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Constitutional Law–Racial Imbalance--Alleviation by Voluntary State Action (*Strippoli v. Bickal*, 21 App. Div. 2d 365 (1964))

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it may offer no clear-cut solutions, it does grapple for the first time with the fundamental issues. Most significantly, it at least defines methods for approaching an area which intellectually and practically defies any concrete delineation.

LESLIE CROCKER

CONSTITUTIONAL LAW — RACIAL IMBALANCE — ALLEVIATION BY VOLUNTARY STATE ACTION

Strippoli v. Bickal, 21 App. Div. 2d 365, 250 N.Y.S.2d 969 (1964).

In *Strippoli v. Bickal*,[1] the appellate division of the New York Supreme Court considered the validity of a transfer of one hundred and eighteen non-white pupils to an all white school located in a non-contiguous school zone. The School District Association of the school to which the pupils were transferred contended that the transfer was made only to cure an existing racial imbalance in the two schools, and that this action was in contravention of the New York Education Law[2] and the equal protection clause of the fourteenth amendment. The respondent school board claimed that its purpose in transferring the students was only to alleviate overcrowding. The New York Supreme Court found the allegation of overcrowding unreasonable. The court found that the board's true purpose was the correction of racial imbalance and therefore held the transfers void.[3] The appellate division reversed, holding that the board of education's decision to transfer students does not become unlawful merely because the factor of racial balance is accorded relevance.[4]

The *Strippoli* decision represents ruling case law in New York. The rationale of the decision was first pronounced in *Balaban v. Rubin*,[5] in which the court of appeals upheld positive school board action to reduce *de facto* segregation. In *Balaban*, existing racial imbalance was cured by constituting the Brownsville School one-

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1. 21 App. Div. 2d 365, 250 N.Y.S.2d 969 (1964).
2. N.Y. EDUC. LAW § 3201 reads as follows: "No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin."
3. Strippoli v. Bickal, 42 Misc. 2d 475, 248 N.Y.S.2d 588 (Sup. Ct.), *rev'd*, 21 App. Div. 2d 365, 250 N.Y.S.2d 969 (1964).
4. Strippoli v. Bickal, 21 App. Div. 2d 365, 250 N.Y.S.2d 969 (1964).
5. 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964).

third Negro, one-third Puerto Rican, and one-third non-Puerto Rican white. The question in both *Strippoli* and *Balaban* was therefore the same: May a school board take affirmative action to alleviate racial imbalance? The courts in both instances answered in the affirmative, basing their decisions on section 3201 of the New York Education Law[6] which reiterates the mandate of *Brown v. Board of Educ.*[7] The rationale seems to be that if the acts of a school board exclude no one on the basis of race, its actions are permissible. Neither of the courts in the above cases carried the constitutional justification for its decision beyond the ruling in *Brown*,[8] for both were apparently convinced that since the issue was not one of compulsory integration, there could be no constitutional violation. Hence, both decisions imply that voluntary state action, which is explicitly racial and taken to reduce *de facto* segregation, engenders no violation of the equal protection clause of the fourteenth amendment.

Recent decisions in three federal circuit courts, however, suggest that the implicit conclusion of the New York courts is not valid. In the leading case of *Boson v. Rippy*,[9] the Fifth Circuit struck down a plan requiring the operation of mixed schools if the parents of both races so desired. The court emphatically stated that Negroes have no right to attend schools with whites; that their only right is to be treated as individuals without regard to race. In a supplemental opinion to *Boson*,[10] the Fifth Circuit was even more explicit on this point. At issue in that instance was a plan giving pupils the privilege of transferring from schools in which they were in a racial minority. The court declared "that classifica-

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6. N.Y. EDUC. LAW § 3201.

7. 347 U.S. 483 (1954).

8. In *Balaban v. Rubin* the court said:

> There can be no doubt . . . that *de jure* segregation is unconstitutional. The question, however, as to whether there is an affirmative constitutional obligation to take action to reduce *de facto* segregation is simply not in this case. The issue, we repeat, is: May (not must) the schools correct the racial imbalance? The simple fact as to the plan adopted and here under attack is that it excludes no one from any school and has no tendency to foster or produce racial segregation. Therefore, we hold, section 3201 of the Education Law is in no way violated by this plan, nor was there any other legal impediment to its adoption. Balaban v. Rubin, 14 N.Y.2d 193, 199, 199 N.E.2d 375, 377, 250 N.Y.S.2d 281, 284 (1964).

In *Strippoli v. Bickal* the court said: "The only question before us is whether . . . the schools may also attempt to correct racial imbalance and this issue has already been resolved by our highest court. . . ." Strippoli v. Bickal, 21 App. Div. 2d 365, 368, 250 N.Y.S.2d 969, 972 (1964).

9. 285 F.2d 43 (5th Cir. 1960).

10. *Id.* at 47.

tion according to race for purposes of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school."[11] Thus, the two *Boson* decisions cast a shadow upon the New York procedures.

