NOT ONE LAW AT ROME AND ANOTHER AT ATHENS: THE FOURTEENTH AMENDMENT IN NATIONWIDE APPLICATION

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Eight years ago, in an opinion on the subject of sit-in demonstrations, Justice Hugo Black sternly rejected an argument that had been made to the Supreme Court by the Solicitor General. If the argument were accepted, said Justice Black,

> we would have one Fourteenth Amendment for the South and quite a different and more lenient one for the other parts of the country. . . . Our Constitution was not written to be read that way, and we will not do it.[1]

For Justice Black, the point did not require elaboration. For him, there was no need to derive a principle of constitutional universality from such classical chestnuts as the one I have chosen for my title, since he found the ideal of a national constitution to be written into the Constitution itself. Cicero, on the other hand, was speaking of a law that was not to be found in any constitution, or in any positive law; for Cicero, it was the law of nature that was the same in Athens as it was in Rome.[2]

The fourteenth amendment began as an act of positive law. Its framers surely thought that their most important task was to extend to the South a system of liberties and equality under the law that already existed elsewhere in the Nation. Today, the fourteenth amendment embodies much of what has become our natural-law Constitution. After a century, the amendment stands as both a symbol of national unity and a practical guarantee of nationally established rights.

Yet, the argument of the Solicitor General is not without appeal. In oversimplified outline, the argument was this: In a state where racial segregation had not recently been an official state policy, the proprietor of a lunch counter might decide to limit the clientele to whites —and call on the police to enforce that policy—since the proprietor's

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1. Bell v. Maryland, 378 U.S. 226, 334-35 (1964) (dissenting opinion).

2. CICERO, DE LEGIBUS II, 4, 10, quoted in C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 9 (1930).

individual acts of racial discrimination do not violate the fourteenth amendment, which guarantees racial equality only against state action. In the South, on the other hand, racial discrimination in restaurants was part of a caste system. In describing that system, the Solicitor General plunged into metaphor. The system was supported by a "community-wide fabric of segregation . . . filled with the threads of law and government policy woven by government through the warp of custom laid down by private prejudice."[3] Thus when a lunch counter proprietor in Maryland refused service to blacks, and asked the police to arrest those who were supposedly trespassing by sitting at the counter and waiting for service, the state was implicated in the private racial discrimination, and any trespass convictions violated the fourteenth amendment. There is much to be said for the southern part of this analysis. Where the asserted distinction fails is in its tolerance of similar northern racial discrimination.

The underlying assumption in the Solicitor General's distinction was, of course, that the South deserves different treatment because it *is* different. Jim Crow was and is a southern name for a system of caste that reached its fullest development in the South.[4] The South was the obvious place to start in the constitutional assault on racial inequality. As a result of this geographic priority, we have arrived at a position that would astound the framers of the fourteenth amendment: In some significant ways, the disestablishment of racial discrimination has progressed further in the South than in the urban North and West. While the fourteenth amendment was originally conceived as a device for extending national rights into the South, our generation's task is also to extend national rights *from* the South to the rest of the Nation.

The issue will come into clearer focus if we look at two groups of cases from the Supreme Court's past Term. Both sets of cases grew out of claims of official racial discrimination; the first was a group of southern school segregation cases, and the second consisted of two legislative districting cases, one from Mississippi and one from Indiana. The Court seized both its opportunities for doing racial justice in the

3. Supplemental Brief for the United States as Amicus Curiae at 14, Griffin v. Maryland, 378 U.S. 130 (1964).

4. *See* C. WOODWARD, THE STRANGE CAREER OF JIM CROW (2d rev. ed. 1966); THE ORIGINS OF SEGREGATION (J. Williamson ed. 1968).

South, but the Court's treatment of the Indiana voting case and the manner of its reservation of decision on questions of de facto school segregation are sobering reminders that the construction of nationwide constitutional protections of racial equality is not yet completed.

I.

The principal school cases in 1971 came from the cities of Charlotte and Mobile.[5] Each city was part of a county-wide school district. In the Charlotte case, the lower court had ordered the grouping of inner-city black schools with outlying white schools; part of the plan called for black children in the first four grades to be bused to the outlying schools and fifth and sixth grade white children from those schools were to be bused to the inner-city schools. The Supreme Court unanimously affirmed this order.[6] In Mobile, the desegregation plan that emerged from the court of appeals had left about 60 percent of the black elementary students in all-black schools. The reason was that a major highway divided the city, and a more thorough desegregation would require busing. The Supreme Court unanimously reversed, calling on the lower courts to devise a desegregation plan that would "work *now*," and specifically directing them to consider busing as a means for ending a dual system of education.[7]

Neither in North Carolina nor in Alabama was school segregation expressly commanded by law in 1971. The racial separation that remained in Charlotte and Mobile was very much like the separation that is found throughout the urban North and West. The syllogism for this kind of separation is nasty, but it is simple: If the neighborhood school policy is assumed to be inviolate, and if neighborhoods are characterized by racial segregation, then the schools will be segregated. In Charlotte and Mobile, however, the Supreme Court approved busing as a way of destroying the syllogism by destroying its major premise; the neighborhood school policy was not to be allowed to interfere with the disestablishment of a segregated system.

These decisions mean at the very least that for a state to disestablish a dual system it is not enough to repeal school segregation laws.

