THE IMPACT OF BROWN VS. BOARD OF EDUCATION

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As a nation, we spend much too little on education, much too much on preparation for war. Yet it is education that helps us to become wise and civilized, to speed us on our way toward the humane world of the future. It is war that does most to degrade us, to revive the savage in man.

Nowhere is there so little wastage in government as in the money spent on education, nor so much wastage as in the money spent on preparation for war. Yet we are parsimonious about education and complain of its costs, while we are extravagent in our preparation for war yet make little complaint about its expenses, so many times in excess of the total cost of education.

When the United States Supreme Court turned its attention to education in *Brown v. Board of Education*[1], it recognized the primary importance of education in mankind's greatest task, the civilization of man. The *Brown* decisions came upon us in the manner of a great earthquake. There were premonitory tremors and quakes, indicating that a major legal quake was impending. Then came the *Brown* case which destroyed *Plessy v. Ferguson*[2] and threatened the massive legal structure erected on a "separate but equal" foundation. Just as with a major earthquake, the *Brown* case has been followed by a series of minor legal "quakes" which, taken collectively, have been quite destructive of the earlier decisions influenced by racial prejudices and thought-limitations.

I. THE BACKGROUND OF BROWN V. BOARD OF EDUCATION

In *Plessy v. Ferguson*,[3] the Supreme Court upheld a Louisiana statute requiring "equal but separate railway seating for the white and

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1 347 U.S. 483 (1953) and 349 U.S. 294 (1955).

2 163 U.S. 537 (1896).

3 *Ibid.*

colored races."[4] The majority opinion, in justifying railroad segregation, relied heavily on the existence of the then unchallenged federal and state laws requiring racially separated school facilities. Justice Harlan sounded a prophetic dissent:[5]

> In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case. . . . The present decision, it may well be apprehended, will not stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficient purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution. . . . The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone, or atone for the wrong this day done.

Some of those states which applied the "separate but equal" mandate of *Plessy v. Ferguson* to education, were unwilling to build and operate separate law schools for Negro students. Instead, several southern states passed legislation providing for the payment, with state funds, of a Negro student's tuition at out of state law schools. The first judicial tremors preceding the *Brown* case arose in this context.

In 1938, in an opinion by Chief Justice Hughes, the Court held that Missouri's offer to pay out of state tuition for a Negro was not the equality required by the Fourteenth Amendment.[6] Equal facilities must be furnished within the borders of the state.

Ten years later the court considered the case of a Negro woman who had applied for admission to the college of law of the University of Oklahoma, and had been denied admission, solely on the ground of her race. Because Oklahoma operated no other law school that could maintain the fiction of "separate but equal" facilities for Negroes, the Supreme Court found it necessary to reverse the decisions of the Oklahoma courts in excluding this plaintiff from its school of law, and to hold that she was entitled to be admitted as a student in "the only institution for legal education maintained by the State."[7]

The same issue was raised with reference to the University of Texas in *Sweatt v. Painter*.[8] When the Negro applicant for admission

[4] LA. ACTS 1890, No. 111, p. 152.

[5] 163 U.S. at 559-60, 562.

[6] Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1948).

[7] Sipuel v. Univ. of Oklahoma, 332 U.S. 631 (1948).

[8] 339 U.S. 629 (1950).

to the school of law sought a writ of mandate, the Texas trial court obligingly granted to the state a stay of six months to give Texas the opportunity to set up a law school exclusively for Negro students. Overnight, as it were, this law school was brought into being for this one student, plus such others as might possibly be found. The trial judge thereupon found that the existence of this shadow law school would furnish facilities "substantially equivalent" to those offered white students by the law school of the University of Texas, and denied the application for the writ.

In reversing the decisions of the Texas courts on this point, the Supreme Court was at pains to demonstrate the decided inferiority of the law school thus hastily brought into existence, on paper, for Negro students only. In so doing, the Supreme Court distinguished the *Plessy* case without re-examining its soundness.

At the same term of court, the Supreme Court again reversed the supreme court of Oklahoma in *McLaurin v. Oklahoma.*[9] In this case, a Negro student, after having been admitted to graduate instruction in the state university, as one of the results of the *Gaines* and *Sipuel* decisions, was required, solely because of his race, to occupy a seat in a row in the classroom specified for Negro students only, at a designated table in the library, and at a special table in the cafeteria. This was in obedience to the mandate of the legislature which required that the instruction of colored students "at its institutions of higher education, should be conducted on a segregated basis."[10] This language was, in effect, a challenge to the Supreme Court, which met the challenge by holding that:[11]

> State-imposed restrictions which produce such inequalities cannot be sustained. . . . Appellant, having been admitted to a state-supported graduate school must receive the same treatment at the hands of the state as students of other races.

