

PLESSY v. FERGUSON: REQUIESCAT IN PACE?

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When, in 1896, the Supreme Court ruled that Negroes and whites could be coercively allocated to separate facilities provided they were substantially equal,¹ it did little more than give its *imprimatur* to the dominant mores of the American community. That "white supremacy" was the loudly announced slogan of the South needs little adumbration, but it is less commonly realized that, while less vigorously articulated, it was equally the majority viewpoint in the North. The few bold souls who spoke out for the rights of the Negro were themselves, almost without exception, committed to a philosophy of segregation,² much as the leaders of the United Party today in South Africa, accepting the principle of *apartheid*, attempt to improve the status of the Negroes *within* this conceptual framework.³ Even the Negro leaders of the Plessy period publicly disclaimed any interest in Negro-white integration,⁴ and spoke of Negro development as something that would take place in a segregated context.

If the Supreme Court gave to segregation a legal *imprimatur*, the biologists of that day supplied the scientific *nihil obstat*. It was generally accepted that the Negroes were, in effect, members of a different species from whites, and the full stamp of approval was given to the doctrine of decisive differences in racial characteristics. Thus, in the same fashion that an intelligent zoo keeper separates the lions and the

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1. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

2. Even the strong dissent of Harlan, J., in *Plessy v. Ferguson* emphasized that political equality under the Constitution was not equivalent to social equality or racial integration. The "liberal view" of that era was that the Negro's status would be improved "among his people"—an attitude which I have termed "racial integralism," see Roche, *The Future of "Separate But Equal,"* 12 *PHYLON* 219 (1951). Interesting evidence that this approach to segregation was shared by left-wing thinkers as well as conservatives can be found in the platform of the Louisiana Socialist Party, prepared in 1903, which advocated "separation of the black and white races into separate communities, each race to have charge of its own affairs." See KIPNIS, *THE AMERICAN SOCIALIST MOVEMENT, 1897-1912*, 131 (1952). For the rabid white supremacist views of some socialist leaders, see *id.* at 131-32. However, Eugene V. Debs always opposed segregation, supported by the left-wing of the Party.

3. See MARQUARD, *THE PEOPLES AND POLICIES OF SOUTH AFRICA* (1952) *passim*.

4. This attitude, as has recently been suggested with specific reference to Booker T. Washington, generally considered the arch conciliator and "Uncle Tom," may have been adopted from tactical considerations rather than from a genuine belief in the legitimacy and necessity of segregation.

elephants in different compounds, the Supreme Court endorsed the proposition that biologically distinct Negroes and whites need not be given identical treatment. What was good for whites was not necessarily good for Negroes, any more than a lion would necessarily thrive on an elephant's diet. Fundamental to this view, though not explicit in the Court decision, was the further corollary that the whites were more advanced, more "civilized," than the Negroes, that they were several steps better, *i. e.*, higher, in the evolutionary scale.⁵

The intellectual concepts that were employed by the justices and by social scientists to justify segregation were, of course, of little interest to Southern politicians. In the view of these practitioners, the holding in Plessy was just one more victory in their campaign to reverse Appomattox and to drive the Negro back into that political and social limbo from which he had but briefly emerged in the Reconstruction period.⁶ The logic of white supremacy interested them not at all: it is hard to justify white supremacy, the superiority of "white blood," when one defines as a Negro anyone with one-sixteenth, one-eighth, or one-quarter "Negro blood;" indeed, this is logically a patent admission of the supremacy of "Negro blood," one part of which could apparently overwhelm an infinite number of contributions made by white ancestors.⁷ But to these politicians, as to the Nazi authors of the Nuremberg laws, theoretical consistency was supererogatory; what was important was that white supremacy supplied them with a "political formula," to use Gaetano Mosca's phrase,⁸ and for this purpose, one definition of a Negro was about as good as another.

White supremacy thus had at least three distinguishable aspects—scientific, legal, and sociopolitical—and in 1896, these three were marching in step. However, in the course of the last half century this united front has gradually been broken, until today both science and law have come down squarely on the side of integration and Negro-white equality. First to go was the race theory, dynamited by a series of empirical studies in genetics and anthropology which indicated that, aside from such surface manifestations as skin pigmentation, eye slant, bone structure, etc., there is no demonstrable proof of functional or significant differences in racial characteristics.⁹ Moreover, to the great

5. This is patently the rationale of anti-miscegenation legislation.

6. See FRANKLIN, *FROM SLAVERY TO FREEDOM*, 293-338 (1947), and FRAZIER, *THE NEGRO IN THE UNITED STATES*, 128-46 (1949) for good, brief analyses of the role of the Negro in the Reconstruction era.