5. For elaboration of the analysis in the text see Karst & Horowitz, *Emerging Nationwide Standards for School Desegregation—Charlotte and Mobile, 1971*, 3 BLACK L.J. 206 (1971).

6. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

7. Davis v. Board of School Comm'rs, 402 U.S. 33 (1971).

Something more is required, and that something is affirmative action to achieve "actual desegregation" in "the greatest possible degree." In the Charlotte case, Chief Justice Burger, speaking for the Court, said that "in a system with a history of segregation," there was a presumption against the continuation of schools that are composed of students of all the same race, or nearly so; in such a case, he said, the school authorities will have the burden of satisfying the Court that the racial composition of the schools "is not the result of present or past discriminatory action on their part."[8] With this language, the Court thus adopts the formula used by Judge Sobeloff of the Fourth Circuit several years ago: the constitutional end, he said, is "the abolition of segregation and its effects."[9]

To understand why the Supreme Court's adoption of this formula is important, we have to go back to the late 1950's, when the lower federal courts in the South were making their first efforts to understand and implement the decision in *Brown v. Board of Education*.[10] One view that came into vogue early in this process was expressed by a prestigious three-judge district court. Speaking of the Supreme Court, those judges said:

> It has not decided that the states must mix persons of different races in the schools . . . . The Constitution, in other words, does not require integration. It merely forbids the use of governmental power to enforce segregation.[11]

In the Charlotte and Mobile cases, the Supreme Court has forthrightly rejected that position. In Alabama, in North Carolina, and wherever state law has previously expressly commanded or authorized school segregation, the Constitution does, indeed, require the mixing of races in the schools.

When the Chief Justice came to identify just what were the continuing effects of past school segregation, he mentioned only one: During the time when segregation was commanded by law, decisions concerning the location of schools and the size of schools might have influenced

8. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971).

9. Bowman v. County School Bd., 382 F.2d 326, 333 (4th Cir. 1967) (concurring opinion), *aff'd sub nom.* Green v. County School Bd., 391 U.S. 430 (1968). The *Green* opinion is the origin of the Court's declaration that a school board must produce a plan that will "work *now*." 391 U.S. at 439 (emphasis original).

10. 347 U.S. 483 (1954).

11. Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

people's choices of residential location. In such an event, he noted, the adoption today of a school assignment plan that was "racially neutral" on its face would not be sufficient to counteract the effects of the school board's past racial discrimination.[12] The Chief Justice did not take the obvious next step, which is to recognize that the whole system of school segregation must surely have had at least as much effect on the racial distribution of families as did the local school board decisions mentioned in his opinion. The Chief Justice's argument, in other words, is more than sufficient to cover residential patterns throughout the urban South.

It is easy to sympathize with a member of a southern school board who might ask, in good faith, "What am I supposed to do?" No school board, and no court, can hope to discover all the effects of Jim Crow, let alone remedy them. Furthermore, after the state abandons its statutory requirement of school segregation, there may be other considerations, both legitimate and racially neutral, that are entitled to some weight. The policy of the neighborhood school is one such consideration. So, whatever the past history of school segregation, there can be no absolute duty of a school board to undo each and every effect of that past history. But to say that a school board cannot be expected to do everything is not to say that it should be allowed to do nothing. In the Charlotte and Mobile cases, the Supreme Court explored the ground between those two absolutes, and emerged with a new desegregation standard.

In defining a school board's duty, the Court used words like "reasonable," "feasible," and "workable."[13] Perhaps the clearest feature of the new standard is what it does not require; there is no constitutional requirement that each school reflect the racial proportions of the whole district. On the other hand, as I mentioned, there is a presumption against the continuation of all-black or all-white schools. Beyond that, we are left to determine the meaning of the terms "reasonable" or "feasible" mainly by reference to what the Court did in these two cases. In Charlotte, the Court affirmed the district court's large-scale grouping of inner-city schools with outlying schools, with county-wide busing of students. And in Mobile, where the Court concluded that the lower courts had failed to meet the standard of reasonableness, the failure that mattered was the failure to use busing to achieve, as the

12. 402 U.S. 1, 20-21, 28.
13. *Id.* at 31.

Chief Justice put it, "the greatest possible degree of actual desegregation."[14] The practicality of busing will vary, the Court noted, with the time required for travel and with the ages of children. In Charlotte, the average travel distance for elementary children to be bused was seven miles; the maximum busing time was thirty-five minutes, one way. The Supreme Court's approval of this order, and its insistence on resort to busing in Mobile, demonstrate that the constitutional standard of reasonableness, for all its flexible appearance, is not an invitation to retreat from the principles of *Brown v. Board of Education.*

When the Court turned away from the effects of past segregation to the present practice of segregation, it approached this second question in a negative way, asking not whether segregation was now being maintained but rather whether the dual system had been abandoned. The conclusion in each case was that the school board had not abandoned the dual system, because it had not taken steps "to achieve the greatest possible degree of actual desegregation."

I have deliberately repeated this phrase, to emphasize that the same considerations define both the existence of racial segregation and the scope of the school board's duty to eliminate segregation. There is nothing in this formula that requires an inquiry into anyone's motivations; a court is to determine whether the constitutional standard has been met on the basis of its assessment of factors that are relatively objective. What matters is not the school board's good faith or bad faith, but its conduct in relation to the constitutional goal.

