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Unconstitutional Racial Classification and De Facto Segregation

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Unconstitutional Racial Classification and De Facto Segregation

Classification along racial lines, when involving state action, is unconstitutional.[1] Such classification may violate the due process or equal protection clause of the fourteenth amendment or the fifteenth amendment,[2] and it has been held invalid in the fields of education,[3] transportation,[4] voting,[5] recreational facilities,[6] ownership and use of real property,[7] and jury selection.[8]

I. The Tests

Where the distinction appears on the face of the legislation, labeling it unconstitutional presents no difficulties.[9] But as soon as racial classification was declared unconstitutional it became apparent that efforts to keep the races apart would not take such a simple form. More skillfully designed schemes would certainly arise to achieve a separation of the races whenever such was the goal.[10]

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1. For example, even the deliberate inclusion of Negroes on a grand jury has been held within the constitutional prohibition against discrimination by race. Collins v. Walker, 329 F.2d 100 (5th Cir. 1964). However, in the area of school segregation, it has been argued that classification along racial lines for the purpose of promoting integration is so necessary to eliminate the harm caused by unconstitutional separation of the races that such classifications are not prohibited. See Note, *Racial Imbalance in the Public Schools*, 50 Va. L. Rev. 464 (1964). See also Maslow, *De Facto Public School Segregation*, 6 Vill. L. Rev. 353 (1961); Comment, *De Facto Segregation—A Study in State Action*, 57 Nw. U.L. Rev. 722 (1963).

2. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

3. *E.g.*, Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Educ., 347 U.S. 483 (1954).

4. *E.g.*, Boynton v. Virginia, 364 U.S. 454 (1960).

5. *E.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960); Terry v. Adams, 345 U.S. 461 (1953). See also Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949).

6. *E.g.*, Mayor & City Council v. Dawson, 350 U.S. 877 (1955) (affirming decision below invalidating racial segregation at public bathing beach); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (vacating opinions below and directing the district court to enter an order banning segregation in the use of a public golf course).

7. *E.g.*, Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Buchanan v. Warley, 245 U.S. 60 (1917).

8. *E.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958); Hernandez v. Texas, 347 U.S. 475 (1954); Avery v. Georgia, 345 U.S. 559 (1953); Strauder v. West Virginia, 100 U.S. 303 (1879).

9. *E.g.*, School Segregation Cases, 349 U.S. 294 (1955); Buchanan v. Warley, 245 U.S. 60 (1917); Strauder v. West Virginia, *supra* note 8.

10. This conclusion is amply supported by a study of the school segregation problem. Attempts to avoid nullification of segregation were predicted prior to the declaration of the unconstitutionality of laws requiring segregation in public schools. Leflar & Davis, *Segregation in the Public Schools—1953*, 67 Harv. L. Rev. 377 (1954). Such predictions proved true indeed. Certain evasive legislative attempts were subjected to judicial scrutiny. See Northcross v. Board of Educ., 302 F.2d 818 (6th Cir. 1962); Gibson v. Board of Pub. Instruction, 246 F.2d 913 (5th Cir. 1957). Compare Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

Where the classification does not directly appear in the words of the statute, discovering violations of the Constitution is more difficult. However, means have been developed to determine whether there is racial classification involving state action. First, the *application* of a nondiscriminatory law may be demonstrated to involve considerations of race. For instance, in the field of jury selection, the law may set forth a reasonable means by which to select jurors, but the officials executing the law may exercise their discretion in such a manner that the ultimate result is a racial classification.[11] Where the application of such a law makes it apparent that there has been racial discrimination, the prohibition of the Constitution applies.[12]

Second, even though racial considerations do not appear in the words of the statute and there is no abuse of discretion in administering it, unconstitutional discrimination may be apparent from the *effect* of the law. The leading case in this area is *Gomillion v. Lightfoot*,[13] which involved the redrawing of the boundaries of the City of Tuskegee by the Alabama Legislature. The resulting new city possessed twenty-eight sides, forming a very odd geometric configuration.[14] The change from a square figure to this configuration had the effect of including almost all the white people of the former city in the new one and leaving outside the new boundaries almost all the Negro residents of the former city.[15] The United States Supreme Court held that this mathematical demonstration of purposeful

See Bickel, *The Decade of School Desegregation*, 64 COLUM. L. REV. 193 (1964); Comment, *State Efforts To Circumvent Desegregation—Private Schools, Pupil Placement, and Geographic Segregation*, 54 NW. U.L. REV. 354 (1959). See also Knowles, *School Desegregation*, 42 N.C.L. REV. 67 (1963).

