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The New Commandment

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NOTES

The New Commandment

In *Swann v. Charlotte Mecklenburg Board of Eduation*,[1] the Supreme Court of the United States (hereafter referred to as Supreme Court) reversed a ruling of the Fourth Circuit Court of Appeals which had upset a desegregation order of the Western District of North Carolina requiring the Charlotte-Mecklenburg school district to seek to achieve a uniform racial ratio of students in its schools and to use pairing and grouping of schools, noncontiguous zoning and additional busing to achieve this goal. Although the United States was not a party to this suit, the Department of Justice filed an amicus brief with Fourth Circuit taking the position that Judge McMillan of the Western District of North Carolina had exceeded his authority in using racial ratios and in requiring busing.

A unanimous court spoke through an opinion written by Chief Justice Warren Burger. In this dramatic, strongly worded decision the court provided the nation with a dual mandate. The opinion reaffirmed the court's commitment to continued desegregation and thus provided the rest of the judiciary and the nation with a clear mandate to do likewise.[2]

The Charlotte decision enunciated the following new principles:

(a) *Racial Balance*—The Court holds that while the Constitution does not require racial balance or any particular degree of mixing, the use of mathematical ratios may be an appropriate "starting point in the process of shaping a remedy."[3] No court has previously taken such an affirmative position with regard to racial ratios for students, and while the Court here emphasizes that such ratios should not be considered as absolute goals, it seems clear that the Court favors their use as a measure of the effectiveness of a desegregation plan.

(b) *One-Race Schools*—The issue of continued existence of all black schools has been touched by lower courts, and during the summer of 1969, the Fifth Circuit went so far as to declare such schools *prima facie* evi-

[1] — U.S. —, 91 S. Ct. 1267, 28 L. Ed.2d 572 (1971).
[2] 49 Tex. L. Rev. 899 (1971).
[3] 28 L. Ed.2d 572 (1971).

dence of the continued existence of a dual school system.[4] This position was qualified substantially throughout the next year. The issue has not been met before by the Supreme Court. The Supreme Court now states that school systems must "make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools."[5] The Court did not establish an absolute rule prohibiting one-race schools but held that schools that are substantially disproportionate in their racial composition raise a presumption of noncompliance.[6] In this connection, the Court indicated that it would "scrutinize" such schools, and the burden upon the school authorities would be to satisfy the Court that their racial composition was not the result of present or past discriminatory action on their part.[7]

(c) *Transportation*—The Court declares that "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it."[8] The Court further recognizes the importance of bus transportation as a "normal and accepted tool of educational policy,"[9] and acknowledges possible objections to the use of transportation only in situations "when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process."[10] In the *Mobile* case,[11] the Court specifically directs the Court of Appeals to consider bus transportation and split zoning to desegregate the entire city system.[12]

(d) *Majority to Minority Transfers*—While the Supreme Court has previously dealt with the invalidity of free transfer and minority-to-majority transfer provisions as desegregation devices, the decision is the first statement by the Court which strongly favors use of majority-to-minority transfer provisions. In addition, the Court stated, "In order to be effective, such a transfer arrangement must grant the transferring stu-

[4] Green v. School Board of City of Roanoke, 316 F. Supp. 6 (1970).
[5] Swann v. Charlotte Mecklenburg Board of Education, — U.S. —, 91 S. Ct. —, 28 L. Ed.2d 572 (1971).
[6] *Id.*
[7] *Id.*
[8] North Carolina v. Swann, 312 F. Supp. 503 (1970).
[9] 28 L.Ed.2d at 574.
[10] *Id.*
[11] Davis v. Board of School Com'rs. of Mobile Co., — U.S. —, 91 S. Ct. 1289, — L. Ed.2d — (1971).
[12] Davis, 28 L. Ed.2d 578 (1971).

dent free transportation and space must be made available in the school to which he desires to move."[13]

(e) *Racial Identifiability of Schools*—The Supreme Court reaffirms the position taken in *United States v. Montgomery*[14] that the maintenance of schools identified as "Negro" or "White" on the basis of racial composition of the staff was impermissible.[15] The Court went beyond this position and for the first time held that a prima facie violation of substantive constitutional rights is established if it is possible to identify "Negro" or "White" schools simply by reference to the quality of school buildings and equipment, or the organization of sports activities.