7. See Ransmeier, *The Fourteenth Amendment and the "Separate but Equal" Doctrine*, 50 MICH. L. REV. 253-54 (1951).

8. See MOSCA, *THE RULING CLASS* (English transl., 1939) *passim*.

9. See DUNN AND DOBZHANSKY, *HEREDITY, RACE, AND SOCIETY* (1946); KLINEBERG, *RACE DIFFERENCES* (1935).

dismay of genealogists, these scientists went on to assert that, whatever may have been the case at some remote time in the past, racial purity is today a chimera. Wars and conquests, to say nothing of normal standards of concupiscence, have so merged ethnic stocks that the quest for a pure Negro, pure Mongolian, or pure white is largely illusory. But, unfortunately, geneticists and anthropologists do not make public policy on the "race" issue: the politician's approach to the scientist is usually comparable to the drunk's attitude towards the lamp-post: he wants support, not light.

This is not the place to discuss in detail the progress of the Negro minority towards full legal and political equality.¹⁰ Suffice it to say that the Twentieth Century has seen a rapidly accelerating movement, among both Negroes and whites, North and South, directed towards implementing the promise of American ideals. The rate of acceleration has increased tremendously over the last twenty years, with perhaps the greatest single catalyst being the almost universal American revulsion against the brutal racialism of Nazi Germany. One after another, the decisive institutions of American society—the churches, the press, the schools, and eventually the Federal Government¹¹—have gone on record for equality. It would be naive in the extreme to suggest that this was wholly based on disinterested idealism; on the contrary, highly practical and pragmatic motives, such as institutional competition, have unquestionably been decisive in many instances. It might be suggested, for example, that the racial pioneering of the Catholic Church in the South, with a concomitant huge increase in the number of Negro communicants, may have spurred the Protestants to a greater appreciation of the New Testament message of brotherhood; and the competition for Negro votes in certain key areas has similarly led political organizations to reassess the meaning of equality.¹² But however

10. Generally see note 6 *supra*. See also MYRDAL, *AN AMERICAN DILEMMA* (1944). A good, short survey of the legal aspects of this progress is Ransmeier, *The Fourteenth Amendment and the "Separate But Equal" Doctrine*, 50 MICH. L. REV. 203 (1951).

11. In the five school segregation cases decided in May, 1951, the United States Attorney General presented a brief *amicus curiae* urging the Court to ban segregation in public education. Initiated by a Democratic administration, this position survived the 1953 change in Attorneys General. A key role in the growing public consciousness of the injustice of segregation was played by the blunt REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947).

12. An amazingly coldblooded instance of this play for the Negro vote took place in the 1953 election of Borough President of Manhattan. After the Republicans nominated a Negro for this position, an unseemly race occurred between the other parties to find Negro candidates of their own. Eventually all three major candidates—Republican, Democratic, and Liberal—were Negroes, an outcome that was achieved after white candidates of the Democratic and Liberal parties withdrew precipitously in favor of Negroes. While a good many Negroes were disturbed by this race prejudice in reverse, the result was that a Negro Borough President took office. See N.Y. Times, July 24, 1953, p. 1, col. 2; *id.*, July 31, 1953, p. 1, col. 5; *id.*, Aug. 15, 1953, p. 1, col. 2; *id.*, Aug. 19, 1953, p. 20, col. 3.

motivated, the fact is plain: the Negro today has moved to the threshold of full equality in the United States. The realization that the armed forces, to take a good case, abolished segregation largely to attain maximum standards of manpower efficiency in no way detracts from the desirability of the end result.

