CONSTITUTIONAL LAW—SCHOOL PERSONNEL—GOVERNMENTAL AGENCY'S COLOR CONSCIOUSNESS IN SELECTION OF SUPERVISORY PERSONNEL NOT UNLAWFUL—*Porcelli v. Titus*, 302 F. Supp. 726 (D.N.J. 1969).

Plaintiffs, ten white teachers employed by the Newark Board of Education, instituted this action under the Civil Rights Act[1] alleging racial discrimination in the Board's appointment of elementary school principals and vice-principals. Plaintiffs sought money damages and a permanent injunction prohibiting the Board from taking any "punitive" action in response to their suit or on account of their race. Plaintiffs' motion for a partial summary judgment was denied and the court directed that a plenary hearing be held on all issues.

The facts were stipulated as follows: On February 1, 1967, the Board entered into an agreement with the Newark Teachers' Association wherein the parties agreed upon a specific personnel promotion procedure.[2] This procedure required that candidates for promotion to administrative positions take oral and written examinations and that the results be listed in numerical priority. All persons promoted to positions of principal, vice-principal and teacher to assist the principal were to be chosen from the ordered list.

On August 22, 1968, Superintendent of Schools, Titus, recommended that the Board institute an entirely new method of promotion.[3] In accordance with this suggestion, the Board suspended the

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1 The Civil Rights Act of 1964, 17 Stat. 13, 42 U.S.C. § 1983 (1964), Civil action for deprivation of rights—

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2 Article X of the contract is the part here in question and reads:

> A. The positions of principal, vice principal, head teacher, department chairman and counselor shall be filled in order of numerical ranking from the appropriate list, which ranking shall be determined by written and oral examinations. Appointments to the position of teacher to assist principal (formally called Administrative Assistant) shall be made annually on a temporary basis if the Superintendent determines that such a position is necessary or desirable, and all appointments to such position shall be made in order of numerical ranking from the appropriate vice principal list if such a list exists.
> B. Such examinations shall be given at regularly scheduled intervals and shall be adequately publicized in every school at least sixty (60) days in advance.

3 The new procedure is as follows:

operation of its rules and abolished the existing procedure. The Board thereafter disregarded the numerical list agreement and made temporary appointments to administrative positions, using the race of the applicants as a criterion.[4]

PROCEDURE FOR ESTABLISHING A POOL OF CANDIDATES FOR PROMOTIONAL POSITIONS

1. Candidates shall submit a formal application.

2. Candidates in order to be eligible for inclusion in the pool shall meet training, experience, and State certification requirements as established for each promotional position. These requirements must be met prior to interview by the screening committee.

The following are minimum experience requirements:

a. For Principals:

Five years of successful contractual teaching experience in the Newark Public Schools, or ten years of successful contractual teaching experience in schools outside of Newark, three years of which shall have been on a recognized administrative level.

b. For Vice Principals, Department Chairmen, and Junior High School Supervisory Assistants:

Three years of successful contractual teaching experience in the Newark Public Schools (with the attainment of tenure).

3. Candidates for the pool shall not be restricted to members of the Newark Public School staff.

4. Candidates shall be screened by a committee composed of:

a. Assistant Superintendent in charge of Personel or a Director on his staff.
b. Assistant Superintendent from the appropriate school level.
c. A Newark school administrator from the appropriate level.
d. An educator from outside the Newark school system.
e. A Newark school teacher from the appropriate school area. No teacher shall serve on a screening committee who is a candidate for promotional position.

5. The screening committee shall recommend to the Superintendent those candidates judged to be worthy candidates for promotion. These successful candidates shall constitute the pool from which promotions shall be made.

6. The criteria for use by the screening committee shall be co-operatively developed by representatives of the N.T.A. and the Superintendent's staff.

7. New candidates shall be selected for the pool once each year in March.

8. The pools shall be in existence for a period of five years from the date of its establishment. At that time this entire procedure will be subject to reevaluation.

9. As a result of negotiations with the N.T.A., it is recommended that all individuals who were on unexpired promotional lists, upon their request, be automatically placed in the pool for the appropriate area without prejudice. It is further agreed that all such individuals will be sent notices to this effect by the Department of Personnel.

10. As a result of negotiations with the N.T.A., all individuals who applied and paid the required fees for participating in the examinations which have been suspended by the Board of Education shall automatically be considered as having applied for inclusion in the pool. It is further agreed that all such individuals will be sent notices to this effect by the Department of Personnel. It is also recommended that all such fees for the suspended promotional examinations be returned.

