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Alternative Schools for Minority Students: The Constitution, the Civil Rights Act and the Berkeley Experiment

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Comments

*ALTERNATIVE SCHOOLS FOR MINORITY STUDENTS: THE CONSTITUTION, THE CIVIL RIGHTS ACT AND THE BERKELEY EXPERIMENT**

Compliance with court-imposed desegregation has preoccupied many of the nation's public school systems in recent years.[1] The Berkeley, California, Unified School District, however, has not only voluntarily integrated its schools but also has developed an experimental schools program.[2] Berkeley's Experimental Schools Program encompasses twenty-three alternative schools, each of which theoretically affords students a different approach to learning than that available elsewhere.[3] Two of these alternatives, Black House and Casa de la Raza,[4] are designed to offer to their respective black and Chicano students educational programs that are free from the white, middle-class biases and pressures allegedly characteristic of an ordinary public school environment.[5] While the notion of educational choice is one of

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1. Since Brown v. Board of Education, 347 U.S. 483 (1954)—in which the Supreme Court declared unconstitutional state imposed racial segregation in public education—and the remedial mandate issued the following year [Brown v. Board of Educ., 349 U.S. 294 (1955)] school districts and federal courts have struggled with the problems of compliance and enforcement. For a partial account of the legal developments following these decisions see D. Kirp & M. Yudof, Education Policy and Law, ch. IV, Fall 1972 (unpublished course materials in Boalt Hall Library).

2. *Hearings on Equal Educational Opportunity Before the Select Comm. on Equal Educational Opportunity of the United States Senate*, 92d Cong., 1st Sess., pt. 9A, at 3976-79, 4057 (1971) [hereinafter cited as *Hearings*]; Divoky, *Berkeley's Experimental Schools*, SATURDAY REVIEW: EDUCATION, Oct. 1972, at 44-51.

3. Berkeley Unified School District, Experimental Schools in Berkeley, at 1-4 Sept. 1971 [hereinafter cited as *Pamphlet*]. *See* note 342 *infra*.

4. Hereinafter referred to as "Casa" or "Casa de la Raza."

5. Interview with Horace Upshaw, current director of Black House, in Berkeley, Sept. 25, 1972 [hereinafter cited as *Upshaw interview*].

the underlying themes of the Berkeley program, some consider Black House and Casa de la Raza to be constitutionally impermissible approaches to public schooling. The apparent racial exclusivity of student and staff selection policies as well as the ethnic orientation of the curricula at these schools are the sources of such criticism.

This Comment analyzes some of the constitutionally significant aspects of Berkeley's Experimental Schools Program in light of the law —both statutory and decisional—and in light of the relation of such law to the developing body of social science evidence on varying types of learning environments. Part I presents a factual examination of Black House and of Casa that is largely derived from personal interviews with the directors of those schools and other officials in Berkeley's system of public education. Part II outlines a more precise definition of the constitutional issues raised by the continued operation of these schools and locates the existing boundaries of relevant constitutional interpretation. The application of the 1964 Civil Rights Act to the Berkeley situation is the focus of Part III, and Part IV develops a tentative series of constitutional justifications for the continued existence of Black House and Casa de la Raza.

At the present time, Berkeley's problems with respect to these schools are unique. However, the issues presented clearly transcend their local origin. The sort of educational experimentation now conducted in Berkeley may well emerge in other places. Similarly, the analysis that follows may be applicable to other areas.[6]

I
BLACK HOUSE AND CASA DE LA RAZA: THE FACTUAL FRAMEWORK

A. Berkeley's Black House—A Practical Adjustment to the Needs of the Black Student

Black House was established in October, 1970, when Buddy Jackson, a teacher at Berkeley's Community High School, began conducting classes in a local YMCA facility on "the effects this society has had on

6. Part IV of this Comment presents a series of constitutional justifications for Black House and Casa de la Raza which relies heavily on facts unique to the Berkeley Unified School District. While each of the proposed justifications has some independent validity, it is doubtful that any of them standing alone could insulate schools like Black House and Casa from legal attack. However, since the Berkeley program raises all of these possible justifications, it seems to be less vulnerable to constitutional challenge than a school district to which only a few of these arguments would be applicable. Hence, while the legal analysis contained in this Comment need not be confined to discussions about Berkeley, at the present time there exists no other school district which, on its facts, could invoke the entire series of justifications presented.

black people."[7] Black House, now at its own site in Berkeley's industrial district, has a faculty of approximately sixteen teachers and a student body of 75 tenth, eleventh, and twelfth graders.[8] Since over 1400 blacks attend Berkeley high schools,[9] the proportion of black high school students attending Black House is quite small.

Horace Upshaw, the present director of Black House, sees the school as a response to problems typically experienced by black students.[10] Because many black students have been found deficient in basic developmental skills, the curriculum of Black House stresses such fundamental subjects as reading and mathematics. But, wherever possible, these remedial efforts attempt to develop skills through the use of ethnically oriented materials rather than through more traditional vehicles. In a sense, the student at Black House is not exposed to an appreciably different curriculum than that characteristic of an ordinary high school; the material simply is presented in a different fashion.[11]

Nonetheless, Upshaw does see two significant ways in which an education at Black House differs from that available at other schools. First, the school attempts to present a more critical analysis of the role of democratic institutions in American society. Traditional schooling, contends Upshaw, usually fails to reveal the interaction between politics and power or lack of power within these institutions. As a result, the traditional way of learning about such institutions is neither particularly relevant nor educationally beneficial for many black students.[12]

Second, Upshaw believes that there is an educationally valuable relationship between student and teacher, when both are black, that cannot exist when that pair is racially mixed. Emphasizing that his conclusions are tentative and require additional study, Upshaw also suggests that, in their attempts to ingratiate themselves to their minority students and to demonstrate their lack of racial prejudice, white teachers often have difficulties that might be detrimental to the students' long-term educational interests.[13] Alternatively, a black student can be educationally harmed in less subtle ways by an unsympathetic or

7. *Pamphlet, supra* note 3, at 12.

8. *Upshaw interview, supra* note 5.

9. Berkeley Unified School District, Report of the Student Racial Census, Fall 1972.

10. *Upshaw interview, supra* note 5.

11. *Id.*

12. For example, while some schools might glorify the governmentally initiated War on Poverty, Black House asks its students to recall the demise of that program. *Upshaw Interview, supra* note 5.

Others share Upshaw's general views about traditional American schooling. *See, e.g.*, Hess, *Political Socialization in the Schools*, 38 HARV. ED. REV. 528 (1968).

13. *Upshaw interview, supra* note 5.

racist white instructor.[14] Upshaw believes that black teachers are able not only to avoid these pitfalls but also to be particularly sensitive to the educational and emotional needs of black pupils.

Black House has attempted to deal with these problems by limiting its student body and personnel to blacks. Upshaw is aware of the possible legal difficulties inherent in such an arrangement but argues that the program is justified because it reaches children whom other schools cannot reach. Skin color, however, is not the sole criterion for admission to Black House; Upshaw cites several cases of black students rejected from the program because they failed to exhibit a certain seriousness of purpose that the school demands. Yet, since the school's admissions policies have been described in different or even contradictory ways at different times, the legal significance of these policies is difficult to analyze precisely.[15]

It is the status of the non-black student that renders Black House a constitutional dilemma as well as an educational innovation. Because Part II of this Comment considers its constitutional implications in greater detail, it is necessary here, in this factual analysis, to emphasize the ambiguity of that status. Apparently, Upshaw can refrain from formalizing the entrance requirements and policies for Black House since no non-black has ever attempted to gain admission.[16] According to Upshaw, Berkeley High School and a variety of other alternative schools offer multicultural courses of study, including fairly comprehensive Black Studies programs. Hence, Upshaw can envision no reason why a non-black would even want to attend Black House. The school's name, its all-black staff, and an unspoken understanding within the Berkeley community perhaps have created a "for-blacks-only" impression.[17] But Upshaw prefers to attribute the lack of non-black applicants to Black House's image as a remedial institution for students experiencing particular problems.[18] If such problems arise from membership in a particular racial group, students from different racial groups would derive little benefit from the experiment.

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14. *See, e.g.*, J. KOZOL, DEATH AT AN EARLY AGE, (1967).

15. The school's history reveals the confusion. In a recent statement, the Berkeley Experimental Schools Program stressed that Black House has never "functioned as a racially or ethnically exclusive school." The statement cites the case of one non-black who attended Black House during the 1971-1972 school year. Letter and proposal from Lawrence Wells, Director, Berkeley Experimental Schools Program, submitted to Floyd Pierce, Regional Civil Rights Director, Dept. of Health, Education and Welfare, April 9, 1973 at 2. [Hereinafter cited as *April 9, 1973 Statement.*] *But see Hearings, supra* note 2, at 4110: "The qualifications [to enter Black House] are the students must be black."

16. *Upshaw interview, supra* note 5. *But see* note 15 *supra.*

17. *See* Part IV(A)(3) *infra.*

18. *Upshaw interview, supra* note 5.

In Upshaw's judgment, Black House has successfully accomplished its twin goals of heightening racial awareness among its students and remedying their deficiencies in developmental skills.[19] If educational success is to be used as constitutional justification for the existence of Black House,[20] however, opinions about the program's success may be of little probative value. Nevertheless, it is difficult to ascertain what other measurements of educational success might be more appropriate. Conventional achievement tests, designed to measure adaptation to an essentially white and middle-class school environment,[21] would not accurately measure the impact of Black House on its students. A middle ground—somewhere between subjective appraisals and conventional testing devices—must be found. Case histories of individual students and graduates of Black House[22] may provide such a tool, but until there is a larger sample, or until such studies are undertaken, evaluations will remain speculative.

By the beginning of the 1973-1974 school year, Black House will become part of a more inclusive "multicultural umbrella" of schools.[23]

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19. *See Hearings, supra* note 2, at 3981, where Dr. Richard L. Foster, Superintendent, Berkeley Unified School District, discusses the gap between the achievement levels of black and white pupils.

20. *See* Part IV(B) *infra.*

21. *See* Hobson v. Hansen, 269 F. Supp. 401, 479 (D.D.C. 1967), *aff'd sub. nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Note, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board,* 81 HARV. L. REV. 1511, 1519 (1968); Comment, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education,* 68 COLUM. L. REV. 691, 734-40 (1968); Comment, *Comments on Psychological Testing,* 69 COLUM. L. REV. 608 (1969); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis,* 60 CALIF. L. REV. 275, 434-35 (1972). *Cf.* Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972).

While these commentaries generally focus on the cultural bias characteristic of most standardized tests of ability or aptitude, similar arguments are applicable to standardized achievement tests. If such tests are designed to measure the scholastic achievement of students taught in conventional public schools, it is reasonable to infer that a student taught in a school like Black House—where the objective is to provide students with alternative forms of learning—would probably not score well on such a test, no matter what level of achievement he actually attained. In this context, see C. JENCKS, M. SMITH, H. ACLAND, M.J. BANE, D. COHEN, H. GINTIS, B. HEYNS, & S. MICHELSON, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 55-56 (1972) [hereinafter cited as INEQUALITY].

At the present time, there are no recognized alternative achievement tests that would adequately measure a pupil's progress at a school like Black House. Currently, members of the evaluation staffs of the Experimental Schools Program in Berkeley are attempting to devise such tests. Interviews with Dr. Ed Turner & Casey Jones, Evaluation Staff, Berkeley Experimental Schools Program, in Berkeley Oct. 16 and Oct. 18, 1972; telephone interview with Carl Jorgensen of the "DEEPS" office [Documentation and Evaluation of Experimental Programs in Schools], in Berkeley, Oct. 20, 1972.

22. *See April 9, 1973 statement, supra* note 15, at 2.

23. Interview with Dr. Richard Foster, Superintendent of Berkeley Unified

The plan for this consortium, which the Experimental Schools Program is now refining, developed in response to some of the legal challenges confronting Black House.[24] The umbrella will encompass a variety of academic programs, each oriented to the needs and interests of particular student groups. However, Black House will probably seek to maintain its own physical identity and some degree of independence within the consortium in order to preserve the unique educational environment it was designed to provide.[25]

B. Casa de la Raza—A School for the Chicano Community

According to Francisco Hernandez, Casa de la Raza's newly appointed director and principal, Casa and Black House share the same basic philosophy of education; they simply are designed to meet the needs of different segments of Berkeley's population.[26] Like Black House, Casa attempts to develop "basic skills" among its students. Yet, while the substance of the educational program resembles that of other schools, Hernandez emphasizes that "the delivery" is different.[27] Chicano culture is the medium for transmission of knowledge, and most of Casa's curriculum is taught bilingually.[28]

The most distinctive feature of Casa is its community orientation. The school includes the twelve academic grades plus a kindergarten class, whereas Black House operates solely as a high school. The governing body of Casa is composed of parents, students, and staff members.[29] Community-related projects form a significant part of the educational program.[30] In short, Casa's concept of an appropriate edu-

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School District, in Berkeley, February 6, 1973. [Hereinafter cited as *Second Foster Interview*.] *See also* memorandum and letter submitted by Experimental Schools Program of Berkeley Unified School District to Floyd Pierce, Regional Director of the Office of Civil Rights of the Department of Health, Education, and Welfare, in San Francisco, May 26, 1972. *See also April 9, 1973 statement, supra* note 15.

24. *See* memorandum and letter cited *supra*, note 23. While the plan was adopted by the Berkeley Board of Education on October 17, 1972, implementation was delayed pending approval by the Department of Health, Education, and Welfare. Berkeley Daily Gazette, Oct. 18, 1972, at 1-2, col. 2. HEW has requested a detailed plan for implementation by April 15, 1973; actual implementation of the plan is scheduled for Fall, 1973. *Second Foster Interview, supra* note 23. Berkeley submitted that plan and now awaits HEW's response.

25. *Upshaw Interview, supra* note 5.

26. Interview with Francisco Hernandez, current director of Casa de la Raza, in Berkeley, Sept. 29, 1972. [Hereinafter cited as *Hernandez Interview*].

27. *Id.*

28. *Pamphlet, supra* note 3, at 23; Divoky, *supra* note 2, at 49.

29. Divoky, *supra* note 2, at 49; Berkeley Unified School District, Experimental Schools Program, Descriptions of Berkeley's Alternative Schools (undated).

30. *Id.*

cation for the Chicano student appears to be much broader than that envisioned by most other schools. Out of the 427 Chicano students in Berkeley public schools in the kindergarten through the twelfth grade,[31] approximately 125 attend Casa.[32]

In stressing Chicano culture and involvement with the Spanish-American community, Casa has limited its students and personnel to Chicanos. Although a handful of white students have attended Casa in the primary grades and a few white reading specialists have been instructors there, the participation of non-Chicanos has been minimal.[33] Hernandez states that he cannot predict the disposition of substantial numbers of applications from other non-Chicano students or staff members since none have been submitted recently. He notes that there are 23 alternative schools in Berkeley, several of which offer multicultural programs; consequently, Casa would appear to have nothing unique to offer non-Chicanos.

Hernandez believes that if enthusiasm and interest are regarded as components of successful schooling, then Casa has been able to offer to its students an environment for learning that is superior to that available in the ordinary classroom. However, because the use of conventional testing devices would be particularly inappropriate in a school like Casa,[34] Hernandez is unable to offer statistical evidence of Casa's educational success. Currently he is attempting to raise funds for developing tests that would afford appropriate measures of academic achievement among these students. The results of such tests would be of both educational and legal significance.[35] For the present, however, the educational merits of Casa, like those of Black House, are not susceptible of objective verification.

Like Black House, Casa plans to become part of the Alliance School, the "multicultural umbrella."[36] While Casa will maintain its autonomy and remain geographically separate from the other components of the consortium, it will engage in exchange programs and joint activities. Hernandez believes that such an arrangement will moot much of the legal criticism directed at Casa de la Raza.

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31. Berkeley Unified School District, Report of the Student Racial Census, Fall, 1972.

32. *Hernandez interview, supra* note 26.

33. *Id. See also April 9, 1973 statement, supra* note 15, at 2. That statement states that approximately ten percent of Casa's students have been non-Chicano.

34. *See* note 21, *supra*; Diana v. State Bd. of Educ., C.A.C.-70B7 RFP (N.D. Cal. 1970) (consent decree); *see also* complaint for injunctive relief filed in Ruiz v. State Bd. of Educ., C.A. 218,294 (Superior Court of the State of California for the County of Sacramento, filed Dec. 16, 1971).

35. *See* Part IV(B) *infra.*

36. *See* notes 23 and 24 and accompanying text, *supra.*

II

DEFINING THE CONSTITUTIONAL ISSUE AND LOCATING THE PRESENT LIMITS OF THE LAW

A. Modern Equal Protection Analysis

In approaching the explicit use of racial criteria in student admissions policies and personnel selection,[37] Black House and Casa are ready targets for constitutional challenge under the equal protection clause of the fourteenth amendment.[38] Despite the general judicial interpretation of this clause as a proscription against certain state-imposed classifications,[39] years of varied applications of the clause have produced a welter of equal protection rules, standards, and tests.[40] Volatile as the framework for any equal protection inquiry may be, two distinct judicial principles—given new certainty in a recent opinion of the United States Supreme Court[41]—emerge as guidelines for a constitutional analysis of Black House and Casa.

The first is the development of a more rigorous standard of review than is demanded under the conventional rational basis test.[42] Under the rational basis test, in order to challenge a classification successfully, one must show that it bears no rational relation to a legiti-

37. Because the admissions procedures of Black House and Casa are informal, it is difficult to determine whether these schools affirmatively exclude non-blacks and non-Chicanos or whether there are other explanations for their racial composition. *See* notes 15, 16, and 33 and accompanying text, *supra*. However, the Department of Health, Education and Welfare inferred explicit racial exclusivity from the nature of the promotional literature and the composition of the enrollment and faculties of these schools. Enclosure to letter from J. Stanley Pottinger, Secretary of Department of Health, Education and Welfare, to Richard L. Foster, April 4, 1972.

38. Although racially exclusive education may raise a variety of constitutional issues, this Comment focuses on an equal protection approach. This choice of emphasis reflects a similar emphasis in *Brown* and its progeny as well as in almost all of the legal literature on the subject. However, it should be noted that Bolling v. Sharpe, 347 U.S. 497 (1954)—a companion case which applied the *Brown* holding to the District of Columbia—stated that de jure segregated education was also violative of the due process clause of the fifth amendment. *See also* Alexander & Alexander, *The New Racism: Analysis of the Use of Racial and Ethnic Criteria in Decision-Making*, 9 SAN DIEGO L. REV. 190, 243-49 (1972). Nevertheless, the due process approach represented by *Bolling* and the Alexander article is atypical.

39. *See* U.S. CONST. amend. XIV; Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

40. *See generally* Tussman & tenBroek, *supra* note 39; *Developments in the Law—Equal Protection*, *supra* note 39; Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

41. *See* San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973).