It will be noted that the Supreme Court caused its opinion in the last three of these cases to be rendered by Chief Justice Vinson, a southerner from Kentucky, concurred in by Justice Reed, also of Kentucky, and Justice Black of Alabama, as well as by all the other members of that Court. In so acting unanimously and speaking through the Chief Justice in these crucially important racial decisions, the Supreme Court created a precedent which it continued to follow, not only in the *Brown* case, but also in the more important racial decisions following *Brown.*

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[9] *Id.* at 637.
[10] 70 OKLA. STAT. ANNO. 455-57 (1950).
[11] *Supra* note 8.

These cases are but a few of the many coming before the federal courts over the years that disclosed the flagrant and callous disregard of the legal intent of the phrase, "separate but equal." It had gone so far that any separate school for Negroes, no matter how unequal and inadequate it might be, was blandly accepted as a compliance with this provision.

Anthony Lewis and the New York Times have compiled some revealing figures:[12]

> In 1915 South Carolina spent $23.76 on the white child in public school, $2.91 on the average Negro child. As late as 1931 six southeastern states (Alabama, Arkansas, Florida, Georgia, North and South Carolina) spent less than a third as much per Negro public-school pupil as per white child. Ten years later spending for the Negro had risen only to forty-four percent of the white figure. At the time of the 1954 decision the South as a whole was spending $165 a year for the average white pupil, $115 for the Negro.

It is clear that this deliberate debasement of the true meaning of "separate but equal" finally wore out the patience of the Supreme Court and compelled it, in the *Brown* case, to abolish the "separate but equal" doctrine.

In the first of the two *Brown* decisions, decided May 17, 1954, overruling the *Plessy* case, the Supreme Court stated that the "separate but equal" doctrine "has no place" in the field of public education.[13] Citing psychological and sociological authorities, the Court noted:[14]

> To separate [Negroes] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . .
> Separate educational facilities are inherently unequal.

The decision restored to its docket the four appeals from Kansas, South Carolina, Virginia and Delaware, consolidated for argument and decision in the *Brown* case, and invited counsel for the parties and states involved, as well as counsel from other states, to present further argument as to the formulation of the decrees in each of these cases.

The vital importance of the issue involved, and the realization among many lawyers that the *Plessy* case was in danger brought into the record a number of briefs of amici curiae. This invitation spurred a number of other states to file lengthy additional briefs, so that

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[12] Lewis and The New York Times, PORTRAIT OF A DECADE 20, (Random House 1964).

[13] 347 U.S. at 495.

[14] *Id.* at 494.

every phase of the question involved was presented to the Court at great, perhaps inordinate length.

It was in the second opinion of the *Brown* case, rendered on May 31, 1955, that the Supreme Court declared that the several states should "make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling."[15] The four cases were then remanded to the lower courts,[16]

> to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.

It is apparent that the use of the imprecise phrase, "with all deliberate speed," was designedly chosen by the Court to enable the lower courts to determine, case by case, what was in good faith a start "toward full compliance," and what delay in some cases might be required.

For ninety years after the Emancipation Proclamation, followed by the adoption of the Fourteenth Amendment, the Negro race had made little advancement. Second-class education resulted in second-class citizenship. In his *Radicalism in America*, Sidney Lens accurately appraised this period in these terms: "For almost a century, the promise of racial equality unequivocally written into the Constitution after the Civil War was a dead letter."[17] But with the publication of the two opinions in the *Brown* case, the door was at last flung open by which Negroes in the United States might have an education on substantially equal terms with their white brethren. Not at once, however, for the prevailing prejudices of many generations of men die slowly.

Now that a dozen years have passed since the *Brown* decisions were announced, let us look at their impact on this tragic and disgraceful prejudice, as registered in the later decisions of the United States Supreme Court. It would take us too far afield to completely trace its impact in the state and federal courts; for the *Brown* case has been cited in upwards of 300 cases in the federal courts, and in a great many of our state court opinions as well. It has been cited with reluctant respect in all of the state supreme courts of the South, where the problem of desegregation is most acute and most difficult, save only in Mississippi. The supreme court of that state has not yet sullied its pages with mention of *Brown v. Board of Education.*

[15] 349 U.S. at 300.