11. Yick Wo v. Hopkins, 118 U.S. 356 (1886). *Accord*, Cassell v. Texas, 339 U.S. 282 (1950) (Where no more than one Negro had served on each of a series of grand juries during a five-year period, systematic discrimination was established, even though the commissioners in charge of the selection of the grand jury had not made attempts to familiarize themselves with the racial nature of the eligible jurors, but had chosen jurors from acquaintances.); Norris v. Alabama, 294 U.S. 587 (1935) (Where the proof showed that no Negro had ever been known to serve on any jury in a community in which legally qualified Negroes resided, racial classification was established.).

12. The criteria of being able to "understand and explain" any article of the federal constitution was applied to Negroes and not to whites. Its effect was to allow just whites to vote, and hence was held to violate the fifteenth amendment. Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949).

13. 364 U.S. 339 (1960). This decision caused considerable comment in legal periodicals. Most were concerned with the removal of municipal definition of boundaries from the sphere of the unassailable "political question." *E.g.*, 12 BAYLOR L. REV. 330 (1960); 11 HASTINGS L.J. 482 (1960); 31 MISS. L.J. 173 (1960); 109 U. PA. L. REV. 1173 (1961).

14. Appendix to Opinion of the Court, Gomillion v. Lightfoot, *supra* note 13, at 348.

15. *Id.* at 341. A similar situation was held violative of the state constitution where the line drawn for a school district meandered up various streets and alleys, placing all of the Negro students in one district and the whites in others. Webb v. School Dist. No. 90, 167 Kan. 395, 206 P.2d 1066 (1949).

classification along racial lines involved the abridgement of the vote of the Negro because his vote did not exercise the influence over the geographical area that it had before, and, therefore, constituted a violation of the fifteenth amendment.[16] Although the facts were complete in this setting, the Court noted the absence of "any countervailing municipal function"[17] to be served by the redefinition of the boundaries of the City of Tuskegee in this manner. In this posture, *Gomillion* left two basic situations for further litigation: (1) the case in which the mathematics of the situation do not lead to a definite conclusion and which consequently requires further scrutiny to determine the true nature of the legislation, and (2) the case in which there is a countervailing function involved in a setting which raises the inference of racial discrimination.

A. *Inconclusive Mathematics*

In *Wright v. Rockefeller*,[18] the New York Legislature reapportioned its congressional districts with the resulting effect that the composition of the Eighteenth Congressional District is 86 per cent Negro and Puerto Rican. The Nineteenth District is only 28.5 per cent non-white; the Twentieth, only 27.5 per cent; and the Seventeenth contains only 5.1 per cent of these minority groups.[19] Although it is quite obvious that greater racial balance could have been achieved among these contiguous districts,[20] there was nothing to indicate sufficiently that racial considerations influenced the selection of the boundaries.[21] Apparently the racial mathematics did not demonstrate with the certainty found in *Gomillion* that there was racial classification.[22]

Whether the classification in *Gomillion* would have withstood constitutional attack if the percentages in that case were not quite as demonstrative as they were cannot be known. Although the conclusion would seem implicit in *Wright*, that decision did not settle all the remaining problems of mathematical demonstration of racial classification. A further problem is created when a geographical area

16. Mr. Justice Whittaker felt that the fifteenth amendment was not the appropriate ground for the decision, arguing that the Negroes could still vote. He felt that the fourteenth amendment equal protection clause offered the better foundation for the decision. Gomillion v. Lightfoot, 364 U.S. 339, 349 (1960) (concurring opinion).

17. *Id.* at 342.

18. 376 U.S. 52 (1964).

19. *Id.* at 54.

