IN THE

Supreme Court of the United States

No. 695

CHARLES C. GREEN, ET AL.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF
NEW KENT COUNTY, VIRGINIA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

Other Authorities

---

* Extracts from cited authorities appear in the Respondents' Appendix in No. 740.

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QUESTION PRESENTED

Are the Negro patrons of a public school system denied equal protection of the laws under the Fourteenth Amendment to the United States Constitution where the system is administered under a plan of operation by which each

pupil is given an unrestricted annual right to attend the school of his choice without regard to race, color or national origin?

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

The petitioners correctly state that, through the 1965-1966 school year, children in New Kent County attended school under the Pupil Placement Act of Virginia, and that there was no integration of the school system until 1965-1966 when 35 Negro children chose to attend the formerly all white school. Brief for Petitioners pp. 6-7.

However, an examination of the tables set forth on page 7 of their Brief will show that, in the year following implementation of the respondents' freedom of choice plan, the number of Negro children attending the formerly all white school more than tripled, and that progress has been made towards faculty desegregation.

The most recent statistics show that 115 of the 736 Negro students are attending New Kent, the formerly all white school, and that there is an enrollment of 644 in New Kent and 621 in Watkins, and 28.2 teachers in New Kent and 30.8 in Watkins.

The freedom of choice plan under which the New Kent County public school system is operated is set forth in the Appendix at pages 34a through 44a and pages 50a through 51a. In general, it gives each student in the system an unrestricted right to attend the school of his choice. It has been examined and approved by HEW, the District Court and the Court of Appeals *en banc*.

SUMMARY OF ARGUMENT

Brown v. *Board of Education of Topeka*[1] articulated a proscriptive constitutional mandate under the Fourteenth Amendment: No state shall deny to any child, solely because of race, admission to the public school of his choice. Compliance with the mandate required the elimination of state-imposed racial considerations so that those admitted to public schools were not Negro children and white children—but just children.

The petitioners themselves concede that they have an unrestricted choice and "a privilege rarely enjoyed in the past —the opportunity to attend the school of their choice." (Pet. for Cert. p. 13.) Yet they ask to be deprived of a choice because the choice exercised by their fellow residents of the county—entirely free of state-imposed or promoted racial considerations—has not produced some sort of integrated balance of Negroes and whites in the school system.

That the states have no obligation under the Fourteenth Amendment to enforce compulsory integration of the races throughout the school system is recognized by decisions in the Courts of Appeal for the Fourth Circuit, the Sixth Circuit, the Seventh Circuit, the First Circuit, the Eighth Circuit and the Tenth Circuit and by the Congress of the United States. The same principle is implicit in decisions in the Courts of Appeal for the Third Circuit and the Second Circuit, respectively.

The respondents are aware that their public school system could be operated under some other plan. Their adoption of freedom of choice is rooted in both a constitutional base and an educational base. It is designed to honor the

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[1]347 U.S. 483 (1954), 349 U.S. 294 (1955) (hereinafter referred to as *Brown I* and *Brown II* or as the *Brown* decisions).

educational imperative of the system, as well as to comply with the Fourteenth Amendment, in the light of the circumstances in this rural Virginia county and the experiences in other areas with the withdrawal of white children from the public school system. Both the constitutional requirement and the educational function are fulfilled by the freedom of choice plan.

ARGUMENT

I.

Introduction

In their Complaint filed March 15, 1965, the petitioners alleged, in Article VI, paragraph 16 on page 8, that they "[S]uffer and will continue to suffer irreparable injury as a result of the persistent failure and refusal of the defendants to initiate desegregation and to adopt and implement a plan providing for the *elimination of racial discrimination in the public school system.*" (Emphasis added.) This was the basic premise of their Complaint and, significantly enough, it was reminiscent of the language in the *Brown* decisions.

On June 28, 1966, the District Court approved the respondents' freedom of choice plan for the operation of the New Kent County public school system. Under this plan each student in the county public school system, effective the 1966-67 term, was given the right to attend each year any school of his choice in the system.

The petitioners have acknowledged that under a free choice plan students are allowed to attend the school of their choice,[2] and have conceded that their right to make

[2] "[S]tudents are given a privilege rarely enjoyed in the past—the opportunity to attend the school of their choice." *Green* v. *County School Board of New Kent County,* Pet. for Cert. p. 13.

an annual choice is "unrestricted and unencumbered."[3] This would seem to fulfill the petitioners' original premise; *viz.*, elimination of racial discrimination by the respondents in their operation of the public school system.

However, the petitioners re-tooled their premise following the adoption of the freedom of choice plan by the respondents. It is now their premise that the respondents have a constitutional duty to compel Negro and white students alike, their free choices to the contrary notwithstanding, to attend schools on a racial basis in order to achieve an integrated system.

The re-tooled premise necessarily entails some difficulty for the petitioners, for it requires them to complain of the "privilege rarely enjoyed in the past—the opportunity to attend the school of their choice."[4] Thus, on page 49 of their Brief, the petitioners acknowledge that a freedom of choice plan is not unconstitutional *per se,* but that it is unconstitutional in operation where "there is little reason to believe it will be successful"—an euphemistic expression for racial balance throughout the system.