[16] *Id.* at 301.

[17] Lens, RADICALISM IN AMERICA, p. 351 (1966).

II. IMPLEMENTATION AND EVASION

In the years immediately following *Brown*, the court was presented with a number of cases in which certain states sought to nullify or at least delay the effect of the *Brown* decisions.

1. ARKANSAS RESISTANCE

The gravest challenge to the *Brown* decisions arose in Arkansas when the people of Arkansas amended their state constitution to command the General Assembly to oppose "in every Constitutional manner the Un-constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court."[18] To say the least, for Arkansas to denounce the *Brown* decisions by its constitutional amendment as "unconstitutional" was hardly a tactful preparation for the test before the Supreme Court that was bound to follow.

At the beginning of the 1957-58 school year a small group of Negro students gained the consent of the Central High School of Little Rock to enroll in the theretofore all-white high school of 2,000 students. But they were met with drastic opposing action by Governor Faubus, who sent units of the Arkansas National Guard to the high school and placed the school grounds "off-limits" to Negro students. Three weeks later, President Eisenhower dispatched federal troops to this high school and the admission of these students was effected. Thereafter, federalized National Guardsmen protected the attendance of these Negro students for the remainder of the school year.

In the meantime the school board and the superintendent of schools of Little Rock filed a petition in the United States district court seeking postponement of desegregation for a period of two and one-half years. The United States district court approved this petition,[19] but the United States Court of Appeals for the Eighth Circuit reversed this decision.[20] On certiorari, the Supreme Court affirmed this denial of suspension in *Cooper v Aaron*.[21] In so doing, the Supreme Court stated that this case "raises questions of the highest importance to the maintenance of our federal system of government."[22] The court further declared that the federal judiciary is supreme in the exposition of the law of the federal constitution, and that the principle of desegregation of public schools is a permanent and in-

[18] ARK. CONST. Amend. 44 (1956).
[19] Aaron v. Cooper, 163 F. Supp. 13 (E.D. Ark. 1958).
[20] Aaron v. Cooper, 257 F.2d 33 (8th Cir. 1958).
[21] 358 U.S. 1 (1958).
[22] *Id.* at 4.

dispensable feature of the constitutional system of the United States.

This case was so vehemently argued on both sides that the Supreme Court took the unique step of having its opinion individually adopted by each of its nine members. Further, it pointed out that the original *Brown* decisions were unanimous, that since these decisions, three of the members of the Supreme Court had been replaced, and these three new members were also wholly in agreement with the *Brown* decisions.[23] In other words, the Supreme Court realized that the time had come to demonstrate its unchangeable determination to maintain its earlier opinions, and to not give an inch respecting them.

The same day that the Supreme Court announced its decision, Governor Faubus issued a proclamation closing the Little Rock schools "in order to maintain peace against . . . impending domestic violence."[24] About the same time plans were announced for the school board to lease the school facilities to a private corporation. In *Aaron v. Cooper*[25] six of the original Negro plaintiffs successfully enjoined this abortive effort to avoid desegregation.

Arkansas was unable to offer further legal resistance to desegregation. The triumph of the Supreme Court over the insolence of this Arkansas constitutional amendment was complete. But the heroes of this highly inflamed dispute were the eight Negro students who, under great adverse pressure, quietly maintained their right to attend this high school during this long period of great tension created by the presence of troops, both state and federal.

2. VIRGINIA EVASION

The state of Virginia was not so crude in its opposition as Arkansas, but no less bitter and determined in its search for a way, if possible, to thwart the effect of the *Brown* decisions. Instead of using troops to oppose the admission of Negro students to its public schools, the Virginia legislature sought to deprive its colored students of the support of the increasing number of men and organizations that gave moral support to Negroes who would seek education in what had been schools devoted exclusively to the education of white students.

Accordingly, the Virginia General Assembly adopted a resolution attacking the *Brown* decision, pledging that the legislature would take all constitutionally available measures to resist desegregation in the public schools.[26] As a first step, it then set up a "Committee on

[23] The new members of the Court were Justices Harlan, Brennan and Whittaker.
[24] Act No. 4 (a) of the Second Extraordinary Session of the 61st General Assembly, 1958.
[25] 261 F.2d 97 (8th Cir. 1958).
[26] VA. ACTS. 1956, S.J. Res. 3.