Fed by this growing institutional consensus, the courts have step by step eroded the legal ground upon which the segregation system stands. First to go was the white primary, the ingenious device by which Negroes were excluded from the political process.¹³ Next went the restrictive covenant, which denied to Negroes the capitalist prerogative of purchasing any property they could afford.¹⁴ But the crucial area of decision has been education, in which a series of holdings have gradually cut the ground out from under "separate but equal."¹⁵ This was not accidental, for the Legal Department of the National Association for the Advancement of Colored People decided at an early date that it was precisely at this point that the segregation system was most vulnerable to attack, and marshalled its heavy weapons for a long assault on the weak point.¹⁶

The Supreme Court's ruling in the *Segregation Cases*¹⁷ has proved the wisdom of this strategy. This epochal decision of May, 1954, far outdistances in its impact even such massive acts of judicial legislation as *The Insular Cases*¹⁸ and *Erie v. Tompkins*;¹⁹ in effect, the Supreme Court has rewritten basic public policy in seventeen states²⁰ and numerous non-Southern communities. The remainder of

13. *Smith v. Allwright*, 321 U.S. 649 (1944).

14. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948).

15. See Roche, *Education, Segregation, and the Supreme Court—A Political Analysis*, 99 U. OF PA. L. REV. 949 (1951); Graham, *The Fourteenth Amendment and School Segregation*, 3 BUFFALO L. REV. 1 (1954); Ransmeier, *supra* note 10.

16. The decisive role that Negro lawyers have played in the movement towards equality has probably led many a Southern politician to echo the Sixteenth Century sentiments of the Spanish conquerors of the New World who asked the King of Spain to prohibit emigration to the colonies by lawyers as they would "encourage dissensions and litigation" and "throw us into confusion with their learning, quibbling and books." SCHURZ, *THIS NEW WORLD* 149 (1954).

17. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

18. *Downes v. Bidwell*, 182 U.S. 244 (1901); *Dorr v. United States*, 195 U.S. 138 (1904); *Rasmussen v. United States*, 197 U.S. 516 (1905).

19. 304 U.S. 64 (1938).

20. Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Statutes cited in Leflar and Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 378 n.3 (1954). This footnote also contains a full breakdown of varying degrees of segregation permitted in various jurisdictions.

this analysis will examine in some detail two significant aspects of the decision: first, its status as a political act; and, second, the problems involved in implementing the holding.

THE SEGREGATION CASES: A POLITICAL ANALYSIS

Like *McCulloch v. Maryland*,²¹ the segregation decision is far more than merely the settlement of litigation between parties; on the contrary, it will stand as a major state paper. Although, on its merits, the holding applies only to segregation in secondary public education, it is inconceivable that segregation in transportation, theatres, railroad stations, etc., can long survive. While education can probably, with diligent exegesis, be distinguished from transportation and the other areas of mandatory segregation,²² the Court did not return to its tactic in the *Sweatt*²³ and *McLaurin*²⁴ cases and avoid reconsideration of the "separate but equal" principle. In contrast with the earlier decisions, Chief Justice Warren explicitly stated that "in the field of public education the doctrine of 'separate but equal' has no place."²⁵ Ignored in the electoral process, emasculated in education, the doctrine of *Plessy v. Ferguson* must inexorably lose its vitality elsewhere. Unlike a Ptolemaic theory of the universe, a society can not continue to operate indefinitely by the creation of special rules, of epicycles, which govern certain limited areas. A system based on applying one principle to children in school and another to the same children in parks, trolley cars, or theatres would be an administrative nightmare, to say nothing of its ideological merits. Consequently, by the same token that "separate but equal" silently spread from one area of group relations to another until it governed legal relationships in every social

21. 4 Wheat. 316 (U.S. 1819).

22. This is discussed in Kauper, *Segregation in Public Education: The Decline of Plessy v. Ferguson*, 52 MICH. L. REV. 1137 (1954). The Supreme Court, following the *Segregation Cases*, disposed of two noteworthy cases involving segregation in other fields. In *Muir v. Louisville Park Theatrical Ass'n*, 202 F.2d 275 (6th Cir. 1953), the circuit court upheld the refusal of entry to a Negro at an outdoor operatic performance sponsored by a private association which had rented the city's amphitheater for specified dates during the summer. The Supreme Court vacated the judgment and remanded the case "for consideration in light of the Segregation Cases . . . and conditions that now prevail." 347 U.S. 971 (1954). Certiorari was denied a circuit court holding that a city must provide golf facilities for Negroes, since such facilities were available for whites; but the city was permitted to provide the facilities on a segregated basis. *Holcombe v. Beal*, 193 F.2d 384 (5th Cir. 1951), cert. denied, 347 U.S. 974 (1954). A Maryland district court recently found that the reasoning of the *Segregation Cases* does not apply to public bathing and swimming facilities. The court consequently held that a city could maintain segregation in these facilities. *Lonesome v. Maxwell*, 23 U.S.L. WEEK 2057 (D.C. Md. July 27, 1954).