It is at this juncture, we submit, that the petitioners concede the validity of the action of the District Court, which approved the plan with the retention of jurisdiction in order to observe its operation,[5] and the action of the Court of Appeals, which remanded the case for the District Court to review and update the record and fashion proper decrees.

[3]*Bowman* v. *County School Board of Charles City County,* 382 F. 2d 326, 328 (4th Cir. 1967), the companion case, for which no review is sought, decided together with this case. While the opinion discussed herein was rendered in the *Charles City County* case, it was expressly made applicable to this case. *Green* v. *County School Board of New Kent County,* 382 F. 2d 338, 339 (4th Cir. 1967).

[4]Note 2, *supra.*

[5]Since the plan has been in operation, the number of Negro students attending the formerly all white school has grown from 35 in 1965-66 to 115 in 1967-68, according to the HEW Documents filed by the petitioners.

A fundamental rule established by the Supreme Court in school desegregation cases is that control over the course and shape of desegregation rests with the district courts and with the school boards themselves. The very nature of the problem points up the wisdom of the rule.

It was precisely for this reason that *Brown II* remanded the cases to the district courts. In subsequent cases the Supreme Court consistently has adhered to this rule, either expressly or in practice, and it was the basis of the remands in *Rogers* v. *Paul,* 382 U.S. 198 (1965), and *Bradley* v. *School Board of City of Richmond,* 382 U.S. 103 (1965). Yet the petitioners would have control transferred to this Court, despite the fact that the District Court unquestionably has the greater opportunity to observe the free choice plan in operation.

In the courts below, the thrust of the petitioners' attack was upon the principle of free choice rather than the operation of the plan. It is incongruous that the movement which began in order to free the Negro from the inability to exercise a choice because of race would now, for purely racial motives, deny him the choice. The petitioners say in effect that white and Negro alike should have no choice. There must be integration of the races in any event. The desire of parents and students must yield to the desire of those who would require compulsory integration.

Though the petitioners have conceded the existence of an unrestricted choice, they would have this Court *force* others to do what they are *free* to do already. This is dangerous in principle because it restores race as a criterion in the operation of the public schools, and it was this very criterion that was rejected in the *Brown* decisions. The criterion of race simply is improper under our governmental system.[6]

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[6]"Our Constitution is colorblind." *Plessy* v. *Ferguson,* 163 U.S. 537, 559 (1896) (Dissenting opinion).

> The genius of the American political tradition, in its best sense, in relation to race is that it dictates that racial criteria are not legitimate in the operation of governmental facilities and should be rigorously eschewed. To bring racial criteria in by the front door, so to speak, even before throwing them out the back, represents, in my opinion, no real gain for the body politic and has potentially dangerous implications for the future.[7]

The petitioners' position also endangers the fundamental aim of the public school system. Clearly there is no redeeming value in integration compelled at the expense of education. This result would obtain, however, where the free choices of parents and pupils are frustrated. The following statement gives some perspective to the problem:

> [T]he purpose of schools is education and . . . no child is being served if education is being made impossible. School authorities must make clear when they believe that pupils are being used as pawns in the struggles of adults. The question to be asked about all proposals is whether they will improve the education of the pupils involved, not whether they will contribute to other goals, even desegregation.[8]

Integration alone is not, therefore, a proper goal in terms of the educational imperative. The social engineering inherent in compelling students to attend certain schools on

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[7]Gordon, *Assimilation in American Life: The Role of Race, Religion and National Origins,* p. 250 (1964). See *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954): "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."

[8]*De Facto Segregation,* Educational Policies Commission of the NEA and the American Association of School Administrators, NEA Journal p. 36 (October 1965).

purely racial grounds and against their wishes has no place in education,[9] and, it is submitted, no warrant in law.

II.

The validity of a plan permitting each pupil annually to attend the public school of his free choice is implicit in the mandate of Brown v. Board of Education

A. The Mandate of *Brown* v. *Board of Education*

The seed of the petitioners' case is sown upon stony ground when they cite the *Brown* decisions for the proposition that the Fourteenth Amendment mandates compulsory integration of public schools. The petitioners construe these decisions to mean that the Fourteenth Amendment prohibits public schools which are segregated *from any cause*

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[9]See Fischer, *Educational Problems of Segregation and Desegregation,* from *Education in Depressed Areas,* A. Harry Passow, editor, p. 290 (1963), in which the author commends "a maximum of free choice for all children" and criticizes the "growing pressure to locate schools, draw district lines, and organize curricula in order to achieve a pre-determined racial pattern or enrollment." *Id.* at 296-97.

A sufficient answer to the petitioners' complaint that a free choice plan is unreasonably burdensome and uneconomical to the school system is that these are not criteria under the Fourteenth Amendment. See *Kelley* v. *Altheimer, Arkansas Public School District,* 378 F. 2d 483, 497 (8th Cir. 1967) (discussing costly and inefficient bus systems). It is not conceded, moreover, that the geographic zone plan urged by the petitioners would be more economical and convenient to the system. The inevitable result of this, based upon the racial balance concept implicit in the petitioners' argument, would be to put the respondents in the zoning business—a diurnal haul indeed. See *Swann* v. *Charlotte-Mecklenburg Board of Education,* 369 F. 2d 29 (4th Cir. 1966), and *Deal* v. *Cincinnati Board of Education,* 369 F. 2d 55 (6th Cir. 1966), *cert. den.,* ..... U.S....., where the plaintiffs complained that the zones as drawn did not produce the "necessary" racial composition in the schools and argued that the Boards were required to re-zone or take other steps whenever necessary to achieve the proper racial composition in the schools . See also *Bradley* v. *School Board of City of Richmond,* 345 F. 2d 310 (4th Cir. 1965), *vacated and remanded on other grounds,* 382 U.S. 103.

whatsoever and requires the appropriate State authorities to compel integration.