Law Reform and Racial Activity," which went into action by summoning David M. Scull to appear before the committee to answer some thirty-one questions which it propounded, inquiring into his supposedly objectionable activities in support of desegregation. Scull had been a leader in the Parent-Teachers Association of Northern Virginia, and in the National Association for the Advancement of Colored People and was conspicuously active in his support of desegregation.

Scull, evidently being shrewdly advised by able counsel, inquired as to the specific subject of the committee's activities, what warrant there might be for such an inquiry, so that he might judge which, if any, of these inquiries were the subject of pertinent and proper legislative investigation.[27] The Committee's response to this inquiry was both vague and contradictory, whereupon Scull declined to answer them. Scull was convicted of contempt of the committee and his conviction was affirmed by the Virginia supreme court of appeals. On appeal, the United States Supreme Court, in *Scull v. Virginia*[28] held that the Committee's investigation "touched on an area of speech, press and association of vital public importance." The Court further held that such an area of individual liberty cannot be invaded unless a compelling state interest is clearly shown. It unanimously set aside the conviction of contempt.

Virginia's next step was to pass laws bringing within their barratry statutes all conduct of attorneys, paid by an organization such as the N.A.A.C.P., which represented, without fee, litigants involved in desegregation.[29] Arkansas, Georgia, Florida, Mississippi, South Carolina and Tennessee enacted similar statutes.[30] In *N.A.A.C.P. v. Button*,[31] these statutes were found to be "part of the general plan of massive resistance to the integration of public schools of the state."[32] Therefore, to give further support to the *Brown* decisions, the Supreme Court held these statutes to be unconstitutional, saying "a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."[33]

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[27] The limitations on legislative investigatory power are developed in Watkins v. U.S., 354 U.S. 178 (1957) and Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[28] 359 U.S. 344 (1959).

[29] CODE OF VIRGINIA 1950, §§ 54-74, 54-78, 54-79 as amended by ACTS OF 1956, Ex. Sess., c. 33 (Repl. Vol. 1958).

[30] ARK. STAT. ANN. 1947 (Cum. Supp. 1961) §§ 41.703-13; GA. CODE ANN. 1953 (Cum. Supp. 1961) §§ 26-4701, 26-4703; FLA. STAT. ANN. 1944 (Cum. Supp. 1962) §§ 877.01-02; MISS. CODE ANN. 1956, §§ 2049.01-08; S. C. CODE 1952 (Cum. Supp. 1960) §§ 56.147-147-6; TENN. CODE ANN. 1956 (Cum. Supp. 1962) §§ 39.3405-10.

[31] 371 U.S. 415 (1963).

[32] *Id.* at 446, Douglas, J., concurring.

[33] *Id.* at 439.

So called "massive resistance" laws were enacted by the Virginia legislature in 1956.[34] These laws authorized the governor to close any public school which integrated its student body. White plaintiffs secured an injunction restraining closure of the Norfolk, Virginia schools in *James v. Almond.*[35]

Foiled in these legislative attempts, Virginia began, reluctantly and as slowly as possible, to admit a minimum number of Negro students into its white public schools in fifty-eight of its fifty-nine counties. But in Prince Edward County, the public schools remained closed while the white children were educated in so-called "private schools" which received financial support from the state. When the action of the Prince Edward county school board came before the Supreme Court, in *Griffin v. School Board of Prince Edward County,*[36] that Court summarily countered by authorizing the United States district court[37]

> to prevent further discrimination, [to] require the supervisors to exercise the power that is theirs, to levy taxes, to raise funds adequate to reopen, operate and maintain without racial discrimination a public school system . . . like that operated in other counties in Virginia.

3. TENNESSEE'S TRANSFER PLAN

The plan of protecting white students from contact with Negro students, adopted in Tennessee schools, provided that any student, upon request, would be permitted, solely on the basis of his own race and the racial composition of the school to which he was assigned, to transfer to another school.[38] When challenged, this transfer provision was sustained by the Tennessee courts, but their holding was reversed in *Goss v. Board of Education.*[39] The Supreme Court held that[40]

> The transfer plans being based solely on racial factors which, under their terms, inevitably lead toward segregation of the students by race, we conclude that they run counter to the admonition of *Brown v. Board of Education.*

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[34] CODE OF VIRGINIA 1950, §§ 22-188.3-188.15, as amended by the acts of assembly, Ex. Sess., 1956, and acts of assembly, 1958.

[35] 170 F. Supp. 331 (E.D. Va. 1959), *appeal dismissed,* 359 U.S. 1006 (1959).

