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Can Federal Tax Benefits Constitutionality Be Extended to Private Segregated Schools - The Implications of Green vs. Kennedy

Darrel A. Rice

Texas has failed to meet the challenge of the hapless juvenile. Rather than removing a segment of the discretionary power granted by the legislature to the juvenile judge, the court in *E.S.G.* allowed a completely ambiguous provision of the Texas Juvenile Act to stand. The majority failed to establish any guidelines to help the parents, the juveniles, or the law enforcement agencies to determine what acts are prohibited. It will be left to the courts to determine which acts will call for a finding of delinquency. Because of this decision, the juveniles of Texas must remain dangerously close to the precipice of disaster in virtually every mode of conduct.

Ronald E. Grant

Can Federal Tax Benefits Constitutionally Be Extended to Private Segregated Schools? The Implications of Green v. Kennedy

White residents of Mississippi established racially-segregated, private schools to avoid the effects of court orders requiring prompt desegregation in the public schools.[1] Plaintiffs, Negro federal taxpayers and their minor children attending public schools in Mississippi, brought a class action to enjoin the Secretary of the Treasury from granting tax-exempt status to racially-segregated, private schools and from granting tax deductions for contributions to such schools. Plaintiffs contended that sections 501 and 170 of the Internal Revenue Code of 1954 are unconstitutional to the extent that they represent substantial support by the federal government to the segregated private school pattern.[2] *Held, preliminary injunction granted*:[3] Pending resolution of the constitutional issues, the Internal Revenue Service may not approve further tax exemptions for private, all-white Mississippi grade and high schools or tax deductions for contributions to such schools, unless the IRS first determines affirmatively that the school

The purpose of the juvenile court is supposedly to correct a juvenile as a child rather than to punish him as an adult. Consequently, juvenile records should not be subject to investigation by various employers. By permitting this type of activity, the juvenile is given a permanent record that is similar in nature to an adult criminal record. This is what juvenile laws were intended to prevent. It was intended that the state should handle its wards as a parent would its own child, and surely parents would not adhere to such policies in correcting their own children. *See* J. MACK, *supra* note 23, at 311.

[1] *See* note 19 *infra*, and accompanying text.

[2] INT. REV. CODE of 1954, § 170(c), provides federal tax deductions for contributions to "charitable" organizations. Charitable organizations are those which are non-political, non-profit (to individual members of the organization), and "organized and operated exclusively for religious, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals." *Id.* INT. REV. CODE of 1954, § 501(c)(3), basically provides federal tax exemptions for those charitable organizations in § 170(c).

[3] Note that this case grants only a preliminary injunction, and does not resolve the constitutional issues. This Note, however, will deal primarily with the constitutional issues, rather than jurisdictional issues or considerations calling for the issuance of a preliminary injunction.

is not operated to avoid desegregated public schools. *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970).

I. Constitutional Background of School Desegregation

School Desegregation Laws. The United States Supreme Court in 1954 handed down its historic decision on racial desegregation in *Brown v. Board of Education*.[4] For the first time, the Court held that "separate educational facilities are inherently unequal."[5] The *Brown* Court ruled that public school segregation is unconstitutional, declaring it a deprivation of equal protection of the law, which is guaranteed by the fourteenth amendment.[6] By so ruling, the Court held unconstitutional all provisions of state or local law requiring or permitting such discrimination. In *Bolling v. Sharp*,[7] a companion case concerning District of Columbia public schools and decided the same day as *Brown*, the Court came to a similar conclusion as to federal law, based on the due process clause of the fifth amendment. The court declared that "segregation in public education . . . imposes on Negro children . . . a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."[8] The Court stated that the federal government cannot be under any less duty under the due process clause of the fifth amendment than that imposed upon the states under the fourteenth amendment.[9]

In the second *Brown* decision, the pace of school desegregation was established as "all deliberate speed."[10] In 1964, this pace was increased to immediate compliance. In *Griffin v. County School Board*[11] and subsequent cases,[12] the Court held that the state and its school districts were under a present, continuing, and affirmative duty to establish unitary, non-racial systems of public schools, and that continued operation of segregated schools under a standard of "all deliberate speed" for desegregation was no longer constitutionally permissible.