This construction by the petitioners must yield to the unequivocal language of the Court itself:[10]

> We come then to the question presented: Does segregation of children in public schools *solely on the basis of race,* even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. (Emphasis added.)
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> . . .
>
> To separate [Negroes] from others of similar age and qualifications *solely because of their race* generates a feeling of inferiority as to their status in the community. . . . (Emphasis added.)
>
> . . .
>
> [W]e hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of *the segregation complained of,* deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. (Emphasis added.)

The key to the meaning of *Brown I* lies in the italicized words, taken in context. The "segregation complained of," which was held to deny equal protection of the laws, was the refusal of the respondents, *solely on the basis of race,* to permit Negroes to attend the school of their choice. It was, therefore, legally enforced segregation, solely on the basis of race, which the Court struck down—*not* freedom of choice. In fact, Mr. Justice Marshall himself, during his argument at the bar of this Court on December 9, 1952, in Case No. 101, carefully pointed out that the harm suffered by the Negro children was the product of *state-imposed* segregation:

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[10]347 U.S. at 493, 494 and 495 (*Brown I*).

> But my emphasis is that all we are asking for is to take off this state-imposed segregation. It is the state-imposed part of it that affects the individual children. . . .[11]

That *Brown I* permits the respondents' freedom of choice plan is implicit in the fourth of five questions put to counsel to reargue in terms of the proper method of achieving desegregation:[12]

> 4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be *admitted to schools of their choice,* or
>
> (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to *a system not based on color distinctions?* (Emphasis added.)

Clearly what concerned the Court was whether *free choice* shall be granted *now* or shall there be a *gradual adjustment?* Gradual adjustment to what? To schools with racial balance? No!—"to a system not based on color distinctions." A freedom of choice plan, in which there is an unrestricted and unencumbered right to attend any school in the system, is manifestly not based on color distinctions.

The Court invited freedom of choice by the very nature

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[11]Ward & Paul, *Transcript of Brown* v. *Board of Education of Topeka* p. 28 (Library, U.S. Supreme Court). See Conant, *Slums and Suburbs* p. 27 *et seq.* (1961). The author suggests that the pupils in a completely Negro school are not by that fact alone deprived of equal educational opportunities if they are not assigned solely because of their race. *Id.* at 28

[12]347 U.S. at 495, *n.* 13.

of the relief it was considering and, in addition, by its decision in *Brown II*. There the Court answered question 4(b) in the affirmative in remanding the cases to the district courts for such orders and decrees as might be required *to admit the petitioners to public schools on a racially nondiscriminatory basis.* Moreover, it is not without significance that the Court couched its decision in terms of the admission, rather than the assignment, of students on a racially nondiscriminatory basis. A freedom of choice plan provides just such a basis in that the sole criterion for admission to any school is the individual's free choice and not his race.[13]

B. The Shape and Meaning of the *Brown* v. *Board of Education* Mandate

1. *In the United States Supreme Court*

The mandate of the *Brown* decisions was stated in unequivocal terms in *Cooper* v. *Aaron,* 358 U.S. 1, 5, 7 (1958):

> On May 17, 1954, this Court decided that *enforced racial segregation* in the public schools of a State is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. (Emphasis added.)
>
> . . .
>
> State authorities were thus duty bound to devote every effort toward *initiating desegregation* and bringing about the *elimination of racial discrimination* in the public school system. (Emphasis added.)

[13]Provided, of course, the choice will not result in overcrowding. In this case the plan properly provides that where a school would become overcrowded if all the choices were granted, pupils choosing that school will be assigned to the school of their choice nearest to their homes.

Clearly the respondents are not "duty bound" under the Fourteenth Amendment to compel Negro and white students alike, solely because of their race, to attend certain schools for the avowed purpose of integrating the races, their free choices to the contrary notwithstanding.

Later decisions of this Court likewise fail to support the petitioners' argument that the States have an obligation under the Fourteenth Amendment to enforce a mixed racial composition in their public school systems. In fact, this Court has conveyed the clear impression that a freedom of choice plan is constitutionally permissible under the *Brown* mandate, even though some sort of racial balance between Negroes and whites is not thereby produced throughout the school system. Thus, *Calhoun* v. *Latimer,* 377 U.S. 263 (1964), was remanded to the district court for an evidentiary hearing to determine whether the respondent's free transfer plan, with the addenda adopted subsequent to argument, satisfied the desegregation mandate of *Brown.*

Goss v. *Board of Education of Knoxville,* 373 U.S. 683, 689 (1963), focused on the elimination of "state-imposed racial conditions" in the transfer of pupils. There the plan re-zoned school districts without reference to race but set up a transfer system under which students, upon request, would be permitted—solely on the basis of their race and the racial composition of the school to which they had been assigned—to transfer from such school, where they would be in the racial minority, back to their former segregated school, where their race would be in the majority.