42. *See* Tussman & tenBroek, *supra* note 39, at 344.

mate state interest.[43] The stricter test, however, subjects the classification to strict judicial scrutiny.[44] It requires the party seeking to uphold a challenged classification to demonstrate an overriding or compelling state interest and to prove that the classification is necessary to further that interest.[45] Application of this more rigorous standard of judicial scrutiny has been limited to cases in wliich classifcatory schemes invoke "suspect characteristics" or place "fundamental rights" in jeopardy.[46] Race has been described repeatedly as a suspect classification,[47] primarily because of judicial recognition that the fourteenth amendment was enacted following the Civil War to protect the newly acquired rights and liberties of America's black population.[48] This reasoning has been extended into cases concerning other racial or ethnic minority groups,[49] including Mexican Americans.[50] Strict judicial scrutiny of racial classifications is arguably appropriate even when the context is very diffeent from the invidious use of racial criteria originally contemplated by the fourteenth amendment.[51]

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43. *E.g.*, San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1300 (1973); United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). *See* Tussman & ten Broek, *supra* note 39, at 344; *Developments in the Law—Equal Protection, supra* note 39, at 1077-78.

44. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1287-88 (1973).

45. *Id.*; Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); *Developments in the Law—Equal Protection, supra* note 39, at 1090.

46. *See* San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1287-88 (1973); McDonald v. Board of Election Comm'rs., 394 U.S. 802, 806-07 (1969); *Developments in the Law—Equal Protection, supra* note 39, at 1120-21. It remains unclear what criteria must be satisfied for a characteristic or classification to be "suspect" and for a right or an interest to be "fundamental," although cases like *Rodriguez* have removed some of this uncertainty.

47. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944).

48. Shapiro v. Thompson, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting); Tussman & tenBroek, *supra* note 39, at 341-42; *Developments in the Law—Equal Protection, supra* note 39, at 1068-69.

49. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

50. Hernandez v. Texas, 347 U.S. 475, 478 (1954); Cisneros v. Corpus Christi Independent School Dist., 324 F. Supp. 599, 605-06 n.28 (S.D. Tex. 1970), *order stayed on other grounds,* 404 U.S. 1211 (1971).

51. Some commentators have argued that when a classification based on race is benign rather than invidious, the permissive standard of review should be applied. For a summary of these arguments and reasons for rejecting them, *see* O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education,* 80 YALE L.J. 699, 706-07, 709-11 (1971). A classification that affects one group benignly usually has the opposite impact on another. For example, if black students are given preferential treatment in admissions to higher education, non-black applicants will be put in a disadvantaged position. Hence, even the existence of allegedly

In practice, the use of the strict test has almost invariably resulted in the invalidation of the challenged classification, for in virtually every such case the state has failed to demonstrate the compelling state interest required for justification.[52] The terms "suspect," "fundamental," and "compelling" seem to dictate this result.[53] So used, the test becomes mechanical and conclusory. Judicial dissatisfaction with these consequences has led both to a more vigorous application of the rational basis test[54] and to a contraction of the cases to which the strict standard will be applied.[55] Yet even the scholars who have predicted from this dissatisfaction the strict test's eventual demise have excluded race-related cases from their forecasts.[56]

In light of these recent judicial developments, perhaps the most acceptable standard by which to review the constitutionality of racial classifications would be a literal application of the strict test—that is, an application in which the requirement of "strict judicial scrutiny"

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benign racial classifications appears to call for application of the strict standard of judicial review. *See Developments in the Law—Equal Protection, supra* note 39, at 1110-13. *See also* Part IV(E) *infra.* But note that such a conclusion overlooks the possibility that the historical basis of the fourteenth amendment might warrant different treatment of classifications burdening majority groups rather than minority groups. *See* text accompanying note 48 *supra*; *see also* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

Despite the special relationship between the fourteenth amendment and racial minority groups, a uniform standard of judicial review should be applied to all classifications which disadvantage any racial group—black or white, minority or majority. "[The] provisions [of the fourteenth amendment] are universal in their application, to all persons . . . without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). At the very least, equal protection of the laws requires that the same standard of review be applied to all racial classifications.

52. *But see* Korematsu v. United States, 323 U.S. 214 (1944), an example of the infrequent case in which the Court has upheld challenged classifications despite application of strict judicial scrutiny.

53. *See* San Antonio Independent Dist. v. Rodriguez, 93 S. Ct. 1278, 1330 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-527 (1970) (Marshall, J., dissenting); Shapiro v. Thompson, 394 U.S. 618, 658-63 (Harlan, J., dissenting). *See also* Gunther, *supra* note 40.

54. *See* Gunther, *supra* note 40. According to Professor Gunther, the present Supreme Court has rejected the mechanical, result-oriented approach suggested by the two-tiered rationality-compelling state interest method of analysis. Instead, he notes that the present Court seems to have adopted a sliding-scale approach that is based on a standard of rationality accompanied by intensified judicial scrutiny. However, Gunther's article was written before the Supreme Court handed down its decision in *Rodriguez.* That decision's comments on equal protection analysis may well require some qualification of the Gunther thesis.

55. *See* San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278, 1297 (1973). *See also* dissenting opinion of Marshall, J., *id.* at 1336.

56. *See* Gunther, *supra* note 40, at 10-11. Note that the group of cases from which Gunther draws the conclusions discussed *supra* in note 54 explicitly excludes race-related cases. *Id.* at 11 n.48.

would describe a method of judicial analysis but would not mechanically dictate the ultimate outcome of the case. So applying the test, to subject Black House and Casa to "strict judicial scrutiny" would entail stringent consitutional analysis of these schools but would not necessarily preclude a finding of adequate justification for their existence once an overriding state interest is shown.

The second significant procedural development in equal protection law is the increased willingness of the judiciary to consider social science data for evidentiary purposes. Arguably, the reason that some classifications, upheld as constitutional in the past, are now considered to violate the fourteenth amendment is that the courts have been persuaded by sociological and psychological studies that certain state actions, although producing the appearance of equality, often conceal psychological or social inequities.[57] It is likely that the converse should also be true: some classifications vulnerable to attack under present constitutional doctrine perhaps can be saved by social science data demonstrating that these classifications are consistent with the equal protection clause.[58]

While judicial use of empirical data has expanded, the extent to which courts should actually rely on this type of evidence remains unsettled. The use of such data in *Brown v. Board of Education* elicited extensive debate on the subject.[59] Although it is tempting to say that

57. The Supreme Court's use of social science data in Brown v. Board of Education, 347 U.S. 483 (1954) is representative of this judicial development. *See also* Appendix to Appellants' brief in *Brown*, reprinted in *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 MINN. L. REV. 427 (1953).

For example, when the Supreme Court in *Brown* stated that "in the field of education the doctrine of 'separate but equal' has no place" [347 U.S. at 495], it was not simply carving out an exception to the "separate but equal" rule. *See* Plessy v. Ferguson, 163 U.S. 537 (1896). Instead, the Court was acknowledging that psychological evidence not previously recognized had begun to show that racial segregation caused "feeling[s] of inferiority" which made separation and equality incompatible concepts in public schooling. 347 U.S. at 494. Recently, courts have been willing to take note of evidence of the feelings of inferiority generated by desegregation plans employing one-way busing arrangements or the particular socio-economic and psychological variables that handicap a disadvantaged child in his response to standardized tests at school. *See* Brice v. Landis, 314 F. Supp. 974 (N.D. Cal. 1969) and Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). All of these examples indicate that some courts are willing to entertain social science evidence of inequality in judging situations which appear to treat all people equally.

58. *San Antonio Independent School Dist. v. Rodriguez* lends support to this speculation. There, the Court noted the division of opinion among scholars as to whether unequal educational funding in fact produces educations of unequal qualities. However, it is unclear just what the Court would have decided if conclusive evidence on either side of this issue had been available. 93 S. Ct. at 1302.

59. *See, e.g.*, Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955); Wechsler, *To-*

factual contingencies should not determine the outcome of constitutional decisions, some empirical evidence is necessary to give meaning and substance to the broad principles enunciated in the Constitution. For example, at least some empirical determinations are required so courts can distinguish situations that violate the principle of equal protection from those that do not. A problem arises only when empirical findings seem to point toward different results than those suggested by traditional constitutional interpretation. Yet even when the relevance of such findings is clear, but the extent to which they are dispositive of the constitutional issues is not, empirical considerations arguably constitute part of the process of "strict judicial scrutiny" to be performed under the rules of equal protection analysis discussed above.[60]

For several reasons Black House and Casa de la Raza present a unique test for these evolving principles. First, because the context is an educational one, empirical data is readily available. Schools have traditionally measured and assessed the educational progress of their pupils. In doing so, a school facilitates outside evaluation of its own educational success.[61] Second, the particular classifications at issue here concern both race and education, two areas that have received a substantial amount of judicial attention. Finally, Black House and Casa de la Raza present an interesting twist. The familiar constitutional principles and precedents are evoked, but to achieve a different result: Racial classifications are advocated by groups who historically decried their use;[62] educational differences are promoted by those who once demanded sameness of treatment; and restrictions on free association—once considered inimical to the notion of equality—are now advanced in the name of ethnic identity, community control, and alternative schooling.

To determine whether or not the promotion of such new values

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ward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. PA. L. REV. 1 (1959); Black, *The Lawfulness of the Segregation Decisions,* 69 YALE L.J. 421 (1960); Mueller & Schwartz, *The Principle of Neutral Principles,* 7 U.C.L.A. L. REV. 571 (1960); Clark, *The Desegregation Cases: Criticism of the Social Scientists' Role,* 5 VILL. L. REV. 224 (1959-60); Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics,* 49 CALIF. L. REV. 104 (1961).

60. *See* text following note 56 *supra.*

61. For example, achievement tests used to measure the progress of students at any given school also reflect whether or not the school itself has been successful in transmitting knowledge and values. In using such tests as an indication of either a pupil's or a school's success, one must take into account any racial, cultural, or socio-economic biases that might inhere in the tests themselves. *See* note 21 *supra.*

62. Of course, there is no single voice speaking for the black or Chicano communities in Berkeley. The racial exclusivity of Black House and Casa has both ardent proponents and opponents within the minority communities. *Upshaw interview, supra* note 5; *Hernandez interview, supra* note 26.

can be derived from traditional constitutional analysis requires an understanding of *Brown v. Board of Education.*[63] But even if *Brown* is a pertinent starting point for this inquiry, it certainly does not provide the last word. *Brown*'s interpretation and application of equal protection is currently being tested by three much debated remedial responses to that case. A brief examination of the issues these responses raise is likewise necessary to clarify the legal foundations upon which Black House and Casa are alleged to rest so precariously.

B. Remedies for Racial Imbalance: The Ambiguities of the Brown Case

Benign quotas,[64] remedies for de facto segregation,[65] and preferential admissions policies[66] are all devices that can be used to correct racial imbalances in educational institutions.[67] Accordingly, they rep-

63. 347 U.S. 483 (1954).

64. The term "benign quota" refers to the voluntary use of fixed racial percentages by a community or school district in an attempt to mitigate existing racial imbalances. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 15, § 1I (1966), ch. 71 § 37D (1969). Courts have generally upheld such measures as constitutional. *See* Offerman v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Tometz v. Board of Educ., 39 Ill. 2d 593, 237 N.E.2d 498 (1968); School Comm. of Boston v. Board of Educ., 352 Mass. 693, 227 N.E.2d 729 (1967). *See also Developments in the Law—Equal Protection, supra* note 39, at 1104-20; Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L. J. 1387 (1962).

65. Like benign quotas, remedies for de facto segregation involve the use of racial classifications to counteract racial imbalances. While benign quotas are generally voluntary efforts of this sort, remedies for de facto segregation are court-imposed relief. Whether *Brown* requires the elimination of de facto segregation is unclear, but the question may be answered by the Supreme Court during the current term in Keyes v. School Dist. Number One, 445 F.2d 990 (10th Cir. 1971), *cert. granted* 404 U.S. 1036 (1972). Case law from the lower courts is divided on this issue. *See, e.g.*, Barksdale v. Springfield School Comm., 237 F. Supp. 543 (D. Mass. 1965), *order vacated and remanded*, 348 F.2d 261 (1st Cir. 1965); Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964); Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

For a detailed analysis of the constitutional issues raised by de facto segregation and the remedies therefor, see Dimond, *School Segregation in the North: There Is But One Constitution*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. (1972). [Hereinafter cited as *One Constitution.*] *See also* Goodman, *supra* note 21.

66. Preferential admissions plans employ racial criteria to achieve integrated student bodies in higher education programs. Characteristically, such plans allow a certain number of students from "deprived" or "disadvantaged" backgrounds, of which race is generally considered an appropriate indicator, to gain admission to an institution of higher learning by meeting qualifications less rigorous than those imposed upon other applicants. *See* DeFunis v. Odegaard, 41 U.S.L.W. 2536 (Apr. 10, 1973), in which a white candidate for admission to the University of Washington Law School brought suit on the ground that he had been denied equal protection of the laws because his application was rejected in favor of those of allegedly less qualified minority applicants. The Supreme Court of Washington rejected his claim, reversing an opinion by a superior court. *See generally* O'Neil, *supra* note 51.

67. *See* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Con-*

resent good-faith responses to the declaration in *Brown I*[68] that racially segregated public education violates the equal protection clause[69] and the call, in *Brown II*,[70] for remedial relief. Yet, because each of these devices itself depends on the use of racial classifications, each has evoked considerable legal controversy.

The source of the controversy is not the *Brown* Court's holding, but rather the reasoning it employed to reach its conclusion. The Court conspicuously avoided moving directly from recognition of the classification to its invalidation—even though the racial criteria underlying it together with the state's failure to offer any plausible countervailing interests would have easily fallen under the strict standard of equal protection review.[71] Instead, the Court advanced a careful, but tenuous,[72] assessment of the educational harms and, by implication, associational harms caused and perpetuated by de jure school segregation.[73] Even if conclusive proof of these harms had been available, such evidence would merely have served to confirm the suspicions already aroused by the racial basis of the classification; it would have added nothing to the logic of the decision since the burden of proof was already on the state.

In so broadening the basis of its opinion, the *Brown* Court created an ambiguity that has yet to be resolved.[74] *Brown*, in effect, outlawed dual school systems—those that inhibit freedom of association through racial segregation and which therefore provide unequal educational opportunities.[75] But students of *Brown* disagree as to which of these evils the Court was most anxious to eliminate.[76] That is, while the opinion revealed the Court's concern for freedom of association, color-blindness,[77] and equal educational opportunities, it failed to rank these values in order of constitutional importance[78] and to recognize that different remedial approaches might be necessary to realize each.

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cepts, 78 HARV. L. REV. 564 (1965). *See also* MASS. GEN. LAWS ANN. ch. 15, § 1I (1966), ch. 71 § 37D (1969).

68. 347 U.S. 483 (1954).

69. 347 U.S. 483, 495 (1954).

70. 349 U.S. 294 (1955).

71. *See* Part II(A) *supra.*

72. *See* Goodman, *supra* note 21, at 279.

73. 347 U.S. 483, 494-95 (1954).

74. The resolution of this ambiguity might be forthcoming this term, when the Court hands down its opinion in *Keyes*. *See* note 65 *supra.*

75. "In *Brown* the Court appears to have posited integration, uncoerced association, and racially equal educational outcomes as aspects of the same end." Kirp, *Community Control, Public Policy and the Limits of the Law*, 68 MICH. L. REV. 1355, 1362 (1970).

76. *See* note 59 *supra.*

77. *See Developments in the Law—Equal Protection, supra* note 39, at 1088. *See also* Fiss, *supra* note 67, at 574-83.

78. Subsequent per curiam opinions not concerned with educational opportunity

One might be tempted to attribute the breadth of the opinion and its attendant ambiguities to the Court's possible desire for sturdier footing than that provided by the compelling state interest test, which admittedly had not reached the fullest extent of its development in 1954.[79] But the language of *Brown's* companion case, *Bolling v. Sharpe*,[80] as well as subsequent per curiam opinions which extended *Brown* well beyond the narrow scope of public education[81] quickly put that hypothesis to rest. Hence, the Court must have had positive reasons for introducing evidence of educational or associational harms and thereby broadening the basis of its decision.

Two possible rationales may be ascribed to the Court. First, the Court may have wished to place *Brown* at the end of the continuum of school segregation cases,[82] each of which had demonstrated the limited applicability of the "separate but equal" doctrine.[83] Without overruling the validity of that doctrine, each case in this series consistently found that the absence of certain "intangible" assets from educational facilities set aside for blacks rendered those facilities unequal to those reserved for whites.[84] *Brown*'s focus on the educational harm

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suggest that the prohibition against racial classifications and the promotion of associational interests may well have formed the nucleus of the Supreme Court's decision. *See, e.g.*, Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955); Holmes v. Atlanta, 350 U.S. 879 (1955); Gayle v. Browder, 352 U.S. 903 (1956).

More recently, the *Rodriguez* case, *supra* note 41, has held that equal educational opportunity is not a fundamental right in the constitutional sense, thus suggesting that perhaps this value was not of great significance in *Brown*. However, the *Rodriguez* opinion, citing *Brown*, stressed that it does not "in any way detract from [the Court's] . . . historic dedication to [the importance] of public education." 93 S. Ct. 1279, 1295 (1973). As a result, the conclusion that *Rodriguez* holds that *Brown* was a case about race rather than about education is unwarranted.

79. By 1954 the primary authority for the strict standard of review of classfications based on suspect criteria was Korematsu v. United States, 323 U.S. 214 (1944), in which a racial classification was upheld after it had been subjected to strict judicial scrutiny. Hence, at that time the test lacked the forcefulness now attributed to it and thus the Court might have regarded it as an inappropriate basis for the *Brown* decision.

80. 347 U.S. 497 (1954). *Bolling* relies on the suspect nature of the racial classification in reaching its conclusion that school segregation is so unreasonable as to violate the due process clause.

81. *See* note 78 *supra*.

82. This series of cases included Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents of the Univ. of Okla., 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950). *Brown* incorporates the reasoning of these cases. 347 U.S. at 492-93.

83. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

84. *See* cases cited in note 82 *supra*. The impact of *Rodriguez, supra* note 41, on these cases is unclear. That case held that the elimination of "tangible" inequalities among different educational facilities was not constitutionally required. Whether or not it implicitly overruled the constitutional requirement of "intangible" equality

engendered by segregation and its statement that "[s]eparate educational facilities are inherently unequal"[85] extended this series of cases to its logical conclusion. Such reasoning, although persuasive and firmly rooted in precedent,[86] permanently tied *Brown*'s holding of unconstitutionality to a factual finding of inequality.

A second, and possibly complementary, rationale that may have guided the Court away from a simple application of the compelling state interest test lies in the Court's perceptions of appropriate relief. If the Court had simply invalidated school segregation on the basis of the state's failure to demonstrate a compelling interest for it, the mere elimination of racial classifications would have been the only remedy implicitly authorized by the opinion. But in emphasizing educational harm, the *Brown* Court created the precedent for a variety of affirmative remedies aimed at alleviating this harm.[87] In so doing, it elevated its factual finding of educational inequality from the status of surplusage to authority for newly discovered constitutional duties.[88]

Whatever the Court's rationale, there emerges from *Brown* a balancing test that complements the ordinary judicial treatment of racial classifications.[89] In situations arguably controlled by *Brown*, the state's effort to demonstrate a compelling state interest[90] must include a factual showing of the absence of the harms that *Brown* sought to dispel. Presumably, then, any affirmative remedies which *Brown* implicitly authorized must be justified both as implementations of overriding state interests, and as relief consistent with the elimination of educational and associational harms.