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[4] 347 U.S. 483 (1954).

[5] *Id.* at 495. Thus, the Court expressly overruled the longstanding doctrine of "separate but equal." *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

[6] In 1955, in the second *Brown* case the Court formulated a decree to effectuate the 1954 decision. Realizing the impossibility of supervising the transition itself, the Supreme Court remanded each case to the appropriate federal or state court, with instructions to write the necessary orders for the implementation of the desegregation in public schools. Brown v. Board of Educ., 349 U.S. 294 (1955).

[7] 347 U.S. 497 (1954).

[8] *Id.* at 500.

[9] The fourteenth amendment applies only to the states. Because this case dealt with schools in the District of Columbia, the Court was forced to rely on the fifth, rather than the fourteenth, amendment, and was thus without an equal protection clause upon which to structure a principle of equal educational opportunity.

[10] In the second *Brown* case, the Court held that school boards must make a "prompt and reasonable start" to do away with dual systems. Because of the complexities arising from the transition to integrated schools, the court provided for "all deliberate speed" in the implementation of the principles of the 1954 *Brown* decision. Brown v. Board of Educ., 349 U.S. at 299-301 (1955).

[11] 377 U.S. 218 (1964).

[12] The Court reaffirmed its position in 1968, and again in 1969, emphasizing the obligation of every school district to end dual school systems immediately and operate only unitary schools now and hereafter. *See* Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968).

State Action, Equal Protection, and Education. State action in the form of laws expressly providing for racial segregation in public schools was held unconstitutional in *Brown v. Board of Education.*[13] To avoid the transition to racially non-segregated schools, many state and local governments turned to other forms of state action. The Supreme Court, however, remained firm. In 1958, the Court enlarged the concept of state action by explaining that the 1954 *Brown* holding was "that the Fourteenth Amendment forbids states to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds, or property."[14]

In 1962, the Supreme Court affirmed a lower court decision which held unconstitutional the changing of public schools to "private" schools.[15] A Louisiana statute authorized public schools under desegregation orders to become "private" schools operated in the same manner, in the same buildings, with the same money, and under the same supervision as the public schools. The district court held that the scheme required such extensive state control, financial aid, and active participation that the statute was violative of the equal protection clause of the fourteenth amendment.[16]

In *Griffin v. State Board of Education*[17] a Virginia district court held that grants of tuition by the state to private schools tended "in a determinative degree to perpetuate segregation," thereby violating the equal protection clause of the fourteenth amendment. In *Coffey v. State Educational Finance Commission*[18] a federal district court applied *Griffin* to state tuition grants to Mississippi children attending private schools. In 1965, many schools in Mississippi were under court orders to desegregate.[19] The district court found that private schools established subsequent to the desegregation orders were segregated and received substantial support from the state tuition grants. The court concluded that these schools constituted "a system of private schools operated on a racially segregated basis as an alternative available to white students seeking to avoid de-

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[13] *See* note 5 *supra*, and accompanying text.

[14] Cooper v. Aaron, 358 U.S. 1, 4 (1958).

[15] The Supreme Court affirmed the district court decision without opinion. St. Helena Parish School Bd. v. Hall, 368 U.S. 515 (1962), *aff'g* 197 F. Supp. 649 (E.D. La. 1961).

[16] St. Helena Parish School Bd. v. Hall, 197 F. Supp. 649 (E.D. La. 1961). In a later case involving private hospitals, the Fourth Circuit court of appeals concluded that massive grants of federal funds to the defendant hospitals and the fact that those hospitals operated as integral parts of joint federal and state programs constituted the necessary state action. Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

[17] 239 F. Supp. 560 (E.D. Va. 1965). In 1967, the Supreme Court banned legislation which allowed private racial discrimination in selling privately-owned residences. The Court held that this ban included all legislative enactments which will "significantly encourage and involve the State in private discriminations." Reitman v. Mulkey, 387 U.S. 369, 381 (1967).