Although this Court held that a racial criterion for purposes of transfer between public schools was unconstitutional, it noted that:[14]

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[14]373 U.S. at 687.

> [I]f the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the schools to which he requested transfer we would have an entirely different case. *Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations,* to remain in the school of their zone or to transfer to another. (Emphasis added.)

The respondents' free choice plan is that "entirely different case" in which each pupil (or his parents) is free to choose which school he will attend, "entirely free of any imposed racial considerations." There the pupil (or his parents) had to show that he came under the majority-minority transfer rule to justify his choice. Here the pupils are not required to justify their choice by any racial criterion. It is unrestricted and unencumbered and, therefore, consistent with the following dictum from *Goss* v. *Board of Education of Knoxville, supra,* at 688-89:

> This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions would fall. Likewise, *we would have a different case here if the transfer provisions were unrestricted,* allowing transfers to or from any school regardless of the race of the majority therein. (Emphasis added.)

There is no difference in principle in the respondents' plan, which gives to each pupil an unrestricted right each year to choose the school he wishes to attend, and a plan which assigns pupils on a non-racial basis and then gives them an unrestricted right each year to transfer to the school they wish to attend.

Although this Court has decided several other cases involving desegregation, the issue in most of them has been speed, *i.e.,* the number of grades to be desegregated within a given time. Speed is not an issue in this case. The respondents' desegregation plan applied to all grades in the schools effective the 1966-67 school year.

2. *In the other Federal Courts*

The gist of the petitioners' argument is that a public school system is segregated as long as there remains any school which is not attended by both white and Negro children. This argument was rejected by the three judge court on the remand in *Brown* v. *Board of Education of Topeka,* 139 F. Supp. 468, 470 (D. Kan. 1955):

> It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them there is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.

In *Briggs* v. *Elliott,* 132 F. Supp. 776, 777 (E.D.S.C. 1955), Judge Parker made perhaps the most famous expression of the constitutional distinction embodied in the *Brown* mandate:

> What [the Supreme Court] has decided . . . is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in

other words, does not require integration. It merely forbids discrimination.

This fundamental distinction is supported by decisions in the Circuit Courts of Appeal for the Fourth Circuit (*Bradley* v. *School Board of City of Richmond, supra,* which was followed by the Court of Appeals in the case at bar), the Sixth Circuit (*Monroe* v. *Board of Commissioners of City of Jackson,* 380 F. 2d 955 (1967)) (now under review in No. 740), the First Circuit (*Springfield School Committee* v. *Barksdale,* 348 F. 2d 261 (1965)), the Seventh Circuit (*Bell* v. *School City of Gary,* 324 F. 2d 209 (1963), *cert. den.,* 377 U.S. 924), the Eighth Circuit (*Clark* v. *Board of Education of Little Rock School District,* 369 F. 2d 661 (1966), *reh. den.,* 374 F. 2d 569)[15] and the Tenth Circuit (*Downs* v. *Board of Education of Kansas City,* 336 F. 2d 988 (1964), *cert. den.,* 380 U.S. 914).

The same distinction is implicit in *Evans* v. *Ennis,* 281 F. 2d 385 (3d Cir. 1960). Although Judge Biggs' statement quoted on page 37 of the petitioners' Brief appears to support their position ("The Supreme Court has unqualifiedly declared integration to be their constitutional right."), it has been lifted out of the context of his repeated statements about Negro children who "desire," "seek" and "will seek" integration. There was no suggestion that the state was to compel integration where the children (or parents) did not desire or seek to attend school on an integrated basis. See also *Taylor* v. *Board of Education of City*

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[15]*Contra, Kemp* v. *Beasley,* .....F. 2d. ....., No. 19017 January 9, 1968 (different panel of 8th Circuit). Compare *Raney* v. *Board of Education of Gould School District,* 381 F. 2d 252 (8th Cir. 1967) (now under review in No. 805), with *Kelley* v. *Altheimer, Arkansas Public School District, supra,* for a further illustration of the division in opinion among the panels in the Eighth Circuit.

School District of New Rochelle, 294 F. 2d 36 (2d Cir. 1961), *cert. den.,* 368 U.S. 940, where the court, after finding that the school board had deliberately drawn and maintained district lines to perpetuate a "Negro" school, decreed that the pupils were to be permitted (not compelled) to transfer to other schools.

Moreover, support for the petitioners' position is more apparent than real in *Board of Education of Oklahoma City Public Schools* v. *Dowell,* 375 F. 2d 158 (10th Cir. 1967), *cert. den.,* 387 U.S. 931. That case must be read in the light of *Downs* v. *Board of Education of Kansas City, supra,* where the use of geographic attendance zones had resulted in some schools having an all white and some schools having an all Negro enrollment. The appellants' argument that this result rendered the zone plan unconstitutional was rejected by the court, at 998:

> Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, *the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them.* (Footnote omitted.) (Citations omitted.) (Emphasis added.)