20. This is clear even though the heavy concentration of Negro and Puerto Rican residents in one area would have made a more equal distribution of races very difficult. *Id.* at 57.

21. This determination was made by the lower court, Wright v. Rockefeller, 211 F. Supp. 460 (S.D.N.Y. 1962), and accepted by the Supreme Court. Wright v. Rockefeller, 376 U.S. 52, 57 (1964).

22. The dissent found that the eleven-sided figure demonstrated racial considerations sufficient to raise a "rebuttable presumption of unconstitutionality." Wright v. Rockefeller, *supra* note 18, at 72-73 (Goldberg, J., dissenting).

is comprised exclusively of one race as an effect of a classification, but the excluded part is biracial in an inconclusive proportion. This situation was presented for judicial consideration in *Taylor v. Township of Dearborn*.[23] A new city was formed by joining two noncontiguous unincorporated areas with a strip of land taken from an incorporated village in the same township.[24] The new city was inhabited almost exclusively by white residents; the persons left in the township village included both Negroes and whites.[25] This latter fact impressed the court, and it held that there was no denial of constitutional rights under either the fourteenth or the fifteenth amendment.[26] Although the United States Supreme Court has yet to consider a factual situation similar to that in *Taylor,* the reasoning in that case is persuasive. Both the included and excluded areas must be examined, and such an inspection must reveal an almost total separation of races before a conclusion of unconstitutional racial classification can be properly established. Assuming the acceptance of the *Taylor* result, the significance of the *Gomillion* decision would seem to be that no mathematical demonstration other than virtually total separation of the races can lead to possible constitutional condemnation. In attempting to establish conclusions from the effect of an act, *Gomillion* seems to be of limited application and confined to its own peculiar facts—virtually complete segregation of the races.

B. *Countervailing Functions*

Even where the mathematical discussion gives rise to suspicion of discrimination, the existence of a countervailing municipal function may exert considerable influence in the analysis of legislation which indulges in geographic classification. The established policy is that the legislature can make a reasonable classification, and the judiciary will not inquire into the intention or motive of the legislature in making the classification.[27] This policy does not offend the equal protection clause of the Constitution because of the practical and desirable necessity of allowing legislative

23. 370 Mich. 47, 120 N.W.2d 737 (1963), 48 MINN. L. REV. 604 (1964), 10 WAYNE L. REV. 229 (1964).

24. The strip between the two noncontiguous areas was taken to satisfy the common-law requirement of municipal contiguity. Township of Genessee v. Genessee County, 369 Mich. 592, 120 N.W.2d 759 (1963).

25. Brief for Appellants, app., pp. 20a, 785a. "Of the remaining 15,720 persons who reside in the Dearborn Township portion of Inkster Village, 11,120 whites and 4,600 Negroes are excluded from the new city." Taylor v. Township of Dearborn, 370 Mich. 47, 62, 120 N.W.2d 737, 745 (1963).

26. *Id.* at 56, 61, 63, 120 N.W.2d at 742, 745, 746.

27. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). This policy has also been stated; "If the act done by the State is legal, . . . it is quite out of the power of any court to inquire what was the intention of those who enacted the law." Doyle v. Continental Ins. Co., 94 U.S. 535, 541 (1876).

programs to adjust to varying conditions.[28] The possibility is immediately apparent that the concept of a countervailing function may be abused to create a façade behind which unconstitutional racial classification can find a meaningful existence. This possibility sharply conflicts with the Supreme Court declaration that racial classification will not be tolerated, whether it is "ingeniously or ingenuously" designed.[29] In one instance there is a policy that permits legislation to be formulated to meet the variety of conditions that influence the aspects of a problem requiring legislation. The other policy is one that invalidates invidious racial classification whenever and wherever it appears. Each of these policies was announced without an attempt to reconcile the other in the situation in which there are multiple effects of a legislative act.

II. Interpretative Techniques and Limitations

Where there is a legislative enactment having multiple effects,[30] it is possible that racial classification is the result desired. If so, the existence of concepts which would avail an intelligent search to discover whether the acts are constitutional, resulting in de facto segregation, or whether the acts are unconstitutional classifications along racial lines, becomes of critical importance. Certain doctrines have been developed to define the scope and nature of the judicial inquiry into the validity of such statutes.