Benign quotas, remedies for de facto segregation, and preferential

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remains open to question. Certainly, however, even a very broad reading of *Rodriguez* would still prohibit educational inequities based upon racial classifications.

85. 347 U.S. 483, 495 (1954).

86. The precedent referred to is the "separate but equal" rule in Plessy v. Ferguson, 163 U.S. 537 (1896).

87. *See* Goodman, *supra* note 21, at 285-86.

88. *Id. See also* Brown v. Board of Educ., 349 U.S. 294 (1955) [*Brown II*].

89. Arguably, even the conventional treatment of racial classifications calls for balancing, at least once the state has shown some plausible interest in maintaining the classification. This is so because the compelling state interest test does not invalidate racial classifications per se, but rather leaves open the possibility that a state interest might be shown to outweigh greatly the ordinary judicial disfavor of racial classifications. *See Developments in the Law—Equal Protection, supra* note 39, at 1103.

90. *See* text accompanying note 45 *supra*. Even though *Brown* did not rely on language of the compelling state interest test, the use in *Bolling v. Sharpe* of such terms as "constitutionally suspect" indicates that the *Brown* Court implicitly had applied such standards, 347 U.S. 497, 499 (1954). But because the state in *Brown* did not discuss any arguably countervailing interest, it was unnecessary for the *Brown* Court explicitly to weigh the state interest or to determine whether or not it was compelling.

admissions policies represent the extent to which such affirmative remedies have been interpreted by some courts, legislatures, and educators. But as such, these remedies also represent situations in which *Brown*'s several themes become incompatible, and thus they illustrate how the principles of equal educational opportunity, constitutional color-blindness, and unrestricted freedom of association may not be susceptible to simultaneous enforcement. *In Swann v. Charlotte-Mecklenburg Board of Education*[91] the Supreme Court demonstrated its willingness to compromise color-blindness and unconstrained association, at least in a school district guilty of past de jure segregation.[92]

Because the context of *Swann* was de jure segregation, it is difficult to discern precisely what the Court envisioned as the goal of that compromise. The Court could not have meant integration per se was constitutionally required—its treatment of segregation outside the educational context makes that clear.[93] The view that the Court's goal was instead the promotion of equal educational opportunity, though less persuasive in light of the Court's recent statements in *San Antonio Independent School District v. Rodriguez*,[94] still seems to represent the

91. 402 U.S. 1 (1971).

92. The *Swann* Court held that when school authorities fail to offer acceptable plans for dismantling formerly de jure segregated school systems, the local district courts have broad powers to fashion remedies pursuant to *Brown*. Such remedies may include reassignment of teachers in order to achieve faculty desegregation, the use of racial quotas and ratios in pupil assignment plans, alterations of attendance zones, and busing. The relief authorized by *Swann* explicitly takes race into account for the purpose of effecting desegregation. Similarly, it entails certain associational constraints: the desegregation plan may foreclose certain children from attending school with their neighbors and instead force them to attend schools in other neighborhoods populated predominantly by children of other races. These associational constraints may operate regardless of the neighborhood to which the children and their parents move.

While Green v. County School Bd., 391 U.S. 430 (1968), may imply a similar compromise of the principles of constitutional color-blindness and freedom of association, that case contains the additional element of freedom of choice, which is not a necessary part of the present discussion. *Green* receives detailed attention in Part IV(A) *infra*.

93. As Professor Goodman, *supra* note 21, at 388, has accurately noted:

> Outside the field of education, the decisions of the Court offer no support for the notion that even de jure segregation may be remedied only through judicially enforced racial mixing. Other municipal facilities—beaches, golf courses, and so on—have been ordered desegregated without a hint that anything more was required than the removal of racial barriers . . . . Nor has anyone suggested that the proper antidote for a racially restrictive zoning ordinance is a judicially-fashioned "checkerboard ordinance" reserving a portion of each block or neighborhood to members of one or the other race to assure mixed residency.

Clearly, then, *Swann* cannot be explained as a decision based on a judicial perception of integration per se as a constitutional requirement.

94. 93 S. Ct. 1278 (1973). The Court held that for purposes of judicial scrutiny under the equal protection clause, education does not constitute a fundamental right. *See id.* at 1336 (Marshall, J., dissenting).

better position.[95] At most then, the authorization of racial classifications in *Swann* suggests that where state-imposed and state-perpetuated segregation is concerned, the Court will place equal educational opportunity at the top of its hierarchy of values and will compromise other values to effectuate it. Although the constitutionality of such remedial action in other contexts remains unsettled,[96] *Swann*'s tentative resolution of the tension among *Brown*'s themes, while superficially at odds with conventional judicial treatment of racial classifications,[97] arguably supports the use of benign quotas, remedies for de facto segregation, and preferential admissions policies.

Even beyond the constitutional issues posed by these uncertain remedies lie the questions raised by the Berkeley Experimental Schools Program. If it is difficult to justify on the basis of *Brown* alone the

95. Some commentators have interpreted the affirmative remedies ordered in *Swann* and *Green* as "curative" or "prophylactic" devices, designed to dissipate the effects of past de jure segregation or to assure that past segregatory laws have been in fact discarded. *See* Goodman, *supra* note 21, at 293-95. Yet it is significant that in most contexts the Court deemed such cures or preventative measures inappropriate or unnecessary, no matter how long or intense the past history of segregation might have been. *See* note 93 *supra*. The inference is that conditions unique to the educational context warranted the imposition of these unusual measures.

Possibly, the fact that "public education is an area in which official compulsion is pervasive" [Goodman, *supra* note 21, at 388] differentiates it from other public services. However, prisons, which like most schools are characterized by "compulsory attendance laws," have been desegregated without any suggestion that racial quotas or the like must be used to correct past de jure segregation. *See, e.g.*, Toles v. Katzenbach, 385 F.2d 107 (9th Cir. 1967), *cert. denied sub nom.* Toles v. United States, 389 U.S. 886 (1967) (per curiam), *vacated and dismissed as moot sub nom.* Toles v. Clark, 392 U.S. 662 (1968) (per curiam).

Hence, the only plausible explanation that emerges from this analysis is that preventative or curative measures were necessary in school desegregation because of the unique importance of equality of opportunity in the educational context. The Court assumed that special educational inequalities were produced by de jure segregation and envisioned that special educational benefits would result from its prompt correction. *See* text accompanying note 73 *supra*. Indeed, it is likely the special role of equality in education that explains the "pervasiveness" of "official compulsion" in the first place. If states were not interested in ensuring some degree of equality in the provision of educational services, compulsory education laws would be unreasonable, and individual decisions whether or not to attend school would be appropriate. *See* Part IV(G) *infra*.

Thus, despite the new law made by the *Rodriguez* case [*see* note 94 *supra*], decisions like *Swann* only make sense as efforts to promote equality of educational opportunity.

96. *See* Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971).

97. This superficial inconsistency results from the Court's failure to even mention that a compelling state interest is required before a state's use of the affirmative remedies authorized in Green v. County School Bd., 391 U.S. 430 (1968), and in Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971). Nevertheless, it is arguable that the Court was implicitly deciding that some aspect of the dismantling of dual school systems constitutes a state interest sufficiently compelling to warrant the use of the racial classifications embodied in these remedies.

use of racial classifications to achieve racially balanced schools, it is even more difficult to cite *Brown* as the foundation for a more extreme remedial device—the use of racially exclusive schools for minority students. In order to vindicate the continued existence of Black House and Casa, Berkeley must be able not only to extend *Brown's* reasoning to such situations but also to circumvent the per se prohibitions against racial discrimination of the 1964 Civil Rights Act.[98] The following sections of this Comment deal with these issues.

III.

IMMEDIATE OBSTACLES: THE 1964 CIVIL RIGHTS ACT

Despite the possibility of private action under the equal protection clause,[99] Title VI of the 1964 Civil Rights Act, expressly prohibiting racial discrimination in federally funded programs,[100] poses the most immediate threat to the continued operation of Black House and Casa de la Raza. While the fourteenth amendment broadly mandates equal protection of the laws, the Civil Rights Act more narrowly condemns all differentiations made on the basis of race, apparently without regard to the possible equalizing effects some racial classifications may produce.[101]

The 1964 Civil Rights Act and the Regulations[102] and Guidelines[103] authorized by the Act reflect a Congressional intent to fortify

98. 42 U.S.C. §§ 2000c-2000d-5 (1970).

99. *See, e.g., De Funis v. Odegaard, supra* note 66, where plaintiff claimed he had been denied admission to the University of Washington Law School in favor of less qualified minority applicants. Private action against Berkeley might proceed in an analogous fashion.

100. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be snbjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (1970).

101. *Id.* While other sections of the Act are concerned with school desegregation generally [*see, e.g.*, 42 U.S.C. §§ 2000c-2000c-9 (1970)], it remains unclear whether the flat prohibition against racial discrimination, [cited in note 150 *supra*] precludes the use of racial classifications to effect desegregation in all contexts. Section 401 of Title IV explicitly states that "desegregation" does not mean "the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. § 2000c (1970). Moreover, section 2000d-6 states that one uniform policy for correcting de jure segregation and one uniform policy in dealing with de facto segregation must be applied to all parts of the United States. 42 U.S.C. § 2000d-6 (1970). But because this portion of the Act does not spell out the specifics of such policies, it fails to clarify whether or not racial classifications may be used to effectuate both policies. *See* Part II(B) *supra*. The Supreme Court has held that the Act does not limit the courts' power to grant relief for state-imposed segregation. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16-18 (1971).

102. 45 C.F.R. §§ 80.1-80.13 (1972).

103. The Guidelines issued in 1968, 33 Fed. Reg. 4955-59, are the most recent. According to Leon Panetta, Director, Office of Civil Rights of the Department of

with administrative authority the judicial efforts to implement *Brown*.[104] Although administrative regulations by themselves are no more effective than judicial decrees, regulations enforced through procedures for terminating federal funds[105] are more likely to induce compliance.[106] In addition, the Civil Rights Act promulgates national standards for solving problems which the *Brown* Court viewed as essentially local.[107] For example, the Act authorizes Guidelines for the use of all school districts undergoing desegregation and the federal courts supervising those transitions.[108]

Because the Civil Rights Act offers administrative support for carrying out the judicial decree announced in *Brown*, it created the need for accommodation and cooperation between the courts and the Department of Health, Education, and Welfare, the executive department responsible for enforcing the Act.[109] Although HEW is bound by final judicial orders,[110] courts often model their desegregation de-

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Health, Education, and Welfare from January, 1969 through March, 1970, the Guidelines were initially used as part of the enforcement mechanism of the Act; however, since they were often stronger than the language of the Act warranted, they lost their effectiveness as an enforcement tool. After President Nixon's election in 1968, HEW stopped issuing Guidelines. Interview with Leon Panetta, in Monterey, California, Oct. 19, 1972 [hereinafter cited as *Panetta interview*].

104. H. HOROWITZ & K. KARST, LAW, LAWYERS, AND SOCIAL CHANGE 239-350 (1969) summarizes the difficulties that the courts faced in attempting to enforce *Brown* without the help of adminsitrative and statutory measures.

105. 42 U.S.C. § 2000d-1 (1970) and 45 C.F.R. § 80.8 (1972).

106. Obviously, if a noncomplying school district's federal funding is terminated, the pupils of the school district will suffer. Since the Act was designed to benefit pupils, a variety of procedural safeguards are incorporated to ensure that termination is used only as a last resort. *See* 42 U.S.C. §§ 2000d-1 and 2000d-5 (1970) and 45 C.F.R. §§ 80.8-.11 (1972). *See also* Board of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).

107. Brown v. Board of Educ., 347 U.S. 483, 495 (1954); 349 U.S. 294, 299 (1955). *See also* note 101 *supra*.

108. The introduction to the 1968 Gudelines states that they "are issued to guide school officials, HEW staff, and the public on the application of Title VI and the Regulation as affected by current judicial precedents, to discrimination in schools on the ground of race, color, or national origin." 33 Fed. Reg. 4955 (1968). The Guidelines then present in detail the steps a school district might follow in complying with the Act. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

109. *See* Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 322 (1967) [hereinafter cited as Comment].

110. *Id.* at 322-29. *See also* 42 U.S.C. § 2000d-5 (1970) and 45 C.F.R. § 80.4 (c) (1972). Floyd Pierce, Regional Civil Rights Director of the Office of Civil Rights of HEW in San Francisco, noted that HEW has no standing in federal court, unless the court asks HEW to outline a desegregation plan. If HEW wants to initiate a lawsuit, the Justice Department must sue in its behalf. [*See* 45 C.F.R. § 80.8(a) (1972) and 33 Fed. Reg. 4955 § 3(4) (1968); *see also* Civil Rights Act of 1964, Title IV, 42 U.S.C. § 2000c-6 (1970), which authorizes civil actions by the Attorney General on behalf of students and their parents unlawfully subjected to racial discrimination.] Moreover, since the courts alone have the authority

crees on HEW's Guidelines and Regulation, in recognition of HEW's expertise in such matters.[111] Thus while the fourteenth amendment rather than the 1964 Civil Rights Act provides the ultimate test for the constitutionality of Black House and Casa, the latter does represent a significant obstacle.[112] Ironically, the statute—originally designed to aid the black population and, by implication, other similarly situated minority groups[113]—is now invoked to challenge the new remedial experiments initiated by these same people. As a result, Black House and Casa have had to divert much of their energies to negotiating a plan that will satisfy HEW.[114]

A. HEW's Involvement with Berkeley: A Brief Chronology

The Berkeley Experimental Schools Program is one of three partially sponsored by the Experimental Schools Project of the Office of Education, a branch of HEW.[115] Its federal support subjects it to the requirements of the 1964 Civil Rights Act.[116]

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to hold a given plan constitutional or unconstitutional, a school district's compliance with an HEW plan does not theoretically preclude a subsequent court adjudication of an alleged failure of that district to comply with *Brown*. Interview with Floyd Pierce, in San Francisco, Oct. 11, 1972. [Hereinafter cited as *Pierce interview*.]

111. Comment, *supra* note 109, at 339. Pierce observed that several courts, notably the Fifth Circuit Court of Appeals, often ask HEW to submit desegregation plans in pending litigation. *Pierce interview, supra* note 110.

112. A determination of noncompliance under the Civil Rights Act would not necessarily resolve the more significant issue of the constitutionality of Black House and Casa, a question which only the courts can decide. *See* U.S. CONST., art. III. Nevertheless, if HEW determines that Black House and Casa violate the 1964 Civil Rights Act and terminates their federal funding, the question of the constitutionality of the schools may never arise. Berkeley might be forced to close down the schools for lack of money, and the constitutional issue would then become moot, unless a suit is brought for reinstatement of federal funding. *See* note 141 *infra*.

While Congress can expand the Supreme Court's equal protection decisions, it is doubtful whether Congress can dilute them. If Black House and Casa would not be unconstitutional under *Brown* and subsequent decisions, the question arises whether an application of the Civil Rights Act prohibiting these schools would operate as an expansion or a dilution of those equal protection decisions. Those argnably excluded by Black House and Casa might see such an application as an expansion; those supporting the schools as remedial efforts consistent with *Brown* might interpret it as a dilution. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966); Oregon v. Mitchell, 400 U.S. 112, 128-29 (1970); Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106 n.86 (1966).

113. *See* notes 49-50 *supra*.

114. Progress Report issued by Berkeley Experimental Schools Program, June 30, 1972, at 3.

115. The Berkeley Experimental Schools Program was initially funded by the Ford Foundation and the San Francisco Foundation. *Hearings, supra* note 2, at 3987. Now it is part of a five-year project sponsored by the U.S. Office of Education. Divoky, *supra* note 2, at 46.

116. 42 U.S.C. § 2000d (1970).

In the spring of 1971, the Senate Select Committee on Equal Educational Opportunity conducted hearings in Berkeley and other multi-racial areas in an effort to study the progress of desegregation and its effects upon educational opportunity.[117] While the testimony from Berkeley revealed significant difficulties,[118] it appeared to leave a generally favorable impression. The Committee exhibited particular interest in Berkeley's system of educational options and appeared to consider schools like Black House and Casa de la Raza as acceptable experiments aimed at coping with the problems of certain minority students.[119]

Soon thereafter, Senator John L. McClellan of Arkansas, a member of the Committee,[120] submitted a letter to the HEW Office of Civil Rights, the office primarily responsible for enforcing the Civil Rights Act. The letter contained a newspaper clipping discussing Berkeley's Experimental Program.[121] The letter questioned Berkeley's legal authority to operate racially segregated schools when most of Arkansas had been forced to desegregate at all costs.

HEW was obviously in an uncomfortable position. On the one hand, its Office of Education was supporting Berkeley's experiment, and on the other, its Office of Civil Rights (OCR) was being pressured to withdraw support. Even within the OCR, a parallel philosophical rift was discernible. Some of those who had guided the civil rights movement through the difficult 1950's and 1960's saw any intentional racial separation as a threatening return to the past.[122] Their unlikely allies were McClellan and his colleagues who,[123] in calling for evenhanded application of the law by HEW, undoubtedly appreciated the political dimensions of Berkeley's experiment. On the other side within OCR were those who distinguished Black House and Casa from traditional segregation and recognized the educational merits of such

117. *See* note 2 *supra.*

118. For example, some of the testimony by students indicated racial hostility within the Berkeley schools. *See* Glazer, *Is Busing Necessary?*, COMMENTARY, March, 1972, 39, at 50-51.

119. *See, e.g., Hearings supra* note 2, at 4106-17. The Committee's attention centered on Black House only since Casa did not open until the fall following the hearings. *See Pamphlet, supra* note 3, at 21.

120. Although Senator McClellan was a member of the Senate Select Committee on Equal Educational Opportunity, he was not present at the hearings on the Berkeley school system.

121. *3 School Systems to Use 'Research,'* The Evening Star, Washington, D.C., May 23, 1971, at A-4, col. 1.

122. Both Leon Panetta and Dr. Richard Foster made this observation. *Panetta Interview, supra* note 103; interview with Dr. Richard Foster, Superintendent of Berkeley Unified School District, in Berkeley, Oct. 12, 1972 [hereinafter cited as *First Foster interview*].

123. *Id.*

alternative schooling.[124]

OCR conducted on-site inspections[125] of Black House and Casa, which were followed by a series of meetings in Berkeley and in Washington.[126] Dr. Richard Foster, Superintendent of the Berkeley Unified School District, characterizes this period as one of minimal hostility. According to him, J. Stanley Pottinger, Director of OCR, was simply "open, friendly, and inquiring."[127] Nevertheless, in April, 1972, Pottinger informed the Berkeley Unified School District that, because of Black House and Casa, it was in "probable noncompliance" with Title VI of the Civil Rights Act.[128] Although the statute provides for elaborate administrative procedures which must be exhausted before funds can be cut off, and although recent case law has limited the extent to which these sanctions can be imposed,[129] the burden was placed on Berkeley either to develop a satisfactory compromise or to press for judicial vindication.

Berkeley's position was as troublesome as that of HEW. The city was reluctant to surrender its commitment to educational experimentation.[130] Yet simultaneously, district officials were apprehensive that publicity concerning its experimental schools could be misused as a precedent for invidious segregation in other parts of the country.[131] As a result, the Berkeley Unified School District chose to work towards a compromise proposal. It is from this series of events that the plan for the Alliance School emerged.

