February 9, 2013

"Nixon's sabotage": How Politics Pushed the "Discriminatory Purpose" Requirement into Equal Protection Law

Danieli Evans, *Yale Law School*

"Nixon's sabotage": How Politics Pushed the "Discriminatory Purpose" Requirement into Equal Protection Law

Abstract: This article describes the way that politics—resistance from the elected branches coupled with President Nixon appointing Chief Justice Burger—shaped the Court's unanimous decision in *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1 (1971), a school desegregation case that played a crucial role in limiting the forms of state action considered unconstitutional discrimination. Chief Justice Burger defied longstanding Supreme Court procedure to assign himself the majority opinion even though he disagreed with the majority outcome. Justice Douglas alleged that he did this "in order to write Nixon's view of freedom of choice into the law." Justice Burger's opinion laid the foundation for limiting constitutional remedies to segregation caused by *deliberate* (invidiously motivated) state action, rather than segregation caused by state action that inadvertently or indifferently reinforced private segregated patterns, as the majority preferred. But the majority assented to Justice Burger's opinion because they feared a split decision would fuel already powerful opposition from President Nixon and Congress. The *Swann* decision was cited throughout subsequent cases leading to the contemporary settlement that Equal Protection prohibits only actions taken "because of," and not merely "in spite of," foreseeable adverse effect on a minority group. *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

The *Swann* decision provides an opportunity to evaluate whether political compromise corrupts, or is a legitimate component of, the Court's constitutional decisionmaking. Should *Swann* be seen as a less legitimate constitutional decision because the unanimous opinion reflects a compromise to appease the elected branches, rather than the majority's independent reading of the Constitution? Or is *Swann* a successful example of democratic constitutionalism, where popular movements properly informed the constitutional line drawn by the Court? *Swann* may well represent the best constitutional outcome—taking account of popular values in order to preserve the authority of the Court and the Constitution. But this raises an additional consideration: If it is legitimate for popular political values (distinct from the Court's own political values) to influence a constitutional decision, should the Court candidly acknowledge this influence? This suggestion is contrary to common sentiment that a Court must deny political considerations in order to preserve the legitimacy of its decisions. But legitimacy in a democracy is associated with candor, transparency, accountability, public understanding, and engagement. And it seems that acknowledging when political preferences inform a decision would enhance the public's understanding of why their law is what it is. By raising these questions I hope to prompt further inquiry into whether it might be possible to move toward norms for judicial opinion writing that more accurately capture the interplay between courts and politics, enabling the public to better understand and participate in the development of their law.

Table of Contents

I. Introduction

The objectives of this paper are threefold: First, relaying how Justice Burger manipulated the *Swann* opinion, according to Justice Douglas, in order to "write Nixon's view of freedom of choice into the law." [1] Second, I illustrate the significance of Justice Burger's opinion for the *Swann* Court, as it was relied upon in subsequent decisions limiting the scope of unconstitutional discrimination. Third, I question whether the political influence in *Swann* compromised the legitimacy of the decision, or if it instead represents a successful example of democratic constitutionalism. On one view, judicial review is legitimate because the Court independently guards enduring constitutional principles against short term political fluctuation; and this function is compromised when politics influences the outcome of a case.[2] Alternatively, *Swann* might be seen as a successful example of democratic constitutionalism—to preserve its legitimacy, the Court must take account of contemporary public values expressed through popular movements, the elected branches, and judicial appointments when interpreting the Constitution.[3] If this political compromise was the best outcome in *Swann*, it raises another important question: Whether, in a case like *Swann*, the Court should candidly reveal the political considerations that informed its decision. One could argue that the decision is not corrupt because of political influence on the Court, but nonetheless lacks legitimacy because the Court did not candidly convey the real basis for its decision. I hope to provoke thought about how norms of judicial opinion writing might be modified to more accurately reflect

[1] MELVIN I. UROFSKY, THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS, 179-80 (1987).
[2] JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).
[3] *See, e.g.*, Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1343 (2006) (Explaining how democratic constitutionalism is a process whereby popular movements infuse constitutional law with contemporary normative values, preserving law's relevance and authority).

how popular preferences expressed through the elected branches influence Court's decisionmaking process, so that the public might better understand and participate in the development of their law.

II. Controversy between Elected Branches and the Courts Leading Up to *Swann*:

During the late 1960s and early 1970s, President Nixon was charged with a complicated balancing act: The public had "extraordinary expectations" for progressive equality after *Brown v. Board of Education*[4] and the Civil Rights Acts, recognized as great triumphs of the preceding decade.[5] But executing these commitments required the Nixon administration to intervene in traditional spheres of private, local autonomy unlike the government had done before. Communities throughout the country were outraged by court orders that required bussing students between school attendance zones, and deprived parents the choice of where to send their children to school.[6]

At the same time, the Court was called upon to define what forms of state action amounted to unconstitutional segregation. It was plain following *Brown* that states could not legally mandate separation of the races. And in *Green v. County School Board*, the Court found that a Virginia county's "freedom of choice" policy that allowed students to elect to transfer between what had previously been the official "black" school and the official "white" school, was unconstitutional because it had the obvious effect of

[4] 347 U.S. 483 (1954).
[5] Lawrence J. McAndrews, *The Politics of Principle: Richard Nixon and School Desegregation*, 83 J. NEGRO HIST. 187, 188 (1998) ("If he succeeded, he could help accelerate the considerable progress the Country was making in race relations… If he failed, he might help alienate a generation of Americans from their leaders."). For further discussion of President Nixon's policies on civil rights, see DEAN KOTLOWSKI, NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY (2001).
[6] McAndrews, *supra*.

maintaining an identifiable "white school" and "black school."[7] The school authorities unconstitutionally placed the burden of desegregation on private individuals—parents and children electing to transfer.[8]

Courts following *Green* found state action that tacitly reinforced segregated patterns, like *Green's* "freedom of choice" policy, to be unconstitutional even if the school officials did not adopt the policy with the deliberate purpose of preserving segregation.[9] Finding unconstitutional state action where the District of Columbia's school zoning reinforced segregated residential patterns, the district court explained: "We firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." [10] When the Court of Appeals for the D.C. Circuit affirmed this decision, Judge Burger dissented, quoting commentators who criticized the decision's "unclear basis in precedent, its potentially enormous scope, and its imposition of responsibilities which may strain the resources and endanger the prestige of the judiciary."[11]

Parents objected to court orders denying parents the choice of sending children to local neighborhood schools, since many families located their residences based on

---

[7] 391 U.S. 430, 441 (1968) In the three years that the county's freedom of choice plan had been operating, not a single white child has chosen to attend the formerly "black" school and only 115 black children enrolled in formerly "white" school, leaving 85% of the black students attending the "black" school. *Id.*

[8] *Id.*

[9] Ian Haney Lopez, *Intentional Blindness: The Entwined Origins of Colorblindness and Discriminatory Intent*, U.C. Berkeley Public Law Research Paper No. 1920418, 11 (August 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920418## ("During the civil rights era, the Court investigated discriminatory motives by drawing inferences about governmental purposes from the larger context while avoiding direct inquiries into individual mindsets. Sometimes this inferential process reflected little more than judicial notice of race relations."); Diamond, *supra*, at 8.

