Constitutional Law - School Desegregation - The Conundrum of De-Facto and De-Jure Segregation

Howard Emmerman

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The plaintiffs, seven minor children, brought an action by their respective parents seeking a mandatory injunction requiring the Waukegan City School District to revise its grade school attendance units to eliminate racial imbalance, pursuant to the Armstrong Act, an Illinois statute ordering such revision "as soon as practicable". The composition of the grade schools within the district was as follows: Of the five grade schools therein, four were composed of at least 98 per cent white students; whereas in the fifth school, only 15 per cent of its students were white, the remaining 85 per cent being predominantly Negro. This situation, as stipulated by the plaintiffs, was not the result of any affirmative, intentional, or discriminatory actions of the school board. The trial court held that the statute is constitutional and that it is validly applied to de facto school segregation. A decree was issued, ordering the defendant board to file a plan of reasonable revision in the attendance units, designed to alleviate the existing imbalance. On appeal, the Supreme Court of Illinois reversed, holding that the Armstrong Act is in violation of the equal protection clause of the fourteenth amendment to the United States Constitution, and of the special legislation prohibition in the Illinois Constitution. The rule then advanced by the court was that programs to create equal educational opportunities must be administered without regard to race. Upon rehearing, the court reversed itself, affirming the order of the lower court and upholding the constitutionality of the Armstrong Act. Tometz v. Board of Education, Waukegan City School District No. 61, —Ill.2d—, 237 N.E.2d 498 (1968).

The Tometz decision joins a modern trend of cases, wherein a state's method of alleviating de facto school segregation is constitutionally evaluated. The case is especially important because it is one of two decisions by

1 Ill. Rev. Stat., ch. 122 § 10-21.3 (1967) provides that among the duties of school boards is the following: "To establish one or more attendance units within the district. As soon as practicable, and from time to time thereafter, the board shall change or revise existing units or create new units in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race, or nationality. All records pertaining to the creation, alteration or revision of attendance units shall be open to the public." There is also similar language in Ill. Rev. Stat., ch. 122 § 34-18 (7) (Powers of the Board of Education), § 34-22 (School buildings) (1967).

2 Ill. Const. art. IV, § 22.


a court of last resort\(^5\) in which a state has attempted to eliminate such segregation by direct, mandatory legislation, rather than by declaration of administrative policy or encouragement of voluntary local action. Although the \textit{Brown}\(^6\) decisions sounded the death knell for segregation of the races in public schools by direct state action, the constitutionality of de facto segregated schools\(^7\) remains in doubt.\(^8\) With the growing public realization that such segregation is widespread, and that its potential effects on the segregated minority are grave, the task of eliminating racial imbalance has been undertaken by several states,\(^9\) notwithstanding the absence of a declared constitutional mandate to that effect. Also, local school boards have employed various means to achieve racial balance among their schools.\(^{10}\)

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\(^5\) The other decision is \textit{School Committee of Boston v. Board of Educ.}, supra note 4.


\(^7\) The terms, "de facto segregation" and "racial imbalance" are used synonymously in this note, both denoting the existence of racial separation in schools, absent deliberate state action.

\(^8\) \textit{1 U.S. Comm'n on Civil Rights, Racial Isolation in the Public Schools} 185 (1967).

\(^9\) \textit{See generally id.} at 229. Specific efforts of four states, California, Massachusetts, New York, and Pennsylvania are discussed in the text, infra.

Tometz, therefore, has a necessary impact on these various methods. It is the purpose of this note both to examine the effect of Tometz on programs to eliminate racial imbalance in general, and to specifically analyze the problems inherent in effectuating racial balance by direct legislation.

THE LEGAL BACKGROUND

The United States Supreme Court in Brown left no doubt as to the unconstitutionality of de jure segregated schools: segregation of school children on the basis of race was held to deprive the minority group of equal educational opportunity, thereby violating the equal protection clause of the fourteenth amendment, notwithstanding the equality of other tangible and physical factors. However, subsequent federal interpretations of the fourteenth amendment have been restrictive. Courts of appeals in five federal circuits, deciding cases which dealt with the problem of racially imbalanced schools, have held that the fourteenth amendment as interpreted by Brown imposes no duty to eliminate such imbalance. Moreover, federal district courts in Illinois, Michigan, Ohio, Virginia, New York, and Texas have concurred in similar cases. The refusal of the courts to apply the equal protection clause to situations of racial imbalance has been carried to the extreme on at least one occasion. In Bell v. School City of Gary, Indiana, plaintiffs were denied relief from attending de facto segregated schools, predicated on the fact that the schools involved had been honestly and conscientiously administered, pursuant to a neighborhood school policy. Moreover, it was held that so long as the schools are so administered, the system need not be destroyed or abandoned. The import of this holding is that honestly and conscientiously administered school systems would not be

11 Brown I, supra note 6, at 493. Such segregation was also held to violate fifth amendment due process, Bolling v. Sharpe, supra note 6, at 500.