B. The Alliance Proposal

Berkeley's present plan, as accepted by its Board of Education, is to create a "multicultural umbrella school," called the Alliance, consisting of three or four geographically distinct components or subschools.[132] Black House and Casa will be two of these components; schools designed to meet the special needs of other students will comprise the remaining units. While the components will maintain a certain degree of autonomy, they will share a common administration. In addition, the Alliance will operate exchange programs among the units.[133] Promotional literature will encourage students of all races to

124. *Id.*

125. *See* 45 C.F.R. § 80.7 (1972).

126. Dr. Foster related this chronology of events. *First Foster Interview, supra* note 122.

127. *Id.*

128. Letter, *supra* note 37, at 3.

129. *See* note 106 *supra.*

130. Interview with Lawrence Wells, Director of Berkeley Experimental Schools Program, in Berkeley, Oct. 24, 1972. [Hereinafter cited as *Wells interview.*]

131. *First Foster interview, supra* note 122.

132. *See* notes 23 & 24 *supra.*

133. Originally, Berkeley envisioned operating the exchange programs on a vol-

take part in these exchanges, and the district will provide transportation from one school to another. The purpose of the plan is to make some of the unique programs in each school accessible to a larger group of students, and simultaneously to encourage more interracial associations, at least on a part-time basis.[134]

In addition, faculty members will be exchanged among the component schools.[135] Often courts have looked to the racial composition of a school's teaching staff as a primary indicator of the racial identifiability of that school.[136]

While implementing policies different from those of the full-scale integration that Berkeley undertook several years ago,[137] the Alliance plan offers a workable compromise that lies at least within the spirit of the 1964 Civil Rights Act.[138] Whether it will satisfy the diverse and sometimes conflicting demands of all factions in HEW[139] and the Berkeley Unified School District is another matter. To do so, it must permit educational experimentation, comply with the law, and remain immune from misinterpretation or misuse by school districts still struggling with *Brown's* initial decree.[140]

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untary basis. *Wells interview, supra* note 130. More recently, however, OCR has indicated that in order for the plan to be "minimally acceptable," it must include assurances that some portion of each child's day will be spent with students of different racial or ethnic groups. Interview with Professor David Kirp, Acting Associate Professor, Graduate School of Public Policy and Lecturer, Boalt Hall (School of Law), University of California, Berkeley, March 27, 1973. Whether or not Berkeley will readily acquiesce in those requirements is uncertain although the most recent Alliance proposal submitted indicates a willingness to do so. *See April 9, 1973 statement, supra* note 15. Equally uncertain is whether or not OCR will be satisfied with a proposal that meets merely the minimum standards of acceptability.

134. *Wells interview, supra* note 130. *See April 9, 1973 statement, supra* note 15.

135. *Id.*

136. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 883 (5th Cir. 1966), *cert. denied,* 389 U.S. 840 (1967); Hobson v. Hansen, 269 F. Supp. 401, 501-03 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Green v. County School Bd., 391 U.S. 430, 435 (1968).

137. *See Hearings, supra* note 2, at 3978 and 4057.

138. Certainly the Alliance plan is more conducive to interracial association than proposals being considered in other cities. For example, Boston is apparently experimenting with a "meet at the Science Museum" program—in which interracial associations are brought about through periodic joint field trips by several schools. Houston is considering an "integration by television" proposal—through which closed circuit televising of classes among schools will "bring" black students to predominantly white schools and vice versa. HEW has approved of these plans in operation. Interview with Professor David Kirp, Acting Associate Professor, Graduate School of Public Policy and Lecturer, Boalt Hall (School of Law), University of California, Berkeley, Sept. 11, 1972.

139. As suggesteed in note 133 *supra,* it is not even clear at this point exactly what standards OCR will impose on Berkeley. At the present time, Berkeley awaits HEW's response to the Alliance plan. *See* note 24 *supra.*

140. *See* text accompanying notes 122-31 *supra.*

IV.

BEYOND THE CIVIL RIGHTS ACTS: PLAUSIBLE JUSTIFICATIONS FOR THE EXISTENCE OF BLACK HOUSE AND CASA DE LA RAZA

Although it poses the most immediate threat, HEW's application of the 1964 Civil Rights Act will not necessarily determine the fate of Black House and Casa, since a variety of lawsuits based on the equal protection clause could be brought regardless of HEW's disposition of the matter.[141] Because the Civil Rights Act is no more than a Congressional mechanism for implementing the requirements of the fourteenth amendment, the amendment itself remains the primary authority for judicial interpretation of equal protection issues, despite the relevance of the Act.[142] Thus, whether suit is brought in support of the schools (for example, a suit to enjoin termination of federal funding) or to challenge the schools, the ultimate issue would be equal protection.

Altogether, there are several plausible arguments that might be advanced to support the constitutionality of Black House and Casa in any litigation concerning that issue. The arguments are to a large extent cumulative; no one alone could satisfy the complex burden of proof that must be met in order for Black House and Casa to survive legal challenge. Some of these arguments serve to meet the compelling state interest test that applies to all racial classifications.[143] Other arguments more directly address objections that might be raised on the basis of the Court's concern in *Brown* about education and associational harms.[144] Moreover, the weight and presentation of any of these supporting arguments would depend upon the parties to the litigation and the character of the action itself.[145] Although each argu-

141. For example, if HEW and the Berkeley Unified School District are unable to reach an accommodation, the latter or some subdivision thereof could sue to enjoin termination of federal funding arguing that the Civil Rights Act is unconstitutional to the extent that it outlaws federal support of schools like Black House and Casa. *See* 42 U.S.C. §§ 2000d-2000d-1 (1970). Or, a black or Chicano student could sue on the grounds that he is entitled to the type of education provided by those schools and that this right would be jeopardized by a cut-off of federal monies.

Litigation might also be initiated by the Justice Department [42 U.S.C. § 2000c-6 (1970)], by any Berkeley citizen excluded from Black House and Casa alleging discrimination by the Experimental Schools Program, or by any taxpayer, regardless of personal charges of discrimination [*cf.* Flast v. Cohen, 392 U.S. 83 (1968)].

142. *See* note 112 *supra* & accompanying text.

143. *See* Part II(A) *supra.*

144. *See* Part II(B) *supra.*

145. For example, if the Justice Department or a taxpayer were to sue to enjoin operation of Black House and Casa, the central contention of the defense would probably be the constitutional permissibility of these schools. Alternatively, if a black or Chicano student were to initiate a proceeding to enjoin HEW's threatened termination of federal funds, the plaintiff's case would probably focus on the argu-

ment is susceptible to counterarguments, on balance the tentative conclusions that emerge support the continued existence of these schools.[146]

A. The Perplexity of Brown's "Unconstrained Association" Principle

Freedom of association was one of the values the *Brown* Court sought to promote:[147] school systems that excluded black students from white schools denied those students the freedom to associate with members of other races. However, cases subsequent to *Brown* imply that the removal of such restrictions does not necessarily produce true freedom of association. In *Green v. County School Board of New Kent County*,[148] the Court invalidated a freedom of choice plan of an eastern Virginia school district on the ground that the plan was not an acceptable method of dismantling a long-entrenched dual school system.[149] Presumably, the school district had reasoned that allowing pupils to choose their schools (and by implication their schoolmates) was sufficient to satisfy the free association requirements of *Brown*. But, observing that few blacks had chosen to attend white schools and that no whites had selected black schools,[150] Justice Brennan stated that freedom of choice is only one means of achieving desegregation, and if it fails to undo segregation, other means must be used.[151]

The relationship between *Green* and *Brown* can be interpreted in three distinct ways; each supports the legality of Black House and Casa.

1. Freedom of Choice Is Compromised; Freedom of Association Is Not.

Under one interpretation, *Green's* holding simply means that choice is a comparatively unimportant consideration in the context of

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ment that these schools are constitutionally required. Some of the arguments in Part IV stress the constitutional permissibility of Black House and Casa; others more directly argue that the schools are constitutionally required. *See* Kirp, *supra* note 75, at 1361-84 where this distinction between these two aspects of constitutionality is discussed in a different, but related, context.

Note, however, that a position in support of the constitutional permissibility of an existing educational program is generally easier to establish than one arguing that presently non-existent educational programs are constitutionally required. The courts' frequent deference to school boards on matters of educational policy suggest that only in rare situations will school boards be under an affirmative court-imposed duty to create new educational programs. *See* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1969), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

146. *See* text preceding note 365 *infra.*

147. *See* text accompanying notes 72-73 *supra.*

148. 391 U.S. 430 (1968).

149. *Id.* at 437.

150. *Id.* at 441.

151. *Id.* at 440.

school desegregation. This holding is consistent with *Brown*'s emphasis on unconstrained association since freedom of choice and freedom of association are conceptually and practically distinct. While *Brown* mandated that students be free to associate with students of other races, it said nothing about a student's freedom to choose any particular school or any particular schoolmates, within or without his district. It follows that *Green*'s rejection of the school district's freedom of choice plan did not deprive the students there of freedom of association, at least as *Brown* contemplated that term.[152]

Even if, for the sake of argument, explicitly racial admissions policies are attributed to Black House and Casa,[153] these schools do not contravene the standards embodied in *Brown* and *Green*. Because all of Berkeley's other schools are integrated,[154] no non-black or non-Chicano is denied the benefit of a racially integrated education.[155] Moreover, any black or Chicano has the same opportunity available if he chooses to exercise it. Thus, the *Brown* Court's concern for students denied the opportunity of interracial associations would be misplaced in Berkeley. This is so even though Berkeley students may not be free to select particular members of other races as their schoolmates. The reading of *Green* advanced above[156] lends support to this conclusion, since that case made it clear that freedom of choice can be subordinated to other constitutional and educational considerations. While *Green* seemed to limit these presumably higher values to the dismantling of dual school systems,[157] it is arguable that any remedial effort designed to undo the inequities that *Brown* sought to cure justi-

152. *Brown* did not guarantee any individual black student's right to attend school with any particular white student; it simply concluded that these two hypothetical students could not be prohibited from attending the same school solely on account of race.

153. It is by no means clear that these schools have such policies. *See* text accompanying notes 16 & 33 *supra*. However, if this particular argument would support Black House and Casa as explicitly exclusive institutions, then it would certainly support them if their admissions policies were shown to be in fact less restrictive.

154. *See* Divoky, *supra* note 2. Only Black House and Casa have been challenged by HEW.

155. Indeed, the existence of Blaek House and Casa does not appreciably lower the percentage of blacks and Chicanos in the relevant school population; hence the integrated educational experience available to non-blacks and non-Chicanos is not substantially affected by these schools: Of all of Berkeley's high school students, 44.6 percent are black. After those attending Black House are subtracted, the high school population is 42.2 percent black. Out of all kindergartners through twelfth graders, 3 percent are Chicano. After subtracting those attending Casa, 2 percent of the total remaining are Chicano. Hence, Black House and Casa do not have a substantial impact on the racial composition of the public schools in Berkeley. *See* Berkeley Unified School District, Report of the Student Racial Census, Fall, 1972. *See also* text accompanying notes 8-9 & 31-32 *supra*.

156. *See* text accompanying note 152 *supra*.

157. *See* 391 U.S. 430, 438-42 (1968).

fies similar infringements on student or parent choice.[158] As the remaining sections of this Comment demonstrate, Black House and Casa are such remedial efforts.

2. *Both Freedoms Are Compromised But Only Temporarily*

An alternative interpretation of *Green* might construe that decision as not only a compromise of freedom of choice but also as an intentional compromise of the color-blindness and free association principles enunciated in *Brown*. When a school board takes affirmative steps to undo segregation, as the Court ordered New Kent County to do, one group of children will be forced to associate with another group solely on the basis of race. Thus, while stating that freedom of choice was not "a sacred talisman,"[159] *Green* may have also suggested that freedom of association and color-blindness had been placed in a similar position. Under this interpretation it follows that Black House and Casa cannot be summarily condemned even if it is assumed that they use explicit racial admissions policies and thereby constrain the excluded students' freedoms of association and choice. Of course, the same showings of remedial purposes, alluded to in the preceding paragraph, would also be required under this reading of *Green*.

Under this interpretation, however, the temporal proviso in *Green* becomes significant. The opinion seems to comtemplate a time when segregation will have been completely undone and hence a time when remedial racial classifications and constraints on free association will not longer be appropriate.[160] Thus *Green* suggests that

158. This is not to say that it is necessary to deny students and parents all educational choices for the purpose of attaining *Brown*'s aims. As the *Green* Court suggested, choice plans that "work" are constitutionally acceptable. 391 U.S. 430, 439-41 (1968).

One of the themes underlying the Berkeley Experimental Schools Program is the notion of choice in public education. The constitutional dimensions of that theme receive further attention in Part IV(G) *infra*. It is important to note here that in Berkeley, students and parents have more educational choices than are offered in most school districts, and whether or not some choices are restricted on racial grounds remains unclear because of Black House's and Casa's ambiguous admissions policies. *See* text accompanying notes 16 and 33, *supra*. But, even if these admissions policies are explicitly based on race, the resulting infringement on freedom of choice is minimal: Berkeley blacks can select any one of 22 alternative schools (all schools except Casa); Chicanos can select any one of 22 (all except Black House); nonblacks and non-Chicanos can select any one of 21 schools (all except Black House and Casa). Of course, many of these schools may have other types of admissions criteria such as past academic performance or special interests. So, while the educational choices in Berkeley are unusually broad, it is difficult to ascertain the precise number of options open to any particular student regardless of his race.

159. 391 U.S. 430, 440 (1968).

160. At some point, . . . school authorities . . . should have achieved full compliance with this Court's decision in *Brown I*. The systems would then be "unitary" in the sense required by . . . *Green*. . . .

any such affirmative remedies should only be employed temporarily. If Black House and Casa do in fact impose constraints on any student's freedom of association, arguably they do so only temporarily or transitionally, as a later section of this Comment contends.[161]

3. *Freedom of Choice Is Permissible Once Segregation Is Undone*

Black House and Casa thus cannot be summarily condemned under *Green* even if the racial exclusivity of each school results from purposeful exclusion rather than happenstance. If, however, the racial composition of the schools is attributable to individual student choices[162] rather than school policy,[163] a third interpretation of *Brown* and *Green* becomes relevant. Under this interpretation the focus shifts from the affirmative remedial devices that are permissible during the transition from segregated to integrated schools, and moves to the kinds of free choices that are permissible after that transition has been completed.

The rationale of the third interpretation of *Brown* and *Green* is that in the early stages of the desegregation process, a student's ability to choose is not free in any meaningful sense.[164] Rather, the choices made by black students and their parents in such a context are restained by the segregationist environment and other psychologically coercive elements.[165] Therefore, before desegregation can occur, an

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> . . . Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished.
> . . .

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971). *See also* note 166 and accompanying text *infra.*

161. *See* Part IV(C) *infra.*

162. Although in a companion case to *Green*, the Court reaffirmed an earlier holding that " 'no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment,' " it left extant the possibility that such plans might be constitutional where "designed to meet 'legitimate local problems.' " Monroe v. Board of Comm'rs, 391 U.S. 450, 459 (1968), quoting from Goss v. Board of Education, 373 U.S. 683, 686 (1964). The type of choice or school transfer made possible by Black House and Casa are designed to meet "legitimate local problems," as subsequent portions of this Comment demonstrate. Moreover, while the Court noted that the purpose of the plan in *Monroe* was patently one of resegregation, 391 U.S. at 459, an analysis of the purpose of Black House and Casa yields very different inferences. *See* Part IV(E) *infra.*

163. *See* text accompanying notes 16 and 33 *supra.*

164. 391 U.S. 430, 440 n.5 (1968). The Court recognizes evidence relevant to possible psychological coercion without adopting it.

165. Although the Court does not adopt the evidence cited in note 164, *supra*, its language throughout the opinion suggests it was coguizant of the psychological difficulties that blacks might experience in selecting white schools. For example, in discussing the period immediately following the *Brown II* decision [*see* note 88 *supra*], the Court states that "[t]he principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the 'white' schools." 391 U.S. 430, 436 (1968).

interim period of affirmative integration is necessary to counteract the deleterious social and psychological effects of past de jure segregation.[166]

As stated above, *Green* suggests that any limitation upon freedom of choice caused by an affirmative plan for undoing segregation should be temporary.[167] Integration per se is not an ultimate goal but rather a transitional remedy.[168] This implies that after the dual school systems are completely dismantled, freedom of choice plans will be constitutionally permissible methods of pupil assignment. Cases temporarily invalidating other types of pupil assignment plans contain similar implications,[169] but, like *Green*, do not delineate the period of time required for forced integration.[170]

See UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 66-70 (1967). The Commission describes southern freedom of choice plans and notes some of the reasons responsible for their failure to produce integration. *See also* Kirp, *supra* note 75, at 1369; Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 452-54 (1973).

166. Although the Court does not explicitly draw this conclusion, it is clearly inferable from the language of the opinion cited in note 165, *supra*, together with the Court's repeated mention of the "transition" or "conversion" from dual to unitary school systems, 391 U.S. 430, 435-41 (1968). These aspects of *Green* support the view that the Court did not mandate affirmative action or forced integration as permanent components of an ideal, desegregated school system but instead envisioned these measures as temporary, curative responses to past de jure segregation. *See* Goodman, *supra* note 21, at 293-94. *See* Fiss, *supra* note 96, at 703. *See also* note 160 *supra*.

167. *See* text accompanying note 160 *supra*.

168. *See* the oft-quoted dictum from Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955):

> [I]t is important that we point out exactly what the Supreme Court has decided and what it has not decided in [*Brown*]. . . . It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. . . . The Constitution, in other words, does not require integration.

169. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). The Court, after holding a neighborhood school plan an ineffective response to *Brown*, suggests that once a school system has become "unitary," continuous affirmative steps to maintain racial balance will not be constitutionally required. *Id.* at 24, 31-32. *See also* Wright v. Council of the City of Emporia, 407 U.S. 451, 464 (1972). Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir.) *rev'd in part on other grounds*, 396 U.S. 290 (1970), applies similar reasoning to plans to group students on the basis of their scores on achievement tests. There the court pretermitted "a discussion of the validity per se of a plan based on testing except to hold that testing cannot be employed in any event until unitary school systems have been established." *Id.* at 1219. *See also* Lemon v. Bossier Parish School Bd., 444 F.2d 1400, 1401 (5th Cir. 1971). The common theme of these cases is that plans that may prove unacceptable as means of achieving desegregation in the first place may nevertheless be acceptable once such desegregation has occurred.