[10] Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967).

[11] Smuck v. Hobson, 408 F.2d 175, 196-97 (D.C. Cir. 1969)(Burger, J. dissenting) (citing Note, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, 81 HARV. L. REV. 1511, 1515 (1968); *Hobson v. Hansen: The De Facto Limits on Judicial Power,* 20 STAN. L. REV. 1249, 1267 (1968); Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 592, 594, 595 (1968)).

proximity to a desired neighborhood school. In early 1970, Southern Senators John Stennis and Strom Thurmond introduced amendments to a pending education bill that would prohibit bussing students from one district to another to achieve integration, and that would guarantee Southern parents had "freedom of choice" as to the schools that their children were sent to.[12] Senator Stennis declared that "[p]arents are not going to permit their children to be boxed up and created and hauled around the city and the country like common animals."[13] Senator Stennis had also introduced an amendment that would prohibit students from being assigned to a school "on account of race, creed, color, or national origin or for the purpose of achieving equality in attendance…at any school of persons of one or more particular races."[14] This language was based on a law that had already been adopted by the New York state legislature. Senator Thurmond spoke in support of this amendment, arguing that it "would prevent our schools from becoming the laboratories of social reformers and race-obsessed judges."[15]

Stennis also proposed an amendment requiring that school desegregation standards "be applied uniformly in all regions of the United States without regard to the origin or cause of such segregation."[16] Stennis was pushing for desegregation to be ordered to the same degree in Northern jurisdictions. He thought it unfair that Northern cities got away with segregated attendance patterns merely because they had not officially segregated students. Northern school officials had also constructed new schools in the center of residentially segregated suburbs and inner cities, and assigned students to attend their "neighborhood" schools. Several race-liberal senators from the North voiced

[12] Warren Weaver, Jr., *South's Senators Seek Bussing Ban in Fund Measure*, N.Y. TIMES 1 (Feb. 6, 1970).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Warren Weaver, Jr., *Ribicoff Attacks Schools in North; Supports Stennis*, N.Y. TIMES 1 (Feb. 10, 1970).

support for Stennis's uniformity amendment; one argued that "Northern communities have been as systematic and consistent as Southern communities in denying to the black man and his children the opportunity that exists for white people."[17] The uniformity amendment passed in the Senate, and there was outrage from parents and school administrators throughout the country. Officials in Northern cities complained of the economic infeasibility of bussing that desegregation would require, and the Senate Republican Minority leader said that the policy was either "unconstitutional or unenforceable" and it would not become law.[18] The Washington Post observed that Congress "seems sure this year to finally pass an anti-integration amendment."[19]

Yale Law School professor Alexander Bickel published a well known article in the New Republic, in which he argued that court ordered desegregation bussing was detrimental because it encouraged white flight—white families moving further away to suburban counties outside of central school districts covered by integration orders, or placing their children in private schools. Bickel argued that "nothing seems to be gained by driving the process to the tipping point of resegregation."[20] Bickel cited an example of an Oklahoma high school student that was arrested for defying a federal court's desegregation order which would have required him to transfer from a school a few blocks from his home to one four miles away. After the student was detained by federal marshals for attempting to remain at his neighborhood school, an Oklahoma city councilman issued a statement that "[t]he people of Oklahoma are fed up with forced

[17] *Id.*
[18] Associated Press, *Massive, Costly Busing Cited in Northern Cities*, THE HARTFORD COURANT 21D (Feb. 20, 1970).
[19] Rowland Evans & Robert Novak, *Integrationists at HEW Losing Fight For Full Administration Support*, THE WASHINGTON POST A17 (Feb. 18, 1970).
[20] Alexander M. Bickel, *Desegregation: Where Do We Go from Here?*, THE NEW REPUBLIC 20, 22 (Feb. 7, 1970).

busing and federal court orders running our schools. We demand an end to this madness."[21] Bickel concluded that "[m]assive school integration is not going to be attained in this country very soon, in good part because no one is certain that it is worth the cost."[22]

President Nixon responded to this public outrage by delivering a statement on forced bussing on March 24, 1970. President Nixon cited Bickel's article and stated that "serious problems are being encountered both by communities and by courts in part as a consequence of th[e] accelerating pace" of school desegregation.[23] President Nixon proposed a principle that would limit desegregation orders:

> [i]n determining whether school authorities are responsible for existing racial separation—and thus whether they are constitutionally required to remedy it—the *intent of their action* in locating schools, drawing zones, etc., is a crucial factor...[W]here this racial separation has not been caused by *deliberate* official action [] school authorities are not constitutionally required to take any positive steps to correct the imbalance.[24]

Nixon's speech established the President was on the side of Congress and public opinion in what the Washington Post described as "a potential constitutional crisis of Congress (heavily backed by popular opinion) vs. the courts."[25] This was reinforced later that summer, when the President "eased Robert Finch, a close friend who was then

[21] *Id.* at 21-22.
[22] *Id.* at 22.
[23] President Richard Nixon, Statement About Desegregation of Elementary and Secondary Schools (March 24, 1970) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=2923#ixzz1nJxJwZO5.
[24] *Id.* Nixon also denounced busing: "I have consistently expressed my opposition to any compulsory busing of pupils beyond normal geographic school zones for the purpose of achieving racial balance," and criticized the practicality of judicial decisions ordering integration: "some rulings…would divert such huge sums of money to noneducational purposes, and would create such severe dislocations of public school systems, as to impair the primary function of providing a good education." *Id.*
[25] Evans & Novak, *supra*, note 19.

Secretary of Health, Education and Welfare, out of his job, in part for pressing too hard on integration."[26]

III. The *Swann* Decision

Swann made its way to the Court during the summer of 1970, months following Nixon's desegregation speech. The district court had ordered a desegregation plan for the entire county of Charlotte-Mecklenburg, North Carolina—the 43rd largest school district in the nation, spanning 550 square miles, and serving more than 84,000 pupils in 107 schools.[27] The plan reorganized the county's elementary, middle, and senior high schools in order to shift many students from schools that were 100% black or white into schools that reflected the racial composition of the entire county of Charlotte-Mecklenburg, North Carolina, which was about 70% white and 30% black. Contrary to President Nixon's speech, the district court issued this desegregation order even though it did *not* find that present school authorities were deliberately segregating students. The court explained that "[t]he observations in this opinion are *not* intended to reflect upon the motives or the judgment of the School Board members," [28] and emphasized that the Charlotte-Mecklenburg school board had "achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and … exceeded the performance of any school board whose actions have been reviewed."[29] The court even noted that "[t]he Charlotte-Mecklenburg schools in many respects are models for others."[30] Despite

