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Constitutional Law-Equal Protection-Federal Court Cannot Order Multi-School District Remedy For Single District De Jure Segregation Absent an Interdistrict Violation

Constitutional Law—Equal Protection—FEDERAL COURT CANNOT ORDER MULTI-SCHOOL DISTRICT REMEDY FOR SINGLE DISTRICT DE JURE SEGREGATION ABSENT AN INTERDISTRICT VIOLATION, *Milliken v. Bradley*, 94 S. Ct. 3112 (1974).

The landmark decision of *Brown v. Board of Education*[1] held that the equal protection clause of the fourteenth amendment[2] prohibited a state from maintaining racially segregated public schools. After years of attempted but ineffective implementation of the mandate of *Brown I*, the Supreme Court attacked the issue with vigor in the late 1960's.[3] State and local authorities were placed under an affirmative duty to convert to a unitary school system which promised to work immediately towards the elimination of the discrimination inherent in state compelled dual school systems.[4]

Federal district courts and local school authorities were still left with imprecise guidelines for effectuating remedies once a constitutional violation had been established.[5] The Court responded by holding that when school authorities were in default of their duty to remedy de jure segrega-

1. 347 U.S. 483 (1954) (*Brown I*). The Court, in a supplemental opinion, held that federal courts implementing the principle of *Brown I* were to be guided by equitable principles, and were to retain jurisdiction during the period of transition in order to consider the adequacy of any plans proposed by school authorities to effectuate a unitary school system. Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*).

2. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

3. The *Brown I* decision effectively repealed any state statutory requirement of a dual school system, but authorities in those southern states were slow to dismantle their dual school systems and engaged in certain dilatory tactics to avoid actual school desegregation. State interposition acts and school closings were among the more blatant methods employed. *See generally* UNITED STATES COMMISSION ON CIVIL RIGHTS, 1959 REPORT 228, 233-34 (overview of southern interposition acts); UNITED STATES COMMISSION ON CIVIL RIGHTS, 1961 REPORT, bk. 2 at 65-77. The Supreme Court struck down these tactics. *See* Griffin v. County School Bd., 377 U.S. 218 (1964) (holding that a public school cannot be closed down to avoid desegregation); Orleans Parish School Bd. v. Bush, 365 U.S. 569 (1961), *aff'g mem.*, 188 F. Supp. 916 (E.D. La. 1960) (striking down Louisiana's interposition statutes as unconstitutional).

A more covert form of avoiding school desegregation was the use of the "freedom of choice" plan, but this method was successfully attacked as well. Green v. County School Bd., 391 U.S. 430 (1968).

4. *See, e.g.*, Alexander v. Holmes Co. Bd. of Educ., 396 U.S. 19 (1969); Green v. County School Bd., 391 U.S. 430 (1968).

5. Chief Justice Burger, concurring in Northcross v. Board of Educ., 397 U.S. 232, 236 (1970), referred to the need for more precise guidelines as to: 1) whether any specific racial balance was required in schools; 2) whether the Constitution requires that school districts and attendance zones be altered; and 3) to what extent transportation of students must be provided.

tion within a school district, federal courts had broad powers to fashion a remedy insuring a unitary school system.[6]

The Court had not dealt with the problem of a federal court's power to alter school districts to remedy racial segregation in a given area.[7] It was precisely this remedy which offered the only viable means of attack in large metropolitan areas, particularly in the North, which operate the equivalent of dual school systems due to widespread residential segregation.[8] Absent an interdistrict busing program or a renovation of school district boundary lines, no significant racial balance can be achieved.[9]

Any solution to this problem would have required a shift in the Court's

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6. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971). Busing and the alteration of attendance zones were validated as means of achieving school desegregation. The extent of a court's power to order the transportation of students to effectuate a desegregation remedy was limited by the practicalities of time and distance factors. *Id.* at 29-31. *See also* Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971). As to racial quotas, the Court held that the Constitution does not require that the racial makeup of every school reflect the racial composition of the school system. The Court stated:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing . . . we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. *Id.* at 24.