170. *Green* is silent on this point. But note that in Lemon v. Bossier Parish School Bd., 444 F.2d 1400 (5th Cir. 1971), which concerned ability grouping and

A strong argument may be made that Berkeley has passed through the interim period of forced integration envisioned by *Green* and can now adopt a freedom of choice policy. In 1968, Berkeley integrated its schools on its own initiative.[171] Indeed, since *Green* only applies to school districts found to have perpetuated de jure segregation, Berkeley's response to the de facto segregation that prevailed there before 1968 actually goes beyond the requirements of that case.[172] Moreover, Berkeley's voluntary integration efforts are sufficient to dispel any presumption that the current racial identifiability of some of its schools is attributable to a failure to take reasonable steps to eliminate racial imbalance.[173]

In light of these facts, *Green*'s prophylactic and result-oriented approach appears out of place in Berkeley.[174] If the freedom of choice plan in *Green* actually had undone the segregation, the Court could neither have declared it ineffective nor concluded that the choices of black students and parents had been inhibited by past conditions.[175] Thus, in *Green* the Court apparently assumed that if truly free to choose, more blacks in New Kent County would have selected integrated schools.[176] But in Berkeley such an assumption would be unwarranted.

Certainly the choices of the black and Chicano students in Berkeley who select segregated schools after several years of integrated education cannot be challenged on the ground that such selections are

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aptitude testing, the court stated that the interval of affirmative integration must be one of "at least several years." *Id.* at 1401.

171. *See* note 2 *supra* & accompanying text.

172. *See* note 2 *supra*. Berkeley's segregated school system prior to 1968 was probably immune from judicial attack because the racial separation in that community could be described as de facto rather than as de jure. In 1968, many courts were holding that de facto school segregation did not violate the Constitution. By denying writs of certiorari in such cases, the Supreme Court avoided confronting the issue and at the same time allowed these decisions of the lower courts to stand. *See, e.g.*, Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). Admittedly, some cases went the other way, *see, e.g.*, Blocker v. Board of Educ. of Manhasset, 226 F. Supp. 208 (E.D.N.Y. 1964). Nevertheless, because of the lack of definitive legal authority on the subject, one can assnme that Berkeley's decision to integrate its schools in 1968 was motivated by educational considerations rather than by fear of judicial reproach. *See also* Heyman, *Affirmative Integration—Studies of Efforts to Overcome De Facto Segregation in the Public Schools: Berkeley*, 2 LAW AND SOCIETY REV. (Editor's Postscript) 21, 30-31 (1967).

173. Fiss, *supra* note 96, at 700.

174. *See* Goodman, *supra* note 21, at 293. *See also* Fiss, *supra* note 96, at 698-99.

175. See Yudof, *supra* note 165, at 452-54.

176. Note the Court's emphasis on the plan's failure to "work" and the importance it attaches to evidence that not a single white child had chosen to attend the "black school" and that only a few blacks had selected the "white school." 391 U.S. 430, 441 (1968). Significantly, the Court stated that freedom of choice plans were not per se unconstitutional. *Id.* at 439.

products of psychological coercion and a segregationist environment.[177] Berkeley's period of integrated schooling presumably dissipated many of the psychological pressures that might have been caused by any previously existing racial imbalances. Indeed, most blacks and Chicanos in Berkeley do choose to attend integrated schools;[178] this fact highlights the distinction between choices by minority groups in New Kent County in 1968 and those in Berkeley in 1973.

The choices of whites not to attend Black House and Casa can also be distinguished from the unfree choices in *Green*,[179] though possibly not as easily. Certainly, the names, curricula, and ethnic composition of Black House and Casa arguably convey the impression that members of other races are not welcome.[180] In Berkeley, however, there is no long history of discrimination against whites with its accompanying psychological inhibitions as there was against blacks in New Kent County. In addition, any possible subtle coercions are mitigated because most of Berkeley's schools are integrated.[181] As a result, unlike in New Kent County, any student in Berkeley may select any one of a number of fully integrated schools, and, therefore, no student in Berkeley is denied an integrated education if he or she desires one.

Indeed, to continue imposing forced integration under these circumstances would, far from furthering unconstrained association, dictate particular associations on the basis of race well beyond the transi-

177. Presumably, there must be some point at which parent and student choices will be deemed free. *See* note 160 *supra*. Since Berkeley is a progressive and racially aware community [*see* Divoky, *supra* note 2], which voluntarily integrated its schools, and since its public schools are administered by people of all races, it is likely that if honest and uninhibited educational choices can be exercised anywhere, they can be exercised in Berkeley.

178. *Upshaw interview* and *Hernandez interview*, *supra* notes 5 & 26. Upshaw also remarked that several blacks who enrolled at Black House later left and entered other schools—an additional fact indicating the absence of psychological pressures.

Indeed, only 125 out of a possible 427 Chicanos attend Casa, and only 75 out of a possible 1402 blacks attend Black House. The remaining Chicanos and blacks attend other schools within the district. *See* text accompanying notes 8-9 and 31-32 *supra*.

179. In this analysis, the absence of non-blacks and non-Chicanos from Black House and Casa, is attributed to choices of the students rather than to explicitly racial admissions policies of the schools. *See* text accompanying notes 16 & 33 *supra*.

180. Nevertheless, non-blacks and non-Chicanos might find Black House and Casa to be unattractive alternatives for very different reasons. Because an integrated education [*see* text accompanying note 181 *infra*] or a multicultural curriculum [*see* text accompanying note 17 *supra*] is available to any student in Berkeley, it is difficult to argue that students of all races would choose to attend Black House or Casa but for some subtle psychological coercions. In addition, the remedial help for certain special problems offered by these schools would likely render them unattractive to students without such problems.

181. Because there are so few racially identifiable schools in Berkeley, parents and students of any race are free of the psychological pressure to select any one particular school. *See* note 178 *supra*. This apparently was not the case in New Kent County in 1968.

tion period contemplated by *Green*. On balance, therefore, although the application of the principles of *Green* and *Brown* to the Berkeley Experimental Schools Program raises a variety of puzzling questions, adherence to these principles argues for the legality of Black House and Casa. A contrary conclusion would inevitably entail permanent judicial supervision of the outcomes of choices instead of the transitional judicial protection, suggested in *Green*, of the freedom to exercise those choices.

B. The Educational Benefit Thesis

As indicated earlier, the fourteenth amendment does not prohibit all racial classifications.[182] When the contested state action is a necessary means of furthering a compelling state interest, the use of racial criteria is constitutionally permissible.[183] Although in the recently decided *Rodriguez* case[184] the Supreme Court held that equal educational opportunity is not a fundamental right for purposes of strict scrutiny under the equal protection clause,[185] in that same case the Court reaffirmed its view that "education is perhaps the most important function of state and local governments."[186] It follows that effective education is a "compelling state interest"—for if the state's most important function is not worthy of that label, it is clear that no other state interest could be.

When the *Brown* Court stressed the importance of both desegregation and equality of educational opportunity, it apparently assumed that a single remedy could attain both aims. Court-ordered eradication of dual school systems was expected to undo the damaging psychological effects of involuntary segregation and the consequent educa-

182. *See* Part II(A) *supra*.

183. For example, in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), the Supreme Court authorized the use of racial quotas and the use of racial criteria to designate attendance zones as methods of attaining compliance with *Brown*. Presumably, the rationale is that desegregating schools systems represents a state interest that is so compelling that it warrants some digression from the principle of constitutional color-blindness. *See* Part II(B). Expressed in another manner, racial classifications may be constitutionally permissible or even constitutionally required as remedial devices although they might be prohibited outside a remedial context.

184. 93 S. Ct. 1278 (1973).

185. *Id.* at 1297.

186. *Id.* at 1295, quoting from Brown v. Board of Educ., 347 U.S. 483, 493 (1954). The *Rodriguez* Court also carefully notes the many other Supreme Court opinions which have expressed the importance of education: Wisconsin v. Yoder, 406 U.S. 205, 213, 238-39 (1972); Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963); McCollum v. Board of Educ., 333 U.S. 203, 213-15 (1948); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Interstate Consol. Street Ry. v. Massachusetts, 207 U.S. 79 (1907).

tional inequities.[187] Whether or not such relief was appropriate in the context in which *Brown* was decided,[188] more recent social science research requires a reevaluation of the assumptions underlying that decision.[189] Empirical studies indicate that integration simply has not produced the positive results that the *Brown* Court apparently had anticipated.[190] If educational outcomes are used as a measure of educational opportunities,[191] desegregated schooling has yet to fulfill the

187. *See* note 11 and accompanying text in *Brown I*, 347 U.S. 483, 494 (1954). *See also* Armor, *The Evidence on Busing*, 28 THE PUBLIC INTEREST 90, 95-97 (1972), where the underlying policy assumptions of *Brown* are summarized.

188. The important point is that when *Brown* was decided, invidious discrimination against blacks was openly practiced. If the Court used this fact and its psychological ramifications as a premise, then the decision may not be determinative of other types of racial segregation.

189. *See* Jencks and Bane, *The Schools and Equal Opportunity*, SATURDAY REVIEW: EDUCATION, Oct., 1972, at 37-42. This article summarizes data and theories which are more fully discussed in INEQUALITY, *supra* note 21. *See also* Armor, *supra* note 187, and Goodman, *supra* note 21, at 417-18.

190. Hostility from white pupils and staff is probably at least partly responsible for integration's failure to produce the overwhelming positive educational results expected. Evidence of such hostility is discernible in many cases; *see, eg.*., Tillman v. Dade County School Bd., 327 F. Supp. 930 (S.D. Fla. 1971); Tate v. Board of Educ. of Jonesboro, 453 F.2d 975 (8th Cir. 1972); Blount v. Ladue School Dist., 321 F. Supp. 1245 (E.D. Mo. 1970); Caldwell v. Craighead, 432 F.2d 213 (6th Cir. 1970), *cert. denied*, 402 U.S. 953 (1971); Melton v. Young, 328 F. Supp. 88 (E.D. Tenn. 1971). *See also* Barber, *From Intransigence to Compliance Is Two Steps Forward and Two Steps Back*, INEQUALITY IN EDUCATION, #5 (1971).

The integration plan itself may be equally responsible. Some integration plans assume that white students have a higher potential for academic achievement than minority students; the presence of better students presumably is thought to enhance the educational opportunities of disadvantaged pupils. *See* Judge Sobeloff's separate concurring opinion in Brunson v. Board of Trustees of School District Number 1, 429 F.2d 820, 824-27 (4th Cir. 1970); Dimond, *supra* note 65, at 45-46. For instance, some integration plans include one-way busing of ghetto pupils into more "educationally endowed" white neighborhoods. *See* Norwalk CORE v. Norwalk Board of Educ., 423 F.2d 121 (2d Cir. 1970); Brice v. Landis, 314 F. Supp. 974 (N.D. Cal. 1969). The use of such plans and their underlying paternalism may well lower the self-esteem and hence the achievement of minority students. *See* Comment, *Constitutional Law—Race Relations—Achieving Integration by Bussing Only Black and Puerto Rican Children Is Proper. Norwalk CORE v. Norwalk Board of Education. Achieving Integration by Bussing Only Black Children Is Not Proper. Brice v. Landis*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 488, 492-95 (1970).

Significantly, a recent study by the United States Commission on Civil Rights has found that in many integrated classrooms in the Southwest, Chicano children are victims of discrimination and neglect and that their educational opportunities are seriously hindered as a result. UNITED STATES COMMISSION ON CIVIL RIGHTS, TEACHERS AND STUDENTS: DIFFERENCES IN TEACHER INTERACTION WITH MEXICAN AMERICAN AND ANGLO STUDENTS (1973).

In short, forced integration cannot be expected to equalize educational opportunity if it perpetuates the same psychological factors that the Court found detrimental in *Brown*. Black House and Casa are experiments designed to avoid these potential educational disadvantages.

191. Since equal educational opportunities are not the same as equal educational

hopes of its advocates.[192]

These conclusions from empirical research do not imply that *Brown* incorrectly emphasized the correlation between educational achievement and the psychological attitudes of the student.[193] Yet even among educators who believe that there is such a correlation, integrated schooling is not universally accepted as the best method of promoting self-confidence and academic achievement for all pupils.[194] If Black House and Casa improve the self-confidence and academic achievement of their students more effectively than integrated schools, these schools would appear to fulfill a compelling state interest.[195] Of course, for this argument to be successful, it must also be shown that these special schools do not negatively affect the educational opportunities of the students who remain outside their walls.

The logic of this argument should not mask its inherent difficulties. Even assuming the availability of appropriate data, its use by a court would present several problems: interpreting the data,[196] relating

outcomes or attainments, a problem arises because one of the most convenient, albeit probably inaccurate, ways to measure opportunity is by examining outcomes or achievement. Hence, the two variables—educational opportunity and educational outcome—are sometimes used interchangeably. *See* Mosteller & Moynihan, *A Path-breaking Report,* from ON EQUALITY OF EDUCATIONAL OPPORTUNITY, 316 (F. Mosteller and D. Moynihan, eds. 1972). [Hereinafter cited as ON EQUALITY.] Perhaps a partial explanation for this interchangeable usage is that the *Brown* Court seems to have assumed that if opportunities were equalized among the races, then equalization of achievement would certainly follow. *See* citations in note 187 *supra.*

192. INEQUALITY, *supra* note 21, at 97-108, 155.

193. 347 U.S. 483, 494 (1954).

194. *Upshaw interview* and *Hennandez interview, supra* notes 5 & 26. *See* Professor Goodman's review of pertinent empirical studies in Goodman, *supra* note 21, at 408-417, and for an eloquent criticism of the theory that forced integration will boost black attitudes and achievement, *see* Brunson v. Board of Trustees, 429 F.2d 820, 824-27 (4th Cir. 1970) (Sobeloff, J., concurring).

195. If Black House and Casa can be shown to accomplish such ends, they might be constitutionally required rather than simply permissible. Arguably, in undermining the validity of *Plessy v. Ferguson's* "separate but equal" rule [163 U.S. 537 (1896)], the *Brown* Court's focus was on the "separate" part of the rule; the Court could not have meant to challenge the constitutionality of the "equal" part of the rule. Indeed, several cases immediately preceding *Brown* imply that equal educational opportunity is constitutionally required. *See* note 214 *infra. Brown* supports this view. 347 U.S. 483 (1954). As a result, some commentators have argued that a denial of equal educational opportunity is as much in violation of *Brown* and the Constitution as is the imposition of segregation on an unwilling minority group. The *Rodriguez* case casts considerable doubt on this argument. *See* notes 226 and 316-21 *infra.* Even apart from *Rodriguez,* however, arguments which impose an affirmative duty on school boards to create new educational programs are very difficult to sustain. *See* note 145 *supra.*

196. The data underlying studies purporting to show correlations between educational opportunities and classroom variables such as racial composition can be both complex and ambiguous. *See* the collection of studies in ON EQUALITY, *supra* note 191. For an expression of the difficulties involved in judicial use of this sort of evidence, *see* Chance v. Board of Examiners, 458 F.2d 1167, 1173 (2d Cir. 1972).

the data to the relevant law, establishing the appropriate evidentiary burdens, and determining when a party to a legal proceeding has satisfied these burdens.[197] While *Brown* may serve as a model for such judicial analysis, it neither eliminates these difficulties nor provides ready solutions for them.[198]

Moreover, several lower court decisions in the South have declared that educational benefits, no matter how great or how easily demonstrable, do not justify racial classifications.[199] However, the factual context of these decisions is vastly different from the Berkeley situation.[200] And, when minority groups, the supposed beneficiaries of *Brown*, can testify to the educational success of experiments like Black House and Casa, a district providing such schools alongside several integrated alternatives would appear to offer the best of both educational worlds.[201]

As a prerequisite to the argument there must be evidence that Black House and Casa provide educational benefits which their students could not otherwise obtain. Preliminary studies show that these schools have attained most of their stated educational objectives[202] and that they enhance their students' self-esteem.[203] Moreover, both Black House and Casa claim that they motivate students left apathetic by ordinary schooling and that they remedy certain weaknesses in the de-

197. How would a court be certain that a party to such a case had satisfactorily demonstrated educational benefit? Conclusions drawn from empirical data are often tentative, and "causal inferences from statistical analysis are always subject to debate." Coleman, *A Brief Summary of the Coleman Report*, EQUAL EDUCATIONAL OPPORTUNITY, 253, 259 (1969). More precisely, in the case described there might be so many input variables that it might be difficult to isolate specific "causes" and "effects." How would a judge be able to ascertain the long-term validity and import of any such piece of scientific data and draw constitutional conclusions from it?

198. *Brown* seems to have accepted without analysis the empirical evidence offered. 347 U.S. 483, 494 n.11 (1954). This aspect of the case spawned extensive debate. *See* citations in note 59 *supra*. More recently, in San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973), the Supreme Court considered social science evidence to support its view that any correlation between educational dollars and educational quality is a matter of uncertainty. *Id.* at 1302.

199. *See, e.g.*, Stell v. Board of Public Educ. of Savannah, 387 F.2d 486 (5th Cir. 1967) and Smith v. Board of Educ. of Morilton, 365 F.2d 770, 782 (8th Cir. 1966); Dimond, *supra* note 65, at 45-46.

200. In contrast to the Berkeley situation, these school districts had invoked educational benefit arguments to justify refusals to desegregate in the first place.

201. Upshaw and Hernandez who, admittedly, do not speak for all blacks and Chicanos in Berkeley believe the continuation of Black House and Casa is necessary to improve the educational opportunities offered to these minority groups. At the same time, it is important to note that blacks and Chicanos in Berkeley remain free to attend any of the other public schools in Berkeley. *Upshaw interview* and *Hernandez interview, supra* note 5 & 26.

202. Interview with Dr. Ed Turner and Casey Jones, *supra* note 21.

203. *Id.*

velopmental skills of these pupils.[204] At the present time, however, the available data may be insufficiently substantiated and hence too tentative to conclusively establish a compelling state interest.[205] Perhaps the most that can be claimed now is that these alternative schools are experimental attempts to remedy some of the deficiencies of conventional education. But since the weight of evidence collected so far indicates that these schools provide substantial educational benefits, and no contrary evidence has emerged, Black House and Casa should be permitted to stay open until more definitive studies are available or better alternatives are devised.[206] Such a recommendation is especially cogent in light of the Supreme Court's recent encomium of "continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever changing conditions."[207]

However, even if Black House and Casa can unequivocally be shown to offer superior educational environments for students with special needs, to meet the compelling state interest requirement they must be the only means to that end.[208] If there are less drastic alternatives[209] that can be used to attain the same goals, the constitutional status of Black House and Casa will be weakened. But the notion of good-faith experimentation[210] again provides a persuasive answer here: Black House and Casa are part of an evolving plan directed towards

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204. *Id.*

205. *See* text accompanying notes 22 & 35 *supra.*

206. The Supreme Court has recognized that notions of equality do change over time. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 669 (1966). As the Court stated on another occasion,

> Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues.

Beauharnais v. Illinois, 343 U.S. 250, 262 (1952). Such reasoning supports the use of experimental efforts designed to find new ways of implementing the requirements of the equal protection clause. *See also* Gilbert and Mosteller, *The Urgent Need for Experimentation,* in ON EQUALITY, *supra* note 191, at 371.

207. San Antonio Independent School Dist. v. Rodrigez, 93 S. Ct. 1278, 1302 (1973).

208. Suspect classifications can only be justified when they satisfy a two-fold test: they must be shown to promote a compelling or overriding state interest and they must be necessary to further that end. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1287-88 (1973); McLaughlin v. Florida, 379 U. S. 184, 190-93, 196 (1964).

209. 93 S. Ct. 1278, 1288.