[26] *The Administration: Bus Stop*, TIME MAGAZINE, Aug. 16, 1971, *available at* http://www.time.com/time/magazine/article/0,9171,877186,00.html#ixzz1nKTw4XV9.
[27] *Swann*, 402 U.S. at 6-7 (1971).
[28] Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F.Supp. 1358, 1372 (W.D. N.C. 1969).
[29] *Id.*
[30] *Id.*

suggesting the absence of deliberate, invidiously motivated segregation, the court found a in that the board had unconstitutionally acquiesced in reinforcing private segregation:

> The manner in which the Board has located schools and operated the pupil assignment system has continued and in some situations accentuated patterns of racial segregation in housing, school attendance and community development. The Board did not originate those patterns; however, now is the time to stop acquiescing in those patterns.[31]

The court of appeals upheld all but one technical portion of the district court's order, which it found unreasonably imposed "extensive additional bussing" of over nine thousand elementary school students.[32]

Justice Burger recognized the importance of the *Swann* case, breaking from ordinary procedures at the outset. Before Justice Burger, the Court had consistently adhered an opinion assignment policy whereby each justice voted for their preferred outcome, and the most senior justice in the majority-supported outcome would assign the opinion to the member of the majority. The Chief Justice would only assign the majority opinion if he was in the majority.[33] This assured that the supporters of the outcome could choose an author who would best represent their position.

But in the first conference following the *Swann* oral argument on October 16, 1970, where the Justices would normally discuss and vote on the cases, Justice Burger said that the *Swann* case was "so important" he wanted to reserve it for a "special

---

[31] *Id*.
[32] Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138, 147 (4th Cir. 1970).
[33] This convention has been well documented. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 507 (2005); LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 97-98 (1999); BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES, 45 (1996); BERNARD SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT (1986); UROFSKY, *supra* note **Error! Bookmark not defined.**, at 185; Kaitlyn Sill, Joseph Ura, & Stacia Haynie, *Strategic Passing and Opinion Assignment on the Burger Court*, 31 JUST. SYS. J. 2, 164 (2010); Timothy Johnson, James Spriggs, & Paul Wahlbeck, *Passing and Strategic Voting on the U.S. Supreme Court,* 39 LAW & SOC. REV. 2, 349, 371 (2005).

Conference" on the next day.[34] Then, on the next day Justice Burger stated that the case was so important that he wanted to "dispense with the ordinary procedures." Justice Brennan's clerks recall that Burger "felt that it would be best to just have a roundtable discussion without a formal vote and let everyone air their views on the matter."[35] At this special round-table discussion, "[t]he only thing that was pretty clear was that there was a lot of support for [the district court's order], and that it was possible that there was sufficient strength to affirm him," however "no vote was taken."[36]

Coming out of this October 17 conference, Justice Douglas had seen himself as the most senior justice in the majority in support of affirming the district court, along with Justices Brennan, Marshall, Stewart, Harlan, and White, and expected to be responsible for assigning the majority opinion.[37] But Justice Burger put the case off for over a month, instructing the other Justices that the Court would not decide the matter before holding another special conference on December 7, 1970, in which everyone would submit their views in written form. At the December 7 conference, "[a]gain, there was no vote taken but the sentiment was in favor of affirming [the district court order]."[38]

All of the Justices were surprised when on December 8, the day following the second conference, Justice Burger circulated a full draft of the opinion, which he must have been preparing long in advance. Justice Burger's opinion vacated the district court's order, rather than affirming it.[39] Justice Douglas sent an angry memo to the Court: "[t]he case obviously was for me to assign and I would have assigned it to Stewart. To our

[34] Opinions of William J. Brennan, Jr. October Term 1970 Case History XXVII-XXVIII (on file with author and the Brennan Papers at the Library of Congress Manuscripts and Archives [Box I:242, No:70-281]).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*

surprise the Chief Justice assigned it to himself, using the artifice of not actually casting a vote. But he took it to write Nixon's view of 'freedom of choice' into the law."[40] Justice Brennan described these as Justice Burger's "phony votes"-"reserving" his vote in order to place himself into the majority when he agreed with the dissent.[41] According to Douglas, this was "an action no Chief Justice in my time would ever have taken." [42] He argued that "[w]hen the minority seeks to control the assignment, there is a destructive force at work in the Court. When a Chief Justice tries to bend the Court to his will by manipulating the assignments, the integrity of the institution is imperiled."[43] It appears that Justice Burger is the only Chief Justice to ever deviate from the Court's longstanding assignment practice in this way.[44]

"[T]he six were astounded" by the draft of Justice Burger's sudden *Swann* opinion, especially since it was contrary to majority's twice-voiced preference for affirming the district court. Justice Brennan's clerks lamented that "[t]he whole opinion was conciliatory to Southern School Boards, describing their efforts to meet *Brown*'s

---

[40] UROFSKY, *supra* note **Error! Bookmark not defined.**, at 179-80.
[41] WOODWARD & ARMSTRONG, *supra* note 33, at 507. Justice Brennan stated that Chief Justice Warren, in contrast to Justice Burger, had 'played fair': he rarely passed on cases, and almost always asked the most senior justice in the majority to assign it. *Id.*
[42] *Id*.
[43] *Id*.
[44] Political scientists have empirically documented Justice Burger's practices: One study found that out of 750 randomly selected cases from the 1971-85 terms, Justice Burger passed on voting 78 times. His passing on voting at conference was positively correlated with (a) the political salience of the opinion, and (b) the likelihood that it would be assigned to a writer closer to his conservative side of the ideological spectrum. Kaitlyn Sill, Joseph Ura, & Stacia Haynie, *Strategic Passing and Opinion Assignment on the Burger Court*, 31 JUST. SYS. J. 2, 164 (2010); Timothy Johnson, James Spriggs, & Paul Wahlbeck, *Passing and Strategic Voting on the U.S. Supreme Court*, 39 LAW & SOC. REV. 2, 349, 371 (2005). In cases where Justice Burger voted up front with the rest of the conference and did not "reserve" his vote, he voted for liberal outcomes in 33.1% cases; however in cases where he passed on voting, he retroactively voted for liberal outcomes 52.1% of the time, and then assigned who would write the opinion. Political scientists have found that Rehnquist "did not systematically assign opinions to his closest allies" and instead prioritized organizational concerns: equal distribution of opinions and efficiently managing workloads when assigning opinions. Wahlbeck, *supra* note **Error! Bookmark not defined.**, at 1748-49

requirements as 'valiant.'... The main point, however, was that the cases were to be remanded for reconsideration."[45]

Justices in the majority responded to Justice Burger's draft: Justice Douglas explained that "the present location of white schools in white areas and black schools in black areas is the result of a varied group of elements of public and private action, all depriving their basic strength originally from public law or state or local government action."[46] Douglas explained that it was "apparent and predictable" that "in Charlotte a neighborhood tends to be a group of homes generally similar in race and income."[47]

