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COMMENTS

DESEGREGATION: ITS IMPLICATIONS IN THE CONSTITUTIONAL, POLITICAL, LEGAL, ECONOMIC AND SOCIOLOGICAL SPHERES OF SOUTHERN LIFE

ARTHUR A. NORTH, S. J.*

The calmness with which the Supreme Court hears and determines controversies; the fact that the Court holds its sessions far from the scene of actual strife; and that its remedies are frequently too late to be of advantage to the aggrieved party may lead the unwary to think that the Court passes its time in a world of unreality.

While it may be true that many of the Court's decisions touch very few people, such decisions as the rejection of the NIRA program,¹ or the support of the Wagner Act² altered almost the entire economy and entered the lives and pocketbooks of almost everyone in the nation. The decision in *Brown v. Board of Education*³ is such a decision. It brings into sharp focus the role of the Supreme Court in the Government of the United States. Its decision in this case reaches out and changes the lives of more than 51,000,000 people in the United States. It may uproot a culture. It may require statutory changes in some states and in the Nation's capitol.⁴ It may lead to a commingling of two races, even though their cultures and mores are quite different. This decision reaches into the private, personal and social lives of every man, woman and child in the South.

Since the purpose of this study is to point up certain aspects of Southern life involved in the *Brown* decision, it seems necessary and helpful to define and limit its scope. It is admitted that in this decision the Court, following its own rule of conduct, decided only the case before it. However, it is understood that this recent decision manifests the Court's thinking in regard to similar cases which may arise.

Furthermore, in a country with a Christian heritage, the moral aspects of discrimination, especially in the form of racial segregation in education, deserve primary consideration. The answers to such questions as, "Is segregation in its very nature contrary to Divine Teaching?", "Is it, as practiced in the South, morally justifiable?", "Is desegregation in the concrete circumstances morally justifiable?" are very important. However, without minimizing the importance of the moral questions involved in the Court's decision, they will not be considered in this exposition. The remarks contained herein will be confined to some

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1. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

2. *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937).

3. 347 U.S. 483 (1954).

4. Guerke, *The Supreme Court Decision and the Separation of Races for School Purposes*, 3 J. Pub. L. 129, 133 (1954).

constitutional, political, legal, economic and sociological effects of the *Brown* decision.

The study of these effects will indicate the extensiveness of the Court's decision and the area of readjustment, which Howard Odum feels, constitutes the most crucial domestic problem in the United States in 1954.⁵ We may add, and for the next several years. The magnitude of the readjustment demands sufficient time to complete the job and in many instances, this will mean gradualism in the transition from segregation to desegregation or to a system not based ". . . solely on . . . race. . . ."⁶ In view of the magnitude of this task ". . . only the zealots see in court decisions the opportunity to integrate the dual school system within the immediate future."⁷

Chief Justice Warren speaking for a unanimous Court, vitally aware of many of the problems which the Court's decision would create in one entire region of the United States said: "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other (tangible) factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."

"We conclude that in the field of public education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal."

"[M]ay this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"⁸

Although the late Justice Jackson in the course of the last December's reargument remarked: "I foresee a generation of litigation if we send it [the Court's decision] back with no standards, and each case has to come here to determine its standard by standard,"⁹ the Court has not as yet sent to the South any definite standards. At the present writing it would seem that the Supreme Court in the use of its equity powers will allow the local courts to judge whether or not in a given locality a prompt and reasonable start has been made in compliance with the Court's order.¹⁰

"There are two ways," the Florida Amicus Curiae Brief in the *Brown* case says, "in which the *Brown* decision may be viewed by history. First, it may be considered as a seismic shock which struck without warning and engulfed a large part of the nation in a tidal wave of hate and inflamed emotions and carried away a public school system which took half a century and billions of dollars to build, or,

"Second, it may be looked upon as a high goal which this Court has fixed for men of good will to strive to attain and which they may attain in due course if

5. Odum, *An Approach to Diagnosis and Dissection of the Problem of Negro Segregation in the Public Schools of the South*, 3 J. Pub. L. 8 (1954).

