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Backing Up the Bus: Can We Ever Retreat from Desegregation?

I. INTRODUCTION

In 1954, the Supreme Court decided *Brown v. Board of Education* and started the states rolling on the long and torturous road to school desegregation.[1] The *Brown* Court has been widely praised for striking down the fifty-eight year reign of the "separate but equal" doctrine which the Court had authored in *Plessy v. Ferguson*.[2] However, the analysis the Court applied in *Brown*, and especially the implementation decision, left much to be desired.[3] After hearing argument on the *Brown* case for the third time,[4] the Court's only guidance on how to desegregate the schools was to act reasonably and "organize public schools on a racially nondiscriminatory basis with all deliberate speed . . ."[5] Such minimal guidance from the Supreme Court has resulted in a confusing and uncertain approach to desegregation in the lower federal and state courts.

While the Supreme Court has authorized a variety of remedies for Equal Protection violations in the school desegrega-

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1. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

2. 163 U.S. 537 (1896). The "separate but equal" doctrine was originally applied by the *Plessy* court in the context of segregated railroad passenger cars, but it quickly became the standard by which racial segregation in all contexts, including public schools, was measured. In essence, the notion of "separate but equal" is that it is not constitutionally impermissible to divide people according to their race so long as the facilities provided for the separate races are substantially equal. In application, "separate but equal" facilities, especially the public schools, had continued to be separate, but rarely were equal.

3. Brown v. Board of Education of Topeka, 349 U.S. 294 (1955). After the initial decision by the Supreme Court, striking down the "separate but equal" doctrine, the case was remanded to the district court to fashion an appropriate remedy. The case returned to the Supreme Court a year later on the issue of how to implement a program of desegregation in the public schools. This decision by the Supreme Court is known as the implementation decision.

4. The implementation decision was, in fact, the third time the case had made it to the Supreme Court. When the case first reached the Court they remanded for additional fact finding without making a decision. It was the second time that the case was before the Court that the famous decision, striking down *Plessy v. Ferguson*, was made. The third time the case came before the Court was to decide the issue of implementation as discussed above.

5. *Id.* at 301.

tion context, the most useful, and most used, tool has been busing. The courts first ordered busing in the South where there was a history of purposeful and statutory discrimination. Then busing orders extended to the North and West where there was little or no history of purposeful or statutory discrimination. Today, busing has become a familiar fact of life, especially in large urban areas. In a few cases, the extent of busing has become extreme, requiring bus rides of one hour or more for children as young as five and six.[6]

In some instances, busing remedies actually amplify rather than alleviate the underlying causes of segregated schools. The process typically begins when the courts impose a desegregation order on a school district or group of school districts, cutting up white, hispanic, asian or black neighborhoods and grouping them into units with sections cut from neighborhoods of the other races. Often the result is that parents with the economic means, usually affluent whites, move to more remote suburbs or enroll their children in private schools to avoid busing. Over time the diminishing number of white children in the school throws off the racial balance and the entire process must be repeated. Each time this occurs school boards and courts are forced to extend the reach of busing even further to find the proper balance of races.

As the scope of busing has expanded, local school boards and neighborhood organizations have increasingly taken their petitions for "neighborhood schools" to the courts in an attempt to limit the expansive reach of the busing remedy. The basis for such actions is that busing has achieved its purpose and outgrown its usefulness. These groups have argued that the purpose for busing school children is to eliminate purposeful discrimination rather than to achieve precise racial parity in all public schools, and that where purposeful discrimination on the basis of race has been eliminated busing is no longer necessary.[7] However, even where the segregation of the races in the schools seems no longer to be purposeful, these efforts have met with considerable difficulty.

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6. The author is personally familiar with circumstances in the greater Los Angeles area where children of all ages, beginning in Kindergarten, are bused from a remote, predominately white, suburban area into an inner city school to achieve racial balancing. The morning ride through rush hour traffic can be over an hour. While this may be one of the more extreme cases, it is certainly not an anomaly.

7. *See e.g.*, Crawford v. Board of Education, 458 U.S. 527 (1982); Washington v. Seattle School Dis. No. 1, 458 U.S. 457 (1982).