[18] 296 F. Supp. 1389 (S.D. Miss. 1969).

[19] In the summer of 1964, the *Evers* desegregation ruling took effect. The order entered by the district court on remand required filing of desegregation plans by Mississippi schools during the summer of 1964. Evers v. Jackson Municipal Separate School Dist., 328 F.2d 408 (5th Cir. 1964). Also, in December 1964, the Department of Health, Education, and Welfare adopted regulations pursuant to title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (1964), requiring public schools systems to initiate desegregation plans for the coming year in order to remain eligible for federal financial assistance. 45 C.F.R. §§ 80.1-.13 (1970).

segregated public schools."[20] The court thus ruled the tuition grants by the state unconstitutional under the fourteenth amendment.

II. GREEN v. KENNEDY

In *Green v. Kennedy* the basic constitutional issue was whether granting federal tax benefits to private, segregated schools constitutes governmental action violative of the fifth amendment. The IRS contended that tax benefits may be denied a private, segregated school only if the operation of the school is unconstitutional by virtue of present state involvement. In 1967, the IRS announced its policy concerning private schools: where the school is segregated and its involvement with the state is such as to make it unconstitutional because of state action, tax exemptions would be denied. However, private schools not involved with discriminatory state action would be allowed federal tax benefits.[21]

The court approached the problem by relying heavily on *Coffey v. State Educational Finance Commission.*[22] Not only the decision in *Coffey*, but the entire evidentiary record of that case was utilized by the court in *Green v. Kennedy*. As in *Coffey*, the court found that segregated private schools were "established in Mississippi for the purpose of avoiding the result of a unitary, non-racial public school system required by the Federal Court decisions outlawing segregation in public schools, and in an attempt to maintain a broad pattern of racial segregation in the school system."[23]

The court found further that tax benefits mean substantial support by the federal government to the schools, and the segregated private school pattern of which they are a part. The most significant support was not found to be the exemption of the schools from taxes laid on their income, but rather the deductions from income tax available to the individual and corporate contributors of the schools. According to the court, capital financing of schools based on contributions makes those contributions extremely important. The idea of "approval" by the federal government in granting tax-exempt status is instrumental in soliciting contributions, as well as the more obvious tax deductions available to those who contribute to the tax-exempt organizations.[24]

After concluding that the federal tax benefits mean substantial support to the private schools by the federal government, the court considered the legal significance of that support. Noting that the due process clause of the fifth amendment does not permit the federal government to aid private racial discrimination in a way prohibited to the states by the fourteenth amendment, the court reasoned that the validity of the application of the tax statutes is "to be determined on the basis of (1) their practical tendency to increase the incidence of private discrimination,

[20] Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969).
[21] IRS Press Release (Aug. 2, 1967), CCH 1967 STAND. FED. TAX REP. ¶ 6734.
[22] 296 F. Supp. 1389 (S.D. Miss. 1969).
[23] 309 F. Supp. at 1134.
[24] Letters to potential contributors emphasized that "donations to the school are deductible from your gross income for tax purposes." *Id.* at 1135.

and (2) whether the discrimination so augmented frustrates the exercise of fundamental liberties."[25]

The court then considered the impact of the tax benefits in determining whether they can be constitutionally applied. The line of reasoning followed is similar to *Coffey*. The true test, according to the court, is not "good faith" or the lack of a discriminatory motive on the part of the government, but rather the practical effect of the action in question. If the state or federal government elects to place its power, property, or money behind a private discrimination to the extent that it represents substantial support, and tends in a determinative degree to perpetuate segregation, then such support is unconstitutional.[26]

Addressing itself to the particular contentions of the IRS and the facts in *Green*, the court held that "the scope of constitutional protection cannot be so narrowly defined to disregard the impact of past State action and support, and to ignore the significance of current Federal support from tax benefits."[27] Holding constitutionally inadequate the assumption of the IRS that only in the event of current state involvement or state action could federal tax benefits be withheld, the court reasoned that where there is a showing, as in this case, that the state has in the past aided substantially the establishment and maintenance of a dual system of segregated schools, the constitutional guarantees apply. The court climaxed its opinion by stating that "[t]he Federal Government is not constitutionally free to frustrate the only constitutionally permissible state policy, of a unitary school system, by providing government support for endeavors to continue under private auspices the kind of racially segregated dual school system that the state formerly supported."[28]