14 Supra note 12.

15 Bell v. School City, supra note 12, at 829.

violative of the fourteenth amendment, even though such schools were found to deprive the segregated minority of its equal opportunity to education in fact. The objectivity of the method of administration could therefore constitutionally justify the most extreme case of racial imbalance in public schools. State action sufficient for a practice to fall within the purview of the fourteenth amendment would, by this holding, have to be affirmative and intentional. This rationale reflects the distinction perceived by the courts between de facto and de jure segregation. While the latter is recognized as inherently unconstitutional, the former has on occasion been deemed inherently constitutional, as in Bell. Only recently have federal district courts in New York and Massachusetts recognized via specific holdings the possibility of a de facto segregated school system becoming unconstitutional in fact. Thus, the court in Blocker v. Board of Education of Manhasset, New York ordered the dissolution of conditions of racial imbalance, but cautioned:

This court does not hold that the neighborhood school policy per se is unconstitutional; it does hold that this policy is not immutable. It does not hold that racial imbalance, not tantamount to segregation is violative of the Constitution. It does hold that the defendant Board has transgressed the prohibitions of the equal protection clause of the Fourteenth Amendment.

This realization, that state-tolerated de facto segregation could deprive the minority of equal educational opportunity and thereby violate the fourteenth amendment, might have been the initial step in court involvement with the disestablishment of such segregation. But federal courts have not followed suit. Either for the reasons advanced in Bell, or for want of sufficient state

17 This limitation on what constitutes state action is not consistent with some past Supreme Court interpretations. See, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948), wherein enforcement of a restrictive covenant by a state court was held to be sufficient state action to invoke the fourteenth amendment. Might this also apply to court enforcement of de facto segregation by denying remedial relief? Would a decision such as Bell, supra note 12, constitute such state action that might convert de facto to de jure segregation in theory? Other instances of liberal interpretations of state action include: Lombard v. Louisiana, 373 U.S. 267 (1963), held that public statements by city officials opposing restaurant desegregation are tantamount to city ordinances and therefore constitute sufficient state action; Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), held that where a state leases property to a private business which discriminates among its patrons by race, this constitutes sufficient state action; Marsh v. Alabama, 326 U.S. 501 (1946). See generally Peters, Civil Rights and State Non-Action, 34 Notre Dame Law. 303 (1959).


19 Supra note 18.

20 Supra note 18, at 230.

21 Supra note 12.
action,\textsuperscript{22} no federal court has deemed it appropriate to order the disestablishment of de facto school segregation since the 1965 \textit{Barksdale} decision.\textsuperscript{23} Therefore, the problem of determining the effects of racial school imbalance and its remedies has been left to the legislative and executive branches of the state governments, and to Congress.

Only four states in addition to Illinois have responded through affirmative direct action: California has incorporated into its statutes a declaration of policy to the effect that those charged with the establishment of school districts shall consider the ethnic composition of the areas involved, with the purpose of avoiding practices which maintain segregation "in practical effect."\textsuperscript{24} This statement of policy was recognized and approved in dicta by the California Supreme Court in \textit{Jackson v. Pasadena City School District}.\textsuperscript{25} Pennsylvania entered the field by virtue of an investigation by a legislative commission, culminating in a state supreme court decision, \textit{Pennsylvania Human Relations Commission v. Chester School District},\textsuperscript{26} wherein the court upheld the power of the Pennsylvania Human Relations Commission, a creature of the legislature,\textsuperscript{27} to file a complaint against a school board, in whose district existed racial imbalance, for violation of the state prohibition of unlawful discriminatory practices.\textsuperscript{28} The power vested in the Commission can assume a mandatory character in that the Commission may initiate its own investigative action, make its own determinations as to the existence and effects of racial imbalance in each case, and issue an order enjoining maintenance of the discriminatory practice and prescribing corrective action.\textsuperscript{29} Massachusetts' attack was more extensive. In 1965, the legislature passed the Racial Imbalance Act,\textsuperscript{30} which instructed the state board of education to "provide technical and other assistance in the formulation and execution of plans to eliminate racial imbalance,"\textsuperscript{31} provided for judicial re-

\textsuperscript{22} The two reasons mentioned are not to be considered mutually exclusive. \textit{See, e.g., Deal v. Board of Educ., supra note 12, at 63.}

\textsuperscript{23} \textit{Supra} note 18.


\textsuperscript{25} 59 \textit{Cal. 2d} 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963). The statute was not germane to the court's decision because state gerrymandering of school districts had been discovered.

