Nos. 695, 740 and 805

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OCTOBER TERM, 1967

CHARLES C. GREEN, ET AL., PETITIONERS

v.

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BRENDA K. MONROE, ET AL., PETITIONERS

v.

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, ET AL.

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v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH, SIXTH AND EIGHTH CIRCUITS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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The central issue in these cases is the character and extent of the State's constitutional obligation in desegregating its public school system pursuant to

the mandate of *Brown* v. *Board of Education,* 347 U.S. 483, 349 U.S. 294. Although it is only one aspect of the problem, we focus on the pupil assignment policies of the three school districts involved because that is the most obvious defect of the plans in suit. Faculty desegregation and other measures designed to erase the labels "white" and "Negro" from the schools of the system are, of course, essential, as the courts below recognized. But effective desegregation is not accomplished so long as there remain all-Negro schools, attended by an overwhelming majority of the Negro children. It is that result in these cases, avoidable by employing a differing assignment technique, which invokes our concern.

In effect, each of the systems uses the so-called "freedom-of-choice" plan, under which each student is free to assign himself to any school in the district.[1] In each instance, a strict geographic assignment policy without the right of free transfer would desegregate the schools. In fact, more than 80% of the Negro children attend all-Negro schools, and this is attributable to a plan which permits the white students to assign themselves elsewhere. Nor are these isolated cases. "Freedom-of-choice" plans are much in vogue today, and the consequences are often the same. See

[1] In New Kent, Virginia (No. 695), every student entering the first and eighth grades is required to choose a school; thereafter, he is re-assigned to the same school unless he affirmatively elects a different school. In Jackson, Tennessee (No. 740), initial assignments are made by geographic zones, but every student is free to transfer to any other school. In Gould, Arkansas (No. 805), every student is apparently required to choose his school each year.

U.S. Commission on Civil Rights, *Southern School Desegregation 1966–1967* (1967), pp. 3, 8–9, 45–46, 94–95. The question is whether this technique is constitutionally permissible when it has the effect of substantially minimizing desegregation. The courts below answered in the affirmative, reasoning that it was enough if the school authorities removed all legal barriers to desegregation, leaving it to the students themselves to mix or not, as they chose.

In our view, so-called "freedom of choice" plans satisfy the State's obligation only if they are part of a comprehensive program which actually achieves desegregation. We do not contend that "freedom-of-choice" is *per se* invalid as an assignment technique or that its presence automatically condemns the desegregation plan of which it is a part. If substantial progress in eliminating all-Negro schools is shown, the Constitution does not forbid freedom of choice as an element in the plan. But when the results are like those reflected by these records, two objections must be interposed: *First,* against a background of prior State-compelled educational segregation, a freedom-of-choice plan that does not operate to eliminate all-Negro schools is an inadequate remedy to disestablish the dual school system; *secondly,* if the effect is to retard or defeat the desegregation that a geographic assignment policy would produce, allowing the students to make their own assignments impermissably abdicates the State's responsibility while effectively authorizing and facilitating public school segregation at the instance of the white students, with official sanction.

I

At the outset, we consider the plans in suit in their factual context. So judged, they are plainly inadequate as remedial devices responsive to the evils created by the previous *de jure* segregation in the three school districts. The persistence of all-Negro schools in all three systems is eloquent testimony to the fact that mere abandonment of compulsory student assignments based on race is insufficient to eliminate the continuing momentum of the past dual system. And it is apparent that the approach represented by the "freedom-of-choice" and "free transfer" provisions of the approved desegregation plans is essentially one of "laissez faire," and will not substantially improve the *status quo.*

Against the background of educational segregation long maintained by law, the duty of school authorities is to accomplish "the conversion of a de jure segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel: students, faculty, staff, facilities, programs, and activities." *United States* v. *Jefferson County Board of Education,* 372 F. 836, 846, n. 5 (C.A. 5), affirmed on rehearing *en banc,* 380 F. 2d 385, certiorari denied, 389 U.S. 840. And see *Bradley* v. *School Board,* 382 U.S. 103; *Rogers* v. *Paul,* 382 U.S. 198. That is not a self-executing task. Here, no less than in other areas where governmentally imposed racial discrimination was deep-rooted and pervasive, a mere abandonment of the old practices will not restore the balance. Cf. *Louisiana* v. *United States,* 380 U.S. 145, 154; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 327–337. Neutrality is not

enough; affirmative measures must be taken to overcome the effects of past discrimination and reverse the direction.