Justice Brennan responded the "entire tone" of the draft was "undesirably negative." On Justice Brennan's view, "[w]here a school is attended exclusively or predominantly by Negro children, and where this attendance pattern is maintained in the face of feasible alternatives which would produce a more integrated student body," the state was culpable for reinforcing segregation: "If a higher degree of integration is easily achievable, to stop at a lower degree will be to adopt a state policy that encourages segregation."[48]

Justice Stewart circulated a draft dissent finding that "the Court below found evidence which by any conceivable standard is more than adequate to show deep involvement of the school board itself in the maintenance of a segregated school

[45] *Brennan Case History*, *supra* note 34, at XXIX.
[46] Letter from Justice Douglass to Justice Burger 2 (December 10, 1970) (on file with author and the Brennan Papers at the Library of Congress Manuscripts and Archives [Box I:242, No:70-281]).
[47] Justice Douglas Draft Dissent in Swann v. Charlotte-Mecklenburg 6-8 (Jan. 13, 1971) (on file with author and the Brennan Papers at the Library of Congress Manuscripts and Archives [Box I:242, No:70-281]).
[48] Letter from Justice Brennan to Justice Burger 3 (December 30, 1970)(on file with author and the Brennan Papers at the Library of Congress Manuscripts and Archives [Box I:242, No:70-281])(emphasis added).

system."[49] Justice Stewart explained why the state's neighborhood school assignment policy amounted to unconstitutional state action:

> The theory put forward is that where the racial composition of student bodies is the product of a 'color blind neighborhood zoning plan,' it is immune from constitutional attack. This is said to be true even where such a 'desegregation plan' results in practice in the same basic pattern of attendance that prevailed under the system of state-imposed segregation. *** A public school system is not built in a day; it is not built in isolation from the community around it. As a school system takes shape through innumerable decisions by hundreds of educational and noneducational officials acting in many different capacities, it acquires a formidable stability and imperviousness to change. Practices, predispositions, and attitudes build up in administrators, teachers, children, parents, and local noneducational officials, and come to be independent of particular administrative regulations or legal rules. At times, these may be strong enough to survive conscious decisions for change by those in positions of responsibility.[50]

Justice Stewart's draft dissent was in line with his majority opinion that same term in *Wright v. City of Emporia,* where the court found a town's decision to secede from a school district unconstitutional because it would preserve segregation, even though it had not been proven that the town's purpose was maintaining segregation.[51] Justice Stewart's opinion explained "it 'is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the … choices of a school board." [52] Because "an inquiry into the 'dominant' motivation of school authorities is as irrelevant as it is fruitless… [t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect."[53]

---

[49] Justice Stewart Draft Dissent in Swann v. Charlotte Mecklenburg 12-13 (February 1970) (on file with author and the Brennan Papers at the Library of Congress Manuscripts and Archives [Box I:242, No:70-281]) (emphasis added).
[50] *Id.*
[51] Wright v. Council of City of Emporia, 407 U.S. 451, 462 (1971).
[52] *Id.* at 465-66.
[53] *Id.*

Taking this same view, Justice Stewart's draft dissent in *Swann* describes an entrenched system of discrimination that survives beyond the intent or purpose of any single entity: "practices, predispositions, and attitudes" build up among administrators and private individuals, were expressed through "innumerable decisions by hundreds of educational and noneducational officials acting in many different capacities," and "may be strong enough to survive conscious decisions for change by those in positions of responsibility." In both the district court's view and Justice Stewart's draft, it was enough that racial separation has been perpetuated by state action, regardless of whether that action was taken with the purpose of segregating.

Justice Stewart's draft dissent brought about the "first real break in the case," as Justices Douglas and Brennan encouraged him to turn into a majority opinion, explaining he'd have a court for it "overnight."[54] They were confident that Marshall and Harlan would join, and probably White, as well, bringing them to a majority of six for affirming.[55] Meanwhile, Justice Burger had circulated a second draft that "kept the same conciliatory, negative tone that the first draft had assumed, and most importantly, [the district court] was still to have the case remanded to him for further action not inconsistent."[56]

When Justice Burger learned that Justices Douglas and Brennan had encouraged Justice Stewart to turn his draft dissent into a majority opinion, he told Justice Stewart that he realized the district court order "had to be affirmed," and that he would modify his opinion to make it a unanimous opinion affirming the district court.[57] This presented

[54] UROFSKY, *supra* note **Error! Bookmark not defined.**, at 131.
[55] *Brennan Case History*, *supra* note **Error! Bookmark not defined.**, at XXXV.
[56] *Brennan Case History*, *supra* note **Error! Bookmark not defined.**, at XXXV.
[57] *Id.*

those supporting Justice Stewart's opinion (Stewart, Douglas, Brennan, Marshall, Harlan, and possibly White) with a difficult choice: Either pursue a narrow majority of five or six in support of Stewart's opinion, and risk the likelihood of Burger, Black, and Blackmun dissenting; or accept Justice Burger's self-assigned opinion in order to generate a unanimous decision affirming the district court.

President Nixon's criticism of court ordered desegregation, and specifically the integration order in *Swann,* "exacerbated" the perception that "for political reasons, the members of the majority desperately needed a unanimous opinion, … and dissenting opinions would only increase the possibility of militant opposition." [58] This lead the other Justices to go along with Justice Burger's opinion.

After seven drafts Justice Burger produced an opinion that all Justices would join. While the final opinion affirmed the district court's order, the language of Justice Burger's opinion is materially different from Justice Stewart's draft. Justice Burger's description of unconstitutional state action excludes state action that significantly reinforces or maintains private segregation, but is not necessarily deliberate or contrived to do so. The subtle but important difference in the tact taken by Justice Burger is captured by the lines from President Nixon's March 1970 speech: that courts should not order measures to correct racial separation that has "not been caused by *deliberate* official action."[59]

[58] EARL M. MALTZ, THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969-1986 179-180 (2000) (observing that the imperative for unanimity in *Swann* lead to 'substantial concessions').
[59] Recall that Nixon's 1970 Desegregation Statement said: "In determining whether school authorities are responsible for existing racial separation--and thus whether they are constitutionally required to remedy it--the *intent* of their action … is a crucial factor. … [W]here this racial separation has not been caused by *deliberate* official action [] school authorities are not constitutionally required to take any positive steps to correct the imbalance." *Statement on School Desegregation*, *supra*, note **Error! Bookmark not defined.** (emphasis added).

