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# Desegregation in Public Education - a Generation of Future Litigation

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# DESEGREGATION IN PUBLIC EDUCATION — A GENERATION OF FUTURE LITIGATION

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That the Southern reaction to the Supreme Court's decisions in the recent *Segregation Cases*[1] would be one of disapproval was certainly expected. The Gallup Poll figures showing that 71 per cent[2] of the people in the South were opposed to the ruling was surprising only in that the percentage was not larger. The commonplace prediction is

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[1] Brown v. Board of Education, 347 U. S. 483 (1954), declaring racial segregation in state public schools to be unconstitutional, and Bolling v. Sharpe, 347 U. S. 497 (1954), companion opinion declaring racial segregation in the public schools of the District of Columbia unconstitutional, and Brown v. Board of Education, 349 U. S. 294 (1955), leaving it to the lower courts to frame decrees implementing the Supreme Court's decisions.

It is not the purpose of this article to analyze these cases as such, or the law which preceded them; but rather, accepting them as *fait accompli*, it proposes to consider the reaction in those states with segregated school systems, which suggests the possibility for years of litigation before the decisions may be fully implemented. For the course of the cases in the Supreme Court, see Prof. G. Kenneth Reiblich's summaries of the 1952, 1953, and 1954 terms of the Supreme Court respectively in 73 S. Ct. 87, 74 S. Ct. 109, and 75 S. Ct. 113. For more exhaustive legal treatment see: Leflar and Davis, *Segregation in the Public Schools — 1953*, 67 Harv. L. Rev. 377 (1954); Maslow and Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. of Ch. L. Rev. 363 (1953); and other articles, casenotes, and comments referred to in Reiblich, *supra*.

Quite obviously there will be a plethora of litigation in the other "separate but equal" areas as both sides scramble for either legal clarification or obfuscation of the doctrine of the School Segregation cases. Since the scope of this aspect of the problem is far too broad for consideration here, this discussion will be limited to the field of public education. See Holmes v. City of Atlanta, 100 L. ed. (Adv. Sh.) 76, 350 U. S. ... (#396, 1955) and Mayor & City Council of Baltimore City v. Dawson, 100 L. Ed. (Adv. Sh.) 75, 350 U. S. ... (#232, 1955); also material in Reiblich, *supra*, and Roche, *Plessy v. Ferguson: Requiescat In Pace?* 103 U. of Pa. L. Rev. 44 (1954).

[2] Washington Post and Times Herald, July 11, 1954. Gallup found that education had a great effect on opinion. Whereas in the South only 19 per cent of high school graduates approved the Supreme Court ruling, 38 per cent of college graduates approved. This is opposed to the nation wide average of 73 per cent approval by college graduates and 54 per cent approval by high school graduates. Age was another important factor; while only 23 per cent of Southerners over 50 approved, 31 per cent of the 21-29 age bracket approved. Location was a third influence: 30 per cent of Southerners in cities over 10,000 in population were in favor of the ruling, while only 18 per cent of those living in rural areas were not displeased. (*Ibid*, July 14, 1954.) There was a significant shift in the North on the practical question of "Would you object to having your children attend a school where the majority of pupils are Negroes?" Nation wide results shows that 54 per cent of people would object; 45 per cent of Northern whites would object. (*Ibid*, July 16, 1954.)

that there will be a generation of litigation before the South will cooperate freely in racial intermingling in the public schools. This article is an effort to outline the indicated trends which Southern states have been following in their reactions to the *Segregation* ruling, and to analyze, on the basis of existing law, the legal fate of the impending litigation. The first and apparently most popular plan to evade the Supreme Court's edict, the turning over of public schools to private concerns, will be examined at length. The other schemes, less widespread and less far-reaching in their implications, will be treated individually in shorter sub-sections.

## I.

South Carolina, under the leadership of ex-Associate Justice James F. Byrnes, was the first state to put into execution a private system plan. In November of 1952, eighteen months before the Supreme Court acted, South Carolina voters approved a state constitutional amendment which would allow the legislature to abolish public education.[3] Georgia and Mississippi followed suit in November and December of 1954.[4] The line of thought of these three states is apparently that the Fourteenth Amendment covers only action by the state or by officials acting under color of state law, and therefore, if there is no public school system, if there are no teachers and school officials working for the state, then there can be no injunction against the operation of segregated schools or orders to admit colored students. Federal courts will thus be without jurisdiction even to hear cases involving these private institutions.

This same line of reasoning was employed by Texas and South Carolina in the 1940's when they tried to maintain a white primary election. After its defeat in the earlier *Nixon cases*,[5] Texas had allowed the Democratic Party of the state to set its own standards of membership. The

[3] New York Times, November 6, 1952, 31:7.

[4] Georgia: *ibid*, November 18, 1954, 31:1; Mississippi, *ibid*, December 22, 1954, 15:1.

[5] Nixon v. Herndon, 273 U. S. 536 (1927); Nixon v. Condon, 286 U. S. 73 (1932).

