In the

Supreme Court of the United States

MARY ELLEN CRAWFORD, A MINOR, ETC., Appellant	)	
v	)	NO. 81-38
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, ET AL	)	

Washington, D. C.

March 22, 1982

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Monday, March 22, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:00 o'clock p.m.

APPPEARANCES:

LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on behalf of Petitioners

G. WILLIAM SHEA, ESQ., Los Angeles, California; on behalf of Respondents

REX E. LEE, Solicitor General of the U.S. Department of Justice, Washington, D.C. Amicus curiae

C O N T E N T S

CHIEF JUSTICE BURGER: You may proceed whenever you are ready.

ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.

ON BEHALF OF PETITIONERS

MR. TRIBE: Thank you, Mr. Chief Justice, and may it please the Court.

This case brings to the Court a judgment of the California Court of Appeal upholding an amendment to the California Constitution. Proposition One enacted a special statewide election to, and I quote from the analysis of the Legislative Analyst, "limit the power of California Courts to require desegregation."

Proposition One expressly linked --

QUESTION: That was written in terms of limited as between the California standards or the federal standards?

MR. TRIBE: Clearly they wanted to link it to the federal standards. What is intriguing about the case is whether it is permissible for a state, in its constitution which provides generous protection for educational equality across the board, to single out the right not to be subject to what the California Courts have called racial isolation, and to single it out by saying that as to that right, the only remedies available are those that a Federal Court, in the same

circumstances, would order.

We submit that that is not permissible, and the Petitioners in this case --

QUESTION: Isn't the corollary to that that states must have the same standards as the federal?

MR. TRIBE: No, not at all, Mr. Chief Justice.

QUESTION: It is a ratchet that only goes one way?

MR. TRIBE: If the states wanted to cut back on their equal protection clause in a neutral way, and to say, in general, they will not go beyond the federal Constitution, that would surely be permissible. The State of California has not done that.

The State of California, as the decision below expressly holds, continues to create rights to be free of racially segregated schooling regardless of cause broader than the rights that are conferred under federal law. The rights, substantively, have been completely unchanged by Proposition One. Moreover, the court below held that the duty on the school board to take affirmative steps, including mandatory pupil reassignment if and when necessary, remains.

What is now different, and it is different only with respect to desegregation, not with respect to school finance or any other area. What is different is

that with respect to school desegregation now, after Proposition One, one cannot use the Courts of California to get any and all necessary remedies. One must limit oneself to those remedies that a federal court, with all of the institutional limits on federal courts, would order in that very case.

QUESTION: Is it analogous to a State Norris-LaGuardia Act?

MR. TRIBE: It is analogous, I think, to a state racially specific Norris LaGuardia Act that says in, for example, racial labor disputes, as opposed to other labor disputes, the state courts cannot enter certain remedies unless federal courts would do so.

It seems to me that the closest analogy is really in this case clearly Hunter v. Erickson, but in a way this case is a lot worse than Hunter v. Erickson for this reason: What is important in this case is not the sort of education that the petitioners, the minority students of Los Angeles, are receiving or will receive as a result of Proposition One. That matters in the world, but the legal issue here is somewhat narrower.

The legal issue here is not even the degree of racial isolation and separation to which petitioners will be fated by virtue of Proposition One. The issue is the special way in which Proposition One creates a

two-track judicial system in California, a dual court system in which only those seeking redress from racial isolation in violation of state law must be satisfied with less than full relief from a state court.

They must, instead, persuade the school board, which is typically the defendant in the case, the entity said to be in default of their continuing obligations under state law, that the school board has been remiss in not ordering certain remedies.

QUESTION: Mr. Tribe, the proposition doesn't forbid a school board from voluntarily desegregating?

MR. TRIBE: No, and indeed, Justice White, that is one of the reasons it is so plain that it is a racial specific classification.

QUESTION: So it is different from the Washington.

MR. TRIBE: It bears almost no resemblance, in our view, to the Washington case.

QUESTION: But if the school board hasn't any duty to desegregate, you agree with that I gather, if there isn't de jure.

MR. TRIBE: Under state law, Justice White, it may have a duty even without de jure and that continues.

QUESTION: Except for the proposition.

MR. TRIBE: Although the court below --

QUESTION: The proposition removes the duty that the Supreme Court of California said was --

MR. TRIBE: Justice White, I don't think so. If I may quote from the court below at page 510 of the California Reporter version --

QUESTION: Where is it in the petition for certiorari--

MR. TRIBE: In the petition for cert. in the -- could I have that for a moment?

QUESTION: I agree, it --

MR. TRIBE: If I could just read, it is a very brief passage, Justice Renquist, so let me read it.

"This right," the court is talking about the broader right, "recognized in Crawford has not been removed by Proposition One, which does not purport to change the duty --

QUESTION: I agree with you, under state law.

MR. TRIBE: -- under state.

So what we have here is not the destruction of a right or the changing of a duty, as this court held only last month in Laverne. The fact that a state may be free to remove a right or remove a duty, does not mean that it has the same freedom to leave the right in place but simply, in a discriminatory way we argue,

provide less than full judicial remedy.

The way Proposition One is written, it distinguishes -- it singles out, let me quote from the Solicitor General, I think there is an accurate rendition of it in this brief, "It singles out a right afforded California school children under state law, admittedly, to attend schools free of racial isolation, whatever the cost, and subjects that right to an unusual judicial process that makes its protection substantially more difficult than protection of other state rights. For example --

QUESTION: What you would say, Mr. Tribe, if the proposition had said that it just removes all the duty that was found in Crawford to desegregate, even if it was de facto?

MR. TRIBE: It cuts the right back completely. It would be a very different and more difficult, Justice White. There would still be one argument --

QUESTION: It is really a lot different -- That is a lot different than what they did. They say, you may have a duty but it is just completely unenforceable in the court.

MR. TRIBE: You are supposed to try to enforce it by going to the other side. The referee is replaced with the other team.

QUESTION: The way it reads, you think now, if the Crawford and the Crawford rule still stands, there is nothing that a school board can do but to desegregate?