Although these two cases arose in the South, their reasoning is easily transferable to the North and West. Consider the question of the continuing effects of past racial discrimination. If the decisions of a southern school board concerning school location and school sizes can be said to have contributed to racial segregation among residential areas, then with far greater force it can be argued that official state action in northern and western cities has produced residential segregation. Until 1948, racially restrictive covenants in deeds were regularly enforced by state courts;[15] governmental action has often located public housing in such a way as to intensify residential segregation;[16] and, in a variety

14. *Id.* at 26.

15. The practice was held unconstitutional in Shelley v. Kraemer, 334 U.S. 1 (1948).

16. *See, e.g.,* Gautreaux v. Chicago Housing Authority, 436 F.2d 306 (7th Cir. 1970), *cert. denied,* 402 U.S. 922 (1971).

of ways, the federal government's programs of subsidy and loan guarantees have explicitly encouraged racial segregation in private housing.[17] The logic of the Charlotte and Mobile decisions thus requires northern and western school boards to take steps that are reasonably feasible to alleviate the racial imbalance that results from past government-sponsored residential segregation.

Once again, we may expect to hear school boards complain that they are not responsible for residential segregation, even if other governmental agencies are responsible. One answer is that the fourteenth amendment's guarantee of equality is a command addressed to the state, which cannot avoid its responsibilities by arguing that its left and right hands are strangers. In any case, the school boards themselves have practiced and continued to practice racial segregation. When a school board draws and redraws its attendance zone lines, and locates schools, and adjusts school sizes, and permits or denies student transfers, it knows the impacts those decisions will have on the racial composition of the schools. If the school board chooses one such pattern when it has reasonably available to it another pattern in which racial imbalance would be less severe, then to just that degree the board has chosen to intensify segregation. A number of federal and state courts have recognized the reality of such choices by holding northern and western school boards guilty of official segregation.[18] Lawyers will not be startled by the conclusion that a school board, like any other person, is held responsible as if it intended the natural and probable consequences of its acts.

In his opinion in the Charlotte case, the Chief Justice took some pains to state that the Court was not making any pronouncements about school segregation that results from causes other than explicit state law or the deliberate action of a school board. The opinion did not, however, mention the term "de facto segregation." That term is misleading in its suggestion that racial segregation in our northern and western cities has just happened, without any application of state power. The Supreme Court has never decided a pure de facto segregation case, and it may never again see one. At this moment the Court has before

17. *See generally Hearing on De Facto Segregation and Housing Discrimination Before the Select Comm. on Equal Educational Opportunity of the United States Senate*, 91st Cong., 2d Sess., pt. 5 (1970).

18. Dimond, *School Segregation in the North*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1972); Karst & Horowitz, *supra* note 5, at 216-219.

it a case from Denver;[19] the case is likely to be important, setting a pattern for the North and the West in much the same way that the Charlotte and Mobile cases have set a pattern for the South. In the Denver case, the complaining parents did not merely allege that their children were attending schools that were racially exclusive; they also alleged deliberate action by the school board to maintain segregation.

Denver's experience will seem familiar to anyone who lives in a large city in the North or the West.[20] There is an area in the core city that is largely populated by blacks and chicanos; additionally, a substantial black population has, since 1950, moved into an area of northeast Denver called Park Hill. In 1968, after years of debate, informed by study committee after study committee, the Denver Board of Education adopted three resolutions designed to achieve a better racial balance in the Park Hill area by transferring students and redrawing district lines so as to produce a proportion of about 80 percent white students and 20 percent black students in each of the schools in Park Hill. Before those resolutions could be carried out, a school board election was held, and two candidates were elected who had promised to rescind the Park Hill integration resolutions. Those two votes were decisive, and in 1969 the resolutions were rescinded. In their place, the reconstituted board adopted a program of voluntary exchanges; if this had been Alabama instead of Colorado, no doubt the plan would have been called a "freedom of choice" plan. The lawsuit against the board was filed soon afterward. The plaintiff parents complained not only about the rescission of the Park Hill resolutions, but also of other acts of the board which they said were designed to preserve segregation in Park Hill and in the core city as well.

As to Park Hill, the trial judge found that the board had deliberately maintained segregation. For example, a new school was built in 1960 in the existing black neighborhood, located to absorb children so as to defend the existing predominantly white schools against the influx of new black children as Park Hill changed its racial composition. When this new school was built, there was an overcrowded white school eight blocks away, but no children were transferred from that school to the

19. Keyes v. School Dist., 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 404 U.S. 1036 (1972).

20. The facts summarized here are taken from Keyes v. School Dist., 313 F. Supp. 61 (D. Colo. 1970); Keyes v. School Dist., 313 F. Supp. 90 (D. Colo. 1970); and the consolidated appeal, Keyes v. School Dist., 445 F.2d 990 (10th Cir. 1971).

new one. The court ordered the reinstatement of the board's 1968 Park Hill resolutions.

The trial judge reacted differently to the plaintiffs' charge that the school board had been pursuing similar policies in the core city. Here, he noted, the racial and ethnic composition of the area had been established well before *Brown v. Board of Education* was decided in 1954. He characterized the situation as de facto segregation, and said that the plaintiffs had not proved any improper motivation on the part of the school board as to these core-city schools. Even so, he concluded that there was a denial of equal educational opportunity to minority children who attended schools that were upwards of 70 percent minority students. Accordingly, the judge ordered the integration of students in fifteen of these schools with students in surrounding white-Anglo schools; each school was to emerge from this process with an Anglo population in excess of 50 percent.

