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The Spirit Versus the Letter

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THE SPIRIT VERSUS THE LETTER

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The social and educational impact of the decision of the Supreme Court of the United States in the public school segregation cases [1] has been reviewed in the literature.[2] The social and educational effects of the decision are of utmost importance and the efficacy of the Court's pronouncement will depend in large part upon the solution of these practical problems looming so large in the minds of all of us. Nevertheless, this author feels that lawyers are interested also in certain features of the decision that are peculiarly pertinent in the practice of law, apart from the subject matter of the decision.

Effect of Intent, If Discernable

The Court asked counsel to compile evidence, if any exists, that the Congress which submitted and the states which ratified the Fourteenth Amendment contemplated that it would or would not abolish segregation in the public schools. In this request was embodied the implication that the Court would be influenced by the intent, if it could be ascertained.

Attorneys arguing in favor of segregation concluded that the objective of the Amendment was to guarantee certain basic rights to the Negro, but that, in the words of the attorney general for the State of Kansas, "the right to mingle with other races in the public schools" was not included in this concept of basic rights. Furthermore, it was argued it could not be said that the states ratifying the Amendment understood that it would abolish segregation in the public schools, since the majority of these states authorized segregation at the time the Amendment was ratified. Attorneys arguing against segregation concluded that the Thirty-ninth Congress which proposed the Fourteenth Amendment and the states that ratified it intended the Amendment to make no distinctions between the races. Both sides relied upon the record of debates among members of Congress, skimming over the fact that records of discussions within the states are meager, if not entirely lacking.

The question was faced squarely in the briefs filed by the United States Department of Justice. When the Thirty-ninth Congress had the Amendment under consideration, those for it and those against it understood that the Amendment would have broad

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[1] Brown v. Board of Education, Briggs v. Elliott, Davis v. County School Board, Gebhart v. Belton, 74 S. Ct. 686; Bolling v. Sharpe, 74 S. Ct. 693; Docket Nos. 1, 2, 3, 4, and 5, October 1954 Term.

[2] E.g., "Next Steps in Racial Desegregation in Education," *Journal of Negro Education* Yearbook Number, Summer 1954. Vol. XXIII, No. 3. 399 p.; *Journal of Public Law*, Vol. 3, No. 1. Emory University Law School, Emory University, Georgia, Spring 1954.

implications; but, both sides mentioned only a few examples, not including the public schools. Records to indicate the understanding of the states are incomplete; where such records exist, there are almost no references to the public schools, and the Department of Justice concluded that possibly the state legislators "were unaware that the Amendment had a bearing on education even to the extent of requiring equal though separate schools."

Soon after the adoption of the Fourteenth Amendment, Congress debated proposed legislation on civil rights. Some of those who opposed the bill mentioned that, if enacted, it would have an effect on the right of Negroes to attend the public schools; those who proposed the bill did not deny that it would have such an effect. Many of the congressmen who debated the civil rights bill had helped frame the Fourteenth Amendment. A little indirect light is reflected on the meaning of the Amendment itself in the debate on this legislative proposal in that some congressmen opposed passage of the bill because they believed it did not grant the Negro any rights he did not already possess under the Amendment.

The important aspect of the inquiry into the meaning of the Fourteenth Amendment is that the evidence was inconclusive. Presumably the Court could answer its own question in the affirmative or in the negative, depending upon its interpretation of the weight of the evidence. The Court had to decide whether or not an application of the Amendment could be adopted because it was warranted by the apparent policy of the Amendment, although such an application was not also affirmatively supported by the legislative history showing that its framers and ratifiers so intended.

It is a maxim in statutory construction that the legislative intent must be followed. It is questionable whether the same principle should be applicable to the construction of a constitutional provision; even so, courts need give little attention to debates in the legislative halls when the evidence is inconclusive. Furthermore, debate on a constitutional amendment is of less materiality than debate on an ordinary legislative bill because the amendment must be ratified in the states before it becomes effective. Who can say that the ratifiers had in mind the same meaning as the congressmen who proposed an amendment? In *Maxwell v. Dow* [3] the Court said,

> . . . the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used and not by the speeches made regarding it. What individual senators or representatives may have urged in debate . . . does not furnish a firm ground for its proper construction.