MR. TRIBE: They are under an obligation, a duty to desegregate.

QUESTION: Exactly.

MR. TRIBE: But there is nothing one can do to review in the Courts of California.

QUESTION: To say that they are voluntarily doing it is beside the point. They have a duty to do it.

MR. TRIBE: They supposedly have a duty to do it. But now, unlike other state duties, this one can't be enforced in the Courts of California.

QUESTION: As a practical matter, isn't it sensible to say that a right without a remedy really isn't a right, and that the conclusion Justice White suggests is true, that the right is gone for all practical purposes?

MR. TRIBE: Justice Renquist, there are two answers that I have to that. The first is that in this court's approach, for example, to procedural due process cases, it has drawn a sharp distinction between the state's destruction of an interest and the state's

statement to someone, "You have this interest property," let us say, "but we will not give you any hearing to protect it."

This court has said, it is a matter of Fourteenth Amendment law -- Once the state confers and continues to protect the right by saying that you have it, it is a matter of Fourteenth Amendment law what remedies are adequate for its enforcement.

I want to make this second point. Even if it were true that the State of California had taken the further step, which it denies it has taken and which the court below denies, and had surgically removed racial segregation from the list of wrongs in the educational world as to which California law provides a more generous standard by not inquiring into cause, and by allowing a broad range of remedies, including inter-district remedies, that would truly have been the withdrawal on a race specific basis, not on a neutral basis, of one right and one right only. That seems to me, under Hunter v. Erickson, this court is not necessarily prepared to counternance.

QUESTION: Then it really is a ratchet because the state can give more and more consideration to desegregation policies going beyond the requirements of the Constitution, but it can never go back.

MR. TRIBE: I think that is not right, Justice Renquist, it can go back. If the state were to do something specially for race, we do not deny that it could take that back.

If the state were to say, equal educational opportunity across-the-board is crucial, so that when it is denied, we don't care if it is de facto or de jure, and were to give that broad panoply of rights, and then were to say, but now we are going to take it back from one group, racial minorities, that would raise a different problem.

It is not a one-way ratchet. It is simply that if the state decides to take something back from minorities only, when it has given on a broader basis, that raises a facially racial classification.

QUESTION: How can you say that Crawford gave on a broader basis? What it gave was a right to minorities, was it not?

MR. TRIBE: No, I don't think so because Crawford relied also on Serrano v. Priest in which the California Court had compared its approach expressly in the areas of inequality of school finance and racial inequality. It had said that it saw no reason to treat them differently.

The federal court, out of reason of deference

to the states, the federal court might, for example, not want to provide inter-district remedies, but there is no reason for the states to worry about deferring to themselves. The federal courts might worry about proof of causation, but as far as state law was concerned equality of educational opportunity, when education was made a fundamental right in California, was so basic that it really didn't matter whether there was a deliberate decision to deny equality.

So the earlier Crawford decision, building on a decision that the California Supreme Court called Jackson --

QUESTION: Jackson was before Serrano?

MR. TRIBE: That is right, and then Serrano relied on Jackson and said, "We think that it is a broad principle of California's fundamental rights law with respect to education."

But in any event, I think it is important to get back to the point that here it is not just a denial of a right. Indeed, the court below rejected the petitioner's attempt to show that one of the things that was wrong here was that a vested right might have been taken away. The court below said, "No, the right is the same. It is just that this right, unlike other rights, can't be fully enforced."

In Hunter v. Erickson, the crucial racial distinction that was drawn, as the court pointed out, was not between blacks and whites, not between various groups of people, religious or racial. The crucial distinction that was drawn, the court said, was between racial housing matters and other racial and housing matters.

So that the example that this court gave was that those people, for example, who wanted to pass rent control laws, or laws increasing protection from negligent landlords or building codes, had an easier time vindicating their goals through the state's legal system than did those people who wanted to end racial discrimination in housing.

What this measure does, without any doubt, on its face since it refers to school integration, when talking about what school boards can voluntarily do -- what it does without any doubt is create a special obstacle, not just to translating goals of racial equality into not yet existent law that doesn't apply elsewhere, but a special obstacle to vindicating state created rights of racial equality which does not apply when one is trying to vindicate state created rights of educational equality in the financial area, in decisions like Serrano.

I do not think that it is right to say that racial animus must be shown in a case like this. Indeed, in Washington v. Davis itself, this court approvingly cited Hunter v. Erickson for the proposition that when a law on its face creates a racial classification that imposes a greater obstacle to racial minorities, or to minority rights, than it does in other analogous areas, at that point one doesn't need to take the next step and show discriminatory intent.

Indeed, Justice Powell in his Bakke decision distinguished Arlington v. Heights from an explicit racial classification. The only relevant intent for Fourteenth Amendment purposes is the intent to treat race differently.

QUESTION: Mr. Tribe, isn't it at least possible that the Proposition One could affect other types of plaintiffs who would seek busing to remedy a problem?

For instance, if California recognized some right of the handicapped to have an equal educational opportunity, and there were only one school that provided that kind of benefit, and plaintiffs might seek busing to afford that remedy, would this proposition affect that possibly?

MR. TRIBE: Justice O'Connor, my view is, based

on the decision below, that it would not. At least seven times, the Court of Appeal in this case said that Proposition One restricts the use of California's Courts for pupil reassignment only for purposes of desegregation.

The school board itself its opposition to certiorari in this Court said at page 9 that Proposition One addresses but one narrow area, the power of a state court to order student assignment as a desegregation remedy. The other Respondent in this case puts that as the question presented, whether a race specific remedy is even permissible under the Constitution.

QUESTION: Mr. Tribe, I gather the judgment of the court whose judgment we are reviewing said that they set aside the findings of discriminatory intent?

MR. TRIBE: There were no findings below, because the trial judge in this case thought that since a federal court would have ordered desegregation Proposition One didn't matter.

QUESTION: In any event, the Court of Appeals thought there was no discriminatory intent.

MR. TRIBE: That's right. The Court of Appeals didn't conduct any hearings --

QUESTION: So that you must convince us that such findings are not necessary in this case.