On appeal, the court of appeals agreed with the trial court as to the Park Hill schools, but reversed as to the core-city schools. The court of appeals did not dispute the trial judge's conclusion that racially separate education is inferior for the segregated minority students, but said simply that the principle of the neighborhood school is racially neutral, and that racial imbalance does not violate the fourteenth amendment unless the imbalance has "resulted from racially motivated conduct."[21]

Let us suppose that the standard of the Charlotte and Mobile cases had been applied in Denver. How would the Denver case be decided? The answer comes easily. Consider these facts about the core-city schools in Denver: In 1953, a new high school was opened to replace an old one. The attendance zone boundaries were left the same even though the new school was built half a block from one of the boundary lines. More than half of the new school's students were minority students; just on the other side of the boundary, half a block away, lived white-Anglo students who attended another high school that was 98 percent white-Anglo. Within three years, some black families had moved into the white school district; the board then changed the boundary line so that the minority school's district now included all the newly black neighborhoods. The board said that the minority school was underutilized, and the white school overcrowded. It was then suggested to the board that the way to alleviate overcrowding was to extend the

21. Keyes v. School Dist., 445 F.2d 990, 1005 (10th Cir. 1971).

boundary of the minority school further into the white neighborhood. What would you guess the board did with that suggestion? You guessed correctly.

Other examples in the record also support the conclusion that the Denver board was aware of what its actions would mean for the racial composition of the core-city schools. Optional transfer zones were created, which had the effect of permitting white students to escape minority schools. At a time when a white junior high school was over capacity, a nearby junior high, largely composed of minority students, was under capacity; between the two schools, there was an optional zone, and as the optional zone became increasingly a black neighborhood, the board removed the optional feature and assigned all the children to the minority school; and even after this change the white school remained overcrowded while the minority school was still under capacity. On a standard of reasonableness, or feasibility, the Denver board's conduct surely would fail. Still the district judge said that the plaintiff parents had not proved any "malicious" action on the board's part. He added this wistful comment about schools in the core city:

> As to these schools, the result is about the same as it would have been had the administration pursued discriminatory policies, since the Negroes and, to an extent the Hispanos as well, always seem to end up in isolation.[22]

It remains for us to ask why the two courts saw discrimination in Park Hill and not in the core city. Perhaps the reason lies in the fact that the minority population of the core city had lived there for a long time, while the more recent movement of black families into Park Hill appeared to be a case of residential mobility that deserved zealous protection against a backlash. Such protection presumably would involve "close scrutiny" of the school board's conduct. Or, perhaps it was merely the fact that the old school board had determined that there was something wrong in Park Hill, the correction of which was thwarted by the election of the two new members to the school board. In either case, what determined the issue as to the core-city schools was the conclusion by the district judge, affirmed by the court of appeals, that the plaintiff parents could win on that issue only if they could prove an improper racial motive on the part of the board.

There are two parts to this test. First, it is assumed that the critical

22. Keyes v. School Dist., 313 F. Supp. 61, 73 (D. Colo. 1970).

question is that of the school board's good faith; secondly, the plaintiffs are told that they must demonstrate that the board has not acted in good faith. The contrast to the Charlotte and Mobile cases is pronounced. In those cases, the Supreme Court's test of reasonableness focused on the effects of the school boards' actions, not on their motives. Does the Denver case mean that we have a different rule outside the South? The court of appeals faced that question head on, and answered, yes. Given the neutrality of the neighborhood school principle, the court said, "it would be incongruous to require the Denver School Board to prove the non-existence of a secret, illicit, segregatory intent."[23] The court acknowledged its own previous decision that a neighborhood school plan in Tulsa, Oklahoma was constitutionally suspect when the effect of the plan was to preserve segregation. "But," said the court, "that case dealt with a school system which had previously operated under a state law requiring segregation of races in public education."[24]

This distinction, which masquerades as a rule of evidence and has a nice surface plausibility, is nothing less than the two-constitutions idea, packaged for sale in a new context. The idea deserves the same treatment Justice Black gave it eight years ago. The asserted distinction rests on a factual error to the extent that it assumes that the motives of northern and western officials are significantly more benign than those of their southern counterparts. Even more importantly, the asserted distinction fails because it focuses on the wrong issue.

Jim Crow is a southern name, but racial segregation—even official racial segregation—has touched every region of our country. The leading judicial decision upholding school segregation before the Civil War bears a name that northerners prefer not to remember, *Roberts v. City of Boston*.[25] In 1891, when the State of Georgia enacted a Jim Crow law governing railroad cars and streetcars, a Chicago newspaper called the law "wretched legislation," and commented, "A state cursed with such a legislative body almost deserves commiseration."[26] But it behooved citizens of Illinois not to be so patronizing. The Illinois con-

23. Keyes v. School Dist., 445 F.2d 990, 1005 (10th Cir. 1971).

24. *Id.* at 1006.

25. 59 Mass. (5 Cush.) 198 (1850).

