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Proponents of segregation obtained the adoption (without a dissenting vote) of a thirteen-act package of legislative measures at the Regular Session, calculated to maintain forced separation of the races in a variety of contexts. Seven of the new laws are aimed at the preservation of segregated public education. Four of the others are concerned with public parks and recreational facilities, waiting rooms for passengers in intrastate commerce, employer-furnished sanitation, eating and drinking facilities for employees, and dances, social functions, entertainments, and athletic events. Two of the measures propose to amend the Constitution. The first designates various park and recreational bodies, and educational officers and boards to be agencies of the state, withdraws any previously granted consent to suits against them and forbids future suits against such agencies without the consent of the Legislature. The other constitutional proposal relates to voting registration and would change the procedure to be followed by an applicant who is denied the right to register when he seeks judicial relief.

It is the purpose of this article to discuss the provisions and probable validity of each of these new measures, but before undertaking that task, it seems appropriate to review briefly some of the events of the recent past. Such a review will serve to show why the new measures were adopted, and may also provide a partial basis upon which to frame an estimate of the validity of these acts if and when they may be subjected to attack in the courts.

It will be recalled that the Legislature was in session on May 17, 1954, when the Supreme Court of the United States rendered its decision in the now famous case of *Brown v. Board of Education*,[1] declaring that enforced segregation of the races in public

*This article is restricted to a discussion of the acts of the Legislature designed or intended to become law. Hence there is no mention of House Concurrent Resolution No. 10, which purports to interpose the state's sovereignty against encroachment upon its police powers. This resolution takes cognizance of recent decisions of the federal courts in the fields of public education and public recreation, asserts that such decisions represent a federal encroachment upon the powers of the states not intended by the Federal Constitution and petitions Louisiana's sister states to join in steps to amend the Constitution to end such usurpation.

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1. 347 U.S. 483 (1954).

schools constitutes a denial of the equal protection of the laws demanded of the states by the fourteenth amendment to the Federal Constitution. In response to pressures exerted both from without and within, that steps be taken "to circumvent" the decision the Legislature of 1954 enacted a series of proposals, including Acts 555,[2] 556,[3] and 752.[4] The first of these measures established segregated elementary and secondary public schools in the exercise of the state's police power; the second authorized parish superintendents of schools to assign students to specific schools and established an administrative procedure for the review of assignments in cases of protest. The third act, subsequently adopted as an amendment to article XII, section 1, of the State Constitution, affirmed the segregated operation of the public schools at elementary and secondary levels, as an exercise of the state's police power.

Between the legislative sessions of 1954 and 1956, significant decisions were announced by federal courts at several levels. On May 31, 1955, the Supreme Court of the United States reaffirmed the principles of the *Brown* case and remanded the cases to federal trial courts with instructions to direct enforcement "with all deliberate speed."[5] On February 15, 1956, a three-judge federal court sitting at New Orleans declared the Louisiana legislation of 1954 to be invalid in a brief per curiam opinion consisting of two paragraphs, as follows:

> "This class action is brought in behalf of minor children of the Negro race by their parents, guardians or next friends, seeking the aid of the court in obtaining admission to the public schools of Orleans Parish on a nonsegregated basis. The complaint alleges the children have been denied admission to schools attended by white children under Article 12, § 1 of the Constitution of Louisiana and Louisiana Acts 555 and 556 of 1954 requiring segregation of the races in public elementary and high schools of the state.
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> "The Supreme Court of the United States in Brown v. Board of Education, 349 U.S. 294 . . ., in dealing with this identical situation with reference to the states of Kansas, South Carolina, Virginia and Delaware, wrote as follows:

2. LA. R.S. 17:331-334 (Supp. 1954).
3. *Id.* 17:81.1.
4. LA. CONST. art. XII, § 1.
5. Brown v. Board of Education, 349 U.S. 294, 301 (1955).

> 'These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle.' In so far as the provisions of the Louisiana Constitution and statutes in suit require or permit segregation of the races in public schools, they are invalid under the ruling of the Supreme Court in Brown."[6]

In other cases, also pertinent to our study here, the Supreme Court of the United States, on November 7, 1955, affirmed a decision from the Fourth Circuit holding that enforced segregation of the races in publicly operated beaches and bathhouses was not a proper exercise of the police power,[7] and reversed a decision from the Fifth Circuit sustaining the power of a city to maintain segregation at a municipally operated golf course.[8] It was against this background of judicial activity, and confronted with the invalidation of its 1954 program, that the Legislature in 1956 set about the task of attempting to erect new and more substantial barriers to protect traditional segregation. It is by the standards of these and other decisions of the courts that we may also make an appraisal of the probable validity of these legislative enactments in the event they come under judicial attack.

EDUCATION

As previously indicated, seven of the new measures relate directly to schools. One of these, Act 319,[9] provides for the classification of schools solely according to the race of the students, and would likely be held to be invalid on its face in light of the *Brown* decision, as interpreted and applied to Louisiana's 1954 legislation in the *Bush* case. Section 1 of the act reads as follows:

> "Those public schools in any city in Louisiana with a population in excess of Three Hundred Thousand (300,000) presently being utilized in the education of children of the white race through the twelfth grade of school shall from

6. Bush v. Orleans Parish School Board, 138 F. Supp. 336, 337 (E.D. La. 1956).
7. Mayor and City Council of Baltimore City v. Dawson, 350 U.S. 877 (1955).
8. Holmes v. Atlanta, 350 U.S. 879 (1955). See also Muir v. Louisville Park Theatrical Assn., 347 U.S. 971 (1954).
9. LA. R.S. 17:341-346 (Supp. 1956).