A. *Judicial Restraint*

The doctrine of judicial restraint requires that the judiciary not investigate further if it finds the classification to be within the power of the legislature. In *State ex rel. City of Creve Coeur v. Weinstein*,[31] the local body had the plenary power to establish recreational facilities in the community. It exercised this power by condemning the land that a Negro had purchased in order to reside in the all-white community. The Negro alleged that the decision to condemn his land for recreational facilities was specifically designed

28. Population is a condition which requires adjustments of a legislative program in a certain area. For instance, the problems of selecting jurors in a metropolitan area is far different from those in a rural area. Hence, a specific method of selecting jurors that is based on such a consideration is valid. Farrington v. Pinckney, 1 N.Y.2d 74, 133 N.E.2d 817 (1956).

29. Cooper v. Aaron, 358 U.S. 1 (1958); Smith v. Texas, 311 U.S. 128 (1940); Lane v. Wilson, 307 U.S. 268 (1939).

30. The types of countervailing municipal functions that involve geographic choice, with possible collateral effects of racial classification, include: (1) incorporation of a city, (2) redefinition of a city's boundaries, (3) the exercise of the power of eminent domain to condemn land for municipal purposes, including parks, playgrounds, municipal buildings, etc., (4) urban renewal, and (5) drawing of school and other districts.

31. 329 S.W.2d 399 (Mo. Ct. App. 1959).

to oust him from the neighborhood.[32] But the court held that since the purpose of the legislation was within the power of the body, the motive could not properly be the subject of judicial inquiry.[33] Although this approach undoubtedly has value, it should not be extended too far. A judicial body cannot disregard constitutional matters by relying on legislative judgment.[34] A court must exercise diligence in discerning a false front disguising state-created segregation of races. In *Wiley v. Richland Water District*,[35] a Negro family was contemplating the construction of a home in a previously all-white residential area. The local Water District condemned the land for future development and sanitation control.[36] The court did not distinguish between purpose and motive, but found that the whole proceeding was based upon a desire to deprive the plaintiffs of the use of the land solely because they were Negroes.[37] Although factually similar to *Weinstein*, the *Wiley* case can be distinguished. There the Water District condemnation was merely enacted, but none of the procedural steps were taken to carry out the announced purpose behind the condemnation.[38] The failure to follow through on the process almost conclusively demonstrated that the action was merely a façade to hide segregation.

B. *Judicial Notice*

Assuming that a court may make further inquiry into the effect of legislation, it often must utilize the technique of judicial notice to guide it in determining the true nature of the legislation in question. In *Meredith v. Fair*,[39] the Court of Appeals for the Fifth Circuit was presented with the situation in which admission to the University of Mississippi was conditioned upon the recommendation of alumni.[40] There was testimony by officials that all policies and regulations were adopted and followed without regard to racial considerations.[41] Nevertheless, the court was able to invalidate this otherwise reasonable requirement by taking judicial

32. The defendant Negroes alleged that there had been attempts to buy them out, a refusal to issue a plumbing permit to their contractor, and now this condemnation action. *Id.* at 402.

33. *Id.* at 406.

34. *Cf.* cases note 29 supra. See also McGowan v. Maryland, 366 U.S. 420, 573 (1960) (Douglas, J., dissenting).

35. Civil No. 60-207, D. Ore., June 30, 1960, 5 RACE REL. L. REP. 788 (1960).

36. The Superintendent of the Richland Water District indicated that there were two problems to consider: color and water. *Id.* at 788.

37. *Id.* at 790.

38. *Ibid.*

39. 305 F.2d 343 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).

40. *Id.* at 351.

