Louisiana Law Review

Volume 28 | Number 3
The Work of the Louisiana Appellate Courts for the 1966-1967 Term: A Symposium
April 1968

Freedom of Choice in the South: A Constitutional Perspective

Richard W. Brown

FREEDOM OF CHOICE IN THE SOUTH: A CONSTITUTIONAL PERSPECTIVE

One of the most hotly debated constitutional issues of our time concerns the school desegregation process in the southern states.[1] This Comment examines the constitutionality of the freedom of choice plan for pupil assignment used by southern school boards as a part of the desegregation process, emphasizing the role of freedom of choice in the Fifth Circuit and the effect of the *United States v. Jefferson County Board of Education* decisions.[2]

The states' actions in classifying students by race to facilitate the establishment of a segregated school system was held to violate the "equal protection clause" of the fourteenth amendment in *Brown v. Board of Education*.[3] The Supreme Court disposed of the "separate but equal" formula which had been announced in *Plessy v. Ferguson*[4] by holding:

> "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[5]

The second *Brown v. Board of Education*[6] ordered desegregation to proceed "on a racially nondiscriminatory basis with all deliberate speed."[7]

Two distinct interpretations have evolved from the language

---

1. The southern states include Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. U.S. COMMISSION ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67 (1967).

2. The case was first heard before a three-judge panel, 372 F.2d 836 (5th Cir. 1966). It was later considered by the court *en banc* on petition for rehearing, 380 F.2d 385 (5th Cir. 1967). The panel decision will hereafter be referred to as *Jefferson I*, while the rehearing will be referred to as *Jefferson II*. When speaking of the two decisions in conjunction, the writer will use the term *Jefferson*.

3. 347 U.S. 483 (1954), hereafter referred to as *Brown I*.

4. 163 U.S. 537 (1896).

5. 347 U.S. 483, 495 (1954).

6. 349 U.S. 294 (1955), hereafter referred to as *Brown II*. The courts were given the power to "consider the adequacy of any plan the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." *Id.* at 301.

7. *Id.*

of the *Brown* decisions.[8] One view holds *Brown I* and *II* to mean that separate schools for Negroes and whites are inherently unequal. Therefore, the equal protection clause requires the state to take affirmative action to remedy the inequality by mixing the races.[9] The other view finds a violation only where the state has acted to segregate the schools.[10] This view would apply the equal protection clause in a negative sense, so that a state is precluded from requiring segregation, but not forced to act affirmatively to achieve a certain degree of integration in the schools.[11] The latter view has been adopted by a majority of the courts. The dispute continues, and must ultimately be decided by the United States Supreme Court.[12] The law applied in the Southern federal circuits, however, invites examination.

The Freedom of Choice Plan

The freedom of choice plan has become the dominant desegregation approach in the South.[13] This remedy purports to

8. For a good discussion of the two opposing trends of thought, see Note, 18 VAND. L. REV. 1290 (1965).

9. Concerning the affirmative action theory, see Barksdale v. Springfield School Committee, 237 F. Supp. 543 (D. Mass. 1965); Taylor v. Board of Education, 191 F. Supp. 181 (S.D.N.Y. 1961); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1964).

10. The pioneering court decision expressing the view states: "The Constitution . . . does not require integration. It merely forbids discrimination." Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955). Other decisions following the *Briggs* doctrine include Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1964): Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962). For a good article discussing the view, see Kaplan, *Segregation, Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U.L. REV. 157 (1963).

11. Note, 18 VAND. L. REV. 1290, 1337 (1965): "The majority view, represented by decisions of two Circuit Courts of Appeal—the seventh in *Bell* and the tenth in *Downs*—finds no requirement in *Brown* that educational authorities must act to alleviate racial imbalance. The courts which followed this view have adhered to a technical interpretation of *Brown* which emphasizes the importance of racial classification. Proponents of the view also point to the fact that there is no definite sociological proof of a causal relationship between fortuitous racial imbalance and academic deprecation or psychological harm to the Negro child.

"Finding that school authorities must act to ease racial imbalance, a few courts have held that racially imbalanced schools deprive the Negro child of equal educational opportunity."