\textsuperscript{26} \textit{Supra} note 4.


view of the actions of the board of education pursuant to the above, and established an advisory committee on racial imbalance, to be appointed by the board of education. The legislature also established standards by which racial imbalance was to be determined by local school authorities. The Racial Imbalance Act was court-tested and upheld in School Committee of Boston v. Board of Education. To date the Act represents the most extensive legislative directive concerning the elimination of de facto school segregation. In New York, quasi-legislative action against racial imbalance has been taken through the office of the Commissioner of Education, based upon the issuance of an order to local school officials, requiring: reports of local racial distribution in each district; a statement of policy from each local board with respect to achieving racial balance; and a plan for action to eliminate racial imbalance, if needed. New York courts have generally approved local plans pursuant to this order. Except for these five, no state has significantly responded to the potential stigma of de facto segregated schools.

Congress has not legislated directly with respect to racial imbalance. The public education provision of the Civil Rights Act of 1964 contains specific disclaimers of the intent to include de facto segregation within the purview of the Act, both in defining "desegregation" in general, and in

34 Mass. Ann. Laws, ch. 71, § 37C (Supp. 1967) provides: "The term 'racial imbalance' refers to a ratio between non-white and other students in public schools which is sharply out of balance with the racial composition of the society in which non-white children study, serve, and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of non-white students in any public school is in excess of fifty per cent of the total number of students in such school." See Mass. Gen. Laws, ch. 71, § 37B (1966).
35 Supra note 4. The appeal to the United States Supreme Court was dismissed for want of a federal question.
36 Supra note 8, at 186.
38 Id.
40 Supra note 8, at 187.
41 Supra note 8, at 237-238. Note that Congress has, however, financially assisted school systems which have taken corrective measures with respect to racial imbalance, through institutes and grants for consultation and training, programs on intercultural understanding, and remedial instruction.
authorizing suits by the Attorney General against school boards under certain circumstances.\textsuperscript{43} Although the extent of these disclaimers is arguable,\textsuperscript{44} federal courts have not applied the requirements of the 1964 Act to racially imbalanced schools.\textsuperscript{45}

HISTORY

The progress of the alleviation of racial isolation in public schools, absent deliberate state action, has been minimal. Without a history of a state-imposed dual school system, racially separated school systems may exist for the most part undisturbed, and generally they do so exist. For example, although Illinois has outlawed de jure segregation since 1874,\textsuperscript{46} integration has not yet been accomplished. Of the approximately 206,000 Negro children in Chicago elementary schools in 1965-66, 89 per cent attended schools whose population consisted of at least 90 per cent Negroes; of approximately 15,000 Negro students in East St. Louis during the same period, 80 per cent attended schools whose population was at least 90 per cent Negro; in Peoria, 87 per cent of the approximately 17,000 Negroes in elementary schools during 1965-66 attended schools wherein Negro students were in the majority (greater than 50 per cent).\textsuperscript{47} There is further evidence indicating the existence of racial imbalance in states which had not imposed racial separation upon their school children:

The high degree of racial separation in the schools . . . is found in the North as well as the Southern and border States. In Buffalo, N.Y., for example, 77 percent of the Negro elementary schoolchildren attend schools that are more than 90 percent Negro, while 81 percent of the whites are in nearly all-white schools . . . . In Gary, Ind., the figures are 90 percent and 76 percent, respectively. . . . In Flint, Mich., 86 percent of the Negro elementary schoolchildren are in majority-Negro schools; in Milwaukee, 87 percent . . . .\textsuperscript{48}

Nor has racial balance been achieved in those school systems which bear a


\textsuperscript{44} See, e.g., Dissenting opinion of Gewin, J., in United States v. Jefferson County Board of Educ., 380 F.2d 385, 397 (5th Cir. 1967). See generally, supra note 8, at 236-38.


\textsuperscript{46} Chase v. Stephenson, 71 Ill. 383 (1874); Hurd Rev. Stat., ch. 122, § 100 (1874) [now Ill. Rev. Stat., ch. 122, § 10-22.5 (Supp. 1967)].

\textsuperscript{47} 2 U.S. COMM’N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 5 (1967).

\textsuperscript{48} Supra note 8, at 5.
history of de jure segregation, and hence would fall within the purview of Brown, as indicated in the following table:

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<tr>
<td>Miami, Fla.</td>
<td>100.0%</td>
<td>91.4%</td>
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<tr>
<td>Charlotte, N.C.</td>
<td>100.0</td>
<td>95.7</td>
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<td>Okla. City, Okla.</td>
<td>100.0</td>
<td>90.5</td>
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<tr>
<td>Dallas, Tex.</td>
<td>100.0</td>
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<tr>
<td>Washington, D.C.</td>
<td>100.0</td>
<td>90.4</td>
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<tr>
<td>Kansas City, Mo.</td>
<td>100.0</td>
<td>69.1</td>
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<tr>
<td>Wilmington, Del.</td>
<td>100.0</td>
<td>49.7</td>
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Although these figures reflect a slight decrease in the per cent of Negroes in predominantly Negro schools, the number of Negroes in almost all-Negro schools has risen. Thus it is, that "[t]he rising Negro enrollment, combined with only slight desegregation, has produced a substantial increase in the number of Negroes attending all-Negro or nearly all-Negro schools in Southern and border state cities."