210. *See* text accompanying note 207 *supra.*

providing better public schooling.[211] The development of the Alliance Proposal[212] is the most recent change in this evolutionary process. These good-faith efforts should not be judged before their success in serving the needs of their students can be adequately assessed.[213] Only after such an assessment will allegedly less onerous alternatives be susceptible to meaningful educational and legal comparative evaluation.

Judicial recognition of the special educational merit of Black House and Casa would be firmly rooted in precedent. Several cases which preceded *Brown* stressed the importance of the intangible factors that contribute to a positive educational environment.[214] The Court reasoned that regardless of the equality of physical facilities for black graduate students on the one hand and white graduate students on the other, segregation produced certain intangible inequalities.[215] Faculty prestige, interracial associations, and the psychological considerations previously discussed[216] were among the variables cited. *Brown* extended this argument to elementary and secondary schooling and placed the focus of the intangible-factors argument squarely on the variable of classroom composition.[217]

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211. Letter from Dr. Richard Foster, Superintendent of the Berkeley Unified School District, to Floyd Pierce, Regional Director of Office of Civil Rights of HEW in San Francisco, May 26, 1972.

212. *See* Part III(B) *supra.*

213. At least one recent study has suggested that any alterations in school atmosphere, resources, or racial composition have a virtually negligible impact on student success. Based on this finding, the study suggests that the only meaningful educational goal is to improve the internal life of the school: "the primary basis for evaluating a school should be whether the students and teacher find it a satisfying place to be." Jencks & Bane, *supra* note 189, at 41.

If this criterion for school evaluation were uniformly adopted (instead of the more widely recognized use of student achievement or success as school evaluation measures), Black House and Casa would clearly rank as excellent schools. The attitudinal studies already conducted suggest such a conclusion, and the speculative evidence on student achievement would be a superfluous consideration. *See* notes 202-04 *supra* and accompanying text.

214. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents of the Univ. of Oklahoma, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

215. *Id. But see* note 84 *supra.*

216. *See* Part II(B) *supra.*

217. *See* J. COLEMAN, ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY [hereinafter cited as *Coleman Report*] (1966) which documented this empirical conclusion suggested in *Brown.* In the *Coleman Report,* however, the social-class aspect rather than the racial dimension of classroom composition emerges as the crucial variable with respect to student achievement. Nevertheless, since predominantly white schools are much more likely to be middle class than predominantly black schools, conclusions expressed in terms of social class can be readily translated into conclusions expressed in terms of race. See JENCKS, *supra* note 21, at 99-100.

Note that San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973), which holds that classrooms in various school districts need not be physically

The stated objectives of Black House and Casa suggest that the ethnic composition of a classroom might be important in a different way. While *Brown* seems to have contemplated an integrated classroom as an educational resource, a school designed to teach black awareness[218] or to enhance the cohesiveness of the Chicano community[219] might find the presence of members of other racial groups distracting or inhibiting. If the law takes intangible factors into consideration in determining whether or not a particular state interest is compelling, it must do so both when the evidence favors integration and when it supports racial separation; judicial implementation of educational values must operate independently of any judicial preference for integration. The evidence now available suggests that in the near future Black House and Casa may well be able to meet the compelling state interest test once subjected to impartial, though strict, judicial scrutiny.

C. The Duration of the Racial Classification

While probably not determinative by itself, the limited duration of racially separate educational programs may mitigate the constitutional arguments against them.[220] Educational responses to the plight of the non-English speaking pupil provide a pertinent example. Legislative efforts at both the state[221] and federal[222] levels, as well as a limited number of judicial decisions[223] recognize that teaching children in a language they do not understand is tantamount to providing them no

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equal, does not seem to call into question *Brown*'s holding about classroom composition. *See also* note 84 *supra*.

218. *Upshaw interview, supra* note 5; *see also Pamphlet, supra* note 3, at 12.

219. *Hernandez interview, supra* note 26.

220. Certainly, violent expressions of bigotry will not be rewarded by being made sufficient justification for a state's imposing long-term burdens on racial groups.

> On the other hand, short-term measures less severely infringing private interests may be upheld. Temporary restrictions . . . might be lawful during [certain] times . . . even when the imposition of long-term segregation would not be.

Developments in the Law—Equal Protection, supra note 39, at 1104.

221. *See, e.g.*, MASS. ANN. LAWS ch. 71A (Supp. 1973); *see also* Kobrick, *Statute: A Model Act Providing for Transitional Bilingual Education Programs in Public Schools*, 9 HARV. J. LEGIS. 260, 273-75 (1972) and Kobrick, *The Compelling Case for Bilingual Education*, SATURDAY REVIEW, April 29, 1972, at 54. Kobrick's articles list the states whose laws at least recognize the problems experienced by the non-English speaking schoolchild.

222. 20 U.S.C. §§ 241a *et seq.* (1969); 20 U.S.C. §§ 880b *et seq.* (1969). *See* 35 Fed. Reg. 11595 (1970).

223. *See* Aspira v. Board of Educ. of the City of N.Y., 72 Civ. 4002 (N.D.N.Y. 1973); Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N. Mex. 1972); Guadalupe v. Tempe Elementary School Dist. No. 3, Civil No. 71-435 (D. Ariz. 1972) (stipulation and order). *But see* Lau v. Nichols, 472 F.2d 909 (9th Cir. 1973) and Morales v. Shannon, 41 U.S.L.W. 2451 (W.D. Tex. Feb. 13, 1973).

education at all.[224] Such situations call for transitional bilingual programs designed to treat the linguistic problems of such students at an early date so they can subsequently be integrated into the mainstream of the educational process. Although these programs classify pupils by race or ethnicity,[225] the resultant segregation is tolerated because of its temporary duration and its obvious educational justification.[226]

Black House and Casa can be analogized to these transitional educational programs. Upshaw envisions Black House as a necessary mechanism for preparing students for subsequent integration in higher education or in society at large.[227] He argues that because each student eventually leaves Black House and reenters an integrated environment better able to cope with that environment, the program is in effect transitional. Casa is susceptible to similar description,[228] and the arguments borrowed from the bilingual education context are particularly applicable. Casa does present its curriculum bilingually, and Hernandez suggests that the failure of other schools to do so constitutes one of the educational problems Casa was designed to rectify.[229]

Thus, Black House and Casa do not differ in philosophy from transitional bilingual educational programs. Each purports to prepare a student for true equality in the context of subsequent integration,[230]

224. "There can be no equal educational opportunity for bilingual children until they are permitted to learn in a language that they can understand." Kobrick, *Statute: A Model Act Providing for Transitional Bilingual Education Programs in Public Schools*, 9 HARV. J. LEGIS. 260, 265 (1972).

225. If all Spanish-speaking children in a given district are placed in one transitional bilingual program, the effect is to segregate most Chicano students from students of other races, since most Spanish-speaking students are Chicanos.

226. Some have argued that bilingual instruction and its resultant ethnic segregation for non-English speaking pupils is constitutionally required rather than simply constitutionally permissible. *See* Serna v. Portales Municipal Schools, 351 F. Supp. 1279, 1282-83 (D.N. Mex. 1972). However, in light of the Supreme Court's recent holdings in *Rodriguez* that a state may distribute educational benefits in any rational manner it chooses, such arguments are of dubious weight. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973). Nevertheless, if the failure to provide bilingual instruction is tantamount to a racial or ethnic discrimination—because it deprives an ethnically identifiable group of equal educational opportunity—, the state would be required to justify this discrimination with a compelling state interest. The Court's forthcoming decision in the *Keyes* case may well provide a more definitive ruling on this issue. *See* note 65 *supra*.

227. *Upshaw interview, supra* note 5.

228. *Hernandez interview, supra* note 26. Admittedly, however, the argument is more tenuous in the context of Casa; for while Black House's program is temporally coextensive with a brief period in each student's life (his high school years), Casa is designed to be a school for kindergarteners through twelfth-graders and, to a certain extent, for the Chicano community in general.

229. *Hernandez interview, supra* note 26.

230. *See Hearings, supra* note 2, at 3986, where one of the leaders of Berkeley's black community describes the sort of "meaningful integration" which that community desired at the time that the desegregation plan was first implemented. The thrust of this plea was for a plan that would not simply place white and black

and remedial work plays a significant role in each. While perhaps the linguistic preparation contemplated by bilingual education nced only encompass a brief period in each student's career, it is arguable that the type of preparation Black House and Casa aim to provide simply requires a substantially longer period of time.

Black House and Casa can be described as transitional or temporary in still another sense. Since *Brown,* the Supreme Court has authorized and even required the use of temporary racial classifications to remedy the effects of past de jure segregation. *Swann v. Charlotte-Mecklenburg Board of Education*[231] and *Green v. County School Board of New Kent County,*[232] both discussed above,[233] illustrate this judicial development. In such cases the Court has stressed that these techniques are only temporary measures, and once such affirmative action has been taken, school boards are not expected to perpetually readjust racial quotas as the ethnic composition of an area changes.[234] If these cases stand for the proposition that racial classifications may be used as transitional devices for remedying any of the inequities *Brown* sought to cure, they may provide helpful judicial support for remedial efforts that go well beyond simple desegregation plans.[235]

Though the Experimental Schools Program has not planned any definite timetable for the duration of Black House and Casa, the argument outlined above is appropriately applied to these schools. Having been designed to remedy certain educational inequities, these schools will probably continue to exist as educational alternatives until they are no longer educationally justifiable or until programs deemed better means of fulfilling special student needs are developed. In other words, like the remedial racial classifications discussed in *Green* and *Swann,* they will probably last until they have "worked."[236] Moreover, the evolving nature of the Experimental Schools Program[237] and

children together in the same school. Interaction among equals, mutual acceptance, and cultural pluralism were envisioned as the ultimate goals to be desired. Arguably, before such goals can be attained, remedial programs—that might result in temporary segregation—may be necessary.

231. 402 U.S. 1 (1971).

232. 391 U.S. 430 (1968).

233. *See* Part II(B) and Part IV(A).

234. 402 U.S. 1, 31-32 (1971). *See also* Wright v. Council of the City of Emporia, 407 U.S. 451, 476 (1972). *See* cases cited in note 64 *supra,* which contain similar reasoning in the context of voluntarily adopted "benign quotas." *See* Part IV(A) of this Comment as well.

235. It is unclear whether the remedial measures authorized by *Swann,* which are in effect temporary racial classifications, must be confined to prompt corrections of racial imbalance in formerly de jure school districts. Arguably, temporary racial classifications which effectuate other educational arrangements consistent with the spirit of *Brown* are likewise permissible.

236. 402 U.S. 1, 31 (1971).

237. *See* letter, *supra* note 211.

the recently proposed Alliance School[238] reinforce the characterization of Black House and Casa as transitional and changing educational experiments rather than as permanent and static institutions.

D. *Community Control of Public Schooling*

Black House and Casa de la Raza are representative of a widespread thrust towards community control or decentralization.[239] This movement generally seeks to shift the focus of governance from broad, heterogeneous entities to smaller, more discrete units, each composed of groups of people sharing common and identifiable interests.[240] More specifically, advocates of decentralization call for the vesting of power and control over education and other public services in the group most directly affected by the decisions made. The composition of Casa de la Raza's administrative board and the community orientation of its academic program are typical of a decentralized approach to education.[241]

Two alternative rationales have evolved in support of communitarianism. The first is based on the argument that identifiable interest groups have the political right to act in concert and thereby to effect some degree of governmental self-determination.[242] This notion of local control, particularly in public education and the decision-making process underlying it, has evoked most vigorous praise from the Supreme Court in recent decisions.[243] The following passage from *Rodriguez*,[244] though directed primarily to the issue of school financing, reflects the strong position the Court has taken:

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238. *See* Part III(B) *supra.*

239. *See* A. ALTSHULER, COMMUNITY CONTROL (1970); COMMUNITY CONTROL OF SCHOOLS (H. Levin ed.) (1970); Cohen, *The Price of Community Control,* COMMENTARY, July 1969, at 23.

240. Kirp, *supra* note 75, at 1358.

241. *See* text accompanying note 29 *supra.*

242. Kirp, *supra* note 75, at 1380-81.

243. *See* Wright v. Council of the City of Emporia, 407 U.S. 451, 469 (1972); *see also id.* at 478 (Burger, J., dissenting). *See* San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1305 (1973); *see also id.* at 1344 (Marshall, J., dissenting) and 1312, 1315 (White, J., dissenting).

Note, however, that an earlier decision dealing with voting rights seemed to reject many of the arguments underlying the case for community control, thus evoking a strong dissent from Justice Douglas. *See* Whitcomb v. Chavis, 403 U.S. 124 (1971). Some cases from lower federal courts have adopted a similar stance. *See* Owens v. School Comm. of Boston, 304 F. Supp. 1327 (D. Mass. 1969) and Norwalk CORE v. Norwalk Bd. of Educ., 423 F.2d 121 (2d Cir. 1970). Contrast these cases with Brice v. Landis, 314 F. Supp. 974 (N.D. Cal. 1969) and the lower court opinion in Chavis v. Whitcomb, 305 F. Supp. 1364 (S.D. Ind. 1969), *rev'd,* 403 U.S. 124 (1971). Both reflect a favorable judicial response to claims in behalf of particular communities or interest groups. *See also* Burns v. Richardson, 384 U.S. 73, 88 (1966).

244. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973).

> In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived.
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> . . . .
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> . . . In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. . . . No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.[245]

Indeed, as locally devised solutions to local problems and community pressures, Black House and Casa are the kind of experiments the Supreme Court has urged local government units to undertake. Certainly it would be anomalous for the judiciary to exhort community experimentation in education and then always to stifle such attempts when the communities involved happen to be racially or ethnically identifiable. This anomaly becomes even more pronounced in light of suggestions that it is among these racially and ethnically identifiable groups—black and Chicano minorities—that the educational need for community-controlled schooling is most strongly felt.

This educational component of community control provides the second legal basis for its justification. It does so by linking decentralized schooling to improved academic achievement among certain minority students.[246] Significantly, recent empirical studies suggest that of all measured variables, "fate control"[247] (a pupil's perception of his own control over his environment), rather than integration per se, shows the most substantial positive correlation with student achievement.[248] Arguably, schools like Black House and Casa, where minority administrators and teachers present ethnically oriented educational materials to minority students, are ideal atmospheres for the de-

245. *Id.* at 1305.

246. *See* Kirp, *supra* note 75, at 1362.

247. *See* Goodman, *supra* note 21, at 402-03.

248. There is every reason to believe that community control of city schools will enhance educational quality. Equality of Educational Opportunity, the most extensive educational study ever conducted . . . emphasized the need for an educational system capable of stimulating a strong sense of self among students. . . . Coleman discovered that the secret to learning lay with student attitudes. Attitudes toward self, of powers to determine one's future, influence academic achievement far more than factors of class size, teacher qualifications, or condition of school plant.

Marilyn Gittell, quoted in Mosteller & Moynihan, *A Pathbreaking Report*, ON EQUALITY, *supra* note 191, at 25. *See also* Goodman, *supra* note 21, at 402-03.

velopment of "fate control." Moreover, where the communities involved have special cultural or linguistic attributes, determinations of how these variables can best be incorporated into a successful educational program would seem most appropriately made at the community level.

While the Supreme Court's recent decision in *Rodriguez* perhaps suggests that pupils and their parents can no longer demand special programs designed to equalize educational opportunities,[249] the decision clearly did not restrict local community efforts undertaken to attain that goal: "[C]ertainly innovative new thinking as to public education, [and] its methods . . . is necessary to assure both a higher level of quality and greater uniformity of opportunity."[250] Now that Berkeley and certain interest groups within that city have in good faith assumed this responsibility, they must be permitted to continue their efforts.

Two counterarguments[251] frequently advanced against the case for communitarianism in education can be dismissed from the Berkeley context with little difficulty. The first is that arrangements permitting local control presume that residents of the same neighborhood or community share the same opinions and values about education and other matters of governance.[252] For example, a given family living in a predominantly black area may prefer integrated schooling to education controlled by the community.[253] Under a system of local control, could the right to a racially desegregated education be denied by a vote of the majority of the community? Although the problem is a real one, it does not exist in Berkeley. Black House and Casa are products of the decentralization movement, yet each is attended only by willing participants.[254] No student in Berkeley is compelled to attend any particular alternative school simply because he is ostensibly a member of a certain community.

The second counterargument stresses the difficulty of isolating the

249. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973). Holding that equal educational opportunity is not a fundamental right in the constitutional sense, the Court concluded that any rational method of distributing educational benefits undertaken by the state is permissible—even if it offers superior educational opportunities to certain classes of students.

250. *Id.* at 1310.

251. A third counterargument in addition to the two discussed in the text that follows is that community control results in the racial resegregation of school facilities. *See* Dimond, *Reform of the Government of Education: A Resolution of the Conflict Between "Integration" and "Community Control,"* 16 WAYNE L. REV. 1005 (1970). In a sense, that issue is the focus of this entire Comment.

252. Kirp, *supra* note 75, at 1369.

253. *Id.*

254. *See* Dimond, *supra* note 251, at 1026-29, for a discussion of student choice as means of resolving some of the problems inherent in community-controlled education.

criteria defining any particular community. Geographic boundaries, ethnic identifiability, and the notion of interest groups or groups with common concerns could each be employed as the basis of such a definition. The problem is particularly acute in litigation wherein the right to community control or its incidents is put in issue.[255] But in the context of the Berkeley Experimental Schools Program, the severity of this difficulty is tempered by the purpose of the Program itself. If, as their directors contend, Black House and Casa are practical responses to educational needs of particular groups of students,[256] then those needs can be used to delineate the relevant community.[257] While the problem might yet arise if people with other special educational needs were to demand special educational programs,[258] this eventuality should not cast doubt on Black House and Casa which presumably have been able to isolate their constituencies successfully. Moreover, the existence of Berkeley's twenty-one other alternative schools[259] may well reflect the identification of additional interest groups and efforts to respond to their particular educational needs.[260]

In isolating and responding to the unique educational needs of particular segments of its population, Berkeley has not made itself vulnerable to equal protection attack for failure to take similar measures for all other possible interest groups—that is, for failure to "strike at all evils at the same time."[261] For, as the Supreme Court has pointed out, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute . . . ."[262] Thus, the difficulty of defining communities and the related problem of of-

255. How should a court identify appropriate communities? Definitions based on neighborhood or race might appear convenient, yet one cannot assume a person's political philosophies simply from the location of his home or the color of his skin. Nevertheless, at least one court has demonstrated its willingness to overcome these difficulties. *See* Chavis v. Whitcomb, 305 F. Supp. 1364 (S.D. Ind. 1969), *rev'd*, 403 U.S. 124 (1971), where the district court identifies "the minority group residing in a modern 'ghetto' " as the relevant community or interest group. *Id.* at 1373-80.

256. *Upshaw interview* and *Hernandez interview, supra* notes 5 & 26.

257. *See Hearings, supra* note 2, at 3977-79, where there are frequent references to the educational needs of the "black community." Similarly, the need for bilingual instruction at least partially defines the interest group served by Casa. The point is that Black House and Casa do serve certain communities or interest groups which can be defined in terms of educational needs. *See* Part IV(H) *infra.*

258. For example, it might be more difficult, though not impossible, to isolate the educational needs—and hence to define the appropriate community—of the probably numerous non-black and non-Chicano students who do not succeed in schools using conventional teaching methods. *See* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1969), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

259. *See* text accompanying note 3 *supra.*

260. *See* note 342 *infra.*

261. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1300 (1973); Katzeubach v. Morgan, 384 U.S. 641, 657 (1966).