41. At a hearing on a motion for preliminary injunction, nearly every member of the Board of Trustees of the University of Mississippi testified that all policies and regulations were adopted and followed without regard to race, creed, or color. Meredith v. Fair, 202 F. Supp. 224 (S.D. Miss. 1962).

notice of the segregationist tendencies in the area.[42] With the aid of judicial notice, any doubt as to the impropriety of the recommendation requirement was dispelled. However, the availability of judicial notice as a meaningful tool has serious limitations. It may be exceedingly difficult to take judicial notice of such a policy in a community that suppresses its prejudice. If social pressure or discretion demands that outward bias be concealed, the ability to take judicial notice of the existence of these attitudes is almost impossible.[43]

Of course, the task of discovering de facto segregation is simplified if the persons involved in the official action under analysis admit that they considered unacceptable factors in their deliberations. In *Kreger v. Board of Trustees of Georgetown Independent School District*,[44] where the members of the school board had announced a desire to segregate until ordered to integrate,[45] the court ordered an injunction to restrain the board from expending funds for the erection of buildings designed and located to maintain school segregation. A similar result was reached in *Hall v. St. Helena Parish School Board*,[46] where the new school plan was accompanied by out-of-court declarations by the sponsors of the act that the plan was aimed at avoiding integration.[47] In *Clemons v. Board of Educ.*,[48] although a desire to integrate was officially declared, the school board's admission of a policy of temporary segregation during a building program was revealed as a deliberate policy of racial discrimination when the board formed one attendance area from two noncontiguous zones consisting largely of Negro residents.[49] As such it was invalidated as unconstitutional. However, discovering unconstitutional considerations becomes more difficult when the actors are silent. Such silence is to be expected upon the realization that an announcement cannot be made without seriously impairing the validity of the legislation involved.

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42. Meredith v. Fair, 305 F.2d 343, 344-45 (1962).

43. One of the essential requirements of judicial notice is that the fact must be one which can be established authoritatively. 9 WIGMORE, EVIDENCE §§ 2565-83 (3d ed. 1940); MCCORMICK, EVIDENCE §§ 323-31 (1954). Taking judicial notice of another's state of mind is obviously difficult and beyond the proper scope of the technique. Comment, *State Efforts To Circumvent Desegregation—Private Schools, Pupil Placement, and Geographic Segregation*, 54 NW. U.L. REV. 354, 360 (1959).

44. 368 S.W.2d 873 (Tex. Civ. App. 1963).

45. *Id.* at 875.

46. 197 F. Supp. 649 (E.D. La. 1961), 30 FORDHAM L. REV. 510 (1962).

47. Judicial notice of the declarations aided in making the unconstitutionality of the plan apparent. "In short, the legislative leaders announced without equivocation that the purpose of the packaged plan was to keep the state in the business of providing public education on a segregated basis." Hall v. St. Helena Parish School Bd., *supra* note 46, at 653.

48. 228 F.2d 853 (6th Cir. 1956), 34 TEXAS L. REV. 1085 (1956).

49. Clemons v. Board of Educ., *supra* note 48, at 856.

C. *Rebuttable Presumptions*

In *Evans v. Buchanan*[50] the plaintiffs mathematically demonstrated that racial considerations were influential in determining the location of school boundaries. This evidence was held to raise a presumption of unconstitutionality,[51] and a final determination was postponed until the board had an opportunity to rebut it.[52] Rebutting such a presumption, however, would not seem difficult. In fact, the court indicated that consideration of other matters, such as transportation, geography and access roads,[53] would have rebutted the presumption. Consequently, the raising of such a presumption does not assist if these other factors exist and if there is no announcement by the members of the board that improper discriminatory factors entered into their deliberations.

III. Judicial Inadequacy To Eradicate De Facto Segregation

It is quite obvious that racially motivated legislation for an otherwise valid public purpose is not easily uncovered. Some courts, recognizing this difficulty, have decided that there may exist an affirmative duty to integrate, at least in the area of de facto school segregation. Although the federal courts have consistently held that the fourteenth amendment does not require affirmative integration,[54] there have been declarations in recent decisions that the deleterious effect of de facto segregation may impose an affirmative obligation on the members of a community.[55]

As a consequence of the futility of attack on a reasonable classification which has the collateral effect of achieving racial distinction, many such enactments resulting in de facto segregation have been upheld. For example, both incorporation of a new city[56]

50. 207 F. Supp. 820 (D. Del. 1962), 63 Colum. L. Rev. 546 (1963), 15 Stan. L. Rev. 681 (1963).

