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Constitutional Law-School Desegregation-Interdistrict Relief under the New Equal Protection Standard

Christopher F. Jones

CONSTITUTIONAL LAW—SCHOOL DESEGREGATION—INTERDISTRICT RELIEF UNDER THE NEW EQUAL PROTECTION STANDARD

United States v. Board of School Commissioners[1]

The United States, pursuant to the Civil Rights Act of 1964,[2] brought suit in federal district court against the Indianapolis Board of School Commissioners,[3] alleging that the school board was racially segregating the Indianapolis Public School District in violation of the equal protection clause of the fourteenth amendment.[4] The defendants answered with a general denial of de jure segregation, arguing that any racial imbalance within the school district resulted primarily from residential housing patterns and private choice.[5] The court held that the school board had failed to eliminate the vestiges of state-imposed segregation within the school district and charged the defendants with the affirmative duty of converting the school district to a unitary system.[6] An interim desegregation plan also was ordered involving limited reassignment of teachers and students within the school district.[7] The court of appeals affirmed and remanded for further proceedings.[8]

Upon remand the district court concluded that an interdistrict remedy was necessary to effect meaningful desegregation within the Indianapolis

1. 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded*, 97 S. Ct. 800-02 (1977).

2. 42 U.S.C. § 2000c-6 (1970).

3. The individual school board members were also named as party defendants. United States v. Board of School Comm'rs, 332 F. Supp. 655, 656 (S.D. Ind. 1971).

4. Specific allegations of unlawful racial discrimination included segregating students on the basis of race, assigning faculty and staff on the basis of race, and maintaining Crispus Attucks High School as a racially segregated school. *Id.* at 665-70.

5. The school board also argued that its present policies were based upon non-racial education principles and neighborhood considerations. *See* Marsh, *The Indianapolis Experience: The Anatomy of a Desegregation Case*, 9 IND. L. REV. 897, 906 (1976).

6. Racial segregation in the Indiana public schools was required by state law until 1949. The court concluded that this official policy of segregation had been perpetuated by the school board subsequent to 1949 by such practices as construction of new schools, boundary changes, high school feeder patterns, optional attendance zones, alteration in grade structures, and transportation policies. United States v. Board of School Comm'rs, 332 F. Supp. 655, 670 (S.D. Ind. 1971).

7. The court also ordered the United States to join as party defendants several suburban school districts and state officials. *Id.* at 679-80.

8. United States v. Board of School Comm'rs, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

School District,[9] and that such a remedy could be based upon the state's ultimate responsibility for the constitutional violation of its political subdivision, the school board. Accordingly, the court invited the Indiana General Assembly to formulate its own desegregation plan[10] and ordered an interim interdistrict remedy embracing several suburban school districts outside the boundaries of the consolidated metropolitan government (Uni-Gov). The court of appeals affirmed the district court's holding that the state had an affirmative duty to desegregate the Indianapolis School District. However, relying upon the Supreme Court's recent decision in *Milliken v. Bradley*,[11] the court reversed that portion of the district court's order encompassing school districts outside Uni-Gov.[12] The remainder of the order was remanded to the district court for determination of whether the evidence warranted an interdistrict remedy within Uni-Gov.[13]

The district court upon remand found two interdistrict violations of the equal protection clause justifying an interdistrict remedy. First, the state, by excluding the Indianapolis School District from the consolidation of the suburban school districts within Uni-Gov, had perpetuated segregation within the metropolitan government.[14] Secondly, the Indianapolis Housing Authority, as an instrumentality of the state, had perpetuated segregation within Uni-Gov by locating low-income public housing exclusively within the Indianapolis School District.[15] Accordingly, the court ordered the transfer of 9,525 black students from the Indianapolis School

9. The court relied heavily upon the theory that once a school district becomes approximately 30% black, a "tipping point" is reached whereby white flight to the suburbs accelerates. Because the Indianapolis School District, which was 40% black, had reached this tipping point, the court concluded that metropolitan relief was essential. United States v. Board of School Comm'rs, 368 F. Supp. 1191, 1197 (S.D. Ind. 1973). *See also* Calhoun v. Cook, 332 F. Supp. 804 (N.D. Ga. 1971).

10. The legislature declined the court's invitation. United States v. Board of School Comm'rs, 503 F.2d 68, 74 (7th Cir.), *cert. denied*, 421 U.S. 929 (1974).

11. 418 U.S. 717 (1974).

12. 503 F.2d at 86.

