

The Coleman study found very much the same thing. Its equations show that school districts that desegregate have, at the end of a ten-year period after desegregation, a level of interracial contact (proportion white in the average black child’s school) that is still twice that of school districts that have not desegregated, despite a greater decline in white enrollment compared to those districts that did not desegregate during that period. Rossell, *supra* note 307, at 167.

\[^{333}\] See notes 29-40 *supra* and accompanying text; note 123 *supra* and accompanying text; and notes 301-12 *supra* and accompanying text for a discussion of the state’s obligations under both theories.
district without regard to the strictures of Milliken I. Most importantly perhaps, it would bring about desegregation in school systems where *de jure* segregation cannot be shown.

The present and proposed doctrines could come into conflict in a case involving a school system where the matter of *de jure* segregation has not yet been litigated. There would be a question as to whether the plaintiffs could proceed on the theory that the system is *de jure* segregated, if they choose, or whether they would be compelled to proceed on the theory of a substantive right to attend a racially integrated school. This question could be important because of the entitlement to collateral relief on the part of the plaintiff class where *de jure* segregation can be shown. It could be contended that the plaintiffs should be able to proceed on either theory, thus enabling them to obtain collateral relief. On the other hand, if there is a substantive right to attend a racially integrated school, it could be contended that the existence of *de jure* segregation is now irrelevant, since the nature of the substantive right now relates to attendance at a racially integrated school, and the new theory supplants the old. Further analysis of this question would seem premature until the new theory is recognized by the Court.

**CONCLUSION**

At the present time, children have a substantive right to attend school in a school system in which there presently exist no vestiges of *de jure* segregation. They have no right to attend a racially integrated school. The ability of a child to attend a racially integrated school in practice then depends on the situation prevailing in the school system in which the child is enrolled, and under the *de jure* segregation doctrine, will depend in large part on what happened in the school system before the child was born.

This writing has set forth a justification for recognition of a substantive constitutional right to attend a racially integrated school. The source of this right was found in constitutional values and it was maintained that, in light of those val-

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ues, the interest of black and white children in associating with each other during the educational process is constitutionally more important than the "administrative convenience" interest that is served by geographic attendance zoning. It also was contended that the Constitution requires the state to provide for attendance at racially integrated schools to the maximum extent feasible, including, where necessary, the assignment of students across existing school district lines.

If such a right and corresponding obligation are recognized by the Court, it will at last come to pass that black and white children will be going to school together, which, "in the final analysis is what desegregation of the public schools is all about."335