In addition, ample precedent exists for construing constitu-

[3] 176 U. S. 581, 601-602 (1900).

tional provisions in the light of present-day situations rather than according to situations existent at the time the provision was adopted. "A principle to be vital, must be capable of wider application than the mischief which gave it birth."[4] Ever since Mr. Chief Justice Marshall spoke his much-quoted warning that "we must never forget that is a *constitution we are expounding*,"[5] the Court has often demonstrated its awareness of changing times.

In *Home Building and Loan Association v. Blaisdell*,[6] Mr. Chief Justice Hughes said,

> If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.

The Court has intimated that it is especially necessary for a court to take cognizance of changing concepts of constitutional provisions when basic rights are at issue. In *Wolf v. Colorado*,[7] Mr. Justice Frankfurter said,

> Basic rights do not become petrified as of any one time, even though as a matter of human experience, some may not theoretically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is determined reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalog of what may at a given time be determined the limitation or the essential of fundamental rights.

Thus, we have in the public-school segregation decision a demonstration in statutory construction applied to a constitutional amendment involving fundamental rights of our people. The Court apparently took the view that the intention of the framers and the ratifiers of the Fourteenth Amendment was immaterial, especially because it was not conclusively proved; but, regardless of proof, because the Amendment must be interpreted today in the light of today's conditions.

Federal Power over State's Rights

The Tenth Amendment to the Constitution reserves to the states all powers not delegated to the federal government. That public education is not a delegated power has been so well accepted that documentation should be needless. In 1899 it was claimed that the public-school system was unconstitutional under the Four-

[4] Weems v. United States, 217 U. S. 349, 373 (1910).
[5] McCulloch v. Maryland, 4 Wheat. 316, 407 (1819).
[6] 290 U. S. 398, 442-43 (1934).
[7] 338 U. S. 25, 26 (1949).

teenth Amendment; however, Mr. Justice Harland made the following statement in *Cumming v. County Board of Education,*[8]

> The education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of federal authority with the management of such schools cannot be justified *except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.* (Italics supplied)

Thirty-eight years later, a more categorical statement was made by Mr. Chief Justice Taft speaking for the Court in *Gong Lum v. Rice,*[9] "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear." Since then, however, the Court has established new precedent for vindicating rights secured by the Fourteenth Amendment in public-school situations, even before the turning point in segregation cases at the graduate-school level. In *West Virginia State Board of Education v. Barnette,*[10] the statement was made that

> the very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

If the Tenth Amendment were to be interpreted as leaving each state entirely free to choose the type of school system it desires, no federal court could substitute its judgment for the choice made by a state. However, though public education is a power reserved to the states, the judicial power of the Court extends to matters within the scope of the Fourteenth Amendment.

Concurrent Jurisdiction of Congress and the Courts

The fact that an issue touches upon political matters does not render the Court incompetent to decide questions of constitutional rights. Judicial power has been said to be lacking in some cases where the matter was purely political.[11] These cases, of course, differ from those which are primarily constitutional questions, though they may have political undertones.

Review of the election returns and qualifications of the members of Congress is outside the jurisdiction of the courts because it is a matter specifically delegated to the Congress itself,[12] and by implication denied the judiciary. That the implementation of the

[8] 175 U. S. 528, 545 (1899).
[9] 275 U. S. 78, 85 (1927).
[10] 319 U. S. 624, 638, 639-40 (1943).
[11] The Protector, 12 Wall. 700 (1872).
[12] U. S. Const. Art. I, sec. 5.

Fourteenth Amendment does not fall into the same category is evidenced by many cases preceding the current segregation decision. They are too numerous to cite. Nevertheless, the possibility was suggested that implementation of the Fourteenth Amendment is a political issue delegated by the Constitution to Congress in Section 5 of the Amendment.

Many of us forget that the Amendment contains more than the statement of basic rights which is in Section 1. Section 5 reads, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The question then was whether congressional action was prerequisite to application of the Amendment to segregated schools or whether the Court could make the application in the absence of congressional action.

If the right of Negroes to attend the public schools with white children was clearly within the meaning of the Amendment, the judicial power to so declare was acknowledged; but, those who opposed this interpretation of the Amendment argued that Congress had exclusive jurisdiction to extend the federal control into "undefined areas on the periphery of equal protection." The Court —any court—has no power to legislate, particularly beyond the limits of the Constitution. So, the scope of judicial power depended in part on the meaning to be given the Amendment itself.