[4] This is the stipulated racial breakdown of the appointments made on August 22, 1968:

Plaintiffs argued that this new procedure violated the equal protection clause of the Constitution in that it racially discriminated against white teachers whose names had appeared on the numerical promotion list.[5] The process was defended by the Board as legitimate governmental action necessary to improve existing educational conditions. The Superintendent also justified this action, explaining that the need for qualified Black and Puerto Rican administrators could not be fulfilled under the previously acceptable advancement procedure, and that absent minority group representation in responsible positions there could be little sensitivity to problems unique to the ghetto.[6]

LEVEL	ACTING POSITION	WHITE	NEGRO
Elementary	Principal	1	4
	Vice Principal	0	2
	Teacher to assist Principal	3	1
Secondary	Principal, Senior High	2	0
	Principal, Junior High	1	0
	Vice Principal, Senior High	8	4
	Vice Principal, Junior High	3	0
	Teacher to assist Principal	3	8
	Department Chairman	11	0
	Supervisory Assistant, Junior High	3	1
Total		35	20

[5] The persons who scored one through fifteen on the principal list had already been appointed. Plaintiffs Porcelli, Bigley and Shapiro appear on the list as eligible persons who had not been appointed. Positions one through thirty six on the vice principal list had already been appointed. Plaintiffs Cohen, Justin and Edelstein were eligible for promotion but had not been appointed. Plaintiffs Hickey, Dunne, LaRusso and Chagnon do not appear on any existing promotional list. LaRusso and Chagnon had been appointed from the vice principals list prior to May 28, 1968.

[6] In a deposition given on September 9, 1968, Titus testified as follows:

Q. You wanted black personnel and/or Puerto Rican personnel, if qualified, in some of the principalships in the school system of Newark; Is that not correct?

A. I felt that the examination procedure as it had existed since roughly 1953 did not in 1968 necessarily produce the best people for responsible positions of leadership . . . (continuing after interruption) I felt that in the 20 years, 25 that had elapsed since the procedure was first or originally modified or developed, the conditions in the city had changed, educational philosophy had changed. There was a high premium on sensitivity than had existed hitherto. And for that reason I welcome the opportunity of reviewing the whole procedure.

Q. What is this sensitivity to which you refer, Mr. Titus?

A. Sensitivity, as I see it, is that element of a person's personality which makes him aware of the problems that are unique to the ghetto, unique to the circumstances surrounding being a member of a minority group, sensitivity to educational needs that go out of the deprived conditions in many of our—most of our school neighborhoods.

Q. Well, now, how would that have bearing in relation to a school promotional list?

A. As I see it, and I see it very clearly in my own mind, anybody who is in a position of leadership today in a city like Newark has to be able to identify, has to be able to understand.

Q. Well, now, when you say 'has to be able to identify,' do you mean has to be

In order to corroborate the charge of discrimination, plaintiffs presented depositions and testimony of Board members concerning these appointments. Some members testified that they had considered the race of the applicant before making their recommendations.[7] One member stated that in order to be selected, candidates had to be Black and qualified, and conversely, were they white and qualified they could not have been selected.[8]

While recognizing that defendants had used race as a criterion for making these appointments, the court concluded that this was not, in itself, proof of discrimination.

> [T]he record shows that the Board has no intention of limiting appointments to Negroes, or that consideration was given only to black applicants. The great preponderance of the evidence supports the contention of defendants that the persons recommended and eventually appointed were considered by the appointing authority to be the best qualified individuals for the available positions.

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able to identify with this 77% (percentage of Negroes in the Newark school system) about which you have spoken?

A. Their needs, the minority group needs, the minority group personality, the minority group reaction, the whole question of attitude in all aspects of the kid's personality is relative to the white power structure.

. . . .

. . . .

Q. Well, where didn't it?

A. Because it didn't represent the kind of racial mix that I feel is most important in accomplishing an educational program in the city of Newark, that's all.

Q. Now, you said 'racial mix' So that what you were looking for were black principals; isn't that correct?

A. I certainly wanted black representation.

Q. And you couldn't put black principals in at the present time while this list was in existence, could you?

A. Not until the Board suspended the list.

[7] In exhibit P-12, lines 10 through 13 of page 98 Simeon Moss stated:

Q. But it was still one of your considerations, wasn't it? (speaking of race)

A. On my part it was one of the prime considerations.

Mr. Knopf, Mr. Moss' assistant stated, exhibit P-12 page 101,

Q. In other words, to get on that list you considered whether or not a man was black?

A. Having heard Mr. Moss' statement about this, I would concur one hundren percent in what he said.

Mrs. Gladys Churchman, a member of defendant Board admitted that she was looking for a way to appoint black people. Exhibit P-11 page 32.

Dr. Edward Pheffer, Deputy Superintendant of Schools admitted that the color of an applicant's skin was considered. See deposition of Dr. Pheffer, exhibit P-12 at pages 65 and 66.