[36] 377 U.S. 218 (1964).

[37] *Id.* at 233.

[38] These local ordinances are set forth in Goss v. Board of Education, 373 U.S. 683, 685 (1963).

[39] 373 U.S. 683 (1963).

[40] *Id.* at 684-85.

4. SEGREGATION IN NORTHERN SCHOOLS

Not all litigation arose in southern states. Racial discrimination in the public schools of the District of Columbia was examined in *Bolling v. Sharpe*.[41] Because the District of Columbia is under the direct administration of the federal government, the Fourteenth Amendment, directed to the states, could have no application. But the Supreme Court held that the Fifth Amendment to the Constitution, which requires that no person be deprived by the federal government of liberty without due process of law, applied here to the same extent as "the equal protection of the laws" prescribed by the Fourteenth Amendment. The Supreme Court acknowledged that "the equal protection of the laws" in the Fourteenth Amendment "is a more explicit safeguard of prohibited unfairness" than the due process of law clause of the Fifth Amendment.[42] But the Court went on to hold that "discrimination may be so unjustifiable as to be violative of due process."[43] Therefore, segregation imposed on Negro children of the District of Columbia was "a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."[44]

It is doubtful if the states that adopted the Fifth Amendment had in mind other than criminal prosecutions when they said in this Amendment "nor shall any person . . . be deprived of life, liberty, or property without due process of law."[45]

To extend this clause to the protection of the liberty of Negro children to attend the same schools as children of other races indicates how much in earnest the Supreme Court is in its determination to strike down segregation in public education wherever it may exist.

Two years after the second of the *Brown* decisions, the Supreme Court found it necessary to decide the case of *Commonwealth of Pennsylvania v. The City of Philadelphia*.[46] Here, Stephen Girard, by his will probated in 1831, left a fund in trust for the operation of a "college" for the education of as many poor, white male orphans between the ages of six and ten years as the income should be adequate to maintain. The will named the city of Philadelphia as trustee to administer the fund, and the city, in turn, selected a board to function for it. The Negro orphans, qualified for admission in all

41 347 U.S. 497 (1954).
42 *Id.* at 499.
43 *Ibid.*
44 *Id.* at 500.
45 U. S. CONST., Amend. V.
46 353 U.S. 230 (1957). *See also* Evans v. Newton, 382 U.S. 296 (1966).

respects save color, applied for admission in 1955, and were rejected on the ground of their color. The Supreme Court reversed the Pennsylvania courts and held that the board which operated the college was an agency of the state of Pennsylvania. Therefore, even though the city was acting only as a trustee, the action of its board in refusing admission of Negro orphans was discrimination by the state, forbidden by the doctrine of the *Brown* decisions. The Court disposed of this case in a unanimous per curiam decision.[47]

5. DELIBERATE SPEED

The decisions of the Supreme Court left no doubt that segregation must cease in all public schools. The requirements of the Constitution in this respect were no longer really debatable. Only the administrative questions of "how" and "when" remained. Shortly after the decisions in *Brown* the Court found it necessary to give context to the requirement that integration proceed "with all deliberate speed."

Florida attempted to exclude Negroes from its law schools on the ground that the "deliberate speed" phase of the *Brown* decision permitted the state courts to determine the precise time when integration should go into effect. But the Supreme Court answered that argument in *Florida ex rel. Hawkins v. Board of Control* by saying:[48]

> As this case involves the admission of a Negro to a graduate professional school there is no reason for delay. He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates.

When James Meredith applied to the University of Mississippi, the circuit court of appeals readily concluded: "As a matter of law, the principle of 'deliberate speed' has no application to the college level; time is of the essence."[49]

III. RAMIFICATIONS OF BROWN V. BOARD OF EDUCATION

1. EXTENSION TO OTHER PUBLIC FACILITIES

In the argument of the *Brown* decisions, the Supreme Court was reminded by counsel of the breadth of the issue there under consideration. A policy of desegregation, if once adopted, could not be

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[47] *Ibid. See also* McNuse v. Board of Education, 373 U.S. 688 (1963), barring division of a school into color units in Illinois.

[48] 350 U.S. 413, 414 (1956).

[49] Meredith v. Fair, 305 F.2d 343, 352 (1962). *See also* Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala. 1955), *aff'd* 228 F.2d 619 (5th Cir. 1955), *cert. denied* 351 U.S. 913 (1956).

limited to the public schools. It would require desegregation in all state or municipal facilities.