Party restricted itself to white people. This was subsequently upheld in 1935 in *Grovey v. Townsend.*[6] In 1944, with only Justice Roberts, the author of the Grovey opinion, dissenting, the Supreme Court reversed itself in *Smith v. Allwright.*[7]

Justice Reed for the majority of the Court pointed out that Texas required voters in the primary election to pay a poll tax; it required the election of county officers of the party; primaries were conducted under statutory authority; no name not certified as having been so chosen could appear on the general election ballot unless nominated by qualified voters who had to swear that they had not participated in any party primary; and, finally, that Texas courts were given authority to issue writs of *mandamus* to compel the observance of these duties. He found that this elaborate statutory system made the party in fact an agency of the state, and as such subject to the prohibitions of the Fifteenth Amendment.[8]

Point number one may then be made. If these three states do carry out their authorized plan to abolish public schools, they will have to do so completely. They may exercise no control over the standards or methods of education. Nor can they require that their citizens attend school or have a certain degree of education. To impose duties on the private corporations which would take over the operation of the state schools would make these corporations agencies of the state under the *dictum* of *Smith v. Allwright.*

But Justice Reed did not stop with the declaration of the agency relationship. He went on to attack the argument of the Texan lawyers that since the right to maintain a political party was guaranteed by the First Amendment, every reasonable exercise of that privilege, including the determination of membership, was likewise guaranteed, stating in part:

> "This grant to the people of the opportunity for choice is not to be nullified by a state through casting

[6] 295 U. S. 45 (1935).
[7] 321 U. S. 649 (1944).
[8] *Ibid,* 663.

> its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied."[9]

On its face this would seem to have halted any future attempts to maintain a white primary; but for motivations which sound curiously like those now offered for refusal to desegregate, some Southern states hung on to their peculiar institution. The State of South Carolina came up with the most ingenious solution for avoiding the Supreme Court's decision. Governor Olin D. Johnston called a special session of the state legislature nine days after *Smith v. Allwright* and called for the repeal of all references to primary elections either in the state code or constitution, stating in part:

> "I regret that this ruling by the United States Supreme Court has forced this issue upon us but we must meet it like men. . . . History has taught us we must keep our white-primaries pure and unadulterated so that we might protect the welfare and honor of all the people of our state. . . . White Supremacy will be maintained in our primaries. Let the chips fall where they may."[10]

The legislature acted quickly and efficiently. Within four days the lawmakers had passed one hundred and fifty acts repealing all statutes which contained any reference, direct or indirect, to primaries. An amendment repealing the sole clause in the state constitution mentioning primaries was proposed and subsequently ratified by the people of the state.

The state Democratic Party Convention which met in 1946 was a "private organization" laying down qualifications for participation in club activities. The basic requirement that a member of the party must be a "white democrat" was unchanged from previous years. The only significant shift was the lowering of the age minimum

[9] *Ibid*, 664.

[10] Quoted in Brief for Appellee, U. S. Circuit Court of Appeals for the Fourth Circuit, Clay Rice et al. v. George Elmore, No. 5664, 1947, p. 27.

to 18. Since state law neither required nor regulated a primary election, the party, again like a private club, undertook to conduct such elections as it had in the past. Now fraud was punishable only by party and not by legal sanctions. Election officials were party, not state, officers.[11]

In the summer of 1947, this new arrangement was attacked by the NAACP in the Federal District Court for the Eastern District of South Carolina in *Elmore v. Rice*.[12] The case was heard before Judge J. Waties Waring, who in the earlier case of *Thompson v. Gibbes*,[13] had ruled that unequal pay for negro teachers was discrimination in terms of the Fourteenth Amendment. His opinion in *Elmore v. Rice* was to the point. He reasoned that the repeal of the statutes was meaningless, that the Democratic Party operated the same as it had prior to 1944, and to say that this did not continue to be state action was to avoid the facts. Neither the Governor nor the legislature had attempted to conceal the fact that the purpose behind the repeal had been to circumvent the *Allwright* decision, so there was little reason to give credence to lawyers' arguments that this was not true. While the General Assembly repealed the primary regulations, the people of the state had assembled in convention and had enacted practically the same rules.

Judge Waring admitted that private clubs could choose their own membership, but private clubs did not elect a president of the United States. Under the law all citizens were privileged to participate in elections; the only real election in the state was that conducted by the Democratic Party in its primary. The Judge's words dripped judicial sarcasm: "It is time for South Carolina to rejoin the union. It is time to fall in step with the other states and to adopt the American way of conducting elections."[14]

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[11] Rules of the Democratic Party of South Carolina, Adopted by the Democratic State Convention, Holden at Columbia, May 17, 1944, p. 2.

[12] 72 F. Supp. 516 (D. C. E. D. S. C., 1947).

[13] 60 F. Supp. 872 (D. C. E. D. S. C., 1945). This case concerned the question of pay for Negro teachers equal to that for white people for the same work requiring the same qualifications. No court order was issued because prior to the decision the state announced it would equalize the salaries.

[14] *Supra*, n. 12, 528.

