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School Desegregation and White Flight: The Unconstitutionality of Integration Maintenance Plans

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School Desegregation and White Flight: The Unconstitutionality of Integration Maintenance Plans

Three decades have passed since the Supreme Court first held that segregation on the basis of race in the public schools is unlawful.[1] During this time, courts and school boards have struggled to develop effective school desegregation plans. One of the problems they have encountered is the phenomenon of "white flight." The term "white flight" describes the decline in white enrollment in public school systems.[2]

Social science research suggests that some of the decline in white enrollment in public school systems undergoing court-ordered desegregation may be caused by desegregation itself, or, more accurately, by parental concerns about the process.[3] Specific parental concerns include opposition to busing, fear that increasing the number of black students in local schools will lead to residential integration, concern about a decline in educational quality, and

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[1] Brown v. Board of Education, 347 U.S. 483 (1954); see also Brown v. Board of Education, 349 U.S. 294 (1955) ("Brown II").

[2] In the context of school desegregation, the term "white flight" encompasses two types of behavior: first, the movement of white students from public to private schools; and second, the movement of white families out of a school district altogether. See Christine H. Rossell, Applied Social Science Research: What Does It Say About the Effectiveness of School Desegregation Plans?, 12 J. Legal Stud. 69, 81 (1983). Causation of white flight is a complex and hotly debated issue. While most researchers agree that school desegregation does contribute to white flight, there is wide disagreement on the extent of its impact and on how to minimize its effects. The following is a representative sampling of the literature: Gary Orfield, White Flight Research: Its Importance, Perplexities and Possible Policy Implications, in Gary Orfield, ed., Symposium on School Desegregation and White Flight 43 (1975); James S. Coleman, Sara D. Kelly, and John A. Moore, Trends in School Segregation, 1968-73 (1975) (school desegregation has significant causative impact on white flight); Thomas F. Pettigrew and Robert L. Green, School Desegregation in Large Cities: A Critique of the Coleman "White Flight" Thesis, 46 Harv. Educ. Rev. 1 (1976); Diane Ravitch, The "White Flight" Controversy, 51 Pub. Interest 135, 145 (Spring 1978) (it is "impossible to contend" that court-ordered school desegregation does not accelerate white flight); Reynolds Farley, School Integration and White Flight, in Gary Orfield, ed., Symposium on School Desegregation and White Flight 11 (1975) (when public schools are desegregated or when they become predominantly black, some white parents hasten their move away from the central city); Christine H. Rossell, School Desegregation and White Flight, 90 Pol. Sci. Q. 675 (1975-76).

[3] See, for example, Coleman, Trends in School Segregation (cited in note 2); Orfield, Symposium on School Desegregation and White Flight 43 (cited in note 2).

simple aversion to integrated education.[4] Some studies indicate that decreases in white enrollment correlate positively with the increase in black enrollment that accompanies desegregation.[5] Based on these findings, some school boards have instituted plans that limit black enrollment in racially mixed schools in an effort to keep white children in those schools ("integration maintenance plans").[6] Integration maintenance plans differ from more typical school desegregation plans in that they implement racial quotas that are based on perceived white preferences rather than on some more neutral measure, such as the ratio of black to white students in the school district as a whole.[7]

This comment considers the constitutionality of integration maintenance plans.[8] Part I discusses the Supreme Court's treat-

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[4] See Christine H. Rossell, School Desegregation and Community Social Change, 42 L. and Contemp. Probs. 133 (Summer, 1978).

[5] See, for example, Charles Clotfelter, The Implications of "Resegregation" for Judicially Imposed School Segregation Remedies, 31 Vand. L. Rev. 829 (1978); Rossell, 12 J. Legal Stud. at 106 (cited in note 2). This comment addresses limitations on black enrollment rather than overall minority enrollment because most desegregation plans are couched in those terms. References to blacks, however, should be seen as a short form for "blacks and other minorities," as the analysis remains the same.

[6] See, for example, Clark v. Board of Educ. of Little Rock School Dist., 705 F.2d 265, 271 (8th Cir. 1983); Johnson v. Board of Educ. of City of Chicago, 604 F.2d 504, 516-17 (7th Cir. 1979); Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 719-20 (2d Cir. 1979) ("Andrew Jackson"); United States v. School District of Omaha, 521 F.2d 530, 547 (8th Cir. 1975); United States v. Board of Educ. of City of Chicago, 554 F. Supp. 912, 919-20 (N.D. Ill. 1983).

[7] Compare Morgan v. Kerrigan, 510 F.2d 401, 423 (1st Cir. 1976), where the court of appeals approved racial quotas which approximated racial balance in the community, with Andrew Jackson, 598 F.2d at 720, approving a ceiling on black enrollment of 50 percent in a system that was over 50 percent black. See also Johnson, 604 F.2d at 509-10, 516-17, approving quotas set at a level that approximated the racial balance in the population at the time the plan was implemented, and frozen at that level despite an increasing black population.

[8] The issues raised in the school desegregation context are very similar to those raised in the housing context. See, for example, Rodney A. Smolla, Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight, 1981 Duke L.J. 891; Bruce L. Ackerman, Integration for Subsidized Housing and the Question of Racial Occupancy Controls, 26 Stan. L. Rev. 245 (1974); Victor S. Navasky, The Benevolent Housing Quota, 6 How. L.J. 30 (1960); Note, Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration, 93 Harv. L. Rev. 938 (1980).

The main difference between the two sets of issues is that the immediate deprivation inflicted by imposition of racial ceilings in public housing projects is far more severe than that inflicted when a child cannot attend the school of his or her choice. Compare Burney v. Housing Authority of County of Beaver, 551 F. Supp. 746, 764 (W.D. Pa. 1982) (denial of housing and implication of inferiority raised by government restricted minority access rendered unconstitutional a consent decree establishing a target racial balance in housing projects) with Otero v. New York City Housing Authority, 484 F.2d 1122, 1137 (2d Cir. 1973) (housing authority permitted to deny housing to minority group members in order to prevent "tipping"). See also United States v. Starrett City Associates, No. 84 CV 2793

ment of the threshold question whether white flight may ever be considered when designing desegregation plans. Part II develops a framework for analysis of integration maintenance plans under the Equal Protection Clause of the Fourteenth Amendment[9] and suggests two reasons for the general disapproval of government actions that classify people according to race. Finally, Part III examines the constitutionality of integration maintenance plans within this framework, and concludes that such plans violate the Equal Protection Clause.