23. *Sweatt v. Painter*, 339 U.S. 629 (1950).

24. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

25. *Brown v. Board of Education of Topeka*, 345 U.S. 483, 495 (1954).

context, the doctrine that *separate is unequal* will spread from education to the littoral of Negro-white relations. The Court's willingness to exclude "separate but equal" from education equally destroys it as a rationale for action elsewhere, practically if not legally.

While the reading of political motives into the activities of the justices may be a dangerous game, and one better fitted for psychoanalysts than political scientists, certain aspects of the segregation decision do merit analysis from this viewpoint. Once again, as in the 1950 cases,²⁶ the decision of the Court was unanimous. Even Justice Frankfurter, who has vigorously stated in the past his opposition to the Court's functioning as a school board,²⁷ refrained from separate concurrence. This unanimity was a political accomplishment of the first magnitude, for it confronted dissenters from the judgment with a united Court, of Southern and Northern antecedents, of Democratic and Republican vintage. No dissents exist to supply opponents with an established position whence to launch a counter-offensive. To deal in mythical terms—and the Supreme Court plays a vital role in American political mythology—there is a majesty about a unanimous Court which vanishes with only one dissent: the Truth has been pronounced rather than competing truths propounded.

A second consideration with political overtones was the delay in reaching final determination. The South Carolina case first made its way to the Court in the fall of 1951, but was remanded to the District Court on a technicality.²⁸ In June, 1952, after the lower court had exercised its authority, the Supreme Court took jurisdiction,²⁹ and in October, 1952, the South Carolina, Virginia,³⁰ and Kansas³¹ cases were consolidated for joint argument.³² The District of Columbia case was accepted for review in November, 1952.³³ Full argument was heard in December, 1952, but in June, 1953,³⁴ the Court ordered the cases restored to the docket for reargument in October, 1953, and in-

26. See Roche, *Education, Segregation and the Supreme Court—A Political Analysis*, 99 U. OF PA. L. REV. 949 (1951), for a discussion of the 1950 cases.

27. In the opinion of the Court in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) and then in a somewhat bitter dissent in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 646 (1943), overruling *Gobitis*.

28. *Briggs v. Elliott*, 342 U.S. 350 (1952).

29. *Briggs v. Elliott*, 72 Sup. Ct. 1078 (1952).

30. *Davis v. County School Board of Prince Edward County*, 344 U.S. 1 (1952).

31. *Brown v. Board of Education of Topeka*, 344 U.S. 1 (1952).

32. *Ibid.*

33. *Bolling v. Sharpe*, 344 U.S. 873 (1952).

34. *Brown v. Board of Education of Topeka*, 345 U.S. 972 (1953).

cluded for special consideration the famous five questions.³⁵ The decision was handed down on May 17, 1954, but even this was not the end of the road, for the Court put off until the fall of 1954 consideration of specific techniques of implementation and formulation of final decrees.³⁶ In effect, the Court has ordered the reargument of questions 4 and 5 on its list of June, 1953.

Delay can be caused by many factors, and it would call for great temerity to assert that the Court's slow-motion disposal of these cases was the outgrowth solely of political factors. But, on the other hand, the sceptic is surely within his rights in asking why the South Carolina case was "ripe" for determination after the 1952 election rather than on its first trip to the Court in 1951. Justices Black and Douglas thought it was ready for decision at the earlier date, but their brethren overruled them.³⁷ Furthermore, while of enormous significance, the

35. "1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?"

"2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?"

"3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?"

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their own choice, or

(b) may 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?"

"5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?" 345 U.S. 972-73 (1953).

36. *Brown v. Board of Education of Topeka*, 345 U.S. 483, 495 (1954).

37. These two justices felt that the constitutional issue was fully ripe, and that the further delay would only lead to obtaining irrelevant information. *Briggs v. Elliott*, 342 U.S. 350, 352 (1952).

question before the Court was not inherently complex; indeed, the alternatives were clear cut. NAACP counsel had taken great pains to ensure a ruling on the merits by bringing up cases which presented the issue in its starkest terms, *e.g.*, the Kansas case³⁸ in which all hands stipulated that the schools provided Negroes were fully equal to those provided whites. What faced each individual justice was not a complicated procedural labyrinth such as he might encounter in administrative or patent litigation; it was a basic decision on the specific content of American democracy.