26. Quoted in Bacote, *Negro Proscriptions, Protests and Proposed Solutions in Georgia, 1880-1908*, THE NEGRO IN THE SOUTH SINCE 1865 at 149, 153 (C. Wynes ed. 1965).

stitution of 1848 had included a provision forbidding Negro immigration into the state; this clause was specifically approved by the voters of Illinois by more than a two-to-one vote.[27] A similar constitutional provision was adopted in Oregon by an eight-to-one vote.[28] In California, the school districts of Orange County continued to segregate Mexican-American school children until the Ninth Circuit ruled the practice invalid in 1947.[29] The ground for this decision is itself depressing; the court held that the California statute did not authorize the segregation of chicano children, since it permitted only the segregation of children who were Indian, Chinese, Japanese and Mongolian! Even today, all our cities are affected in their racial housing patterns by a system combining public and private power to exclude blacks from major portions of their residential areas. Dick Gregory summed it all up nicely when he said this to a northern audience: "Down South, they don't care how close I get, so long as I don't get too big; up here, you don't care how big I get, so long as I don't get too close."

When Gunnar Myrdal published his monumental study of the black man and woman in America, his subtitle was: The Negro Problem and Modern Democracy.[30] Myrdal's study ended just as World War II was beginning, when the black population was concentrated in the rural South. Even then, even before the great waves of migration that have helped just a little to reduce northern and western self-righteousness about the South, there never was a Negro problem. There was, and there still is, a national problem, and the problem is called by a name that is not pretty: racism. Given this nationwide heritage, the double standard announced in the Denver case seems singularly inappropriate. If, in Tulsa, a school board must offer convincing justification for maintaining segregation through the use of neighborhood schools, there is no sound distinction based on history or on present conditions that should turn this presumption upside down in Denver.

I am not saying that a showing of bad motive on the part of a school board, North or South, is irrelevant. There is nothing wrong with a rule that says the plaintiffs in a school desegregation case win if they prove that racial imbalance is the result of the school board's improper-

27. See L. LITWACK, NORTH OF SLAVERY 70-71 (1961).
28. *Id.*
29. Westminster School Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1947).
30. G. MYRDAL, AN AMERICAN DILEMMA (1944).

ly motivated actions.[31] What is wrong is the converse conclusion, reached in the Denver case, that northern or western desegregation plaintiffs lose if they do not prove purposeful misconduct by the board.

In many cases, of course, the same result will be reached whether or not the courts require proof of the board's improper motive. A number of judges, both state and federal, have recently found improper motives on the basis of proof that the effects of school board action are to maintain racial imbalance.[32] These courts are simply applying to a new context the ancient learning that one of the best ways to determine what a person intends is to look at what that person is accomplishing by his or her conduct. Similarly, the problem of proving bad motive can be attacked from another direction. In any constitutional case, a court will ask: What is the state's interest in taking the action that is challenged? If, upon examination, the asserted interest of the state is extremely weak, then a court may conclude that there is some other purpose for the state's conduct.[33]

The inquiry into motive, then, is above all an inquiry into the expected good to be accomplished by the state's action, and the harm that is expected to result from it. The facts to be proved in such a cost-benefit analysis are practically identical to the facts that would be proved if the legal rule demanded an inquiry not into bad motive, but instead into the alternative choices that are reasonably available to a school board for avoiding excessive racial imbalance. Then why does it make any difference whether we approach the issue of northern and western desegregation in terms of motive or in terms of a principle of the reasonable availability of means to reduce racial imbalance?

We have seen that the motive rule places the burden of proof on desegregation plaintiffs, when the burden of explanation ought to be on

31. See the persuasive argument of Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95. *See also* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

32. *See* note 18 *supra*.

33. This is the technique used by the Supreme Court in a number of first amendment cases dealing with investigations into political association. *E.g.*, DeGregory v. Attorney General, 383 U.S. 825 (1966); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama, 357 U.S. 449 (1958). On the *Shelton* case, see A. BICKEL, THE LEAST DANGEROUS BRANCH 51-54 (1962); H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 100-03 (1965); Karst, *The First Amendment and Harry Kalven*, 13 U.C.L.A.L. REV. 1, 15-22 (1965).

the school board. Under the doctrine that has come to be called "the new equal protection," a state normally has the burden of demonstrating a "compelling state interest" to justify its imposition of disadvantage on a racial minority.[34] This presumption against racial discrimination deserves to be reflected in our rules of evidence. Furthermore, in a school desegregation case, once significant racial imbalance is shown, and once the plaintiffs show that the board has reasonably available to it other alternative courses of conduct that would significantly reduce racial imbalance, it makes the best practical sense to call upon the board to explain its reasons for choosing to maintain the higher degree of racial imbalance. Those reasons are surely known to the board. And if there are no such reasons, or if the reasons are illegitimate—such as opposition among whites to racial integration—then the continuation of segregation's harms cannot be justified on any theory.

Abandoning a motive test in favor of a test looking to the school board's reasonably feasible alternatives thus accords with equal protection doctrine and with a commonsense approach to the articulation of the issues. But more important than either of these considerations is another reason why a desegregation plaintiff in Denver should not have to prove the school board's illicit motive. Inquiring into the purity of heart of the members of the school board is a corrosive business that can only do harm to the community. Even with the best of faith on all sides, the painful problem of school desegregation can never be solved once and for all in a society that is undergoing continuous change. That means, inevitably, a continuation of communication among a school district's various component groups—and specifically between the school board and the minority communities, with a judge frequently playing a useful role as broker. These discussions are difficult enough when they deal exclusively with questions of cost and harm; their difficulty is magnified enormously when they are conducted in an atmosphere poisoned by accusations of bad faith. The principal contribution that the courts can make to this already emotionally charged process is to get the parties to focus on issues that can be discussed rationally.