12. Two important cases will be decided by the United States Supreme Court in the 1967-68 term, which should cast some light on the situation. Raney v. Board of Education of Gould School District, 381 F.2d 252 (8th Cir. 1967), *cert. granted*, 88 S.Ct. 783 (1968) (No. 805); Monroe v. Board of Commissioners, City of Jackson, Tennessee, 380 F.2d 955 (6th Cir. 1967), *cert. granted*, 88 S.Ct. 771 (1968) (No. 740).

13. U.S. COMMISSION ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67, 45-46 (1967): "Free choice plans are favored overwhelmingly by

give each pupil the unrestricted right to attend any school in the district. The only reason a student may be refused admission to a school is overcrowding or some other extraordinary circumstance.[14]

The plan has been used in various forms in the South. Some school boards have used it to perpetuate segregation, but the courts have scrutinized all suspicious plans to insure that each student has a truly free choice.[15] The Civil Rights Act of 1964[16] gave the Department of Health, Education, and Welfare the right to withhold federal assistance from any local school district which fails to meet minimum requirements determined by the Department for the school desegregation process.[17] To provide some objective standards, the Department has issued Guidelines—prerequisites for the receipt of federal aid—setting forth requirements for the freedom of choice plans.[18] These Guidelines[19] have been given considerable weight[20] by the Fifth

---

the 1,787 school districts desegregating under voluntary plans. All such districts in Alabama, Mississippi, and South Carolina, without exception and 83 percent of such districts in Georgia have adopted free choice plans. . . . The great majority of districts desegregating under court order also are employing freedom of choice. Of the 160 school desegregation suits which had been brought within the Fifth Circuit prior to March 6, 1967, some 129 had resulted in orders embodying free choice plans; only 11 districts under court order in the Fifth Circuit used geographical zoning in whole or in part."

14. The circuits ruling on free choice plans have all held that overcrowding is the only legitimate reason for rejecting a student's choice. Racial considerations will not be tolerated. The Guidelines of the Department of Health, Education, and Welfare include "overcrowding and other reasons stemming from extraordinary circumstances" as the only excuses for rejection of an application. *Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964*, 45 C.F.R. § 181 (1966).

15. See, *e.g.*, Goss v. Board of Education, 373 U.S. 683 (1963) (declared unconstitutional a minority to majority transfer plan that was limited to white students); Kemp v. Beasly, 352 F.2d 14 (8th Cir. 1965) (the provision of an annual choice was held required to validate a free choice plan); Lockett v. Board of Education of Muscogee County, 342 F.2d 225 (5th Cir. 1965) (a freedom of choice plan is unconstitutional where it is established on a pre-existing system which was the result of racial discrimination by the school board).

16. Text of the Act of 1964—Civil Rights Act of 1964, 28 U.S.C. § 1447(d) (1964); 79 Stat. 445 (1965), 42 U.S.C. § 1971 (1965); 78 Stat. 249-52 (1964), 42 U.S.C. § 1975(a)-(d) (1964); 78 Stat. 243-68 (1964), 42 U.S.C. § 2000(c)-(h) (1964).

17. 78 Stat. 252 (1964), 42 U.S.C. § 2000(d) (1964).

18. *Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964*, 45 C.F.R. § 181 (1966).

19. For a good discussion of the HEW Guidelines and their effect on freedom of choice plans, see Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967).

20. The HEW Guidelines were given such "great weight" by the Fifth Circuit because the Department of Education had acquired such expertise in the area that the court felt its findings to be exceptionally reliable. The

Circuit in determining the constitutionality of the plans.[21] The Fifth Circuit has been quick to point out, however, that the court's power stems not from the Civil Rights Act of 1964 but from the equal protection clause itself.[22] The details of the Department's free choice Guidelines are aimed at securing actual existence of free choice.[23]

The freedom of choice plan, an institution unique to the South, has certain advantages over plans adopted in other areas of the country. Prior to *Brown* the North and West had adopted the neighborhood school plan; and although its use has not been precluded by *Brown*, much controversy has arisen concerning the drawing of geographical zones necessary to the plan. A dispute has developed whether the state has a duty to eliminate *de facto* segregation[24]—that which occurs not by force of law but by fortuitous residential segregation. Geographical zoning was also common in the South, but was based on a dual zoning system, one zone for Negroes and one for whites. A freedom of choice plan in which the choice is more than nominally free would seem largely to overcome the effects of residential racial groupings. Racial separation under *free* choice can only result from the individual's school selection. The state will not force him to attend the school nearest his home, and

---

Guidelines were declared constitutional, also. Other circuits, although not giving such full endorsement to the Guidelines as the Fifth Circuit, have accorded them much respect. For a good general discussion of the Guidelines and their effect and impact in southern school desegregation, see Comment, 77 YALE L.J. 321 (1967).