The reason for the failure of state and local school authorities to effectively apply the mandate of Brown is not easily analyzed: Local discretionary power, residential segregation, student and teacher assignment methods, and poor administration have all had significant effect on racial imbalance. Certainly the recent United States Supreme Court "freedom of choice" cases, holding that elimination of legally compelled racial segregation is not sufficient for the satisfactory disestablishment of de jure segregation, reflects a cognizance of the actual factors perpetuating isolation, irrespective of the nominal policies adopted by school boards.

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49 Statistics were selected from a more extensive table in 2 U.S. Comm'n on Civil Rights, Racial Isolation in the Public Schools 12-19, Table A.3 (1967).

50 Supra note 8, at 10.

51 Supra note 8, at 59.


53 Green v. County School Board, supra note 52 at 1694, invalidating a freedom-of-choice plan as only a means to an end; Raney v. Board of Educ., supra note 52, at 1700, wherein it was held that court jurisdiction in desegregation cases should be retained until it is clear that diestablishment has been achieved; Monroe v. Board of Comm'rs, supra note 52, at 1704, invalidating a free-transfer plan similar to that of Green.

54 This intent is indicated by Brennan, J., referring in Green, supra note 52, at 1694, to the slow pace of desegregation in the instant case: "[I]t is relevant that this first step (the freedom-of-choice plan) did not come until some 11 years after Brown I was decided and 10 years after Brown II directed the making of a 'prompt and reasonable start.' . . . Such delays are no longer tolerable . . . ." Why has Justice Brennan used the words, "no longer"? Were such delays anticipated, and have they been tolerated?
Also, the recent institution of school desegregation suits in the northern states\textsuperscript{55} indicates a recognition by the courts of the existence of a more subtle form of state-imposed racial separation.\textsuperscript{56} But the immediate impact of decisions such as these is conjectural and perhaps dubious in view of the lack of substantial progress made since \textit{Brown}.

Racially imbalanced school systems are widespread, both in areas with and without a history of de jure segregation, due to the lack of any court-proclaimed mandate to undo the effects of de facto segregation, coupled with the ineffectiveness of the attempts to implement \textit{Brown}. Local and state action appears to have a more immediate effect than that which has been exerted by federal authority. Acts such as the Armstrong Act and the Racial Imbalance Act, as well as the quasi-legislative action of the Pennsylvania Human Relations Commission and the New York Commissioner of Education may hold a greater promise of alleviating racial imbalance than do landmark Supreme Court decisions. But such action frequently faces the threat of running aground due to strict interpretation of the fourteenth amendment. The question involved is not whether the fourteenth amendment prescribes the elimination of racial imbalance, but rather, what means of alleviating such imbalance are permissible?\textsuperscript{57}

\textbf{THE BENIGN RACIAL CLASSIFICATION}

The primary legal barrier to the implementation of programs to disestablish de facto segregation is the dilemma presented by the benign racial classification: Does the fourteenth amendment prevent a governing body from taking cognizance of race, even for a purpose now deemed socially desirable? In its original holding in the \textit{Tometz} case, the Illinois Supreme Court assailed the Armstrong Act as unfounded and unconstitutional, predicated solely upon the state-prescribed racial classifications inherent in the Act.\textsuperscript{58} Absent


\textsuperscript{56} Id. This recognition is reflected in the conclusions of law. The court, per Hoffman, J., cited the following as elements of de jure segregation: recruitment and assignment of school teachers on a racial basis; policy decisions by the defendant board, made with respect to attendance zones, site selections, pupil transportation; purposeful tailoring of the components of a neighborhood school policy so as to conform to racial compositions of the neighborhoods in the district; building upon private residential discrimination. Identification of the latter two factors as elements of de jure segregation expands the scope of the term, as court-applied.

\textsuperscript{57} The Illinois Supreme Court recognized this distinction in \textit{Tometz v. Board of Educ.}, 237 N.E.2d 499, 501 (Ill. 1968).