262. *Id.*

fering differential educational benefits among communities do not pose any significant threat to community oriented education in Berkeley.

Communitarian interests are clearly very important, and they constitute a significant justification for alternative schools like Black House and Casa. Whether or not such interests are "compelling" in a constitutional sense[263] and whether or not racially identifiable schools are a necessary[264] and least onerous means[265] of implementing these interests are less clear. Nevertheless, even by itself an argument based on community control provides affirmative support for Black House and Casa. Together with the consideration of other affirmative justifications—such as educational benefit[266]—such an argument fortifies an already strong case in favor of the continued operation of these schools.

E. The Relevance of the Benignity of the Classification

Legal precedent and policy generally foreclose judicial inquiry into the motives and intents underlying state action.[267] Hence, the intuitively attractive argument that Black House and Casa are distinguishable from the segregated facilities banned by *Brown*, because noninvidious motives underlie the resulting racial separation,[268] may carry little weight.

Yet the issue is not so easily dismissed. As Professor Bickel has pointed out, the oft-invoked rationale for judicial abstention from motivational analysis is that courts do not feel competent to engage in psychoanalysis.[269] But he notes that ordinary statutory construction

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263. *See* Part II(A) *supra.*

264. *Id.*

265. *Id.*

266. *See* Part IV(B) *supra.*

267. *See* Fletcher v. Peck, 10 U.S. 87, 130-31 (1810); Flemming v. Nestor, 363 U.S. 603, 617 (1960); and United States v. O'Brien, 391 U.S. 367, 383 (1968). However, in one recent desegregation case the Supreme Court suggested two situations in which it might take motivations into consideration:

> It is true that where an action by school authorities as motivated by a demonstrated discriminatory purpose, the existence of that purpose may add to the discriminatory effect of the action by intensifying the stigma of implied racial inferiority. And where a school board offers non-racial justifications for a plan that is less effective than other alternatives for dismantling a dual school system, a demonstrated racial purpose may be taken into consideration in determining the weight to be given to the proffered justification.

Wright v. Council of the City of Emporia, 407 U.S. 451, 461 (1972).

268. It has been argued that benign or noninvidious racial classifications should be judged by the rational basis test rather than the compelling state interest test. *See* Part II(A) *supra. See also* Askin, *The Case for Compensatory Treatment*, 24 RUTGERS L. REV. 65, 73 (1969). However, such a suggestion has been rejected on a number of counts. *See Developments in the Law—Equal Protection, supra* note 39, at 1104-19. *See also* note 51 *supra.*

269. A. BICKEL, THE LEAST DANGEROUS BRANCH, 208 (1962).

often amounts to a similar process.[270] For example, when *Brown* was orally argued before the Supreme Court, one item of debate was the alleged "original meaning" of the fourteenth amendment, which was interpreted in part by analyzing the intentions or motives of its framers.[271]

Recent case law has perpetuated this confusion over the legal significance of official motivation by creating new distinctions and blurring old ones. In 1964, the Supreme Court in *Griffin v. County School Board of Prince Edward County*[272] declared unconstitutional the closing of a county's schools on the heels of an order to desegregate.[273] Having chronicled Virginia's policy of "massive resistance"[274] to the *Brown* decree, Justice Black observed that "the record . . . could not be clearer that Prince Edward's public schools were closed . . . , for one reason, and one reason only: to ensure . . . that white and colored children . . . would not, under any circumstances, go to the same school."[275] Later in the opinion he reiterated the point: [I]t is plain that . . . [the plan to close schools was] created to accomplish . . . the perpetuation of racial segregation . . . ."[276] While drawing such conclusions might have been difficult for the Court to avoid, such considerations would have been irrelevant if the ban on motivational analysis were strictly and literally adhered to.

In a case seemingly similar to *Griffin*, however, the Supreme Court upheld the right of Jackson, Mississippi, to close its public swimming pools when ordered to desegregate them.[277] Justice Black, again speaking for the Court, stated that the Supreme Court has never invalidated a legislative act "solely because of the motivations of the men who voted for it."[278] He distinguished *Griffin* as focusing on the "effect of the enactment[s]" rather than on the motivation for it.[279] Black's purported distinction seems specious[280]—or inadequately explained, at best.

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270. *Id.* at 215.

271. *See* ARGUMENT 182-93 (L. Friedman ed. 1969).

272. 377 U.S. 218 (1964).

273. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1207, 1295 (1970).

274. 377 U.S. 218, 221 (1964).

275. *Id.* at 231.

276. *Id.* at 232.

277. Palmer v. Thompson, 403 U.S. 217 (1971).

278. *Id.* at 224.

279. *Id.* at 225. Black stressed that one effect of the school closings in *Griffin* was the establishment for whites of private schools receiving state support. In *Palmer*, on the other hand, no swimming pool with which the state was involved was open to any citizen of any race. *Id.* He did, however, acknowledge the existence of a YMCA pool and a state college pool operated on a segregated basis. *Id.* at 222.

280. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitu-*

Yet one district court has offered an expanded and useful analysis of the distinction that Black so hastily intimated. In *Poindexter v. Louisiana Financial Assistance Commission*,[281] Judge Wisdom differentiated between motive, which is "off limits" for judicial analysis, and purpose, which courts can examine.[282] While the former involves a process akin to what Bickel called "psychoanalysis," the latter concerns simply the determination of the past history of the enactment in question and its practical effects.[283] Unlike motives, both past history and practical effects are susceptible to objective discovery. Such a view not only makes abundant sense in terms of the courts' competence, but also permits reasonable consideration of variables that should not escape judicial scrutiny. If findings of unconstitutionality can be predicated on evidence of unconstitutional purposes, there is no persuasive reason why evidence of constitutional purposes should not be admissible in defense of otherwise suspect state action. Such a theory offers support for the continued operation of Black House and Casa because it affords an additional ground for distinguishing these schools from the type of racial classifications routinely invalidated once subjected to strict equal protection review.[284]

Borrowing Judge Wisdom's approach, as far as blacks and Chicanos are concerned, Black House and Casa can clearly be differentiated from the one-race schools overturned in *Brown*. First, the situations have different histories. In *Brown*, public education had followed a long tradition of invidious separation; whereas in Berkeley, voluntary integration was undertaken in 1964 and completed in 1968.[285] The Experimental Schools Program then evolved to further such educational innovation. Furthermore, the effects of the school-

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tional Legislative Motive, 1971 SUP. CT. REV. 95, 99. *See also* Palmer v. Thompson, 403 U.S. 217, 265 (1971) (White, J., dissenting).

281. 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968).

282. *Id.* at 837. In Wright v. Council of the City of Emporia, 407 U.S. 451 (1972), the Court makes what seems to be a similar distinction using different terminology. It differentiates between purpose and motivation, on the one hand, and effect, on the other. *Id.* at 461-62. The wording used is similar to that employed in Justice Black's distinction between *Griffin* and *Palmer* [*see* note 279 *supra* and accompanying text]. Though perhaps *Wright*, *Griffin*, and *Palmer* all arrive at the same distinction as the one Judge Wisdom enunciates in *Poindexter*, the latter case forms the primary basis for the analysis which follows because of its superior clarity.

283. Poindexter v. Louisiana Financial Assistance Comm., 275 F. Supp. 833, 837-38 (E.D. La. 1967), *aff'd.* 389 U.S. 571 (1968).

284. *See* Part II(A) *supra*. Clearly, once a racial classification has evoked the equal protection test of strict judicial scrutiny, simply distinguishing it from other types of racial classifications will not suffice to justify it. However, because *Brown* arguably involved more than a straightforward application of that test, such attempted distinctions become relevant as part of a broader balancing test. *See* Part II(B) *supra*, particularly text accompanying note 89.

285. *Hearings*, *supra* note 2, at 4057.

ing plans in question are dissimilar. In *Brown*, the objectively observable result was forced segregation which precluded the exercise of individual choice. Under the Berkeley plan, choice is enhanced by the existence of twenty-three alternative schools,[286] most of which serve students of all races.[287]

Even with respect to white students, the analysis is similar. Widespread and intense discrimination, like that practiced against blacks by several southern states both before and after *Brown*, is clearly absent from the history of the Berkeley Unified School District's treatment of whites. Furthermore, the Experimental Schools Program has the practical effect of providing a racially integrated education for any white pupil desiring one. This aspect of the Program sharply contrasts with plans that courts have invalidated because of uniformly discriminatory or segregatory effects. While the effect would be noticeably different if all blacks or all Chicanos attended Black House or Casa de la Raza,[288] such an outcome is neither a projected goal not an actual result of the Program.[289] The Alliance proposal, which will further diminish the already limited racial separation in Berkeley schools, underscores this assertion with additional certainty.[290]

Notwithstanding the purposes or motives of the state action in question, some equal protection scholars have urged legal consideration of the psychological responses of the groups upon whom the challenged classification has been imposed.[291] Such a suggestion perhaps provides a different perspective from which to measure benignity or invidiousness and in any event expands judicial analysis of the effects of official action beyond those of a readily observable nature.[292] For example, a recent California district court opinion overturned a desegregation plan involving the busing of black children to white schools—without the reciprocal busing of whites—because of the stigma the plan tended to impose upon the blacks.[293] Indeed, *Brown* itself argua-

286. *See* Part IV(G) *infra.*

287. *See* text accompanying notes 3 and 154 *supra.*

288. If all blacks and all Chicanos attended Black House and Casa, respectively, all non-blacks and non-Chicanos would be denied, in effect, the option of an integrated education. *See* note 155 *supra.*

289. *First Foster Interview, supra* note 122.

290. *See* Part III(B) *supra.*

291. *See Developments in the Law—Equal Protection, supra* note 39, at 1127, in which the authors discuss stigmatization as a possible criterion for differentiating suspect classifications from other classifications. *See also* Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint,* 54 CORNELL L. REV. 1, 17-18 (1968).

292. *See* text accompanying note 283 *supra. See also* quotation in note 267 *supra* relating stigmatizing effects to discriminatory motives or purposes. *See also* Palmer v. Thompson, 403 U.S. 217, 266 (1971) (White, J., dissenting).

293. Brice v. Landis, 314 F. Supp. 974, 978 (N.D. Cal. 1969). *See* citations in note 190 *supra.*

bly tied its finding of inequality to the minority group stigmatization resulting from segregated schooling.[294] While implicit considerations of stigma may well have played a role in several Supreme Court equal protection decisions,[295] in many cases the thirteenth amendment's abolition of all "badges of slavery" provides an equally cogent basis for such analysis.[296] Clearly, where blacks are concerned, to describe race-related stigmatization as a badge of slavery is simply to describe a psychological variable (stigma) in terms of its legal antecedent (slavery). To extend the argument to Chicanos who, though not slaves, have been recognized by the Court as objects of hostile ethnic discrimination,[297] does not unreasonably strain the rationale of the thirteenth amendment.[298] In any event, any complete analysis of the purported benignity of Black House and Casa—particularly one attempting to distinguish these schools from the educational segregation outlawed by *Brown*—requires an appraisal of the possibility that these experiments may tend to stigmatize or produce other untoward psychological reactions among the groups they classify.

At the present time, there is little detailed psychological data from which to assess the attitudes of the blacks and Chicanos and the nonblacks and non-Chicanos who might be affected by the operation of Black House and Casa. Senate Hearings conducted in the spring of 1971[299] and personal interviews provide some information[300] suggesting that the ethnic groups either explicitly or implicitly excluded from these schools do not feel stigmatized because of the wide variety of educational choices open to them and because of the general absence of anti-white discrimination in American society. Moreover, preliminary studies undertaken by the Experimental Schools Program indicate that the blacks and Chicanos attending Black House and Casa have exhibited measurable growth in self-confidence and self-awareness.[301] Such findings are inconsistent with a stigmatization hypothesis. Fur-

294. *See* Part II(B) *supra.*

295. *Developments in the Law—Equal Protection, supra* note 39, at 1127.

296. U.S. CONST. amend. XIII; Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

297. *See* note 50 and accompanying text *supra.*

298. In Hernandez v. Texas, 347 U.S. 475, 478 (1954), the Court states that the "Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro." Arguably, similar reasoning is applicable to the thirteenth amendment, which was also designed to combat discrimination. Such a conclusion is especially appropriate where the "badges of slavery" [*see* citations in note 296 *supra*] rather than the legal institution of slavery itself are in issue.

299. *See* note 2 *supra.*

300. Interviews with Dr. Turner and Jones, *supra* note 21.

301. *Id.* The studies are preliminary, and hence the results are only tentative. *Id.*

thermore, although some black psychologists might disagree,[302] it is arguable that compelled integration is far more demeaning to these groups than is the voluntary separation made possible by Black House and Casa.[303] The tentative and inconclusive nature of this discussion reflects simply a paucity of necessary data. It should not detract from the importance of psychological considerations in evaluating purportedly benign racial classifications,[304] but rather should emphasize the need for Black House and Casa to produce additional convincing evidence on this issue. Nonetheless, the limited data currently available provide no grounds for inferring that Black House and Casa have stigmatized any definable segment of Berkeley's population. Thus, from this perspective too, the existence of Black House and Casa does not threaten to revitalize the psychological disabilities that the *Brown* Court sought to eradicate.

F. The Compensation Argument

Several commentators have attempted to justify special treatment for blacks and other minority groups by citing the need to cure or compensate for past discrimination.[305] The premise of the argument, in the perhaps too emotional words of one adherent, is that "[t]here is nothing in law . . . which requires . . . equivalent treatment of oppressor and oppressed."[306] Instead, unequal benefits are appropriate for the latter group because of the unequal burdens suffered in the past.[307] Although this general approach has had many advocates in

302. *See* K. Clark, *The Social Scientists, the Brown Decision, and Contemporary Confusion*, in ARGUMENT, xxxi, xlvi-l (L. Friedman ed. 1969).

303. *See* Brunson v. Board of Trustees of School Dist. No. 1 of Clarendon County, 429 F.2d 820, 824-27 (4th Cir. 1970) (Sobeloff, J., concurring).

304. The Supreme Court altered its analysis of the importance of attitudes and perceptions in the period of time between Plessy v. Ferguson, 163 U.S. 537 (1896) and Brown v. Board of Educ., 347 U.S. 483 (1954). In the former, the Court labeled a "fallacy" the notion that "the enforced separation of the two races stamps the colored race with a badge of inferiority." The Court went on to say that even if such a stigma exists, "it is not by reason of anything found in the act [which provided for separate railway facilities for blacks and whites], but solely because the colored race chooses to put that construction upon it." Plessy v. Ferguson, 163 U.S. at 551. In contrast, the *Brown* Court emphasized the fact that "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." 347 U.S. at 494.

305. *See, e.g.*, Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Hughes, *Reparations for Blacks?*, 43 N.Y.U. L. REV. 1063 (1968); Askin, *supra* note 268; Elden, *"Forty Acres and a Mule," with Interest: The Constitutionality of Black Capitalism, Benign School Quotas, and Other Statutory Racial Classifications*, 47 J. URBAN LAW 591 (1969). *See also* B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973).

306. Askin, *supra* note 268, at 73.

307. *See, e.g.*, Elden, *supra* note 305.

the past, it no longer commands the attention it once did, presumably because of certain obvious weaknesses inherent in the reasoning. One weakness emerges in attempting to identify the "oppressor" and "oppressed." Though whites and blacks, respectively, may have literally assumed these roles in the era of slavery, it is not immediately clear that extending that generalization to present-day members of those races makes constitutional—or even intuitive—sense.

Nevertheless, some of the better-reasoned contentions cited in support of compensation for victims of past racial or ethnic discrimination at least circumvent these difficulties and thereby offer additional affirmative support for special programs like Black House and Casa. In the first place, special programs that single out for beneficial treatment members of races subjected to past inequities are consistent with the thirteenth amendment's call for the elimination of "badges of slavery."[308] In this context, the thirteenth and fourteenth amendments are designed to be read as complementary post-Civil War provisions[309] authorizing affirmative steps to make the opportunities available to victims of past discrimination objectively equal to those enjoyed by whites. It must have been foreseeable that affirmative efforts to eradicate all traces of slavery—or other past conditions of legal inferiority[310]—might entail corrective state action that patently favors the previously denigrated group.

Notably, the policy here is not the questionable one of identifying "oppressor" and "oppressed" and seeking appropriate vindication; rather, it is one of carrying out an affirmative constitutional duty to eliminate existing inequalities. The empirical hypothesis implicit in this reasoning is that racially neutral or color-blind state action often has racially specific effects because it fails to undo the cumulative effects of past discrimination or deprivation.[311] As the late Justice Frankfurter observed, "there is no greater inequality than the equal treatment of unequals."[312] Moreover, to now treat all persons identically would arguably perpetuate a cycle of "unjust enrichment" for those whose counterparts were favored in the past.[313] As a result, of-

308. *See* citations in note 296 *supra.*

309. Elden, *supra* note 305, at 605-06.

310. *See* notes 297-98 and accompanying text *supra.*

311. Professor Goodman, discussing racially specific effects, has observed:

> [T]he background characteristics that distinguish blacks from whites within each class are not racial in any biological sense, but are cultural, social, economic, or psychological characteristics growing out of the unique historic experience of black people in this country as a submerged caste.

Goodman, supra note 21, at 309-10. In this context, *compare* Hunter v. Erikson, 393 U.S. 385 (1969) *with* James v. Valtierra, 402 U.S. 137 (1971).

312. Dennis v. United States, 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting).

313. *See* Askin, *supra* note 268, at 71.

ficial action undertaken for compensatory purposes should not be judged according to whether it classifies persons for unequal benefits, but rather according to whether the effects it produces are consistent with the equal protection clause[314] Arguably prompted by such reasoning, federal law has recognized the importance of compensatory programs for "educationally deprived" children.[315]

Some scholars have adopted this empirical hypothesis as the foundation for the argument that compensatory education for disadvantaged students is constitutionally required.[316] A school system cannot take all of its pupils as it finds them,[317] runs the argument, but instead must take into consideration the relative advantages and deficiencies of each pupil's background in an attempt to equalize the educational opportunity available to each.[318] Though expressed in terms of equalizing student inputs, the force of the argument is a call for equalization of student outputs or academic performance.[319] Certainly, the Supreme Court's recent holding in *Rodriguez*[320] casts grave doubts upon the viability of any approach that makes educational equalization a constitutional imperative—regardless of whether the argument is framed in terms of equal inputs or equal outputs.[321] Yet *Rodriguez* explicitly encourages state and local efforts designed to provide "greater uniformity of [educational] opportunity."[322]

Black House and Casa are examples of such a policy undertaken at the local and community level. They are remedial and corrective programs adopted to eliminate the frequently poor academic perform-

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314. *Id.* at 73, 77-79.

315. *See* 20 U.S.C. §§ 241a *et seq.* (1970).