34. For a carefully reasoned argument applying the "compelling state interest" test to legislative classifications that produce racially discriminatory effects, see Judge Sobeloff's separate opinion in Wright v. Council of City of Emporia, 442 F.2d 588, 593 at 594-98 (4th Cir. 1971).

Finally, a distinction which makes northern plaintiffs prove a school board's illicit motive, but which assumes a southern board's bad faith, deserves rejection because it mocks the ideal of a national Constitution. It places the courts in the indefensible position of telling northern blacks that they are entitled to a lesser degree of judicial vigilance on behalf of their constitutional rights, and at the same time telling southern whites that they have been consigned to a moral limbo reserved for them alone. It is only rarely the case that to state a proposition is to refute it, but this is one of those cases.

II

The problem of racial discrimination in legislative districting bears some similarity, on the surface, to the problem of school segregation. In both situations, lines are drawn on maps for the purpose of parceling out access to government institutions. In both situations, the line-drawing can have racially discriminatory effects. The complications that arise in the school-segregation cases, as we have seen, are largely logistical; the resolution of school-segregation controversies will perhaps never be tidy, but the factors that should govern decision seem now to be identified. In contrast, legislative redistricting does not involve anything like the construction of new buildings, or the transportation of voters. What makes the issue of racial discrimination in legislative districting a difficult issue is not a shortage of physical resources, but a shortage of legal doctrine.

In 1964, when the Supreme Court gave us the principle of one person, one vote,[35] there were skeptics, even on the Court, who pointed out that a carefully partisan drawing of district lines could produce a map that would give to each district the same population, and still turn an electoral minority into a majority of seats in the legislature.[36] In the classical form of gerrymandering, the party in control of the legislature draws the lines so as to load up a few districts with overwhelming majorities for the opposition party, and spreads its own partisans in such a way as to produce lesser, but solid majorities for its candidates. In this manner, for example, a Republican plurality in New Jersey in 1966 was turned into a 9-6 Democratic margin in congressional seats;

35. Reynolds v. Sims, 377 U.S. 533 (1964).

36. For a thorough analysis of the problem of gerrymandering and the relevant judicial decisions, see R. DIXON, DEMOCRATIC REPRESENTATION 456-99 (1968).

and in Iowa in the same year, a Republican margin of less than 5 percent in the vote for Congress produced a congressional delegation that was 5-2 Republican.[37] All this is familiar learning. The unfairness of the system cries out for remedy. Thus far, however, the courts have been reluctant to try to provide that remedy, and for good reason. It is fearfully difficult to devise judicial doctrine—standards for decision—that will be adequate to the intricate task of defining the essentials of effective representation. If Democrats deserve a districting scheme that reflects their state-wide voting strength in the state legislature, then so do prohibitionists and farmers and old-age pensioners. A generalized right to effective representation turns out to be more complicated than the busing of school children.

Suppose, for example, that the New York legislature were to draw congressional districting lines on Manhattan Island so as to load up one district with 86 percent of voters who were black or of Puerto Rican origin. The result would be that one—and only one—of Manhattan's four congressmen would represent a majority of voters who were black or Puerto Rican. Perhaps you will not be astounded to know that his example is quite real.[38] A lawsuit was brought to challenge this districting, on the ground that it was a racial gerrymander. How should the case have been decided? Should the courts have ordered a redistricting, to spread Manhattan's black and Puerto Rican minority over the four districts? To use the language of the school cases, should there be something approximating racial balance in legislative districts? One person who did not think so was the late Congressman Adam Clayton Powell, who intervened in this lawsuit on the side of the defendants, to support the districting as it was. Racial balance in Manhattan would have produced a 38 percent minority in each of the congressional districts, and Congressman Powell rightly suspected that such a policy might work to his disadvantage. It was, in fact, precisely racial imbalance that assured Harlem of one representative that would be unmistakably *its* representative. The Supreme Court got off this dilemma's horns by concluding that this was not a racial gerrymander at all, saying that the plaintiffs had not proved either that the legislature was racially motivated or (and this is truly remarkable) that the legislature had in fact drawn the districts along racial lines.

37. *Id.* at 462.

38. Wright v. Rockefeller, 376 U.S. 52 (1964).

In Alabama, however, a few years previously, the legislature had redrawn the boundaries of the City of Tuskegee in such a way as to exclude all but a handful of the city's black residents. In that case the Supreme Court had held the act invalid under the fifteenth amendment as a denial of the vote on account of race.[39] In the Tuskegee case, the Court had muddled its discussion of motive and effects, but the case seems explainable only on the theory that the racially discriminatory effect of the legislature's act demonstrates its improper motive, in the absence of any other argued justification. How did the Supreme Court deal with the Tuskegee case when it came to decide the case in New York? By silence; it did not mention the case at all.