Congress has acted to prohibit certain types of segregation and thus has exercised its authority under Section 5 of the Amendment. It has the power to do likewise with regard to the public schools if it chooses, the Tenth Amendment notwithstanding.

The attorney general for the State of Kansas urged the Court to assume the same attitude toward the schools as it had with regard to the commerce clause of the Constitution. Section 8 of Article I enumerates the powers of Congress. Subsection 3 empowers Congress "to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes." In *Cooley v. Board of Wardens of Philadelphia,*[13] the Court pointed out in 1851 that the grant of a power to Congress cannot be divorced from the subject matter of the grant; and in holding that the states had the right to legislate with regard to pilots the Court said that its decision

> . . . does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the states in the absence of all congressional legislation; nor [does the opinion refer] to the general question, how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the states upon the same subject.

In the absence of federal action (by Congress) the states may enact laws regulating interstate commerce as to matters of local

[13] 12 How. 299, 320 (1851).

concern. This principle has developed under the commerce clause; it does not necessarily thereby apply to other subjects, as indicated in the *Cooley* case. The Court refused to make a similar application to the public schools.

Because of the inclusion of Section 5, which empowers Congress to implement the rights guaranteed by Section 1, there is no reason why judicial power should be denied in an area within which Congress has not acted. Concurrent power exists. The Court has construed the Amendment many times in circumstances on which Congress had not legislated.[14] These many decisions, including the recent graduate-school segregation cases, would have to be overruled if that theory were not to prevail.

Individuals injured by violation of the Fourteenth Amendment have never been denied access to the courts merely because Congress has not acted to provide general remedial legislation.[15] When Congress exercises its power to enforce the Amendment, "the majestic generalities of the Fourteenth Amendment are thus reduced to a concurrent statutory command."[16] So weighty are the precedents that to hold today that Congress has exclusive jurisdiction would be a complete reversal of scores of decisions and would nullify the effectiveness of our Bill of Rights.

EQUITY POWER OF THE COURT

The Court has jurisdiction in equity as well as in law. The Court has the power to use its discretion in shaping equitable decrees and in controlling their execution so as to protect public interest.[17] By act of Congress, the Court has power to enter "such appropriate judgment, decree or order or require such further proceedings to be had as may be just under the circumstances."[18] When a legal right has been violated and will continue to be violated, the individual is entitled to relief which will be effective to redress the wrong. However, the Court must take into account not only the rights of the parties but the public interest as well.

A court of equity is not restricted to particular forms of relief. It has full power to direct whatever remedy it considers will

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[14] Even in this particular subject matter: Sweatt v. Painter, 399 U. S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U. S. 637 (1950); Sipuel v. Board of Regents, 332 U. S. 631 (1947); Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (1938). In other fields: Smith v. Allwright, 321 U. S. 649 (1944), with respect to voting; Henderson v. United States, 339 U. S. 815 (1950), with respect to travel; Shelley v. Kraemer, 334 U. S. 1 (1948), with respect to land ownership; District of Columbia v. John R. Thompson Co., 346 U. S. 100 (1953), with respect to restaurants; Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768 (1952), with respect to employment; Avery v. Georgia, 345 U. S. 559 (1953), with respect to jury service.

[15] Virginia v. Rives, 100 U. S. 313 (1880). *But see Ex parte* Virginia, 100 U. S. 339 (1880), never followed in subsequent cases, of which there have been many, including those cited *supra* note 14.

[16] Fay v. New York, 332 U. S. 261, 282-83 (1947).

[17] Securities and Exchange Commission v. U. S. Realty and Improvement Co., 310 U. S. 434 (1940); U. S. v. Morgan, 307 U. S. 183 (1939); Virginia Ry. Co. v. System Federation No. 40, 300 U. S. 515 (1937).

[18] 28 U. S. C. 2106.

best serve the ends of justice in the particular circumstances. Therefore, conventional remedies are often adapted to meet the needs of unusual situations. In connection with the citation of instances where decrees have been adjusted to meet particular circumstances, the Court's opinion in *Addison v. Holly Hill Fruit Products* [19] included the following colorful statement,

> The creative analogies of the law were drawn upon by which great equity changes, exercising imaginative resourcefulness, have always escaped the imprisonment of reason and fairness within mechanical concepts of the common law.