MR. TRIBE: Well, there are two ways that we can win in this case, Justice White. One is to convince you that since this is an explicit racial classification which imposes an obstacle to the vindication of minority rights, intent is irrelevant. We believe that's clearly

right and I want to refer to it.

QUESTION: Even -- you wouldn't even say that that is equivalent to discriminatory intent?

MR. TRIBE: Well, discriminatory in the sense of intent to have a disparate and adverse impact on a racial minority, not necessarily out of animus and not simply as opposed to sleepwalking, but in the sense that it's not just a statistical connection with race. Obviously, when race is present on the face of the law -- we're not dealing with an Arlington Heights situation or a Washington v. Davis situation, in which a seemingly innocent act happens to have an adverse impact on a racial group.

When you have explicit racial classification, as you do here, the relevant purpose is already conclusively demonstrated.

QUESTION: What is the racial classification that you have here?

MR. TRIBE: The racial classification here is between rights to reduce racial inequality in California schools and other rights relating to the educational system in California.

QUESTION: Where do you find that in the initiative?

MR. TRIBE: The initiative specifically says

that it shall not be construed to prevent a school board from engaging voluntarily in integration. So that this initiative deals with integration on its face, integration and desegregation.

At the same time, the official legislative analysis that accompanied it stated that its concern was desegregation. The Solicitor General says it is indeed race specific in the sense that it's focused on the problem of racial isolation in California's schools.

But even if it were true that by accident a law plainly designed on its face, since it speaks to integration, to create special limits on the use of California's courts in the desegregation area might happen to have a spillover effect and might happen, I would submit quite inadvertently, to interfere with racial -- with school assignments in the area of handicapped or overcrowding, even if that were to happen that would not in any way affect the proposition that a clear and explicit line is nonetheless drawn between racial inequality in California schools and, for example, economic inequality, something the California courts had treated as entirely analogous.

Justice Rehnquist asked in the Seattle case whether it wasn't true, in Hunter v. Erickson, that only fair housing ordinances were subject to the referendum

requirement. Well, indeed, it wasn't quite true. It was argued by the City of Akron in its brief and it was undisputed, in its brief in this Court, that some other ordinances, including taxation ordinances, for example, ordinances raising taxes, also had to be subjected to referendum.

So it couldn't be said literally that the line put race and only race on one side and everything else on the other.

QUESTION: Well, this particular charter amendment did, though.

MR. TRIBE: This particular charter amendment did, and we submit that the correct way of reading Proposition One is that it doese and the court below so read it.

But I was suggesting earlier that there was another way to win this case, and I would like to turn for a moment to that before I amplify the, we think, serious and rather unique constitutional defect in Proposition One. And that is, with respect to Arlington Heights, not only was there no determination of any kind about racially impermissible impact and purpose by the trial court, because it didn't think Proposition One was even an issue in the case, but the Court of Appeals conducted no inquiry remotely resembling what the Court

required in Arlington Heights.

The Court of Appeals said that it was a sufficient answer to all of our allegations and all of the evidence that we had yet to introduce to any tribunal, but that is in this record, a sufficient answer that in its face there was written into Proposition One a non-racial purpose.

Well, my goodness, if that's all it takes to satisfy Arlington Heights, if all you have to do is say in the law, we're not trying to do this because of race, then Arlington Heights becomes a meaningless precedent.

The Court of Appeals went on to say that because the proposition could have been motivated by considerations other than race, it would necessarily be too speculative to conduct a hearing on how in fact it was motivated. Surely that's not the standard that this Court laid down in Arlington Heights.

At a minimum, therefore, if the Court were not to agree that this is an impermissible explicit racial classification violative of Hunter, there would have to be either a remand under Arlington Heights or a determination that on this record this is so plainly designed to restrict desegregation, not just to restrict racial balance but to restrict the use of California's

courts to achieve desegregation, that it on its face is impermissibly motivated, or that the evidence so clearly shows it to be impermissibly motivated that you don't need a further hearing. But at least we would have been entitled to a remand.

QUESTION: You say that in face of the fact that compliance with federal standards and federal courts' orders was implicit in the California No. 1.

MR. TRIBE: I say it not so much in the face of that fact, but because of that fact. What is so unusual, Mr. Chief Justice, is that, as this Court has emphasized again and again, typically it is when the federal courts that are unavailable, for whatever reason, for lack of standing or because of deference to the state courts, what is important is that when federal courts are unavailable typically one can vindicate one's rights, state as well as federal, in state court.

Now, when does Proposition One limit the ability of a state court fully to vindicate one's rights under state law? Precisely when one couldn't get vindication from a federal court. In other words, this revolving door begins to operate in a race specific way exactly when you need the state courts the most.

QUESTION: Well, the reason you can't get relief in the federal court, by your hypothesis, is

because no federal right is violated.

MR. TRIBE: But Mr. Justice Rehnquist, in the Valley Forge decision you did emphasize that even though there might be a federal right, Article III imposes independent and important limits on the federal courts. The fact that you can't get relief from a federal court may not in itself mean there's no substantive violation.

QUESTION: Well, certainly people who claimed they were the victims of de jure segregation have had no difficulty getting relief from the federal courts in the past.

MR. TRIBE: Certainly that's right, Justice Rehnquist. But, number one, it might well be that the only effective relief from de jure segregation is an inter-district remedy that this Court under Milliken, partly out of deference to the state courts, would not be willing to give. And yet a California court prior to Proposition One would have had no reluctance to do it.

QUESTION: That's an example of a case where you don't have any federal right.

MR. TRIBE: But the reason perhaps that you don't have any federal right is deference to states' rights. And it seems to me perverse to make that deference to states' rights the reason for states to

close their doors.

But what about de facto segregation? California has chosen in the area of education to say what this Court, partly out of institutional and federal-state concern, was unwilling to say in Rodriguez, that education is a fundamental right, therefore that you don't need to show deliberate denial of equality as a matter of California law.

The failure to show that would prevent one from getting federal relief in school finance cases and in desegregation cases. But it's only in desegregation cases that it would have the further effect of now requiring that in order to get relief from the illegality you have to persuade the other side, the school board that is in default of its duties under state law, that it must do something for you, and if you don't persuade them that's the end of it.