Issues Laid to Rest

In addition to announcing several new principles to what we have regarded as established law, the Court also came to decisions concerning arguments which we had long rejected as unsupported, but which have often been repeated by persons opposing school desegregation.

(a) *Timing*—Despite what were considered by the Department of Health, Education and Welfare to be clear holdings in *Green, supra,* that the complete elimination of the dual system must be accomplished forthwith, the Court strongly condemned the dilatory tactics of school districts designed to avoid desegregation and thus once more implicitly rejected the concept of "all deliberate speed."[16]

(b) *Title IV*—The court holds that Section 407(a)(2) of the Civil Rights Act of 1964, regarding "transportation of pupils . . . to achieve . . . racial balance," had been included in the statute merely to limit the scope of the Act to that of the Fourteenth Amendment of the Constitution of the United States.

(c) *Burden of Affirmative Action*—Here again the Court reiterated its position in *Brown* and in *Green* that the Board is charged with the affirmative duty to end the dual school structure. "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked."[17]

(d) *Faculty Desegregation*—The Court, specifically relying on its earlier holding in *United States v. Montgomery,*[18] implicitly affirmed the

[13] Swann, 28 L. Ed.2d 572 (1971).
[14] 395 U.S. 225 (1969).
[15] Swann, 28 L. Ed.2d 569 (1971).
[16] *Id.* at 567.
[17] *Id.* at 568.
[18] 395 U.S. 225 (1969).

Fifth Circuit decisions requiring that the ratio of black to white faculty within each school in a district must reflect the ratio of black to white faculty in the system as a whole.[19]

TITLE VI—ENFORCEMENT IMPLICATIONS

This decision has required renegotiation of previously accepted Title VI compliance plans, particularly those negotiated with and accepted from medium to large Southern school districts allowing them to maintain all black and disproportionately black schools. The Department of Health, Education, and Welfare's decision makers in the past were often reluctant to require compliance plans which would necessitate increased transportation of students and for several months followed positions developed by the various *ad hoc* committees to the effect that (1) no new busing of elementary school students could be required either directly or indirectly (through altered attendance zones), and that (2) noncontiguous zoning should not be included in the plans of the Department of Health, Education and Welfare.

A second immediate impact of the *Swann* decision on the Department of Health, Education and Welfare Title III enforcement relates to the Court's discussion of the constitutional mandated affirmative responsibility on school districts to decide questions relating to the construction of new schools and the closing of old ones so as not to perpetuate or re-establish the dual school system.

The guidelines of the Department of Health, Education and Welfare since March, 1968, have set forth general requirements to this effect, but the Court's elaborate discussion and the emphasis on the importance and constitutional gravity attached to specific techniques relating to the location of new school facilities and of facilities to be closed strongly suggests that the Department of Health, Education and Welfare should follow-up with increased efforts in this area. The department has, in fact, already incorporated new compliance oriented questions in its Fall, 1971 School Survey Form regarding the racial composition of currently envisioned new school buildings and additions to present facilities.

Thirdly, the Court has held that school districts currently operating with majority-to-minority transfer provisions in their desegregation plans must make transportation available without cost and must provide space for students transferring.

[19] Davis v. Mobile, 393 F.2d 690 (5th Cir. 1968); United States v. Bassemer, 396 F.2d 44 (5th Cir. 1969); Singleton v. Jackson, 419 F.2d 1211 (5th Cir. 1969).