13. The issue upon remand was framed in terms of whether the establishment of Uni-Gov boundaries without like reestablishment of the Indianapolis School District's boundaries constituted an interdistrict violation of the equal protection clause. *Id.* at 86.

14. Large-scale school district consolidation was effected throughout Indiana in 1959 under the Indiana School Reorganization Act. Marion County, however, was excepted. In 1961, special legislation was enacted which provided for automatic extension of school district boundaries corresponding to extensions of city boundaries. The legislature amended this special legislation in 1969 by abolishing the power of the Indianapolis School District to follow municipal annexations. United States v. Board of School Comm'rs, 419 F. Supp. 180 (S.D. Ind. 1975), *aff'd*, 541 F.2d 1211 (7th Cir. 1976).

15. The Indianapolis Housing Authority was authorized under state law to locate public housing projects within five miles of Indianapolis School District boundaries. Six of the ten housing projects were built on the school district boundary line or within a few blocks thereof. United States v. Board of School Comm'rs, 541 F.2d 1211, 1216 (7th Cir. 1976), *vacated and remanded*, 97 S. Ct. 800-02 (1977).

District to several suburban school districts within Uni-Gov. A divided court of appeals affirmed the interdistrict remedy, holding that the exclusion of the Indianapolis School District from Uni-Gov and the location of public housing had an interdistrict segregative effect sufficient to trigger a heavy burden of review. Neither administrative convenience nor local autonomy, the court concluded, was compelling justification for the discriminatory state action.[16] The Supreme Court (6-3) vacated and remanded the case to the court of appeals for reconsideration[17] under *Washington v. Davis*[18] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[19]

One of the most intractable problems faced by the federal courts in school desegregation litigation is designing an effective remedy to eliminate de jure segregation[20] in large urban school districts having substantial black enrollment.[21] In *Milliken v. Bradley*[22] the Supreme Court was first faced with the validity of interdistrict relief to remedy racial segregation found to exist only in the inner-city school district. The Court rejected the argument that the state's overall responsibility for public education justifies imposing a metropolitan remedy whenever necessary to effectively eliminate unlawful segregation in one district. Nevertheless, the Court concluded that federal courts do have the power to cross school district lines for desegregation purposes "where there has been a constitutional violation calling for interdistrict relief." Therefore, *Milliken* seemed to suggest that while the Constitution will not permit judicial interference with the operations of local governmental entities not implicated in any unconstitutional conduct, an interdistrict remedy will be permissible where state action has been a "substantial cause of interdistrict segregation."[23]

In the wake of *Milliken*, lower federal courts explored several bases for

16. United States v. Board of School Comm'rs, 541 F.2d 1211, 1221 (7th Cir. 1976).

17. 97 S. Ct. at 800-02.

18. 426 U.S. 229 (1976).

19. 97 S. Ct. 555 (1977).

20. De jure segregation is segregation that violates the equal protection clause of the fourteenth amendment. In those states where racial segregation was required or permitted by state law, de jure segregation exists if "all vestiges of state-imposed segregation" have not been purged from the system, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); or if school officials have failed in their "affirmative duty" to eliminate racial discrimination "root and branch," Green v. County School Bd., 391 U.S. 430, 436-37 (1968). In states where segregation was not legally sanctioned, de jure segregation requires intentional state action. Keyes v. School Dist., 413 U.S. 189 (1973).

21. Intradistrict desegregation plans often prove counter-productive in urban core districts having a substantial number of blacks. Reassignment of blacks to the few remaining predominantly white schools accelerates the now-familiar process of white flight and resegregation. *See* Coltfelter, *The Detroit Decision and "White Flight"*, 5 J. LEGAL STUD., 99 (1976).

22. 418 U.S. 717 (1974).

23. *Id.* at 744-45.

interdistrict relief, including gerrymandering of school district lines,[24] school district reorganization[25] and metropolitan consolidation[26] plans excluding urban school districts having a large percentage of blacks, and exclusionary housing and zoning laws.[27] The assumption underlying these decisions was that state action having a substantial interdistrict segregative effect justified imposition of an interdistrict remedy. However, the Supreme Court subsequently held, in *Washington v. Davis*,[28] that official action having disproportionate racial impact is not a denial of equal protection unless discriminatorily motivated.[29] This new equal protection standard was further developed by the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[30] Among the "subjects of proper inquiry" enumerated by the Court for determining whether invidious purpose was a motivating factor in the official action are: evidence of disproportionate racial impact, the historical background of the action, the specific sequence of events leading up to the challenged action, any departures from normal procedure, and any legislative or administrative history. Unless "sensitive inquiry" into these and other relevant evidentiary sources reveals racial motive, there is no constitutional violation requiring judicial relief.[31]

By remanding *Board of School Commissioners* to the court of appeals in light of *Davis* and *Arlington Heights*, the Supreme Court in effect concluded that the challenged state action was not an interdistrict violation of the equal protection clause unless segregative motive could be demonstrated.[32] Because *Board of School Commissioners* came to trial before *Davis* and *Arlington Heights* were decided, there was no serious attempt by the United States to prove racial motive. Nevertheless, an analysis of the facts in the case may indicate the likelihood of obtaining an interdistrict remedy under the new equal protection standard.