21. United States v. Jefferson County Board of Education, 380 F.2d 385, 390 (5th Cir. 1967): "In constructing the original and revised decrees, the court gave great weight to the 1965 and 1966 HEW Guidelines. These Guidelines establish minimum standards clearly applicable to disestablishing state-sanctioned segregation."

22. United States v. Jefferson County Board of Education, 372 F.2d 836, 880-81: "Second, the equitable powers of the courts exist independently of the Civil Rights Act of 1964. It is not contended in the instant cases that the Act conferred new authority on the courts. And this Court has not looked to the Act as a grant of new judicial authority."

23. *Hearings on H.R. 26 Before the Committee on Rules*, 89th Cong., 2d Sess. 32-34 (1966). Speaking of the purpose of the Guidelines, the present Commissioner of Education said: "We are trying to give the effect of free choices in having pupils enter into whatever school they may wish to attend."

24. Moses v. Washington Parish School Board, 276 F. Supp. 834, 840 (E.D. La. 1967): "Lest there be confusion from the beginning, it should be understood that as used conventionally now by most legal writers and courts, the term 'de jure segregation' means simply 'segregation' in the traditional sense; whereas 'de facto segregation' cannot be said to mean segregation in the traditional sense at all, but rather the mere chance of fortuitous concentration of those of a particular race in a particular class or school—fortuitous 'separation' of the races, not accomplished in any way by the actions of state officials."

under a properly administered plan, there is no state involvement in the pupil's selection. The disadvantage of the free choice plan lies in its administrative difficulty.[25]

The Jefferson Decision's Effect

Perhaps from a feeling of frustration, and to give effect to federal policy,[26] the Fifth Circuit in *Jefferson* dramatically discarded[27] the *Briggs v. Elliott* doctrine, which had held that *Brown I and II* did not impose an affirmative duty to integrate but merely prohibited state enforced segregation in public schools.[28]

The majority in *Jefferson I* adopted the affirmative action theory, at least as far as its applicability to formerly *de jure* segregated schools is concerned.[29] The court held that "the only

25. For a case holding that the school board could not institute a freedom of choice plan because it did not accomplish good school administration, see Moses v. Washington Parish School Board, 276 F. Supp. 834 (E.D. La. 1967).

26. Pressure has emanated from recent United States Supreme Court holdings and federal legislation aimed at accelerating the desegregation process in the South. Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 229 (1964) ("There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in *Brown v. Board of Education, supra*, had been denied Prince Edward County Negro children."); Bradley v. School Board of Richmond, 382 U.S. 103, 105 (1965) ("Delays in desegregating school systems are no longer tolerable."). Concerning the Civil Rights Act of 1964, the Fifth Circuit in United States v. Jefferson County Board of Education, 372 F.2d 836, 849-50 (5th Cir. 1966) said: "Ten years after *Brown*, came the Civil Rights Act of 1964. Congress decided that the time had come for a sweeping civil rights advance, including national legislation to speed up desegregation of public schools and to put teeth into enforcement of desegregation."

27. In rejecting *Briggs v. Elliott* and adopting the affirmative duty theory, the court overruled several prior decisions by that same court. There were nine decisions in all, commencing with Avery v. Wichita Falls Independent School District, 241 F.2d 230 (5th Cir. 1957), and ending with Lockett v. Board of Education of Muscogee County School District, Georgia, 342 F.2d 225 (5th Cir. 1965).

28. Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955).

