North Dakota Law Review

Volume 41 | Number 3 Article 4

1964

The Constitutionality of De Facto School Segregation

Alan Grindberg

NOTES

THE CONSTITUTIONALITY OF DE FACTO SCHOOL SEGREGATION

Present day attempts to desegregate the schools received their impetus from the decision of the United States Supreme Court that "separate but equal" facilities are not tolerable under the Constitution.[1] Since this 1954 decision the courts have been the primary medium used to enforce that mandate. Cases on racial discrimination have been very numerous in the period since *Brown*,[2] and one can scarcely look at a volume of the reporter system of our federal courts without finding that it contains at least one case on some form of alleged racial injustice.

Perhaps the most litigated problem in the area of discrimination is that of school segregation, and within the last two or three years it appears that a new target has been selected from within the school problem. This is the situation that is referred to as *de facto* segregation. *De facto* segregation is defined as existing when minority groups are separated from large parts of the white population on a basis other than race.[3] *De facto* segregation is thus more properly described as racial imbalance than segregation, as under the above mentioned definition it can occur only when its basis is not racial considerations and does not usually involve total separation of the races.

This type of "segregation" occurs as a by-product of the neighborhood school policy, which is widely used throughout the United States.[4] The racial minorities have tried to break up the imbalance in the school that their children attend by asking the courts for mandatory injunctions prohibiting the school boards from continuing to operate the school system in a segregated manner. The courts have acted on these requests inconsistently, which is not surprising in view of the fact that the Supreme Court has not seen fit to give a clear mandate on this problem. It is the purpose of this note to examine the cases considering *de facto* segregation in the light of the opinion in *Brown*,[5] the fourteenth amendment,[6]

---

1. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).
2. *Ibid.*
3. See 50 VA. L. REV. 464, 465 & n. 3 (1964).
4. See Bell v. School City of Gary, Ind., 213 F. Supp. 819 (N.D. Ind. 1963), aff'd 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).
5. *Supra* note 1.
6. U.S. CONST. amend. XIV, § 1.

and the opinions of the Supreme Court in other applicable situations to determine, as far as is possible, how the Supreme Court will handle this problem when it is presented.

The culprit in a *de facto* segregation situation is usually the neighborhood school policy. This policy operates by using school attendance zones, which are drawn by the school board around each school in its system. Every school child in each zone is required to attend the school within his "neighborhood," and transfers out of these areas are prohibited. The advantages of this system are apparent. It allows the board to anticipate the enrollment at each school several years in advance, and new construction needs, teacher placement, materiel distribution and budget requirements can be made with the expectation that the situation planned for will actually exist when that period arrives.

Since the minority groups tend to reside in the same area within the city, the schools in these areas tend to have student bodies that are racially imbalanced. In the *de facto* cases, the parents of these students have asked the courts to issue injunctions prohibiting the school boards from continuing to adhere to the neighborhood school plan, alleging that the board has intentionally created a segregated school. Furthermore, they suggest that if the board has not intentionally acted to achieve racial segregation, the fact that the school is "segregated in fact" brings the plan under the mandate in *Brown*[7] since such does not afford the equal protection that the Constitution[8] requires.

There is no doubt that a school board is prohibited, since the ruling in *Brown*,[9] from intentionally zoning a school for the purpose of segregating the races, and the courts have so held.[10] The answer is not so clear where the board has acted in good faith in drawing the lines, and, as previously mentioned, the results are not as uniform. This is not surprising in view of the fact that the issue of segregation and discrimination is so charged with emotion. Furthermore, our judges are necessarily members of the human family, with the same feelings as other mortals. Since the problem of *de facto* segregation seems to have been litigated with increasing frequency, in the last two years, it would seem that the Supreme Court should consider the issue soon, and bring order to the field before too much inconsistency results from the lower court decisions.