It's very much like what the Court observed was unconstitutional in Boddie v. Connecticut. That is, when the state makes it impossible for you to vindicate your rights without full resort to the state judicial system, but then cuts off that resort to the state judicial system, it is violating your rights under the Fourteenth Amendment.

Now, that was true in Boddie v. Connecticut

partly because a fundamental federal right was involved. The analogue in this case of that fundamental federal right is that the limitation on access to courts is race specific. The line surely is drawn between desegregation and school finance even if it turns out that there's no line drawn between desegregation and problems of handicapped.

But we submit that the belated suggestion by the school board, for the first time in this entire litigation, that perhaps Proposition One wasn't directed just to desegregation, that perhaps it was directed at problems of handicapped and overcrowding as well, is utterly and facially incredible.

Never in the history of this litigation until the filing of the most recent round of briefs in this Court has it been suggested by the school board, by any other Respondent, that Proposition One has nothing to do with race. Indeed, if that were true there would have been a very simple answer for the Court of Appeals to give to the Hunter v. Erickson argument.

When we argued to the Court of Appeals that this was a race specific obstacle to the enforcement of rights, in violation of Hunter versus Erickson, it would have said presumably, no, we don't construe it as being race specific at all. But instead the court below said,

how could it be a violation of your federal rights when it explicitly embraces the Fourteenth Amendment? That was the only answer to the Hunter versus Erickson argument below.

We submit that when rights of racial equality are reduced in a state's law to what the Fourteenth Amendment as enforced by federal courts would do, while analogous rights are more generously treated, it is no answer to say that the Fourteenth Amendment is good enough for the federal courts and it had therefore better be good enough for minorities as well.

QUESTION: Doesn't that add up to the proposition that once the state has given some right it can't take it away?

MR. TRIBE: I don't think so, Mr. Chief Justice. It can take it away as long as it does not do so on a race specific basis. For example, if the State of California had taken a view analogous to that of this Court in Rodriguez about school finance and had just said in the one limited area of race that we will no longer worry about whether something is de jure and de facto, we will give a broader set of rights, and had then taken that back either by judicial decision or by constitutional change, we would not be in this Court arguing that that was a race specific change.

It might be race specific in the trivial sense that when you give something to members of a minority race and then take it back that's race specific by definition. But this Court has not, as the Dayton decisions show, equated that with a racial classification.

That's very different from saying across the board in the educational realm, we will confer broader rights and now we'll take them back from minorities alone. This law clearly at least does that, and we submit it does more, because what it does is say, you all have all of these rights, they're wonderful, they're like a teasing illusion -- a munificent bequest in a pauper's will, Justice Jackson once called it -- because although you have these rights the only way you can vindicate them is by persuading the person who's in default of its obligation with respect to these rights, the school board, that it should voluntarily confess error and make correction.

QUESTION: Well, what if California had construed its constitution more liberally in a number of respects, say the rights of criminal defendants, property rights and that sort of thing, and then decided that it would retreat in the area of education, which did involve the Crawford type right, but also involved

the Serrano type right?

MR. TRIBE: I think education is a broad and neutral enough category that it would not be race specific.

QUESTION: Even though that was the only one where minorities were involved?

MR. TRIBE: It seems to me that would be a statistical overlap, as between veterans and males in Feny, and we would then have to prove discriminatory intent. But when it is race specific in the sense that it draws a line between integration -- that word, I remind the Court, is present in Proposition One itself -- when it draws a line between integration and other forms of equalization within education, then we don't have to worry about why in the world did they pick education, was it because minorities are involved there?

Clearly, the focus of this law on its face is desegregation.

But I want to say, before reserving some time for rebuttal, that it's important to put this case in its right context. This is not a case, it seems to me, about desegregation or schooling as such. It is a case about the fundamental question of whether a state may structure its court system so that we have a system of

dual courts, courts fully capable of remedying, with the full panoply of necessary remedies, rights that relate to education, unless those rights involve claims of racial equality.

This Court in 1963 in the case of Johnson against Virginia held that racially segregated courtrooms are per se unconstitutional. This courthouse itself was segregated for some years after Brown v. Board of Education.

Bad as it was to relegate minorities to the back of the bus under the Jim Crow laws of the old South, we submit that it is even worse to relegate minorities to the back of the courthouse under the more subtle laws of the new North. We believe that this law does just that.

CHIEF JUSTICE BURGER: Mr. Shea?

ORAL ARGUMENT OF G. WILLIAM SHEA, ESQ.

ON BEHALF OF RESPONDENTS

MR. SHEA: Mr. Chief Justice, may it please the Court:

Throughout the course of this lengthy litigation, the Petitioners have always asserted that the decisions of this Court and the lower courts in the federal system, as well as the equal protection clause of the Fourteenth Amendment, should be controlling.

Proposition One accepts that argument by making all of those the governing standard in California.

I submit that the key to the constitutionality of this Proposition One is the very adoption of the requirements of the Fourteenth Amendment equal protection clause in the decisions of this Court. All the provisions of One -- and I'll take them up in a minute -- yield to the supremacy of the federal Constitution, and Proposition One has no racial classification in it.

Now, let me first of all turn, because of the remarks of counsel for the Petitioners -- I want to explain. He said specifically that the court below did not address itself to the issue of whether it was race specific. I can understand that a new argument is being made here, and it is a new argument, and that is, and that's the only reason I bring it up, that is why the Court of Appeals did not address itself when the case was argued below to any charge of being race specific.

There were two issues argued below. One was that the findings of the court, the trial court in 1970, which contrary to the statement that has just been made were incorporated by the trial judge in the decision which led to the Court of Appeal decision. The 1980 decision on Proposition One, incorporated those same

1970 findings.

And I call the Court's attention to the fact that from pages 11 to 49 of the opinion of the court below in the appendix to the petition for certiorari, that's an entire discussion of those findings, with the conclusion being set forth that those findings did not constitute a de jure violation by this school board under the decisions of this Court.