6. *Brown v. Board of Education*, 347 U.S. at 493.

7. Guaerke, *supra* note 4, at 134.

8. 347 U.S. at 493, 495, 496, n. 13.

9. Davis, *The School Segregation Decision: A Legal Analysis*, 3 J. Pub. L. 88 n. 32 (1954).

10. *Brown v. Board of Education*, 349 U.S. 300 (1954).

rational consideration is given to human frailty and faith is maintained in the slow but sure upward movement of democracy."¹¹

In an effort to convince the Court that it should use its equity powers and that the transition from existing segregated systems to a system not based on color distinction should be well planned, many of the Southern states, accepting the Court's invitation to appear as amici curiae, explained in detail the many problems involved in obeying the Court's decision and the need of sufficient time in making the required transition.¹²

Even though the full effects of the *Brown* decision have not as yet actually prescribed any immediate action for the entire South, the hurricane signals have been raised in the North as well as in the South. The eye of the hurricane centers around the constitutional theories of federalism and dual sovereignty, while on the periphery are clustered lesser storms arising from the political, economic, legal and sociological effects of integration in the South.

CONSTITUTIONAL EFFECTS

Today the United States finds itself once again engaged in the age-old conflict on the nature of the Union. Was it formed, as John Marshall maintained in *Cohens v. Virginia*,¹³ *McCulloch v. Maryland*,¹⁴ and in *Barron v. Baltimore*,¹⁵ by the people of the United States or was Taney correct in thinking the Union was formed by the States?¹⁶ Was Lincoln thinking constitutionally when he said that ". . . the Union is older than the States"?¹⁷ and how does this theory square with that contained in the expression ". . . an indestructible union of indestructible states"?¹⁸

If the nation in this constitutional crisis attempts to avoid a head-on collision by a solution on the level of theory, will it find an easier solution in the realm of practical politics? What credence can be placed in the statement of an eminent historian of the Court: "However the Court may interpret the provi-

11. Brief for the State of Florida as Amicus Curiae, p. 97, *Brown v. Board of Education*, 349 U.S. 300 (1954).

12. Briefs Amici Curiae of Arkansas, North Carolina, Florida, Virginia, Texas, Maryland, and the United States. The briefs studied may be open to a charge of lack of objectivity in several ways since they are the product of men of the states concerned. Much of the data and conclusions are based on material gathered from questionnaires sent to selected individuals and groups. Only one state (Florida) employed a team of competent sociologists to make its investigation. All states, however, did consult white and Negro members of the teaching profession. Furthermore, the educational statistics used in the briefs were taken from the Departments of Education of the respective states. This material had not been gathered solely for use in briefs.

13. 19 U.S. (6 Wheat.) 264 (1821).

14. 17 U.S. (4 Wheat.) 316 (1819).

15. 32 U.S. (7 Pet.) 242 (1833). Recent critical studies have brought to light new insight on Marshall's concept of Federalism. His views on this subject do not seem to be identical in the last two cases mentioned. See Crosskey, *Politics and the Constitution in the History of the United States* (1953).

16. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

17. Abraham Lincoln, *Collected Works*, vol. 4, p. 265 (Basler ed. 1953).

18. *Texas v. White*, 74 U.S. (7 Wall.) 725 (1868).

sions of the Constitution, it is still the Constitution which is the law and not the decision of the Court,"¹⁹ when everyone knows the opinion of Justice Hughes, who said: ". . . We are under a Constitution but the Constitution is what the judges say it is."²⁰

Furthermore, since the decision of the Court on May 17, 1954, seems to run counter to a long line of precedents, beginning with *Plessy v. Ferguson*,²¹ the constitutional principle of judicial review has become involved in the recurring problem of the mutability of the original instrument. Although the current writings from the South do not directly challenge the views of the late Justice Holmes: "I do not think the United States would come to an end if we [the Court] lost our power to declare an act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several States,"²² yet several of the briefs filed in the *Brown* case have called in question the use of judicial review in the light of the historical meaning and understanding of the fourteenth amendment. What is the value of the opinions of those who framed and the states which ratified that amendment? Did Chief Justice Warren ignore or reject history, when speaking for a unanimous court, he said: "In approaching this problem, [the effect of segregation on education] we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."²³