An essential goal of the conversion process is to terminate the racial identification of particular schools as "Negro" schools or "white" schools. That aspect of the problem is highlighted in two of the cases before the Court (Nos. 695 and 805), involving systems with only two plants, one traditionally allocated to Negroes, the other to whites. Of course, the facilities must be equalized and deliberate steps must be taken to desegregate their faculties and staff. In some communities that may be enough to establish a new climate in which voluntary student desegregation will follow under a "freedom-of-choice" plan. And in other areas where residential patterns and the present location of schools would perpetuate segregation under a geographic assignment plan, a "freedom-of-choice" technique may offer more promise as an interim measure until new schools are constructed. But, as Judge Sobeloff observed below, concurring specially in the New Kent, Virginia case (No. 695, A. 79):

> "Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. * * *

In the circumstances of these cases, it is plain that "freedom-of-choice" is not a tool to achieve desegregation. On the contrary, in New Kent, Virginia, and

Gould, Arkansas, where geographic zoning would integrate the two schools of the district, it is apparent that "freedom-of-choice" works in the opposite direction, to perpetuate an identifiably "Negro" school, attended only by Negroes. And, although less dramatically, the "free transfer" policy followed in Jackson, Tennessee, likewise tends to defeat the substantial degree of pupil desegregation that would result from strict geographic zoning.

In our view, these facts alone condemn the plans in suit as inadequate measures to disestablish the dual school system. Cf. *Goss* v. *Board of Education,* 373 U.S. 683. But there are other reasons to question the constitutional validity of the "freedom-of-choice" technique as it operates here. These are broader grounds, which we think relevant, though the Court may find it unnecessary to reach them.

II

The actual results in these cases demonstrate that, in some circumstances at least, "freedom-of-choice" plans empower the white students effectively to segregate the school system by assigning themselves away from the schools they would otherwise be attending with Negroes. And there is no doubt that the consequence of racial isolation for the Negro children puts them at a disadvantage. Not only are they deprived of contacts and experiences which would enable them to participate on a more equal footing in the public and private life of the dominant community (see *Sweatt* v. *Painter,* 339 U.S. 629, 634–635; *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637, 640–642; and see U.S. Commission on Civil Rights, I *Racial Isolation in*

the Public Schools (1967), pp. 100–114, 193, 203–204), but, shunned by the whites, the Negro children are unmistakably told that their separation is not the accidental result of neutral geographical zoning, but, rather, the deliberate consequence of a system which, as *Brown* emphasized (347 U.S. at 494), "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The question accordingly arises whether segregation, so caused, offends the Constitution.

The courts below thought the result constitutionally unobjectionable, apparently reasoning that the injury was self-inflicted in view of the seemingly equal opportunity given the Negro students to determine their own assignments and thus to avoid their separation by pursuing the white students. In our view, that is not an adequate answer.

1. Initially, we have difficulty with the premise that the Negro students in areas like those involved here enjoy a truly unencumbered option to move away from their traditional schools. The Fourth Circuit itself, in one of the cases under review (No. 695, A. 67), has emphasized that "'freedom of choice' is acceptable only if the choice is free in the practical context of its exercise." And the court went on to add that "[i]f there are extraneous pressures which deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them" (*id.*). But is this a realistic approach?

We do not believe that it is enough to eliminate only the grosser forms of intimidation—threats of

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physical injury or economic reprisal—even assuming that judicial decrees or administrative action can effectively deal with such pressures. The reality is that a variety of more subtle influences—short of outright intimidation—tend to confine the Negro to his traditional school. Insecurity, fear, founded or unfounded, habit, ignorance, and apathy, all inhibit the Negro child and his parents from the adventurous pursuit of a desegregated education in an unfamiliar school, where he expects to be treated as an unwelcome intruder. And corresponding pressures operate on the white students and their parents to avoid the "Negro" school.[2] No doubt, special provisions in the

[2] Some of the factors at work are isolated in the report of the U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States—1965–1966* (1966), pp. 51–52, quoted by Judge Sobeloff, concurring below in the New Kent, Virginia case (No. 695, A. 80–81):

> Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro community has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation.

"freedom-of-choice" plan can mitigate the play of these forces. But when the results are like those in these cases, we think it blinks reality to assume that the persistence of all-Negro schools is the consequence of wholly voluntary self-segregation by the Negro students.

2. Even if one could properly characterize the result as the product of truly free choice, however, it would be constitutionally objectionable because the exercise of the option involves an improper burden where the racial identity of the schools has not been eliminated. Thus, the Fourth and Fifth Circuits have disapproved transfer plans which require the Negro students to take special steps to obtain a desegregated education. In the words of the Fourth Circuit, in one of the cases under review (No. 695, A. 66):

> The burden of extracting individual pupils from discriminatory, racial assignments may not be cast upon the pupils or their parents. It is the duty of the school boards to eliminate the discrimination which inheres in such a system.