This principle was reaffirmed in the Oklahoma City case even though it required the school board to take affirmative action to promote integration. The distinction between the two cases is that in Oklahoma City the school

board had acted in bad faith in its plans (or lack thereof) to desegregate the school system (even failing to comply with a court order), while in the Kansas City case the school board had acted in good faith.

The Fifth Circuit alone has stated without qualification that there is no distinction in constitutional principle between "desegregation" and "integration," and that the states have a duty under the *Brown* mandate to take affirmative action to achieve a mixed racial composition in all schools in the system.[16] This position runs counter to the cases cited above from the other circuits, to the proscriptive language of the Fourteenth Amendment, to the Civil Rights Act of 1964 and to the views of those who are trying to keep the educational lighthouse in sight amidst the turbulent seas of litigation.

"Segregation" is, according to the petitioners' definition, both a condition and an activity. In their use it means any situation in which all pupils in a particular school are of the same race, and apparently they contend that even so defined it is unconstitutional—at least in the South. The sounder view, it is submitted, is that merely the existence of a wholly white or wholly Negro school is not unconstitutional *per se*.[17] The missing ingredient is someone who is discriminated against, who is denied admission solely because of race. This is the true focus of the *Brown* mandate, and it points up the distinctive meaning of the words involved. The mandate was thus understood by Jack Greenberg, principal counsel for the petitioners:[18]

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[16]*United States* v. *Jefferson County Board of Education,* 372 F. 2d 836 (5th Cir. 1966), *aff'd with modifications on rehearing en banc,* 380 F. 2d 385 (1967) (four judges dissenting), *cert. den. sub. nom., Caddo Parish School Board* v. *United States,* 389 U.S. 840.

[17]See Conant, Note 11, *supra.*

[18]Greenberg, *Race Relations and American Law* pp. 239-40 (1959). See Conant, Note 11, *supra.*

> Moreover, the jury discrimination precedents may be recalled: Bias may be presumed from a consistently segregated result; a token number of Negroes may be legally equivalent to none. If, however, in education there were complete freedom of choice, or geographic zoning, or any other nonracial standard, and all Negroes still ended up in certain schools, there would seem to be no constitutional objection.

"Segregation," "desegregation" and "integration" are, therefore, words of art in legal contemplation, though it is significant that they are assigned distinctive meanings in other disciplines as well. Thus, Milton Myron Gordon, a sociologist at the University of Massachusetts, has written:[19]

> Desegregation refers to the elimination of racial criteria in the operation of public or quasi-public facilities, services, and institutions, which the individual is entitled to as a functioning citizen of the local or national community, equal in legal status to all other citizens. . . . Integration, however, embraces the idea of the removal of prejudice as well as civic discrimination and therefore refers to much more.

Proper definitions of these terms can be framed on the basis of the great body of decisional law and the Civil Rights Act of 1964[20]:

> Segregation—a system whereby persons of different races are required by the state to attend public schools set apart for their use only and are denied admission to all other public schools by the state solely because of a racial criterion.

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[19]Note 7, *supra,* p. 246. See generally Handlin, *The Goals of Integration,* from *Daedalus,* p. 268 (Winter 1966).

[20]78 Stat. 241.

> Desegregation—a plan whereby persons of different races are admitted to the public schools in the system without regard to their race.
>
> Integration—the intermingling of persons of different races in the same public schools, either by the free choice of the persons themselves or by compulsory assignment by the state through the use of race as a criterion for assignment.

3. *In the Congress*

The legislative history of the Civil Rights Act of 1964 clearly shows that Congress did not intend or announce a national policy requiring the states to take affirmative action to achieve integration of the races in every school throughout the public school system. This is manifest from the statements of the Senate floor leader for the Act, Hubert H. Humphrey, whose language paraphrased Judge Parker in *Briggs* v. *Elliott, supra*:[21]

> Judge Beamer's opinion in the Gary case [*Bell* v. *School City of Gary,* 213 F. Supp. 819 (N.D. Ind. 1963)] is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute.
>
> . . .
>
> I should like to make one further reference to the Gary case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration. . . . *The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems.* (Emphasis added.)

Since Congress intended to write the "thrust" of the *Gary* opinion into the Civil Rights Act, an examination of that

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[21] 110 Cong. Rec. 12715, 12717.

case will disclose the national policy embodied in the Act. The third question presented to the court for determination in that case is the same that the petitioners now present to this Court:

> Whether the plaintiffs [approximately 100 minor Negro children] and other members of the class have a constitutional right to attend racially integrated schools and the defendant has a constitutional duty to provide and maintain a racially integrated school system. *Id.* at 820.

The question was answered in the negative by Judge Beamer, who relied upon *Brown* v. *Board of Education of Topeka, supra,* and *Evans* v. *Buchanan,* 207 F. Supp. 820 (D. Del. 1962). Judge Beamer quoted with approval from the latter case, at 830:

> '[T]he States do not have an affirmative, constitutional duty to provide an integrated education. The pertinent portion of the Fourteenth Amendment . . . reads, "nor [shall any State] deny any person within its jurisdiction the equal protection of the laws." This clause does not contemplate compelling action; rather, it is a prohibition preventing the States from applying their laws unequally.'