\textsuperscript{58} "Our holding is that programs to create equal educational opportunities must under the equal protection clause of the fourteenth amendment . . . be administered without regard to race. This is the neutral application of the statement in \textit{Brown}—'the fundamental principle [is] that racial discrimination in public education is unconstitutional.' Just as the neutral principle of free speech protects speech which may
a legislative finding that racial intermingling would promote equal educational opportunity, the court perceived no constitutional need sufficient to sustain the heavy burden of justification imposed by a racial classification. In its subsequent opinion upholding the racial classification of the Armstrong Act, however, the court exercised a greater degree of judicial restraint in determining legislative purpose, and construed more liberally the requirements necessary to justify prescription of racial classification. The ratio decidendi of this judicial change of position, more than any other one point, is a re-evaluation of the court's perception of de facto segregation. Noting that the test of any legislative classification is one of reasonableness—whether the classification is reasonably calculated to promote a proper legislative purpose, the court concludes that the Armstrong Act survives this test. In view of the growing judicial awareness that "de facto segregation has a seriously limiting influence on educational opportunity" and of the Illinois Constitution's directive that the state legislature provide a thorough and efficient system of free schools, the purpose of the legislature is valid. Nor is an explicit legislative determination of the nexus between racial imbalance and the denial of equal educational opportunity required:

The legislature is necessarily vested with broad discretionary power to determine not only what the public interest and welfare require, but what measures are necessary to secure such interests . . . . The power is elastic and capable of extension to keep up with human progress. It extends to the great public needs, that which is sanctioned by usage or held by prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to public welfare. . . .

The different points of view in the two Tometz opinions are representative of the two sides of the argument: the former, adhering to the maxim that the Constitution is color-blind; the latter, advancing the theory that the Constitution may be color-conscious if the end sought is justifiable.

or may not be socially desirable, so also does the principle prohibiting racial discrimination in public education prevent this type of legislation regardless of the Armstrong Act's purpose." Tometz v. Board of Educ., supra note 3.

59 "In those few States where action against racially imbalanced schools has been sustained, it has been done on the ground that it was for equality of educational opportunity. . . . "If the purpose of the Armstrong Act is to eliminate racial imbalance, it would appear to be for integration qua integration. . . ." Id. This argument has been incorporated into the dissenting opinion to the final Tometz decision, supra note 57, at 507.


61 Tometz v. Board of Educ., supra note 57, at 503.


63 Id. at 502-03, quoting from People v. City of Chicago, 413 Ill. 83, 91, 108 N.E.2d 16, 21 (1952); and citing Thillens, Inc. v. Morey, 11 Ill. 2d 579, 583, 144 N.E.2d 735 (1957).

64 See Harlan, J., dissenting in Plessy v. Ferguson, 163 U.S. 537, 539 (1896).

65 See generally, Fiss, Racial Imbalance in the Public Schools: the Constitutional
The latter theory is a derivative of the law which has developed regarding classifications by a state in general. The test of a legislative classification advanced in *Tometz* is generally accepted by the United States Supreme Court as the criterion used in evaluating a state-imposed classification for purpose of equal protection. The high court would also agree with the *Tometz* court that a state legislature is generally allowed a wide range of discretion in choosing the means to be used in achieving proper goals. However, a classification based on race has been deemed an exception to this practice. Thus, the United States Supreme Court in *McLaughlin v. Florida* noted:

... [N]ormally [legislative] judgment is given the benefit of every conceivable circumstance which might suffice to characterize this classification as reasonable rather than arbitrary and invidious. But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect".

The constitutional suspicion thus attributed to racial classifications has resulted in frequent invalidations by the Court. But those cases were decided in a context distinctly different from that of *Tometz*. In those cases, the purpose of the classification was the separation of the races, resulting in the denial of a right or access. The racial classification prescribed by the Armstrong Act has as its apparent purpose the conferral of those rights and opportunities inherent in equal protection by the amelioration of a racially separated school system. It is for this purpose, opponents of strict "constitu-

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*Supra* note 66, at 191, quoting from *Bolling v. Sharpe*, *supra* note 6, at 499.

See, e.g., cases wherein the Court invalidated racial classifications as applied to: criminal cohabitation, *McLaughlin v. Florida*, *supra* note 66; public parks and playgrounds, *Watson v. Memphis*, 373 U.S. 526(1963); restaurants, *Burton v. Wilmington Parking Authority*, *supra* note 17; railroad riding facilities, *Henderson v. United States*, 339 U.S. 816 (1950). See *Goss v. Board of Education*, 378 U.S. 683, 687 (1963), wherein the Court made the broad statement that: "Classifications based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment." In context, the statement was applied to a school desegregation plan which allowed white students to escape reassignment. Taken out of context, the statement might be applied to a benign racial classification.
tional color-blindness" argue, that the Constitution allows the recognition of race by the states.\textsuperscript{70}