The request for a declaratory judgment was granted. The opinion closed with the statement that the defendants and their successors in office would be enjoined from excluding qualified voters from enrollment in the party and from voting in elections because of race. The injunction itself, however, only ordered that the party poll managers be restrained from denying Negroes the right to vote; it did not mention enrollment in the party.[15]

The Democratic Party appealed the ruling and in November and December of 1947 arguments were heard before the U. S. Circuit Court of Appeals for the Fourth Circuit sitting in Richmond, Virginia. Thurgood Marshall closed his brief for the appellee with an eloquent plea which played on the harp of Justice Reed's *Allwright* opinion:

> "Basic civil rights grounded in the Constitution cannot be revoked by technicalities. In South Carolina the Democratic Party has for years controlled the voters, the legislature, the State, and its elected representatives in Congress. It is impossible to discern the line between the Democratic Party and the State of South Carolina. The repeal of the primary statutes was a deliberate attempt to evade the decision of the United States Supreme Court. . . . This deliberate effort to circumvent the decisions of the United States Supreme Court is another challenge to our ability as a nation to protect the rights of all our citizens in practice rather than in theory."[16]

On the day before New Year's Eve of 1947, Chief Judge John J. Parker delivered the three-judge court's decision. He acknowledged the claim of Thurgood Marshall that the Democratic Party and its primary were the controlling factors in South Carolina elections and that this primary had become an integral part of the election machinery. The question which then arose was whether a state could avoid provisions of the federal Constitution by allowing a political party to take over a part of its electoral process and by so

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[15] Record in Elmore v. Rice, U. S. District Court for the Eastern District of South Carolina, Civil Action #1702, 1947.

[16] Brief for Appellee, *supra*, n. 10, pp. 24-25.

doing deny a racial group a voice in government. The answer had to be in the negative.[17]

Chief Judge Parker held that those who controlled the Democratic Party and the state government could not absolve themselves of their duties under the Constitution by placing the first step in the electoral process in the hands of the party. When party officials participated in what was a part of the state's election apparatus they became officers of the state *de facto* if not *de jure*, and as such were subject to the restraints imposed by the Constitution.[18]

The Chief Judge closed with an admonition that went unheeded:

> ". . . no election machinery can be upheld if its purpose or effect is to deny the Negro, on account of his race or color, any effective voice in the government of his country or the state or community wherein he lives."[19]

The Democratic Party appealed to the Supreme Court but *certiorari* was denied.[20]

Still the matter was not finished. There was one loophole remaining. The District Court injunction had ordered only that Negroes be allowed to vote; it had not specifically commanded that they be enrolled in the ranks of the party, though the text of the opinion had made it clear that this was the intention. The State Democratic Party met in 1948 and limited membership to whites. The right to vote in primaries, however, was offered to any person of any race who would subscribe to a voter's oath, swearing belief in racial segregation and opposition to a federal FEPC law.[21]

The NAACP challenged the validity of this system in *Brown v. Baskin*,[22] argued once again in Judge Waring's court. The Judge branded the voter's oath as another piece

[17] Rice v. Elmore, 165 F. 2d 387, 389 (4th Cir., 1947).
[18] *Ibid*, 391.
[19] *Ibid*, 392.
[20] Rice v. Elmore, 333 U. S. 875 (1948).
[21] Rules of the Democratic Party of South Carolina, Adopted by the Democratic State Convention, Holden at Columbia, May 19, 1948, p. 10.
[22] 78 F. Supp. 933 (D. C. E. D. S. C., 1948). There were two arguments of this case. The first was for a temporary injunction; the second for a permanent restraining order, 80 F. Supp. 1017 (D. C. E. D. S. C., 1948).

of chicanery designed to frustrate the basic principles of American government. To demand as a prerequisite to voting that a citizen take an oath subscribing to the beliefs of a state convention was a flagrant violation of the fundamental right of Americans to express their own views and opinions in selecting their representatives.[23]

The *Elmore* case had fully settled the principle that the Democratic Party in South Carolina was a state agency in that it performed a public function in holding the only meaningful election. It was important, Judge Waring emphasized, that the defendants realized these facts. They would be made to carry out the order of the court, not only in its technical aspects, but in its full meaning and spirit. Any violation of the letter or the spirit of the injunction which would issue would be punishable as contempt of court. "The court is convinced that they are fully aware of what is the law, and it will not excuse further evasions, subterfuges or attempts to get around the same."[24]

On appeal, Chief Judge Parker upheld the Waring decision and remarked: "Courts of equity are neither blind nor impotent."[25]

The Democratic Party made no further appeal.

The second point in regard to the private school plan may now be made. A state may not avoid its constitutional duties by passing the onus of discrimination on to a private organization under state regulations, and cleanse itself of those obligations by expurgating its statute books, and thus, by closing its legal eyes permit private organizations to function as they see fit in performing one-time state functions. While Thurgood Marshall's contention that such a repeal of statutes itself constitutes a denial of equal protection has never been accepted formally by the federal courts, nevertheless a position not too far from this has been reached.[26]

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[23] *Ibid*, 941

[24] *Ibid*, 942.

[25] Baskin v. Brown, 174 F. 2d 391, 394 (4th Cir., 1949).

[26] For a development of this doctrine in regard to labor unions and racial discrimination see: Steele v. Louisville & Nashville Railroad, 323 U. S. 192 (1944); Tunstall v. Brotherhood, 323 U. S. 210 (1944); Wallace Corp. v.

The most recent white primary case decided by Supreme Court opinion, *Terry v. Adams*,[27] gives a vivid illustration of this doctrine. The Supreme Court was presented with a pre-primary election held by the Jaybird Association of Fort Bend County, Texas. Participation in the pre-election was restricted to whites. The Jaybird Association operated under color of no state law; it was a private group which nominated candidates only for the primary election. Its nominees were sometimes defeated, sometimes successful in the primary. The Court by an 8-1 vote held the barring of Negroes from voting in this peculiar election to be a violation of the Fifteenth Amendment.