> the effective date of this statute be utilized solely and exclusively in the education of children of the white race, unless otherwise classified by the Legislature as provided in [sections 3 and 4 hereof]."

Section 2 makes a comparable classification of schools "presently being utilized in the education of children of the Negro race," and section 3 declares that new schools subsequently erected shall be classified "as white or Negro" by a special legislative committee, created by the provisions of section 4, consisting of two members from each House. No standards are prescribed by which the committee shall make the decision to classify new schools, but it is clearly stated that their duty is to classify the new school either white or Negro, with power reserved in the Legislature to change or ratify the action of the committee. Section 5 directs that white teachers shall teach white children, and Negro teachers shall teach Negro children, and section 6 provides that suits contesting the validity of this act may be brought only after consent to do so shall have been obtained from the Legislature. This latter provision raises an issue identical to that presented by Act 613,[10] forbidding suits against a large number of educational and recreational agencies, and will be discussed later in this article.

Since this statute directs that each school shall be used "solely and exclusively in the education of . . . children" of one race and thereby forbids the education of a child of the other race in that school, it is inescapable that it will operate to effect segregation — the very thing declared invalid by the *Brown* decision. The fact that the statute is drawn so as to be applicable only in the City of New Orleans (where the 1954 legislation was declared invalid) suggests that it is intended to avoid the effect of the *Bush* case.

A more debatable issue would be presented in the event of attack upon the provisions of Acts 248, 249, 250 and 252. These acts relate, respectively, to school bus drivers (Act 248),[11] permanent teachers employed by parish or city school boards outside Orleans Parish (Act 249),[12] permanent employees (other than teachers) of the Orleans Parish School Board (Act 250),[13]

10. See page 115 *infra*.
11. LA. R.S. 17:493 (Supp. 1956).
12. *Id.* 17:443.
13. *Id.* 17:523.

and permanent teachers employed in Orleans Parish (Act 252).[14] In each of the cases mentioned, statutes affecting tenure of employment were amended to provide for the dismissal of such employees if found guilty, after hearing, "of being a member of or contributing to any group, organization, movement or corporation that is prohibited by law or injunction from operating in the State of Louisiana, or of advocating or in any manner performing any act toward bringing about the integration of the races within the public school system or any public institution of higher learning of the State of Louisiana."

As will be indicated later, proponents of these acts have publicly announced that they will be used in conjunction with another statute enacted in the course of the session (that relating to certificates of eligibility and good moral character required for admission to public institutions of higher learning), which raises a further problem. It is the writer's purpose, at this point, to discuss the probable validity of these changes in the tenure acts as an independent matter, disregarding the existence of any other statute.

The first proscription of the amendments relating to membership in or contributions to any organization which is prohibited from operating in Louisiana was obviously intended to apply, inter alia, to supporters of the National Association for the Advancement of Colored People. The Louisiana chapter or affiliate of that organization had been enjoined from engaging in further activities in the state for noncompliance with R.S. 12:401 by a decree of a state district court prior to the time the Legislature convened. At the time this article was written an appeal from that decree was pending in the court of appeal, and for that reason it was considered inappropriate to comment on the merits of the case. If it is ultimately determined that the state may validly exclude the organization from operations within its jurisdiction, the substance of the tenure amendments' prohibitions would very likely be sustained also. Questions could conceivably arise concerning the administration of the provision, as, for example, whether membership was held or contributions made without knowledge of the organization's illegal character. The Supreme Court of the United States in a recent decision involving the Oklahoma teachers' loyalty oath concluded that it was a denial of due process of law for a state to terminate em-

14. *Id.* 17:462.

ployment upon the basis of membership in a proscribed organization without giving the teacher an opportunity to show that such membership was innocent.[15]

The second proscription of the tenure law amendments, which forbids the "advocating of or in any manner performing any act toward bringing about the integration of the races within the public" education system, poses several problems that may furnish the basis for constitutional attack. The initial problem is one of interpretation. No valid estimate of the amendments' constitutionality can be attempted until there is a determination of the type of conduct they forbid. The language used is broad and sweeping and not entirely unambiguous. It is susceptible of various interpretations and will unquestionably be construed to mean different things by different persons, since it relates to a controversial matter which is the subject of widely differing opinions. The amendments prohibit both the advocacy of integration as well as the performance of any act directed to that end. The key word, "integration," has no established meaning in law, and while popularly used with great frequency, has no settled meaning even in common usage when sought to be applied in this setting. Resort to *Webster's New International Dictionary, Second Edition*, discloses that "integration" is "the act or process of making whole or entire." Unquestionably, however, the term connotes more than this to the ordinary citizen or lawmaker in the South. In its most generalized sense, "integration" is a term used to describe the situation that obtains when the traditional southern institution of "segregation" is abandoned.