Federal and state courts have consistently and explicitly recognized this distinction of purpose, upholding voluntary local actions designed to eliminate or alleviate racial school imbalance against the charge that it is unconstitutional to take race into consideration.\textsuperscript{71} Hence, there is general accord that voluntary local action, albeit involving racial classifications, when taken to further the disestablishment of de facto school segregation, is justifiable, even in light of the fact that such action is prima facie constitutionally suspect. No question of the sufficiency of the nexus between the action taken and the promotion of equal educational opportunity was raised in these cases. Regarding evaluation of a state law prescribing that racial classifications be made, the only case which would serve as precedent to Tometz is School Committee of Boston \textit{v. Board of Education}. In that case, the Racial Imbalance Act survived court scrutiny. The Supreme Judicial Court of Massachusetts perceived the same distinction regarding racial classifications related to a proper governmental purpose:

It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment.\textsuperscript{72}

\textsuperscript{70} \textit{See}, e.g., United States \textit{v. Board of Educ.}, 372 F.2d 836, 876, \textit{aff'd en banc} 380 F.2d 385 (5th Cir. 1967): "The Constitution is both color-blind and color-conscious. . . . [A] classification that denies a benefit, causes harm, or imposes a burden must not be based on race. . . . But the Constitution is color-conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination."; Morean \textit{v. Board of Educ.}, \textit{supra} note 4, at 243, 200 A.2d at 100: "Constitutional color-blindness may be wholly apt when the frame of reference is an attack on official efforts toward segregation; it is not generally apt when the attack is on official efforts toward the avoidance of segregation."


The Massachusetts court coupled the recognition of the possible validity of a benign racial classification with reliance on a legislative finding that racial imbalance in public schools is the cause of an emergency within the state, and upon this finding, imposed presumed validity:

All rational presumptions are made in favor of the validity of every legislative enactment. . . . It is only when a legislative finding cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain it that a court is empowered to strike it down. . . .

Hence, whereas the Massachusetts court connected achievement of racial balance with equal educational opportunity by depending upon a legislative finding, then presuming validity; the Illinois court, absent a legislative finding, established the connection by relying on the legislature’s broad discretionary power. The former approach appears less culpable, especially since the allowance of broad discretionary power by the Illinois court does not comport with the United States Supreme Court’s view of a racial classification as constitutionally suspect. A legislative finding by the Illinois General Assembly somehow indicating the need for achieving racial balance in schools would have constituted a firmer foundation for the nexus between the means prescribed by the Armstrong Act and a legitimate government purpose. This concern with the lack of a reasonable connection was reflected in the dissenting opinion to Tometz: “If the purpose of the Armstrong Act is to eliminate racial imbalance, it would appear to be for integration qua integration without any determination that it would promote equal educational opportunities.”

THE PROBLEM OF PRECISENESS

The Armstrong Act was also considered in the light of a requirement pertaining specifically to all legislative directives—that of preciseness. Appellants charged that the Armstrong Act is imprecise in that: (1) It fails to instruct local school boards to consider other factors traditionally relevant to the drawing of boundary lines; (2) it fails to designate when a school is racially imbalanced; and (3) it contains no definition of the words “race” or “color.” To the first contention, the court, noting that the prior

75 Tometz v. Board of Educ., supra note 57.
76 Tometz v. Board of Educ., supra note 57, at 504.
77 Tometz v. Board of Educ., supra note 57, at 504.
78 Tometz v. Board of Educ., supra note 57, at 504.
section now superseded by the Armstrong Act contained no such directive, answered that the omission of these traditional factors in the Act was not intended to preclude their consideration; rather, elimination of racial imbalance was to be included among the factors considered in redistricting schools. The court rejected the second contention, advancing the following rule:

It is only where the legislative act is so indefinite and uncertain that courts are unable to determine what the legislature intended, or when the act is so incomplete or inconsistent that it cannot be executed, that the law will be invalidated by reason of indefiniteness or uncertainty.

The court concluded that the Armstrong Act is capable of being executed, and that the determination of standards by which racial imbalance shall be measured may properly be delegated to local authority. In rejecting the third contention, the court relied on School Commission of New Bedford v. Commissioner of Education, to the effect that the terms “white” and “non-white” are reasonably susceptible of application by school officials for the purpose of taking a “racial census.”

It is unlikely that the Illinois legislature's failure to specifically include consideration of “traditionally relevant” factors within the order of the Armstrong Act is of any legal consequence, although the Racial Imbalance Act contains such provisions. The Illinois Supreme Court's interpretation

79 Ill. Rev. Stat., ch. 122, § 10-21.3 (1961); “To establish one or more attendance units within the district.”

80 Tometz v. Board of Educ., supra note 57, at 504.


82 Id.


“[It is contended] that no adequate standards for classifying students as ‘white’ and ‘non-white’ are laid down. . . . We recognize the difficulties which may arise in particular cases . . . . These terms, however, seem to us reasonably susceptible of application by school superintendents and teachers for the present general purpose. . . . Even difficult border-line cases, for practical purposes can probably be solved on the basis of appearances without making this census inadequate. . . .” But cf. Bittker, The Case of the Checkerboard Ordinance: An Experiment in Race Relations, 71 Yale L.J. 1387, 1421-22 (1965).