In his dissenting opinion Justice Minton expressed his concern over the fact that the Court had discovered some alchemy which turned successful private action into state action with the resulting constitutional limitations. He felt that while there had been justification for holding that there had been state involvement in the South Carolina cases, here there was none. He thought that the Court was seeking to redress wrongs done by private action. It

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Labor Board, 323 U. S. 248 (1944); Graham v. Brotherhood of Firemen, 338 U. S. 232 (1949); Railroad Trainmen v. Howard, 343 U. S. 768 (1952). In Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212 (4th Cir., 1945), *cert. den.* 326 U. S. 721 (1945), the Fourth Circuit Court of Appeals ruled that where a municipality had invested a considerable portion of the money and in fact exercised a great degree of control over a private corporation, the fact that the corporation had been set up by a private individual did not allow that institution to practice racial discrimination. The city aid in this case was such as to make the corporation an agency of the municipality.

There is one recent case which may be used to bolster the private school plan, *i.e.*, Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. C. Md., 1948), in which the same federal district judge whom the Court of Appeals had reversed in the Kerr case held that a private school did not become a state agency simply because it accepted a substantial sum of money from the state each year. This case, however, involved an attempt by a young Negro to be admitted to a hitherto white school, and it should be remembered in evaluating this as a judicial precedent that prior to May 17, 1954, "separate but equal" was ruling law. Even conceding that the school in question had been a state agency there would have existed at that time no right on the plaintiff's part to be admitted to that particular institution.

This agency doctrine, or an extension of it, was used by Justice Black in Marsh v. Alabama, 326 U. S. 501 (1946), to rule that a company town permitted to exist by the state could not deny freedom of speech or religion. See *infra*, n. 27, for the Jaybird Case in 1953.

For an exposition of this agency doctrine see Thurgood Marshall's brief in Rice v. Elmore, *supra*, n. 10.

[27] 345 U. S. 461 (1953).

was a commendable but nevertheless unconstitutional procedure.[28] Justice Minton's dissent can be construed as a tacit recognition of the fact that the Court is willing to read into discrimination cases a *sub rosa* agency relationship.

The conclusion, then, for the segregation issue is inescapable. As long as Justice Reed's declaration, that a state may not allow a private organization to practice the discrimination which the state itself cannot, stands along with Judge Parker's felicitous phrase that courts are neither blind nor powerless, any system of turning over public schools to private organizations will run afoul of the federal courts. If a complete purge of statutes and utter absence of state financial or police aid did not divest party officials of their character as *de facto* state officers, it is unlikely that the positive action of turning over (even at a nominal fee) school properties to private corporations will not taint these corporations as state agencies obliged to afford equal protection of the law.

Several very practical points suggest themselves in this context. Could a state divorce itself, in fact, from its police and health duties which are concomitants of education? For an organized society such diverse matters as qualifications of teachers, child vaccination, and special zoning of school areas demand government regulation. In addition, a great deal of money will be needed to carry on the school system. For example, the total needed by the State of Georgia for public education for the year 1953-54 totaled $137,223,460.[29] With this as an annual overhead it would be difficult for any private corporation to offer education at a cost low

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[28] *Ibid, dis. op.* 484, 493: "I do not understand that concerted action of individuals which is successful somehow becomes state action." This case is an excellent example of the individualistic tendencies of the Vinson Court. Justice Black wrote the majority opinion, in which only Justices Douglas and Burton joined; Justice Frankfurter concurred alone; and Justice Clark filed a concurring opinion for himself, and Justices Vinson, Reed and Jackson. In the Howard case, *supra*, n. 26, *dis. op.* 775, 778, Justice Minton had also dissented:

> "I do not understand that private parties such as the carrier and the Brotherhood may not discriminate on the ground of race. Neither a state government nor the Federal Government may do so, but I know of no applicable federal law which says that private parties may not."

[29] C. D. HUTCHINS AND A. R. MUNSE, PUBLIC SCHOOL FINANCE PROGRAMS OF THE UNITED STATES (Washington: GPO, 1955), 85.

enough for the average citizen to send his children. Some sort of state subsidy would be necessitated.

There are several delicate twists which could be put on the basic private school scheme. One county in Virginia has recently refused to appropriate money for school operations during the coming year without setting up a plan for private operation.[30] A federal court undoubtedly could not order a local government to appropriate the necessary funds. However the price tag attached to this particular subterfuge is eventual illiteracy for a large part of the population.

A second refinement would be for a state to abolish the public school system and then to give tuition fees directly to the parents of eligible children to meet the expenses of private education. Here again there are practical as well as legal pitfalls. The state could not require that the money be spent for education, nor could it demand any definite standards either from the schools or from the citizens without coming into conflict with the *Allwright* holding. By demanding that the money be used in private establishments and by prescribing standards for such corporations, the state could be held to have made these institutions its own agents in exactly the same manner as Texas had made the party primary part of its own electoral machinery. Even if all the parents cooperated unselfishly and did spend the money for its true purpose, a court which could not read indirect state action into such wholesale subsidizing would indeed be blind.[31]

If the basic plan to turn over public schools to private corporations is unconstitutional, then it is highly probable

[30] Washington Post and Times Herald, June 2, 1954. Georgia has gone even further and has stipulated in appropriation bills that no funds may be spent for mixed schools and any official of the state or local government who does so is subject to a two year prison term. New York Times, January 20, 1953, 19:1; June 5, 1955, E 9:2-6.