Viewed in this light it seems reasonable to assume that when the Legislature forbade school workers to advocate integration, it intended to forbid any form of conduct which would weaken or threaten the institution of segregation. Assuming this is the proper interpretation to be accorded the language of the amendments, it would follow that a school worker will be subject to dismissal for any act or expression by which he exhibits criticism of racial discrimination in public education. There seems to be little basis for doubt that the amendments, thus construed, would be declared invalid, on either of three bases.

In the first place it might well be argued that they are invalid under the principle of the *Brown* case itself. The second *Brown*

15. Wieman v. Updegraff, 344 U.S. 183 (1952).

decision declared it to be a "fundamental principle that racial discrimination in public education is unconstitutional . . . [and that] all provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."[16] It could be urged with real force that the tenure law amendments were state laws intended to perpetuate the principle of racial discrimination in public education, and hence were laws "permitting such discrimination," within the ban of the equal protection clause as applied in *Brown.*

In the second place, and assuming that the law as construed is not invalid under the rule of the *Brown* case, a school worker, dismissed for words or actions found to be calculated to weaken or destroy segregation, might reasonably contend that he had been deprived of his liberty without due process of law. It has long been established that the freedom of speech and expression, protected against congressional invasion by the first amendment to the Federal Constitution, are embraced within the "liberty" protected from state restraint by the fourteenth amendment.[17] Recognizing that the freedom to speak is not to be equated with license, the Supreme Court of the United States has long struggled with the problem of fixing permissible limits which may be imposed upon the individual's freedom of expression by legislative bodies (both state and federal). The traditional and classic test of "clear and present danger" formulated by Mr. Justice Holmes in 1919, has been the device most frequently invoked in the process, and is said to control decisions to the present day,[18] although some observers question the continued vitality of the rule.[19] Mr. Justice Holmes enunciated the test in the following language, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the Legislature] has a right to prevent."[20] If the Court were to consider the tenure law amendments in terms of the clear and present danger test, it is most probable

16. 349 U.S. 294, 298 (1955).

17. The principle was first established in Near v. Minnesota, 283 U.S. 697 (1931) and has been consistently and repeatedly followed to the present day.

18. See Dennis v. United States, 341 U.S. 494 (1951), where the Court affirmed the conviction of the so-called "Eleven Top Communists" and invoked the clear and present danger test in the course of its opinion.

19. Chafee, *Thirty Five Years with Freedom of Speech,* 1 KAN. L. REV. 1 (1952); Corwin, *Bowing Out "Clear and Present Danger",* 27 NOTRE DAME LAW. 325 (1952); Mendelson, *Clear and Present Danger — From Schenck to Dennis,* 52 COLUM. L. REV. 313 (1952).

20. Schenck v. United States, 249 U.S. 47, 52 (1919).

that they would be declared invalid. *Brown's* clear holding that "racial discrimination in public education is unconstitutional" makes it clear that such a policy is not one of the "substantive evils" which the Legislature may prevent within the principle of the clear and present danger test. Accordingly, it would follow that the state is likewise forbidden to suppress freedom of expression which is apt to precipitate the supposed "evil."

However, the defenders of the legislation might have reason to believe that the Court would view the issue in another light, for, as already indicated, the clear and present danger test, if not abandoned, is sometimes disregarded in cases of this nature, particularly where, as in this case, the legislation affects public employment as distinguished from general legislation affecting all citizens. Thus, for example, in *United Public Workers v. Mitchell*[21] involving the federal Hatch Act's restriction upon political activities of federal employees, and more recently in a number of cases involving loyalty oaths of teachers and other public employees, the Court has drifted more in the direction of appraising the "reasonableness" of the regulations rather than adhering strictly to the provisions of the clear and present danger doctrine. Concluding that the Legislature's judgment that governmental "efficiency may best be obtained by prohibiting active participation by classified employees in politics as party officers or workers"[22] was not unreasonable, the Court sustained the provisions of the Hatch Act over the objection that freedom of expression was unduly restricted. A similar trend of decision has been apparent in the cases involving enactments requiring that teachers and other public employees subscribe to loyalty oaths. The dangers of Communism or other ideologies were presumably regarded by the Court as sufficiently real to support the legislative judgment that suppression of individual freedom served the public interest in such cases.[23] Relying upon this line of cases, Louisiana's Attorney General might plausibly argue that recent demonstrations attending integration, actual or attempted, in Tennessee, Kentucky, and Texas demonstrate the need for suppressing the freedom of expression on the part of individuals connected with the public school system. These cases seemingly sup-

21. 330 U.S. 75 (1947).
22. United Public Workers v. Mitchell, 330 U.S. 75, 99 (1947).
23. Garner v. Board of Public Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951); Adler v. Board of Education, 342 U.S. 485 (1952).

port the thesis that, since there is no right to public employment, the Legislature may subject such employment to conditions it deems fit, including the deprivation of liberties which it might not transgress in the case of private citizens. However, such a thesis was recently rejected in a case involving Oklahoma's loyalty oath where the Court distinguished its previous decisions in the Hatch Act and loyalty oath cases, invalidated the Oklahoma statute as applied in that case, and concluded with the statement, "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory."[24] But the very basis of the Court's decision in *Brown* is the conclusion that segregated public education is discriminatory. Hence, it would follow that even if the defenders of the legislation were to persuade the Court to appraise these measures by the less exacting test of "reasonableness" in place of the more literal and exacting phraseology of clear and present danger, their case would ultimately fail because of the discriminatory character of the statute's ground for dismissal. Thus, the Court would conclude that since the avowed purpose of the tenure changes is to preserve segregated public educaton, discharge of a public employee for utterances in opposition to that policy would be patently discriminatory.