316. *See* Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education,* 13 U.C.L.A. L. REV. 1147 (1966) and Comment, *Equality of Educational Opportunity: Are "Compensatory Programs" Constitutionally Required?,* 42 So. CAL. L. REV. 146 (1969). [Hereinafter cited as *Compensatory Programs.*]

317. Horowitz, *supra* note 316, at 1168.

318. *Compensatory Programs, supra* note 316, at 150.

319. For example, Horowitz appears to argue for an equalization of inputs in the educational process: he advocates compensatory programs for pupils who enter school inadequately prepared. Horowitz, *supra* note 316, at 1166-67. In other words, he seems to argue for an equalization of opportunity. But Horowitz repeatedly bases his argument on the "markedly lower educational achievement by children in . . . 'disadvantaged' areas. . . ." *Id.* at 1166. *See also id.* at 1147. The elimination of such disparities requires, to some extent, the use of an output standard. *See* note 191 *supra.*

320. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973).

321. In holding that a state may distribute educational services in any rational manner, *Rodriguez* implied that a state is under no constitutional compulsion to equalize educational inputs or outputs. *See* note 319 *supra.* Whether or not the same holding would prevail where a certain distribution of educational services, though not discriminatory on its face, has racially specific effects is unclear. *See* note 226 *supra.*

322. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1310 (1973).

ance of black and Chicanos in ordinary educational environments, which are typically geared to the needs and interests of the white, middle-class pupil.[323] The equalization of educational opportunity they attempt is both one of student inputs and student outputs. For example, Casa's bilingual instruction equalizes students inputs to the extent that it prepares Spanish-speaking Chicano students to attend classes with English-speaking students and to participate on an equal basis in some of Berkeley's other alternative programs that are taught solely in English. Simultaneously, Casa's bicultural emphasis is more aptly described as a means of equalizing student outputs: it is designed to provide educational material for the Chicano student that will sufficiently awaken an interest in learning to raise his level of academic performance to that generally attained by nonminority students. Black House's program is susceptible to analysis in similar terms.[324] Significantly, members of other ethnic groups are absent from these special programs not because they are "oppressors." Instead, they do not attend because they are unlikely to profit from such relief and because they bear no "badges of slavery" justifying such corrective action. Given the importance of compensatory efforts designed to equalize opportunities, Berkeley's alternative schooling operates to promote a state interest that may not unreasonably be deemed compelling.[325]

G. Enhancing Choice in Public Schooling

Though advocates of educational reform have pressed for expanded individual choice and decision-making in education,[326] the Supreme Court has never intimated that school districts are constitutionally required to provide educational options responsive to particular needs within their student populations.[327] Nevertheless, on several occasions, the Court has shown its willingness to promote individual educational preferences at the expense of the typically broad grant of

323. *See* note 12 and accompanying text *supra.*

324. Upshaw has described Black House both as a means of compensating its students for the basic inadequacies in their educational preparation and also as a method of improving achievement within the school itself. Thus, it attempts to elevate both student input and student output. *Upshaw interview, supra* note 5.

325. To withstand strict judicial scrutiny, Berkeley's program must not only promote a compelling state interest but must also be necessary to achieve that end and the least onerous way of doing so. *See* note 45 and accompanying text *supra.* Because the goals involved—compensation or equalization of opportunity—can best be measured in terms of subsequent achievement, data indicating such achievement is necessary before each aspect of the strict equal protection test can be met. *See* notes 202-13 and accompanying text *supra.*

326. *See, e.g.,* Coons and Sugarman, *Family Choice in Education: A Model State System for Vouchers,* 59 CALIF. L. REV. 321 (1971). *See* particularly the forward by Professor Charles S. Benson, *id.* at 323.

327. *See* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1969), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

discretionary power left to the numerous states enacting compulsory education laws.[328] The holding in *Pierce v. Society of Sisters*,[329] built on a careful balancing of individual choice and state discretion, initiated a landmark compromise: *Pierce* declared that Oregon's attempt to prohibit private schooling was an unwarranted infringement on the constitutional rights of the pupils' parents—and, by implication, the pupils—as well as those of the private institutions themselves.[330] *Pierce* dictates that if a state requires children to attend school, it cannot ban all alternative, private means of complying with that requirement.[331]

The most recent extension of *Pierce*'s grant of educational choice is *Wisconsin v. Yoder*,[332] a case exempting children of the Amish faith from compulsory education after the completion of the eighth grade. While the religion issue as well as the role of the Amish in American society[333] were explicit determinants of the outcome, this decision underscores the philosophy of compromise initiated in *Pierce*. In effect, the *Yoder* Court recognized that compulsory education beyond the eighth grade would be detrimental to the special needs and interests of the Amish children and their parents. Whether or not an accommodation could be made for children and parents with other types of special needs and interests[334] is a question at the very heart of the Berkeley Experimental Schools Program. While a literal extension of the constitutional imperative in *Yoder* beyond a religious context may be dubious, at least one point is certain: students, like those in Berkeley, who ask that their state or district be allowed to continue offering them educational alternatives clearly demand less than the defendants in *Yoder* who asked for a unique exception to a long standing state educational law and policy.[335]

There is another reason that makes the Berkeley Experimental

328. [C]ourts are not school boards or legislatures, and are ill-equipped to determine the "necessity" of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing . . . [competing interests in such cases].

Wisconsin v. Yoder, 406 U.S. 205, 235 (1972).

329. 268 U.S. 510 (1925).

330. The Court held that the Oregon statute violated the rights of the parents and guardians to direct the education of their children. *Id.* at 533-35.

331. The Court stressed, however, that its holding did not mean that the state could not regulate all schools or enact other laws respecting public education. *Id.* at 534.

332. 406 U.S. 205 (1972).

333. *Id.* at 222.

334. The accommodation envisioned here is not the exemption from school granted in *Yoder*, but rather recognition of special or unusual educational needs and a judicial decree based on that recognition. *Yoder* was such a decree.

335. *See* 406 U.S. 205 (1972).

Schools Program, and Black House and Casa in particular, especially justifiable. *Pierce*'s deference to privately provided alternatives clearly restricted choice in education to students whose parents could afford the cost of private schooling.[336] Regardless of whether such a result is tantamount to a classification based on wealth and thus possibly subject to strict judicial scrutiny,[337] Berkeley has decided to make positive educational choices accessible to some of those unable to obtain them through private means; Berkeley's decision is especially significant since the majority of students at Black House and Casa come from poorer families for which private schooling provides no real alternative.[338] In short, *Pierce* proscribed the forced standardization of students,[339] and Berkeley has undertaken the responsibility of implementing that proscription for rich and poor alike.

Neither the Court's invalidation of freedom of choice plans in formerly de jure segregated districts[340] nor Berkeley's possible failure to extend precisely equivalent educational options to each member of its student population[341] signals a constitutional flaw in this argument. This is so first because the Berkeley Experimental Schools Program is not a freedom of choice plan in the sense that the Supreme Court has normally construed that term. It does not simply allow the district's students to select among a number of virtually identical schools which are distinguishable at most by location and racial composition of the student bodies. Instead, each alternative school offers a totally different educational approach, with concommitant variations in teaching

336. The decision in *Yoder* is not inconsistent with that result since the Amish children in that case were simply granted the option of no schooling rather than a choice among positive alternatives. *Id.*

337. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1289-90 (1973).

338. *Upshaw interview* and *Hernandez interview, supra* notes 5 & 26.

Of course, if the racial aspect of some of these publicly provided alternatives would make them unconstitutional, then it would be constitutionally impermissible for them to exist as private schools with which the state is involved in any way. *See* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964); Poindexter v. Louisiana Financial Assistance Comm., 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968); and Green v. Connolly, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

However, if as this Comment contends, Black House and Casa are constitutionally justifiable, publicly offered alternatives, then a fortiori they would be permissible as private institutions benefiting from some state involvement.

339. 268 U.S. 510, 535 (1925).

340. *See* Part IV(A) *supra.*

341. Arguably, there remain some groups of students whose particular educational needs Berkeley has not yet isolated or for which it has failed to provide appropriate educational alternatives. Nonetheless, the fact that the Berkeley Experimental Schools Program consists of twenty-three alternative schools does suggest that the district has responded to the educational needs of at least that number of groups.

methods, curriculum, and environment.[342] Second, Berkeley's substantial endeavors toward educational reform create no affirmative duty for it to extend like benefits to every student within the district.[343] As the Supreme Court has recently pointed out, "every reform that benefits some more than others may be criticized for what it fails to accomplish."[344] Nevertheless, where a system is "implemented in an effort to *extend* public education and to improve its quality,"[345] or where the "system is affirmative and reformatory, . . . [it] should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution."[346]

One final point to note: the absence of any definitive judicial statements on the issue leaves open the question whether a program designed to enhance educational choices and alternatives may qualify as a state interest sufficiently compelling to justify an alleged use of racial criteria. But whether or not compelling in a constitutional sense, *Pierce* and *Yoder* certainly suggest the importance of the policy considerations underlying such a program. At the very least, a state interest in the provision of educational choices affords an affirmative policy argument in support of Black House and Casa, to be invoked together with the justifications that are more clearly compelling.[347] Possibly, however, it provides more: an independent affirmative rationale—another compelling state interest—for the continued existence of these schools.[348]

H. The Argument of Functional Equivalence

Many of the arguments outlined above make clear that one aspect of Black House and Casa which distinguishes them from other racial classifications is that their purpose is not simply to separate

342. *See Pamphlet, supra* note 3. *See also* Divoky, *supra* note 2. For example, Kilimanjaro, one of the other experimental schools, has been described as "a counterculture elementary school," attracting "white 'welfare-by-choice' parents." Divoky, *supra* note 2, at 47. Lincoln, another alternative, houses an environmental studies program and is designed to teach children previously labeled "unteachable." *Id.* at 46.

343. *See* notes 261-62 and accompanying text *supra.*

344. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1300 (1973).

345. *Id.*

346. *Id.*

347. Part IV(B) appears to present the clearest case for a compelling state interest.

348. Even if the state has a compelling interest in affording educational choice and accommodating educational needs, in order to survive strict judicial scrutiny Black House and Casa must be the only means to that end and the least onerous means of pursuing it. *See* note 45 and accompanying text, *supra.* Tentatively, Black House and Casa do meet these rigid standards: thus far they are the only means that Berkeley has found to accommodate the educational needs of and to offer meaningful alternatives for the students who have chosen to attend these schools. When and if

Berkeley's student population into neat racial categories but rather to promote values that are important in their own right—educational benefit,[349] community control,[350] compensation,[351] and enhanced educational choice.[352] As a result, the purposes[353] of Black House and Casa can be translated into nonracial terms, though functionally these schools serve racially identifiable classes of persons.[354]

In this context, it is significant to note that neither the equal protection clause[355] nor the Civil Rights Act[356] proscribes special educa-

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Berkeley educators are able to devise something superior or "less onerous" in their place, a different conclusion may follow. *See* notes 202-13 and accompanying text, *supra.*

349. *See* Part IV(B) *supra.*

350. *See* Part IV(D) *supra.*

351. *See* Part IV(F) *supra.*

352. *See* Part IV(G) *supra.*

353. The term "purpose" as used here may be interpreted according to the legal definition suggested in Part IV(E). Yet the argument advocated in that Part is logically distinguishable from the functional equivalence argument presented here. Part IV(E) focused on classifications that are patently racial for benign or nonin-vidious purposes. Here, the issue is not benignity; rather, the point is that it is possible to define Black House and Casa in terms of criteria that are not explicitly racial at all. In other words, the purposes of these schools can be correlated to race, but they can be expressed in nonracial terms with equal accuracy. *See* Goodman, *supra* note 21 at 309-10, for a helpful discussion—albeit in a different context—about "effects . . . never strictly racial but merely correlated to race." *Id.* at 310.

354. However, changing the criteria that determine school attendance while preserving racial exclusivity has been found unconstitutional in some cases. For example, desegregation plans that have contained provisions for pupil assignment on the basis of neighborhood, freedom of choice, ability grouping, or new school district boundary lines, but have failed to alter the racial identifiability of the schools have been found to be unacceptable methods of complying with *Brown.* *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-30 (1971); Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Wright v. Council of City of Emporia, 407 U.S. 451 (1972); and United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972). Similarly, *see* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964); Poindexter v. Louisiana Financial Assistance Comm., 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam,* 389 U.S. 571 (1968); and Green v. Connolly, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971). In all of these cases, the courts invalidated state action which, while not explicitly race-related, resulted in racial segregation.

Yet in all of the cases cited above, the state action which was overturned was shown or presumed to have had illegal purposes, an inference that can be drawn from a consideration of the history and effect of each of the state actions invalidated. *See* Part IV (E) *supra.* As therein demonstrated, the Berkeley Experimental Schools is distinguishable. Hence, the unfavorable pattern revealed by these cases is of dubious applicability to schools in Berkeley. A dispositive ruling on the issue of de facto segregation may well help to resolve this question because it may indicate whether racial separation is per se unconstitutional or whether a showing of an illegal purpose is necessary in order to render it unconstitutional. *See* note 65 *supra.*

355. *See* Part II (A) *supra.*

356. *See* Part III (A) *supra.*

tional programs for the deaf, the retarded, or the non-English speaking child.[357] Where these or other learning disabilities are coextensive with certain ethnic attributes, the legal result should be the same. Perhaps the most persuasive illustration is the constitutional permissibility of governmentally sponsored programs to combat sickle cell anemia, medical efforts which effectively benefit only blacks.[358] Since the functions of Black House and Casa can be translated under an analogous rubric, they too should be constitutionally permissible even though their benefits, in fact, apply to a single racial group. In both situations, race or ethnicity is simply an indicia of the possible presence of a problem that is susceptible to definition in nonracial terms;[359] the racial classification that emerges in such cases is functionally equivalent to the classification likely to emerge if educational or medical, rather than racial, criteria were employed.

The important point is that if a classification can be adequately described in non-racial terms, then it lacks the arbitrariness or irrelevance usually characteristic of race-related state action.[360] Contrast the positive values promoted by Black House and Casa with the classification criticized in *Tanner v. Little*,[361] a decision cited by Thurgood Marshall when he orally argued the appellants' case in *Brown* before the Supreme Court:[362]

> Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classifications would be logically appropriate. Apply it further: make a rule of conduct depend on it, and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen as wrong; it would have only arbitrary relation to the purpose and province of the legislation.[363]

Clearly, racial classifications resulting from the promotion of substan-

357. Indeed, federal legislation authorizes bilingual educational programs. *See* note 222 *supra*. Moreover, some courts have suggested that such programs are constitutionally required by the equal protection clause. *See* Serna v. Portales, 351 F. Supp. 1279 (D. N. Mex. 1972).

358. The federal government will spend $15 million for sickle-cell anemia programs in 1973. In addition, several states have implemented related programs recently. *See The Row Over Sickle-Cell,* NEWSWEEK 63, Feb. 12, 1973.

The disease primarily affects blacks, and approximately 50,000 of the 22 million blacks in the United States have the disease while 2.2 million more are carriers. *Id.* While some members of other races in the United States carry the sickle-cell gene, it is usually the result of interracial mating. *Id.*

359. "[U]nder some circumstances race may be a relevant indicator of an individual's need." *Developments in the Law—Equal Protection, supra* note 39, at 1112.

360. *See Developments in the Law—Equal Protection, supra* note 39, at 1088 and 1108.

361. 240 U.S. 369 (1916).

362. *See* ARGUMENT 199-200 (L. Friedman ed. 1969).

363. 240 U.S. 369, 382 (1916).

tial state interests, whether these interests are "compelling" or simply "important,"[364] are neither arbitrary nor irrelevant. Thus, Black House and Casa are more accurately viewed as analogous to help for victims of sickle cell anemia than as legislative distinctions between red-haired and black-haired men.

CONCLUSION

Despite almost universal disfavor of racial separation, Berkeley's alternative schools for minority students evoke a number of arguments in support of their continued operation. Analyzed together, these arguments both provide affirmative legal support for Black House and Casa and reveal the significant features that distinguish these schools from the racially identifiable educational facilities the law prohibits. From this cumulative justification Berkeley's educational experiment emerges as a persuasive, but exceptional case.

The difficulty lies not so much in determining the legality of the Berkeley schools, but rather in applying that determination to other contexts. As a case like *Wisconsin v. Yoder*[365] demonstrates, the greater the number of elements supporting a particular outcome, the greater the difficulty of isolating which ones are determinative.[366] In other words, although Berkeley's alternative schools and the Amish plea for exemption from compulsory education present intuitively easy cases themselves, they do not provide dispositive models for future application.

The essential problem is the difficulty of establishing a legal precedent that would permit the kind of separate schooling undertaken in Berkeley without providing a loophole for school districts still attempting to evade *Brown*. While the two kinds of racial separation are distinguishable, delineating that distinction in case or statutory law would be difficult and potentially dangerous. For example, if blacks in New Kent County now asked for a Black House, could a court infer

364. It is not clear whether all of the affirmative justifications advanced for the existence of Black House and Casa demonstrate compelling state interests, necessity, and the absence of less onerous alternatives. *See* Parts IV(B), (D), (F), and (G) *supra*. The educational benefit thesis [Part IV(B)] describes the interest most likely to be compelling—especially in the context of all the other arguments. However, community control, compensation, and enhanced educational choice may possibly qualify as well. In any event, they are all clearly very important state interests.

365. 406 U.S. 205 (1973). *See* Part IV(G) *supra*.

366. A number of factual elements appear to have been important in the *Yoder* decision. The first amendment basis of the Amish plea for school exemptions, the limited nature of the relief sought (exemptions only beyond the eighth grade), and the unobtrusive role of the Amish in American society were all undoubtedly significant factors. Whether or not a court faced with some but not all of these factors would reach the same result is unclear.

truly free choice in 1973 if it could not in 1968?[367] On the other hand, if blacks in Berkeley are offered educational options, should blacks in New Kent County be denied such opportunities simply because whites discriminated against blacks there in the past.[368]

Such anomalies exemplify the problem. Admittedly, public school desegregation already has encountered legal difficulties and public hostility. A community like Berkeley, openly dedicated to the concept of educational equality, appreciates the precarious position of desegregation in other parts of the nation and understands the possible impact of court-approved racial separation of any kind. Nonetheless, educational experimentation must not come to a standstill because of apprehensions that the legal justifications for it might be misused. Whatever the political merits of caution and compromise, the educational and social values promoted by Black House and Casa are of overriding importance.*

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367. *See* Part IV(A) *supra.*

368. Alternatively, what would be the legally appropriate response to the establishment of a "White House" in any school district—even Berkeley? Clearly in such a context the cumulative justification advanced for Black House and Casa would at most be only partially applicable.

* *Editors' Note*: As this Comment was in final stages of preparation for publication, we learned that Black House and Casa de la Raza have been temporarily discontinued, pending negotiations between the Berkeley school system and HEW. *See* Berkeley Daily Gazette, June 20, 1973, at 1, col. 8. Whether the schools continue as previously constituted or in modified form is at this time uncertain. The actions in Berkeley have not squarely addressed, and thus leave unresolved, the constitutionality of such programs and their viability under the Civil Rights Act. The analysis of these issues presented by Ms. Appleton's Comment provides an instructive framework for the continuing debate of these questions. Indeed, the actions of the school system and HEW may be precursors of the type of litigation suggested by the Comment in Part IV, which litigation would presumably address the subject matter of the foregoing Comment directly.