The following sections discuss two apparently conflicting approaches the Supreme Court has taken with respect to anti-busing efforts at the Congressional and state levels and examine how they can be reconciled with each other.

II. IMPLEMENTATION OF *BROWN* AND THE BUSING REMEDY

Early efforts to enforce *Brown* met with strong resistance in the South. The Supreme Court, however, left the enforcement of the desegregation requirement primarily to the lower courts and the political arena for several years after the *Brown* implementation decision in 1955. When the Supreme Court did address the issue of enforcing desegregation, it took a firm stance that upheld the validity of *Brown*.[8]

The Supreme Court's first major re-entry to school desegregation occurred thirteen years after *Brown* in *Green v. County School Board*.[9] In *Green* the Court dealt squarely with the issue of whether Equal Protection required only the elimination of purposeful segregation or mandated affirmative efforts to integrate the public schools.[10] By this time, many Southern school districts had adopted "freedom of choice" plans whereby students and parents were free to choose which schools within the district they would attend. These plans, however, resulted in very little movement of blacks into white schools and almost no movement of whites into black schools.[11]

The Court's emphasis then shifted from eliminating purposeful discrimination to achieving actual integration. Because the "freedom of choice" plans were not achieving the desired level of integration, the Court found such plans to be inadequate. In *Green* the Court said, "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and

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8. Two examples of this are Cooper v. Aaron, 358 U.S. 1 (1958), and Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218 (1964). In *Cooper* all nine Justices reaffirmed the validity of *Brown* in the face of opposition to desegregation by Governor Faubus and the State of Arkansas. In *Griffin*, the county instituted a plan to avoid desegregation whereby all the public schools in the county were closed, and white school children were given grants of public funds to pay their tuition at all-white private schools. The Court found the legislation unconstitutional, reasoning that the only possible reason for the closing of the public schools was to ensure that white children would not, under any circumstances, be compelled to go to the same schools as black children in the county.

9. 391 U.S. 430 (1968).

10. *Id.* at 432.

11. *Id.* at 441.

promises realistically to work *now*."[12] In evaluating the effectiveness of "freedom of choice" plans the Court stated:

> Although the general experience under "freedom of choice" to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device . . . [But] if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, "freedom of choice" must be held unacceptable.[13]

The emphasis in *Green* on effects rather than purposes laid the foundation for the whole-scale integration orders that were to flow from the federal courts over the next twenty years.

The method most often used by the federal and state courts to comply with the Supreme Court's mandate was to carve up neighborhoods on the basis of race and assign the correct number of sections to the various public schools, insuring that the racial balance of each school in the system reflected the racial balance of the district as a whole. Achieving this kind of balance can often require taking sections from widely separated neighborhoods and assigning them to a single school. Such a process relies heavily on racial quotas.

While the Supreme Court has continued to reject the strict application of ratios or quotas to school desegregation, it has approved of ratios as a starting point for developing an integration plan.[14] The danger inherent in such a position is that by starting with quotas, the end result is seldom more than quotas.[15]

Two questions now arise. First, if there really is no legal mandate on the state or local level causing the racial imbalance

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12. *Id.* at 439 (emphasis in original).

13. *Id.* at 440-41.

14. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

15. While some people feel that strict quotas are the only workable solution to segregated schools, such an approach looks past the underlying purposes of school desegregation. The popular moral that led to the Supreme Court's decision in *Brown* was the belief that it was improper to separate school children based solely on their race. Quotas succeed in racially integrating the schools, but they rely on the same fallacy which the *Brown* decision sought to remedy. The school which a child will attend is still determined by his race. Ideally, a system of integration should not consider race at all. In operation, however, quotas are easy to administer and provide results. The problem of balancing results with analytical purity is a difficult one and goes beyond just the school desegregation context, reaching into all forms of affirmative action.

in the schools, and there is no showing of intent on the part of the school board to segregate the schools based on race, is integration still compelled by the Fourteenth Amendment simply on the grounds that different neighborhoods in the school district are primarily black or white? And second, after a court order requiring integration of a school system through busing is entered, when, if ever, is the problem of purposeful segregation sufficiently remedied as to allow the removal of federal court jurisdiction and a return to neighborhood schools? These questions have been posed increasingly over the years as efforts to limit the scope of busing have multiplied.