51. The concept of raising a presumption of unconstitutionality was endorsed by Justices Goldberg and Douglas in the dissent in Wright v. Rockefeller, 376 U.S. 52, 72-73 (1964) (dissenting opinion).

52. Evans v. Buchanan, 207 F. Supp. 820, 825 (D. Del. 1962).

53. *Id.* at 824.

54. *E.g.*, Bell v. School City, 213 F. Supp. 819 (N.D. Ind. 1963); Cohen v. Public Housing Administration, 257 F.2d 73 (5th Cir. 1958).

55. In the lower federal courts, Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964); Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962). In the state courts, Jackson v. Pasadena School Dist., 59 Cal. 2d 876, 382 P.2d 878 (1963); 11 U.C.L.A.L. Rev. 414 (1964). See also Taylor v. Board of Educ., 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961), 41 Texas L. Rev. 128 (1962), 38 U. Det. L.J. 479 (1961). In addition to judicial utterances, some commentators agree that de facto segregation is unconstitutional. See Comment, *"Equal Protection" and the Neighborhood School*, 13 Catholic U.L. Rev. 150 (1964). Other commentators only argue that the Constitution does not prevent legislation requiring affirmative activity to integrate. See, *e.g.*, Maslow, *De Facto Public School Segregation*, 6 Vill. L. Rev. 353 (1961). *But see* Kaplan, *Segregation Litigation and the Schools—The New Rochelle Experience* (pt. 1), 58 Nw. U.L. Rev. 1 (1963).

56. Taylor v. Township of Dearborn, 370 Mich. 47, 120 N.W.2d 737 (1963).

and condemnation for park purposes,[57] although resulting in de facto segregation, have withstood attack. In *Barnes v. City of Gadsden*,[58] urban renewal was instituted which would have rid the city of the slums, where almost all of the city's Negroes resided. The collateral knowledge that the Negroes would not be able to purchase living facilities in the town once the program was completed[59] (a practical consequence of the economic restriction on who could purchase) did not invalidate the program. In *Seay v. Patterson*,[60] the governor of Alabama denied a Negro's application for reappointment as a notary public. There being no restrictions on the governor's power to appoint notaries throughout the state, the court upheld the governor's action in the absence of a showing of "bad faith" or "arbitrary" action solely because of the man's race.[61] In *Henry v. Godsell*,[62] a new school district was drawn so that the enrollment of the school was overwhelmingly Negro.[63] However, the factors of ease of transportation, distance, accessibility, and other safety considerations made this determination immune from attack on grounds that there had been an unconstitutional classification along racial lines.[64]

The failure of these constitutional attacks may result in an

57. State *ex rel.* City of Creve Coeur v. Weinstein, 329 S.W.2d 399 (Mo. Ct. App. 1959). *Accord*, Deerfield Park Dist. v. Progress Dev. Corp., 26 Ill. 2d 296, 186 N.E.2d 360 (1962) (Here the condemnation for park purposes followed closely after the announcement by a housing developer in that all-white community that it was his intention to rent to both races proportionally to the racial balance in the general area.). In a federal case collateral to *Deerfield*, the Court of Appeals for the Seventh Circuit held that proof of a conspiracy to prevent integration by the local officials against the developers would constitute a valid cause of action. Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961). On remand, the lower court held that the doctrines of res judicata and collateral estoppel settled the question of a conspiracy adversely to the developer because of the state court decision. Progress Dev. Corp. v. Mitchell, 219 F. Supp. 156 (N.D. Ill. 1963).

58. 174 F. Supp. 64 (N.D. Ala. 1958), *aff'd*, 268 F.2d 593 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959).

59. *Id.* at 67

60. 207 F. Supp. 755 (M.D. Ala. 1962).

61. *Id.* at 757.

62. 165 F. Supp. 87 (E.D. Mich. 1958).

63. *Id.* at 89.