Thus was the stage awkwardly furnished when the Supreme Court returned last year to the problem of racial gerrymandering. One case came from Mississippi,[40] and one from Indiana.[41] By now you should know how the cases came out. These cases were complicated by an additional factor that goes under the clumsy name of multi-member districting. In each case, many of the state legislators were elected to represent single-member districts of the usual type, but other legislators were elected in groups from districts that were larger in population. Thus Marion County, which includes the City of Indianapolis, elected twenty-three state assemblymen in an election at large. The Supreme Court had held in the past that multi-member districts are not unconstitutional per se, but it had also strongly implied that such a system would be invalid if it "operate[d] to minimize or cancel out the voting strength of racial or political elements of the voting population."[42] In the Mississippi and Indiana cases, the complaints were just the opposite of the attack that had been leveled at the congressional districting of Manhattan Island. In both cases, the plaintiffs argued that black voters were submerged in a big district dominated by whites, depriving them of the legislative representation they would have if single-member districting were used.

The Mississippi case reached the Supreme Court well after the Indiana case had been briefed and argued, but was decided immediately because an election was imminent. Some redistricting was required in this case, under the one-person-one-vote principle. Since 1964, Mis-

39. Gomillion v. Lightfoot, 364 U.S. 339 (1960).
40. Connor v. Johnson, 402 U.S. 690 (1971).
41. Whitcomb v. Chavis, 403 U.S. 124 (1971).
42. Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

sissippi had used some multi-member districts, and the lower federal court's plan included a multi-member district in Hinds County for both the state senate and the state house of representatives. That court also had made a finding that there had been no racial discrimination in the case.[43] On appeal, the Supreme Court, in a two-page per curiam opinion, reversed this decision and instructed the lower court to draw a new map with all single-member districts. All the Supreme Court said was that as a general matter, large single-member districts were to be preferred over multi-member districts when a federal court was fashioning an apportionment plan. There was no mention of racial discrimination.

Four days later, the Court handed down its decision in the Indiana case. Here there had been an elaborate trial on the question whether the use of a multi-member district in Marion County was unconstitutional as a racial discrimination. The voters in the central-city ghetto comprised 18 percent of the country's population, and over the past five elections had elected from among its residents 5 percent of the county's state senators and 6 percent of its representatives. A well-to-do white suburban area, comprising 14 percent of the county's population, had elected 48 percent of the state senators and 34 percent of the representatives. The plaintiffs made the surprising concession that this multi-member district scheme had not resulted from any intention to disadvantage blacks, but argued that the scheme's effects were to do just that, and therefore that the plan was unconstitutional. The lower court agreed with this contention, but the Supreme Court reversed, by a 6-3 vote.

Mr. Justice White, speaking for the majority, said that the plaintiffs had failed to prove that the elected legislators from Marion County were not adequately representing the interests of the center-city ghetto. Absent that proof, all that could be said was that the residents of the ghetto were consistently losing at the polls, something they had in common with the minority in any election. Justice White did, however, give the Court's blessing to a rule that would invalidate the intentional drawing of district lines for the purpose of disadvantaging a racial group, and he cited the Tuskegee case, along with two lower court decisions from Alabama, as examples. What about the Mississippi case? The Court simply didn't mention it.

43. Connor v. Johnson, 330 F. Supp. 506, 520 (S.D. Miss. 1971).

The parallel between these cases and the school cases is striking, and the message has not been lost on the lower federal courts. One such court, sitting in Alabama, decided just three months ago that a multi-member district scheme was invalid, because of its effect, which was to submerge areas with a black majority into large countywide multi-member districts.[44] The Indiana case was distinguishable, the court said, because Indiana is "a State without the long history of racial discrimination evident in Alabama."[45] This history, the court asserted, made it "reasonable to conclude that multi-member districts tend to discriminate against the black population."[46] In the South, then, a multi-member district is suspect, and presumptively invalid, while elsewhere in the country a multi-member district is presumed valid even though it restricts the number of representatives elected by the residents of a racial ghetto. In the North and the West, such a resident must prove either a deliberate purpose to disadvantage a racial group or a racially discriminatory effect on something so concrete as specific votes in the legislature.

If a ghetto resident's attack on multi-member districting depended on carrying the impossible burden of proving such things as the precise ways in which a state senator fails to represent a part of his or her constituency, then the Court's decision in the Indiana case would imply resignation in the North and West. But in the next case from Indiana, of course, the plaintiffs will not concede the issue of racial motive, but will argue that such a motive is demonstrated by the effects of the districting scheme. One of the Alabama cases approvingly cited by the Supreme Court found an improper motive on the basis of a showing of such an effect, plus the absence of any need for the use of multi-member districting for the purposes of equalizing district populations.[47] This kind of cost-benefit analysis is closely similar to the analysis of "reasonably feasible" alternatives in school segregation cases.

The question naturally arises: Why did the Supreme Court insist on a racial-motive inquiry in the Indiana case? The answer surely lies in the majority's reluctance to plumb the mysteries inherent in defining a right to "effective representation" in an electorate composed of interest

44. Sims v. Amos, 336 F. Supp. 924 (M.D. Ala. 1972).
45. *Id.* at 936.
46. *Id.*
47. Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965).

groups that are numerous, diverse and overlapping. Justice White commented that the plaintiffs' theory was "not easily contained,"[48] and he is surely correct that any interest group might make an argument that is similar to the argument pressed by the black plaintiffs in Indianapolis. Indeed, the logic of an interest-group theory of representation also presses for the abandonment of even single-member districting in favor of a system of proportional representation, with all those fragmenting tendencies we used to associate with politics in France. Justice White can be pardoned for turning away from such a path. Yet it is always proper to be suspicious of an argument that begins with words such as, "This will open the door to . . . ." If the Indiana case seems wrongly decided—as it does to me—then we must try to construct a container for the plaintiffs' case that will permit the Court to avoid entering into the full-scale articulation of a judicially enforced right to effective representation, and at the same time to reaffirm that the fourteenth amendment means as much in Indianapolis as it does in Hinds County, Mississippi.