In granting relief to civil cases against a practice or conditions found to be unlawful, courts have frequently suspended the operation of their decrees on grounds of inconvenience to the public or undue hardship to the wrongdoer and have allowed sufficient time for removing the illegality.[20] The Court on May 17 followed these precedents. It declared the principle of law but postponed direction of the remedy to allow the parties concerned and other collaterally interested to study and plan procedures to correct the unlawful practices and conditions. The postponement of the decrees was not only within the judicial power but was in the interest of the public.

On December 6 the Court will hear proposals of the several states with regard to their plans for eliminating the unconstitutional segregation of races in the public schools. The interval between pronouncement of illegality and the final disposition of the issues by the Court raises many other questions of constitutional law and judicial practice.

INTERIM UNCERTAINTIES

Questions that lawyers, educators, and laymen are asking during these months between May 17 and the issuance of the final decrees pertain to the breadth of the decision. Does the decision apply only to the individuals who instituted the five cases included in the opinions of May 17? How does the pronouncement of unconstitutionality affect similar practices in other jurisdictions? Have provisions in state constitutions and state laws permittng or requiring segregated schools been *ipso facto* nullified? Should states that have practiced segregation but that were not parties in the five cases participated in the hearings scheduled for December 6? If they do, does their participation alter their status after the final decrees are entered?

Briefs Amicus Curiae

When the Court asked the parties in the segregation cases to return months later to discuss plans for implementing the de-

[19] 322 U. S. 607, 620-22 (1944).

[20] United States v. American Tobacco Co., 221 U. S. 106 (1911); Georgia v. Tennessee Copper Co., 206 U. S. 230 (1907); Northern Securities Co. v. U. S., 193 U. S. 197, 360 (1904).

cision of May 17, it also invited other states with segregated schools though they were not parties to these cases. Of the 17 states primarily concerned with the decision, directly or indirectly, some have accepted and some have declined to participate in the December hearings. Those which have declined are convinced that to accept would make them subject to the instructions ensuing thereafter from the Court. Those which have accepted the opportunity to place before the Court the problems they will face in complying with the principle of integrated schools have accepted for one or both of two reasons: They wish to abide by the law as interpreted by the Court on May 17 or they have been assured that to participate in the hearings does not make them subject to the Court since they were not parties to the original suits.

Since learned counsel in the several states have taken opposite views on the effect of filing a brief or appearing for oral argument when not a party to the suit, it is in order to examine into the facts and the motives that may be behind each point of view. Participation in a case by one not a party is permissible with the consent of the court and the parties to the action. Such participation at the invitation of a court sets the stage even more precisely than when the participation is at the request of a nonlitigant. These participants are invited to give information to the Court, information which will assist the Court in making its decision. The participation is as a friend of the court.

Briefs *amicus curiae* are quite common. The only unusual feature in this instance is that the Court extended the invitation; whereas, ordinarily the friend of the court takes the initiative. The legal effect is the same. Unlimited experience has proved that the decision in a case in which friends of the court have filed briefs or assisted in oral argument has not subjected them to the jurisdiction of the court. Therefore, it appears that the expressed fear of making themselves subject to subsequent instructions by the Court hides deeper fear of showing the Court plans for circumventing the decision.

Those who have agreed to participate in the December hearings have indicated their willingness to abide by the decision even though they are not parties to these cases. They are interested in laying before the Court their problems in attempting to desegregate the schools so that the Court's final disposition of the current cases will take into consideration all the problems, which admittedly differ in different jurisdictions. There is also the thought that proposals for putting the decision into effect may be approved by the Court so as to avoid future litigation.

Those who have refused to participate in the December hearings, on the other hand, have indicated their intention to continue segregated schools if a way can be found to do so. They cannot present to the Court an informative brief showing problems and plans in an unbiased way. They have declared that they will not take any steps toward the desegregation of their schools unless

and until forced to do so by an order directed specifically to litigants within their own jurisdiction.