29. The court seemed hesitant to go so far as to adopt the affirmative action theory to its full extent to include the *de facto* segregation in the North. It draws a distinction: "The similarity of pseudo de facto segregation in the South to actual de facto segregation in the North is more apparent than real. . . . In this circuit, therefore, the location of Negro schools with Negro faculties in Negro neighborhoods and white schools in white neighborhoods cannot be described as an unfortunate fortuity. It came into existence as state action and continues to exist as racial gerrymandering, made possible by the dual system. United States v. Jefferson County Board of Education, 372 F.2d 836, 876 (5th Cir. 1966). This distinction was criticized as being fictitious by Judges Gerwin and Bell in their dissent in *Jefferson II*: "This distinction, which must be without a difference and somewhat hollow to a deprived child wherever located, is used as a beginning. . . . The de jure-de facto doctrine simply is without basis. Segregation by law was legal until the *Brown* decision in 1954. Such segregation should hardly give rise

school desegregation plan that meets constitutional standards is the one that works."[30] The court clarified its statement by revealing a newly adopted objective:

> "As we see it, the law imposes an absolute duty to desegregate, that is, disestablish segregation. And an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored; rather, mixing of students is a high priority educational goal. The law does not require a maximum of racial mixing or striking a racial balance accurately reflecting the racial composition of the community or the school population. . . .
>
> "The criteria for determining the validity of a desegregation plan is whether it is reasonably related to the objective."[31]

This conclusion is justified by the rationale underlying the affirmative action theory that segregated schools are by their very nature unequal, and that school authorities have a duty to provide an equal educational opportunity for all children.[32] To remedy this existing inequality, school officials have the affirmative duty to mix the races.[33] In *Jefferson II*,[34] the court adopted the panel decision of *Jefferson I*:[35]

> "The court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools."[36]

---

to punitive treatment of those states employing what was then a legal system. United States v. Jefferson County Board of Education, 380 F.2d 385, 413-14 (5th Cir. 1967); see also Davis v. East Baton Rouge Parish School Board, 269 F. Supp. 60 (E.D. La. 1967).

30. United States v. Jefferson County Board of Education, 372 F.2d 836, 847 (5th Cir. 1966).

31. *Id.* at 846-47 n.5.

32. See Note, 18 VAND L. REV. 1290, 1301-06 (1965).

33. United States v. Jefferson County Board of Education, 372 F.2d 836, 869 (5th Cir. 1966): "In a school system the persons capable of giving class relief are of course its administrators. It is they who are under the affirmative duty to take corrective action toward the goal of one integrated system."

34. United States v. Jefferson County Board of Education, 380 F.2d 385 (5th Cir. 1967).

35. *Id.* at 389: "The court sitting en banc adopts the opinion and decree filed in these cases December 29, 1966, subject to the clarifying statements in this opinion and the changes in the decree attached to this opinion."

36. *Id.*

The effect *Jefferson* will have on the status of free choice in the Fifth Circuit is considerable. Following the reasoning of the court to its logical conclusion, grave doubts[37] surround the validity of a free choice plan that does not produce a racially balanced school system:

> "Freedom of choice is not a goal in itself. It is a means to an end. A schoolchild has no inalienable right to choose his school. A freedom of choice plan is but one of the tools available to school officials at this stage of the process of converting the dual system of separate schools for Negroes and whites into a unitary system."[38]

The Fifth Circuit held that the percentages[39] set forth in the HEW Guidelines are a reliable reference in deciding whether a plan is working.[40] If a plan does not work, it should be discontinued.[41]

The freedom of choice system was designed to place the burden of school assignment on the pupil himself. He has the choice to attend a formerly all white or formerly all Negro school. The Fifth Circuit would shift this burden to the school officials who must undo the wrong which has been done by devising a plan which results in some, as yet undetermined, degree of racial mixing. Apparently, all freedom of choice plans

37. In United States v. Jefferson County Board of Education, 372 F.2d 836, 888-89 (5th Cir. 1966), the court recognized that freedom of choice plans have "serious shortcomings." The Commission on Civil Rights also criticized the free choice plan, stating: "Freedom of choice plans . . . had failed to disestablish the dual school system in Southern and border States, the Commission determined. This failure was attributable to the fact that such plans did not eliminate the racial identity of the schools and placed the burden of change upon Negro parents and pupils who often were reluctant to assert their rights for fear of harassment and intimidation by hostile white persons. U.S. COMMISSION ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67 pt. 2, at 3 (1967).