In the first place, the Indiana case involved a multi-member district. Given its winner-take-all feature, such a system of at-large elections is peculiarly susceptible to abuse. The preference for single-member districts, expressed by the Court in the Mississippi case, might be made into a constitutional presumption in the pattern of the new equal protection, so that the state would have to justify its use of multi-member districts, showing that they are necessary to achieve a compelling state interest.[49]

The other distinction between the claims of the plaintiffs in the Indiana case and other potential claims to effective representation is the obvious one: This was a case of racial discrimination, and both the history of the fourteenth and fifteenth amendments and present-day need justify treating racial equality as a value that deserves special protection. The majority's acceptance of the racial-motive principle shows that this argument has not been lost on the Court. Yet the majority might plausibly ask this question: If we are to adopt a principle of effective representation for racial minorities, what *is* effective representa-

48. Whitcomb v. Chavis, 403 U.S. 124, 156 (1971).

49. The Supreme Court's willingness to treat multi-member district cases as justiciable suggests that it recognizes the special dangers in such a system. In contrast, the Court has tended to avoid reviewing cases involving claims of partisan gerrymandering in single-member district situations. *See* Dixon, note 36 *supra,* at 475 ff.

tion? In the New York case, black plaintiffs opposed a "racial borough" scheme that assured a safe congressional seat for Harlem. What is the constitutional interest that is harmed in cases like these? Can we consistently accept the claim of the Harlem plaintiffs and also the claim of the Indianapolis plaintiffs?

I doubt that any black person would agonize very long over these exquisitely balanced considerations. The harm, in the eyes of the victims of racial gerrymandering, lies in the scarcity of black and brown faces in the legislature. This harm goes far beyond any concern for the symbolism of creating role models for the minority communities; it goes to the heart of the legislative process. Just try telling a black woman in the Indianapolis ghetto that her interest in the establishment of a child-care center will be defended by her state senator who lives in the white suburb. Anyone who has been in public life—or for that matter, anyone who has even served on anything so lowly as a university committee—knows the difference it makes to have blacks and chicanos present in the negotiating room. The racial balance that is needed is not in the legislative district, but in the legislature.

The argument, then, is that the Indianapolis plaintiffs did state a good claim for relief, since it was plain that a racial minority was submerged into the multi-member district. But what of the Harlem case? The plaintiffs' position in that case seems to me to be entirely consistent with what I have been urging. What the Harlem plaintiffs wanted was not just an even distribution of the minority communities across all four congressional districts in Manhattan. Since those communities constituted 38 percent of the population, a precise statistical slice of the political pie would give them one and one-half congressmen. I am not arguing that a federal judge should try to play Solomon; my point is simply that the Harlem plaintiffs were seeking the same thing as the Indianapolis plaintiffs: an increase in the number of legislative representatives who clearly could be said to represent them.

I doubt that the Supreme Court will, in the near future, explicitly embrace a constitutional right to effective representation for racial minorities. But I am willing to predict that before long the Court will reach a result that is the substantial equivalent. For the short run, I am willing to guess that the Court will achieve that result through finding racial motives largely on the basis of evidence of racially discriminatory effects, just as so many northern and western judges have found

in the school cases.[50] If the Court proves me wrong—if it fails to recognize the justice of claims like those pressed in the Indiana case—then it will be making a mistake that is truly grievous. White America will not be taken seriously, when we urge our minority communities to work within the existing system for peaceful change, unless such an orderly course is genuinely open to them. For that reason alone, the Indianapolis decision cannot be allowed to be the end of the story.

But there is another reason, which I have taken as today's theme: If the fourteenth amendment is interpreted to be a regionally selective command, we shall all be the poorer. If social diversity makes a national constitution difficult, the same social diversity makes a national constitution imperative. We have no crown to serve as a symbolic focus for national allegiance, and today even the flag is misused for partisan purposes by left and right alike. What we do have, in a time when our divisions threaten to break us apart, is one preeminent symbol of nationhood: the Constitution. If the Supreme Court nourishes the two-constitutions idea, that unifying symbol will lose its force.

More than symbolism is at stake. Cicero saw that the idea of a higher law implies a law that is universal. And here lies a profound and disturbing truth for our own time. A system that provides one law at Rome and another at Athens need not be respected as a higher law. The more we accept the idea of two constitutions, the more we risk having no constitution at all.

We can hope, however, that the Supreme Court will insist that the fourteenth amendment commands a single nationwide standard of racial justice. We can hope that the Court will say—to blacks and chicanos in Denver and Indianapolis, no less than to whites in Mobile and in Hinds County—what Justice Black said when he was asked to accept the two-constitutions idea: "Our Constitution was not written to be read that way, and we will not do it."

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50. Alternatively, the Court may do as some lower courts have done in political gerrymandering cases involving single-member districts, achieving the "backdoor" result of striking down gerrymandering in the name of refining the mathematical equality of the districts. See Dixon, *The Warren Court Crusade for the Holy Grail of "One Man—One Vote,"* 1969 SUP. CT. REV. 219, 256-58.