Justice Burger's description of unconstitutional state action lists scenarios where officials act with the calculated, conscious goal of separating students by race: Choices about closing and opening schools "have been *used as a potent weapon* for creating or maintaining a state-segregated school system." Since *Brown*, authorities have built schools "*specifically intended"* for black or white students, they "closed schools which appeared likely to become racially mixed," and built new schools in white suburban neighborhoods, furthest from black population centers "*in order to* maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.'"[60] This discussion suggests, without saying, that the district court's integration order is founded on Charlotte officials having deliberately segregated students. At the time the decision was handed down, Professor Owen Fiss explained that *Swann* "added a another ingredient" to the constitutional analysis by "focus[ing] attention on the board's past wrongdoing," finding "a causal connection between the Board's past discrimination and present segregation," and on this basis "attribut[ing] responsibility to the Board for the segregation."[61] But the way that Justice Burger's opinion attributes invidious motives to the Charlotte authorities is contrary to the district court's opinion, which disclaimed any judgment about the motives of school officials, and instead noted that they were making commendable efforts at desegregation. Fiss noted this, also, explaining that while the court "emphasized the role that past discriminatory conduct might have played in causing th[e] [segregated] patterns," this finding "involve[d] significant elements of conjecture."[62]

---

[60] *Swann*, 402 U.S. at 21.
[61] Owen M. Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 700 (1971).
[62] *Id.*

Focusing on school authorities' intent as the determining factor, Justice Burger's opinion says that school officials may establish that one race, or predominately one race, schools are constitutional by showing "that their racial composition is not the result of present or past discriminatory action *on their part.*"[63] To the contrary, Justice Stewart's draft did not look to intent as determining whether state involvement in segregation was unconstitutional. Stewart explained that the school system "is not built in isolation from the community around it," that segregation may result from the confluence of attitudes of private individuals compounded by hundreds of diffuse official decisions taking place over time and building up imperviousness to change. Stewart implies that this amounts to unconstitutional state involvement in segregation even if "those in positions of responsibility" had good intentions, or made "conscious decisions for change."

Justice Stewart's draft considers as part of the constitutional violation the way that official decisions interplay with, and reinforce or embellish, the private attitudes of children and parents. Justice Burger's description of a constitutional violation expressly exonerates state authorities from responsibility for incidentally reinforcing the private actions and attitudes of students and parents: "[o]ur objective in dealing with the issues presented by these cases … does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."[64] And while Justice Stewart's description of unconstitutional state action included the decisions of both educational and non-educational officials (e.g., residential planning and zoning officers), Justice Burger excludes actions of non-educational officials: "The elimination of racial discrimination in public schools is a large

[63] *Swann*, 402 U.S. at 26 (emphasis added).
[64] *Swann*, 402 U.S. at 21.

task and one that should not be retarded by efforts to achieve broader purposes lying *beyond the jurisdiction of school authorities*. One vehicle can carry only a limited amount of baggage."[65] Contrary to Justice Stewart's statement that a school system is not built in isolation from the community around it, and therefore cannot be evaluated in isolation of how it relates to or builds upon the surrounding community, Justice Burger's opinion creates a caveat for resegregation caused by private discrimination: "it does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so."[66] And if private movements result in more segregation, "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary."[67]

IV. Equal Protection Doctrine Following *Swann*

To illustrate the significance of Justice Burger's focus on deliberate official action, I will describe how *Swann's* focus on purpose introduced the foundation for the contemporary "doctrine of discriminatory purpose" articulated in *Feeney*, that unconstitutional discrimination must be taken "'because of,' not merely 'in spite of' its adverse effects on an identifiable group."[68] *Feeney* solidified the Court's contemporary understanding of constitutional equality law; that "the Constitution permits the state to act

[65] *Id.*
[66] *Id.* at 31.
[67] *Id.* at 32.
[68] Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 274 (1979); Several accounts describe how the "doctrine of discriminatory purpose" articulated in *Feeney* limited constitutional remedies for policies that reinforce or perpetuate gender and racial stratification. But they do not trace its origins back to *Swann*. *See* Reva Siegel, *Why Equal Protection No Longer Protects*, 49 STAN. L. REV. 1111 (1997); Lopez, *supra* note 9.

in ways that perpetuate, or even aggravate, the racial stratification of American society; it is only race-based state action or state action animated by racially discriminatory purposes that violates tenets of equal protection."[69] I do not suggest that Justice Burger's *Swann* opinion held as much. Indeed, at the time it was decided *Swann* was viewed as pro-integration.[70] But the cases following *Swann* illustrate that the opposite is true.

In 1972, the Fourth Circuit relied on *Swann* to conclude that a district court's desegregation order spanning Richmond and surrounding counties exceeded the scope of constitutional remedies[71]:

> *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. 2d 554 (1971), established limitations on [the court's] power to fashion remedies in school cases.*** We are convinced that what little action, if any, the counties may seem to have taken to keep blacks out is slight indeed compared to the myriad reasons, economic, political and social, for the concentration of blacks in Richmond and does not support the conclusion that it has been *invidious state action* which has resulted in the racial composition of the three school districts… That there has been housing discrimination in all three units is deplorable, but a school case, like a vehicle, can carry only a limited amount of baggage. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 24, 91 S.Ct. 1267, 28 L.Ed.2d 554.[72]

An equally divided Supreme Court issued a *per curiam* order affirming this ruling.[73]

The Court relied on *Swann* in its first case addressing a desegregation order in a Northern city, where there had never been laws mandating segregation. In *Keyes v.*

---

[69] Siegel, *Why Equal Protection No Longer Protects*, *supra*, at 1131.
[70] Fiss, *supra* note 61. Fiss acknowledged that *Swann* made purpose central by granting the school board the opportunity to show that the segregated schools are "not caused by its discriminatory action and that it is therefore not responsible for segregation." *Id.* at 701. But he predicted that the distinction between the school board's purpose and the effect of their actions is likely to become blurred, and that state authorities would have a difficult time disproving discriminatory motives. *Id.*
[71] Richmond v. Bradley, 412 U.S. 92 (1973).
[72] Bradley v. School Board of City of Richmond, 462 F.2d 1058, 1060 (4th Cir. 1972).
[73] Richmond v. Bradley, 412 U.S. 92 (1973).

School District No. 1,[74] the lower court had ordered desegregation throughout the Denver school system based on the finding that authorities in *one central portion* of the district had deliberately gerrymandered attendance zones for the purpose of segregating students. The school board argued that the district court exceeded the permissible scope of a desegregation order by incorporating outer areas of the district, beyond the core zone where authorities had been shown to act with invidious motives. The Solicitor General's brief quoted language from *Swann* to argue that the court could not order desegregation beyond the core-zone without providing the opportunity for school officials in the outer areas "to establish that the present segregated condition of schools … 'is not the result of present or past discriminatory action *on their part*.'"[75]

Justice Brennan wrote for the Court. The opinion very clearly limits unconstitutional state action to segregation caused by deliberate official action. In determining the existence of unconstitutional segregation attributable to state action, or *de jure* segregation, the Court "emphasize[d] that the differentiating factor…to which we referred in *Swann* is purpose or intent to segregate."[76] The *Keyes* Court held that once authorities in the central portion of the school district were shown to have committed invidious discrimination, there was a rebuttable presumption that those in the surrounding areas also acted with illicit motives, since "there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in