I. Is White Flight Ever a Permissible Consideration in The Construction of a Desegregation Plan?

Courts are divided over whether, and in what manner, school boards may take white flight into account when crafting desegregation plans.[10] This division has been fueled by language in two Supreme Court opinions suggesting that white flight, or the possibility that it might occur, is not a permissible consideration. Closer examination of the Court's treatment of the issue suggests that there are circumstances in which white flight may be considered in creating a desegregation plan. The Court's framework, however, is inadequate as a means of evaluating specific ways of limiting white flight. In particular, it is inadequate as a means of evaluating integration maintenance plans.

In *United States v. Scotland Neck City Board of Education*,[11] the Supreme Court held that the school board's fear of white flight could not justify its attempt to escape court-ordered desegregation of a previously segregated school system. The case involved the Halifax County, North Carolina school district, which had been

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(E.D.N.Y. May 15, 1987) (available on LEXIS) (ceilings on minority access to a private housing development violate the Fair Housing Act, 42 U.S. § 3604 (1983), even though instituted to prevent segregation).

[9] U.S. Const. amend. XIV.

[10] See, for example, Clark, 705 F.2d at 271 (white flight may be taken into account in an attempt to promote integration); Riddick v. School Bd. of City of Norfolk, 784 F.2d 521, 540 (4th Cir. 1986) (white flight can be considered in devising a voluntary plan to improve the racial balance of the schools); Stout v. Jefferson County Bd. of Educ., 537 F.2d 800, 802-03 (5th Cir. 1976) (in choosing between various permissible plans, court may choose the one minimizing white flight). Compare United States v. Pittman, 808 F.2d 385, 390-91 (5th Cir. 1987) (plan that placed a ceiling on black enrollment in certain schools, leaving two of eleven schools in the system all-black, was "fatally flawed"); Morgan, 530 F.2d at 422 ("resegregation" caused by white flight is not constitutionally recognized segregation); Mapp v. Board of Educ. of City of Chattanooga, 525 F.2d 169, 177 (6th Cir. 1975) (no affirmative obligation to address white flight), aff'g 366 F. Supp. 1257 (E.D. Tenn. 1973).

[11] 407 U.S. 484 (1972).

held liable for maintaining a segregated system. Before a desegregation decree could be implemented, the state legislature enacted a bill that created a new school district bounded by the limits of Scotland Neck, a city that previously had been part of the Halifax County school district. The effect of the statute was to carve out of the Halifax County system an independent, all white, school district, which would escape any desegregation plan imposed on the county system.[12]

The district court enjoined enforcement of the statute, but was reversed by the court of appeals.[13] The Supreme Court reversed, noting that enforcement of the statute would leave the county system, exclusive of Scotland Neck, 91 percent black.[14] The Scotland Neck school board argued that separation of the Scotland Neck schools from the other Halifax County schools was necessary to avoid white flight by Scotland Neck residents: if forced to participate in the desegregation plan, they would leave the system altogether. The Court rejected the school board's argument, stating that while white flight "may be cause for deep concern," it cannot "be accepted as the reason for achieving anything less than complete uprooting of the dual public school system."[15]

Similarly, in *Monroe v. Board of Commissioners of the City of Jackson*,[16] the Court held inadequate a "free transfer" plan[17] that the school board had implemented in response to a court order to desegregate its system.[18] The school board justified its plan by claiming that whites would leave if it implemented a plan that involved mandatory reassignment of students on the basis of race.[19] The Court held that fears of white flight could not justify a plan that was otherwise inadequate, noting that " 'the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.' "[20]

In both *Scotland Neck* and *Monroe*, the school board offered the possibility of white flight as a justification for avoiding constitutionally compelled desegregation. In *Wright v. Council of City of*

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[12] Id. at 485-87.

[13] Id. at 488.

[14] Id. at 490.

[15] Id. at 491.

[16] 391 U.S. 450 (1968).

[17] A free transfer plan is one which does not involve mandatory reassignment of students according to race. Instead, students are given the option of transferring out of their neighborhood schools into schools where children of their race are in a minority.

[18] 391 U.S. at 459.

[19] Id.

[20] 391 U.S. at 459, quoting Brown II, 349 U.S. at 300.

Emporia,[21] the Court faced a different issue. In *Wright*, the city of Emporia, Virginia, attempted to withdraw from the surrounding county, which had been ordered to desegregate its school system.[22] The district court concluded that if Emporia were allowed to withdraw from the county, white flight would result. The proportion of white students in the county system would drop, thus precipitating a further drain of whites from the system and frustrating the desegregation process. On this basis, the district court enjoined Emporia from withdrawing.[23] The court of appeals reversed the district court ruling.[24] The Supreme Court, however, reversed the court of appeals, finding that Emporia's withdrawal would cause white flight and thereby impede desegregation.[25] Implicit in the Court's holding was that the possibility of white flight was an appropriate concern in these circumstances.

Although the Court in *Wright* did not distinguish *Scotland Neck* and *Monroe*, the distinction is readily drawn. Fear of white flight may form the basis for remedies on behalf of school desegregation, but such fear may not form the basis for a retreat from desegregation.[26] In *Wright*, the district court responded to the possibility of white flight with a vigorous effort to promote desegrega-

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[21] 407 U.S. 451 (1972).

[22] Id. at 456.

[23] Id. at 463.

[24] Id. at 460-61.

[25] Id. at 469-71.