Therefore, the Civil Rights Act of 1964 embodies the policy that, while no Negro shall be denied admission to any public school solely because of his race, there is no constitutional right to attend a racially integrated school and no corresponding duty on the state to achieve racial integration in all schools. Any lingering doubts should have been set to rest by the reaffirmation of this policy in the 1966 amendments to the Elementary and Secondary

Education Act of 1965, which added the emphasized language below:[22]

> In the administration of this chapter, no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system of any local or State educational agency, *or require the assignment or transportation of students or teachers in order to overcome racial imbalance.*

C. Fulfilling the *Brown* v. *Board of Education* Mandate: The Freedom of Choice Plan

1. *Whether the plan "works"—constitutional principle or mathematical equation?*

Freedom of choice plans have met with approval despite the objections now made by the petitioners. The argument that they do not "work" because too few Negroes choose to attend formerly all white schools and whites seldom choose to attend the school formerly for Negroes alone was made and answered in *Clark* v. *Board of Education of Little Rock School District, supra,* at 666:

> Plaintiffs are disturbed because only 621 of 7,341 Negroes in the Little Rock school system of 23,000 . . . were actually attending previously all white schools.[23] Thus, they argue that the 'freedom of choice' plan is not succeeding in the integration of the schools.
>
> Though the Board has a positive duty to initiate a

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[22]80 Stat. 1212.

[23]HEW Documents filed by the petitioners show that 115 of 736 Negroes are attending the formerly all white school in New Kent County, Virginia, in 1967-68.

> plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas, or considering race in the assignment of students to their classrooms. . . . The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools.[24]

A like objection to freedom of choice was rejected in *Bradley* v. *School Board of City of Richmond, supra,* at 315-16:

> [T]he plaintiffs insist that there are a sufficient number of Negro parents who wish their children to attend schools populated entirely, or predominantly, by Negroes to result in the continuance of some schools attended only by Negroes. To that extent, they say that, under any freedom of choice system, the state 'permits' segregation if it does not deprive Negro parents of a right of choice.
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> It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. Everyone of every race has a right to be free of discrimination by the state by reason of his race. There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's

[24] *Contra, Kemp* v. *Beasley, supra* (different panel).

> right to be free from discrimination requires that the state deprive him of his volition is incongruous.
>
> . . .
>
> There is no hint [in *Brown*] of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that such individual's freedom of choice may be affected by the equal right of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend.[25]

2. *Private discrimination—promoted or suffered?*

The petitioners have varied the theme of the arguments in *Clark* and *Bradley* in an effort to bring freedom of choice within the pale, however peripheral, of proscribed "state action" under the Fourteenth Amendment. Thus, in note 53 on page 42 of their Brief they suggest that by permitting students (or parents) to choose their schools, the respondents promote invidious discrimination which renders the plan unconstitutional.[26]

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[25]Under the respondents' freedom of choice plan there is a 15 day choice period each year, all school activities are covered, transportation is without regard to race, no person may be penalized or favored because of the choice made, and no school personnel may advise, recommend or influence choices. See *Goss* v. *Board of Education of Knoxville, supra.*

[26]The same point is stressed by the Solicitor General in his amicus Memorandum. He seems to assume that a freedom of choice plan peculiarly enables school patrons to succumb to the blandishments of racial prejudice. In reality school patrons are as likely to succumb even where geographic zoning or pairing devices are employed. The experience in the North and Washington, D. C., bears this out. The fact of the matter is that, in terms of integration, Negroes have a greater option under the freedom of choice plan. This is true because

The flaw in this argument is that, while the petitioners concede that the Constitution does not prohibit private discrimination, they are unable to point to any *affirmative race-related activity* on the part of the respondents. It is settled, of course, that the state may remain neutral with respect to private racial discrimination. See *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). And this would seem to be a sufficient answer to the petitioners' argument because here, unlike *Reitman* v. *Mulkey, supra,* and other so-called "state action" cases,[27] the state has made no classification on the basis of race and has not acted in any way to inject racial considerations in the free choice process.

The validity of the respondents' plan is not based upon their neutrality, however. It is based upon the fact that the respondents have taken affirmative action towards the elimination of race as a criterion in the school community under the free choice plan. Thus, the Choice of School Form sent annually is accompanied by a letter on the school board letterhead, signed by the Superintendent of Schools, stating the following:

> Dear Parent:
>
> A plan for the desegregation of our school system has been put into effect so that our schools will operate

people may choose where they will live and whether their children will attend a private school, but because of their economic condition and housing pattern Negroes do not enjoy the same choice. A freedom of choice plan alone enables Negroes to break away from housing patterns and a disadvantaged economic condition to achieve education in an integrated school. See *Clark* v. *Board of Education of Little Rock School District, supra.* Taliaferro County, Georgia, is a case in point. Its two schools were paired in 1965, when there were some 600 Negro students and 200 white students. In 1967 there were 527 Negro students and no whites. *United States* v. *Jefferson County Board of Education, supra,* at 416, *n.* 6.

[27]*E.g., Robinson* v. *Florida,* 378 U.S. 153 (1964), *Anderson* v. *Martin,* 375 U.S. 399 (1964), and *Lombard* v. *Louisiana,* 373 U.S. 267 (1963).