38. United States v. Jefferson County Board of Education, 380 F.2d 385, 390 (5th Cir. 1967).

39. *Id.*: "The percentages referred to in the Guidelines and in this Court's decree are simply a rough rule of thumb for measuring the effectiveness of freedom of choice as a useful tool."

40. The percentages of students who transfer from segregated schools, if not measuring up to expectations, may result in the commissioner holding that the plan does not meet "constitutional and statutory requirements." This may require revision of the plan or adoption of a different plan altogether in order to meet HEW standards for federal financial aid. *Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964*, 45 C.F.R. § 181.54 (1967).

41. *Id.*: "If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; they should try other tools."

which do not effect an actual racial mixing retain little validity in the Fifth Circuit.[42] That a plan is modelled after the HEW Guidelines and is fairly administered seemingly is not determinative of its efficacy in achieving integration.

The Other Circuits

The Eighth Circuit disagrees with the Fifth Circuit's conclusions. In *Clark v. Board of Education of Little Rock School Dist.*,[43] decided shortly before *Jefferson I*, the court upheld the constitutionality of a free choice plan, stating:

> "If all of the students are, in fact, given a free and uninhibited choice of school, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their classrooms. We find no unlawful discrimination in the giving of students a free choice of schools. The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools."[44]

"In short," the court declared, "the Constitution does not require a school system to force a mixing of the races in schools according to some predetermined mathematical formula."[45] It warned, however, that a pupil's constitutional rights may be violated if he is unable to exercise a free choice due to state action correlative to the free choice plan.[46] On rehearing,[47] after *Jefferson I*, the Eighth Circuit reaffirmed its holding in *Clark* stating, "We find no state act that results in discrimination against Negroes."[48] In *Kelley v. Altheimer*,[49] the court intimated

42. Subsequent to the *Jefferson* decisions, one district court in the Fifth Circuit failed to find a freedom of choice plan unconstitutional because it did not accomplish a racial mixing but required its abandonment on other grounds. The court said: "As we have indicated, we by no means base our decision on the theory that 'free-choice' has not 'worked' to integrate the school system and that a different method must therefore be tried." Moses v. Washington Parish School Board, 276 F. Supp. 834, 847 (E.D. La. 1967).

43. 369 F.2d 661 (8th Cir. 1966).

44. *Id.* at 666.

45. *Id.*

46. *Id.* at 667: "If the program is designed to, or in fact does, intimidate or influence the students in their choice of schools, so that Negro children are induced to attend Negro schools, this would be unconstitutional state action in violation of the rights to equal protection and due process of law."

47. Clark v. Board of Education of Little Rock School District, 374 F.2d 569 (8th Cir. 1967).

48. *Id.* at 571.

49. 378 F.2d 483 (8th Cir. 1967).

that freedom of choice plans would be held to higher standards[50] to establish their constitutionality, but again rejected a proposal to eliminate freedom of choice and require active integration of classes.[51] In *Raney v. Board of Education*,[52] the Eighth Circuit followed *Clark* but warned that good faith administration[53] of the plan is required. The distinction to be noted between the Eighth Circuit view and that of the Fifth is that when the former requires a freedom of choice plan to "work" in order to be constitutional, it means it must be operated in good faith by school authorities to insure that each student has no interference in making his choice from sources attributable to the state; when the Fifth Circuit requires the plan to "work," however, it means not only good faith administration but also active racial mixing of the pupils in fact.

The Sixth Circuit contains school districts desegregated both prior and subsequent to *Brown*. In *Deal v. Cincinnati Board of Education*,[54] the Circuit rejected the contention that the fourteenth amendment demands integration of schools despite the presence of a school assignment system administered in good faith and not based on race. Although *Deal* involved a school district desegregated prior to *Brown*, the court later reached the same result with respect to a school system desegregated after *Brown*.[55] The Sixth Circuit, therefore, is in accord with the Eighth Circuit in opposing *Jefferson* by holding that equal protection does not require affirmative state action to

50. The higher standards imposed were chiefly in the fields of transportation and faculty desegregation. The court holds that a choice is not actually free until transportation sufficient to effectuate that choice is provided by school officials to the maximum extent feasible. Also freedom of choice is not insured until the faculties are desegregated.