Justice Sutherland, commenting on the statement "the constitution must be considered in the light of the present," seems to have had a different opinion. He said: "If by this is meant that the constitution is made up of living words which apply to every new condition which they include, the statement is quite true. But to say that . . . the words of the Constitution mean today what they did not mean when written . . . that they do not apply to a situation now to which they would have applied then . . . is to rob that instrument of the essential element. . . ."²⁴

Only the unsophisticated would deny that the judges by their decisions legislate and only the idealist would reject Taney's statement: "So long . . . as this Constitution shall endure, this tribunal [Supreme Court] must exist with it, deciding in the peaceful forms of judicial proceedings, the angry and irritating controversies between sovereignties. . . ."²⁵ However, in the light of the Court's

19. 2 Warren, *The Supreme Court in United States History* 748-49 (new & revised ed. 1926).

20. Quoted in *The Constitution of United States* (Annotated) xxvii (Corwin ed. 1953).

21. 163 U.S. 537 (1896).

22. Quoted in *Encyclopedia Social Sciences*, vol. 14, p. 475 (1934).

23. 347 U.S. at 492. It is interesting to note that while Chief Justice Warren and the Court thought the exhaustive consideration of the meaning of the fourteenth amendment in Congress and ratification by the states in regard to existing racial segregation inconclusive (347 U.S. at 489) the appellants, in their brief on reargument (p. 186) thought it was ". . . conclusive in proscribing all racial distinctions in law, including segregation in public schools."

24. *Westcoast Hotel v. Parrish*, 300 U.S. 379, 402-03 (1937) (dissenting opinion).

25. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 520-21 (1858).

decision in the *Brown* case is it fair to ask if the constitutional lines between national and state spheres of jurisdiction have not been blurred? Now that the states have been restricted in regard to the manner in which their local communities may provide free public education, has the federal government usurped power in a sphere formerly considered to be reserved to the states by the tenth amendment?

POLITICAL AND LEGAL EFFECTS

In the event that "separate but equal" is completely deprived of any legal standing, anomalous political and legal situations will arise in the Southern states where segregation on a racial basis was constitutionally mandatory.²⁶ When the Supreme Court declares a state law or an article of a state constitution, unconstitutional, it merely states that such an article or law is null and void. It does not repeal them. Repeal action can only be taken by the power, constituent or legislative, which made them. The states, therefore, may leave intact their constitutions even though one or more of its articles has been declared to be in violation of some particular provision in the Federal Constitution. No court, however, not even a state court, can take legal cognizance of the stricken articles. However, although the states may fail or refuse to alter their constitutions, in many instances they will be required to pass superseding legislation. This will mean, that for a time at least, there will be state statutes, city ordinances and community regulations contrary to the state constitutions as written.

If no changes in the state constitutions are necessitated by the Court's opinion in the *Brown* case, why is it necessary for the Southern states to enact superseding legislation? The answer to this question is not complicated; the state constitutions merely recite state general principles leaving their implementation to the various branches of state and local government. The Constitution of Florida, for example, states "The Legislature shall provide for a uniform system of public free schools and shall provide for the liberal maintenance of the same."²⁷ "White and colored children shall not be taught in the same school, but impartial provisions shall be made for both."²⁸ Here it will be noticed that the legislature is entrusted by the State Constitution with the duty of establishing, maintaining and executing a uniform system of segregated but impartial education. The state legislature in its turn also enacts general as well as specific statutes leaving their implementation or their execution to the state superintendent and to the state and local boards of education. The public school, since it is an institution of society is, consequently, the creature of its laws. The public school cannot act without law. Laws control the actions of superintendents, principals and teachers. Laws control the expenditure of money, the dis-