Up to this point the discussion has proceeded upon the assumption that the amendments' prohibition of advocacy of integration would be construed to embrace conduct or expression evincing disapproval of segregation. It was recognized, of course, that this is not the only permissible interpretation of the act in view of the sweeping breadth and ambiguity of the language used. To save the statute from invalidity its defenders might contend that the forbidden advocacy of integration which was intended was far more narrowly confined and that there was no intent to proscribe criticism of racial discrimination, per se. It could be correctly argued that the narrow holding of the *Brown* case is that no state may forbid a student from attending public schools solely upon the basis of race. The Court did not hold that all states must operate all of their schools on a mixed race basis. An all white school, confronted with no request for admission by a qualified Negro, may continue to operate as an

24. Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

all white school; and an all Negro school, confronted with no request from a qualified white student, may continue to operate as an all Negro school. In this sense of the term, a state is not compelled to "integrate" its public school system, and that being the case, defenders of the statute might contend that the state is therefore free to prohibit its school workers from advocating a policy which it is under no duty to institute. In other words, the state, while in no position to forbid a qualified student from admission to public school because of his race (and, indeed, being under a duty to admit him), might nevertheless forbid a school worker from advocating such action. Or, stated still differently, the amendments, as thus more narrowly construed, would serve to prevent school workers from advising, urging, or in any other way causing students to exercise their constitutionally protected rights.

This is admittedly a different case from the one supposed under the previous interpretation and might conceivably call for a different result. However, it is the writer's belief that the amendments, even thus more narrowly construed, would nevertheless be held invalid. It is still a case where the freedom of expression of public employees is subjected to censorship. They are, in effect, restrained from advising, urging, or advocating that citizens assert rights established by a public policy enunciated by the highest court of last resort as the law of the land. The Court has sustained serious restrictions upon freedom of expression in the Hatch Act and loyalty oath cases, but in all of those cases it was able to bring itself to conclude that what the Legislature had done was not "unreasonable." In this case it would have to make that same conclusion against a background of considerations with which it has already voiced disagreement.

Earlier in the discussion of the tenure law amendments mention was made of Act 15[25] which provides that "no person shall be registered at or admitted to any publicly financed institution of higher learning in this state" until he files a certificate attesting to his "eligibility and good moral character," signed by his high school principal and the superintendent of education for the parish or county in which he graduated from high school. Criminal penalties are provided to be imposed upon any official or employee of any institution of higher learning who admits any student in violation of the act. An interpretative contro-

25. LA. R.S. 17:2131-2135 (Supp. 1956).

versy arose soon after the adoption of the act when school officials sought to learn whether the certificate requirement applied only to new students seeking admission to institutions for the first time, or whether it was intended that all students, new or old, were required to submit certificates. The office of the Attorney General ruled that the statute applied only to students seeking admission for the first time. Members of the Segregation Committee of the Legislature disagreed with this interpretation, contending that it was the intent of the Legislature to require certificates to be on file for all students, old and new. Several of the district attorneys in the districts in which state institutions of higher learning are situated indicated their intent to proceed with the enforcement of the statute in accordance with the interpretation of the legislative committee,[26] and at the time this article was written it appeared that most, if not all, of the affected institutions, including Louisiana State University, would require certificates to be on file for all students at the start of the second semester of the 1956-1957 academic year.

Leaving aside the issue of interpretation, and considering the act as a completely independent measure, there would seem to be no basis upon which to question its validity. Attacks conceivably predicated upon due process or equal protection of law would hold little prospect of success, in view of the Court's inclination to sustain reasonable regulation of publicly financed education. Most institutions of higher learning, public and private, already impose varying requirements respecting character by requiring references, letters of recommendation and similar devices to serve as a check on the quality of the incoming student body. These requirements are of such general and long standing usage that a court would be extremely reluctant to deny legislative power to condition the acquisition of an education, largely subsidized by the expenditure of state funds, upon the furnishing of a certificate of eligibility and moral character.

Previous mention has been made of the fact that proponents of the segregation legislation have frequently made public statements of their intention to use the tenure law amendments in conjunction with the certificate act for the avowed purpose of bringing an end to the integration in state colleges and universities which has existed thus far pursuant to federal court orders.