The two bases relied upon in *Board of School Commissioners* for interdistrict relief were the exception of the Indianapolis School District from

24. United States v. Missouri, 515 F.2d 1365 (8th Cir. 1975); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).

25. Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).

26. United States v. Board of School Comm'rs, 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded*, 97 S. Ct. 800-02 (1977); Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975).

27. United States v. Board of School Comm'rs, 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded*, 97 S. Ct. 800-02 (1977); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).

28. 426 U.S. 229 (1976).

29. "The school desegregation cases have . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* at 140.

30. 97 S. Ct. 555 (1977).

31. *Id.*

32. 97 S. Ct. 800-02 (1977).

consolidation under Uni-Gov and the location of low-income public housing exclusively within the Indianapolis School District.[33] Under *Davis*, neither action rises to the level of a constitutional violation unless discriminatorily motivated. Absent direct evidence of invidious purpose, segregative motive must be inferred by examining the factors delineated in *Arlington Heights*. Evidence of disproportionate racial impact provides an important starting point. There is little doubt from the record in *Board of School Commissioners* that the Uni-Gov legislation and the location of public housing had a substantial segregative impact. Because ninety-five percent of the black population to be encompassed by Uni-Gov resided within the Indianapolis School District, the exclusion of the district from Uni-Gov effectively created a dual school system within Uni-Gov. Similarly, by refusing to build low-income public housing, most of which would be occupied by blacks, in the outlying suburban communities, the Indianapolis Housing Authority contributed to the racial disparity between the Indianapolis School District and the suburban school districts within Uni-Gov.[34]

However, segregative effect alone will rarely trigger strict scrutiny of facially neutral state action unless the effect is so overwhelming that it is unexplainable other than on racial grounds.[35] In *Board of School Commissioners* the evidence reaches no such extreme. The failure to include the Indianapolis School District in Uni-Gov is at least partially explainable in terms of such benign concerns as administrative inconvenience, increased property taxes, and loss of local autonomy. There is also evidence that the public housing projects were located exclusively within the Indianapolis School District because housing officials were unable to secure cooperative agreements from the suburban communities as required under HUD guidelines for federal funding.[36] Therefore, the court should look to other indicia of discriminatory intent.

The historical background of the official action is another important evidentiary source, particularly if it reveals a pattern of state action taken for invidious purposes. In *Board of School Commissioners*, the amendment excluding the Indianapolis School District from Uni-Gov followed a series of attempts by state legislators representing suburban constituents to isolate the district.[37] Similarly, the decision to limit public housing projects to the Indianapolis School District was made against a historical backdrop of

33. 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded*, 97 S. Ct. 800-02 (1977).

34. *Id.* at 1220, 1222.

35. The Supreme Court appears to require a factual pattern as stark as those in Yick Wo v. Hopkins, 118 U.S. 356 (1886), in which a municipal ordinance regulating commercial laundries was enforced exclusively against Chinese establishments, and Gomillion v. Lightfoot, 364 U.S. 339 (1960), in which municipal boundaries were redrawn to exclude all but a handful of black voters. 97 S. Ct. 555, 564 (1977).

36. 541 F.2d at 1228.

37. *Id.* at 1217-18.

pervasive public and private exclusionary practices which effectively discouraged blacks from renting or buying suburban housing.[38] However, neither pattern necessarily betrays racial motive.[39] A history of exceptional treatment for Indianapolis is not surprising in view of the unique economic and administrative considerations which large urban areas present to state legislatures. In addition, there is no evidence linking the public housing decision with past discrimination by other parties. Consequently, the court may seek more compelling evidence of segregative purpose.

A third area of inquiry is the specific sequence of events leading up to the challenged action. There is little in the record of *Board of School Commissioners* to spark suspicion other than the timing of the Uni-Gov legislation. The amendment excepting the Indianapolis School District from Uni-Gov was adopted after the desegregation suit was filed and a mere sixteen days before Uni-Gov was enacted.[40] While such timing may suggest a purposeful design to avoid suburban participation in the anticipated desegregation plan, a more likely explanation is a realistic political judgment by the legislature that suburban opposition would scuttle Uni-Gov if the school district were not excluded.