7. *See* note 5 *supra*. Chief Justice Burger also delivered the opinion in *Swann*. The Chief Justice addressed the issues of racial quotas and busing which he had earlier indicated in *Northcross* needed more precise guidelines. However, the question concerning the permissible extent of school district alteration was not considered.

Subsequent decisions dealt with one aspect of the problem. A federal court has the power to enjoin local officials from altering school districts where the effect would be to foster racial segregation or impede the process of dismantling a segregated school system. *See, e.g.*, United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972).

8. In such situations a federal court is faced with the problem of a predominantly black public school system in the city surrounded by predominantly white suburban school systems.

9. After *Swann* it was felt that the Court had laid sufficient doctrinal groundwork to attack the specific problems of metropolitan area school desegregation. *See generally* Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971); Smedley, *Developments in the Law of School Desegregation*, 26 VAND. L. REV. 405 (1973); Comment, *Interdistrict Segregation: Finding a Violation of the Equal Protection Clause*, 23 AM. U.L. REV. 785 (1974); Note, *Merging Urban and Suburban School Systems*, 60 GEO. L.J. 1279 (1972).

A strident pace had been set in *Green* and built upon in *Swann*. The *Swann* decision held that school authorities must make every effort to achieve the greatest possible degree of actual desegregation. 402 U.S. at 26. The *Green* decision emphasized that the evil to be attacked was the racial identification of a school system's schools. 391 U.S. at 435. A metropolitan area, as a whole, reflects a pattern of racially identifiable schools. The mandate that actual desegregation be achieved would seem to require that the areawide pattern be eliminated.

analysis. Remedies in school desegregation cases are predicated upon a finding of de jure segregation within a school system, which contemplates that the state is operating a dual school system under color of law.[10] The Court has consistently refused to apply remedies to de facto segregation.[11] In the case of de facto segregation, separate white schools and black schools exist, but they are the product of neighborhood assignment plans superimposed on a residentially segregated community. Since no constitutional violation can be based upon de facto segregation,[12] any judicial response to the problems in northern metropolitan areas would require an expanded concept of state action.[13]

10. *Brown I* contains no reference to the state action requirement, however, school desegregation cases are directed at alleged violations of the fourteenth amendment's equal protection guarantee and thus operate within the framework of the *Civil Rights Cases*, 109 U.S. 3 (1883) (fourteenth amendment protection is limited to cases of perceptible state action). Reviewing the decisions of the Court in the school desegregation area, it is clear that only state-imposed or state-fostered segregation constitutes a violation. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968); Cooper v. Aaron, 358 U.S. 1 (1958).

The Court noted in *Keyes* that the differentiating factor between de jure and de facto segregation is intent to segregate. 413 U.S. at 208. This particular distinction was raised in the context of a school system where acts of purposeful segregation found in part of the system were found attributable to the system as a whole. *Id.* at 208-09.

11. The Court has never ruled on the constitutionality of de facto segregation, but in denying certiorari in cases where remedies were denied in de facto situations it has tacitly upheld the proposition that there exists no affirmative duty on the part of school authorities to cure a de facto condition. *See, e.g.*, Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Bell v. School City, 324 F.2d 209 (7th Cir.), *cert. denied*, 377 U.S. 924 (1963).

12. This dichotomy has been criticized as insensitive to the fundamental issues involved in the school desegregation area. Mr. Justice Douglas is particularly vexed at the denial of remedies in de facto segregation cases. *See, e.g.*, Milliken v. Bradley, 94 S. Ct. 3112, 3135 (1974) (dissenting opinion); Keyes v. School Dist. No. 1, 413 U.S. 189, 215 (1973) (concurring opinion). Mr. Justice Powell also registered his disregard for the de jure/de facto dichotomy in his dissenting opinion in *Keyes*. *Id.* at 219.