[74] 413 U.S. 198 (1973).
[75] Brief for the United States at 11, Keyes v. School District No. 1, 413 U.S. 198 (1973) (quoting *Swann*, 402 U.S. at 26) (emphasis in original).
[76] *Keyes*, 413 U.S. at 208 (citing *Swann*, 402 U.S. at 17-18).

other areas of the system."[77] Authorities could negate the basis for a remedy in outer portions of the system by proving that "their actions as to other segregated schools within the system were not also motivated by segregative intent."[78]

Keyes illustrates how limiting judicial remedies to the invidious motives of state actors met the public values at stake in the controversy over Stennis's uniformity legislation, which undoubtedly informed Nixon's 1970 desegregation speech: Focus on invidious motives applied uniformly to the North, assuaging Stennis's criticism that the South was being picked upon, but it would also capture only a limited number of the many Northern jurisdictions where schools reflected segregated residential patterns. Indeed in subsequent cases addressing Northern jurisdictions, the Court relied on *Keyes* and *Swann* to strike down desegregation orders that went beyond the scope of segregation that had been linked to purposeful discrimination. [79]

In *Washington v. Davis*,[80] the Court relied on *Keyes* (quoting *Swann*) to affirm the discriminatory purpose requirement in the context of employment discrimination. While the police department's verbal skills test had the evident and foreseeable effect of

---

[77] *Keyes*, 413 U.S. at 208.
[78] *Id.*
[79] Milliken v. Bradley, 418 U.S. 717, 738 (1974) ("*Swann* held, the task is to correct, by a balancing of the individual and collective interests, 'the condition that offends the Constitution.' A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '(a)s with any equity case, the nature of the violation determines the scope of the remedy.'") (striking down an integration order that spanned Detroit and neighboring school districts); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986)("This Court [has] focus[ed] on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies.") (citing *Swann*, 402 U.S. 1); Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424, 425 (1976)("Since the post-1971 shifts in the racial makeup of some of the schools resulted from changes in the demographics … due to a normal pattern of people moving into, out of, and around the school system, and were not attributable to any segregative action on the school officials' part, neither the school officials nor the District Court were 'constitutionally required to make year-by-year adjustments of the racial composition of student bodies once … racial discrimination through official action is eliminated from the system.'") (quoting *Swann*, 402 U.S. at 32); Crawford v. Bd. of Educ. of City of Los Angeles, 458 U.S. 527, 537 n.15 (1982)("A neighborhood school policy in itself does not offend the Fourteenth Amendment.") (citing *Swann*, 402 U.S. at 28).
[80] 426 U.S. 229 (1976).

disproportionately excluding black applicants, there was not evidence that the department adopted the test with the invidious purpose of excluding black employees:

> The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is 'a current condition of segregation resulting from intentional state action. The differentiating factor. . . is purpose or intent to segregate.'[81]

In *Arlington Heights*,[82] the Court relied on *Keyes* (quoting *Swann*) and *Davis* (quoting *Keyes*) to conclude that an ordinance prohibiting multi-family housing (apartment complexes and lower income housing) in one area of the city did not amount to unconstitutional state action, even though the ordinance had the obvious effect of excluding black residents from that area of the city. Again the Court emphasized that unconstitutional discrimination required *deliberate* discriminatory official action: Evidence must "reveal[] a series of official actions taken for invidious purposes."[83] The Court explained that this inquiry looked to the specific, subjective goals of the decisionmakers; as it would require presenting statements from decisionmaking bodies' records or testimony from members participating in the decision to establish that "racially discriminatory intent existed."[84]

---

[81] *Id.* at 240 (quoting *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205, 208 (1973) (citing *Swann*, 402 U.S. at 17-18)). *Davis* cites *Keyes* for the proposition that integration remedies are limited by the extent of perpetrators' culpability, and *Keyes* cited *Swann* for that principle.

[82] Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977)("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases, the holding in *Davis* reaffirmed a principle well established in a variety of contexts. E. g., *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 208 (1973).").

[83] *Id.*

[84] *Id.*

In *Personnel Administrator of Massachusetts v. Feeney*,[85] the Court formally limited unconstitutional state action to invidious motives,[86] explaining that "'discriminatory purpose' implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker…selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects on an identifiable group."[87] The *Feeney* Court relied on *Swann* to uphold the constitutionality of a statute that provided employment preferences to military veterans and incidentally excluded a disproportionate number of women. Quoting *Swann*, the Court explained that the "question is whether the adverse effect reflects invidious gender-based discrimination. In this [] inquiry, impact provides an important starting point, but purposeful discrimination is 'the condition that offends the Constitution.'"[88]

Restricting unconstitutional segregation to that "caused by *deliberate* official action" significantly limited cases where segregated school patterns, or any facially neutral state action that entrenched preexisting status inequality, could be found unconstitutional.[89] There are two reasons for this: First, overt, purposeful discrimination had been unlawful for the fifteen years since *Brown* was decided. Officials generally recognized overt prejudice as socially and morally unacceptable, and were unlikely to

---

[85] 442 U.S. 256 (1979).
[86] Reva Siegel, *How Equal Protection No Longer Protects, supra* note 68, at 1134-35; Lopez, *supra* note **Error! Bookmark not defined.**.
[87] *Feeney,* 422 U.S. at 279.
[88] *Id*.
[89] Siegel, *How Equal Protection No Longer Protects*, *supra* note 68, at 1136 ("The Court has thus adopted a working definition of discriminatory purpose that raises a substantial barrier to suits challenging facially neutral state action…Because it is so hard to prove discriminatory purpose under the Equal Protection Clause, most institutions, practices, and values will be constitutionally characterized as race- or sex-neutral."); Theodore Eisenberg & Shed Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?,* 76 CORNELL L. REV. 1151, 1166-67 (1991) (suggesting that the difficulty of showing discriminatory purpose deters plaintiffs, and that annually, on average, only one or two intent-based claims are filed in each federal district).

acknowledge discriminatory intentions. Cognitive dissonance avoidance—an innate psychological drive to perceive ones' own conduct as moral and righteous—disposes individuals to see themselves as moral and non-prejudicial.[90] Studies demonstrate that more often than exhibiting conscious prejudice, individuals embrace principles of equality but nonetheless manifest subconscious or unconscious bias.[91] After deliberate segregation had been declared unlawful, the natural reluctance to see oneself as prejudiced or immoral would likely lead many officials to genuinely envision themselves as assigning students to neighborhood schools amidst residentially segregated neighborhoods for neutral reasons (meeting community demands or protecting the welfare interest of children), rather than consciously understanding themselves as purposefully segregating.

