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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, ET AL.,

PETITIONERS,

-V-

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, ET AL.,

RESPONDENTS.

AMICUS CURIAE BRIEF

OF THE

STATE OF FLORIDA

AUTHORITY FOR FILING

This amicus curiae brief for the State of Florida ex rel. Earl Faircloth, Attorney General of Florida, and Floyd Christian, Commissioner of Education, is filed pursuant to Rule 42 (4) of the Rules of this Court.

QUESTION PRESENTED

WHETHER THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION REQUIRES OR PERMITS SCHOOL SYSTEMS TO ASSIGN PUPILS TO PARTICULAR SCHOOLS BECAUSE OF THEIR RACE.

STATUTE INVOLVED

42 U.S.C. § 2000c (b) (1964), provides:

> "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

STATEMENT

Florida respectfully relies upon the factual representations contained in the briefs filed by the parties to this cause.

SUMMARY OF ARGUMENT

In deciding this case the Court should keep two principles foremost in its consideration. The first principle is that this case turns upon what the Constitution mandates and not what seems "better" or "more desirable". The second principle is that we are concerned with a national constitution which should be uniformly applied without reference to "labels of convenience".

In our nation, any classification based upon a person's race is obviously irrelevant and invidious. Simply stated, our Constitution is "color blind".

From this premise it follows that a "non-gerrymandered" neighborhood school system meets constitutional mandates, even though, in many cities, it would result in schools lacking in racial balance. Likewise, a uniformly applied and "color blind" freedom of choice assignment plan meets constitutional mandates. The fact that students, under such a plan, might elect to remain in schools where their own race predominates, is constitutionally irrelevant.

Forced racial balancing by federal court order is obviously unconstitutional, since it is a deprivation of liberty in violation of the Fifth Amendment for an arm of the federal government to assign a student to a particular school because of his race. Furthermore, such orders

are in violation of the Civil Rights Act of 1964 which was enacted pursuant to the authority of Congress to enforce the Fourteenth Amendment. This Congressional authority extends to defining what activity does or does not violate the Equal Protection Clause.

ARGUMENT

I. Introduction.

In Brown v. Board of Education, 347 U. S. 483 (1954) (Brown I), this Court unanimously decreed that the equal protection clause prohibited school systems from maintaining schools where pupil assignment was dictated by the color of the particular pupil's skin. Brown is now, and rightfully should continue to be, the supreme law of the land.

However, Brown and its progeny, particularly in the lower federal courts, have spawned a variety of conflicting views as to what is required of a school system in order for it to comply with the mandate of the Constitution. Some persons plead for "freedom of choice", others cry for "neighborhood schools", and yet others argue for "racial balance".

Florida would urge this Court to initially keep foremost the fact that it is the Constitution which is here being interpreted. In this regard, just as the Constitution does not "enact Mr. Herbert

Spencer's Social Statics", Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), neither does it also enact Ross Barnett's or Eldridge Cleaver's views on race relations. In short, the question as to whether it is "better" or "more desirable" to have a racial balance in each school or to have complete separation of the races, is constitutionally irrelevant. These political questions of policy have, under our system of government, "been committed by the Constitution to another branch of government". Baker v. Carr, 369 U.S. 186, 211 (1962). We are here only concerned with constitutional requirements.

Florida would also urge this Court to remember that "[i]t is, after all, a national constitution" Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (Brennan and Goldberg, JJ), which this Court is being called upon to interpret. Particularly when dealing with the issue of racial balance, many lower courts have come to completely opposite conclusions because the past "segregation" in the school system was "de facto" as opposed to "de jure". This distinction is of little consolation to the pupil currently in school and thus this Court should emphatically reject it. "To hold otherwise would be to disregard substance because of the feeble enticement of the [de facto] label-of-convenience which has been attached", In Re Gault, 387 U.S. 1, 50 (1967), to the absence of racial balance in Northern schools. Thus, the constitutional requirement vel non of racial

balancing in school systems must be applied "in an even handed manner" throughout our nation.