[26] Most lower courts have adopted a case-by-case approach, attempting to adhere to the Supreme Court's distinction. See, for example, Clark, 705 F.2d at 271 (white flight may be taken into account in an attempt to promote integration); Davis v. East Baton Rouge Parish School Board, 721 F.2d 1425, 1438 (5th Cir. 1983) (efforts to desegregate could not be terminated because of fears that desegregation would cause white flight, but school board had a duty to try to stem white flight through other means); compare United States v. DeSoto Parish School Board, 574 F.2d 804, 815-16 (5th Cir. 1978) (cannot limit desegregation in order to prevent white flight).

A few courts have taken the position that resegregation caused by white flight is irrelevant to the creation of a remedy for "de jure," or state-enforced, segregation, and that therefore courts are precluded from ordering school boards to address white flight when designing desegregation decrees. See, for example, Morgan v. Kerrigan, 530 F.2d at 422 (1st Cir. 1976) (" 'resegregation' is not constitutionally recognized segregation," because it is the result of individual rather than state action); Mapp v. Bd. of Educ. of City of Chattanooga, 366 F. Supp. 1257, 1259 (E.D. Tenn. 1973) (school board's interest in a stable racial mix not relevant because achieving such a mix is not the constitutional mandate), aff'd, 525 F.2d 169 (6th Cir. 1975); Pasadena City Board of Education v. Spangler, 427 U.S. 424, 435-36 (1976) (where there was no proof that white flight was caused by segregative acts of the board or by the initial desegregation decree, the district court could not require the school board to annually adjust attendance patterns in order to maintain a particular racial mix). Compare Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 640-641 (1983) (white flight is actually the result of the original constitutional violation and is therefore legally relevant).

tion, whereas in *Scotland Neck* and in *Monroe*, the school boards raised the possibility of white flight in an effort to justify complete acquiescence to community preferences for segregation and virtual abdication of the duty to desegregate.

The distinction between plans that attempt to prevent white flight by avoiding desegregation and those that do so in ways that promote desegregation is an appealing one, and explains cases such as *Scotland Neck*, *Monroe* and *Wright* quite well. However, it does not provide an adequate means of determining the constitutionality of integration maintenance plans, which fall between the extremes. Although integration maintenance plans are not as clearly an abdication of the duty to desegregate as those implemented in *Scotland Neck* and *Monroe*, neither are they unambiguously beneficial. On one hand, integration maintenance plans do guarantee some minimal level of black representation in the schools; on the other hand, that level of representation is limited by white preferences for segregation. Application of the Court's distinction therefore requires further definition of those actions that constitute "promotion," and those that constitute "obstruction," of desegregation. The unique problems presented by integration maintenance plans call for the development of an alternative framework to give substance to this semantic distinction.

The Supreme Court has made clear that the constitutional adequacy of a desegregation plan is measured by its effectiveness in achieving desegregation.[27] Thus, when white flight limits the effectiveness of a desegregation plan, it must be considered in crafting a remedy. The difficult problem, however, is devising a way in which a court or school board can respond to demographic changes in a manner which is effective, consistent with the Equal Protection Clause, and does not reward community preferences for discrimination.

II. THE FRAMEWORK: THE EQUAL PROTECTION CLAUSE AND SCHOOL DESEGREGATION

The Equal Protection Clause of the Fourteenth Amendment provides that no state "[shall] deny any person the equal protection of the laws."[28] This language has been characterized as

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[27] Swann v. Board of Education, 402 U.S. 1, 25 (1971). This principle was emphasized in Green v. County School Board, where the Court stated "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." 391 U.S. 430, 439 (1968) (emphasis in original).

[28] U.S. Const. amend. XIV.

prohibiting all race-conscious government action.[29] School desegregation plans are necessarily race-conscious; yet, they have been upheld as constitutional. Thus, analysis of the constitutionality of integration maintenance plans cannot turn on their race-conscious nature alone. Rather, such plans must be examined to see whether they raise particular concerns under the Equal Protection Clause, concerns that are not raised by typical desegregation plans. To determine whether integration maintenance plans raise such equal protection concerns, one must first identify the evils against which the clause protects. Examination of integration maintenance plans in this light reveals that they implicate fundamental equal protection concerns, concerns that parallel those raised by de jure segregation but are distinct from those raised by other race-conscious remedies for segregation. Thus, under all but a few, narrowly defined circumstances, they should be deemed unconstitutional.

A. Process and Impact Theories of Equal Protection

Two approaches dominate explanations of the evils against which the Equal Protection Clause seeks to guard: the process-oriented approach and the impact-oriented approach. The process-oriented approach suggests that the clause is aimed at preventing certain defects in governmental decision-making processes. The impact-oriented approach suggests that it is aimed at preventing certain kinds of harm from being inflicted on people solely because of their race. Integration maintenance plans, as distinct from other race-conscious remedies, are particularly problematic because they give rise to both types of concerns.

1. *The Process-Oriented Approach.* The process-oriented approach to equal protection analysis maintains that the Equal Protection Clause prohibits government action that is influenced by certain factors.[30] Racial prejudice is one such factor. Any government action that selectively disadvantages the members of particular groups must bear some relation to a legitimate government objective, meaning an objective that does not stem from racial bias.[31] There are several ways in which racial bias can influence govern-

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[29] But see David A. Strauss, The Myth of Color Blindness, 1986 Sup. Ct. Rev. 99, arguing that the Constitution does not mandate color blindness.

[30] See generally Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984); Cass R. Sunstein, Public Values, Private Interests, and the Equal Protection Clause, 1982 Sup. Ct. Rev. 127; Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 7-8 (1976).