There are ten cases which have directly considered the question of *de facto* segregation, and there are many more which have language which may be applicable to that problem and which are

7. *Supra* note 1.
8. *Supra* note 6.
9. *Supra* note 1.
10. Taylor v. Board of Educ., 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); Jeffers v. Whitley, 309 F.2d 621 (4th Cir. 1962).

cited as authoritative, but the holdings in these cases covered other issues, and the applicable language is only dicta. This dicta cannot be ignored, however, since it is an excellent indication of how that court will decide the issue when it accepts a hearing on the problem.

Those courts that hold that there is nothing in the neighborhood school policy that violates the Constitution, when exercised in good faith, base their decisions on five reasons.

1. *The Fourteenth Amendment is prohibitory and not compelling.*

Those courts that hold the neighborhood school policy to be valid for this reason,[11] rely on the words of the amendment. They emphasize the fact that its wording is: "nor shall any state deny any person . . . the equal protection of the laws,"[12] and contend that this does not authorize the courts to compel the states to act, but only prohibits action. If, however, the states are truly guilty of a denial of equal protection there can be no argument about the power of the court to prohibit continuance of this treatment, and to order action taken to correct the unconstitutional condition that has resulted. If this were not true, the fourteenth amendment would be unenforceable, and the court would have been acting without authority when it ordered the end to segregation by law in Topeka, Kansas.[13]

This then leads to a question that none of the courts have considered in their opinions. That is: is an unequal education the equivalent of unequal protection which is prohibited by the fourteenth amendment? The obvious way to determine the answer to this question would be to consider each case on its merits, and make a determination as to whether a child of any other race would be allowed to transfer on the grounds that he was receiving an unsatisfactory education. If the answer is no, there is no unequal protection of the laws, and if the answer is yes, there is definitely unequal treatment. Any other holding would fly in the face of the principle that the constitution is color-blind, and would only be a reverse application of unequal treatment.

2. *The Constitution is color-blind.*

Applied to *de facto* segregation by one court,[14] the theory that the Constitution is color-blind has been used by the Supreme Court in considering the makeup of juries. The Supreme Court has held that a negro has no right to have persons of his race placed on a jury,[15] and it has been held that it is just as unconstitutional

11. Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 85 Sup. Ct. 898 (1965); Bell v. School City of Gary, Ind., *supra* note 4; Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962).
12. *Supra* note 6.
13. See Brown v. Board of Educ., 347 U.S. 483 (1954).
14. Lynch v. Kenston School Dist., 229 F. Supp. 740 (N.D. Ohio 1964).
15. Hernandez v. Texas, 347 U.S. 475 (1954).

to intentionally place negroes on a jury to ensure a racial balance as to intentionally exclude them from a jury.[16] This principle cannot be carried to an extreme, for then the courts might conceivably be precluded from noting the fact that a litigant is a negro when determining his rights, which would lead to very unjust results. It seems that it should be applicable to the degree that it prevents the occurrence of enforced "reverse" segregation, for to put it simply, the equal protection guarantees should operate with equal force in all directions.

3. *Segregation that is not willful does not contravene the Fourteenth Amendment.*

It is often said in these cases that discrimination that is not intentional does not violate any constitutional provision.[17] This statement has some precedent in decisions of the Supreme Court and has been used in cases concerning equal protection under state taxing statutes[18] and in the application of election laws.[19] There appears to be no reason why this should be of any less force in a case involving school segregation, if the problem is taken away from the emotion that generally surrounds it.