II. A person's race is constitutionally irrelevant.

This Court has long adhered to the position that classifying a person on the basis of his race is, under our Constitution, an "obviously irrelevant and invidious" - Steele v. Louisville & N.R. Co., 323 U.S. 192, 203 (1944), practice. To simply state it, "[o]ur Constitution is color blind". Plessy v. Ferguson, 163 U.S. 537, 599 (1896) (Harlan, J., dissenting).

The singling out of a person because of his race "in any form and in any degree has no justifiable part whatever in our democratic way of life". Korematsu v. United States, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting). Admittedly, there were times in the history of our nation when, for example, a pupil was singled out for assignment to a particular school because of his race. Brown I allegedly sounded the constitutional death knell for this practice. This Court must now decide whether the practice will be constitutionally resurrected.

III. A neighborhood school pupil assignment plan is constitutional.

Florida submits that a neighborhood school pupil assignment plan, where all students must attend the school closest

to their home, clearly meets constitutional mandates, since it provides a "color blind" method of assignment.

Florida notes that this Court clearly indicated its approval of the neighborhood school concept in the original Brown decision. In Brown, once this Court issued its original opinion, it called for supplemental briefs and argument re the practical implementation of the opinion. In its supplemental opinion this Court stated school boards were entitled to a certain time to achieve compliance because of the administrative problems arising (in part) from the necessary "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis". Brown v. Board of Education, 349 U.S. 294, 300-1 (1955) (Brown II). This Court has thus already directed the nation's school systems to alter their school systems to conform to the neighborhood concept, i.e., "attendance areas [in] compact units".

To be sure, these attendance areas constitutionally cannot be "gerry-mandered" so as to systematically exclude students of one race who should otherwise have attended a particular school. See Sailors v. Board of Education, 387 U.S. 105, 108 (1967); Gomillion v. Lightfoot, 364 U.S. 339 (1960). However, if the areas are drawn on a "color blind" geographical basis, it constitutionally matters not that the respective schools might have

disproportionate numbers of one race or another. As has been noted with reference to voting districts and their constitutionality:

> "Neighborhoods in our larger cities often contain members of only one race; and those who draw the lines of Congressional Districts cannot be expected to disregard neighborhoods in an effort to make each district a multiracial one." Wright v. Rockefeller, 376 U.S. 52, 59 (1964) (Douglas and Goldberg, JJ).

Thus, a neighborhood school system, so long as its attendance zones are drawn on a "true" geographical basis, meets constitutional mandates. Brown II, supra.

IV. A freedom of choice pupil assignment plan is constitutional.

Florida next notes that a "color blind" pupil assignment plan, based upon "freedom of choice" meets constitutional mandates and has clearly been approved by this Court.

In Goss v. Board of Education, 373 U. S. 683 (1963), this Court passed upon the validity of a student transfer plan which hinged the ability of the student to transfer upon the student's race and the racial composition of the school he was to attend. The Court rightfully condemned

the plan because race was the criterion employed for the transfer. This Court went on to emphasize, however, that:

> "In so doing, we note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school 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." Id. at 687.

Thus it clearly appears that a "color blind" freedom of choice pupil assignment system (either singly or in conjunction with a neighborhood system) meets constitutional mandates. It should be noted that the freedom of choice system has, perhaps, one desirable feature which surpasses even the neighborhood system, i.e., in the freedom of choice system, the student's ability to attend a racially balanced school (if he so desires) in no way depends upon the racial composition of his neighborhood. Neighborhood racial patterns have no effect upon a freedom of choice system.