The remaining sections will examine the efforts of Congress, state and local governments and private citizens to curb busing in the public school systems. The contention of those who support a reduction in busing is that the point of *Brown* was to eliminate the invidious separation of school children on the basis of race, not to compel precise racial balances in all public schools. In many school districts, racial discrimination seems to have been largely eradicated, at least on the official government or school board level, and the continued busing may be doing more harm than good.[16]

III. CONGRESSIONAL EFFORTS TO CURB BUSING

In the wake of extensive busing remedies mandated by the federal courts came efforts by Congress to limit busing in public schools. Relying on Congressio nal power in Art. III and § 5 of the 14th Amendment, several acts have been proposed that would limit the busing of school children.

The Education Amendments of 1974 set up a hierarchy of remedies for the federal courts to employ in affecting desegrega-

16. It is important to point out here that this position is not accepted by many who have analyzed the problem of school desegregation. Paul R. Dimond, in his book, BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION (1985), takes an opposing view. He sees the efforts to curb busing in public school districts as unwarranted and premature. His focus is on the Supreme Court's continued refusal to consider the actions of government institutions (local, state, and federal) other than school boards in promoting segregated residential areas through a wide variety of discriminatory practices. Dimond contends that government action is often behind the problem of racially segregated neighborhoods, and thus, the racial imbalance that continues to exist in many schools can't be dismissed as a simple function of geography rather than purposeful discrimination. Dimond advocates the continued use of busing to integrate the schools and other measures to get at government action that purposefully discriminates on the basis of race beyond the school boards themselves.

tion.[17] Praising the virtue of neighborhood schools, the Act limited the use of busing by forbidding "the transportation of any student to a school other than the school closest or next closest to his place of residence."[18] Fearing that the Act might not withstand constitutional review, however, an important proviso was also added, stating that the provisions of the Act were "not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments."[19] This proviso significantly limited any bite that the Act might otherwise have had in limiting the extensive busing orders that continued to flow from the courts.

The efforts to use Congressional power to curb busing remedies continued throughout the 1970s and 1980s. In 1981, Senator Johnston of Louisiana proposed the Neighborhood School Act, which would have allowed busing as a remedy to school segregation cases only in very narrowly defined circumstances. While the proposal was adopted by the Senate, it met with opposition in the House and was never acted upon.

Many laws and constitutional amendments have been proposed in Congress almost annually, especially during the Reagan and Bush Administrations, which took a clear anti-busing stance and sought to restrict federal court power to order busing. However, these efforts have proved unsuccessful to date.

IV. STATE EFFORTS TO CURB BUSING

In 1982, the Supreme Court decided two cases concerning the constitutionality of state efforts to curb mandatory busing programs that the states had previously imposed upon themselves in order to remedy racial segregation in their schools. The state action in *Washington v. Seattle School District No. 1*[20] was found unconstitutional while the state action in *Crawford v. Board of Education*[21] was sustained. The holdings are difficult to reconcile with each other, but a closer look at the Court's reasoning is insightful into the modern Court's stance on anti-busing measures.

17. 20 U.S.C. §§ 1706-18 (1974).
18. *Id.* at § 215(a).
19. *Id.* at § 203(b).
20. 458 U.S. 457 (1982).
21. 458 U.S. 527 (1982).

A. *Washington v. Seattle School District No. 1*

The *Washington* case was appealed to the Supreme Court to decide the constitutionality of a state initiative that provided that "no school board [shall] directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence [and] which offers the course of study pursued by such student."[22] This state law was passed in response to a plan by the city of Seattle for mandatory busing to eliminate racial imbalance in the city's schools.