> in all respects without regard to race, color, or national origin.
>
> . . .
>
> [T]here will be no discrimination based on race, color, or national origin in any school-connected services, facilities, activities and programs.[28]

The respondents have, therefore, committed the influence of their office to a nonracial school system and have commended such a system to the community by means of this letter and by the publicity and community preparation activities spelled out in Article X of the Plan for School Desegregation.[29]

3. *Free choice—whose?*

The exercise of the choice in an acceptable freedom of choice plan was discussed by Judge Haynsworth in the companion case, *Bowman* v. *County School Board of Charles City County, supra,* at 327-28:

> If each pupil, each year, attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free.
>
> . . .
>
> Whether or not the choice is free may depend upon circumstances extraneous to the formal plan of the school board. If there is a contention that economic or other pressures in the community inhibit the free exercise of the choice, there must be a judicial appraisal of it, for 'freedom of choice' is acceptable only if the choice is free in the practical context of its exercise. If there are extraneous pressures which deprive the choice of its freedom, the school board may be re-

[28]The letter is set out in the petitioners' Appendix at pp. 43a-44a.

[29]The Plan is set out in the Petitioners' Appendix at pp. 34a-40a.

> quired to adopt affirmative measures to counter them.
> . . .
> Since *the plaintiffs here concede that their annual choice is unrestricted and unencumbered,* we find in its existence no denial of any constitutional right not to be subjected to racial discrimination. (Emphasis added.)

Despite their concession in the Court of Appeals, the petitioners apparently take the position that a free choice for Negroes in the South is a contradiction in terms. Yet they were unable to offer for judicial appraisal by the District Court anything other than speculation and conjecture. Therefore, cases such as *Coppedge* v. *Franklin County Board of Education,* 273 F. Supp. 289 (E.D.N.C. 1967), are scarcely relevant.

Moreover, the petitioners' argument that Negroes in New Kent County do not have a free choice is, in logic, *post hac ergo propter hac.* From the fact that a greater number of Negro students have not chosen to attend the formerly all white school, the petitioners conclude that the Negroes do not have a free choice. What the petitioners overlook is that Negroes, like whites, may choose to remain in the same school simply because the surroundings are familiar and they have friends there.

Because they view any choice as the product of racial prejudice (whites) or coercion (Negroes) and disclaim nonracial choices, the petitioners would deny a choice to everyone—students and parents alike. The fundamental right of parents to direct the education of their children is, therefore, to be denied in the name of integration, their preference to the contrary notwithstanding.[30]

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[30]*Cf. Pierce* v. *Society of Sisters of Holy Names,* 268 U.S. 510 (1925), and *Meyer* v. *Nebraska,* 262 U.S. 396 (1923).

4. *Compulsory integration in formerly de jure systems—principle or purge?*

The petitioners argue that, since there was de jure segregation in the New Kent County schools at the time of *Brown* v. *Board of Education, supra,* the respondents have an affirmative duty under the Fourteenth Amendment to enforce integration of the races in every public school. In support of this unique argument, they quote at length from *United States* v. *Jefferson County Board of Education, supra,* which, interestingly enough, concluded by approving a freedom of choice plan.

There the court found such a duty following its reexamination of school desegregation standards in the light of the Civil Rights Act of 1964 and the HEW Guidelines. As we have seen, the congressional intent was to embody in the Act the decision of Judge Beamer in *Bell* v. *School City of Gary, supra.* In *Jefferson County* the court (divided 2-1) excised this intent by a tailored construction of the legislative history. It found that, although Senator Humphrey spoke several times in the language of *Briggs* v. *Elliott,* his references to *Bell* v. *School City of Gary* "indicated" that the policy against affirmative, compulsory action to achieve racial balance was directed to the Gary, Indiana, de facto segregation and did not apply to de jure segregation. Therefore, the court concluded, there was in fact a national policy that formerly de jure segregated public school systems were obligated to take affirmative action in order to achieve a mixed racial composition throughout the entire system.[31]

[31]The HEW Guidelines were considered an expression of such a national policy. In the instant case the petitioners did not, and properly so, predicate their case on the HEW Guidelines. Indeed, in note 44 on page 32 of their Brief the petitioners make an interesting

This conclusion is untenable, as four judges vigorously pointed out on the rehearing *en banc.* In the first place, the decision ignores the fact that the Gary school system had de jure segregation until 1949, and that Judge Beamer cited cases which upheld *Briggs* v. *Elliott,* clearly a de jure segregation situation. Secondly, the decision fashions a double standard under the Fourteenth Amendment, one for the South and another for the North, on the basis of the de jure-de facto distinction. This is without support in principle and reason. It completely rejects the fact that prior to 1954 racially separate, if equal, public schools had not been declared unconstitutional.

The real concern about *Jefferson County* is that it will not be understood for what it is—an exercise in "social engineering."[32] There is cause for optimism, however, because the decision was not accepted by the Fourth Circuit in this case, and the error in its de jure-de facto distinction was clearly seen in *Monroe* v. *Board of Commissioners of City of Jackson, supra,* at 958:

> However ugly and evil the biracial school systems appear in contemporary thinking, they were, as *Jefferson,* supra, concedes, de jure and were once found lawful in Plessy v. Ferguson . . . and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by *Brown* would

concession regarding the Guidelines. They state that HEW has approved free choice plans, despite their inability to disestablish the dual system, only because such plans have received approval in the courts. "It feels, perhaps properly, that *it may not enforce requirements more stringent than those imposed by the Fourteenth Amendment.*" (Emphasis added.) This is tantamount to a concession by the petitioners that the requirements they now ask this Court to impose *are* more stringent than those imposed by the Fourteenth Amendment.