Given the nature and gravity of the cause, it might be hypothesized that the delay was, at least in some part, occasioned by the desire of the Court to achieve unanimous determination of the issues involved. Perhaps the Court could have handed down a decision sooner, but only at the cost of vitiating dissents by some of its members. It may be that, as various newspapers and magazines suggested, the influence of the new Chief Justice was decisive in attaining judicial unity, and it also seems like a fair guess to say that some members of the Court probably joined the ranks on the condition that decision and implementation be treated as two discrete and temporally distinct actions. This latter expedient would have great natural appeal to more cautious jurists who could thus agree to the establishment *de jure* of integrated schools, while adjusting *de facto* execution to the exigencies existing in different areas.

However justified, the agreement to put off actual implementation until at least 1955 was a stroke of political genius. Although it appeared to some advocates of full equality as a symptom of judicial equivocation, it muffled Southern reaction to an extraordinary extent. Southern extremists were prepared to denounce a decision which ended segregated schools, but the Court left them completely off balance with its two-step holding. If the Court had issued its decrees simultaneously with its judgment, these extremists would have had something into which to sink their teeth. Instead, they were left to battle a phantom enemy for at least a year, while Southern moderates were supplied with an excellent rhetorical position from which to conduct their campaign. The latter were in the position of saying to the people, "What is all this bellowing about? We haven't even found out what we are going to have to do."

In addition, as many political commentators have noted, the interest-span of the American people tends to be short. Miniature golf, the yo-yo, General MacArthur, Johnnie Ray, are the center of short,

38. *Brown v. Board of Education of Topeka*, 98 F. Supp. 797 (D.C. Kan. 1951).

violent spasms which soon subside. The Southern extremists are now face to face with this psychological phenomenon: they built up opinion for the grand climax, only to be given a year's intermission at the crucial point. It is to be doubted whether they can sustain a fever pitch over that period of time without committing the cardinal sin of American politics: boring the sovereign people. Legal purists have often complained about a Supreme Court perpetually populated with politicians; perhaps the political tactics of the justices in this case supply some evidence for the contrary position, that critical legal decisions are far too important to be left in the hands of legal technicians.

One other aspect of the decision deserves brief comment: the extraordinary fact that, in a group of cases technically between specific parties, the attorneys general "of the states requiring or permitting segregation in public education" are invited to appear as *amici curiae* at the argument on implementation in the fall of 1954.³⁹ This puts these officials in an extremely hazardous position. If they refuse to submit briefs, they are open to the accusation that they did nothing to save their states from drastic decrees.^{39a} On the other hand, if they do submit briefs, the latter must be drawn up *within the framework of desegregation*, and the attorneys general are thus, willy-nilly, put on record as supporting in principle the Court's holding. Moreover, the fiction that these are simple lawsuits between parties has in fact been abandoned by the Court, which is instead calling a forum of interested parties—the NAACP as counsel for the Negro plaintiffs, the school boards, the United States Attorney General, and the state attorneys general—to help find a practical solution to the problem.

In summary, the Supreme Court, in a major political decision, has revised an enormous body of public policy. There are those who bewail the fact that the Court is too political,⁴⁰ and others who deny its policy-making prerogatives,⁴¹ but the framers of the Constitution intended the Court to exercise this function, and the justices have exercised it to a greater or lesser degree since the foundation of the Re-

39. *Bown v. Board of Education of Topeka*, 345 U.S. 483, 496 (1954).

39a. It appears that the states of Florida, North Carolina, Oklahoma, Arkansas, Tennessee, Maryland and Texas are filing briefs, and that Georgia, Alabama, South Carolina, Mississippi and Louisiana are boycotting the proceedings. Significantly, in support of the position advanced above, Alabama's Attorney General announced that his state would file no brief because if such action were taken, the state would be bound legally and morally to accept the final decree. *N.Y. Times*, Sept. 15, 1954, p. 27, col. 1.

40. See, e.g., Mishkin, *Prophecy, Realism and the Supreme Court: The Development of Institutional Unity*, 40 *A.B.A.J.* 680 (Aug. 1954).