Second, "deliberate official action" assumes that segregation results from specific, isolated decisions made by coordinated decisionmakers, who could operate with one contrived intent or purpose. This is contrary to the way that school systems were developed and administered: As Stewart's draft explained, persistent segregation in the North and South was caused by a confluence of many uncoordinated state officials (some well intentioned, some indifferent, and some perhaps prejudiced) making various decisions that were facially race-neutral (i.e., "freedom of choice" or "neighborhood

[90] Cass Sunstein, *Why Markets Don't Stop Discrimination,* 8 SOC. PHIL. & POL'Y 22, 32 (2008)("The beneficiaries of the status quo tend to [conclude] that the fate of victims is deserved, or is something for which victims are responsible, or is part of an intractable, given, or natural order… The reduction of cognitive dissonance thus operates as a significant obstacle to the recognition that discrimination is a problem, or even that it exists."); Studies find that people are more likely express attitudes viewed as prejudiced when their past behavior has established their credentials as non-prejudiced persons. This illustrates that people want to see themselves as moral and non-prejudiced; and those exhibiting more prejudice are those who tend to see themselves as non-prejudiced. B Monin & D.T. Miller, *Moral Credentials and the Expression of Prejudice*, J Pers. Soc. Psychol. 33-43 (2008).

[91] Faye Crosby, Stephanie Bromley & Leonard Saxe, *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review,* 87 PSYCH. BULL**.** 546 (1980); Charles R. Lawrence *III, The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism,* 39 STAN. L. REV. 317 (1987) (arguing that government practices motivated by unconscious racial bias should violate equal protection)

schools") but interacted with private patterns to preserve and entrench racial stratification. The system was built over time through the decisions of different types of public officials responding in various ways to private pressures without coordinating to act with one concerted purpose or deliberate intent. This is why Justice Stewart's majority opinion that term in *Emporia* shows explained that it is "difficult or impossible" to determine the "sole or dominant motivation" behind the choices of a school board, and this is a "fruitless" inquiry. [92] In several more recent decisions, the Court has acknowledged that "[p]roving the motivation behind official action is often a problematic undertaking"[93] and "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make."[94] In *Emporia* this difficulty was the reason for finding a constitutional violation regardless of the authorities' mental state, since neutral decisions that assigned students to "neighborhood" schools in the midst of segregated neighborhoods undeniably *involved* the state in segregation. These neighborhood assignments blatantly reinforced private residential segregation with the state's power to control school location and attendance zones. In later decisions where the Court has noted the difficulty of proving invidious intent, this is not a reason for looking beyond intent to state involvement as it was in *Emporia*, but simply a reason for denying a constitutional remedy. Today, schools throughout the country are more segregated than they were when *Swann* was decided.[95]

[92] *Id.* at 465-66.
[93] Hunter v. Underwood, 471 U.S. 222, 228 (1985).
[94] Miller v. Johnson, 115 S. Ct. 2475, 2488 (1995).
[95] GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, UCLA, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 23 (2007).

V. Political Influence on Constitutional Decisionmaking

The *Swann* decision was influenced by political pressure: The Stewart majority accepted Justice Burger's opinion because unanimity was crucial in light of resistance from Congress and President Nixon. And Justice Burger was positioned to impose his opinion on the Court because voters, perhaps pushing back against the Warren Court's perceived "judicial activism," elected a president who appointed Justice Burger to Chief and Justice Blackmun to the Court. Because *Swann's* outcome was so clearly influenced by resistance from the elected branches as well as judicial appointments, it presents an opportunity to question the extent that the Court's constitutional decisions rely on independence from political influence in order to maintain legitimacy. I do not purport to answer the questions raised in this discussion about the proper role of political influence on judicial decisionmaking. Rather my objective is to stimulate thought about the degree that judicial decisions should (and perhaps must) bend to political will, in order to preserve legitimacy, and whether courts, in the interest of transparency, intelligibility, and democratic legitimacy, should self-consciously acknowledge political influence on their decisionmaking.

There are two ways to view the *Swann* decision: It could be criticized as an unprincipled political compromise, in which a majority of justices yielded to political pressure and assented to a view of unconstitutional segregation that did not fully capture their view of unconstitutional state action. Constitutional theorists like Herbert Wechsler and John Hart Ely have classically legitimated the authority of courts, as non-democratic decisionmakers, as neutral (politically independent) bodies that apply transcendent principles originating from a fixed constitution, to guard these fundamental principles

against short-term political fluctuation.[96] If the Court is swayed by political pressure in order to reach one outcome or another—here satisfying cries from the elected branches to retreat on desegregation (in particular, bussing)—; it succumbs to politics rather than guarding constitutional principles against political pressure. On this view of legitimation, the majority should have adhered to its independent view that any state action causing segregation—deliberately or incidentally—violated the Constitution, regardless of the political consequences of this ruling. Justice Douglas implies this critique by describing Justice Burger's assignment strategy as "a destructive force" that "imperils" the "integrity of the institution," and characterizing the *Swann* decision as "Nixon's sabotage."

An alternative view is that *Swann* represents the process of democratic constitutionalism functioning properly. The theory of democratic constitutionalism diverges from Wechsler and Ely's view of legitimate court authority, described above, by recognizing that a constitutional court is not outside of the political process, but instead is necessarily and properly influenced by political movements. On the view of democratic constitutionalism, a Constitution represents the Nation's ever evolving sense of identity— its "common body of precept and narrative," its "way of being educated into this corpus," and its "sense of direction or growth…as the individual and his community

[96] E.g, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law* 73 HARV. L. REV. 1 (1959) (arguing that the justification for judicial review requires judicial decisions to "rest on reasoning and analysis which transcend the immediate result"); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (legitimating counter-majoritarian judicial review because courts exercise independent judgment and reasoning to safeguard enduring principles against political fluctuation); Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J. L. &. PUB. POL'Y 137, 137-38 (1994) (describing the pervasiveness of the belief that the Supreme Court's legitimacy derives from the view that its decisions are "dictated by law"); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1342-43 (1995) (suggesting that opening Supreme Court deliberation could undermine judicial independence, but that judicial independence is warranted only if the Court makes legal rather than political decisions.).

work out the implications of their law."[97] In this sense, the Constitution's meaning does, and should, express ever-evolving collective values and norms as they develop through public debate and discourse. The decisions of a constitutional court must reflect political movements in order to preserve the Court's authority and the authority of the Constitution: The Court and the Constitution will only be recognized as legitimate authorities if they express, or at least cohere with, predominant public values.[98]

Popular values influenced the *Swann* decision: the majority for Stewart's draft valued the prospect of a unanimous decision and assented to Justice Burger's opinion because there was such heavy political resistance to their outcome. This resistance was expressed through President Nixon's statements, Congress's proposals to strip courts of authority to order desegregation busing, and Nixon appointing Justice Burger to Chief and Blackmun as a Justice. The other members of the court recognized unanimity as critical to legitimate a decision that may be resisted by the President or Congress.[99] If Justices Burger, Blackmun, and possibly White, had dissented from Stewart's narrow majority they would have criticized Justice Stewart's decision imposed no limits on the extent that lower courts could reorganize school zoning that incidentally perpetuated segregation. They would have likely stressed that the decision implicated many Northern school districts where state officers met local demand to build neighborhood schools in the center of white suburbs, indifferent to (but not intending) racial segregation. This

[97] Robert M. Cover, *The Supreme Court, 1982 Term — Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 12-13 (1983).
[98] Siegel, *Constitutional Culture*, *supra* note 3.
[99] Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court 1948-1958*, 68 GEO. L. J. 1, 73-86 (1979) (explaining the Court's internal efforts to make its unanimity clear to the public); Eric Segall, *The Court: A Talk with Judge Richard Posner*, N.Y. REV. OF BOOKS, Sep. 29, 2011, *available at* http://www.nybooks.com/articles/archives/2011/sep/29/court-talk-judge-richard-posner/?pagination=false (describing Justice Brennan's willingness to compromise in order to reach desired outcomes).

might have fueled support for pending legislation stripping the courts of authority to order busing for desegregation.