[31] See Korematsu v. United States, 323 U.S. 214, 216 (1944).

ment decisions. First, a government action may be taken in order to disadvantage a particular group. Second, though a government action may not rest on a desire to disadvantage as such, it might rest on assumptions of the inferior worth of certain races.[32] Segregation, for example, is theoretically premised not on a desire to harm blacks, but to separate them from whites, because they are thought inferior. Third, government action might reflect the fact that the decision makers are more likely to empathize with the concerns felt by members of their own race than those of other races.[33]

Where the asserted justification for discriminatory government action is rational, it is very difficult, if not impossible, for a court to inquire into and discover the real motivation behind the action.[34] Instead of pursuing this problematic inquiry, the Supreme Court has used a three-level standard of review as a proxy for the inquiry into actual motivation by identifying types of government actions that present an especially high likelihood of impermissible motivation.[35] Government actions based on racial classifications are thought especially likely to have been influenced by racial bias. Even when the disadvantage imposed by such actions is minimal, decisions based on a legislative preference for discrimination violate the guarantee of equal protection. Thus, courts have deemed unconstitutional laws that expressly classify people on the basis of race unless the classification can be shown to be "necessary"[36] to achieve a "compelling" government interest.[37] This standard of re-

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[32] Brest, 90 Harv. L. Rev. at 7-8 (cited in note 30).

[33] Id.

[34] Id. at 9; Smolla, 1981 Duke L.J. at 926-31 (cited in note 8).

[35] Note that the Supreme Court has never acknowledged this as the rationale underlying its three-level standard of scrutiny. Rather, those who have analyzed the Court's decisions have concluded that it uses strict scrutiny as a proxy for investigation into government motivation. See Sunstein, 1982 Sup. Ct. Rev. at 131 (cited in note 30) (scrutiny "flushes out" impermissible ends); Brest, 90 Harv. L. Rev. at 15 (cited in note 30) (strict scrutiny serves as proxy for direct inquiry into the decision-making process).

[36] McLaughlin v. Florida, 379 U.S. 184 (1964).

[37] The state interest required to support "suspect" classifications, of which race is one, has been articulated in various ways, all of which imply the same standard of review. See, for example, In re Griffiths, 413 U.S. 717, 721-22 (1973) (compelling); Loving v. Virginia, 388 U.S. 1, 11 (1967) (overriding); Korematsu, 323 U.S. at 216 (pressing public necessity). Although racial classifications receive "strict scrutiny" and require a "compelling" state interest, other forms of classification, where the risk of improper legislative motive is deemed less threatening, receive less exacting scrutiny. Classifications on the basis of gender, for example, receive "intermediate" scrutiny requiring only a "substantial" state interest. Craig v. Boren, 429 U.S. 140 (1976). Other forms of classification, not thought to be particularly subject to legislative prejudice, receive "rational basis" scrutiny, where the court need only be able to envision a rational reason for the challenged classification. New York City Transit

view is referred to as "strict scrutiny." As a practical matter, subjecting any classification to strict scrutiny has resulted in the invalidation of that classification.[38]

2. *The Impact-Oriented Approach.* The impact-oriented approach incorporates the notion that government action cannot be based on racial prejudice, but focuses on the harmful effects of racial classifications on minorities.[39] In the most obvious sense, such classifications may disadvantage minorities by denying them jobs, votes, or public accommodations. These are significant practical disadvantages, but they represent only one aspect of the harm inflicted by racial classifications. The more subtle, but equally invidious, effect of racial classifications is that they stigmatize and isolate minorities, thus compounding any practical disadvantages imposed.

Thus, there are two strands to the impact-oriented approach. First, there is a strand that focuses on practical impact, concerning itself with equality in a material sense, and second, there is a strand that concerns itself with the stigma inherent in racial thinking. In the context of school desegregation, these strands are interwoven: to some extent, the practical harms imposed by school segregation flow from its stigmatic impact. The Supreme Court recognized as much in *Brown v. Board of Education*, noting that the quality of education received by black children suffered not because of inequality of tangible resources,[40] but because " 'A sense of inferiority affects the motivation of a child to learn.' "[41]

It is this judicial concern with the stigmatic impact of racial classifications that explains why "separate but equal" is unconstitutional. Riding in the back of the bus instead of the front, or playing in one park rather than another, imposes no obvious practical disadvantage. Neither does attending an all-black school.[42] But such classifications do stigmatize blacks as being unfit to associate with whites, and therefore as inferior. Once stigmatic impact is recognized as one of the harms the Equal Protection Clause seeks to prevent, the justification for finding a constitutional viola-

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Authority v. Beazer, 440 U.S. 568 (1979).

[38] The Supreme Court has only once found the state interest in a racial classification to be sufficiently compelling. Korematsu, 323 U.S. at 216.

[39] See Brest, 90 Harv. L. Rev. at 6 (cited in note 30).

[40] The court made clear that its analysis did not rest on a finding of inequality of resources: "Our decision . . . cannot turn on merely a comparison of . . . tangible factors in the Negro and white schools involved in each of these cases." 347 U.S. at 492.

[41] 347 U.S. at 494, quoting Gebhart v. Belton, 32 Del. Ch. 343, 87 A.2d 862, 865 (1952).

[42] See Brest, 90 Harv. L. Rev. at 9 (cited in note 30).

tion is clear. For example, concern with stigmatic harm was clearly an underlying factor in the Supreme Court's decision in *Brown*: in finding "separate but equal" schools unconstitutional the court emphasized the stigmatic impact of segregation on black children, stating that it "generates a feeling of inferiority as to their status in the community that is unlikely ever to be undone."[43]

The practical impact approach lies at the heart of the justification for integration maintenance plans. The argument is that some mixing of the races is better than none, since white schools generally have better facilities and more extensive resources than black schools. The shortcoming of this approach is that it does not grapple with the fundamental concern in *Brown*, the concern which is one of the motivating factors behind application of the Equal Protection Clause: the stigmatic impact of racial classifications. By focusing on stigma as a central concern of the impact-oriented approach to equal protection analysis, it is possible to distinguish between race-conscious remedies that further the goals of equal protection and those that compound the injury it seeks to avert.