26. Fifteen states will require constitutional amendments: Ala. Const. art. XIV, § 256; Del. Const. art. X, § 2; Fla. Const. art. XII, § 12; Ga. Const. art. VIII, § 1; Ky. Const. § 187; La. Const. art. XII, § 1; Miss. Const. art. VIII, § 207; Mo. Const. art. IX, § 1(a); N.C. Const. art. IX, § 2; Okla. Const. art. XIII, § 3; S.C. Const. art. XI, § 7; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, §§ 7, 14; Va. Const. art. IX, § 8; W. Va. Const. art. XII, § 8. Arkansas, the District of Columbia, and Maryland required segregation by statute.

27. Fla. Const. art. XII, § 1.

28. Fla. Const. art. XII, § 12.

tricting of schools, their building, and admission and transfer of students. All officials operate under some form of state law, city ordinances, or local regulation. If any of these laws were based on racial distinctions, e.g., admission or transfer of students and school districting, they are now in the light of the *Brown* case, unconstitutional. Since the officials cannot function in a vacuum, new laws or ordinances are required, if there is to be a uniform system of education throughout the state. The Supreme Court in the *Brown* case²⁹ recognized this difficulty by allowing time for the changes in statute law or city ordinances which would be necessary to bring them in harmony with its decision.

EDUCATIONAL AND ECONOMIC EFFECTS

Schools are financed by state appropriations and local taxes which are allocated by law to the various districts for the whites and Negroes. Bonds are issued by the state and counties on the same basis. If the people of a local community refuse to integrate education will they be willing to tax themselves for integrated schools? Failure to adequately finance education will seriously impair the public schools. This failure would seem to be even more detrimental to public education than the transfer of students by parents from public to private schools. However, such action could only be taken by parents in the upper economic brackets and consequently, the transfers would not be too numerous. A more serious threat to public school education is revealed in the various states' attempt to abolish public schools, or to finance scholarships to private schools. However, the public schools are too close to the people to abolish them and it is doubtful that the state's financing of private schools would avoid the scrutiny and condemnation of the Supreme Court.³⁰

By law many of the Southern states have set up scholarship awards apportioning them among the whites and the Negroes. By law or local ordinance Negroes compete for these with Negroes and whites with whites. As a result of this type of competition the Negroes will always receive many of these scholarships. Since, however, the very basis of this type of competition was by law racial, this law will probably have to be changed. What will happen to the many scholarships that used to be awarded to Negroes?³¹ Without these scholarships fewer Negroes will be able to continue their education. Will integration condemn the Negro to be "drawers of water and hewers of wood?"

While many educators even in the South have felt that the continuance of the dual system could lead only to bankruptcy or to gross inequalities in physical and educational facilities, the immediate abolition of this system especially in certain areas and in certain states will cause added financial loss in many ways.³²

29. 349 U.S. at 300. See Brief for the State of Oklahoma as Amicus Curiae, p. 3; Brief for the United States as Amicus Curiae, p. 10, *Brown v. Board of Education*, 349 U.S. 294 (1954).

30. The Southern states would only underwrite the private schools on the condition that they would maintain segregation. Such procedure would appear to be somewhat analogous to the action declared unconstitutional in *Smith v. Allwright*, 321 U.S. 649 (1944). See also *LeFlar & Davis, Segregation in Public Schools*, 67 *Harv. L. Rev.* 377 (1953).

31. See *N.Y. Times*, March 13, 1956, p. S-4, col. 8.

32. Swanson, *Some Economic Effects of the Supreme Court Decision*, 3 *J. Pub. L.* 122 (1954).

ECONOMIC AND SOCIOLOGICAL EFFECTS

What will happen to the 80,000 Negro teachers, recreation officers, coaches and physical education officers in the South? Some states in the South do not have a system of tenure for teachers in the public schools.³³ For years one of the few avenues open for the Negro to achieve status and social position has been the teaching profession. Negroes had been encouraged by scholarships and other financial aids to enter the profession. If integration thins the ranks of the Negro teacher the loss to him and to his race will be severe both economically and socially.