The recent Virginia case of Almond v. Day, 24 L. W. 2221, .. S. E. 2d .., (Va. Sup. Ct. of Ap., Nov. 7, 1955), (see also 24 L. W. 1075), points up the fact that attempts to install a private school system may involve state as well as federal constitutional difficulties. However, South Carolina, Georgia and Louisiana have experienced little trouble in amending their constitutions to fit in with educational plans.

[31] Compare language and attitude of the Court in the Child Labor Tax case, 259 U. S. 20, 38 (1922).

that any variations in matters of detail to meet practical problems would likewise be invalid.

Some lawyers have contended that there is one important distinction between the primary election and the education cases. The Constitution specifically protects the citizen's right to vote against discrimination because of sex or race; but there is no such guarantee of a right to public education. A state must hold elections of some sort; it need not educate. Thus while choosing political representatives is a public function, education need not be so.[32]

This is a contention which could be the basis of serious litigation, but the answer of the Court would probably run along these lines: segregation in public education is *per se* discrimination; a violation of the Fourteenth Amendment is no less serious an infringement on civil rights than a violation of the Fifteenth. Then Justice Reed's and Judge Parker's *bons mots* could be brought into play for the *stare decisis* role. In the segregation decision by the Supreme Court, Chief Justice Warren placed heavy emphasis on the effects of schooling: "Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship."[33] In light of this, it is improbable that the Court would give weight to an argument that mass-education, in mid-twentieth century, can be divested of its public character.

## II.

The private school plan has not been the only scheme proposed to avoid the spirit of the *Segregation* decisions. In November of 1954 the voters of the state of Louisiana approved an amendment to the state constitution which places the continuation of segregation under the police power of the state. As an exercise of its inherent authority to maintain the public health, safety, welfare, and morals, racial separation is declared valid; for intermingling of the

[32] This line of reasoning was first suggested to me by Mr. Robert McC. Figg, Jr., who was the able attorney for the Democratic Party and for the State of South Carolina in the Segregation cases, *supra*, n. 1.

[33] Brown v. Board of Education, 347 U. S. 483, 493 (1954).

races in the public school system would mean disorder and disturbance of the peace.[34]

Although the Fourteenth Amendment was certainly not designed to interfere with the police power of the state, yet while a state's police regulations are necessarily special in their character, and while there is a strong presumption in favor of the rationality of a state classification, still race may not be made the basis of such a classification.

In *Buchanan v. Warley*,[35] in declaring unconstitutional a city ordinance of Louisville, Kentucky, which forbade colored persons to occupy houses in city blocks where the greater number of houses were occupied by white persons (and *vice versa*), the Court faced the argument that the proposed segregation would promote the public peace by preventing race conflicts but answered: "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

Mr. Justice Holmes' *dictum* in a later case involving the equal protection clause is *apropos:*

> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."[36]

Mr. Justice Holmes cannot be accused of having been hostile to the ideal of giving almost a free rein to state legislatures in police matters. But an obvious intent of the

[34] The New York Times, November 4, 1954, 31:1. The text of the amendment is as follows:

> "All public elementary and secondary schools in the State of Louisiana shall be operated separately for white and colored children. This provision is made in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order in the State, and not because of race. The Legislature shall enact laws to enforce the state police power in this regard."

(Proposed Constitutional Amendments as adopted at the General Election, November 2, 1954, compiled by Wade O. Martin, Jr., Secretary of State; Constitutions of the State of Louisiana (Dart) (1955 Cum. Supp.), Art. 12, Sec. 1.)

[35] 245 U. S. 60, 81 (1917).

[36] Nixon v. Herndon, 273 U. S. 536, 541 (1927).

Fourteenth Amendment was to do away with discrimination because of race,[37] and again the Supreme Court has equated segregation in the public educational process with discrimination. It is significant that in the May 31, 1955, order spelling out the manner in which the Court's decision is to be effected, Chief Justice Warren used the word "discrimination" five times to describe the "separate but equal" situation. The word "segregation" does not appear in the text of the order.[38]

Directly to the point in this matter is the recent statement of the Court of Appeals for the Fourth Circuit in the case of *Dawson v. Mayor and City Council of Baltimore City*.[39] In regard to the maintenance of segregation in state parks this tribunal observed that such racial separation could no longer be justified as a means to preserve the public peace. The Supreme Court, it was noted, had shown that psychological factors as well as physical facilities had to be considered in ascertaining whether equal protection of the law was being denied. "With this in mind, it is obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the State; . . ."[40] On November 7, 1955, the Supreme Court affirmed this decision without giving an opinion of its own.[41]

Away from the constitutional and into the statutory field, in April of 1955, Governor Hugh White of Mississippi signed into law a bill which provides a fine and possible imprisonment for whites who attend a state supported school with Negroes. The fine is from one to twenty-five dollars, and the punishment may include up to six months in jail.[42] In a similar move the Georgia State Board of

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[37] See Buchanan v. Warley, *supra*, n. 35.
[38] Brown v. Board of Education, 349 U. S. 294 (1955).
[39] 220 F. 2d 386 (4th Cir., 1955).
[40] *Ibid*, 387.
[41] Mayor City Council of Baltimore City v. Dawson, 100 L. ed. 75 (Adv. Sh.), 350 U. S. ... (#232, 1955). On the same day the Court, again without writing an opinion of its own, vacated orders by a federal District Court and Court of Appeals in Holmes v. City of Atlanta, 100 L. ed. 76 (Adv. Sh.), 350 U. S. ... (#396, 1955), permitting segregation on a municipal golf course and remanded the case to the District Court for a judgment in accord with the Dawson case, cited above.
[42] The New York Times, April 6, 1955, 20:6.