District Judge Roth also attacked the distinction in his opinion in *Bradley v. Milliken*, commenting that "[i]t is . . . unfortunate that we cannot deal with public school segregation on a no-fault basis, for if racial segregation in our public schools is an evil, then it should make no difference whether we classify it de jure or de facto." 338 F. Supp. 582, 592 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 94 S. Ct. 3112 (1974). Yet the continued application of the distinction appears certain. *See, e.g.*, Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd*, 404 U.S. 1027 (1972).

13. The concept of de jure segregation is viable in regard to the south which has had a tradition of state-fostered dual school systems. The concept breaks down, however, in the case of northern systems where no statutory scheme of school segregation existed prior to *Brown I*.

The only resolution to the problem can be found in expanding the scope of state action, not only in regard to establishing a constitutional violation, but in regard to effectuating a

The Supreme Court dealt with one effort to effectuate a metropolitan areawide remedy in *Milliken v. Bradley*.[14] The federal district court had found acts of de jure segregation in the Detroit City School District,[15] and in a supplemental opinion ordered a panel of experts to submit a plan which contemplated the transportation of students across school district lines.[16] The court heard no evidence and made no finding that any school district outside of Detroit had engaged in any unconstitutional activity, or that the State of Michigan had drawn school district lines with the inten-

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remedy. Within the context of a single school district the Court has found state action in any showing of deliberate efforts by the state to maintain segregated schools. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

Once the state is tagged with the responsibility of fostering de jure segregation the question arises as to the permissible extent of the remedy. The residential patterns of multi-school district metropolitan areas are such that a violation found within one school district cannot be effectively remedied within the school district. Some justification must be found to charge the state with effectuating an interdistrict remedy. One method would be to find the state responsible for the residential patterns in the first place. *See, e.g.*, Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971). The 6th Circuit Court of Appeals found it unnecessary to reach this issue in affirming the lower court decision. 484 F.2d 215, 242 (6th Cir. 1973). Mr. Justice Stewart, concurring in the reversal of the 6th Circuit decision, left the question open. 94 S. Ct. 3112, 3132. A second method would be to require that the state ignore school district lines of its own creation which have the effect of maintaining racial segregation regardless of the neutrality of their creation or maintenance. This latter method was rejected by the Supreme Court. *See* Milliken v. Bradley, 94 S. Ct. 3112 (1974).

14. 94 S. Ct. 3112 (1974) (5-4 decision), *rev'g*, 484 F.2d 215 (6th Cir. 1973), 345 F. Supp. 914 (E.D. Mich. 1972), 338 F. Supp. 582 (E.D. Mich. 1971).

15. 338 F. Supp. 582, 587-92 (E.D. Mich. 1971). The district court found that the Detroit Board of Education had created and maintained optional attendance zones within neighborhoods undergoing racial transition and between attendance areas of a predominantly different racial composition. Also, the school board drew attendance zone boundaries along north-south lines in spite of the fact that an east-west drawing would have produced greater desegregation. The school board bused black pupils to predominantly black schools, by-passing nearer white schools. School construction had been such that the greater number of schools had been built in all black or all white neighborhoods. The effect of all these actions was to perpetuate segregation within the Detroit school system. The court held these actions of the local school board attributable to the State of Michigan for purposes of state action. *Id.* at 587-92.

The district court also found that the State of Michigan had committed constitutional violations in regard to its general supervision over public education. The state had failed to transport students within Detroit, regardless of their poverty or distance from their assigned schools until as late as 1971, while offering a full range of transportation to suburban students. Most significant was the state legislature's passage of an act which had the effect of impeding the Detroit School Board's voluntary plan of desegregation. *Id.* at 589.