The Fourth Circuit has reached a similar result. In *Green v. School Bd.*,[12] the original assignment of pupils to segregated schools with discriminatory provisions for transfer was held unconstitutional. Finding the plan infected with racial considerations, the court said: "As we have more than once made clear, school assignments, to be constitutional, must not be based in whole or in part on considerations of race."[13]

Decisions in the Sixth Circuit, now reversed,[14] provided some basis for sustaining the action taken in New York. In *Kelley v. Board of Educ.*,[15] the Sixth Circuit upheld a transfer privilege similar to that condemned in the supplemental opinion in *Boson v. Rippy.*[16] The court's reasoning in *Kelley* is similar to that found in the New York cases;[17] namely, that "it is the denial of the right to attend a nonsegregated school that violates the child's constitutional rights."[18] Since the transfer privilege was voluntary and excluded no one, it "does not deprive any of the children of equal protection under the Fourteenth Amendment."[19] But *Goss v. Board of Educ.*,[20] a unanimous United States Supreme Court decision, crushed the logic of the Sixth Circuit. Overruling that circuit's decisions on the transfer privilege, the Court seemed to adopt the position taken in *Boson v.*

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11. *Id.* at 48. For other Fifth Circuit decisions supporting the same proposition see, *e.g.*, Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55 (5th Cir. 1964); Armstrong v. Board of Educ., 333 F.2d 47 (5th Cir. 1964); *cf.* Collins v. Walker, 329 F.2d 100 (5th Cir.), *cert. denied*, 379 U.S. 901 (1964).

12. 304 F.2d 118 (4th Cir. 1962).

13. *Id.* at 122. For other Fourth Circuit decisions supporting the same proposition see, *e.g.*, Wheeler v. Durham City Bd. of Educ., 309 F.2d 630 (4th Cir. 1962); Dodson v. School Bd., 289 F.2d 439 (4th Cir. 1961); Hill v. School Bd., 282 F.2d 473 (4th Cir. 1960).

14. Mapp v. Board of Educ., 319 F.2d 571 (6th Cir.), *enforcing* Goss v. Board of Educ., 373 U.S. 683 (1963).

15. 270 F.2d 209 (6th Cir. 1959). Other Sixth Circuit decisions sustaining *Kelley* are Goss v. Board of Educ., 301 F.2d 164 (6th Cir. 1962), *rev'd*, 373 U.S. 683 (1963); Maxwell v. County Bd. of Educ., 301 F.2d 828 (6th Cir. 1962), *rev'd*, 373 U.S. 683 (1963).

16. 285 F.2d 43 (5th Cir. 1960).

17. N.Y. EDUC. LAW § 3201.

18. Kelley v. Board of Educ., 270 F.2d 209, 229 (6th Cir. 1959).

19. *Id.* at 230.

20. 373 U.S. 683 (1963).

Rippy.[21] The Court boldly stated that "classifications based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment."[22] On this basis it would seem that the New York scheme, which is essentially a classification based on race for purposes of transfers between public schools, is proscribed. But the *Goss* decision is a limited one. The Court noted that there the transfer privilege was a "one way operation"[23] and as such promoted segregation; thus, "no official transfer plan or provisions of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment."[24] But, since the "inevitable consequence" of the New York plan is hardly racial segregation, it is unlikely that it would be found invalid if ever brought to a test in the Supreme Court.

Nonetheless, the sweeping language of many of the recent federal decisions purports to make racial classifications for any purpose invalid per se. If this be true, the New York integration plan is unconstitutional on its face. However, it has been suggested that the equal protection clause is not so restrictive.[25] It does not proscribe state action to distinguish, select, and classify the objects of legislation so long as there is a reasonable basis for the legislative action, and so long as the classification bears some reasonable relation to the object of the legislation.[26] Traditionally, racial classifications have failed to meet this test, the only basis for the state action having been prejudice.[27] Divorcing itself from prejudice,

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21. 285 F.2d 43 (5th Cir. 1960).

22. Goss v. Board of Educ., 373 U.S. 683, 687 (1963).

23. *Id.* at 688.

24. *Id.* at 689.

25. McLaughlin v. Florida, 379 U.S. 184 (1964). In *McLaughlin* the Supreme Court ruled that a fornication statute that punishes interracial violators was unconstitutional. Mr. Justice White, writing for the majority, did not condemn the law because a racial classification was used but because the classification was arbitary and unreasonable. Thus, the implication is that racial classifications, if reasonable, are permissible.

26. Ferguson v. Skrupa, 372 U.S. 726 (1963); Morey v. Doud, 354 U.S. 457 (1957); Griffin v. Illinois, 351 U.S. 12 (1956); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); New York Rapid Transit Corp. v. City of New York, 303 U.S. 573 (1938); Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936); Colgate v. Harvey, 296 U.S. 404 (1935); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580 (1935); Smith v. Cahoon, 283 U.S. 553 (1931); Frost v. Corporate Comm'n, 278 U.S. 515 (1929); Radice v. New York, 264 U.S. 292 (1924); Kansas City So. Ry. v. Road Improvement Dist. No. 6, 256 U.S. 658 (1921); F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Magoun v. Illinois Trust & Sav., 170 U.S. 283 (1898).

27. *E.g.*, Watson v. City of Memphis, 373 U.S. 526 (1963) (racial classification for playground regulation); Peterson v. City of Greenville, 373 U.S. 244 (1963) (segre-