51. 378 F.2d 483, 498 (8th Cir. 1967): "They ask that we require that the Board of Education to take action immediately to integrate all of the elementary classes at one time and secondary classes at the other. Though this solution has great appeal because of its simplicity, and obvious efficiency, we are not prepared to hold at this time, in view of our recent decisions . . . that desegregation in accordance with the Constitution cannot be accomplished if students are permitted to attend schools of their choice."

52. 381 F.2d 252 (8th Cir. 1967).

53. Brown v. Board of Education, 349 U.S. 294, 299 (1955). The Court alluded to the following language in *Brown*: "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

54. 369 F.2d 55 (6th Cir. 1966).

55. In Monroe v. Board of Commissioners, City of Jackson, Tenn., 380 F.2d 955 (6th Cir. 1967), the court refused to recognize the distinction which *Jefferson I* made between the states desegregating before *Brown* and those desegregating afterwards and applied the holding in *Deal* to that case also.

effect racially balanced schools.[56] The Constitution requires only that there be a plan fairly administered which removes all state interference from a pupil's free choice.

The Fourth Circuit, in the process of desegregating schools, has faced problems similar to those of the Fifth Circuit, and has given particular attention to the dictates of *Jefferson I*. The status of free choice in the Fourth Circuit is in need of further clarification; at present it does not include an affirmative duty of the school authorities to accomplish racial mixing. In *Bowman v. County School Board*,[57] the court states that the type of freedom of choice plan approved by the Fifth Circuit in the *Jefferson* decisions imposes "standards no more exacting than those we have imposed and sanctioned,"[58] but the court seemed unwilling to follow *Jefferson* in requiring an ultimate objective of racial mixing. The court used the following language:

> "If each pupil, each year, attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free. Thus we have held and we adhere to our holdings. . . .
>
> ". . . Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination."[59]

While confirming the status of free choice as a permissible school desegregation plan, the court admonished that, "if there are extraneous pressures which deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them."[60] The concurring opinion in *Bowman* criticizes the opinion of the court for not imposing standards on free choice plans as strict as those employed in *Jefferson I* and urges

56. *Id.* at 958: "We are asked to follow United States v. Jefferson County Board of Education . . . which seems to hold that the pre-*Brown biracial* states must obey a different rule than those which desegregated earlier or never did segregate. . . . However ugly and evil the biracial schools systems appear in contemporary thinking, they were, as *Jefferson, supra*, conceded, de jure and were once found lawful. . . . [T]o apply a disparate rule because these early systems are now forbidden by *Brown* would be in the nature of imposing a judicial Bill of Attainder. . . . But to the extent that United States v. Jefferson County Board of Education, and the decisions reviewed therein, are factually analogous and express a rule of law contrary to our view herein and in *Deal*, we respectfully decline to follow them,"

57. 382 F.2d 326 (4th Cir. 1967).

58. *Id.* at 328.

59. *Id.* at 327-28.

60. *Id.* at 328.

acceptance of the *Jefferson* holdings *in toto*.[61] The concurring judges felt that freedom of choice is a device which has no use unless it accomplishes racial mixing.[62] Generally, the district courts in the Circuit have rejected the affirmative action theory and have followed the principles set forth in the majority opinion in *Bowman*.[63]

Free Choice and Traditional Equal Protection

With apparent conflict among the circuits concerning the constitutional requirements of a free choice plan, the issue will ultimately be decided in the United States Supreme Court. In solving the problem, the constituent elements of an equal protection violation must be reviewed, equal protection being the constitutional basis for holding a segregated school system based on race invalid.

The two basic elements involved in all equal protection violations are state action and unreasonable classification.[64] Equal protection applies only against discriminatory state action and not private discrimination. The United States Supreme Court has recently reaffirmed the requirement of state action, "The Equal Protection Clause speaks to the state or to those acting under the color of its authority."[65] There exists a zone between

61. Sobelof and Winters concurring, *id.* at 331-32: "It may be profitable, therefore to examine closely what the court of appeals of that jurisdiction has recently said and done. We may then see how much further our courts need to go to bring itself abreast of the Fifth Circuit."