41. The latest to tilt at the windmill of judicial "usurpation" is W. W. Crosskey in his semantic safari *POLITICS AND THE CONSTITUTION OF THE UNITED STATES* (2 vols. 1953).

public.⁴² The real argument, trimmed of polemical excess, is over *whose politics* the Court endorses, and the American tradition is to denounce the Court when it adopts your opponent's views and applaud it when it subscribes to the Truth, *i. e.*, your own position.⁴³ The current case is no exception. Southern politicians, known far and wide as pillars of conservatism and the rule of law, are now attacking the "political court."⁴⁴ It is predictable that, had the decision gone the other way, they would be equally vigorous in their assault on any who criticized the determination of our "great impartial tribunal." Viewed *sub specie aeternitatis*, the basic principle of American constitutional interpretation, and of American politics, is "whose ox is gored?"⁴⁵

But to say this is not to engage in disinterested, puerile cynicism, for some oxen are patently better than others. Thus, judged in terms of the democratic ethic and the Judeo-Christian tradition which sustains it, the Supreme Court in May, 1954, took a great stride towards the realization of the American ideal. Much remains to be done, but in a world filled with oppression and rumors of oppression, this is no small achievement.

THE PROBLEMS OF IMPLEMENTATION

In a democratic society, or, for that matter, in any non-totalitarian society, law is not enforced by the police, but by the community itself.⁴⁶ Coercion is applied in exemplary fashion to conspicuous deviants from social norms, but the great bulk of compliance is automatic, resting on the consensus of the community. If the society, or a large proportion of it, rejects a norm, direct coercion is of little value, *e. g.*, prohibition. To take an example from a different setting, a British district officer in Nigeria who was asked how he kept order among 10,000 Yoruba tribesmen with five policemen, replied that if five police-

42. In short, I unconditionally accept the position of Professor Eugene V. Rostow that ". . . there can be little real doubt that the courts were intended from the beginning to have the power they have exercised." Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 195 (1952).

43. A classic case of this "true believer jurisprudence," as I have called it elsewhere, was the abolitionist approach to constitutional law: see TEN BROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 42-70 (1951).

44. "The South will not abide by nor obey this legislative decision by a political court." (Senator Eastland, Miss.) "A flagrant abuse of judicial power." (Senator Russell, Ga.) The justices "abandoned their role as judges of the law and organized themselves into a group of social engineers." (Senator Stennis, Miss.) These quotations and others can be found in Cong. Q. Weekly Report, June 4, 1954, p. 696, col. 1.

45. Or, as President Franklin D. Roosevelt liked to phrase it, "whose child has the measles."

46. See ROCHE AND STEDMAN, *THE DYNAMICS OF DEMOCRATIC GOVERNMENT* c. 10 (1954).

men could not handle the job, the chances were that neither could 5,000 soldiers.

Viewed in this context, it is apparent that the Supreme Court can not by itself enforce desegregation on seventeen state governments. Its authority is largely moral, and, needless to say, in this particular situation, the Court can count on little support from Congress. Even convictions for criminal contempt of court depend on the decision of a locally oriented jury, so this judicial weapon is not fully reliable. How, then, can the Supreme Court ensure that the final decrees in the segregation cases are put into practice?

The precise answer to this question must, of course, await the historian of the future. The general question of how the Court can enforce its views has troubled commentators since the hectic days of *Chisholm v. Georgia*,⁴⁷ and there is no denying that the instant cases present special problems. The major difficulty is the localization of segregation sentiment in the South. If those who favored segregation were a national minority scattered throughout the Union, the problem would be negligible, for in each area they would be outnumbered by those to whom segregation, if not a positive evil, seemed only a trivial matter. Unfortunately this is not the case, for the proponents of segregation are concentrated geographically in areas where they have complete control of state and local government and have enforced their views through the police power. A good example of the kind of problem that results from this concentration is the passage by the Louisiana state legislature, after the Court's decision, of three measures to perpetuate segregation⁴⁸—although palpable, and not very cleverly designed dodges, they passed by overwhelming votes. Other such devious maneuvers can be anticipated.⁴⁹

The best answer to the question appears to be that the Court will not enforce its decision; rather, it will supply a catalyst to those forces in the South that will, in the long run, abolish segregation. The long-standing myth of the monolithic character of Southern political life must initially be exposed; in fact, as V. O. Key has shown in his superb *Southern Politics*,⁵⁰ virtually the only unity that does exist is a verbal agreement on white supremacy. Furthermore, there are forces at work

47. 2 Dall. 419 (U.S. 1793).