The Court has also broadened the definition of a racially identifiable school by declaring that independent of student assignment, a prima facie violation of substantive constitutional rights may be shown by reference to (1) the racial composition of teachers, (2) the quality of school buildings and equipment or (3) the organization of sports activities. While this language is susceptible to an interpretation that regardless of the student population of a school, an inferior physical plant or equipment might in and of itself render the school racially identifiable (and thus illegally segregated), the more probable interpretation is that the quality of school technically desegregated but racially impacted, must be equalized as part of the district's constitutional obligation.

Lack of Popular Support—The recent course of desegregation law has not found widespread support. Dissatisfaction has been expressed not only by the general populace, but also by the nation's leaders. Furthermore, some black groups are now opposed to busing to achieve racial balancing.[20] The lack of direction produced by this absence of public support was exacerbated by the ambivalence of the Supreme Court's position on the issue of busing. Judge-made law is most effective and develops most easily when it has the support of the general populace and presents the appearance of historical necessity. The possibility that the goal, racial mixing, and the tool, busing, might both be involved obviously could inhibit the efforts of the lower courts to achieve racial mixing. In addition, with neither support from below nor a mandate from above, there was little impetus for the creation of a generally applicable desegregation standard based upon busing. This was the challenge that confronted the Court when it granted certiorari in *Swann*. How it decided to meet this challenge promised to have the most profound implications for the future of Southern education.[21]

The *Swann* decision clearly approved some white children's being moved out of the schools of their families' long time neighborhoods solely because they were white. Likewise, it may be that some black children will be compelled to give up attendance at a school in which they would prefer to remain.

Thus, with the dilemma the decision has created, neither side understands *why*. "If the whites don't want it and the blacks don't want it, why

[20] *In* Allen v. Board of Pub. Instruction, 432 F.2d 362 (5th Cir. 1970), black parents objected to the closing of all-black schools.

[21] 49 Tex. L. Rev. 898 (1971).

do we have it?" The answer is the *Constitution of the United States.*[22] The standards established by the Supreme Court are not intended to be final; they are merely intermediate steps in a long evolutionary process which must continue if the law is to be made complete and perfect. It would be unreasonable to expect the Supreme Court, alone, to develop the details of desegregation law. The Supreme Court has recognized this and acknowledged the vital role played by the lower courts in this evolutionary process. The lower courts have, consequently, been left with a great deal of discretion in formulating desegregation decrees in order that they may continue to experiment.[23] A continuing effort on the part of the lower courts to perfect and refine the law is essential if desegregation is to develop beyond its present state. The Supreme Court has provided the lower courts with a mandate for both change and a direction for that change.[24] It is further submitted that the Court in *Swann* could have given credence to lower federal court opinions which recognized such a constitutional duty.[25]

Swann has been considered a busing decision. The Court did not order wholesale busing across the South, but did call for as much "actual" desegregation as possible, and legitimized a reasonable degree of busing as one way to accomplish it.

The Supreme Court left to lower courts how much desegregation and busing to insist upon in each district. The Court's ruling has been applied mainly to urban school districts in the South, those where black schools are locked inside large black neighborhoods. Some civil rights lawyers regarded it as the most important desegregation decree since the Court first outlawed separate black and white schools in 1954.

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Antitrust Remedies
State Given Setback to Sue as Parens Patriae

The State of North Carolina has alleged injury to its general economy and to its power of raising revenues through sales taxes.[1] In *North*

[22] 306 F. Supp. 1293 (1969).
[23] — U.S. —, 91 S. Ct. at 1282 (1971), — L. Ed.2d —.
[24] 49 Tex. L. Rev. 902 (1971).
[25] 16 How. L.J. 582 (1971).

[1] North Carolina v. Chas. Pfizer & Co., M-19-93 (S.D.N.Y.), 69 Civ. 839 (S.D.N.Y.), Civil No. 2287 (E.D.N.C., filed Jan. 31, 1969).