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Constitutional Law: Fifth Circuit Uniformity in Faculty Desegregation

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CONSTITUTIONAL LAW: FIFTH CIRCUIT UNIFORMITY IN FACULTY DESEGREGATION

Montgomery County Board of Education v. Carr, 400 F.2d 1 (5th Cir. 1968)

Petitioners, Negro children acting through their parents, sued the Board of Education of Montgomery County, Alabama, in 1964, to enjoin the board from maintaining a dual school system based upon race. The district court ordered defendant to take steps to cease segregation by race and to submit a detailed plan for desegregation of the entire school system by the 1965-1966 school year.[1] In 1966, the court approved a freedom-of-choice[2] plan submitted by the defendant and ordered the board to make periodic reports concerning the racial composition of the schools in the system.[3] In 1968, on motion of the United States to require the county board to take further steps to desegregate the dual system, the court established more specific requirements governing desegregation. Its decree ordered that all students be provided full access to all services, facilities, activities, and programs (including transportation, athletics, and other extracurricular activities). The decree also provided that race not be a factor in hiring, assignment, promotion, demotion or dismissal of faculty and staff, and that assignments should be made to eliminate the effects of past discrimination.[4] On appeal, defendant contested that portion of the order directing it to assign and transfer faculty and staff according to a fixed mathematical ratio based on race. The Court of Appeals for the Fifth Circuit HELD, that the board had a duty to assign teachers in order to desegregate but that the mathematical ratio was too inflexible. The court modified the decree by eliminating the numerical standards.[5]

The most difficult problem in the desegregation process is the integration of faculties.[6] Desegregation of schools cannot possibly be accomplished without faculty desegregation.[7] "The presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes that school a 'colored school' just as certainly as if the words were printed across its entrance in

1. Carr v. Montgomery County Bd. of Educ., 232 F. Supp. 705, 710 (M.D. Ala. 1964).

2. The typical freedom-of-choice plan assigns students to schools within the school district for which the students have indicated a preference. 1 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 66 (1967).

3. Carr v. Montgomery County Bd. of Educ., 253 F. Supp. 306, 307 (M.D. Ala. 1966).

4. Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647 (M.D. 1968).

5. 400 F.2d 1 (5th Cir. 1968).

6. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 892 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967).

7. "Faculty desegregation is a necessary precondition of an acceptable free choice plan. A free choice plan cannot disestablish the dual school system where faculties remain segregated on the basis of the race of the teachers or the pupils. In such circumstances a school inevitably will remain identified as 'white' and 'Negro' depending on the color of the teachers." United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 892 n.116 (5th Cir. 1966), *quoting* U.S. COMM'N ON CIVIL RIGHTS, SURVEY OF DESEGREGATION IN THE SOUTHERN AND BORDER STATES — 1965-1966, 57 (1966).

six-inch letters."[8] Faculties must be integrated so that students of all races can feel that their color is represented at an equal level and that people of their race are sharing in high-level teaching.[9] To deprive students of teachers of their own race is as harmful as segregating the students themselves.[10]

In the present case the school board recognized an affirmative duty to desegregate the faculties throughout the system.[11] However, the board felt that an order requiring involuntary transfers was not in keeping with sound school administration. Some courts have been reluctant to force faculty transfers until more is known about possible detrimental effects of such orders on the quality and efficiency of the schools.[12]

It has also been held that forced transfer of teachers based on white-Negro teacher ratios results in "racial balancing" as distinguished from desegregation of faculties.[13] These decisions reason that if it is illegal and discriminatory to force segregation in public schools, it is equally illegal and discriminatory to force integration.[14] In the present case, appellants relied on a Fourth Circuit case, which rejected involuntary transfer of faculty and stated that any policy that requires racial consideration of any kind in employment and placement is unlawful.[15]

Among recent cases, however, there has been a trend indicating that educational principles and theories cannot be used to prevent vindication of constitutional rights if they result in preservation of an existing system of segregation.[16] It is argued that refusal to assign white staff to minority schools and Negro staff to white schools cannot be justified on grounds that educational standards will be lowered since any teacher qualified to teach white children ought to be competent enough to teach Negroes or vice versa.[17] A majority of cases also rejects the second argument and refuses to recognize any effort by school authorities to frustrate alteration of illegal conditions on the ground that race is not a permissible consideration. The Constitution does not discountenance such consideration of race.[18] The Department of