4. *The decision in Brown[20] is limited to intentional segregation.*

The decision of the Supreme Court in *Brown*[21] was concerned only with enforced segregation and the "separate but equal" principle. Care must be taken so that the language of that case is not applied too broadly, for *Brown*[22] can easily be distinguished from the *de facto* situation on its facts alone. In that decision the Court said that they were proscribing segregation based *solely* on race.[23] They were considering nothing more. The lower courts have at times used the emphasis given above as holding that the Court was indicating that other segregation was allowable under that decision.[24] Those courts have also used the questions propounded to counsel for reargument in *Brown*[25] to bolster this claim. Question 4 (a) read:

> Assuming it is decided that segregation in public schools violates the Fourteenth Amendment (a) would a decree necessarily follow providing that, *within the limits by normal*

16. Collins v. Walker, 329 F.2d 100 (5th Cir. 1964).
17. Craggett v. Board of Educ., 234 F. Supp. 381 (N.D. Ohio 1964); Lynch v. Kenston School Dist., *supra* note 14; Webb v. Board of Educ., 223 F. Supp. 466 (N.D. Ill. 1963); Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich. 1958).
18. See Sunday Lake Iron Co. v. Township Wakefield, 247 U.S. 350 (1918).
19. Snowden v. Hughes, 321 U.S. 1 (1944).
20. *Supra* note 13.
21. *Ibid.*
22. *Ibid.*
23. *Id.* at 494.
24. Bell v. School City of Gary, Ind., 213 F. Supp. 819 (N.D. Ind. 1963), *aff'd* 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); Lynch v. Kenston School Dist., *supra* note 14; Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962).
25. Brown v. Board of Educ., 347 U.S. 483, 495 n. 13 (1954).

> *geographic school districting*, Negro children should forthwith be admitted to schools of their choice, ... (emphasis supplied).

This, it is argued,[26] clearly shows that the Supreme Court considers neighborhood school attendance zones to be proper. But might it not also indicate that the Court i n t e n d e d to limit its order to desegregate to a reasonable plan? Until it speaks clearly on the subject we cannot know, but this must weigh heavily in determining that a plan must include balancing of the races.

5. *The benefits of integration are outweighed by the dangers and inconveniences of the system which would result if the neighborhood plan is abandoned.*

One court has said that it was influenced by the "reasonableness" of the procedure necessary to eliminate *de facto* segregation,[27] but others have given no indication that this entered into their considerations at all. It seems that all of the courts that must decide whether or not to order a new school attendance plan must necessarily consider the economics of the proposed plan. To ignore the financial impact that the new plan might have on the system would possibly result in a community being blessed with a school system that is completely balanced as to race, but so far in debt that the standard of education in all schools is lower than that of the most inferior under the old imbalanced system.

These are the reasons given for refusing to discard the neighborhood school plan. The reasons given for the converse decision are self explanatory. Those courts[28] feel that the decision in *Brown*[29] must be read to prohibit all segregated education, no matter what its cause may be, because it is "inherently unequal." It is stated[30] that the main constitutional question is the fact that the school is segregated, and that the reason for this is the zones created by the board. This board action constitutes an act of the state, and the opportunities are unequal, ergo, it is unconstitutional. This reasoning conflicts with the theory, that was advanced earlier when discussing the fourteenth amendment, that unequal educational opportunities, without more, may not be unequal protection of the laws. Also, when discussing the effects of segregated education in *Brown*,[31] the Supreme Court was discussing a situation where there was total separation of the races.

No court has discussed the possibility that *de facto* segregation,

---

26. Bell v. School City of Gary, Ind., *supra* note 24.
27. Evans v. Buchanan, *supra* note 24.
28. Barksdale v. Springfield School Comm., 33 L.W. 2356 (D. Mass. 1965); Blocker v. Board of Educ., 226 F. Supp. 208 (E.D. N.Y. 1964); Branche v. Board of Educ., 204 F. Supp. 150 (E.D. N.Y. 1962).
29. *Supra* note 25.
30. Branche v. Board of Educ., *supra* note 28.
31. *Supra* note 25.

where it is not total separation, may not be held to have that same effect on the children, at least not with the certainty that is evidenced in *Brown*.[32] In fact, only one court has stated a definite rule as to what degree of racial imbalance it considered to be equal to segregation.[33] This case set the entire issue in clear perspective, and since it is currently in the process of appeal, it will give the Supreme Court an excellent vehicle to make its views clearly known. In this case Judge Sweeney found that the board had not intentionally zoned the city to create a segregated school system, and he also found that any school that had a student body that is composed of more than fifty per cent negro students is segregated. He then held that the board must submit a plan to desegregate the system, and stayed his order pending appeal.[34] The issue here is clearly defined, and it would be hard to hand fashion a case that would give the Supreme Court a better opportunity to clear the confusion.