Implicitly, the Supreme Court accepted this challenge. In rapid succession the *Brown* decision was used as the basis for prohibiting segregation on public bathing beaches,[50] municipal golf courses,[51] restaurants in state properties,[52] courthouses[53] and public parks.[54] Where state statutes required segregating in privately owned facilities open to the public, such laws were similarly declared unconstitutional.[55]

A less direct statutory discrimination was stricken in *Anderson v. Martin*,[56] holding that a state statute requiring that all ballots designate the race of the candidate operated as a discrimination against the Negro, and was therefore violative of the equal protection clause of the Fourteenth Amendment.

In *Harper v. Virginia State Board of Elections*[57] the Supreme Court held that the equal protection clause bars a state from making a payment of a state poll tax a prerequisite of voting. Speaking by Mr. Justice Douglas, whose opinion relied on the *Brown* case, the Court said:[58]

> Long ago, in *Yick Wo v. Hopkins*, 118 U.S. 356, 370, the Court referred to "the political franchise of voting" as a "fundamental political right, because *preservative* of *all* rights." (Emphasis added.)

2. THE RIGHT TO VOTE

A series of reapportionment cases plunged the Court into an area theretofore considered by many to turn on "political questions" beyond the jurisdiction of the courts. These cases recognized the right to vote as a "federally protected right" under the Fourteenth Amendment.

Gomillian v. Lightfoot[59] examined legislation altering the boundaries of the city of Tuskegee from a square to "an uncouth, strangely

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50 Dawson v. Mayor, 220 F.2d 386 (4th Cir. 1955), *aff'd* 350 U.S. 877 (1955).

51 Holmes v. City of Atlanta, 350 U.S. 897 (1955).

52 Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Turner v. Memphis, 369 U.S. 360 (1962).

53 Johnson v. Virginia, 371 U.S. 61 (1963).

54 Watson v. Memphis, 373 U.S. 536 (1962).

55 Gayle v. Browder, 352 U.S. 903 (1956) (intrastate transportation).

56 375 U.S. 399 (1964).

57 383 U.S. 663 (1966).

58 *Id.* at 667.

59 364 U.S. 339 (1960).

irregular twenty-eight sided figure,"[60] the effect of which was to disfranchise all of Tuskegee's Negroes, save only four or five, without disfranchising a single white citizen. In reversing the Alabama courts upholding this action, the Supreme Court said:[61]

> When a State exercises power wholly within the domain of State interest, it is insulated from federal judicial review. But such insulation is not carried over when State power is used as an instrument for circumventing a federally protected right.

Baker v. Carr[62] held in a divided opinion that a complaint stated a cause of action by alleging that Tennessee's Apportionment Act in 1901, covering the state's apportionment of members of the state legislature, had become obsolete and unconstitutional because the changes in settlement subsequent to the apportionment had created a gross disproportion of representation of voting population in the selection of the state legislature. Messrs. Justice Frankfurter and Harlan were strongly persuaded that this was a political question which should be left to the legislatures of the states to decide.

A majority of the Court had found a federally protected right, not only in voting in congressional elections (where the Fifteenth Amendment would be applicable), but also in voting in state elections. Shortly after *Baker v. Carr*, in *Reynolds v. Sims*[63] an eight judge majority, in the course of examining elections to the Alabama legislature, stated:[64]

> Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much of invidious discriminations based upon factors such as race.

In these reapportionment cases, the impact of *Brown v. Board of Education* was carried beyond racial discrimination. Within nine months of *Baker v. Carr*, litigation challenging the constitutionality of state legislative apportionments had been instituted in at least thirty-four states.[65] *Baker* was the initiation of a long overdue reform.

3. THE RIGHT TO EDUCATION

When Negroes sought admittance to the white swimming pool in Greensboro, North Carolina, the city closed and sold both its white

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[60] *Id.* at 347.

[61] *Ibid.*

[62] 369 U.S. 186 (1962).

[63] 377 U.S. 533 (1963).

[64] *Id.* at 566.

[65] See McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 706-10 (1963) for a summary of these cases.

and colored pools. A complaint seeking to enjoin the closing and sale was dismissed on the ground the plaintiffs failed to show the sale was not bona fide. Can such a case be distinguished from the Arkansas and Virginia attempts to turn their schools over to private organizations? In affirming the dismissal of the swimming pool case, the Fourth Circuit noted that it had not been contended that the city could not cease to provide swimming facilities altogether.[66] Of course, no such contention could be made. The constitution does not guarantee the right to swimming pools. It merely assures that if the state does provide a swimming pool, it must be equally available to all.