8. Brown v. County School Bd., 245 F. Supp. 549, 560 (S.D. Va. 1965).

9. Dowell v. School Bd. of Okla. City Pub. Schools, 219 F. Supp. 427, 445 (W.D. Okla. 1963).

10. *Id.*

11. "Although appellants consistently argue for voluntary assignment of teachers and staff and contend that 'sound and quality school administration' favors voluntary assignment," it is clear from their brief that they recognize that they have an affirmative duty to desegregate the faculties throughout the system. Montgomery County Bd. of Educ. v. Carr, 400 F.2d 1, 4 n.4 (5th Cir. 1968).

12. *E.g.*, Bradley v. School Bd. of City of Richmond, 345 F.2d 310, 321 (4th Cir. 1965), *vacated and remanded on other grounds*, 382 U.S. 103 (1965); Beckett v. School Bd. of City of Norfolk, 269 F. Supp. 118, 139 (E.D. Va. 1967).

13. Beckett v. School Bd. of City of Norfolk, 269 F. Supp. 118, 139 (E.D. Va. 1967).

14. Davis v. East Baton Rouge Parish School Bd., 269 F. Supp. 60, 64 (E.D. La. 1967).

15. Wheeler v. Durham Bd. of Educ., 363 F.2d 738, 740 (4th Cir. 1966).

16. Dowell v. School Bd. of Okla. City Public Schools, 244 F. Supp. 971, 979 (W.D. Okla. 1965), *affirmed in part*, 375 F.2d 158, *cert. denied*, 387 U.S. 931 (1967).

17. Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965).

18. Wanner v. County School Bd. of Arlington County, 357 F.2d 452, 454 (4th Cir.

Health, Education and Welfare (HEW) may take race into consideration to establish standards[19] and to counteract and correct the effect of segregated assignments of faculty and staff.[20] Therefore, many courts have held plans for desegregation inadequate, which do not contain a provision for involuntary faculty transfers.[21] The present case relied on two recent decisions of the Court of Appeals for the Fifth Circuit, both of which approved such a provision.[22]

The second point of the instant appeal was the imposition of mathematical ratios governing the racial composition of faculties.[23] The court in the present case was primarily influenced by a desire for uniformity throughout the Fifth Circuit.[24] In order to understand this desire for uniformity, it is necessary to trace some of the events leading up to the decision.

In 1966, the Court of Appeals for the Fifth Circuit, in *United States v. Jefferson County Board of Education,*[25] established a model decree. The court indicated that the decree would be applicable to all freedom-of-choice desegregation plans in the Fifth Circuit, thus reducing the discretion of district courts in fashioning individual remedies. The model decree is also novel in that it adopts as its uniform plan the HEW guidelines.[26] The relationship between HEW and the courts has been uncertain. Many courts have felt that education should remain primarily the responsibility of state and local authorities[27] and that a district court should not abdicate its responsibility to an agency of the executive branch of the federal government.[28] Courts often cited the guidelines in opinions and felt them entitled to serious judicial deference,[29] but they were still regarded as a guide rather than a rigid standard. As a result, district courts often allowed desegre-

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1966).

19. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 877 (5th Cir. 1966).

20. Stell v. Board of Pub. Educ. for City of Savannah, 387 F.2d 486, 497 (5th Cir. 1967).

21. *E.g.*, Monroe v. Board of Comm'rs of City of Jackson, 391 U.S. 450 (1968); Jackson v. Marvell School Dist. No. 22, 389 F.2d 740 (8th Cir. 1968); Stell v. Board of Pub. Educ. for City of Savannah, 387 F.2d 486 (5th Cir. 1967); Kemp v. Beasley, 353 F.2d 14 (8th Cir. 1965).

22. United States v. Board of Educ. of City of Bessemer, 396 F.2d 44 (5th Cir. 1968); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966).