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26. State-Times Newspaper (Baton Rouge), Oct. 12, 1956, p. 1, col. 7; October

These statements, which first appeared in the press soon after the adjournment of the regular session of the Legislature in July,[27] have reappeared with such frequency[28] that there is every reason to believe that they reflect the legislative intent with which these measures were adopted, and the purposes for which their enforcement will be sought. A typical press account reads as follows:

> "Teamed with a change in the teacher tenure act, permitting firing of teachers who advocate integration [the Committee Chairman] said the certificate could eliminate Negro students from white state colleges.
> "A school official signing a certificate for a Negro to attend a white college would be advocating integration, [the Committee Chairman] explained."[29]

The fact that this method of administering the two laws is achieving the sponsors' purpose is attested by the further fact, noted in the published statements, that while the state university and colleges did not require certificates of old students at the start of the fall semester, 1956, "no new Negroes registered at L.S.U. or any of the other three colleges. At L.S.U., Negro registration has fallen off from a high of 302 to 61, and Southeastern fell from a high of 49 to 16."[30] The statement indicated that figures were not available but that the trend was the same at McNeese and S.L.I.

These public statements of purpose and intent with which these measures were adopted and for which enforcement will presumably be sought confirm the assumption made earlier concerning the construction to be placed upon the ambiguous language of the tenure law amendments. They make it plain, for example, that these provisions will be utilized not merely to preserve racial discrimination in public education, but to return the situation to the status quo before segregation was disturbed by court orders directing the admission of qualified Negroes. The

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31, 1956, p. 1.

27. Morning Advocate Newspaper (Baton Rouge), July 17, 1956, p. 1.

28. State-Times Newspaper (Baton Rouge), Oct. 10, 1956, p. 1; Morning Advocate Newspaper (Baton Rouge), Oct. 11, 1956, p. 1; Morning Advocate Newspaper (Baton Rouge), Oct. 12, 1956, p. 1; State-Times Newspaper (Baton Rouge), Oct. 12, 1956, p. 1; State-Times Newspaper (Baton Rouge), Oct. 15, 1956, p. 10C; State-Times Newspaper (Baton Rouge), Oct. 16, 1956, p. 8D.

29. Morning Advocate Newspaper (Baton Rouge), Oct. 11, 1956, p. 1, col. 4.

30. Morning Advocate Newspaper (Baton Rouge), Oct. 11, 1956, p. 1. col. 4.

tenure law amendments, thus construed and applied, would be held invalid under the due process clause for the reasons discussed earlier. Furthermore, in the judgment of the writer, the tandem enforcement of these two separate measures in the manner described would likewise lead to the invalidation of the certificate measure as thus enforced. It is a well-settled principle of constitutional law that a measure, valid on its face and judged independently in the light of its purpose, may nevertheless be invalid because of the means employed in its administration.[31] Hence it would follow that the certificate act, reflecting a reasonable legislative purpose and valid on its face, if administered in a manner to deprive a citizen of equal protection of the law, would be declared invalid as thus applied.

There is an additional question posed by the tenure law amendments and the certificate act which bears mention here although it is beyond the scope of this article and inappropriate for discussion. To the extent that Negroes have heretofore been admitted to the State University and colleges these admissions have been pursuant to orders of federal courts in cases which were class actions, prosecuted not only in the name of a specific individual, but for the benefit of all others similarly situated. To the extent that these new laws are utilized to prevent Negroes from attending the affected institutions, these acts will conceivably raise a serious question respecting the matter of compliance with these court decrees.

The final measure in the field of education was the amendment to the compulsory school attendance law enacted by Act 28.[32] This law, which makes it a penal offense for a parent or guardian to fail to send his child to school, was amended to make it inoperative in any school district, public or private, where integration of the races has been ordered by any judicial decree or other authority. Although it seems unlikely to arise, it is conceivable that the amendment could be attacked on the point of equal protection. The situation would arise, for example, in the case of a parent who failed to send his child to a school in a district where the students were all of one race. If prosecuted for his failure to do so, he might well contend that the exemption

31. Myles Salt Co. v. Iberia and St. M. Drainage District, 239 U.S. 478 (1916); United States v. Reynolds, 235 U.S. 133 (1914); St. John v. New York, 201 U.S. 633 (1906).

32. LA. R.S. 17:221 (Supp. 1956).

of parents in integrated school districts was discriminatory and worked a denial of equal protection of the law as to him. This would pose a problem of classification which the Court customarily disposes of in traditional terms of reasonableness. Unless the classification is shown to be arbitrary, whimsical, or capricious it is sustained. In this case, the classification is effected by racial considerations, a basis which the Court has found to be unreasonably discriminatory in other areas, and hence might reasonably be expected to find here also.

REGISTRATION FOR VOTING

An applicant for voter registration who is declared to be ineligible for that right is, under the present law, entitled to file proceedings in court seeking to reverse the decision of the registrar. Act 616 proposes to amend article VIII, section 5, of the Louisiana Constitution to interpose a series of administrative appeals which must be exhausted before the applicant may seek redress in court. Under the terms of this proposal the rejected applicant, if aggrieved, has five days within which to file his appeal with the parish board of supervisors of elections which has thirty days within which to decide the issue. Following the board's decision the applicant, if still aggrieved, or the registrar, if his decision has been reversed, may file an appeal with the police jury within five days. The police jury is given sixty days within which to decide the appeal, and its decision, when given, may be made the basis for court action. Since registration applications are normally filed in large numbers during the period immediately preceding elections, it is clear that the exhaustion of the administrative remedies thus provided will, in most cases, carry beyond the date of the election for which registration was sought, thereby effectively denying the applicant the right to vote. The possibility that this device might be "used as a political weapon to discourage registration of factional opponents or other groups" has been mentioned by the Public Affairs Research Council of Louisiana in its publication, *Voter's Guide*. These are considerations of policy which do not involve the validity of the proposal. Unless the proposal, once adopted, is used in a discriminatory manner, the fact that it may inconvenience, or even disfranchise, persons otherwise entitled to vote under the provisions of our statutes controlling eligibility, the provision would likely be sustained.