III. Integration Maintenance Plans and the Equal Protection Clause

Integration maintenance plans are problematic under both theories of equal protection in ways that other race-conscious desegregation remedies are not. The distinction between integration maintenance plans and other desegregation plans that assign students on the basis of race is that the former are premised on accommodation of white preferences for discrimination. That is, integration maintenance plans implement quotas that are based on the percentage of black students that the school board believes white families will tolerate, while other desegregation plans implement quotas based on the racial mixture in some larger segment of the school district's population. This is a crucial distinction for purposes of determining the constitutionality of integration maintenance plans.

A. Application of Process and Impact-Oriented Approaches

A specific example will clarify application of the process- and impact-oriented approaches of equal protection analysis.[44] Suppose

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[43] 347 U.S. at 494; see also Brest, 90 Harv. L. Rev. at 9 (cited in note 30).

[44] This example assumes that all the school board members are white.

a school district has maintained a segregated school system. The district has two schools, school A, which is all white, and school B, which is all black. The district-wide student body is 60 percent black and 40 percent white. As part of a court-ordered desegregation plan, the school board decides that school A should maintain a student population that is 70 percent white and 30 percent black. Because the ratio of black to white students in the system is greater than the ratio to be maintained at school A, school B will remain virtually all black. The school board explains that if both schools are maintained at a ratio that accurately reflects the composition of the district-wide population, white families will pull their children out and, instead of having one black school and one integrated school, the district will have two virtually all black schools.

The school board's plan clearly classifies students on the basis of race. All desegregation plans, however, involve student reassignment on the basis of race. When examined in light of the process and impact approaches, it is apparent that integration maintenance plans are particularly problematic because they accede to white preferences for limiting integration.

1. *The Process-Oriented Approach and Integration Maintenance Plans.* When government action is premised upon the accommodation of white preferences, there is a substantial risk that the private preferences and biases of the decision makers have played a role in the decision. For example, a school board choosing among alternative desegregation plans may choose an integration maintenance type of plan solely because the board members do not want their children attending school with blacks, rather than because they believe such a plan to be the best for the whole community. Even if they do not have children in the school, they may sympathize with white fears about the consequences of school integration, such as fears about lower real estate values and poorer education.[45] Finally, because the board members understand and perhaps share the fears of white parents, they may undervalue the disadvantages to blacks of integration maintenance plans, while overvaluing the benefits of such plans.[46] In other words, even if the board does not intend to disadvantage blacks, its sympathies may nevertheless introduce racial bias into the decision-making process.[47]

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[45] See Brest, 90 Harv. L. Rev. at 7-8 (cited in note 30).

[46] Id.

[47] See id. at 19 (with reference to integration maintenance quotas, "an observer cannot

2. *Stigma and Integration Maintenance Plans.* Integration maintenance plans implicate concerns about impact as well as about process. Because such provisions accommodate white preferences for segregation, they convey virtually the same message as governmental endorsement of "separate but equal:" that black students are less desirable than white ones.[48] The asserted goal of integration maintenance plans is to promote integration, but only as much integration as whites will tolerate. Black students are allowed to enter the white school, but only in such numbers that whites will not be driven away. Such plans not only acknowledge but institutionalize the limits to white tolerance of integration. In this sense, integration maintenance plans emphasize and reinforce the stigma created by de jure segregation.[49]

3. *Palmore v. Sidoti: Accommodating Racial Prejudice.* The Supreme Court has long recognized the special problems attendant to basing government action on efforts to accommodate white preferences, and, in a recent case, reiterated the significance of those problems.[50] *Palmore v. Sidoti* involved a child custody battle in which the child's mother had divorced the child's natural father and then married a black man.[51] Applying a Florida statute requiring that custody decisions be made in the child's best interest, the trial judge awarded custody to the natural father. He did so because he found that the mother's interracial marriage was not in the child's best interest. The judge explained that " . . . it [was] inevitable that [the child would], if allowed to remain [with her mother], . . . suffer from the social stigmatization that [was] sure to come."[52] The Florida court of appeals affirmed without opinion.

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tell whether the decision maker condones the white attitudes or just acknowledges that they cannot be changed in the short run; whether the policy panders to white prejudice or is truly designed to promote a stable, integrated environment. Indeed, decision makers may find it difficult to separate these factors in their own minds.").

[48] See Morgan, 530 F.2d at 421 (limiting racial mixture amounts to legalizing what had once been unconstitutional).

[49] Some courts have recognized the potential for stigmatization associated with integration maintenance quotas. See, for example, Clark, 705 F.2d at 269 n.6 ("In a district with a student body that is 65% black or more, an arbitrary limit of 50% on the black enrollment in a magnet school could send a message to the black students that they are somehow less desirable than whites."). This potential has also been recognized in the housing context. See Burney v. Housing Authority of County of Beaver, 551 F. Supp. at 758. See also Gewirtz, 92 Yale L.J. at 662 (cited in note 26) (remedies that limit racial mixing because of white preference may inflict dignitary harms on black children).

[50] Buchanan v. Warley, 245 U.S. 60 (1917); Watson v. Memphis, 373 U.S. 526 (1963); Wright v. Georgia, 373 U.S. 284 (1963).

[51] 466 U.S. 429 (1984).

[52] Id. at 431.

The Supreme Court granted certiorari and reversed.[53] The Court, while recognizing the reality of racial prejudice, held that such prejudice could not justify basing the custody decision solely on the race of the child's stepfather. Writing for a unanimous Court, Chief Justice Burger stated that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, *directly or indirectly*, give them effect."[54]

Palmore incorporates both the process and impact approaches to equal protection analysis. Process concerns are evident in the Court's statement that racial classifications are "more likely to reflect racial prejudice than legitimate public concerns,"[55] and concern over impact is evident in the recognition that even rational race-dependent decisions can perpetuate or recreate the harm inflicted by racial prejudice.

4. *Integration Maintenance Plans:* Palmore *Exacerbated.* Integration maintenance plans are even more problematic than the decision invalidated in *Palmore*. First, although race affected the outcome of the trial judge's decision in *Palmore*, that decision was arguably neutral in effect.[56] The decision hurt the child's white mother as much, if not more than, it hurt her black stepfather. The same result would have been reached even if the races of the participants had been reversed. Integration maintenance plans, however, exclude blacks, not whites. In no sense are they racially neutral.