But what about a right to education? From the decisions that followed *Brown* there has emerged something that looks very much like a federally protected right to education.

In *Griffin v. Board of Education of Prince Edward County*,[67] the United States Supreme Court for the first time used the phrase "constitutional rights to an education."[68] The preceding cases of the Supreme Court that came closest to giving support to this statement are *Interstate Consolidated Street Railway Company v. Massachusetts*[69] and *Barbier v. Connolly*.[70] But these two cases go no farther than to hold that education is one of the purposes that the police power can be used to protect.

The constitutions of most of the states recognize a right to education and a corresponding duty on the state to provide an education.[71] The limits of such a right (whether arising from the federal or state constitutions) are presently ill-defined. This may be left to future litigation. The existence of such a right serves to distinguish education cases from swimming pool cases; beyond this it suggests a concept of considerable significance which has only begun to develop.

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66 Tinkins v. City of Greensboro, 276 F.2d 890 (4th Cir. 1960).

67 377 U.S. 218 (1964).

68 *Id.* at 234.

69 207 U.S. 79 (1907).

70 113 U.S. 29 (1885).

71 See e.g., WASH. CONST. Art IX §1: "It is the *paramount duty* of the State to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex." (Emphasis added.); CAL. CONST. Art. IX §1, where under the heading of "Encouragement of Education" it provides: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement; MAINE CONST. Art. VIII: "A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the legislature . . . shall . . . require . . . the several towns to make suitable provision, . . . for the support and maintenance of public schools; . . ."

4. THE EXPANSION OF "STATE ACTION"

The Fourteenth Amendment prohibits certain actions by the states. It does not prohibit discrimination by individuals or by the federal government. The cases since *Brown,* however, point to an ever broadening assimilation of actions by individuals into "state action" in order to make the prohibitions of the Fourteenth Amendment applicable.

Eight years before *Brown,* in *Shelley v. Kraemer,*[72] judicial enforcement of a restrictive covenant was held to be state action. The covenant was valid, but the Fourteenth Amendment could not countenance its enforcement by a state court.

It is not clear what the result in *Shelley* would have been if the remedy sought had not been specific performance, or if the state court had been asked to involve itself in aid of the persons trying to defeat the restriction instead of the persons trying to uphold the restriction. In the Girard College racial restriction case,[73] the Court did not find "state action" in a state court decision upholding a racial restriction. Instead it held that the action by trustees appointed by the city was "state action."

In *Griffith v. Maryland*[74] the Court reversed the conviction of five Negroes who were arrested while picketing a private amusement park protesting its policy of racial discrimination. The arrest was made by a park employee authorized as a deputy sheriff. The Court held that the action of the deputy in enforcing racial discrimination was state action and therefore violative of the Fourteenth Amendment as interpreted in the *Brown* decision.

In *Burton v. Wilmington Parking Authority,*[75] the Court held that the lessee of restaurant space in a public parking facility operated by a state agency must comply with the Fourteenth Amendment. That is, segregated seating required by the restaurant operation was "state action" and therefore unconstitutional.

Brewer v. Hoxie School District No. 46[76] dealt with an attempt by private individuals to interfere with the school board's efforts to integrate the schools. The Eight Circuit reasoned that since the board had a constitutional duty to effect integration, it had a correlative

[72] 334 U.S. 1 (1948).
[73] See note 46 *supra.*
[74] 375 U.S. 399 (1964).
[75] 356 U.S. 715 (1961).
[76] 238 F.2d 91 (8th Cir. 1956).

right to be free from interference. It further considered the rights of the Negro children (who were not parties) to equal protection of the laws at the hands of the school board. It concluded that the school board may raise the rights of the children and that the court had jurisdiction under the Fourteenth Amendment to enjoin the interfering actions.

One of the great constitutional issues of the present day is the scope of the concept of "state action" under the Fourteenth Amendment. Are private businesses holding themselves open to the public and possessing governmental licenses, such as stores or restaurants, engaged in state action? Are the actions of corporations which have been franchised by the state, "state action"? Are the actions of organizations enjoying tax exemptions and special privileges, such as private clubs, "state action"? To what extent may federal legislation prohibit private interference with the exercise of the Fourteenth Amendment rights?

5. LEGISLATION

The national discussion and prevailing approval of the *Brown* decisions led to the enactment of legislation at both federal and state levels to further protect the civil rights of our Negro citizens.