Departures from normal procedure provide yet another source from which to glean invidious purpose. In *Board of School Commissioners* there is evidence that the factors normally considered by the legislature in determining the propriety of school district reorganizations heavily favored a decision contrary to the one reached.[41] While such a substantive departure from normal procedure is strong evidence of racial motive, the inference is diluted by the fact that the Indianapolis School District was just one of many governmental units excluded from Uni-Gov.[42]

Finally, any legislative or administrative history, including testimony of the public officials involved, may be relevant evidence of discriminatory intent. An examination of official reports in *Board of School Commissioners* yielded no direct evidence of racial motive. Similarly, although several public officials were called as witnesses by the United States, each of them

38. The discriminatory conduct included the recording of racial covenants, discriminatory FHA loan practices, and private discrimination by brokers and sellers. *Id.* at 1228 n.8.

39. The courts are more likely to infer racial motive when the challenged action is antedated by pervasive discrimination as in Lane v. Wilson, 307 U.S. 268 (1939), in which a facially neutral voter registration statute had the effect of excluding blacks who had been previously disenfranchised; or Griffin v. County School Bd., 377 U.S. 218 (1964), in which a refusal by the county to fund the public schools had the effect of excluding only blacks because whites were provided county tuition grants to attend private schools.

40. 541 F.2d at 1218.

41. *Id.* at 1217.

42. Among the governmental units excepted from Uni-Gov were the Airport Authority, the Health & Hospital Corp., the County Dept. of Welfare, the Building Authority, the library districts, and the suburban communities of Speedway, Perry, and Lawrence.

denied invidious motivation. Consequently, this is unlikely to be a fruitful evidentiary source.[43]

Whether the court of appeals will conclude that the foregoing evidence satisfies the new equal protection standard depends upon how liberally the broad terms of *Arlington Heights* are applied.[44] In making similar determinations, the courts are likely to be influenced by two external considerations. First, the greater the perceived need for interdistrict relief to effectively eliminate unlawful segregation in the urban core district, the more willing the courts may be to find the requisite constitutional violation.[45] Secondly, although the suburban communities to be included in the desegregation plan may not have committted constitutional violations, the more they appear implicated in the discriminatory conduct, the more inclined the courts may be to attribute invidious purposes to the challenged state action.[46] Both factors favor a finding of a racial motivation in *Board of School Commissioners*.[47]

There are at least two other bases for interdistrict relief which may hold promise under the new equal protection standard. The first, suggested in *Milliken*,[48] is the deliberate gerrymandering of school district lines in a discriminatory manner. Such a showing may be easier in the South,[49] with its history of state-imposed segregation, than in the North where district lines are generally drawn for ostensibly neutral reasons. In either case, particularly strong evidence of segregative motive would be the redrawing of school district boundaries closely following racial shifts in residential patterns.[50] Also, the argument can be made that school reorganization and metropolitan consolidation plans which exclude black urban school districts are racially motivated boundary manipulations.[51]

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43. This is unlikely to be an important evidentiary source for two reasons. First, only the most obtuse political official would make his invidious motives a matter of public record. Secondly, the prospect of eliciting incriminating testimony from the public officials involved is severely weakened by the doctrine of privilege. *See* United States v. Nixon, 418 U.S. 683, 705 (1974); Tenney v. Brandhove, 341 U.S. 367 (1951).

44. *See* Hills v. Gautreaux, 425 U.S. 284 (1976).

45. Although a wrong and its remedy are separate considerations in theory, they functionally overlap. Courts generally search for an interdistrict constitutional violation only after they have become convinced that an interdistrict remedy is indispensable.

46. In *Milliken*, there was no evidence that the suburban communities had engaged in discrimination against the urban district. To the extent that suburban communities are implicated, although not themselves in violation of the Constitution, the courts are less likely to be deferential to local autonomy.

47. 541 F.2d at 1214.

48. 418 U.S. at 744-45.

49. *See* United States v. Texas, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); Haney v. County Bd. of Educ., 410 F.2d 920 (8th Cir. 1969).

50. In large metropolitan areas, such lines may be redrawn to avoid requiring suburban districts to accommodate the relatively few blacks residing outside the inner city.

51. *See* United States v. Board of School Comm'rs, 541 F.2d 1211 (7th Cir.