III. Conclusion

Although the court did not finally resolve the constitutional question, it did give an opinion which may foreshadow future constitutional developments. To reach its conclusion concerning the unconstitutionality of federal tax benefits to private, segregated schools, the court noted that an outright grant of funds by the federal government, which has the impact of substantially aiding racial discrimination, is violative of the fifth amendment. Reasoning that the impact of a federal tax exemption or deduction is that of an indirect or "matching" grant, the court similarly declared that the extension of such tax benefits to private, segregated schools would be a violation of the fifth amendment. The court, however, also considered the impact of federal acquiesence in past state action. Recognizing the importance of the facts in this case, the court did not ignore the history of state-supported racial segregation in Mississippi schools. The federal

[25] *Id.* at 1136.

[26] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961); *see* note 30 *infra*, and accompanying text. *See also* Bolling v. Sharp, 347 U.S. 497 (1954); note 7 *supra*, and accompanying text.

[27] 309 F. Supp. at 1137.

[28] *Id.*

government cannot, declared the court, support by tax benefits a dual system of segregated schools which the state formerly supported.

Relying on a narrow interpretation of *Green*, it would seem that only in the event of past or present state involvement could federal tax benefits be denied to private all-white schools. However, under a broad interpretation, *Green* could govern a situation which did not involve past action by the state in support of segregated schools by considering the tax benefits themselves as action violative of the due process clause of the fifth amendment. The fifth amendment imposes the same duty upon the federal government as that imposed upon the states by the fourteenth amendment.[29] The broad test of state responsibility under the fourteenth amendment encompasses state action of every kind which denies equal protection of the laws. The Supreme Court has held that private conduct abridging individual rights does violence to the equal protection clause if "to some significant extent the State in any of its manifestations has been found to have become involved in it."[30] It is a logical extension of this constitutional interpretation that state action is involved whenever public funds are directly or indirectly (as through tax exemptions and deductions) made available to segregated schools.[31]

If this conclusion is correct, any private school maintained for the purpose of racial segregation would not qualify for federal tax benefits under sections 170 and 501 of the Internal Revenue Code of 1954. The practical effect of this would be to make much more difficult the establishment and maintenance of a system of private schools operated as an alternative to desegregated public schools. The move toward school desegregation has been slow; perhaps no other civil rights activity has created so much resistance. The decision in *Brown v. Board of Education* was handed down over sixteen years ago, and yet the institution of dual school systems continues to survive. A final determination that federal tax benefits may not constitutionally be extended to private, segregated schools would be a stride in the direction of achieving the implementation of the constitutional guarantees delineated in *Brown*.[32]

Darrel A. Rice

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[29] *See* note 6 *supra*, and accompanying text.

[30] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

[31] There is a lower federal court case which presents a well-reasoned decision to this effect, although there are later cases with opposite holdings. *See* Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945) (concerning a library rather than a school).

[32] The public concern and controversy over federal tax benefits for private, segregated schools has spotlighted the probable impact of such a determination. Sen. Walter F. Mondale, Chairman of the Select Committee on Equal Education Opportunity, accused the Internal Revenue Commissioner of perpetuating southern "segregation academies" by granting them federal tax benefits which are vital to their existence. The Senator objected to the IRS policy of accepting an assurance from officials of private schools that their schools were open to all races. Commissioner Ranol Thrower of the IRS responded by stating that since the federal court order requiring a determination that schools receiving exemptions do not discriminate, the IRS has granted only eight exemptions out of 136 applications. He also said field investigations will be made on complaints about the schools, but that exemptions will not be withdrawn on the basis of past discrimination. Dallas Morning News, Aug. 13, 1970, at 8A, cols. 4, 5.