It seems that no question could be seriously considered as to the effect of filing a brief as a friend of court in typical cases. Therefore, those who have expressed the fear that doing so in this instance would subject them to instructions from the Court are using this threat to avoid placing their plans before the Court, expecting thereby to develop some scheme that will at least delay desegregation, that will necessitate future litigation, in the hope that the Court may eventually circumscribe the flat pronouncement of May 17.

As a matter of fact, all states which have practiced segregation in the public schools will be bound indirectly by the decree regardless of whether they have individually been parties to the five current cases or participants in the December hearings as friends of the Court. The applicability of the decrees will be less direct but probably just as influential ultimately in the states that boycott the hearings as in those participating.

Class Suits

In each of the five cases decided on May 17, the individuals instituting the suits pleaded for relief for themselves and for all other similarly situated. They were class suits. Therefore, the decrees will be applied not only to the children whose names appear in the pleadings in these particular cases but to all children attending the public schools in these jurisdictions. Since the constitutional provisions and state laws declared to be unconstitutional have statewide application in most instances, the decrees may be said to be applicable to all children within those states.

The attorney general for the State of South Carolina claims that because county boards of education in his state have considerable autonomy in school management, the case that originated in South Carolina is a local issue affecting Clarendon County only, not affecting the other counties of the state. The error in this theory seems obvious since segregation in Clarendon County and in all counties in South Carolina has been based upon a provision in the state constitution that has statewide applicability.

Of more importance is the contention that the decision does not apply in states that were not parties to the five cases. Technically that may be true. However, it could be argued that "all others similarly situated" could refer to all Negro children barred from admission to schools attended by white children, no matter where located. It depends upon how far one can expand the class. Regardless of this point, however, if states not involved directly in these five cases continue to maintain separate schools, suits will be brought in each of them and the Court would probably deny certiorari on the ground that the issue had been decided on May 17, 1954. Such was the result in several cases pending before the

Court on the date it decided these particular cases.[21] Probably some states may await this inevitable result, while others will accept the general principle laid down in the five cases and consider that it is applicable to the similar situations in their states.

Effect of a Declaration of Unconstitutionality

It has been said that the constitutional provisions and state laws providing for segregated schools remain on the books of the various states and are the law until eliminated by state action; that the declaration by the Court that such provisions violate the Federal Constitution has no immediate effect, especially until the decrees are ordered after the December hearings. What about the general principle that a provision declared to be unconstitutional is as if never enacted?

Most of the states, including those that have announced their intention to abide by the Court's decision without resistance, have stated that their provisions for segregated schools remain operative until they can be eliminated by state action. Such action, they say, takes time even when the state officials are willing to proceed. Had any state initiated the process of repealing a state constitutional provision on the day after the Court announced its ruling, it could have concluded the process in a matter of months—possibly in time to remove the provision before the opening of the school years 1954-55. The possible rapidity of action to amend a state constitutional provision has been demonstrated in at least one state which has held a special session of the legislature since the Court's decision, adopted a proposal to repeal the constitutional provision providing for a public-school system, and made arrangements for the proposal to be considered by the voters at a special election. Equal speed could have been demonstrated to eliminate the unconstitutional provisions for segregation, had any state so desired. Also, the administrative problems inherent in changing from a segregated to an integrated school system are said to require time —yet a number of schools and some entire school systems have been changed over at least in part at the opening of the fall term in September 1954, just four months or less from the day the decision was announced.

Noteworthy is the fact that many states that have taken no action to delete legal provisions for segregated schools have taken administrative action looking toward integrated schools. These

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[21] State of Florida ex rel. Hawkins v. Board of Control, 347 U. S. 971; Tureaud v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, 347 U. S. 971; Wichita Falls Junior College District v. Battle, 204 F. (2d) 632 (C. A. 5th, 1953), *cert. den.* 347 U. S. 974. Applying the decision in nonschool areas: Municipally owned amphitheater—Muir v. Louisville Park Theatrical Assn., 347 U. S. 971; Golf courses—Holcombe v. Beal, 193 F. (2d) 384 (C. A. 5th, 1951), *cert. den.* 347 U. S. 974; Public housing—Housing Authority of San Francisco v. Banks, 120 Cal. App. (2d) 1, 260 P. (2d) 668 (1953), *cert. den.* 347 U. S. 974; In the *Hawkins, Tureaud* and *Muir* cases petitions for certiorari granted judgments vacated, cases remanded "for consideration in the light of the segregation cases."