If the other justices acquiesced to Justice Burger's self-assigned opinion because political pressure stood behind Justice Burger's view of the law, this can be seen as democratic constitutionalism at work: the way that the Court articulated the Constitution's meaning accounted for contemporary popular values exerted through the political branches. Perhaps this compromise was the best answer in this case: Restricting constitutional remedies to *deliberate* state action excluded ways that state actors most typically caused or reinforced discrimination. But this limitation may reflect evolving popular consensus about how much autonomy private individuals were willing to sacrifice for the sake of integration. The public was only ready to sacrifice individual choice as a means of repudiating invidiously motivated wrongdoing, but not for the broader social project of redistributing educational opportunities. The Court's school desegregation decisions from *Swann* onward capture this compromise.

Understanding *Swann* successful instance of democratic constitutionalism raises another question: should the Court have candidly acknowledged the political considerations informing its decision? Or even relayed the internal struggle over opinion assignment? Might this enable the public and future courts understand a decision like *Swann* more accurately? Criticizing the Court (Justice Brennan in particular) for compromising language in order to make the school desegregation decisions politically palatable, Professor Joseph Goldstein argued that the Court has an obligation, as a counter-majoritarian body, to make its constitutional decisions intelligible to the

public.[100] Goldstein argued that "[i]f understanding had been the goal—as it should have been and Justice Brennan declared that it was—the Court would have explained [that] the language of desegregation replaced the language of integration" in order to placate communities that resisted integration.[101] Goldstein proposed that the Court hold conferences when releasing a constitutional decision in which the justices would explain their understanding of the decision and how it was reached. On Goldstein's account, the justices would not blur the substantive differences between their views or homogenize their reasoning, but elaborate on the process and factors which lead them to reach the final decision.[102] In this view, when, as in *Swann*, the Court (somewhat disingenuously) speaks as though its decision follows from formally applied constitutional principles, rather than practical or political considerations, this obfuscates understanding of the law (which presumably involves understanding *why* the law is what it is). The notion that a court should admit political influence is contrary to popular wisdom that "if, in the interest of candor, the court concedes the consideration of politics in its decisionmaking, then it will lose the legitimacy required to demand adherence to its most controversial decisions."[103] In response to this concern, I would distinguish between acknowledging that the apparent preference of the political branches informed a decision and acknowledging that the Court's own political preferences did. Democratic legitimacy would be impaired if a Court were to suggest that its decision was informed by its own political preferences, that it would be imposing on the public as a counter-majoritarian institution. But I am not suggesting that this should be done, or that this is the case in

[100] JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AND SOMETHING WE THE PEOPLE CAN UNDERSTAND 45-54, 19 (1992).
[101] *Id.* at 52.
[102] *Id.* at 128.
[103] Book Review: *Democracy and Dishonesty*, 106 HARV. L. REV. 792, 794 (1993).

Swann. Nor is this the sort of politics that should inform a constitutional decision under the theory of democratic constitutionalism. The sort of political influence that may be legitimate in the *Swann* decision is not the Court imposing its *own* political preferences, but rather taking account of popular preferences expressed through the political branches; acknowledging that the public resistance clearly indicates popular preference for one outcome or another. If the Court accounts for popular political preferences in its decisionmaking, as opposed to its own political preferences, I question whether acknowledging the influence that public opinion had on the decision would undermine legitimacy. This seems contrary to the general understanding that in a democratic republic, legitimacy is associated with transparency, candor, and public participation in decisionmaking. If anything, it seems as though a Court acknowledging the influence of popular political preferences might lessen anxiety stemming from the counter-majoritarian nature of judicial decisions. One might even imagine the Court writing two alternative forms of its decision in a controversial constitutional case like *Swann*, and submitting the alternative opinions to some form of public approval process—e.g., having Congress vote for its preferred reasoning.[104] It seems that recognizing the influence of popular values (distinct from the Court's own political views) in this way would enhance, rather than undermine, the legitimacy of the Court's constitutional decision, when concerns about legitimacy arise from the fact that the Court's decision is non-democratic.

Because Justice Burger's manipulation of *Swann* exemplifies how politics can influence constitutional decisionmaking, it is an opportunity to question whether this

[104] After all, the Court does not have an absolute monopoly on constitutional interpretation: the Senate, when exercising its advice and consent power, has the "ability to take the pulse of the nation to inform its constitutional judgments," Congress has the power to modify and elaborate on constitutional commitments through legislation enforcing the Fourteenth Amendment enacted pursuant to its Section V power. Neal Kumar Katyal, Legislative Constitutional Interpretation, 50 DUKE L. J. 1335, 1336 (2001).

influence bolsters or undermines the Court's legitimacy, and whether the court should candidly elaborate on popular influence in its decisionmaking. My goal is not to answer these questions, but to prompt further inquiry into whether it might be possible to move toward norms for judicial opinion writing that more accurately capture the interplay between courts and politics, therefore enabling the public to better understand and participate in the development of their law. These are questions of lasting relevance, as the Court is often in tension with the political branches, especially in cases that implicate controversial legislation, such as the Affordable Care Act,[105] the Defense of Marriage Act, and the Voting Rights Act.[106] The public's unsettled sense of whether the Court is and should be influenced by politics is a source of enduring debate, and (perhaps misguided) criticism.[107] It seems this uncertainty in part stems from the public lacking understanding of the interplay between the branches, and it could be mitigated by constitutional decisions that more candidly convey the factors that inform the Court's decisionmaking.

[105] Amy Gardner, *The Supreme Court's Health Care Ruling Could Deal Dramatic Blow to Obama's Presidency*, THE WASHINGTON POST (March 28, 2012), http://articles.washingtonpost.com/2012-03-28/politics/35448554_1_health-care-reform-individual-mandate-health-insurance.
[106] Bruce Ackerman, *The Supreme Court's War on the Twentieth Century*, THE HUFFINGTON POST (January 31, 2013), http://www.huffingtonpost.com/bruce-ackerman/the-supreme-courts-war on_b_2586512.html?view=print&comm_ref=false.
[107] Ezra Klien, *Of Course the Supreme Court is Political*, THE WASHINGTON POST (June 21, 2012).