Reports in the public press on October 11 and 19, 1956, also indicate that a "systematic challenge" is being utilized to "purge the registration rolls" of the names of Negroes previously registered. Negroes thus removed from the registration rolls will be required to utilize the new procedures if the amendment is adopted. Segregation leaders have stoutly maintained, however, that they do not propose to discriminate against Negroes in their campaign, but will treat ineligible white voters on the same basis. If this pledge is maintained, there is little reason to believe that the new proposal would be invalid.[33]

SUITS AGAINST THE STATE

Act 613 proposes an amendment to article XIX of the Constitution by the addition of a new section declaring that various recreation commissions and education boards "shall be considered special agencies of the State of Louisiana" which may not be sued without the consent of the state manifested by legislative approval. All prior consent to suits is withdrawn and statutes in conflict with this provision are superseded. An outright exception is made in the case of litigation growing out of contracts entered into by these agencies. Presumably the legislative purpose was to prevent litigation seeking to enjoin such bodies from pursuing policies of racial discrimination in the administration of recreational and educational facilities. If this is a correct appraisal of legislative intent, it is the writer's opinion that the measure will fail to achieve its objective.

When the three judge federal court invalidated the 1954 legislation in *Bush v. Orleans Parish School Board*,[34] it was confronted with the defense that the proceeding was in reality a suit against the state, brought without its consent, and hence forbidden by the terms of the eleventh amendment. The defendants in that case were the Board as well as various named agents and employees. Judge Wright rejected the defense on three grounds: first, because "a suit against officers or agents of a state acting illegally is not a suit against the state,"[35] second, because the

33. See, however, Lane v. Wilson, 307 U.S. 268 (1939), declaring that the fifteenth amendment "nullifies sophisticated as well as simple minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Id.* at 275.

34. 138 F. Supp. 336, 337 (E.D. La. 1956).

35. *Id.* at 340.

Brown case itself was a case against a school board and Judge Wright had the feeling that if this was an improper exercise of jurisdiction, "some court along the line, including the Supreme Court, in at least one of the cases would have noticed it, as courts are required to do although the issue is not raised,"[36] and third, because "the state statute creating the defendant Board here gives it the right to sue and be sued. La. R.S. 17:51."[37]

Since the third ground assigned by Judge Wright clearly disposed of the issue, and flatly controverted the assertion that the suit (even if it were a suit against the state) was brought without the consent of the state, it may be said that his other observations were dicta. The effect of Act 613, if adopted by the voters, will be to withdraw the consent conferred by La. R.S. 17:51, thereby taking away the third ground of Judge Wright's decision, and thus making it necessary to consider the validity of his other two grounds. Pretermitting discussion of the failure to mention the issue in the other recent cases, (or perhaps explaining it), it is quite clear that the court was correct in its statement of the first ground.

For almost fifty years it has been settled that the eleventh amendment is no bar to federal courts' exercise of jurisdiction to enjoin state officers from proceeding with the enforcement of state laws which infringe on federal constitutional rights. In the landmark case of Ex parte *Young*[38] the court sustained the right of a federal district court to enjoin a state attorney general from proceeding to administer and enforce a state statute which was alleged to violate the due process clause of the fourteenth amendment. The principle has been reaffirmed and applied as recently as 1952 when the Supreme Court held that a federal court sitting in the State of Georgia had jurisdiction to enjoin a state officer from enforcing a tax statute which was alleged to impair the obligation of contract contrary to the provisions of article I, section 10, of the Federal Constitution.[39] In such cases the court reasons that "If the act which the [officer] seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his

36. *Ibid.*
37. *Ibid.*
38. 209 U.S. 123 (1908).
39. Georgia Railroad & Banking Co. v. Redwine, 342 U.S. 299 (1952).

official or representative character and is subjected in his person to the consequences of his individual conduct. *The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.*"[40] (Emphasis added.) But, one may ask, if the state officer is engaged in "individual conduct" in such cases, may that conduct nevertheless be treated as "state action" so as to bring it within the prohibition of the equal protection clause of the fourteenth amendment? An affirmative answer to that question was supplied by a Louisianian in the person of Chief Justice White in the case of *Home Telephone and Telegraph Co. v. Los Angeles*,[41] a case in which the company charged that a city ordinance had fixed rates so low as to be confiscatory, a taking of property without due process of law. City officials, defending their ordinance, contended that it was not to be construed as state action. Rejecting "the law of principal and agent governing contracts between individuals" as the test of whether an "act done by an officer of a State is within the reach of the Amendment," Chief Justice White stated that "the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of the power."[42] It follows from these clear statements of principles that the proposed constitutional amendment, if adopted, will provide no barrier to a litigant seeking to invoke the jurisdiction of federal courts for the enjoyment of his federally protected rights. The amendment may, perhaps, prohibit the filing of cases in state courts, but this is of no moment to the Negro victim of segregation who has looked exclusively to the federal courts for redress in these matters.