school officers, apparently, do not believe that they are acting illegally in ordering or encouraging steps in the integration process in violation of their own state provisions requiring segregated schools. The fact of the matter is that school officers who are disregarding the state provisions for separate schools cannot be penalized for violation of their state provisions, since they are following the supreme law of the land. Article VI of the Federal Constitution reads,

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

Actually, in the states where the decision has been most bitterly opposed officially, there exists an occasional oasis where the children of both races have been or are now attending the same schools. The decision of May 17 makes this procedure legal despite state provisions to the contrary.

Before the Court decided to postpone the decrees and in so doing postponed the final decision until the October 1954 term, it had considered whether or not to order desegregation immediately and to require admission of Negro children "forthwith" to schools previously attended by white children only. Counsel urged the Court, that if it so decided, to interpret "forthwith" as meaning no sooner than the school year 1955-56. Gradual adjustment was hoped for. The Court recognized the necessity of time for planning, but no one knows how much time the states will be given after the Court considers the evidence in the December hearings and learns how much has been accomplished already, how real is the resistance in some jurisdictions, and how sincere is the attempt to achieve constitutionality in other jurisdictions.

In the meantime, the states are considering their problems and making their plans.[22] Committees and commissions have been appointed in almost every one of the Southern states; in some instances with a view toward continuing segregated schools if possible by lawful means, in other instances to recommend methods for integrating the races. Not all these committees and commissions have issued public reports of their recommendations.[23] Yet it is well known that several states are developing techniques in preparation for a "last ditch" fight.

Constitutionality of Circumventing Techniques

Although the suggestions may never materialize, a number

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[22] See *Southern School News*, a factual and objective summary of how the states are reacting to the segregation decision. Free, sponsored by Ford Foundation. Nashville, Tenn. First issue September 3; second issue, October 1.

[23] Outstanding is the report to the Governor of North Carolina prepared by the Institute of Government, University of North Carolina, Chapel Hill, 206 pp. August 1954.

of variations of the "private-school" plan have received considerable publicity and have progressed officially further than any of the other suggested circumventing techniques. Constitutional amendments have been proposed and already adopted in South Carolina making it possible to abolish the public-school system and permit the education of all children of school age by private-school facilities.

In the *Civil Rights Cases* of 1883, the Court held that individual action was beyond the restrictions of the Fourteenth Amendment, that the Amendment applied only to official acts of the state through one of its official agencies.[24] Today, this distinction no longer exists. By analogy with nonschool decisions [25] it would appear that the private-school plans would lay the state open to challenge with less than a 50-50 chance of winning. The private schools are almost certain to be considered state instrumentalities, though ostensibly under private control.[26] Also, since public education has been held to be a governmental function in many types of cases over the years, any institution that performs this function for the state may be said to be performing a governmental function and hence subject to the same restrictions as would obtain if the function were performed directly by the government or one of its official agencies.[27] State action has been found in so many controversies over activities conducted by private agencies that any attempt to maintain a private-school system as a substitute for the public-schools in order to perpetuate segregation of the races should be approached with the awareness that such a plan is likely to do no more than to postpone the "evil" day.

One state suggested, instead of a private-school plan, that teachers' contracts be executed in such a way that each teacher is obligated to teach only the children of his own race. Since the school officers executing these contracts are agents of the state, their action would obviously be state action, subject to challenge as an attempt to do indirectly what the state cannot lawfully do directly.[28] The illegality of this plan appears even more certain than that of the private-school scheme.

Another state has proposed to give local school authorities ex-

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[24] 109 U. S. 3 (1883).

[25] Especially important are the following cases: Muir v. Louisville Park Theatrical Assn. 347 U. S. 971 (1954) vacating judgment of Court of Appeals of Sixth Circuit, *ibid.* 202 F. (2d) 275 (C. A. 6th, 1953); Terry v. Adams, 345 U. S. 461 (1953); Smith v. Allwright, 321 U. S. 649 (1944); Baskin v. Brown, 174 F. (2d) 391 (C. A. 4th, 1949); Rice v. Elmore, 165 F. (2d) 387 (C. A. 4th, 1947); Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. (2d) 212 (C. A. 4th, 1945); Nash v. Air Terminal Services, 85 F. Supp. 545, 549 (D. Va., 1949); Lawrence v. Hancock, 76 F. Supp. 1004 (D. W. Va., 1948); Culver v. City of Warren, 84 Ohio App. 373, 83 N. E. (2d) 82 (1948); City Commissioners of City of Newton, 151 Kans. 565, 100 P. (2d) 709 (1940).