16. 345 F. Supp. 914 (E.D. Mich. 1972). The Detroit School District is surrounded by 85 suburban school districts. School district lines are not coterminous with political subdivision boundaries. *Id.* at 934; 94 S. Ct. at 3151 (Marshall, J., dissenting). The district court ordered that 53 of the 85 suburban school districts be included in the desegregation area. 345 F. Supp. at 918.

tion of fostering segregation.[17] Nevertheless, the court stated that no actual desegregation could be achieved within the Detroit school system unless students were transported across school district lines.[18] This decision was upheld on appeal[19] and subsequently the Supreme Court granted certiorari.[20]

Considering the circumstances under which a federal court may impose a multi-district areawide remedy to a single district de jure violation, the Supreme Court reversed and held that a federal court is not empowered to impose such a remedy unless acts of the state or local school district have been a substantial cause of interdistrict segregation.[21] The lower court decisions were attacked on the ground that they were based upon erroneous standards.[22] For example, the district court had ordered that a remedy be provided which reflected the racial proportion of the entire metropolitan area in each classroom.[23] Previously the Supreme Court had expressly rejected such racial balancing as not dictated by the equal protection clause.[24]

The core of the decision addressed the circumstances under which interdistrict relief could be granted in a school desegregation case. The Court announced as its controlling principle an axiom earlier enunciated—the nature of the violation determines the scope of the remedy.[25] Furthermore, the constitutional right of black respondents residing in Detroit was to attend unitary schools in their own school district.[26] Interdistrict relief was limited to situations where it is shown that a constitutional violation embraces more than one school district.[27] Since the Detroit district was the

17. 345 F. Supp. at 920.

18. *Id.* at 921-22.

19. 484 F.2d 215 (6th Cir. 1973).

20. 414 U.S. 1038 (1973).

21. 94 S. Ct. at 3127.

22. *Id.* at 3125.

23. 345 F. Supp. at 918.

24. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), *See* note 6 *supra.* The Court cited this holding in *Milliken.* 94 S. Ct. at 3125.

25. 94 S. Ct. at 3127. *See also* 402 U.S. at 16.

26. 94 S. Ct. at 3128.

27. The Court held that interdistrict relief is limited to situations where it is shown that ". . . a constitutional violation within one district . . . produces a significant segregatory effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation." *Id.* at 3127. The Court cited examples of what type of activity would call for an interdistrict remedy. Racially discriminatory acts of one or more school districts which cause racial segregation in another district, or the deliberate drawing of school district lines on the basis of race are violations calling for interdistrict relief. *Id.*

only violator, the court limited any remedy to that district.[28]

Prior Supreme Court decisions demanded that actual desegregation be achieved, and that any remedial decree should attempt to eliminate racially identifiable schools.[29] The basic problem here was the undeniable fact that any Detroit-only remedy would result in the creation of an identifiable black school system in Detroit surrounded by all white suburban school systems.[30] The dictates of prior case law were relied on to require interdistrict relief to achieve the elimination of racially identifiable schools.[31] The Supreme Court pointed out that all of its prior decisions involved only single district violations and single district relief.[32]

Another basis for interdistrict relief perceived by the lower courts involved the responsibility of the state for the acts of de jure segregation within the Detroit School District.[33] Since the state had committed de jure acts of segregation, it was within the power of the court to order the state to restructure or ignore its school district boundaries, that remedy being within the power of the state.[34] The Supreme Court was unwilling to accept such an expansion of the state action concept.[35] The Court ruled that the fact of the state's participation in fostering racially segregated schools within Detroit provided no ground for ordering an interdistrict remedy without a showing that an interdistrict segregatory effect had resulted.[36]

The Court found that during the late 1950's black students from a predominantly black suburban district had been sent to a predominantly black high school in the Detroit School District. The Court pointed out that this situation may have had an effect on the school populations of the two districts but that such an isolated incident would not justify the broad mandate of the lower court decisions. *Id.* at 3129-30.

28. The Court found specifically that none of the actions constituting de jure segregation was an interdistrict violation having an interdistrict effect. The evidence revealed de jure segregation only in the Detroit schools. Any remedy imposed on the outlying school districts not shown to have committed a violation would be impermissible. *Id.* at 3127.

29. *See generally* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

30. 484 F.2d at 245; 345 F. Supp. at 916.

31. *See* note 29 *supra.*

32. 94 S. Ct. at 3128.

33. *See* note 15 *supra.*

34. [T]he State has committed de jure acts of segregation and . . . the state controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts. . . . In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts . . . . 484 F.2d at 249.