Education has ordered that all teachers who support, condone or agree to the teaching of mixed classes will have their licenses revoked "forever".[43]

In view of the National Supremacy Clause (Article VI, clause 2) it is hard to conceive of the Supreme Court's upholding the conviction or administrative punishment of a person by a state for obeying a federal court order. These efforts would also fall if justified under the police power, since the classification both of the offense and the people affected is clearly opposed to current Supreme Court interpretations of the meaning of the Fourteenth Amendment.

In a more subtle vein Georgia and Louisiana have put forth plans which would allow school superintendents to assign pupils to schools in advance of the term.[44] Apparently the defense for this course of action would be that the statutes did not discriminate against anyone, but for reasons of expediency simply gave to educational directors the authority to equalize pupil loads and school facilities. Under such a system segregation would be an accidental concomitant.

On its face such legislation might seem to be valid. However, the administration of the law, to be of any assistance to the states in maintaining segregation, would have to be discriminatory in the sense that colored children and white children would have to be, on the whole, assigned to different schools. And as a rather conservative Supreme Court said in *Yick Wo v. Hopkins* in regard to a similar issue:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."[45]

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[43] Time, July 22, 1955, 38.

[44] Louisiana: New York Times, July 7, 1954, 34:7. Georgia: The Georgia Education Commission, a special group set up by Talmadge, pursuant to a state law, to study and suggest legislation to maintain segregation, proposed this as one of a series of methods of circumventing the Supreme Court: New York Times, December 9, 1954, 38:5.

[45] 118 U. S. 356, 373-374 (1886).

North Carolina has enacted a local option law which embellishes without fundamentally changing the Georgia and Louisiana ideas. Under the North Carolina statute, to city and county boards have been transferred all authority to enroll pupils and assign them to various schools. The State Board of Education is divested of all control over such matters.[46] This law could be used to facilitate integration just as easily as segregation in that it could allow each county to set its own pace in mixing the races in existing facilities. The purpose of this bill, however, can be judged from a resolution which passed both houses of the North Carolina state legislature without a dissenting vote ten days later. This resolution said that "mixing of the races in the public schools in the state cannot be accomplished."[47]

It is difficult to see how this local option law makes the legal status of segregation any different from the Georgia and Louisiana plans. As far as federal courts are concerned, the official action of a county or municipal agent is the action of the State. As Justice Jackson remarked in *Board of Education v. Barnette,* "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted."[48]

Another plan which differs only indirectly from these last two is that of gerrymandering the school districts so that Negroes will still attend separate schools. This move could be based on the hope that the Court would apply its doctrine of *Colegrove v. Green*[49] to the segregation issue. In that case the Court refused to "enter the political thicket" and pass on the constitutionality of Illinois' congressional rotten boroughs. The Vinson Court supported this decision in *South v. Peters*,[50] where it dismissed a suit against the county unit system of Georgia which discriminates both against urban counties, and indirectly against Negroes, since colored people usually only vote in the cities.

[46] The New York Times, March 30, 1955, 21:2.
[47] *Ibid*, April 9, 1955, 11:3.
[48] 319 U. S. 624, 637 (1943).
[49] 328 U. S. 549 (1946).
[50] 339 U. S. 276 (1950).

It said in part: "Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."[51]

Justices Black and Douglas dissented from both decisions and it may be that with Justices Warren and Harlan on the bench they could pick up the necessary other three votes to form a majority and reverse this rule as far as education is concerned — citing *Yick Wo* as an authority in so doing — even assuming that the Court would declare school districting to be a political question. There would be good basis for believing that the Court would not consider gerrymandering school districts to be political, or even if it did, that it would consider the issue of its merits because of its great importance and the need for settling the question.[52] And it might be observed, that assuming the possibility of avoiding decision by the Supreme Court, the practical consequence of gerrymandering are such that it, alone, could never be fully successful.

In the North, large scale Negro migration has been a fairly recent phenomenon and colored people have tended to settle together. The "black belts" of Chicago and Harlem can easily be districted to exclude educational commingling of the races. In some instances in the South, particularly in urban regions, this could be equally as effective; but in most cases it simply could not be done. Gerrymandering could cut down integration decidedly, but where the two races live so closely together complete exclusion would not be physically possible. This practical difficulty is pointed up by the cases of *Shelly v. Kraemer* and *Barrows v. Jackson*[53] which made racially restrictive covenants unenforceable in the courts. Thus Negroes have a mobility which would permit families to move from one district to another if not at ease, at least at will. City officials would have to re-district daily to keep ahead of the NAACP.

In all the variations of gerrymandering, there would always be the possibility that the Supreme Court would

[51] *Ibid*, 277.
[52] *Cf.* Barrows v. Jackson, 346 U. S. 249 (1953).
[53] 334 U. S. 1 (1948); *ibid.*

take cognizance of the obvious violation of the spirit of its unanimous edicts in the school segregation decisions, and be impelled to avoid all technical objections to its jurisdiction in order to enforce compliance with the spirit of the law.[54]

Mississippi has considered another plan. In the fall of 1954, the state House of Representatives passed an act which according to its title would have prohibited "the fomenting and agitation of litigation".[55] In essence it would have made it a crime for a plaintiff to have accepted an inducement from any group to bring a law suit before any court or administrative agency in Mississippi. Both the plaintiff and his lawyer could be required to take an oath that no such inducement had been received or had been conspired to be received.