See, also, *United States* v. *Jefferson County Board of Education, supra,* 372 F. 2d at 864–867. In our view, the same rationale condemns the present plans, which unnecessarily shift the burden to the Negro to seek his way out of his traditional school.

Under a plan like that prevailing in Jackson, Tennessee, where initial assignments are made by geograpical zones, special steps must be taken to transfer elsewhere. That is, in itself, an obstacle. The burden on the Negro is not lightened because the white students must also assume it if they wish to avoid the

traditionally Negro school to which proximity first assigns them. Cf. *Griffin* v. *School Board,* 377 U.S. 218. Nor are the obstacles in fact equal in the situation that most concerns us, the persistence of the all-Negro school. Where students of both races have been initially assigned, on the basis of residence, to a traditionally Negro school, the decision to transfer elsewhere is obviously more difficult for the Negro. Unlike the white child whose "transfer" merely returns him to his accustomed school, the Negro is required to sacrifice old ties for an uncertain welcome if he wishes to pursue his search for a desegregated education.

Nor are these problems immediately overcome by the "freedom-of-choice" provisions prevailing in New Kent, Virginia, and Gould, Arkansas. Something is gained by requiring everyone to express a choice before any assignment is made. But that does not eliminate all the pressures weighing on the Negro—and to a lesser extent on the white—to "choose" in favor of the *status quo.* Again, an uneven burden falls on the Negro if he is to leave his traditional school. At least where all the white students have shunned the local Negro school, the decision to follow them requires courage, and, for the pioneers at least, a willingness to subordinate personal advantage to the common good of the race. See *Kelley* v. *Altheimer, Ark. Public School Dist. No. 22,* 378 F. 2d 483, 486–487, n. 6 (C.A. 8).

We do not mean to exaggerate the tendency of "freedom-of-choice" plans to perpetuate the all-Negro school or the special burden they impose on

Negroes to remove themselves from their old segregated institutions. Of course, individuals can resist the pressures and in some communities the technique may work. Yet, where, as in these cases, freedom-of-choice does not eliminate the all-Negro school, it would be pure irony if Negro children or their parents, already victims of educational segregation, suffering the very handicaps that this Court sought to avoid for the future, were held to have "waived" the promise of *Brown.* Cf. *Lane* v. *Wilson,* 307 U.S. 268, 276. However surmountable they may be, the Constitution does not tolerate the erection of unnecessary hurdles to the enjoyment of fundamental rights. See, *e.g., Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337. Cf. *Lamont* v. *Postmaster General,* 381 U.S. 301; *Harman* v. *Forssenius,* 380 U.S. 528; *Shelton* v. *Tucker,* 364 U.S. 479, 488; *Speiser* v. *Randall,* 357 U.S. 513; *Thomas* v. *Collins,* 323 U.S. 516.

3. The situation would be different if the burden, and the resulting injury, were unavoidable, or even if pupil assignment were traditionally a matter left to the free play of private choice. But that is not the fact. On the contrary, compulsory assignment of public school students had been the almost invariable rule, North and South, until *Brown.* Freedom-of-choice plans—haphazard and administratively cumbersome [3] —have been devised for the apparent purpose of allowing the white students to accomplish what the

[3] See *Singleton* v. *Jackson Municipal Separate School District,* 355 F. 2d 865, 871 (C.A. 5).

State could no longer provide for them.[4] Essentially, the assignment of students is a governmental function, controlled by the requirements of the Fourteenth Amendment. Cf. *Marsh* v. *Alabama,* 326 U.S. 501; *Terry* v. *Adams,* 345 U.S. 461; *Evans* v. *Newton,* 382 U.S. 296. And, as this Court observed in *Burton* v. *Wilmington Pkg. Auth.,* 365 U.S. 715, 725, "no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."

The suggestion that the action of the students in effectively segregating themselves need be of no concern to the State may be compared to the proposition that the State, which has a constitutional duty to avoid discrimination in jury selection, is free to allow prospective jurors to separate themselves on racial lines for service on particular panels. The unconstitutionality of such a permissive arrangement is surely beyond debate. The reason is not that a defendant has a right to be tried by a racially representative jury (see *Cassell* v. *Texas,* 339 U.S. 282), but, rather, that the State may not permit discrimination to influence the selection of a jury. The same principle governs here: even if accidental segregation in public education is permissible, the Constitution does not tolerate

[4] The lower courts have recognized that in some communities freedom-of-choice was adopted because alternative plans would require white pupils to attend Negro schools. See *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458, 479, n. 27 (M.D. Ala.), affirmed *sub nom. Wallace* v. *United States,* 389 U.S. 215; *United States* v. *Jefferson County Board of Education, supra,* 372 F. 2d at 878, 888–889. And see the testimony of the Superintendent of the Gould, Arkansas, schools (No. 805, A. 67).

schemes which invite that result to be accomplished by indirect means through a delegation of State responsibility. Cf. *St. Helena Parish School Board* v. *Hall,* 368 U.S. 515; *Goss* v. *Board of Education, supra; Griffin* v. *School Board, supra; Louisiana Financial Assistance Comm.* v. *Poindexter,* No. 793, this Term, decided January 15, 1968, affirming 275 F. Supp. 833 (E.D. La.).

In sum, where freedom-of-choice plans leave the schools essentially segregated, while a more traditional assignment policy would not, that segregation may fairly be attributed to the State. That conclusion alone covers the present cases. But the fact that the State is knowingly contributing to the result has another dimension also.

4. By resorting to a permissive device which, in context, seems to serve no purpose other than to defeat or retard integration, the State is declaring its approval of the discrimination which it allows to govern pupil assignments. The effect is two-fold: the apparent official sanction given to the preference of the white students aggravates the injury to the Negro children; and, at the same time, it lends encouragement to the separation of the white students and tends to stiffen those very attitudes that desegregation might relax.

There is, of course, nothing novel in the proposition that the Equal Protection Clause forbids official action which injures the Negro by implying his unfitness or inferiority as a class and encourages private racial prejudice. Indeed, this is the rationale of *Strauder* v. *West Virginia,* 100 U.S. 303, one of the

earliest landmark decisions construing the Fourteenth Amendment. Striking down a statute excluding Negroes from service on juries, the Court there observed (100 U.S. at 308):

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The *Brown* opinion merely returned to this authentic interpretation of the Amendment when it noted (approvingly quoting one of the lower courts, 347 U.S. at 494): "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."

The principle is not limited to situations in which the State teaches a philosophy of racial inferiority by expressly compelling segregation. The same message can be conveyed by lesser measures and they are equally forbidden. *E.g., Lombard* v. *Louisiana,* 373 U.S 267; *Robinson* v. *Florida,* 378 U.S. 153. Indeed, in some contexts, the Equal Protection Clause prohibits official action which merely facilitates, or gives effect to, private discrimination on the ground of race. *E.g.,*

Anderson v. *Martin,* 375 U.S. 399; *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.,* 235 U.S. 151; *Shelley* v. *Kraemer,* 334 U.S. 1. And see *Reitman* v. *Mulkey,* 387 U.S. 369. The State cannot gratuitously take steps to make discrimination easy; the Fourteenth Amendment bars State action which unnecessarily creates opportunities for the play of private prejudice. So, here, we submit, the State authorities overstepped the constitutional line by adopting student assignment plans which predictably, if not designedly, cater to the preference of white students to avoid desegregated schools.

III

It remains to suggest the appropriate remedy in each of the cases before the Court. As we have noted, the central fact in all three school districts involved is that an overwhelming majority of the Negro student population still attend all-Negro schools because the prevailing "freedom-of-choice" or "free transfer" plans allow the white students who would otherwise attend those schools to assign themselves elsewhere. That result condemns the freedom-of-choice assignment system in each of the cases, in light of the availability of other more promising alternatives.

We need not particularize the details of an appropriate plan for each district. But it is apparent that in both New Kent, Virginia (No. 695) and Gould, Arkansas (No. 805), each of which have only two schools, a substantial degree of desegregation would be achieved if geographical zoning were adopted. And, of course, full desegregation would result if the two

schools in each district were "paired", one as the elementary school for the entire area, the other as the secondary school. Either solution is presumably sound educationally and nothing in the record suggests that either alternative presents special administrative problems.

The Jackson, Tennessee, situation (No. 740) is more complex, but the availability of alternate solutions is equally clear. In this district, geographic attendance zones are already in operation and the obvious first step therefore seems to be to eliminate the superimposed "free transfer" provision of the plan which has worked to preserve as all-Negro each of the formerly Negro elementary schools, the formerly Negro junior high school, and the formerly Negro high school. There remains, however, a challenge to the three junior high school zones as "gerrymandered." [5]

On the face of the record, the charge of gerrymandering is well founded. Indeed, it appears that substantially greater desegregation at the junior high school level would have resulted if the elementary zone lines had been followed to create a feeder system. No explanation was offered for the deviations from this traditional plan. Moreover, it is demonstrable that other alternative boundaries—with no apparent disadvantages—can be drawn to achieve still more desegregation in the three schools involved. Quite plainly, the school authorities made no effort in this direction. In our view, they should be directed—subject, of course, to the supervision of the district court—to

[5] A challenge to the elementary school zones was sustained by the district court and is not in issue here.

redraw the junior high school zones with this purpose in view.

Respectfully submitted.

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FEBRUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968