It should be noted here that some lower federal courts have rejected freedom of choice plans on the ground that they do not "work", i.e., most blacks tend to remain in predominantly black schools and likewise with the whites. This "indictment of workability", however, has no constitutional substance. If a freedom of choice plan is administered in "an even handed manner", what is the constitutional objection if black students elect to remain in predominantly black schools (for reasons of "black pride", "black control" or whatever) and likewise for the white students? This "workability objection" has constitutional substance only if the Constitution is construed as affirmatively requiring Americans of different races, ethnic backgrounds, etc., to associate with each other. Florida is not aware of any recognized legal interpretation of the Constitution which would support such a premise.

It is thus clear that a "freedom of choice" school system (where the "choice" is uniformly applied) meets the constitutional mandate of a "color blind" system which admits students "regardless of their race". Goss v. Board of Education, supra.

V. Forced racial balancing is unconstitutional.

Florida submits that it is almost too axiomatic to require citation of authority that under a "color blind" Constitution, which views its citizens on a "nonracial" basis, the assignment of pupils to a

particular school because of their race (as opposed to because it is "the closest school" or "the school of their choice") is unlawful. It thus follows that federal court orders which order "forced bussing", "forced walking", or even "forced subwaying" of pupils to a particular school, because of their race, are patently unconstitutional on their face. Parenthetically, Florida would here emphasize that "bussing", "walking" or "subwaying" are not fundamentally the issues in this case. Each, or all, of the above have a legitimate basis in our educational system. Florida simply maintains that none of the above have any place in our democracy where any of them are occasioned simply to affirmatively achieve a set ratio of students based upon their race (or ethnic origin, nationality, etc.).

It is clear that when a federal court orders a student to attend a school, other than the one he would normally attend (under any "color blind" assignment plan), because of the color of his skin, then that court has deprived that student of his valuable and fundamental right to due process of law. This Court has already emphatically and unanimously held that the assignment of pupils to a particular school, by an arm of the federal government, because of the color of their skin "constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause [of the Fifth Amendment]". Bolling v. Sharpe, 347 U.S. 497, 500 (1954). This Court, some years later, reemphasized that "[t]he recognition of race

as an absolute criterion for transfers . . . is no less unconstitutional than its use for original admission or subsequent assignment to public schools". Goss v. Board of Education, 373 U.S. 683, 688 (1963). It is thus patently obvious that federal court orders which force students to attend particular schools because of their race are totally impermissible under our "color blind" Constitution.

Florida would also emphasize that such court orders also violate the provisions of the Civil Rights Act of 1964 which states that desegregation "shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. § 2000c (b) (1964). To dismiss this mandate as merely relating to a "government aid program", as some lower courts have done, is to totally ignore the Constitutional authority of Congress "to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]" Amend. XIV, § 5, U.S. Const. This Congressional authority extends to "responsibility for exercising judgment as to when the Fourteenth Amendment is violated". United States v. County Board of Elections, 248 F.Supp. 316, 322 (W.D. N.Y. 1966), appeal dismissed, 383 U.S. 575 (1966).

It cannot be denied that Congress was exercising (in part) its section 5 authority when it enacted this statute. Heart of Atlanta Motel v. United States, 379 U.S. 241, 279-292 (1964) (Douglas and Goldberg JJ concurring). Thus, it is

clear that this Congressional prohibition on pupil assignment to achieve racial balance is given "constitutional life" by section 5 of the Fourteenth Amendment and it cannot be ignored by the judiciary.

CONCLUSION

Florida submits that this Court should now give full meaning to the late Justice Harlan's admonition that "our Constitution is color blind". For too many years in this nation the color of a boy's or girl's skin determined the school he or she had to attend in order to receive an education. To be sure, our Constitution should remain "color conscious" to the extent of voiding classifications based solely upon the color of a citizen's skin.

Let us not, however, in a zeal to eliminate the sins of the past, resort to the same racial criterion even though the end result might be thought "best". Let us not also "visit the sins of the father upon the son".

Florida simply urges this Court, when it decides to adopt its criteria, no matter what they may be, to establish criteria for public school assignment which do not contain the terms "white", "black", "Indian", or any other racial prefix to qualify the noun "American".

Respectfully submitted,

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