So that was the point that was first made below. The balance of that opinion, commencing on page 50, solely dealt with the constitutionality of Proposition One. So the argument of racial classification is new and being raised for the first time in this Court.

And I submit that if you look at the language of Proposition One -- and I'm referring particularly to the response that counsel for Petitioners made to Justice O'Connor's question -- it is the position of the school district that Proposition One in its language does not limit, does not limit its reach either in the constitutional restraint on the state and the invoking of the Fourteenth Amendment or in the provision restraining the state courts unless there's a Fourteenth Amendment violation and a decision which would support the remedy involved.

It is not limited to school desegregation cases. Nowhere -- and I'm looking at the first page of the proposition as it appears in the appendix to our brief in this Court -- nowhere is there any limitation that, for example, would not involve overcrowding of schools or handicapped children, in the illustration given.

And then Petitioners' counsel finds what in Proposition One to establish it's race specific? He turns to the proviso clause, which says that nothing in it, nothing in One, shall prevent a school board from using, any California school board, from using mandatory busing or reassignment of students in a school segregation problem.

So he takes that and lifts it to the whole Proposition One and says, there is your race specific. Or he goes another way and he says, look at the court section, the restraint on the court section. Only to remedy - a court in California can only use mandatory assignment of students or transportation of those students to remedy a specific violation of what? A violation of the equal protection clause of the Fourteenth Amendment, and impose a remedy which would be permitted under a federal court interpreting that violation and applying a remedy.

From that he urges this Court to say that this is a racial classification because it sets up a two-tier, a second class court system in California.

If California in Proposition One does so, I submit, only gives the courts in that one instance the same powers that you give the lower federal courts, that is hardly creating a second class judicial system, because that has been created by the decisions of this Court under the Fourteenth Amendment.

QUESTION: Mr. Shea, in your view if Congress should take away federal jurisdiction to use busing as a remedy would the California courts be deprived of the power to do the same thing, even when there's a violation of the federal Constitution?

MR. SHEA: Justice Stevens, I would have to look at that bill, but I would have grave doubts as to the constitutionality if Congress tried to take away a decision -- the right of the federal courts to redress a Fourteenth Amendment violation, if that was needed under the circumstances, as was said in the Swann case, needed in order to bring about the desegregation.

QUESTION: As I read Proposition One, the measure of the power that's left to the California courts is it's equal to what a federal court could order.

MR. SHEA: I so agree.

QUESTION: So any cutting back on the federal court power it seems to me would automatically also affect the power of your courts, even if there were a federal constitutional violation.

MR. SHEA: Well, I would say yes, because the parity would be there. I can't deny that.

QUESTION: But you question whether --

MR. SHEA: But I question the propriety under the Constitution and the separation of powers. I wouldn't want to get into that big problem, but I would question whether that could be properly done. So in evaluating whether we have got an inferior court system, I just don't think that's a real possibility.

But I would go one step further in my position on the state courts as to where they stand now under the Proposition One. They are still in a position to do more than the federal courts can, because the other tools that this Court well knows that are used in desegregating schools, in relieving racial imbalance -- magnet schools, voluntary transfers, changes in teacher-pupil ratios, enriched curricula -- those are still obligations.

They are still obligations and, as we have pointed out in our brief, at the present time in Los

Angeles we have Plan Four working which was put into effect in the fall of last year, after the decision below had been made and the California Supreme Court on March 11, 1981, the same court, made up of almost the same personnel that decided Crawford One, declined to review those two key points in the decision below, that there was no de jure violation and that Proposition One was constitutional.

QUESTION: Are you saying that the courts can do more, that the state courts can do more, or that the state school boards can do more?

MR. SHEA: Well, the state school board can do even more, because they can use the transportation assignment under the proviso clause.

QUESTION: Well, can a state court do anything in the absence of a finding of de jure segregation?

MR. SHEA: I think they can, because contrary -- and I would agree with counsel for the Petitioner, I think the question was asked what the Court of Appeals did and that's where we stand now below -- it did not say that Crawford One, the decision which first carved out the state right for de facto relief of racially imbalanced schools. In the decision below at page 54 in the same reporting in the appendix of the petition for certiorari, they did say that that obligation remained.

Justice Rehnquist, if that obligation remained then the courts could order the establishment, if they did need to, establishment of a magnet school, or they could order other things, as long as it did not involve the reassignment or transportation on a mandatory basis of the pupils.

QUESTION: So that when you qualify it that way it seems to me that it is almost entirely left up to the school boards, because of the language in Proposition One that in enforcing this subdivision or any other provision of this constitution, no court of this state may impose upon the State of California or any public entity, board or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation.

Now, what can a court do in the light of that prohibition?

MR. SHEA: Well, I assume, for example, if they did not -- we have established magnet schools. But assume that a school board did not establish them and a parent or somebody wanted a magnet school, and so they asked the school board to do it and they did not do so. And that being recognized as a tool, they could sue and ask the court to enforce the --

QUESTION: Well, wouldn't that be concerning

pupil assignment?

MR. SHEA: No, because magnets are all voluntary. The school could be established, but the attendance would not have to be compelled.

QUESTION: The court would order a school established, but it --

MR. SHEA: It could do so. I'm not saying so, because I would hope that other school districts would emulate us, where we have established magnet schools and where we now have an ongoing program. But all I meant to bring out is that there is implicit in Proposition One a broader power in the state courts in that sense than even a federal court would have.

But the attendance would be simply voluntary.

The racial classification argument, which I think as I heard counsel is relying primarily under the Hunter against Erickson situation, I think is readily distinguishable because there was clearly there, just as we go back in the older case of Yik Wo or in Gomillion against Lightfoot -- it was too clear that there, when you were interfering and putting a special premium on the getting a charter amendment in Akron that required to go out and get a majority vote, when up to that time the minorities involved were only obliged to get what any other ordinance would be, the councilmanic reading,

instead of going to the electorate -- that you've got a clear case for violating a race and making a racial classification.

But you cannot take that and lift it, and it seems to me this Court in almost a comparable problem in James against Valtierra later declined, where the obvious impact or character was lessened by the fact that you only had low cost housing involved in that case, and you refused then to follow and extend the Hunter doctrine.