[8] Mr. Cervase, a member of the Board testified:

Q. So now you boiled it down to two qualifications. One is they were qualified, and the other was they were black. So that in order to get the job you had to be black and qualified; isn't that correct?

A. That's correct.

Q. Ergo, to be white and qualified you couldn't get the job, could you?

A. Well, that would be the implication.

> Indeed, when the Board considered the recommendations of the Superintendent and his staff, some members of the Board were not even aware of the race of those whom they voted to appoint.[9] It is sufficient to state that the Board had the authority to take such steps as it deemed necessary and proper to promote the educational welfare of the Newark school community. Of course, in taking such steps, the Board could not infringe upon the right of white teachers to be free from discrimination because of race.[10]

Furthermore, the court observed that the actions of the Board were not solely designed to procure Black people for administrative positions nor to discriminate against white persons.

> The record makes it clear that 'race' in its broadest connotation, played a part in the Board's decision to suspend the promotion lists and abandon the examination system . . . . [T]here was an awareness of the racial problems, frequent discussions about the lack of non-white administrators, and the need to obtain qualified black administrators.[11]

Purportedly, the primary goal of the procedure was to advance "qualified persons, white or Black, whose qualifications were based on an awareness of, and sensitivity to, the problems of educating the Newark school population."[12] In support of its conclusion, the court opined that a municipal board of education possesses the inherent power to establish a system by which persons shall be promoted to administrative positions.[13] "There appears to be no state law requiring that promotions to such positions as principal or vice principal be made on the basis of competitive examinations."[14] Apparently any procedure would be valid provided it was not used to perpetuate a policy of racial discrimination.

It is well recognized that the state may not lawfully practice racial discrimination in the maintenance of its public school system.[15] This prohibition was extended to the selection of public school teachers in

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9 Porcelli v. Titus 302 F. Supp. 726, 734 (D.N.J. 1969).

10 *Id.* at 736.

11 *Id.* at 732.

12 *Id.* at 732-33.

13 N.J. STAT. ANN. 18A: 27-4 (1968):

Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto.

14 302 F. Supp. at 730.

15 Brown v. Board of Educ., 347 U.S. 483 (1954).

Wall v. Stanly County Board of Education.[16] However, every consideration of race does not indicate a discriminatory practice. This was recognized in *United States v. Jefferson County Board of Education,* where the court declared that: "To prevent such harm [racial imbalance] or to undo the harm, or to prevent resegregation, the school authorities, even in the administration of an otherwise rational, nondiscriminatory policy, should take corrective action involving racial criteria."[17]

Generally, legitimate consideration of race has been limited to correcting patterns of segregation or discrimination.[18] In the instant case no such pattern existed. In fact, as the court itself observed, "there is a fully integrated school population on the student and teacher level. . . . [and] [t]here is no claim that a dual system exists in Newark."[19]

In light of this fact, the question arises whether the Board's action can be justified on the basis of the predominance of Negro children in the schools? In *Kemp v. Beasley,*[20] the court answered this question in the negative by stating that, *"When the predominant race of the students attending a particular school, continues to serve as the predicate for the Board assignment of a teacher,* then equal opportunity is denied."[21] Similarly, in *Smith v. Board of Education,*[22] the court rejected the contention that racial sensitivity and awareness of the special problems of the ghetto permit a consideration of race as a qualification.

> [R]ace per se is an impermissible criterion for judging either an applicant's qualification or the district's needs. And this applies equally to considerations described as environment or ability to communicate or speech patterns or capacity to establish rapport with pupils when these descriptions amount only to euphemistic references to actual or assumed racial distinctions.[23]

Consideration of race in the *Porcelli* context is not only incompatible with, but an outright denial of the essence of equal protection. To sacrifice one man's rights to advance another's is to destroy them both. While *Porcelli's* goal may be sociologically desirable, it is ques-

16 378 F.2d 275 (4th Cir. 1967).

17 372 F.2d 836, 892 (5th Cir. 1966), *cert. denied,* 389 U.S. 840 (1967).

18 McLaughlin v. Florida, 379 U.S. 184 (1964); Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Offerman v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965).

19 302 F. Supp. at 734.

20 389 F.2d 178 (8th Cir. 1968).

21 *Id.* at 190.

22 365 F.2d 770 (8th Cir. 1966).

23 *Id.* at 782.

tionable whether it is legally sound in light of our constitutional history.

Brown v. Board of Education[24] and countless cases following its rationale have striven to achieve a society in which race is inconsequential. To condone the practice legitimated in *Porcelli* is to invite the renewal of the 'race' factor and "turn the clock back to . . . 1896 . . . [and] *Plessy v. Ferguson*. . . ."[25]

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[24] 347 U.S. 483 (1954).

[25] *Id.* at 492.