85 “Any plan to detail changes . . . with the intention of reducing or eliminating racial imbalance, must take into consideration on an equal basis with the above-men-
of the Armstrong Act as prescribing that racial factors be included among other determinations in drawing boundary lines renders any challenge to the exclusion of other factors moot. Whether the Act would pass favorably, insofar as preciseness is concerned, under federal scrutiny will not likely be decided until the Armstrong Act is implemented on a widespread basis. Since no local school board would have standing to challenge the statute, an individual affected by its implementation would have to bring suit. The question of vagueness in such an action would be unique. Generally, the United States Supreme Court has applied the "vice of vagueness" theory in appraising state criminal or sedition statutes for violation of fourteenth amendment due process. Less frequently, this theory has been held to apply in civil actions, though the standard of certainty required is less rigorous. Nonetheless, "the exaction" of compliance with a statute "must strip a participant of his rights to come within the principle of these cases." In other words, in order to have standing, an assailant of the Armstrong Act would have to allege his right to attend a certain school. Federal courts have generally denied the existence of any such right.

Although the alleged vagueness of the Armstrong Act is unlikely to pose an immediate threat to its constitutionality, the Act is in no way self-executing, and as compared with the Racial Imbalance Act does not lend itself to

86 "[A] municipal corporation, created by a state . . . , has no privileges or immunities under the federal Constitution which it may invoke in opposition to the will of its creator." Williams v. Mayor, City of Baltimore, 289 U.S. 36, 40, (1933); Trenton v. New Jersey, 262 U.S. 182, (1923).

87 The Massachussetts court recognized this in School Comm'n of Boston v. Board of Educ., supra note 72, at 699-700, 227 N.E.2d at 734.


91 Boutilier v. Immigration Service, supra note 89, at 123.

92 It has been held that white students may not resist a plan to eliminate racial imbalance on the ground that they have a constitutional right to attend a given school: See, e.g., Guida v. Board of Educ., supra note 71, at 123, 213 A.2d at 844; Addabbo v. Donovan, 22 App. Div. 2d 383, 388, 256 N.Y.S.2d 178, 183; Balaban v. Rubin, 20 App. Div. 2d 438, 444, 248 N.Y.S.2d at 580. Similarly, it has been held that Negro students may not force elimination of a de facto segregated school system solely on the basis that they have a constitutional right to attend a given school: See, e.g., Deal v. Board of Educ., 369 F.2d 55, 63 (6th Cir. 1965); Downs v. Board of Educ., 336 F.2d 988, 998 (10th Cir. 1964); Bell v. School City, 324 F.2d 209, 213 (7th Cir. 1963).
speedy implementation. The Massachusetts legislature, in passing the Racial Imbalance Act, assumed some of the responsibility of its administration. A scheme was devised, whereby each local school committee is required to submit an annual racial “school census” to the state commissioner of education. If the commissioner determines that racial imbalance exists, he instructs the local committee to prepare and file a plan to eliminate the imbalance, with the assistance of the state board of education.\textsuperscript{93} The matter of what shall constitute racial imbalance is not left to the commissioner’s discretion since the Massachusetts Act defines racial imbalance as existing when the percentage of non-white students in a school exceeds fifty per cent.\textsuperscript{94} The Illinois legislature, on the other hand, assumed no administrative responsibility\textsuperscript{95} in eliminating racial imbalance. By virtue of Tometz, a precedent as to when a school should be considered racially imbalanced is established at 85 per cent non-white students.\textsuperscript{96} Apparently, the Illinois courts will be called upon to decide in each individual case whether a local school board has given sufficient consideration to racial factors in redistricting or relocating its schools. Another distinction between the two acts lies in the strength of their sanctions. Massachusetts has teeth in its statute: a local school committee’s failure to submit a plan in compliance with the order of the commissioner within a reasonable time results in the withholding of state aid for the errant committee’s schools.\textsuperscript{97} The Illinois legislation apparently depends upon the courts to enforce the order of the Armstrong Act.

CONCLUSION

The existence of racially imbalanced public schools, either due to prior state-imposed separation or arising through usage, is patent throughout the country. The cumulative effects of Brown have ironically been detrimental to the achievement of integrated education. While Brown has opened the door to the disestablishment of de jure segregation, it has, by restrictive interpretations, provided a shield for those school systems which do not bear the taint of past de jure segregation. This shield exists, notwithstanding the damaging effect such a school system may have on the Negro child. Whether racially imbalanced schools produce the same adverse effects as

\textsuperscript{94} Id.
\textsuperscript{95} Note, however, that the Illinois education structure does not include a state board of education. A supervisory committee would necessarily have to effectuate some coordination among the virtually autonomous school systems as they now exist.
\textsuperscript{96} Tometz v. Board of Educ., supra note 57, at 500.
were attributed to segregation by law in Brown, is as yet undecided by the court. Notwithstanding, extensive studies have indicated that the adversity of de facto segregation may well exceed that of segregation by law, albeit the two are of different species. Urban racial unrest and civil disorder appear to emphasize the need for reform, one thrust of which must be educational.