I would like to conclude by discussing what I interpreted was their second effort to persuade you to reverse the court below, and that is that this proposition had a discriminatory purpose. Now, in support of that argument -- they even seem to concede that it doesn't say so on its face. And they can't point to -- they point to no evidence below of that purpose to establish that.

What they really point to is a collection, a miscellaneous collection of newspapers, campaign literature, and historical treatises. I have made the point in our brief that none of that was admitted below. It wasn't considered.

Now, there is a suggestion in this latest reply brief on the part of Petitioners that the least

you should do with this case, the very least, is send it back and give them a chance to prove that intent, that discriminatory purpose. And they say there was no remand, therefore you should remand.

I submit if you look at the very last words of the opinion below, as it appears at the end on page 70A of the same appendix, and I quote: "The orders of May 19, 1980" -- and that is the one below on Proposition One -- "and July 7, 1980" -- and that is the one that was made moot by the ruling on the Proposition One -- is "remanded to the trial court for further proceedings consistent with this opinion."

But not only was the court below remanding, but a remand was held and there was another trial. There was a trial in the summer of 1981, where the Petitioners in face of that remand with notice had every opportunity to offer evidence of this discriminatory purpose. And they offered none, no evidence.

And I call to the Court's attention that this was in effect the fifth trial, and if they had this purpose in mind, this discriminatory purpose, when Proposition One -- and the chronology is that the long trial involving Plan Three started in October of 1979 and continued to April of 1980. But by 15 days after the trial started, Proposition One had been passed by

the people. And we asked the court then now to apply Proposition One.

That trial lasted for six months and if there was any thought by then that this had a discriminatory purpose, that was their first opprtunity to prove it. And they had a second opportunity in the second trial after the remand by the court below.

It seems to me, Your Honors, with all due respect, that what Petitioners are asking you to do here is to in effect overrule your decisions where you have required under the Fourteenth Amendment in school cases a deliberate discriminatory intentional purpose, and establish that rule in California. And I urge you that in this case Proposition One should be upheld because it does match the requirements of the Fourteenth Amendment, and I respectfully close by urging you to affirm the decision below.

CHIEF JUSTICE BURGER: Mr. Solicitor General?

ORAL ARGUMENT OF REX E. LEE, ESQ.

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. LEE: Mr. Chief Justice and may it please the Court:

Petitioners' attack on the constitutionality of Proposition One is a very narrow one. It's narrow because it has to be, and it turns on whether

Proposition One really means what it says. The argument is that under Hunter v. Erickson there is a constitutional inequality in access to the courts.

Because of this Court's holding in James v. Valtierra, which was very closely observed, that argument is foreclosed unless the Petitioners can persuade this Court that, contrary to the clear language of Proposition One itself, it prohibits court-ordered busing only for integration purposes and not for any other purposes as well.

Petitioners' contention that this case is governed by Hunter v. Erickson is insufficient for two reasons: First, this is not a Hunter v. Erickson case, for the same reason that James v. Valtierra was not a Hunter v. Erickson case.

In Valtierra this Court upheld a California voter amendment to the state constitution which provided that no federally funded low rent housing project could be developed by a state body without approval by a majority of those voting in a community election. The parallel to Hunter v. Erickson was remarkable. Nevertheless, the Court held that it could hold that California voter amendment unconstitutional only by extending Hunter v. Erickson, which, in the language of this Court, "we decline to do." And the reason was

that, and I'm quoting again, "The article requires referendum approval for any low rent public housing project, not only for projects which will be occupied by a racial minority."

In order to get over the Valtierra hurdle, therefore, the Petitioners have to show that court-ordered busing applies only to busing for racial balance purposes. This they cannot do and this they have not done. The reason is that the relevant language simply will not yield to their rewriting efforts.

It prohibits, in relevant terms, judicial imposition -- and I am quoting -- "of any obligation with respect to . . . pupil school assignment or pupil transportation." What the Petitioners would like it to prohibit is any obligation with respect to pupil transportation for the purpose of achieving racial balance. But that is not what it says.

QUESTION: General Lee, are we bound by any characterization of the proposition in the Court of Appeals, for example, on page 50A of its characterization?

MR. LEE: If counsel's characterization of what the Court of Appeals said in its opinion below were correct, then you would have the difficult problem of the language saying A and the Court of Appeals saying

not A, and I've always wondered what this Court would do under those circumstances.

In fact, you don't have that case. I'm sure that this was just a slip in the exuberance of the moment. But there is nowhere, absolutely nowhere in that Court of Appeals opinion, that says that the only purpose for which court-ordered busing is prohibited is for racial balance purposes.

Now, it is true that on five or six different occasions the Court of Appeals does refer to the fact that this prohibits the use of court-ordered busing for desegregation purposes. But nowhere does that court opinion say or does any other authoritative interpretation by the California authorities say that it's only for those purposes. The only authoritative ruling that you have on that subject comes from the California Attorney General, and his view is, as it must be, that the amendment means what it says.

QUESTION: Mr. Lee, do you have the petition for cert there with the appendix?

MR. LEE: I think I can give you --

QUESTION: I'm looking for page 55A.

MR. LEE: Yes.

QUESTION: 54A, at the bottom it says: "The board remains" -- this is after the passage of the

amendment.

MR. LEE: Right.

QUESTION: "The board remains subject to its constitutional duty under state law to undertake reasonable feasible steps to alleviate school segregation, regardless of cause."

MR. LEE: Right.

QUESTION: Then it says: "In carrying out its duty, the board may utilize any and all desegregation techniques, including pupil assignment and pupil transportation."

MR. LEE: Absolutely right.

QUESTION: Well, what did the amendment forbid?

MR. LEE: The amendment forbade the use of either the court's ordering pupil transportation or the school board's utilizing busing as one of their means for -- excuse me. Well, it forbade the use of court-ordered busing. It did not forbid the school board itself from --

QUESTION: I'm going down to the next paragraph.

MR. LEE: Yes.