[26] Action of private organizations has been considered state action, making the private organizations instrumentalities of the state. The cases, cited *supra* note 25, show the extent to which "state action" has been held to exist.

[27] Marsh v. Alabama, 326 U. S. 501 (1945).

[28] Yick Wo v. Hopkins, 118 U. S. 356 (1886).

clusive power of assignment of pupils. If Negro students are initially enrolled in a school with white children, they could be transferred under the power of assignment. Again, illegality is thinly veiled.

Other suggestions have been made, but in any of the techniques planned to circumvent the effect of the decision there is ample cause for complaint on the part of those denied their constitutional right. Any of these plans, if they accomplish their objective, would continue a situation that the Court has declared unconstitutional. Although there is no precedent exactly in point, states that throw up roadblocks are certain to be called to account.

On the other hand, states that proceed affirmatively toward an integrated program of public education may avoid reprimand by the Court if their intentions are sincere and their gradulism is due to administrative problems or fiscal difficulties.

Judicial Supervision over Enforcement

The Court has not decided how it will enforce its decrees. Possibly it will exert no supervision; it did not do so in connection with the graduate-school segregation cases. The Court, on the other hand, may appoint special masters to formulate detailed standards. Equally possible would be the time-honored custom of remanding the five cases to the lower courts in which they originated, instructing these courts to work out detailed arrangements with the states.

Discussion of these possibilities in advance of the decrees of the Court is premature. Suffice it to say that none of the suggestions would establish new precedents in equity remedies.

Summary and Conclusion

An attempt has been made in this paper to restrict the discussion to the legal points of constitutional law and judicial procedure of greatest interest to the legal profession, apart from the subject matter of segregation in the public schools, interest in social and educational repercussions of the May 17 decision in the public-school segregation cases having overshadowed those legal principles.

It was shown that the intent of framers and ratifiers of a constitutional amendment is not controlling, especially when that intent cannot be conclusively proved; that, though proof were conclusive, the Constitution is to be interpreted in the light of current situations rather than by the meaning its framers and ratifiers might have intended.

The rights guaranteed in the Fourteenth Amendment will be enforced by judicial process regardless of the fact that one section of that Amendment grants concurrent power of enforcement to the Congress, or the fact that the Tenth Amendment reserves to the states some particular power. In other words, fundamental rights cannot be invaded under the theory of states' rights; nor need they await the legislative action of Congress.

The Court in its plenary power to act in equity may frame its decree in any way that its judgment dictates is for the best interest of the public and may postpone a decree to allow wrongdoers time to plan procedures to correct their unlawful practices.

A situation declared to be unconstitutional is unconstitutional for all who have created the situation. Even though a decree should apply only to the parties of a suit or to all those similarly situated in the same jurisdiction, the matter will be *res adjudicata* for those not parties to the suit. And this result will obtain whether or not the nonlitigants participate in hearings called for the purpose of planning practical application of the principle already announced.

Even though the unconstitutional provisions remain on the books, they can no longer be enforced and those who follow the supreme law of the land cannot be penalized for failure to abide by a contrary state provision. Those who encourage the modification of a practice to coincide with the pronouncement of the Court are acting in accordance with the law, regardless of contrary provisions of state or local jurisdictions.

The public-school segregation cases illustrate these principles of constitutional law and judicial procedure. Perhaps "nothing new has been added" in these respects, but the subject matter makes the decision of May 17 a bench mark in the evolution of our Country.

TO EACH AND EVERY MEMBER OF THE COLORADO BAR ASSOCIATION

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Please address all writing or comments to Mr. Donald S. Molen, 702 Midland Savings Bldg., Denver, Colo. or to Mr. Richard Harvey, University of Denver College of Law, Denver, Colorado.

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VASCO G. SEAVY, JR., *Managing Editor.*