The last section of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to enforce the amendment. Due to the essentially negative nature of the Amendment, the breadth of this legislation authorization is a matter of considerable question.[77] Federal civil rights legislation may also be grounded on the interstate commerce clause or, when appropriate, on the Fifteenth Amendment.

Interstate commerce legislation is not limited to the regulation of situations where "state action" is invoked; it may regulate private businesses directly. Operating within its police power, a state can also directly regulate private businesses. When either state legislation or federal statutes based on the interstate commerce clause prohibit discrimination in private business, a delicate question is raised as to the right of the businessman or citizen to discriminate in his private affairs. Is there such a right? Where is the line drawn between private affairs and transactions that are subject to governmental regulation? To date little judicial attention has been focused on these questions.

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[77] See U. S. v. Guest, 383 U.S. 745 (1966). For an excellent discussion of this question see Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, esp. at 108-21 (1966).

Among the federal legislation that found inspiration in the *Brown* decisions were the "Civil Rights Act of 1964"[78] and the "Voting Rights Act of 1965."[79] The Civil Rights Act granted injunctive relief against discrimination on the ground of race, color, religion or national origin, in places of public accommodation, such as hotels, restaurants, motion picture houses, theatres, concert halls or sports arenas. The constitutionality of this Act was sustained by a unanimous decision in *Heart of Atlanta Motel, Inc. v. United States.*[80] It was expressed in several opinions arguing various aspects of the case. In the concurring opinion of Mr. Justice Douglas, he cited the *Brown* decisions as the basis for this Civil Rights Act.[81]

A second attack, however, was made on the constitutionality of Title II of the Civil Rights Act of 1964 in *Katzenbach v. McClung.*[82] Alabama restaurant proprietors brought suit to enjoin its enforcement as unconstitutional. This Title forbade racial discrimination by restaurants offering to serve interstate travelers, or serving food, a substantial portion of which had moved in interstate commerce. A three-judge United States district court enjoined enforcement of this Title of the statute as unconstitutional, but the Supreme Court reversed, holding this provision to be a constitutional exercise of the commerce clause.

IV. CONCLUSION

The cases included in the foregoing review are by no means all of the cases in the United States Supreme Court whose decisions have grown out of or have been influenced by the *Brown* case, but they may be taken as representative, and as indicative of the far flung influence of this landmark case.

Furthermore, we have seen that in the *Brown* case, starting with the fundamental constitutional right to equality in education, has spread its influence into the protection of a variety of closely related rights, including the areas of speech, press and association, the right of groups such as the N.A.A.C.P. to come to the rescue of those whose rights appear to be involved, the right to vote and have votes given equal weight, and the right to equality of treatment in such public facilities as transportation, hotels, restaurants, motion picture houses, theatres, concert halls, sports arenas, public parks and other recrea-

[78] 78 STAT. 241 (1964).
[79] 79 STAT. 437 (1965).
[80] 379 U.S. 241 (1965).
[81] *Id.* at 281.
[82] 379 U.S. 294 (1965).

tional facilities.

The enactment by the Congress of the "Civil Rights Act of 1964" and of the "Voting Rights Act of 1965" were popular endorsements of the wisdom of the *Brown* decisions, and the cases related to them, that must have been gratifying to the members of the Supreme Court and discouraging to the hard-shell segregationists.

Taken together, these judicial decisions and the action of Congress in the Civil Rights and Voting Rights Acts, represent a marked advance towards maturity of the people of the United States.

The Civil War, with its immense expenditure in blood and treasure, was only a first step towards the emancipation of the Negro race. It remained for this generation, starting with the opinions embodied in the *Brown* case, to express the growing concern of the people that "justice and liberty for all" should become more than a phrase, should be translated into actual fact.

This demonstrated advance in the experience and thinking of the American people recalls a well known utterance of Thomas Jefferson:[83]

> I am certainly not an advocate for frequent and untried changes in laws and constitutions. . . . But I know also, that laws and constitutions must go hand in hand with the progress of the human mind.

In the *Brown* decisions, overruling the *Plessy* case, the Constitution and its amendments, as interpreted by the Supreme Court, were indeed advancing "hand in hand with the progress of the" American mind.

Nevertheless, of one thing we may be sure. The period of what we may call the "secondary legal quakes" is by no means over. It may well continue for a generation.

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[83] Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816, in PADOVER (ed.) *The Complete Jefferson* 287, 291 (1943).