PUBLIC PARKS AND RECREATIONAL FACILITIES

Denominated an exercise of the state's police power, Act 14[43] declares that "all public parks, recreation centers, play grounds, community centers and other such facilities at which swimming,

40. *Ex parte* Young, 209 U.S. 123, 159 (1908).
41. 227 U.S. 278 (1913).
42. *Id.* at 287.
43. LA. R.S. 33:4558.1 (Supp. 1956).

dancing, golfing, skating or other recreational activities are conducted shall be operated separately for members of the white and colored races." Reference was made earlier to the decisions of the Supreme Court of the United States of November 7, 1955, holding that segregation at public beaches in Baltimore and on golf courses in Atlanta was unconstitutional.[44] There appears to be no basis to expect that the court will accord different treatment to the issue in other areas of recreation. Nor is it likely that the court will give any effect to the legislative assertion that this separation of facilities is "made in the exercise of the State's police power and for the purpose of protecting the public health, morals and the peace and good order in the state and not because of race." A similar pronouncement in the 1954 legislation relating to education was disregarded by the district court in the *Bush* case.[45] In the opinion of the writer, this act, if attacked, will be declared invalid on its face.

SEGREGATION REQUIREMENTS IMPOSED ON PRIVATE PERSONS AND AGENCIES

In each of the cases heretofore considered, we have been concerned with public segregation, i.e., where the state, its political subdivisions, or institutions have been parties to the practices forbidden or required by the legislative enactments. Each of the three acts which remain to be considered imposes requirements or standards of conduct upon private persons, compelling them to provide various types of segregated facilities or services. The fourteenth amendment imposes no restraints upon individual acts of discrimination by private citizens. The amendment's injunctions against deprivation of life, liberty or property without due process, or the denial of equal protection of the laws, are prefaced with the qualifying words, "No state shall." The distinction was emphasized as early as 1883 in the *Civil Rights Cases* where it was said, "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."[46]

Granted, then, that individuals are free to practice racial discrimination in their personal, business, and social affairs,

44. Mayor & City Council of Baltimore City v. Dawson, 350 U.S. 877 (1955); Holmes v. Atlanta, 350 U.S. 879 (1955). See also Muir v. Louisville Park Theatrical Assn., 347 U.S. 971 (1954).

45. Bush v. Orleans Parish School Board, 138 F. Supp. 336 (E.D. La. 1956).

46. Civil Rights Cases, 109 U.S. 3, 11 (1883).

does it follow that a state may compel them to do so? As a pure abstraction it would seem that if the Federal Constitution forbids a state itself to engage in acts of racial discrimination, the same document would likewise forbid it to compel its citizens to do so. The few cases precisely in point seem to support this thesis. Thus, for example, a city ordinance of Louisville, Kentucky, forbidding the sale of property in predominantly Negro districts to white persons, and vice versa, was declared invalid as a deprivation of property without due process of law when sought to be invoked to prevent a white vendor from selling property in a white district to a Negro purchaser.[47] And more recently, in the restrictive covenant cases, the court has held that such agreements, valid in and of themselves, nevertheless fall under the ban of the equal protection clause when the state undertakes to enforce the discriminatory provisions they embody.[48] The case of *Berea College v. Kentucky*,[49] involving a prosecution of the college for violation of a Kentucky statute forbidding the teaching of white and Negro students in the same school did not pass upon this issue, and was resolved in terms of the state's reserved power to amend the articles of its corporations.

The cases which seemingly refute the thesis that a state may not compel its citizens to practice segregation are, for the most part, cases in which the Negro victim of the practice has sought to challenge the law which has been willingly complied with by the individual coerced by the statute to engage in the practice. In a long line of cases, beginning with the famous decision in *Plessy v. Ferguson*,[50] the Court rejected the argument that a state denied equal protection of the laws when it compelled "equal but separate accommodations for the white and colored races" to be provided in intrastate transportation. (The commerce clause has long been construed to forbid a state from imposing racial restrictions upon interstate travel.)[51] The *Plessy* doctrine was expressly rejected by the Court in *Brown* with the statement that "we conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate

47. Buchanan v. Warley, 245 U.S. 60 (1917).
48. Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 344 U.S. 24 (1948). See also Barrows v. Jackson, 346 U.S. 249 (1953).
49. 211 U.S. 45 (1908).
50. 163 U.S. 537 (1896).
51. Morgan v. Virginia, 328 U.S. 373 (1946); Hall v. DeCuir, 95 U.S. 485 (1877).

educational facilities are inherently unequal." It has since been rejected by the Court in the area of public recreation. It remains to be decided whether the doctrine has any continuing vitality in the field of intrastate transportation or elsewhere. It is in this context that we must appraise the three remaining statutes of the 1956 session.