Recent studies on integration effected in Kentucky, Delaware, New Jersey, Maryland, and in communities at the cross way, like Cairo, Illinois, Evansville, Indiana, and St. Louis, Missouri, do not manifest any loss in the number of Negro teachers. However, there are indications of such a loss. The possibility of such a loss seems greater in states which do not provide for teachers' tenure.

An illustration of what happens in the North is shown by: "The experience of Jeffersonville, Indiana. The town lies in the Southern part of the State, just across the Ohio River from Kentucky. A great deal of Southern tradition and many Southern customs have reached across the river. Jeffersonville is just completing desegregation of its schools. There have been few unhappy incidents. But there has been a greater problem with teachers than with the children in the schools. There were 16 Negro teachers in Jeffersonville when desegregation was started in 1948. By 1951 the number had dwindled to 11 as school enrollments were consolidated. For the school year starting in autumn, 1951, only three Negro teachers were retained. They had achieved permanent tenure under the State law, and could be discharged for cause only."³⁴

While many Southern states were well along the way to closing the gap in the salaries and qualification between white and Negro teachers,³⁵ each state was by law required to keep two lists, one for white, the other for Negro, qualified teachers. If and when these lists become one, where will the Negro teacher stand in regard to appointment to vacancies? Usually the superintendent is given some discretion in regard to the top four or five teachers on the list.

SOCIOLOGICAL AND EDUCATIONAL EFFECTS

Integration in any real sense of the word will involve not only a racially mixed student body but also a mixed faculty. White teachers will be assigned to teach white as well as Negro students. Negro teachers will likewise be assigned to teach a group of white and Negro students.

Unless all the Negro superintendents, supervisors, and principals are unceremoniously dismissed from the system, they will in many instances have

33. Brief for the State of Texas as Amicus Curiae, p. 11, n. 4, *Brown v. Board of Education*, 349 U.S. 294 (1954). Two border states which have begun integration have dropped Negro teachers. *N.Y. Times*, March 13, 1956, p. S-2, col. 5; p. S-3, cols. 3, 5.

34. *U.S. News & World Report*, Aug. 27, 1954, p. 35.

35. Brief for the State of Maryland as Amicus Curiae, p. 33; Brief for the State of North Carolina as Amicus Curiae, p. 34; Brief for the State of Florida as Amicus Curiae, p. 194, *Brown v. Board of Education*, 349 U.S. 294 (1954). See also Guerke, *supra* note 4, at 140.

charge and direction of a mixed or segregated faculty. Will the Southern white accept this leadership or will he leave the profession? Will he remain in the profession and oppose such leadership in every way possible? This would disrupt public school administration and eventually prove detrimental to public education.

There are many who feel that the merging of Negro and white students in the same class in large numbers will introduce into the school system of the South serious and irreparable harm. It may tend to lower standards in many of the integrated schools, at least in the beginning.³⁶ There is rather strong evidence to support this opinion. Since 1949, the department of education in Florida³⁷ has run a battery of five tests for all twelfth graders in the state. The results of this testing program reveal that fifty percent of the Negroes rank no higher than the lowest tenth percentile of the whites. Furthermore, on the general ability test the fiftieth percentile on the white scale corresponds with the ninety-fifth percentile of the Negro. Perhaps it is an indication that the education of the Negro was not equal though separate. Whatever the explanation may be, the merging of these students in the same class will effect standards.