62. *Id.* at 333. The concurring opinion contains the following language: " 'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, non-racial system.' "

63. In Betts v. County School Board of Halifax County, Va., 269 F. Supp. 593, 601 (W.D. Va. 1967), the district court stated: "I acknowledge the persuasiveness of the guidelines insofar as they establish certain prerequisites for a freedom of choice plan, but I reject the concept that the constitutionality of such a plan must depend upon a certain degree of integration having been achieved. Implicit in the recent holding of the Fifth Circuit in the *Jefferson County* case is a concept of the requirements of Brown v. Board of Education which is contrary to the established law in this circuit and which, consequently, I do not adopt." See also Wright v. County School Board of Greensville County, Va., 252 F. Supp. 378 (E.D. Va. 1966); Swan v. Charlotte-Mecklenburg Board of Education, 243 F. Supp. 667 (W.D.N.C. 1965). For a holding adopting the affirmative action theory, see Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

64. See United States v. Price, 383 U.S. 787 (1966); Evans v. Newton, 382 U.S. 296 (1966); United States v. Williams, 341 U.S. 70 (1951); United States v. Powell, 212 U.S. 564 (1909).

65. United States v. Guest, 383 U.S. 745, 755 (1966).

state and private action, however, where courts have sometimes found state action sufficient to constitute a violation. Thus, state action may be indirect or it may be "only one of several co-operative forces leading to a constitutional violation."[66] A free choice plan administered in good faith by school officials would seem to remove any state action from the process of pupil assignment.[67] In such a situation the pupil or his parents exercise an unhindered choice,[68] and may choose any school within the district. Can the concept of state action be extended so far as to hold the state responsible for what an individual freely chooses to do? Some manner of factual state interference with the free choice itself would logically seem a prerequisite for an equal protection clause violation.[69] This view would parallel that of the Eighth, Sixth, and probably the Fourth Circuit. The Fifth Circuit's holding denies the existence of a neutral area in which the state can remove itself completely from the student's exercise of a free choice. *Jefferson* is hard to reconcile with the traditional notion of "equal protection of the laws."[70]

---

66. *Id.* at 755-56.

67. United States v., Jefferson County Board of Education, 380 F.2d 385, 404 (5th Cir. 1967). Judges Gewin and Bell dissenting in *Jefferson II* said: "If the completely free choice is afforded and neither the students nor their parents desire to change the schools the students have heretofore attended, this court is without authority under the Constitution or any enactment of Congress to compel them to make a change."

68. See, *e.g.*, Raney v. Board of Education of Gould School District, 381 F.2d 252, 256 (8th Cir. 1967): "We recognized in *Clark* that a plan appropriate on its face could be unconstitutionally administered and observed that in case of such a development, the District Court upon appropriate application could do what is necessary to bring the plan up to constitutional standards."

69. The Fifth, Eighth, Sixth, and Fourth Circuits hold that a freedom of choice plan is unconstitutional when the student's choice is interfered with by state officials or school authorities. See Bowman v. County School Board, 382 F.2d 326 (4th Cir. 1967); Raney v. Board of Education of Gould School District, 381 F.2d 252 (8th Cir. 1967); Monroe v. Board of Commissioners, 380 F.2d 955 (6th Cir. 1967); United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966). Where private pressures within the community are alleged to have interfered with the free choice, a judicial appraisal must be taken. If the pressures are found to be existent and acting to deprive the pupil of his free choice, the school board may be ordered to act to counter them. Bowman v. County School Board, 382 F.2d 326 (4th Cir. 1967). Obstacles to the exercise of free choice have been listed in U.S. COMMISSION ON CIVIL RIGHTS, REPORT ON SOUTHERN SCHOOL DESEGREGATION, 1966-67, 47-59 (1967). Perhaps the problem of private pressures can best be handled by the courts of law through civil and criminal actions against the coercers themselves. Such was suggested by *id.* at 97-98.

70. Concerning the *Jefferson I* holding and the affirmative action theory, Justice Cox in his dissent in that decision states: "No court up to this time has been heard to say that this Court now has the power and the authority to force integration of both races upon these public schools without regard

Even if state action is found, it may be a valid exercise of state power unless it results in an unreasonable classification.[71] Where is such unreasonable classification by the state in a free choice plan? A pupil is not classified at all in the sense of his being required to attend a certain school. Certainly, no racial classification by the state can be demonstrated.