Act 27[52] puts the issue squarely, requiring all common carriers of passengers to provide separate waiting room facilities, one to be marked "White Waiting, Intrastate Passengers," and the other, "Waiting, Interstate Passengers and Colored Intrastate Passengers." For the reasons stated above, there is real doubt whether the state could validly enforce this provision against a carrier who was unwilling to assume the added expense and inconvenience that this provision would entail. This is essentially an academic problem, however, as the carriers do in fact comply with the provisions. Whether a Negro passenger might successfully invoke the equal protection clause to have the act declared invalid is still an open question with the Court. An inconclusive indication of the Court's thinking on the issue was manifested last term when it dismissed an appeal in *South Carolina Electric and Gas Co. v. Flemming*.[53] In that case, a Negro passenger who had been required to change her seat on a bus in compliance with company rules imposed as a result of a South Carolina statute sued the bus company for damages. The federal district court dismissed the complaint on the ground that the state law was valid under the rule of the *Plessy* case.[54] The United States Court of Appeals for the Fourth Circuit reversed the case with the observation that "we do not think that the separate but equal doctrine of *Plessy v. Ferguson*, supra, can any longer be regarded as a correct statement of the law. . . . That the principle applied in the school cases should be applied in cases involving transportation, appears quite clearly from the recent case of *Henderson v. United States*, 339 U.S. 816, 70 S.Ct. 843, 94 L. Ed. 1302, where segregation in dining cars was held violative of a section of the interstate commerce act providing against discrimination."[55] The Supreme Court's dismissal of the bus company's appeal is not a decision on the merits because in its cryptic per curiam decision the Court cited *Slaker v. O'Con-*

52. LA. R.S. 45:1301-1307 (Supp. 1956).
53. 76 S.Ct. 692 (1956).
54. 128 F. Supp. 469 (E.D.S.C. 1955).
55. 224 F.2d 752 (4th Cir. 1955).

nor,[56] a case holding that a decree reversing the dismissal of an action for lack of jurisdiction (as was the situation here) is not a final order upon which an appeal to the Supreme Court may be predicated. While it is therefore clear that the Supreme Court did not pass upon the merits of the case, the writer shares the view of the Fourth Circuit that recent pronouncements of the Court make it reasonable to predict that if and when this issue is squarely tendered for decision, the remaining remnants of the *Plessy* rule will be swept away, and with them, Louisiana's Act 27 of 1956.

Act 395[57] requires all employers of white and Negro employees to provide separate and clearly marked facilities for sanitation, eating, and drinking. Act 579,[58] popularly known as the "athletic events bill," actually applies to all persons who sponsor not only this type of event, but "any dancing, social functions, entertainment, athletic training, games, sports and other such activities involving personal and social contacts," and forbids mixed participation in these affairs. The general tenor of the act makes it appear that it was intended to apply only to those persons who sponsor these events as a commercial venture, as it proceeds to require separate sanitary and other facilities, and to compel separate seating arrangements. The broad language of the first section, however, declares that its prohibitions extend to "all persons . . . sponsoring, arranging, participating in, or permitting on premises under their control," which could conceivably be extended to apply to the personal affairs of private citizens. Religious gatherings, services and functions are excepted. Both of these measures carry criminal penalties which are identical — fines ranging from $100.00 to $1,000.00 and imprisonment from sixty days to one year.

The validity of these measures may be appraised in the same two-phase aspect as the waiting room provision discussed above. There is every reason to believe that as sought to be applied to the specific persons to whom they refer — the employer and the sponsor of the various events named in Act 579 — the measures would be held to constitute a deprivation of property without due process of law. Whether a Negro victim of discrimination applied by a person who willingly complies with these

56. 278 U.S. 188 (1929).
57. LA. R.S. 23:971-975 (Supp. 1956).
58. LA. R.S. 4:451-455 (Supp. 1956).

statutes would have a remedy depends ultimately upon the extent to which, if at all, the *Plessy* rule persists. In this connection, it is to be noted that neither of these two statutes require that the separate facilities to be furnished for Negroes be equal to that furnished for whites. The separate waiting room act retained that feature.

EPILOGUE

After this article had been written and while the manuscript was in the hands of the printer, the United States Supreme Court on November 13, 1956, announced its *per curiam* opinion affirming the judgment of a three judge federal court in Alabama which had declared the municipal ordinance of the City of Montgomery requiring segregation of white and colored races on motor buses to be unconstitutional as a deprivation of due process of law and a denial of equal protection of the law demanded by the fourteenth amendment.[59] The brief opinion reads in its entirety as follows: "The motion to affirm is granted and the judgment is affirmed. *Brown v. Board of Education,* 347 U.S. 483; *Mayor and City Council of Baltimore v. Dawson,* 350 U.S. 877; *Holmes v. Atlanta,* 350 U.S. 879." While the opinion makes no reference to the *Plessy* decision, it is quite clear that it is now definitely overruled since the *Montgomery* case presented a similar fact situation (segregated intrastate transporation) to that before the Court in *Plessy.*

It is likewise clear that as a result of this decision Act 27, requiring separate waiting room facilities for the races is invalid. While Acts 395 and 579, relating to employers and sponsors of social and athletic events relate to different activities, there seems little reason to expect that the Court would accord them different treatment when and if they are attacked.

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59. Browder v. Gayle, 142 F.Supp. 707 (1956) affirmed, sub nom. Gayle v. Browder (Docket No. 342) and Owen v. Browder (Docket No. 343) 17 United States Supreme Court Bulletin (Commerce Clearing House) 94 (November 13, 1956).