QUESTION: "In the absence of a board plan that provides meaningful progress, the trial court is

authorized to implement a desegregation plan that may utilize all available desegregation techniques, except that of pupil school assignment and pupil transportation."

Now, what techniques are those?

MR. LEE: Well, they're the ones that Mr. Shea referred to, techniques such as magnet schools or the assignment of higher quality teachers and staff to particular minority schools, techniques such as spending more money in minority schools.

This they not only have the opportunity to do; this they have the obligation to do, because California still has requirements over and above those that the federal Constitution has. It's just that what California has done is to cut back to one extent one remedy or one duty, if you want to call it that. And I don't think you get much sustenance out of whether it's one or the other. It has cut back to one extent the interpretation of its constitution that California previously experimented with.

And that brings me --

QUESTION: Mr. Solicitor General, is there any respect in which the California constitution gave broader protection to any group that's relevant here other than racial minorities?

MR. LEE: Not that I know of, not that I know of, because --

QUESTION: Well then, necessarily does the amendment have any affect on court matters except those involving pupil transportation to correct racial imbalance?

MR. LEE: Indeed it does. If you read it carefully, Justice Stevens, I don't see any way that you -- for example, I am informed that there may be a statutory obligation --

QUESTION: But this refers only to constitutional obligations. The Proposition One relates only to the California constitution as I understand it.

MR. LEE: All right, all right. But assume that there were -- that someone came into -- assume that someone came into court and asserted that there were a constitutional obligation, for example, say they had a budget-balancing amendment or whatever. This would prevent the courts from ever enforcing any court-ordered busing remedy for the purpose of achieving any constitutional amendment in the State of California.

QUESTION: Well, perhaps one can think of hypotheticals, and I'm not sure yours really fits. But is it not true that the only real life problems that the amendment addresses concern busing for racial purposes?

MR. LEE: I don't know whether that's true or not, because I'm not that acquainted with the California experience.

QUESTION: At least there's nothing in the record that identifies anything else?

MR. LEE: There is nothing in the record that I am aware of. But the fact of the matter is this, that California has structured this about as carefully as it can be structured. It is not race specific. I agree certainly with counsel for the Petitioners that in order to get over the Valtierra hurdle they have to persuade this Court that it really does on its face exclude any other kinds of busing, and that they simply have not done and cannot do.

QUESTION: Would you agree it would be invalid if it were race specific in the sense they argue?

MR. LEE: No, and that brings me to my second point. I agree that they lose unless it is race specific. I do not agree that we lose if it is.

QUESTION: Before you go to your second point --

MR. LEE: Yes.

QUESTION: -- let me pick up where your response to, I think, to Justice White left off. The next sentence is: "Thus, the effect of the

constitutional amendment is to withdraw one desegregative technique from the state courts' arsenal of remedies available to alleviate unintended non-purposeful segregation, but to leave all other available techniques intact."

MR. LEE: That is correct.

QUESTION: That sums up, or at least the court was attempting to sum up, the consequence of its holding, was it not?

MR. LEE: That is correct, and that brings me to my second point. The California courts have held that the constitution of that state imposes an obligation to alleviate de facto segregation and it still does even after Proposition One.

QUESTION: Are you suggesting that the matter that the Chief Justice read to you requires you to reach your second point?

MR. LEE: No, not at all. I'm just saying that it's a nice introduction into my second point, which I've been trying to get to.

QUESTION: That means you really haven't answered the Chief Justice yet.

MR. LEE: Not at all. I have answered the Chief Justice, but I will now answer you.

QUESTION: Why shouldn't we accept this as the

-- as the -- as the only real life reason for adopting this amendment? That's what the court said.

MR. LEE: It does not say, Justice White, that it was the only one. As Mr. Shea has pointed out, the James v. Valtierra argument --

QUESTION: Well, what if it wasn't? What if you said it was half of it. Would you be any better off?

MR. LEE: Excuse me. I missed the question.

QUESTION: Well, you say it wasn't the sole reason. What if it was one of two reasons? You have two equal reasons. Then you're still in trouble, aren't you?

MR. LEE: No, I think we're not in trouble at all.

QUESTION: Why? Why is that?

MR. LEE: Because what this Court held in James v. Valtierra, that Hunter v. Erickson does not apply in those circumstances where there are other reasons other than racial reasons for what the court -- what the state has done.

QUESTION: You mean even if it's half and half?

MR. LEE: Even if it's -- well, I don't know whether it was half and half or whatever it was.

QUESTION: Or a quarter, or ten percent, or what?

MR. LEE: So long as it is not race specific and race specific only.

QUESTION: Sort of a Mt. Healthy test.

MR. LEE: That is correct.

If California loses this case, then the real losers are going to be not only the constitutional allocation of authority in our federal system between national and state governments, but even more specifically the effort by states and individuals all across the country to achieve racially integrated schools.

If California had originally chosen to limit its efforts to deal with racial imbalance to the requirements of the Fourteenth Amendment, then its decision would clearly have raised no constitutional issue, and the Petitioners do not contend otherwise. In fact, California went further. It took upon itself the obligation to deal not just with the problems of de jure segregation, but de facto as well. And now, almost 20 years later, all ethnic groups in all parts of the state agree that one aspect of that experiment has not worked, at least for California.

QUESTION: You did say "all", didn't you?

MR. LEE: In the sense, Justice Marshall, that this amendment --

QUESTION: I mean, I know a few out there that don't agree.

MR. LEE: There is no disadvantage to anyone from permitting states to try something beyond the bounds of the Fourteenth Amendment demands and then back off if it doesn't work. The successes from that kind of experimentation redound to everyone's benefit. The failures harm only the particular state that undertook the experiment.

It would be a great disservice not only to federalism generally but specifically to the cause of relieving racial segregation if states such as California were not permitted to try the waters beyond the Fourteenth Amendment barrier reef, with the assurance that the Fourteenth Amendment will permit them to come back to a safer harbor if the experiment does not work.