However, absent both state action and unreasonable classification, the Fifth Circuit in *Jefferson* requires the state to take affirmative action to accomplish racial mixing.[72] The equal protection clause has not previously been interpreted as compelling a state to take such action to accomplish any purpose, however worthy.[73]

---

to any equitable considerations, or the will or wish of either race. . . . In sum, there is no law to require one of these public schools to integrate or force mix these races in public schools." United States v. Jefferson County Board of Education, 372 F.2d 836, 907, 909 (5th Cir. 1966).

71. In Reitman v. Mulkey, 387 U.S. 369 (1967), the United States Supreme Court upheld the California Supreme Court's holding that a state constitutional provision which prohibited the state from denying the right of any person to decline to sell, lease, or rent his real property to such person as he in his absolute discretion chooses, violates the equal protection clause because the state in so doing adopted private discrimination against Negroes. The Court noted that real estate agents customarily attempt to place Negroes in Negro neighborhoods and whites in white neighborhoods. The situation involved in *Reitman* is different from that of the state's institution of a free choice plan. Whereas, in *Reitman* there was state adopted discriminatory practices which the court held involved an unreasonable classification based on race, there is no such unreasonable classification involved in a school board's action to adopt a free choice plan for pupil assignment. Each pupil has a free and unrestricted choice to attend the school he prefers. Where each has the right to do as he wishes, there is no discrimination. In fact, no classification exists at all.

72. The only action a state has been required to take under the equal protection clause has been that of removing its own imposed unreasonable classification.

73. Deal v. Cincinnati Board of Education, 369 F.2d 55, 59 (6th Cir. 1966): "The principle thus established in our law is that the state may not erect irrelevant barriers to restrict the full play of individual choice in any sector of society. . . . If the state or any of its agencies has not adopted impermissible racial criteria in its treatment of individuals, then there is no violation of the Constitution. If factors outside the schools operate to deprive some children of some of the existing choices, the school board is certainly not responsible therefor. . . . Appellants, however, argue that the state must take affirmative steps to balance the schools to counteract the variety of private pressures that now operate to restrict the range of choices presented to each school child. Such a theory of constitutional duty would destroy the well settled principle that the Fourteenth Amendment governs only state action. Under such a theory, all action would be state action, either because the state itself had moved directly, or because some private person had acted and thereby created the supposed duty of the state to counteract any consequences."

Conclusion

The equal protection clause has traditionally been applied to remove any unreasonable classification a state may impose.[74] It does not place upon the state the obligation actively to remove all the judicially determined ills of society.

The *Jefferson* decisions of the Fifth Circuit conflict with decisions of other circuits that have dealt with the freedom of choice plan. It runs counter to traditional notions of equal protection of the laws because of its requirement that school boards act affirmatively. Any free choice plan offering an actual choice untainted by state compulsion should be held constitutional.[75] Equal educational opportunity is a laudable goal[76] but the means by which it is accomplished must be within the Constitution.[77]

Richard W. Brown

---

74. Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. L. REV. 157, 172 (1963): "The Supreme Court has never held that in the absence of some racial classification the mere inequality of one school compared with another involves a constitutional violation."

75. Freedom of choice, in the opinion of Judges Gewin and Bell, "if exercised by students or by their parents or by both, depending on the circumstances, in accordance with a plan fairly and justly administered for the purpose of eliminating segregation, the dual school system as such will ultimately disappear." United States v. Jefferson County Board of Education, 380 F.2d 385, 404 (5th Cir. 1967).

76. In Katzenbach v. Morgan, 384 U.S. 641 (1966), the United States Supreme Court held with respect to the congressional right to legislate directly under the fourteenth amendment itself that, "correctly viewed § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 651. Congress can act in a manner "necessary and proper" to effectuate the policies of the Amendment; so there is a possibility that Congress could legislate against the use of freedom of choice plans. However, in the Civil Rights Act of 1964, Congress defines "desegregation" as meaning "the assignment of students to public schools and within such schools without regard to race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 78 Stat. 246 (1965), 42 U.S.C. § 2000(c) (1964).

77. For an opinion that invalidation of a free choice plan because it does not result in a certain degree of racial mixing violates the individual's first amendment right of free association, see Judge Godbold's dissent in United States v. Jefferson County Board of Education, 380 F.2d 385, 423-24 (5th Cir. 1967).