Obviously the bill was aimed at the NAACP in general and Thurgood Marshall and his legal staff in particular. The act was killed in committee in the state Senate. It is difficult to see what purpose it could have served if it had passed. Under its inherent police power a state can protect itself from nuisance suits and it may be that this particular bill would have been upheld as such a regulation had it been applied to persons bringing suit in state courts. But, certainly the NAACP would institute its cases in the federal courts and even under the *Slaughter House*[56] decision access to the federal courts, subject to congressional regulations, is protected under the privileges and immunities clause. It is not likely that the federal courts would allow a state to bar a citizen from use of the federal judicial system to protect his federal rights.

As a political expedient it has been suggested by numerous individuals, and two states have taken concrete steps to urge,[57] that Congress call a national convention to amend the Constitution to allow state governments to run their school systems as they see fit. There is certainly nothing illegal in this. Agitation for change, even though it may be

[54] *Supra, circa*, n. 52.

[55] Mississippi Legislature, Extraordinary Session, 1954. House Bill #30.

[56] 16 Wallace 36 (U. S., 1873); see also Terral v. Burke Const. Co., 257 U. S. 529 (1922).

[57] Mississippi and Georgia: The New York Times, March 11, 1955, 28:6.

opposed to the views of the majority of the people in the country, is a fundamental right guaranteed by the First Amendment. However, in this particular instance it has no hope whatsoever of succeeding. One can well imagine the fate of a New York, Massachusetts, Illinois, or Michigan congressman who voted for such a convention. His defeat at the next election would be as sure as that of a Georgia politician who voted for the repeal of the state anti-miscegenation laws.

As a palliative rather than a solution, another means has received serious attention: separation of sexes. Since admittedly the great objection of the South to intermingling is biological, this would tend to minimize the dangers in that respect. It would, probably, be perfectly legal. As a matter of practice South Carolina, for example, maintained separate high schools for boys and girls in many areas up until the last few years. This is not true segregation since colored boys would attend classes with white boys, and girls with girls. And again the practical question arises as to whether it is financially expedient and sociologically wise to separate the sexes in grammar and high schools. Current educational doctrine seems to indicate that it is not the best policy, although it has been used widely enough to show that it is not a disastrous course of action.

The last set of alternatives open is neither pleasant nor even covered with a cloak of legality. The possibility of activity by the Ku Klux Klan, or some similar type organization, has been suggested, or a combination of economic pressures, not unmixed with dark hints of stronger action, might even be employed to discourage Negro parents from sending their children to "white" schools.

Although Ku Klux Klan activity is patently criminal under state[58] and frequently federal law, the possibility of its use again should not be ignored. The white primary cases provide another excellent parallel in this respect.

[58] Besides the general fact that beatings, floggings, threats of violence, etc., are against the law, several Southern states have passed anti-mask statutes. South Carolina passed such a bill in April of 1951 (The Columbia (S. C.) State, April 11, 1951); and Georgia had done the same thing earlier that year (New York Times, January 20, 1951, 19:1).

After the decisions against exclusion of Negroes from the ballot in 1947 and 1948, the hooded knights began to ride in force in South Carolina. The demonstrations ranged in size from a few night raiders to nine hundred robed Klansmen and thousands of curious spectators. The peak of the activity was reached in the years 1950-1951. During this time there were some forty-three cross burnings and mass gatherings which drew up to four thousand people. There were also seven kidnapping-beatings recorded. Thus, the Ku Klux Klan sprang up while popular reaction against the white primary decisions was at its height and the Klan went into eclipse as public interest waned.

The result of this new found life for the masked riders was, in the final analysis, a victory for civil rights. The states of North and South Carolina with the full assistance of the FBI and federal courts began prosecutions in 1951. Klan activity in 1952-53 took place mostly in court rooms packed with the hooded knights on the receiving end of justice.[59]

Hodding Carter[60] has warned that this type of reaction in a more subtle form is being planned already. "Citizens Councils" are being formed rapidly all over the South. These organizations have one purpose — maintain segregation in the public school system. As the Chairman of the Mississippi Senate Constitution Committee said as he reported the private school amendment out of his committee, his state would try other means of preventing intermingling before destroying the school system. Among those means would be organizations of white people to put "great economic strain on the Negro".[61]

As long as it stops short of actual violence such pressure will be difficult to control. This type of action can succeed

[59] The author has made what he considers to be a thorough study of the Klan revival of this period. Among the sources checked were the archives of two large South Carolina newspapers. Every notice of K.K.K. activity between the years 1935 and 1953 was examined.

[60] Hodding Carter, *A Wave of Terror Threatens the South*, Look, March 22, 1955. The Washington Post and Times-Herald reported (October 20, 1954), that a new surge of Ku Klux Klanism had hit Georgia, Alabama, Mississippi, and Tennessee. In Florida, K.K.K. Titans circulated petitions for the continuation of segregation (New York Times, September 29, 1954, 29:1).