64. *Id.* at 90. *Accord*, Bell v. School City, 213 F. Supp. 819 (N.D. Ind. 1963); Sealy v. Department of Pub. Instruction, 159 F. Supp. 561 (E.D. Pa. 1957), *aff'd*, 252 F.2d 898 (3d Cir.), *cert. denied*, 356 U.S. 975 (1958). See also McNeese v. Board of Educ., 305 F.2d 783 (7th Cir. 1962) (The court noticed that there was no allegation that the attendance areas were not based on a rational consideration, although the case was sent back because the plaintiffs had not exhausted their state remedies.). Commentators on school segregation have recognized the difficulties in attacking attendance areas where consideration is publicly given to valid factors. Kaplan, *Segregation Litigation and the Schools—The General Northern Problem* (pt. 2), 58 NW. U.L. REV. 157, 178 (1963); Maslow, *supra* note 55, at 360; Comment, *"Equal Protection" and the Neighborhood School*, 13 CATHOLIC U.L. REV. 150, 155 (1964); Comment, *De Facto Segregation—A Study in State Action*, 57 NW. U.L. REV. 722, 733 (1963); Comment, *De Facto Segregation and the Neighborhood School*, 9 WAYNE L. REV. 514, 523 (1963); Note, *Racial Imbalance in the Public Schools*, 50 VA. L. REV. 464, 495 (1964).

increased use of otherwise valid legislation to effect a segregation of the races. The use of the power of eminent domain poses a significant threat to the attempt to end irrational classification along racial lines.[65] New municipal buildings, new roads and highways, urban renewal, and public playgrounds and parks all require the exercise of the power of eminent domain. Consequently, all such activity seems to present means by which a segregation-minded community can improve their municipal facilities, while achieving the intended elimination of Negroes in certain areas. Of course, this process assumes a conspiracy of silence as to the true nature of the effort.[66] If silence accompanies the acts, the principle of judicial approval of a rational legislative classification would seem to preclude a successful attack on the acts, even though one of the effects is de facto segregation.

If a judicial challenge is made, rigid requirements must be met before such an action will be successful. The allegations must be specific, and must be fortified by: (1) in the absence of a countervailing function, evidence that the activity clearly demonstrates that there has been racial classification,[67] or (2) in the presence of a countervailing municipal function, evidence that irrational discrimination appears in the face of the statute[68] or that the activity was expressly racially motivated.[69] These strict requirements have been considered desirable in order to insure that the ability of governmental units to dispatch their services and functions will not be needlessly impaired.[70] The strictness would preclude any challenge that is politically motivated by a desire to impeach the qualifications of an officeholder by charging him with racial bias or that is aimed at political advantage by obstructing the continuation of municipal progress. If the requirements were less, judicial involvement would take an unusual form. A court would be forced to weigh, with no objective standard, any detrimental influence of the racial aspect of a classification against the legislatively approved value of the classifi-

65. The equal protection clause may have greater influence in the area of governmental planning than merely guarding against racial discrimination. See Williams, *Planning Law and the Supreme Court*, 13 ZONING DIGEST 97 (1961).

66. See notes 44-49 *supra* and accompanying text.

67. This requirement is derived from Gomillion v. Lightfoot, 364 U.S. 339 (1960).

68. This requirement is firmly established in many cases. See, *e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917).

69. See, *e.g.*, Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961).

70. Even where a racial effect may be apparent, commentators have approved consideration of prominent beneficial aspects of a rational classification in upholding it as valid. Bickel, *The Decade of School Desegregation*, 64 COLUM. L. REV. 193, 218 (1964); Kaplan, *supra* note 55, at 176, 178; Leflar & Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 412 (1954); Comment, *"Equal Protection" and the Neighborhood School*, 13 CATHOLIC U.L. REV. 150, 155 (1964).

cation. This subjective process would require the judiciary to substitute its judgment for that of the legislative body, where its only standard is not affirmatively commanded by the Constitution, but derived from the guidance given by a negative prohibition.[71]

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71. The same type of problem as to judicial remedy exists in this area as in the legislative reapportionment field. See *Reapportionment Symposium*, 63 MICH. L. REV. 209 (1964). Here the problem is more difficult, however, because the controlling criteria in each case comes not from an affirmative constitutional standard, but is only guided by the constitutional prohibition against unreasonable classification.