When the Supreme Court finally agrees to hear a *de facto* segregation case, what will it decide? There are those who contend[35] that the Court has made its views known by denying certiorari in two of the cases[36] that held that there was no constitutional violation by a good faith application of the neighborhood school policy. Such an action by the Court does not signify that that body approves or disapproves of the opinion that it is asked to review. According to Justice Frankfurter,[37] the denial of certiorari merely signifies that a majority of the justices do not feel that the Court should consider the issue at that time. Therefore, this method of "guess-timating" the answer of the Supreme Court may not produce a reliable answer. It might be of value to count the number of lower courts on each side, if only to see which is in the majority. Only two federal courts have held that the *de facto* segregated school violates the Constitution,[38] and they are both district courts. One state supreme court has also indicated that it feels this way.[39] On the other hand, there are two circuit courts of appeals[40] and four district courts[41] that have decided contra. In addition, two

32. *Ibid.*
33. Barksdale v. Springfield School Comm., *supra* note 28.
34. Supplemental order, Barksdale v. Springfield School Comm., filed U.S. District Court, D. Mass., Jan. 19, 1965.
35. See Christian Science Monitor, March 3, 1965, p. 14, col. 1; N.Y. Times, March 2, 1965, p. 1, col. 6; Time, Feb. 5, 1965, p. 70, col. 1.
36. Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 85 Sup. Ct. 898 (1965); Bell v. School City of Gary, Ind., 213 F. Supp. 819 (N.D. Ind. 1963), *aff'd* 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).
37. Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950).
38. Blocker v. Board of Educ., 226 F. Supp. 208 (E.D. N.Y. 1964) and Branche v. Board of Educ., 204 F. Supp. 150 (E.D. N.Y. 1962); Barksdale v. Springfield School Comm., 33 L.W. 2356 (D. Mass. 1965).
39. Jackson v. Pasadena City School Dist., 31 Cal Rptr. 606, 382 P.2d 878 (1963).
40. Downs v. Board of Educ., *supra* note 36; Bell v. School City of Gary, Ind., *supra* note 36.
41. Lynch v. Kenston School Dist., 229 F. Supp. 740 (N.D. Ohio 1964); Craggett v. Board of Educ., 234 F. Supp. 381 (N.D. Ohio 1964); Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962); Webb v. Board of Educ., 223 F. Supp. 466 (N.D. Ill. 1963); Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich. 1958).

circuit courts have clearly indicated that they accept this view,[42] as do a large number of district courts.[43] The box score of followers of each holding is weighted heavily in favor of the constitutionality of the neighborhood school plan.

The fact that this interpretation of the law seems to be more generally accepted is in line with the authors opinion that it is based on the better reasoning. The reason that it is felt that this view should be accepted is based largely on the reasoning that the fourteenth amendment applies equally in all directions, and that reverse discrimination ought to be as abhorrent to the Constitution as any other.

ALAN GRINDBERG

42. See Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55 (5th Cir. 1964); Bradley v. School Bd., 317 F.2d 429 (4th Cir. 1963).

43. See Monroe v. Board of Comm'rs, 221 F. Supp. 968 (W.D. Tenn. 1963); Calhoun v. Members of Bd. of Educ., 188 F. Supp. 401 (N.D. Ga. 1959); Brown v. Board of Educ., 139 F. Supp. 468 (D. Kan. 1955); Briggs v. Elliott, 132 F. Supp. 776 (E.D. S.C. 1955).