Now, my opponent says that that's true, but you can't do it where it's race specific. That is only saying that you can't ever back off from efforts at racial imbalance, because by definition you have to use racial imbalance efforts; they have to be saying that racial balance efforts are race specific. And as a

consequence the interests of school desegregation, whether de jure or defacto, would scarcely be served if the one state, the one state whose legal requirements go the farthest in dealing with segregation and clearly go beyond the demands of the Fourteenth Amendment, were to be the only state whose efforts to deal with de facto segregation were held to violate the Fourteenth Amendment.

Justice Brandeis in his classic statement on the values of experimentation pointed out that this Court has the power to prevent an experiment, and that it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory. In this case, we submit the Court should not stop experimentation. If it does, every state will know that its reward for experimenting beyond the bounds of the federal Constitution will be a Hunter v. Erickson requirement that experiments which fail must nevertheless be continued.

It is not a sufficient answer to that argument to say that it is race specific in that instance, because all that that is really saying is once again that it really is a ratchet wrench, that you can't really back off once you've tried something and it doesn't work. Because by definition any effort at

racial imbalance must fit the Petitioners' definition of what is a race specific classification, because there is nothing in this particular case to differentiate it from any other.

For this reason, we join with the Appellees in urging that the judgment of the Court of Appeal be affirmed.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Tribe? You have five minutes remaining.

REBUTTAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.

ON BEHALF OF PETITIONERS

MR. TRIBE: Thank you, Mr. Chief Justice.

To begin with, I suppose I should note that no argument is any longer being made by the board in this case that there is some compelling justification for this measure. Unlike the Seattle law, for example, there's no suggestion that this is genuinely a neighborhood policy. Students can be forcibly bused out of their neighborhoods if the school board realizes or agrees that that's what it ought to do.

So what we're left with is the question of whether either on its face or under Arlington Heights it is a racial classification.

QUESTION: Mr. Tribe, do you agree or do you not that Valtierra said that even if half the purpose os

racial that the law is constitutional?

MR. TRIBE: No, I certainly don't, Justice White.

QUESTION: It just said it might have some impact on --

MR. TRIBE: It says if it's a statistical coincidence that that's not race specific. Indeed, in Hunter what Section 137 added was race and religion to a list that already included taxation. It can't make a difference whether it's in one law or two. It seems to me very clear that if an obstacle is put in the way of racial minorities as such, even if a couple of other obstacles are thrown in for good measure, that does not invoke James v. Valtierra by any stretch of the imagination.

A word about Arlington Heights. It's simply not the case that opportunities have been bypassed to try to show racially discriminatory purpose. Proof was introduced, but its admissibility was never ruled on because the trial court thought that the validity of Proposition One was immaterial. And there was a remand from the Court of Appeal, but expressly limited to the question of what to do now that the Court of Appeal had decided Proposition One was constitutional.

No evidence was allowed on remand on the very

question on which no evidence has yet been heard in this case, namely whether Proposition One was motivated by desire to impose greater obstacles to racial minorities.

So I do think that at a very minimum the failure to apply Arlington Heights was fatal below.

QUESTION: But surely the Court of Appeals disaffirmed the trial court's previous findings of purposeful racial discrimination. Did it or not?

MR. TRIBE: They did.

QUESTION: Well --

MR. TRIBE: They said that --

QUESTION: -- are you suggesting nevertheless it turned right around and said Proposition One nevertheless indicates a racial purpose?

MR. TRIBE: No. What I'm saying is that those are two wholly unrelated issues in this case.

QUESTION: Well, I agree with that. But I'm asking what you're submitting.

MR. TRIBE: Well, the Court of Appeals said, number one, that the 1970 findings didn't establish any purposeful discrimination by the board.

QUESTION: By the board, exactly.

MR. TRIBE: And then as to Proposition One it said that, because it has a disclaimer on its face and

because it could have been properly motivated, it follows that there need be no inquiry under Arlington Heights. That is surely a misstatement of the law.

But we don't even need to reach Arlington Heights, because I think it is very clear, as Justice White has pointed out, that even if something hits explicitly race plus something else the explicit attention to race imposing an obstacle to racial minorities independently triggers the strictest scrutiny, which can't be satisfied here because there's no compelling justification.

More than that, the suggestion of the Solicitor General that we have here one of these very difficult cases where the law on its face is simply incompatible perhaps with what the Court of Appeals said, and then you try to figure out what to do, is untenable. The law on its face, as Justice Stevens points out, clearly suggests in light of the fact that the California constitution when it comes to pupil assignment had added nothing outside the area of race, clearly suggests that it's only race that's being spoken of.

But if there were ambiguity the Court of Appeals would have settled it. On page 59A of the appendix to the petition for certiorari it is

specifically said by the Court of Appeals that Proposition One merely -- and they use the word "merely" -- removes court-ordered school assignment to cure state-prescribed racial imbalance.

The court says on page 67A, all the amendment does -- despite the Solicitor General's suggestion that they never said "all", they never said "only" -- all the amendment does is remove from courts this remedy to end racial isolation. Nothing could be clearer than that this Court is bound by the authoritative interpretation of the state courts on this.

QUESTION: That isn't really an authoritative interpretation on the point you're making, though, is it? It wasn't put to them then that this applies to handicapped, pupil assignment for handicap purposes, and they say, no, it doesn't apply for handicaps, it's just for racial imbalance.

MR. TRIBE: Well, it was -- Justice Rehnquist, it was suggested by counsel for the board that it wasn't put to them that it was race specific. On the contrary, it was. That was half the argument in the Court of Appeals.

QUESTION: Well, was this -- was the proposition that Proposition One had an effect on assignment for handicap purposes put to them in oral

argument?

MR. TRIBE: No, of course not, because no one would have imagined that it did.

QUESTION: Did you argue orally?

MR. TRIBE: No. But what we argued in the case below, what was argued in the case below, was that the only thing it covers is race. And the court addresses that issue. It's not a new argument. It addresses it and, instead of denying it, it says, no, it embraces the Fourteenth Amendment.

That is not enough under the Constitution when it puts an obstacle specifically in the way of vindicating racial rights, it creates a forbidden system of courts that inadequately protect minorities.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:10 p.m., the above-entitled matter was submitted.)

CERTIFICATION

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BY Deone Hammond