Second, integration maintenance plans involve issues that are hotly debated within the community. As a result they create greater incentives, and greater opportunity, for the expression of racial prejudice than do decisions such as the one overruled in *Palmore*.[57] By limiting black enrollment in order to accommodate white opposition, integration maintenance plans create an incentive for white parents to object to desegregation as vociferously as possible.

The problem presented by integration maintenance plans is similar to that presented by the "heckler's veto" in the First

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[53] Id.

[54] Id. at 433 (emphasis supplied).

[55] Id. at 432.

[56] For an argument that the trial judge's decision was actually completely color blind, see Strauss, 1986 Sup. Ct. Rev. at 103-05 (cited in note 29).

[57] See Gewirtz, 92 Yale L.J. at 662 (cited in note 26) ("a rule allowing courts to limit the scope of integration to prevent resistance and flight would give whites incentives for exaggerated displays of resistance").

Amendment context, where a speaker is silenced whenever his or her audience threatens violence.[58] The heckler's veto allows the audience to silence the speaker whenever it disagrees with the speech. Similarly, integration maintenance programs allow whites to dictate the contours of desegregation plans. As Judge Sobeloff has recognized, adoption of integration maintenance quotas "offers a premium for white resistance. The suggestion that . . . qualifying a desegregation program is a legally acceptable way to discourage flight [is to be feared]. Once this tactic is sanctioned, it would be followed by every hostile school board."[59] The impact of a decision that directly involves only one or two families is likely to be less far-reaching than that of a desegregation plan, which affects all families in the school district.

B. The Role of Benign Motivation

Most courts have seen the primary cost of integration maintenance plans as being the denial to some children of the opportunity to attend an integrated school. They have weighed this cost against the claim that, without such plans, no children would be able to attend integrated schools. They have then concluded that because these plans are motivated by benign intent, and because it is better that some children be able to attend an integrated school than that none be able to do so, such plans are constitutional.[60] This analysis undervalues the cost of integration maintenance plans and mistakenly accepts at face value the assertions of benign motivation.

In *Parent Association of Andrew Jackson High School v. Ambach* (*"Andrew Jackson"*), for example, the Second Circuit upheld an integration maintenance plan that implemented a cap of 50 percent on black enrollment.[61] The percentage of black students

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[58] Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein and Mark V. Tushnet, Constitutional Law 997-1001 (1986).

[59] Brunson v. Board of Trustees of School District #1 of Clarendon County, 429 F.2d 820, 827 (1970) (Sobeloff, J., concurring).

[60] See, for example, Andrew Jackson, 598 F.2d at 719-20; Johnson, 604 F.2d at 516-17; Parent Ass'n of P.S. #50 v. Queens, N.Y. Comm. School Dist. #28, 625 F. Supp. 1505, 1509 (E.D.N.Y. 1986) (following *Andrew Jackson*). See also Gewirtz, 92 Yale L.J. at 662 (cited in note 26) (group harms unlikely if ceilings provide desegregated education to more blacks than other remedies would); Ackerman, 26 Stan. L. Rev. 245 (cited in note 8) (in housing context, integration plans should maximize the number of blacks who get integrated housing).

[61] 598 F.2d 705. Such caps are often referred to as "tipping factors," and are set at an estimate of the highest percentage of black students that the white community is willing to allow in its schools. The theory is that if the percentage of black students rises above the

in the system was greater than 50 percent; thus, many were unable to attend desegregated schools.

In approving the plan, the court framed the issue as whether "an individual non-white student [could] be made to suffer exclusion in a community effort to prevent resegregation of the system."[62] By framing the question in this manner, the court balanced the cost of the plan to those children who were compelled to remain in a segregated, all-black school against the benefit to those able to attend desegregated schools.

The court's assumption that the primary cost involved was the denial to some black children of an integrated education, and that the dispute was essentially a battle between the competing claims of non-whites, was shortsighted. Superficially, the issue may be seen as a conflict among non-whites. To the extent that giving black children an integrated educational environment is the sole remedial objective,[63] remedies incorporating a tipping factor can be seen as an allocation of that benefit among competing blacks. More importantly, however, the conflict is between the discriminatory preferences of whites and the right of blacks to non-discriminatory treatment.[64] Although the inability to attend an integrated school is a significant cost to individual black families, the more important harm associated with integration maintenance plans is inflicted on blacks as a group, in the form of stigmatization and institutionalization of opposition to desegregation.

In addition, the risk of improper process is not eliminated by the mere assertion of benign motivation. Strict scrutiny is designed to function as a proxy for case-by-case investigation of actual motivation when the risk that racial prejudice influenced the decision seems high.[65] In *Andrew Jackson*, the court employed a lower standard of review because it concluded that the challenged plan was intended to preserve integration, and that "attentiveness to population tides [was] the Board's real concern rather than a

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tipping factor, whites will begin to leave the system, thus driving the percentage of blacks higher still, and setting off a chain reaction which will result in a virtually all black system. See Rossell, 12 J. Legal Stud. 69 (cited in note 2).

[62] 598 F.2d at 719.

[63] See Derrick A. Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470 (1976) (integration ideals may no longer accord with the educational interests of blacks).

[64] See Kenneth L. Karst, Why Equality Matters, 17 Ga. L. Rev. 245, 274 (1983): "The main question in a segregation case never was the right to sit in a particular place in a courtroom, or a particular place on the beach. The central issue raised by segregation was one of place—the place of blacks in society."

[65] See text at notes 34-35.

sham."[66] However, the board may well have condoned the white opposition to desegregation, or at least identified more with the concerns of white parents than with those of black parents. The assertion of benign intent is merely that, an assertion. Precisely what was in the hearts and minds of the school board members is unknown, if not unknowable. Moreover, the assertion of benign intent does not alleviate the stigmatic impact of integration maintenance plans. No matter what the ultimate goal of the school board, these plans have the express purpose of restricting black enrollment to a level more acceptable to whites.