[32]See Notes 8 and 9, *supra. Cf. Moses* v. *Washington Parish School Board,* 276 F. Supp. 834 (E. D. La. 1967).

> be in the nature of imposing a judicial Bill of Attainder. . . . Neither, in our view, would such decrees comport with our current views of equal treatment before the law.

5. *Integration and education—antitheticals?*

It is hoped that the educational lighthouse is still in sight. It calls for an equal educational opportunity for all children, regardless of race, color or national origin. The respondents maintain that their public school system offers an opportunity for each child to receive as good an education as every other child in the system, and apparently the petitioners do not challenge this in fact.

Their position seems to be that, as a matter of principle, the educational opportunity of Negro children is unequal and can never be equal unless they are made to attend classes with white children. Thus, if the free choices of children and parents produce schools which do not grant to Negro children the "advantage" of education with white children, the Negro children are, *ipso facto,* receiving an education inferior to that of the whites and their fellow Negroes who are attending school with whites.

That argument is manifestly erroneous in two respects. First, it assumes that Negro children who freely choose not to attend an integrated school are thereby harmed. It is too incredible for belief that this circumstance generates a feeling of inferiority as to their status in the community. Certainly this proposition has never been tested and proved. *Moses* v. *Washington Parish School Board, supra.* The second, and more fundamental error, was discussed in *Moses* at 845, 846:

> It should be noted that the rather obvious objective of the proponents of the 'equal educational opportunity' theory is the elimination of racial prejudice

> through the public school system, rather than the immediate fulfillment of equal educational opportunities for all students. Little has been put forth to prove that actual and active integration will in fact of itself raise the educational opportunities even of formerly segregated Negro students.
>
> . . .
>
> [T]he emphasis should always be on a good education for all students, and courts should refuse to rule that a particular all-Negro school, where the Negro concentration is fortuitous, is *ipso facto* unequal and that the solution to the 'problem' is the forced mixing of the races.

Long ago it was settled that the hearts and minds of Negro children are adversely affected by a state's refusal to admit them, solely because of their race, to the schools of their choice. We have now come full circle, but little or no consideration seems to have been given to the effect of compulsory integration on Negroes and whites alike. Is there no danger in compelling children, in the name of integration, to attend a certain school in order to achieve a certain racial composition, regardless of their own desires? The matter was aptly put in *Olson* v. *Board of Education of Union Free School District,* 250 F. Supp. 1000, 1006 (E.D.N.Y. 1966), *appeal dismissed,* 367 F. 2d 565 (2d Cir.):

> [N]or did it [*Brown*] decide that there must be coerced integration of the races in order to accomplish educational equality for this also would require an appraisal of the effect upon the hearts and minds of those who were so coerced.

Like caveats have been sounded in terms of how compulsory integration will affect the educational imperative. James Bryant Conant, whom the petitioners identify on

page 44 of their Brief as the author of the most important study of secondary education in America, warrants quoting at length:[33]

> In some cities, political leaders have attempted to put pressure on the school authorities to have Negro children attend essentially white schools. In my judgment the cities in which the authorities have yielded to this pressure are on the wrong track. Those which have not done so, like Chicago, are more likely to make progress in improving Negro education. It is my belief that satisfactory education can be provided in an all-Negro school through the expenditure of more money for needed staff and facilities. Moreover, I believe that any sense of inferiority among the pupils caused by the absence of white children can be largely if not wholly eliminated in two ways: first, in all cities there will be at least some schools that are in fact mixed because of the nature of the neighborhood they serve; second, throughout the city there ought to be an integrated staff of white and Negro teachers and administrators.[34]

A similar position has been taken by Oscar Handlin, another distinguished writer, who has called integration a "false issue":[35]

> The insistence upon integration is thus self-frustrating, as the experience of Washington, D. C., shows. Further pressure toward racial balance will certainly weak-

[33]Note 11, *supra,* pp. 28-29.

[34]The second suggestion of Dr. Conant points up the wisdom of the Circuit Court in remanding this case to the District Court to review and update the record and fashion proper decrees based upon its continuing observation of the plan in operation through the retention of jurisdiction.

[35]Note 19, *supra,* p. 282.

> en the public schools and leave the Negroes the greatest sufferers.[36]

These views warrant serious consideration. They make a point which has been overlooked too often: Desegregation (*i.e.*, the elimination of state enforced segregation solely because of race) is a legal question; integration (*i.e.*, the compulsory assignment of pupils to achieve intermingling) is an education question—best left for decision by educators, for educational purposes, on the basis of educational criteria.[37] A freedom of choice plan alone honors this distinction.

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[36]*Id.* at 281. The experience in Taliaferro County, Georgia (Note 26, *supra*) is a sad illustration of this. A unitary system was achieved, of course, but it is hardly what the proponents of compulsory integration intended and is unlikely to afford an adequate—let alone equal—educational opportunity to the Negro students.

[37]See Notes 8 and 9, *supra.*

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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