The five vote majority opinion, written by Justice Blackmun, held that the state initiative was unconstitutional. Blackmun concluded that the initiative "must fall because it does not attempt to allocate governmental power on the basis of any general principle. [Instead, it uses] the racial nature of an issue to define the governmental decision-making structure, thus imposing substantial and unique burdens on racial minorities."[23] The state's argument that the initiative had no racial overtones was rejected by Blackmun, who called this an explicit use of race.[24]

The Court emphasized that the practical effect of the initiative was to reallocate the power over student assignment from the local school boards to the state level. This kind of reallocation had been held to be unconstitutional in *Hunter v. Erickson*,[25] and Blackmun relied heavily on that case. Blackmun did concede that "the simple repeal or modification of desegregation or anti-discrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."[26] But he saw the Washington statute as doing something more than a "simple repeal."

B. *Crawford v. Los Angeles Board of Education*

In *Crawford*, Justice Powell, who had written for the dissent in *Washington*, wrote the majority opinion. Here, the Court upheld a California constitutional amendment designed to limit

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22. *Washington*, 458 U.S. at 462.
23. *Id.* at 458.
24. *Id.* at 470.
25. 393 U.S. 385 (1969).
26. *Washington*, 458 U.S. at 483 (quoting *Crawford*, 458 U.S. at 539).

the power of the state courts under the state constitution to order busing remedies. Previously, the state courts had used the California constitution to provide even more extensive busing remedies than would be required under federal Equal Protection. Now the state legislature sought to limit the state courts to only those remedies that would be required in the federal system.

Addressing the same issue as in *Washington*, Powell concluded that the amendment did not employ an explicit racial classification or impose a race specific burden on minorities.[27] Thus, the discriminatory purpose required for an Equal Protection violation was not present. The benefits of neighborhood schools that the amendment sought to confer were available to all, regardless of race. This is especially important considering that white students were actually a minority in the Los Angeles District. Powell concluded that, "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."[28]

C. *Distinguishing Washington from* Crawford

Don't these two cases, decided at the same time, have opposite holdings? Both cases deal with the efforts of local citizens to cut back on extensive busing remedies where it appeared that there was no longer any explicit or purposeful discrimination on the part of the school boards. Yet one was rejected while the other was upheld. On what grounds can they be distinguished?

Blackmun makes an earnest effort to distinguish the two cases on the fact that *Washington* was taking the control over student assignment out of its traditional resting place, the local school board; but isn't that what happens every time the federal courts step in to mandate integration of the schools by busing? And wasn't the initiative in *Washington* designed to set limits on the remedies school boards could use for integrating their schools rather than taking away their power to assign students to the appropriate school?

The only plausible distinction between the two cases seems to be a relatively insignificant one: where *the state* seeks to cut back on the local school boards' efforts to integrate through

27. *Id.* at 531.
28. *Id.* at 539.

extensive busing there is an Equal Protection violation, but where *the local school boards themselves* seek to cut back on the busing remedies they have applied in the past there is no constitutional violation. Perhaps underlying all of this is the Supreme Court's concern that if *Crawford*, were held to be unconstitutional we might have reached a point of no return. The desegregation orders were originally implemented to eradicate purposeful discrimination. Once the purposeful discrimination has been removed, is there still a need for the extensive busing of school children to achieve racial balancing? If the answer to this question had been "yes" in *Crawford* it would be hard to conceive of any scenario where the answer would be "no."

V. CONCLUSION

The debate over whether busing continues to serve its purpose and whether traditional busing remedies are doing more harm than good remains unresolved. The Supreme Court has left itself considerable room on the issue in deciding future cases that are sure to arise. Depending on whether the Court chooses to characterize the facts of any particular case as more analogous to *Washington* or *Crawford*, future anti-busing efforts could make progress or be stymied. There are also several new Justices on the Court since the time of the *Washington* and *Crawford* cases whose stance on this issue is uncertain.

Another important feature of this continuing debate is likely to come to the front in the near future. The new Republican majority that swept into Congress in the 1994 elections is likely to make some efforts on the legislative front to curb busing. But even if such legislation is passed, it will undoubtedly meet with constitutional challenges in the courts. While the future of busing in America remains uncertain, the debate is likely to increase rather than abate in intensity.

Keith Woodwell