35. *See* note 13 *supra.*

36. 94 S. Ct. at 3128. In dissent Mr. Justice White and Mr. Justice Marshall defended the proposition that the state's responsibility is to ignore school district boundary lines of its own creation in effectuating a remedy for de jure segregation. *Id.* at 3139, 3158. Further, Mr.

The Court was particularly concerned with the effect a contrary decision would have on the established tradition of local school district control.[37]

Coupled with the Court's earlier affirmance of a denial of relief,[38] this latest pronouncement reflects its reluctance to further expand the constitutional doctrine in the school desegregation area. Rejection of an ex-

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Justice Marshall felt that the Court utilized an unsatisfactory method of inquiry which required not only that state action be found to trigger a violation, but that it also be found to trigger a remedy. He stated that no second inquiry is necessary; rather once the primary inquiry reveals a constitutional violation, the Court is duty-bound to formulate an effective remedy. *Id.* at 3153-54 n.19.

37. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools . . . . *Id.* at 3125.

The Court of Appeals agreed with the findings of the district court that the local school district boundary lines in Michigan were simply arbitrary lines drawn for political convenience and therefore capable of being ignored for remedial purposes. *See* 484 F.2d at 244-45. In his vigorous dissent, Mr. Justice Marshall remarked that:

> [T]he majority's emphasis on local governmental control and local autonomy of school districts in Michigan will come as a surprise to those with any familiarity with that State's system of education. 94 S. Ct. at 3151.

In fact, Michigan's educational system is peculiarly a state function with little control vested in the local school board. *See, e.g.*, Lansing School Dist. v. State Bd. of Educ., 367 Mich. 591, 116 N.W.2d 866 (1962).

38. Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972), *aff'd by an evenly divided Court*, 412 U.S. 92 (1973). The Supreme Court in *Bradley* affirmed the decision of the 4th Circuit Court of Appeals vacating an order by District Court Judge Merhige consolidating the school district of Richmond, Virginia with those of Henrico and Chesterfield Counties for the purposes of school integration. The court of appeals ruled that in the absence of any constitutional violation in the establishment or maintenance of the three school districts, or of any unconstitutional consequence of such maintenance, a federal court's authority did not extend to such interference with the separate political subdivisions of the Commonwealth of Virginia.

It should be noted that the school district boundary lines in Virginia are coterminous with her political subdivisions and are exclusively controlled by local authorities in contrast to the situation in Michigan. *See* note 18 *supra*.

The *Milliken* and *Bradley* cases are the only school district merger cases which have reached the Supreme Court. The disposition of each generally reflects the Court's lack of reliance on school consolidation to remedy the metropolitan situation. The *Milliken* decision is potentially more important, not only because a larger northern metropolitan area was involved, but also because the two situations presented substantially different factual settings. As opposed to the school district organizational plan in the Richmond area, Detroit area school district lines do not reflect political subdivisions. Neither does Michigan educational policy revolve around the local school district to the extent of Virginia policy.

See generally Smedley, *Developments in the Law of School Desegregation*, 26 VAND. L. REV. 405 (1973) (for a comparison of the Richmond and Detroit decisions at the intermediate appellate stage); Note, *Merging Urban and Suburban School Systems*, 60 GEO. L.J. 1279, 1299 (1972) (an analysis of the district court decision in *Bradley*).

panded state action approach and limiting remedies to a single school district effectively quashes the hopes of those who had earlier perceived a remedy to the racial demography of our large metropolitan areas.[39] This decision will accentuate the growing racial identity of our cities.[40] The interdistrict remedy may still be appropriate where the state is found responsible for the residential segregation of a metropolitan area.[41] In the absence of such a finding any remedy is thereby severely limited in its application.

W.R.T.

39. *See* note 9 *supra*.

40. Black school systems encourage an influx of more blacks into the system and generate white flight from the cities to the suburbs. *See* 94 S. Ct. at 3153-54 (Marshall, J., dissenting).

41. *See* note 15 *supra*.