PANEL DISCUSSION

An opening observation by Solicitor General McCree in response to the intervening commentators has been incorporated in his Commentary, as printed above.

In response to Professor Goodman, Professor Tollett said:

I partially agree with your statement of why blacks are for racial balance, to the extent that they are. They recognize that with so much racism left in the society, the only way they can be sure that resources and seriousness are brought to bear on institutions where there is a black presence is to insure that there is a white presence also. I see the busing proposition primarily as a bargaining chip. Personally, I would be happy if I could get an equal expenditure per pupil.

He added this comment about higher education:

I should say a word about predominantly black higher education institutions. If you read what I have written about integration in higher education,[1] what I do is disassociate higher education from *Green*[2] and *Swann*[3] and suggest that the freedom-of-choice principle certainly applies in higher education, and that racial balance is not required there. It is not commanded by the Constitution, and in the light of the special functions that these institutions serve, there is nothing wrong with predominantly black higher education institutions being identifiably black.

In answer to a question from the audience, Professor Goodman amplified his views on the question of the appropriate remedy after Brown:

You've really asked several questions. First of all, you don't like what I said about voluntarism as an appropriate remedy for desegregation. You suggest that voluntarism is essentially what we adopted under the pupil-placement laws that were enacted in the South shortly after the *Brown* decision as a means of evasion. You're implying that surely I don't approve of those things, so how can I approve of voluntarism in general. Second, I am not sure what you meant when you said that desegregation hasn't worked. I'll speak to that in a second about what it means to say "worked" because I think your statement that "we've tried this and we've

1. *E.g.*, Tollett, *Black Institutions of Higher Learning: Inadvertent Victims or Necessary Sacrifices?*, 3 BLACK L.J. 162 (1974); Tollet, *Blacks, Higher Education and Integration*, 48 NOTRE DAME LAW, 189 (1972).

2. Green v. County School Bd., 391 U.S. 430 (1968).

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

tried the other thing and that none of them have worked, so what else can we do," is one of roots of the whole problem.

But first, here is another answer. I do not approve of the pupil-placement plans that immediately followed *Brown* and I do not approve of the variation of the pupil-placement plans that the Court struck down in *Green*. I think that the Court was right in *Green* in 1968 in saying that this freedom-of-choice plan was no good. What was wrong with that plan, and what was wrong with the previous pupil-placement plan, is that they set up schools that were labeled white and black. This was just the old fashioned southern-style de jure segregation with one additional wrinkle that said "you are initially to be assigned to this black school and then you can affirmatively opt out of it." That theory is no good because we started off in a non-colorblind way identifying children and identifying schools by race. It isn't enough, then, to say that if you want to, you can opt out.

What I am advocating is a system that assigns children initially on a non-racial colorblind basis to their schools, geographically if you like, and then offers them the opportunity to opt out of those schools and into others that have racial compositions favorable to them, in their own view. You probably would say that that won't "work" either. By "work," what you mean is simply to bring about maximum feasible racial balance. I am not suggesting that if you have only voluntarism, you will get, through the operation of parental choice, the result that the Supreme Court is now ordering as a matter of judicial mandate. I am saying that that ought not to be the objective, that the proper objective—that is, the appropriate function of a constitutional remedy—is simply to make certain that no black student who wants to attend a school in which there is a predominance of whites, or some whites, or whatever they may prefer, will be deprived of that opportunity. And it "works" if it accomplishes that result, even if it does not accomplish the result of producing any particular racial composition.

Professor Tollett added this observation on the remedy question:

There's a point I do want to make that is related to what you said and the last question. I think that Burger was quite correct in the *Swann* case when he said that just as race may be taken into account in determining whether there has been a constitutional violation, it also has to be taken into account in fashioning a remedy. I think it is extremely difficult at this stage in our history to be racially neutral and at the same time do justice to blacks, to Chicanos, and to others who have been oppressed for years and years, such as women in the employment situation and, to a lesser extent, in education.

A member of the audience wondered if the remedy problem would have been largely solved if the Rodriguez *case had come out the other way on expenditure equalization.*[4]

Professor Goodman responded:

> The broader question, of which the *Rodriguez* case was one aspect, is whether or not education is such an important value in our society, that there is a constitutional right on the part of every school child to have equality in the amount of school facilities that are allocated to him. That is one way of putting one aspect of the *Rodriguez* issue. I take it that your point is that if the Court had held that there is a right to equality in the distribution of school resources, it would have solved the problem that the Court failed to solve in the *Brown* and post-*Brown* desegregation litigation.
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> I suppose that if you assume, as many blacks and whites do, and as Professor Tollett said a few minutes ago that he does, that the principal value in desegregation or racial balance is to assure all children an equal share of the economic resources of the school district—if that is the reason why you want integration—then I suppose you are right. A Supreme Court decision holding that there is a right to equality in the resources and providing effective means of policing that right, would have been an appropriate and adequate substitute for desegregation.

Professor Kurland noted that a major desegregation case had been proceeding in Los Angeles despite the earlier victory in Serrano *for the equal expenditure principle, and said of that principle:*

> It may satisfy the equal distribution problem—the economic problem—but I think there are more problems involved than the economic problem and I think that the California experience proves that.

Professor Tollett added this response to the same question:

> I would look at *Rodriguez* a little differently. I think the three-tiered approach to interpreting constitutional questions got the Court into some difficulty. I think the Supreme Court of the United States could have come out in essentially the same place that the Supreme Court of Califor-

4. In San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), the Supreme Court held that different levels of educational spending by local school districts with different levels of assessed property value did not violate the equal protection clause of the fourteenth amendment. Earlier, the California Supreme Court had ruled the other way in Serrano v. Priest, 487 P.2d 1241 (1971), basing its decision on the state constitution rather than on the fourteenth amendment.

nia came out if the court had not started off by trying to determine if education was a fundamental right. It seems to me that the Court could have stated that there was a need for equal expenditure without determining that education was a fundamental right and I think it would have advanced us a long way in providing equality.

I would like to qualify my agreement with Professor Kurland, as indicated at the beginning. A certain amount of personal association is also required, and the *Brown* opinion was not a bad opinion in its reference to the intangible aspects of equal educational opportunity. There is a little more to it than economics; you need freedom of association, too. I think that if you could have the free choice to go to a school, and then have equal expenditure as well, you would be all right.