1. *Race-Conscious Remedies That Do Not Violate the Equal Protection Clause.* There are two forms of race-conscious remedies that do not raise process and impact concerns to the same extent as integration maintenance plans: desegregation plans that do not incorporate integration maintenance quotas but do involve the assignment of students according to race,[67] and affirmative action plans.

Desegregation plans are always race-conscious, even if they do not incorporate integration maintenance quotas. Yet, such plans are routinely upheld as constitutional.[68] These desegregation plans differ from integration maintenance plans in important ways.

First, there is little risk that desegregation plans that do not implement integration maintenance provisions are premised on racial prejudice.[69] Indeed, such plans are ordinarily implemented in the face of opposition from whites. Second, desegregation plans are generally race-neutral in that they place a burden on children of both races—blacks and whites alike may be bused to achieve desegregation. Third, although racially equal or neutral impact does not in itself exempt race-dependent measures from strict scrutiny, desegregation plans, unlike institutional miscegenation or "separate but equal" schools, do not obviously stigmatize any group. To the extent that one of the goals of desegregation is to allow children of different races to have contact with each other, to destroy the prior dual system "root and branch," or to make sure that

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[66] 598 F.2d at 718. See also Note, White Flight as a Factor in Desegregation Remedies: A Judicial Recognition of Reality, 66 U. Va. L. Rev. 961 (permissibility of white flight concerns should turn on "good faith" of school board).

[67] These include plans that incorporate such devices as magnet schools and free transfer programs.

[68] See, for example, Swann, 402 U.S. at 23-5 (racial quotas based on racial balance in community were constitutional as a starting point for desegregation); see also Scotland Neck City Bd. of Education, 407 U.S. at 489-90.

[69] Brest, 90 Harv. L. Rev. at 16-17 (cited in note 30).

black children enjoy the superior facilities that the dual system offered some white children, desegregation carries no stigma. On the contrary, it emphasizes the equality of the races. The absence of stigmatization, in conjunction with the race-neutral impact (children of both races bear the burden of busing and share the benefit of integrated schools), renders ordinary desegregation plans far less supect than integration maintenance plans.

As with desegregation plans, the assertion of benign intent in the case of affirmative action programs is supported by the reality that such programs are unlikely either to be used to disadvantage blacks or to implement racial prejudice against whites.[70] One of the arguments advanced against affirmative action is that it stigmatizes blacks by suggesting that they are unable to succeed without special assistance. If affirmative action programs do have such an effect, that would indeed be an argument for subjecting them to strict scrutiny. When the stigmatization is remote, however, and the immediate effect is advantageous, it seems inappropriate to subject these programs to such review.[71]

Thus, allegedly benign motivation has made a difference only in those cases where it is clear that the possibility of defective process and disadvantageous effect, both stigmatic and material, are so slight that it is unlikely that the racial classifications were enacted out of racial prejudice. Integration maintenance programs, however, are characterized both by stigmatic impact and the risk of defective process. Even the Justices who voted in *University of California v. Bakke* to uphold a preferential admissions plan affirmed the "cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more."[72] Integration maintenance plans do violate this principle. This, in conjunction with the risk of improper process, mandates that they be deemed unconstitutional, unless they are proven to be the least restrictive means to achieve a compelling state need.

2. *Voluntarily Implemented Integration Maintenance Plans.* One possible variation on the theme of benign intent is that even if

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[70] See id. at 17; John H. Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 724 (1974).

[71] See Brest, 90 Harv. L. Rev. at 19 (cited in note 30); compare William Van Alstyne, Rites of Passage: Race, the Supreme Court and the Constitution, 46 U. Chi. L. Rev. 775 (1979).

[72] 438 U.S. 265, 357-8 (1978) (Brennan, J., concurring).

integration maintenance plans implemented in response to court orders to desegregate ought to be subject to strict scrutiny, voluntarily implemented plans ought to escape such review.[73] Voluntarily implemented plans are, arguably, a clear instance of a school board acting in good faith. Therefore, the argument goes, strict scrutiny is not mandated. This argument is flawed in two respects.

First, the risks of process and impact are not alleviated because the plan is voluntarily implemented. If anything, these risks are heightened. In *Johnson v. Board of Education of City of Chicago*, the school board voluntarily implemented a plan designed to freeze the racial balance at two schools located in neighborhoods that were undergoing a transition from white to black.[74] The school board justified the plan on the grounds that it was necessary in order to prevent the schools from becoming racially segregated.[75] A panel of the Seventh Circuit upheld the plan, stating that "in the limited circumstances of voluntary affirmative action, and in the absence of an invidious or pernicious intent attributable to the Board," it was entitled to implement the plan.[76] On these facts, it seems entirely possible that the board *was* motivated by an "invidious or pernicious intent." Blacks were moving into the previously white neighborhoods at a rapid rate. It is just as plausible to say that the board froze the quotas in order to stem black entry as to say that it did so in order to stem white flight. That a plan is voluntarily implemented does not guarantee a process free of racial bias.

Second, voluntary implementation of an integration maintenance plan may actually give rise to suspicion of less than good faith. Imagine a school board meeting where the board members announce that integration will be limited to a ratio of 30 percent black, whereupon a white parent leaps to her feet and announces that she will leave if the ratio reaches 20 percent. Integration maintenance plans, paradoxically, create an incentive for opposition. A school board that sincerely wishes to address segregation cannot afford to cater to, and thereby reinforce, the illegitimate preferences of its white population.

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[73] See Note, 66 U. Va. L. Rev. 961 (cited in note 66) (approving of voluntariness and findings of good faith as criteria in determining constitutionality of integration maintenance plans).

[74] 604 F.2d at 508-09.

[75] Id. at 510.

[76] Id. at 517.

C. The Unconstitutionality of Integration Maintenance Plans

Integration maintenance plans raise the two most fundamental concerns of the Equal Protection Clause: concern about the process through which they are designed and implemented; and concern about their impact on blacks.