Barriers to understanding not only cripple the individual but also endanger the nation. Clearly, the future of the United States depends in no small part on education—not the education of white children but the education of all children. We do not need another fact finding commission to tell us that something must be done to prevent a school situation which produces apathy and hopelessness that cause a life to be wasted, or frustration and anger that cause it to be risked in public disorders.

Yet, the courts have been slow to recognize this need. Had the Illinois Supreme Court not reversed itself in Tometa; had the Supreme Judicial Court of Massachusetts invalidated the Racial Imbalance Act; had New York, New Jersey, Connecticut, and Michigan forbidden implementation of remedial procedures in the name of strict "Constitutional color-blindness," this need would either be ignored, or its examination impaired by ingenious schemes circumventing the caveat against considering race. Inasmuch as the courts are not able to achieve uniformity on such a vital question, a Supreme Court approval of the validity of the benign racial classification is in order.

Nor is the distinction between de jure and de facto segregation any longer clear. As the time span between Brown and a present desegregation case increases, how can it be determined where de jure segregation has ended and de facto segregation begun? Do the "freedom of choice" cases imply that a court may retain jurisdiction in a desegregation case to disestablish what might otherwise be considered de facto segregation, except for the fact that it occurs as the aftermath of de jure segregation? Or is the overriding factor the simple fact that children are being deprived of an equal opportunity to education in a state-tolerated school system? In light of past Supreme Court decisions stretching the requirement of state action so that a practice may fall within the purview of the fourteenth amendment, the distinction between de jure and de facto segregation seems academic.

See, e.g., 1 U.S. COMM'N. ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 73-114 (1967); BOARD OF EDUCATION, CITY OF CHICAGO, A REPORT TO THE BETTER SCHOOLS COMMITTEE at 27-30 (1968); United States v. School Dist. No. 151 of Cook County, supra note 55.

United States v. School Dist. No. 151 of Cook County, supra note 55, memorandum opinion at 5.

Supra note 52. See supra note 53.

Supra note 17.
Finally, is a law such as the Armstrong Act dispositive of the problem? Has the Illinois legislature borne its fair share of responsibility in providing for study and alleviation of the problem? Devising schemes to effectively remedy situations of racial isolation has been the subject of continued study.\textsuperscript{102} In light of the amount of research required before a meaningful determination can be made as to the effects and possible elimination of racially imbalanced schools, a single-paragraphed order, absent a legislative finding of any sort as to de facto segregated schools, with no provisions for administration or enforcement, seems a feeble effort to solve a vastly complex problem. Compared with the efforts of Massachusetts and Pennsylvania, the Armstrong Act appears to be but a token gesture.

\textit{Howard Emmerman}

\textsuperscript{102} See, e.g., 1 \textsc{U.S. Comm'n on Civil Rights, Racial Isolation in the Public Schools} 115-184 (1967); \textsc{U.S. Comm'n on Civil Rights, Education Parks} (Clearinghouse Pub. No. 9, 1967).

\section*{EVIDENCE—SUFFICIENCY FOR DIRECTED VERDICTS—CAN A JUDGE HOLD A CANDLE TO TWELVE REASONABLE MEN?}

On December 7, 1960, Raymond Pedrick and his wife were injured when their automobile collided with one of defendant's trains at a railroad crossing in Pekin, Illinois. In an action brought by Pedrick and his wife against the railroad, the only allegation of negligence submitted to the jury was that defendant company negligently permitted its train to operate through the intersection without activating the red flasher warning signals. Testifying on behalf of plaintiffs were Raymond and Cleo Pedrick and a passenger in their automobile, who had a separate lawsuit pending against the defendant. Five of defendant's employees and two disinterested witnesses testified on behalf of defendant. A jury in the Circuit Court of Tazwell County rendered a verdict for plaintiffs and judgment was entered thereon. Defendants appealed. The Third District Appellate Court of Illinois reversed without remanding for a new trial. On appeal, the Supreme Court of Illinois affirmed the appellate court's decision, holding that evidence on the issue of whether crossing flasher signals were operating at the time of the accident so overwhelmingly flavored the defendant that no contrary verdict based on the evidence could ever stand, and therefore, defendant's motion in the trial court for a directed verdict should have been allowed. The Court further announced the rule that "verdicts ought to be directed and judgments \textit{n.o.v.} [sic] entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors