

NO. 81-9

---

---

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

---

SEATTLE SCHOOL DISTRICT NO. 1, et al.

v.

STATE OF WASHINGTON, et al.,

APPELLANTS

---

ON APPEAL FROM THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT

---

MOTION FOR SUMMARY REVERSAL

---

REX E. LEE  
Solicitor General

WM. BRADFORD REYNOLDS  
Assistant Attorney General

Department of Justice  
Washington, D. C. 20530  
(202) 633-2217

---

---

QUESTIONS PRESENTED

1. Whether the equal protection norms of the Fourteenth Amendment are affronted by a state education policy of race-neutral student assignments to neighborhood public schools where no unlawful segregation has been demonstrated?
2. Whether racial animus was a decisive motivating factor in the formulation and approval of an initiative to establish a statewide policy of racial neutrality in the assignment of students to neighborhood public schools? See Aslington Hgts, p. 270-71, 429 US; Mt. Healthy 429 US. 274.
3. Whether an initiative establishing a state educational policy of racial neutrality in student assignments to neighborhood public schools is constitutionally invalid because it prohibits race-conscious student assignments except to remedy a proven constitutional violation? See Keyes and Swann where neutral plans may be invalidated [if and only if] there is dual history or violation. Neutrality is ok. by implication if no history or violation.

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1980

---

NO. 81-9

SEATTLE SCHOOL DISTRICT NO. 1, et al.

v.

STATE OF WASHINGTON, et al.,

APPELLANTS

---

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

MOTION FOR SUMMARY REVERSAL

---

Under this Court's Rule 35, the United States moves to reverse summarily the order of the court of appeals.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. B-1 to B-29) is reported at 633 F.2d 1338, and the opinion of the district court (J.S. App. A-1 to A-36) is reported at 473 F.Supp. 996.

JURISDICTION

The order of the court of appeals was entered on December 16, 1980, and an order denying rehearing was entered on March 26, 1981. A notice of appeal was filed on May 18, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(2).

STATEMENT

1. The school districts of Seattle, Tacoma, and Pasco in the State of Washington are municipal corporations. Each is directed by the State Constitution to "provide without distinction or preference on account of race, color, caste or sex ... a general and uniform system of public schools" for the educational instruction of students. (J.S. App. F-1). No school district in Washington has ever been proven to have acted with an intentionally segregative purpose in the operation of public schools (Id. 4).

In March 1978, the Seattle school district initiated a policy of race-conscious student assignments to obtain a racial balance in schools. A principal component of the policy was the mandatory assignment of entire neighborhoods of students to schools beyond those closest to home (Id. 5, A-17 to A-18). Similar race-conscious student assignment policies were adopted and implemented by the school districts of Tacoma and Pasco (Id. 8-9, A-9 to A-14).

Disagreeing with the Seattle policy of race-conscious student assignments, a voluntary citizens committee (CiVic) drafted Initiative 350 for submission to the voters of Washington (Id. A-18 to A-19). The Initiative proposed a statewide public educational policy of racially neutral student assignments to neighborhood schools

(Id. F-1 to F-2). Proponents of Initiative 350 urged that forced busing aggravates racial imbalance, noted that Seattle is not subject to a court desegregation order, and maintained that forced busing to desegregate the public schools had not worked elsewhere (Id. A-22). Civic "deliberately" avoided injecting race as an issue in its support of Initiative 350, and many adherents were motivated by an educational preference for neighborhood schools (Id. A-23).

On November 7, 1978, Initiative 350 was approved by approximately 66 percent of the voters statewide (Id. A-22).

2. The school districts of Seattle, Tacoma, and Pasco, brought suit assailing the constitutionality of Initiative 350 under the equal protection clause of the Fourteenth Amendment. The district court declared Initiative 350 unconstitutional on three grounds, and permanently enjoined its enforcement.

Initiative 350 created an impermissible racial classification because mandatory neighborhood student assignments were required to be color-blind despite a local school board preference for race-conscious assignments to achieve a racial balance, the district court declared. Local school authorities, the district court noted, retained discretion to assign students mandatorily beyond a neighborhood school for purposes other than racial balance, such as for special educational needs or health or safety reasons (Id. A-29 to A-30).

The district court further held Initiative 350 unconstitutional because "one of the factors" motivating its formulation and adoption was a racially discriminatory purpose (Id. A-30). The court asserted that it could "safely assume" that "many voters" supported Initiative 350 to maintain racial separation in public schools, but acknowledged that "a great many voters" were motivated by a desire to maintain neighborhood schools, and many others voted for mixed motives (Id. A-31).

The district court also insisted that Initiative 350 would disproportionately impair the education of minority children by foreclosing race-conscious student assignments to achieve racial balance (Id. A-33), and was intended to frustrate the racial balance plan of the Seattle school board (Id. A-34). The district court further noted that local school districts in Washington enjoy substantial autonomy, and that Initiative 350 departed from this norm by making educational policy at the state level (Id. A-34 to A-35). Accordingly, racial motivation was at least one factor in the adoption of Initiative 350, the district court concluded. (Id. A-35).

Finally, the district court held that Initiative 350 unconstitutionally interfered with a school board duty to remedy perceived de jure segregation, despite the absence of any judicial, administrative or other formal finding of an unconstitutional dual school system (Id. A-35 to A-36).

3. By a vote of 2-1, the court of appeals affirmed on the ground that Initiative 350 embodied an unjustifiable racial classification (Id. B-4). 1/ The court of appeals pointed to the finding that the Initiative was conceived

---

1/ The court of appeals declined to address the other two grounds for invalidity advanced by the district court.

and approved with the purpose of overriding the Seattle school board policy of race-conscious pupil assignments to achieve racial balance in the schools (Id.). The decision of Washington state voters to establish a statewide norm of racial neutrality and neighborhood schools to govern mandatory pupil assignments, the court of appeals explained, created a suspect racial classification because local school district departures from a neighborhood school policy were permitted for special educational needs and safety or health purposes. A racial classification is created, the court of appeals concluded, whenever a state differentiates between the treatment of racial and other problems in the same area (Id. B-7 to B-8).

The state interest in color-blind pupil assignments to neighborhood schools was insufficient to justify Initiative 350. The state policy should be discounted, the court of appeals asserted, because it supplanted the traditional autonomy enjoyed by local school boards, and, in Seattle, operated to frustrate an outstanding local student assignment plan striving to achieve racial balance (Id. B-8 to B-11).

Dissenting, Judge Wright denied that Initiative 350 created a racial classification. He observed that Initiative 350 does not treat persons differently on the basis of race (Id. B-20). A statewide educational policy of color-blind student assignments to neighborhood schools, Judge Wright asserted, could not be transformed into a racial classification simply because the discretion of local school boards to ameliorate lawful de facto segregation was circumscribed (Id. B-22 to B-23). Neither was a racial classification created by permitting local school districts to order pupil assignments beyond neighborhood schools for purposes of special education or to avoid health and safety hazards (Id. B-20 to B-21).

Judge Wright also declared that a racial classification could not be extracted from Initiative 350 simply because it established a statewide race-neutral, neighborhood school policy in preference to local race-conscious student assignment schemes seeking racial balance. He noted that the Washington State Constitution legitimately empowers the people to establish statewide educational or other policy by initiative (Id. B-22 to B-24).

Judge Wright disputed the finding that Initiative 350 was tainted by a racially discriminatory purpose. The district court's belief that racial imbalance in schools exposes minorities disproportionately to inferior education was clearly erroneous, he insisted (Id. B-25 to B-26). Moreover, the record was devoid of evidence that racial animus, as opposed to race-neutral concerns, inspired Initiative 350 (Id. B-26). In addition, resorting to a statewide initiative to establish educational policy regarding pupil assignments did not diverge sufficiently from procedural norms to prove a discriminatory intent behind Initiative 350 (Id. B-27).

Finally, Judge Wright noted that Section 6 of Initiative 350 permits departures from a race neutral, neighborhood school policy when necessary to rectify a constitutional violation proven in a court. Accordingly, Initiative 350 did not threaten interference with the vindication of constitutional rights (Id. B-29).

ARGUMENT

I. A COLOR-BLIND, NEIGHBORHOOD SCHOOL ASSIGNMENT  
POLICY DOES NOT CREATE A SUSPECT RACIAL CLASSIFICATION

Initiative 350 creates no racial classification for purposes of judicial review under the equal protection clause of the Fourteenth Amendment. Indeed, the Initiative demands a color-blind assignment of pupils to neighborhood schools, and nowhere mentions race.

Lacking an express racial classification, Initiative 350 can be treated as discriminatory along racial lines for purposes of equal protection review only by proof that the Initiative causes blacks to suffer a "significant deprivation of a benefit" or to shoulder a "substantial burden." Califano v. Boles, 443 U.S. 282, 293-295 (1979). The court of appeals suggested that Initiative 350 fastens a special political burden on blacks by foreclosing local school boards from adopting race-conscious student assignment schemes to achieve racial balance in

classrooms. The race neutrality demanded by Initiative 350, however, may be superseded by an initiative that expressly empowers local school boards to employ race-conscious student assignment plans to achieve racial balance. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971). Proponents of such an initiative would confront no greater electoral obstacles than the proponents of any other initiative, including Initiative 350. Thus, Initiative 350 does not impose on blacks 2/ or others advocating racial balance in classrooms any political burden to enacting their policy into law than is routinely encountered by any group seeking to further goals through the initiative process.

In addition, black students are not significantly deprived of any educational benefits by the operation of Initiative 350. To be sure, the Initiative does prevent local school districts from mandatory assignment of students beyond neighborhood schools to achieve racial balance. It speaks volumes, however, that the district court made no findings that the racial balance plans used in Seattle, Tacoma, or Pasco school districts or elsewhere have enhanced the educational achievement of black students. Despite a wealth of evidence disproving the argument

---

2/ It is noteworthy that a substantial majority of minorities apparently opposed the local Seattle plan for achieving racial balance in schools. (J.S. 5, 18).

classrooms. The race neutrality demanded by Initiative 350, however, may be superseded by an initiative that expressly empowers local school boards to employ race-conscious student assignment plans to achieve racial balance. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971). Proponents of such an initiative would confront no greater electoral obstacles than the proponents of any other initiative, including Initiative 350. Thus, Initiative 350 does not impose on blacks 2/ or others advocating racial balance in classrooms any political burden to enacting their policy into law than is routinely encountered by any group seeking to further goals through the initiative process.

In addition, black students are not significantly deprived of any educational benefits by the operation of Initiative 350. To be sure, the Initiative does prevent local school districts from mandatory assignment of students beyond neighborhood schools to achieve racial balance. It speaks volumes, however, that the district court made no findings that the racial balance plans used in Seattle, Tacoma, or Pasco school districts or elsewhere have enhanced the educational achievement of black students. Despite a wealth of evidence disproving the argument

---

2/ It is noteworthy that a substantial majority of minorities apparently opposed the local Seattle plan for achieving racial balance in schools. (J.S. 5).

that racial balance improves the educational performance of black students, 3/ the district court found the opposite

3/ Although no definitive consensus has emerged among scholars, a fair-minded interpretation of the evidence does not show that racial balance contributes to superior educational performance. See Nancy St. John, The Effects of School Desegregation on Children: A New Look at the Research Evidence, P.84 of Race Schooling in the City, Harvard Univ. Pres., 1981; N. St. John, School Desegregation Outcomes for Children 136 (1975). See Bell, Book Review, 92 Harv.L.Rev. 1826 (1979), and studies reviewed therein. See also D. Armor, The Evidence on Busing, 28 Pub. Interest 90 (1972). Substantial evidence testifies to the fact that forced busing to achieve racial balance is an impediment to educational achievement. See Wilkinson, From Brown to Bakke (1979), pp. 44-45, 152, 185, 187 (citing experience in Richmond, Va., Florida, a 1972 study by David Armor, and a 1975 study by Nancy St. John); Lawrence G. Felice, Mandatory Busing and Minority Student Achievement: New Evidence and Negative Results, 1975. (The study assesses the effects of busing on the academic performance of bused Black students. Data indicates that the academic achievement of bused Black children is significantly lower than that of non-bused Black students following a two-year period of busing); Burleigh B. Gardner, et al. The Effect of Busing Black Ghetto Children Into White Suburban Schools, 1970. (The study analyzes the change in student attitudes and academic performance resulting from busing. Although the study finds positive attitudinal change between the two groups as a result of desegregation, no significant difference is found in the scholastic performance levels achieved by bused and non-bused Black students); Yao-Chi Lee and Luther Tweeten. "The Impact of Busing on Student Achievement." Growth and Change, 1973. (Based on data from a 1970 statewide survey of Oklahoma students, the study finds that an .01 level of significance, time spent riding a bus reduced education achievement for fourth and eighth grade students). The manifold reasons for this unhappy effect on education include the diversion of educational resources and attention to busing controversies, Keyes v. Denver School Board, 413 U.S. 189, 242, 250 (1973), (Powell, J., concurring in part dissenting in part) and the loss of parental support and involvement in public school operations, Milliken v. Bradley, 418 U.S. 717, 741-742 (1974), a critical component of successful educational programs, J. Fuerst, Report Card: Chicago's All-Black Schools, The Public Interest, Summer 1981. ~~Every poll taken since the judiciary embarked on busing as a desegregation remedy shows a majority of all races in opposition.~~ See Nathan Glazer testimony before Hatch Committee; Statement of Bennett Johnston regarding The Neighborhood School Act. Thomas Sowell has compiled

} Not true

3/ (continued)

---

persuasive evidence that shows black students can achieve superior educational gains without racial balance in classrooms. See Patterns of Black Excellence, The Public Interest, Spring 1976; Assumptions Versus History in Ethnic Education (unpublished manuscript).

It is generally agreed that differences in effectiveness among schools can be ascribed to the following five factors:

- o Strong administrative leadership by the school principal, especially in regard to instructional matters.
- o A school climate conducive to learning; that is, a safe and orderly school relatively free of discipline and vandalism problems.
- o Schoolwide emphasis on basic skills instruction (which entails acceptance among the professional staff that instruction in the basic skills is the primary goal of the school).
- o Teacher expectations that all students, regardless of family background, can reach appropriate levels of achievement.
- o A system for monitoring and assessing pupil performance which is tied to instructional objectives.

See Effective Schools: What The Research Says, Today's Education, April-May 1981, 46 G; Effective Schools: Mirror Or Mirage, Today's Education, April-May 1981, 48 G; Teaching and Instruction, Instructionally Effective Schools Research Area Planning Document, January 14, 1981 (N.I.E.); Instructionally Effective Schools, Research Area Plan, March 1980 (N.I.E.); Some Schools Work And More Can, Social Policy, March-April 1979, p.1.

without any supporting authority (J.5. A-7, A-25). The court of appeals avoided any reliance on that district court finding. The United States submits that the record in this case fails to demonstrate that black students suffer any significant deprivation of educational benefit by a statewide policy in Washington of color-blind mandatory student assignments to neighborhood schools. Initiative 350, therefore, is not subject to strict equal protection scrutiny demanded for laws embodying racial classifications.

The court of appeals mistakenly relied on Hunter v. Erickson, 393 U.S. 385 (1969), in reaching a contrary conclusion. 4/

---

4/ The court of appeals also relied on Lee v. Nyquist, 318 F.Supp 710 (W.D. N.Y. 1970), aff'd without opinion, 402 U.S. 935 (1971), which invalidated a state statute that permitted elected school boards, but not appointed school boards, to adopt race-conscious student assignment plans. The summary affirmance by the Supreme Court did not constitute endorsement of the rationale of the district court that the divergent statutory powers of the elected and appointed school boards created a racial classification. See Bradley v. Mandel, \_\_\_\_\_ U.S. \_\_\_\_\_ (1978).