Throughout the State of North Carolina its testing program manifested that among high school students one white child out of every six was retarded as compared with one Negro child out of every three.³⁸ Are these facts offset by studies made in the North or border states on the psychological and educational consequences of desegregation? For example, a research team of the Lafargue clinic made a study in 1953 in Delaware. They found that: "(1) the most positive conclusion is that Negro children included in the study who changed from segregated to integrated schools made distinctly better academic progress than they had shown before. (2) Negro and non-Negro children adjusted on the whole to the new situation in a constructive and friendly manner. (3) There was an absence of disturbing incidents. The dire forebodings of adults did not materialize."³⁹ In a study of Arizona and California after integration when the Negro pupils were asked to evaluate the integrated program ". . . they placed emphasis upon the importance of the treatment accorded them. They said the general atmosphere was not comfortable in the mixed school and that some of the faculty members showed prejudice. Pupils said that practically no Negro student participated in the activity program of the school."⁴⁰

If segregation induces in Negro children an inferiority complex both in regard to ability and social status what will happen to him and the white student in the South when they mix in scholastic competition in the same classroom? Will the inferiority of the Negro student be increased? Will this discourage him from continuance in school? Will the white student receive an inferior educa-

36. N.Y. Times, March 13, 1956, p. S-2, cols. 1-2; p. S-4, cols. 6-7.

37. Brief for the State of Florida as Amicus Curiae, pp. 19, 190, *Brown v. Board of Education*, 349 U.S. 294 (1954). See also Holley, *Education and the Segregation Issue* 15 (1955).

38. Brief for the State of North Carolina as Amicus Curiae, pp. 38-40, *Brown v. Board of Education*, 349 U.S. 294 (1954). See also N.Y. Times, March 13, 1956, p. S-4, cols. 6-7.

39. Guaerke, *supra* note 4, at 142.

40. *Ibid.*

tion? Will he suffer an educational or psychological trauma by being forced by law to attend classes with the Negro?⁴¹

One may expect, at least in the beginning of an integrated program, that the Negro will accuse the white teacher of favoritism in marks and that the white student will charge the Negro teacher with inferior teaching. But if the Negro teacher cannot maintain order among the white students or is accused of inferior teaching, will he continue in his job? This becomes a very serious problem, especially if white students refuse to be disciplined by or take correction from Negro teachers.

In 1950, Elmo Roper measured the attitude of both the white and the Negro Southerners on segregation in the public schools. The results showed that only 17.1 percent of those questioned wished at that time to end segregation.⁴²

Perhaps the reason for this attitude may be found in the fact that desegregation in education opens the doors to social equality. If peaceful coexistence of large numbers of Negro and white students were universally achieved, daily classroom attendance, mixed athletics, traveling and eating together, association in school clubs for dramatics and debates, at socials and on the dance floor could easily lead to a destruction of the barriers the whites have erected, as they believe, for their protection. No doubt, too, many of the Southern whites see in this close association free occasions for willing or forced miscegenation.

Regardless of what the facts may eventually be, these are some of the present fears of the white South. These fears are likewise alluded to in all the recent polls and studies made in the South and reported in the various briefs of the *Amici Curiae* presented to the Supreme Court at the reargument of the *Brown* case.

While the saner elements of the South do not predict riots and bloodshed on a large scale if integration in education is ordered by the Court, there is serious evidence to the effect that in certain areas it may be very difficult to maintain law and order. Perhaps one of the most disconcerting bits of evidence is found in the fact that the police officers and sheriffs in several of the states have in large numbers stated that they do not believe they will be able to keep order if trouble starts.

Again, most of the whites seem quite convinced that the Negro teacher will not be able to maintain discipline in the classroom and that the white student will not respect their scholastic ability. While many of the whites may be willing to allow integration in schools where only a few Negroes would be in attendance, the opposition seems to mount as the number of Negro students approaches that of the white.⁴³

Although in a few regions of the South ominous signs have appeared,⁴⁴ the Southern states have for the most part concentrated their action on legal means to defeat the *Brown* decision. Several states have resorted to the doctrine of

41. Guaerke, *supra* note 4, at 132.

42. Dabney, *Southern Crisis: The Segregation Decision*, *Saturday Evening Post*, Nov. 8, 1952, p. 40. See also Guaerke, *supra* note 4, at 143 n. 59.

43. Hill, *Impact of the Supreme Court Decision on Southern Communities*, 3 *J. Pub. L.* 151-53 (1954).

44. *Time*, Feb. 20, 1956, p. 40; *N.Y. Times*, March 13, 1956, p. S-8, col. 2.