[61] Quoted in The New York Times, September 15, 1954, 17:3.

only if it has the backing of a large segment of public opinion; and if it has that backing then effective state prosecutions become virtually impossible. But, it is probable that Congress would be called on to protect federal rights as declared by the Supreme Court, if they should be flagrantly abused in any area.

The remnants of the Civil Rights Acts could be construed to make such economic pressure a federal crime:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. . . . They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."[62]

However, the difficulties of enforcing this statute are pointed up by Justice Frankfurter's opinion for the Court in the 1951 case of *U. S. v. Williams*[63] reversing a conviction on this count. Justice Frankfurter stated that this particular section covers only that conduct which interferes with rights which arise from the substantive powers of the federal government, the right to vote for example, and does not protect against interference with those rights guaranteed from state violation.

> "All the evidence points to the same conclusion: that §241 applies only to interference with rights which arise from the relation of the victim and the Federal Government, and not to interference by State officers with rights which the Federal Government merely guarantees from abridgement by the States."[64]

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[62] 18 U. S. C. A., Sec. 241 (1950).

[63] 341 U. S. 70 (1951). It should be noted that the Court majority which reversed this conviction of a Miami, Florida, police officer for using *inter alia* a rubber hose, a pistol, a blunt instrument, a sash cord, and a blinding light to extract a confession from four Negroes, was obtained only because Justice Black concurred with Justices Vinson, Frankfurter, Minton, and Jackson on the basis of *res adjudicata*. Since his co-defendants had been acquitted of the substantive charge of depriving a person of his civil rights and it was not claimed that Williams had cooperated with anyone else, Justice Black could not see how a conviction for "conspiracy" could be upheld. Williams could not have conspired with himself. *Dis. op.* 85, 86.

[64] *Ibid*, 81, 82.

## III.

In light of the foregoing, replacing public schools with a private system with or without aid to parents, making it a criminal offense to attend mixed schools, prohibiting litigation against the *status quo*, defending segregation as an exercise of police power, allowing school supervisors to separate the races by assigning pupils to schools in advance, are all believed to be unconstitutional under existing laws. The calling of a national convention to amend the Constitution is a legal possibility but is practically out of the question. There is an outside chance that gerrymandering might perhaps be valid, or be able to avoid Court declaration of invalidity, but its practical consequences make it of dubious effectiveness. Separation by sexes is both legal and possible, but here there can be no segregation, only deflecting of the biological fears of the South. Threats of violence and economic pressure remain against the law — but against a law that can stand only if supported by an intelligent public opinion. Such a recourse may well sap the strength from the Supreme Court's decision, but this alternative would likewise morally debilitate a great people. The price of success would be the destruction of law and order.

The main trends which the "generation of litigation" will take have been analyzed. Cases have been cited which provide adequate precedents to void continued educational segregation. Lawyers who restrict themselves to legal technicalities may find precedents and *obiter dicta* to sustain arguments in favor of the various plans for evasion. However, any such defense overlooks the vital spirit and personal make-up of the Supreme Court. A bench that cut through the veil of "private organizations" to bury the white primary, that forbade labor unions to discriminate against Negroes if such unions utilized federal legal machinery, that held racially restrictive covenants unenforceable, that refused to countenance segregation in public schools — such a group of Judges will hardly provide a ready audience for hair-splitting arguments in favor of *de facto* state discriminatory action accomplished either

by public or by private agents. Indeed the decisions of the 1955 October term display a definite intention of the part of the Court to extend rather than to restrict its ban on segregation.[65]

The conclusion must be that as long as the present Court is fundamentally unchanged in its membership and views, attempts to evade the historic decision of May 17, 1954,[66] will be foredoomed. The Court, or at least its immediate predecessor, has not been noted for its defense of civil liberties in general. Yet one of its most acute critics has admitted that:

> "All in all, the liberal record of the Vinson Court in racial discrimination cases stands out in sharp contrast to the generally anti-libertarian trends of its decisions in other fields. Moreover, a comparison of the 1948 and 1953 restrictive-covenant decisions, as well as the 1944 Steele and 1952 Howard decisions, reveals a progressively developing boldness in the handling of discrimination issues."[67]

The replacement of Justices Vinson and Jackson by Justices Warren and Harlan would seem to have done nothing to move the Court away from its position on racial matters. The tenor of its implementing decision of May, 1955,[68] is one of firm adherence to its desegregation policies. Although leaving some leeway in time and method to those states where the problem is greatest, the Court seems to have assumed that there will be a good faith attempt to comply with the law as it has now been clearly declared.

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[65] Mayor & City Council of Baltimore City v. Dawson, 100 L. ed. 75 (Adv. Sh.), 350 U. S. ... (#232, 1955); Holmes v. City of Atlanta, 100 L. ed. 76 (Adv. Sh.), 350 U. S. ... (#396, 1955). It should be noted that on May 24, 1954, one week after the decision in Brown v. Board of Education, the Supreme Court denied *certiorari* in Holcombe v. Beal, 347 U. S. 974 (1954), and thereby refused to review a Court of Appeals ruling, 193 F. 2d 384 (5th Cir., 1951), that segregation on a municipal golf course was permissible under the Fourteenth Amendment.

[66] *Supra*, n. 1.

[67] C. HERMAN PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT (Chicago: University of Chicago: University of Chicago Press, 1953), 145.

[68] *Supra*, n. 1.