Government actions that implicate the process-oriented concerns underlying the Equal Protection Clause must survive strict scrutiny: they must be necessary to achieve a compelling state interest.[77] To be "necessary," such classifications must be more than the most effective or least costly way to achieve that interest—they must be the only way. The unique conflicts created by integration maintenance plans mandate that the burden of proving them necessary be extremely heavy.

If integration maintenance plans are indeed the only way to accomplish desegregation, we can choose to utilize such plans, or we can accept segregation on the grounds that desegregation is not compelling enough a government interest to justify implementation of such plans. To say that integration maintenance plans are unconstitutional because desegregation is not a compelling state interest is to say that school segregation is constitutionally mandated: a school board must allow resegregation rather than institute an integration maintenance plan.[78]

This choice is an extremely painful one, made more difficult because of the extent to which integration maintenance plans give rise not only to concerns of process but also to those of stigma. To allow resegregation is to give up on *Brown v. Board of Education*.[79] But to sanction integration maintenance plans is to sanction the complete accommodation of white preferences, and to accept the concomitant harms to a large minority in our society. Integration maintenance plans should be chosen only if we are absolutely certain that the only alternative is segregation.

Integration maintenance plans fail this very stringent test of necessity. First, the empirical evidence on whether such plans are

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[77] See, for example, In re Griffiths, 413 U.S. at 721-22; see also text at notes 35-38.

[78] The argument can be made that desegregation is less compelling a state interest when the school board acts voluntarily to remedy a case of de facto segregation than when it acts to remedy de jure segregation. Where a school district is found to have fostered and maintained a segregated system, desegregation is a constitutional imperative. Where the segregation is not the result of state action, the constitutional imperative is lacking. See Keyes v. School Dist. No. 1, 413 U.S. 189, 208-09 (1973). Thus, voluntarily implemented plans are less likely to survive strict judicial scrutiny than are those implemented in response to a court order.

[79] 347 U.S. 483 (1954).

required is far from conclusive. Social scientists disagree on the extent to which increasing black enrollment does increase white flight.[80] Those who have found a correlation between increased black enrollment and white flight disagree about whether increasing the percentage of blacks causes a one-time drop in white enrollment or whether it sets off an irreversible white exodus.[81] They agree, however, that there is insufficient information to support sweeping policy recommendations.[82] Given the unacceptable risks and effects associated with integration maintenance plans, a far greater degree of certainty as to the need for such plans is warranted before making the choice between integration maintenance and compelled segregation.

Moreover, even if increasing black enrollment does have a significant impact on white flight, the first line of attack ought to be on addressing that correlation, not on accepting and institutionalizing it. There are ways to limit white flight that do not involve limiting black enrollment. First, metropolitan desegregation plans should be implemented whenever possible.[83] Such plans desegregate entire metropolitan areas as opposed to single districts within a metropolitan area. Thus, these plans would include the suburbs surrounding a city school district as well as the city district itself. To the extent that school desegregation causes white flight, metropolitan plans should result in less flight than single district plans. By increasing the area subject to desegregation, they make it much more difficult for white families to escape desegregation.[84] In addition, they increase the pool of students available for reassignment,

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[80] See, for example, Farley, Symposium on School Desegregation and White Flight at 16 (cited in note 2) (majority of whites apparently do not object to public schools which have large black enrollments). Compare Rossell, 12 J. Legal Stud. at 88 (cited in note 2) (increase in white flight corresponds with increase in black enrollment).

[81] See Rossell, 42 L. and Contemp. Probs. at 163 (cited in note 4) (most studies show initial loss of whites in year of implementation is offset in later years, although one study has found long-term impact). Compare Rossell, 12 J. Legal Stud. at 106 (cited in note 2) (desegregation continues to have negative long-term impact on white enrollment in many large central city districts with more than 35 percent black enrollment).

[82] Compare Orfield, Symposium on School Desegregation and White Flight at 58 (cited in note 2) (research can support only limited policy recommendations); School Desegregation Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong., 1st Sess. 160, 230 (1981) (statement of Christine H. Rossell) (there is insufficient information to determine whether limiting desegregation would decrease white flight).

[83] But see Milliken v. Bradley, 418 U.S. 717, 745 (1974) (cannot order interdistrict relief absent an interdistrict violation).

[84] See Orfield, Symposium on School Desegregation and White Flight at 56 (cited in note 2).

and thus facilitate a greater degree of integration. If a central city school district is already 90 percent black, a single district plan can accomplish only token integration. By involving the surrounding white suburbs, a metropolitan plan can achieve a more substantial degree of integration.

Second, school boards should work with the community to alleviate its fears and concerns about the desegregation process. For example, white families are often concerned about potentially declining educational quality. By demonstrating a commitment to educational quality, the board may decrease opposition to desegregation and improve the system as a whole. Finally, desegregation plans incorporating magnet schools with enriched educational opportunities may draw white children. Some of these alternatives may not work as quickly as integration maintenance plans, but they are constitutionally sound. Consequently, integration maintenance plans are not absolutely necessary to achieve desegregation.

Conclusion

Integration maintenance plans raise serious concerns about the constitutionality of the process through which they are implemented as well as about their impact on blacks. These concerns stem primarily from the fact that such plans impose ceilings on black enrollment that are based on white preferences as to what that enrollment should be. Although integration maintenance plans may prevent white flight—and the evidence on that point is not conclusive—they do so at the risk of allowing racial bias to enter the process of designing desegregation plans, and at the cost of further stigmatizing and isolating the very group desegregation should benefit. These are the evils that the Equal Protection Clause is designed to prevent; thus, integration maintenance plans undercut the very goals they purport to advance.

The concerns and conflicts created by integration maintenance plans are of such magnitude that, absent a showing of absolute necessity, they cannot be approved. That showing has not been made. We may, at some point, be forced to choose between accommodating private preferences for segregation and accepting resegregation; but not until integration maintenance plans are shown to be the only way to achieve the desegregation of our schools should we allow their use.

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