23. "The school board will accomplish faculty desegregation by hiring and assigning faculty members so that in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system. At present, the ratio is approximately 3 to 2." The court included a schedule for faculty desegregation. Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647, 654 (M.D. Ala. 1968).

24. Montgomery County Bd. of Educ. v. Carr, 400 F.2d 1, 7 (5th Cir. 1968).

25. 372 F.2d 836 (5th Cir. 1966).

26. Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964, 45 C.F.R. §181 (1968).

27. *E.g.*, Alabama NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346, 351 (M.D. Ala. 1967).

28. *E.g.*, Betts v. County School Bd. of Halifax County, 269 F. Supp. 593, 605 (W.D. Va. 1967).

29. *E.g.*, Smith v. Board of Educ. of Morrilton School Dist. No. 32, 365 F.2d 770, 780 (8th Cir. 1966).

gation programs with minimum standards lower than the HEW guidelines.[30] *Lee v. Macon County Board of Education*[31] held that the Department of Health, Education and Welfare could not cut off funds from a school under a court order. This allowed school boards, with the aid of district courts, to continue to receive federal funds while pursuing less stringent desegregation plans than those set out in the HEW guidelines.[32]

This problem was first given judicial notice by the Fifth Circuit in *Singleton v. Jackson County Municipal Separate School District.*[33] The court closely followed the HEW guidelines and noted that the United States Office of Education is better qualified, and is a more appropriate federal body than the courts, to weigh administrative difficulties inherent in desegregation.[34]

Therefore, to eliminate the problem of a possible gap in requirements and to curb frustration by the district courts of the court of appeals' desegregation opinions,[35] the court structured the model decree in *Jefferson*[36] almost exactly from the HEW guidelines.[37] *Jefferson* has been enforced in the Fifth Circuit and the court has been quick to disallow any attempt to lower its standards.[38] In the present case, however, the mathematical ratios proposed by the district court were seen as an attempt to go beyond *Jefferson's* standards.

There are arguments both for and against permitting the district courts leeway to adopt more stringent requirements. One argument for circuit-wide uniformity and adherence to the HEW guidelines is that uniformity should aid the court in accelerating integration by making available the resources and expertise of the Office of Education. Uniform requirements should also simplify efforts of the court to judge the relative progress of the various school

30. Of the 99 court approved freedom-of-choice plans in the Fifth Circuit prior to *Jefferson,* 44 had not segregated all grades by 1967; 78 had failed to provide specific, nonracial criteria for denying choices; and 79 had failed to provide for any faculty desegregation. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 860 n.52 (5th Cir. 1966).

31. 270 F. Supp. 859 (M.D. Ala. 1967).

32. *See generally* Note, *The Courts, HEW, and Southern School Desegregation,* 77 YALE L.J. 321 (1967).

33. 355 F.2d 865 (5th Cir. 1966).

34. Singleton v. Jackson Municipal Separate School Dist., 348 F.2d 729, 731 (5th Cir. 1965).

35. *See generally* Note, *Judicial Performance in the Fifth Circuit,* 73 YALE L.J. 90 (1963).

36. 372 F.2d 836 (5th Cir. 1966).

37. The model decree has not been adopted in other circuits. It has been criticized on constitutional grounds as inadequate procedurally. *See generally, e.g.,* Note, *supra* note 32. *Jefferson* was distinguished from Clark v. Board of Educ. of the Little Rock School Dist., 374 F.2d 569 (8th Cir. 1967), wherein the court refused to adopt HEW guidelines as an absolute "polestar" because the court felt that the situation in the Eighth Circuit did not warrant such action. Moreover, the Sixth Circuit felt that it was not faced with the same difficulties given first to *Jefferson* and declined the invitation to follow that decision. Monroe v. Board of Comm'rs of City of Jackson, 380 F.2d 955 (6th Cir. 1967).

38. In Andrews v. City of Monroe, 370 F.2d 925 (5th Cir. 1966), the court vacated and remanded a school desegregation plan approved by the district court but failing to meet standards established in *Jefferson.*

boards within the circuit.[39] Nevertheless, local conditions are often an important factor in school desegregation cases.[40] In the present case, the district judge had been working with the local school board for several years and was well acquainted with local conditions. He was well equipped, therefore, to add specifics to the model decree.[41] Another advantage of giving the district courts leeway to go beyond the minimum standard is that the resulting diversification would enable the courts to find the method that works best.