In that case, the Akron City Council found that racial discrimination in the housing market caused many minorities to live under "sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions." (Id. at 391). Accordingly, the council enacted an open housing ordinance prohibiting discrimination on the basis of race, color, religion, ancestry, or national origin. A City Charter Amendment was thereafter adopted that suspended the operation of the fair housing ordinance and that required approval by voters in a referendum of any subsequent ordinance forbidding racial or similar discrimination concerning the sale or rental of real estate. Housing ordinances dealing with other issues could become effective without a referendum. The Court reasoned that the Charter Amendment created a racial classification because it deprived racial minorities victimized by discrimination of the significant benefits of an outstanding fair housing ordinance and placed special burdens on racial minorities within the governmental process (Id. at 391). In this case, in contrast to Hunter, there are no supportable findings that racial minorities are significantly deprived of educational benefits by Initiative 350. Furthermore, Initiative 350 does not fasten any special political burden on racial minorities to the enactment by initiative or state law of a race-conscious student assignment policy to obtain racial balance. Accordingly, neither Hunter nor Califano v. Boles ordains the conclusion that Initiative 350 creates a racial classification.

II. A STATEWIDE POLICY OF COLOR-BLIND MANDATORY  
STUDENT ASSIGNMENTS TO NEIGHBORHOOD SCHOOLS  
IS JUSTIFIED BY COMPELLING STATE INTERESTS

Summarize  
law: Even if  
suspect class  
triggering  
strict  
scrutiny  
compelling  
interest  
saves  
it...

Initiative 350 satisfies the equal protection clause under any standard of review because it advances several compelling state interests. A public policy of color-blindness in education or elsewhere advances the strong government interest in safeguarding civil rights irrespective of race, and discouraging the populace from thinking and acting along divisive racial lines. See Brown v. Board of Education (II), 349 U.S. 294, 300-301 (1954) (holding that students are constitutionally entitled to racially nondiscriminatory assignments to public schools); Anderson v. Martin, 375 U.S. 399, 402 (1964) (holding racial labelling of candidates on ballots unconstitutional because it encouraged voters to discriminate upon the grounds of race); See also Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting, and maintaining that no state may regulate the enjoyment by citizens of their civil rights solely upon the basis of race); McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273 (1976) (interpreting Title VII of the 1964 Civil Rights Act and 42 U.S.C. 1981 as establishing a norm of color-blindness in employment); Fullilove v. Klutznick, 100 S.Ct. 2758, 2802-2803 (1980) (Stewart, J. dissenting, and observing that racial distinctions made by government teaches the public to think in racial terms and

fosters private discrimination; Hughes v. Superior Court, 339 U.S. 460 (1950) (concluding that a state may proscribe picketing intended to coerce an employer to hire on the basis of race rather than on individual merit).

A state also has a compelling interest in a policy of mandatory neighborhood school assignments. A neighborhood school policy may contribute to educational success by eliciting substantial parental support, see Milliken v. Bradley; 418 U.S. 717, 741-742 (1974), and by avoiding the distraction, loss of resources, and exodus from public schools typically associated with student assignments beyond neighborhood schools to achieve a racial balance, see Keyes v. Denver School Board, 413 U.S. 189, 242, 250 (1973) (Powell, J. concurring in part and dissenting in part); Estes v. Metropolitan Branches of the Dallas NAACP, 100 S.Ct. 716 (1980) dissent from a denial of certiorari); J. Coleman, Trends in School Segregation 1968-73 (Urban Institute paper); D. Armor, White Flight, Demographic Transition and the Future of School Desegregation (The Rand Corp., August 1978), and Testimony before the Senate Judiciary Subcommittee on the Constitution, 97th Cong., 1st Sess. (1981); See also Wilkinson, From Brown to Bakke (1979), 151-152, 197. Congress, moreover, has proclaimed a national policy blessing student assignments to neighborhood schools, 20 U.S.C. 1701, and Initiative 350 faithfully echoes this policy.