A final controversy in the present case involves the use of mathematical ratios and the allowable specificity of such ratios. Defendant argued that the ratios were inflexible and ignored desegregation's goal of quality education. In the *Jefferson* decree, the court adopted the percentages mentioned in the HEW guidelines.[42] The court referred to these percentages as a general rule of thumb or objective administrative guide for measuring progress in desegregation, rather than as a firm requirement that must be met.[43] This rationale was expressed in a letter sent to members of Congress and Governors in 1966 by John W. Gardner, then Secretary of Health, Education and Welfare.[44] The technique has precedent in other areas of law, especially in the discriminatory elimination of Negroes from juries.[45] The purpose of the mathematical method is to aid the evaluation of data on which legal judgments can be founded.[46] Common sense suggests that a gross disparity between the white-Negro ratio in a school system and the HEW percentage guides raises an inference that the desegregation plan is not working as it should.[47]

In the present case, the district court decreed that the board should desegregate the faculty so that in each school the ratio of white to Negro teachers would be substantially the same as it was throughout the entire county system. At the time the system-wide ratio was approximately 3-2. The court of appeals eliminated the numerical ratios, holding that they did not allow enough flexibility. Numbers and percentages are not the ultimate

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39. Comment, *Constitutional Law—Equal Protection of the Laws—The HEW Guidelines Are Minimum Standards for a Free Choice School Desegregation Program*, 81 HARV. L. REV. 474, 478 (1967).

40. *E.g.*, Flax v. Potts, 218 F. Supp. 254, 258 (N.D. Tex. 1963).

41. 402 F.2d 782 (5th Cir. 1968) (dissenting opinion).

42. The percentage requirements in the guidelines suggest that systems using freedom-of-choice plans for at least two years should expect 15 to 18% of the pupil population to select desegregated schools, *Requirements for Effectiveness of Free Choice Plans*, 45 C.F.R. §181.54 (1968).

43. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 886-87 (5th Cir. 1966).

44. "With more than 2,000 separate districts to consider, such percentages are thus an administrative guide which helps us to determine those districts requiring further review. Such review in turn will determine whether or not the freedom-of-choice is in fact working fairly." United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 887 n.106 (5th Cir. 1966), *quoting* Letter from John W. Gardner, Secretary of Health, Education & Welfare to Members of Congress and Governors, April 9, 1966.

45. *See generally* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966).

46. *Id.* at 373.

47. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 888 (5th Cir. 1966).

answer.[48] Flexibility is necessary to take educational factors into account. On the other hand, in 1968, only thirty-nine out of 1,365 teachers in the Montgomery County school system were teaching in schools with pupils predominantly of the opposite race.[49] This might indicate that this school system was so recalcitrant as to need more specific ratios. "Loathe as judges are to articulate constitutional goals or actions in the oft-disparaged mechanical terms of arithmetic, this is an area where it is not the spirit, but the bodies that count."[50] The only school desegregation plan that meets constitutional standards is one that works.[51]

The chief importance of the present case is its relationship to the model decree of the Court of Appeals for the Fifth Circuit. The court affirmed its past decisions that school systems have an affirmative duty to desegregate faculties and staffs, by forced transfer if necessary. The court basically felt that the allowable specificity of standards in terms of mathematical ratios was a matter of degree. In the present case, the desire for flexibility to handle educational problems outweighed the need for standards as specific as those the district court outlined. The major impact of the present case, however, is that the court, jealous of the uniformity achieved by the model decree, and wishing to keep the decree from having its demands enhanced as well as diminished, has chosen to place limits on the discretion of district courts to add more stringent standards.

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48. Yarbrough v. Hulbert-West Memphis School Dist. No. 4, 380 F.2d 962, 969 (8th Cir. 1967).

49. Montgomery County Bd. of Educ. v. Carr, 402 F.2d 782, 783 n.2 (5th Cir. 1968) (dissenting opinion).

50. *Id.* at 784, 786.

51. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966).