Milliken  
should  
be  
elaborated  
on  
here  
reg-a-v  
the  
importance  
of neighborhood  
schools  
absent  
violation  
or  
substantive  
guarantee

Finally, a state has a compelling interest in offering its citizens an opportunity to enact policy directly by initiative. See City of East Lake v. Forest City Enterprises, 426 U.S. 668, (1976); James v. Valtierra, 402 U.S. 137, 141-142 (1971). This Court, moreover, has remonstrated against judicial suspicion of the distribution of power within a State because the Constitution entrusts States with "extraordinarily wide latitude" over such matters. Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71-74 (1978). Thus, Initiative 350 cannot be constitutionally faulted for overriding the policy preferences of local school boards through a statewide vote.

III. RACIAL ANIMUS WAS NOT A MOTIVATING FACTOR  
BEHIND THE APPROVAL OF INITIATIVE 350

The district court concluded that racial animus was a motivating factor in the adoption of Initiative 350. A racially discriminatory purpose could be deduced, the district court asserted, from a safe assumption that many voters desired to maintain a maximum degree of racial separation in public schools, from a putative known adverse impact on the education of minorities caused by Initiative 350, from a manifest intent to frustrate Seattle's racial balance plan, and from the displacement of traditional local authority over student assignments with a statewide policy (J.S. A-30 to A-35).

The district court's "safe assumption" that many voters supported Initiative 350 because of racial animus was clear error. The assumption is discredited by the facts that race was not injected into the public debate by the sponsors of Initiative 350, 5/ that many voters supported the Initiative because of a preference for the multiple advantages of neighborhood schools, 6/ that Washington State has an unblemished history of nondiscrimination in public education, 7/ and that a majority of both blacks and whites oppose forced busing to achieve racial balance. 8/

The district court's also mistakenly asserted that Initiative 350 will disproportionately impair the educational opportunities of black students. The record is devoid of evidence that racial balance in schools meaningfully contributes to superior education, and numerous studies have failed to prove the same. 9/

---

5/ (J.S. A-23)

6/ Id. A-23, A-31

7/ Id. 5

8/ See Statement by Senator Johnston  
in Neighborhood School Act

9/ See J.S. B-25 and n. 4 thereon; n.2, supra.

The district court's suspicion of resort to a statewide initiative to enact a neighborhood school assignment policy, in lieu of the traditional power over such policy entrusted to local school boards, was misplaced. The Washington Constitution entrusts educational policy to the State (J.S. 4 in n. 4, 15), and Initiative 350 was designed to insure nondiscrimination in student assignments, and adherence to a neighborhood school policy that had traditionally been employed in Seattle (Id. A-22 to A-23) and elsewhere in the State. The evidence fails to show that enacting a nondiscriminatory, neighborhood school assignment policy through Initiative 350 was inspired by a racially discriminatory purpose. 10/

---

10/ Even if a tainted purpose were proven, the compelling state interests delineated in Part II would exonerate Initiative 350 from any equal protection infirmity.

IV. SCHOOL DISTRICTS ARE NOT CONSTITUTIONALLY  
OBLIGATED TO EMPLOY RACE-CONSCIOUS STUDENT  
ASSIGNMENT SCHEMES SEEKING RACIAL BALANCE  
ABSENT A COURT OR OTHER FORMAL FINDING OF  
UNCONSTITUTIONAL ACTION

(a) Swann Keyes

(b) But no to further racial balance  
but to remedy desegregation.

\* V. The school districts themselves created the  
racial classification; the initiative undoes it.  
*with some attention that racial <sup>impossible</sup> classification is  
fully an impossible racial classification.*

(a) Argument goes: Racial classifications are  
suspect, depends for their imposition on the  
existence of a violation and a duty to desegregate.  
Therefore, no problem presented when voters  
rescind an otherwise unjustifiable racial  
classification.

(1) No authority on school districts  
part to identify discrimination. See Bakke,  
Fullilove