48. Discussed in Ryan, *Reaction and Heat Ride in the Bayous*, *The New Leader*, Aug. 16, 1954, p. 23, col. 2.

49. See Frank, *Can the Courts Erase the Color Line?*, 2 *BUFFALO L. REV.* 28, 39-40 (1940). One practical device for evading the segregation decision arose in Montgomery, Alabama, recently when twenty-three Negro students were refused admission to the white school because they lived in another school district. The smaller Negro school to which the students were relegated was only a block away from the new white school. *N.Y. Times*, Sept. 3, 1954, p. 11, col. 1.

50. KEY, *SOUTHERN POLITICS IN STATE AND NATION* (1949).

undermining this barrier: the young Southerner, who may have shared a Korean foxhole with a Negro soldier, seems to have a good deal less faith in the slogan of white supremacy than his father or grandfather.⁵¹ There is a growing discontent among businessmen with the high economic price that must be paid for racial superstitions, and, with the rapid industrialization of the South, capitalist standards of efficiency are militating against the system. In short, the South is not united behind segregation, and the moderation displayed by many Southern politicians since May, 1954,⁵² indicates that strong forces of compromise and concession are checking the extremist battalions.

All that has been said thus far would give the reader the impression that the South is white, and that any decisions that are to be taken on the question of segregation will be the exclusive concern of whites. While Southern politics, at least since the end of Reconstruction, have been the private preserve of white men, the growing potential of the Negro component of Southern society and its probable consequences can not be omitted from any realistic account of what the future may hold. In the eighteen jurisdictions which have mandatory segregation,⁵³ there was in 1950 a total Negro population of 10,522,495.⁵⁴ Long denied their political rights by one technique or another, these Negroes have in recent years been moving to the polls in ever increasing numbers and have been awakening to a consciousness of their potential strength.⁵⁵ In this group, the Supreme Court, and those politicians who endorse it, have a built-in constituency, and it may be predicted with some certainty that as the Negro electorate grows in strength and awareness, its views on segregation will be heard. Perhaps they are already being heard, at least in a minor key, for part of the tremendous majorities that "liberal" Southern Democrats received in the 1954 Democratic primaries has been credited to Negro support for men accused of betraying white supremacy. Senator John Sparkman, for instance, is believed to have received 90% of the Negro votes cast in the Alabama primary, and in a state with a Negro population approximating one million, this is no inconsiderable asset.⁵⁶

51. See the interesting analysis of this changing viewpoint in Lenoir and Lenoir, *Compulsory Legal Segregation in the Public Schools With Special Reference to Georgia*, 5 MERCER L. REV. 211 (1954).

52. See the quotations by Senators Daniel (Texas), Holland (Fla.) and Byrd (Va.), and by Governor McKeldin of Maryland in Cong. Q. Weekly Report, *supra* note 44.

53. See note 20 *supra*.

54. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1953, 36 (74th ed. 1953).

55. See MOON, BALANCE OF POWER: THE NEGRO VOTE (1948).

56. It was similarly estimated that 90% of the 200,000 Negroes who voted in the Democratic primary elections in Texas voted for Judge Yarborough who refused at that time to denounce the segregation decision. See Eubanks, *The Heat Is on*

It is obvious that school integration will not be accomplished at one blow. If experience is any guide, the process of compliance will probably begin with full cooperation by certain authorities, notably in the border states and in the bigger cities of the deep South, partial compliance by others, and outright recusancy on the part of a few.⁵⁷ The litigation will be enormous, for subterfuges of all sorts will be tried and challenged. But the basic clue to success is the mobilization of the lawful majority, and here the Supreme Court has supplied the standard around which they can rally. No longer in the exposed position of being mere defenders of the Negro, the moderates are now the forces of law and order, the guardians of the Constitution. In addition, if the research of social psychologists is correct, the number of people who reject segregation will increase as a direct coefficient of integration, *i. e.*, the more people there are exposed to integrated situations, the more there will be who favor desegregation.⁵⁸ Thus, in a sense, integration will tend to create its own public opinion, and at an increasingly rapid rate of acceleration.

Thus, using the term in its broadest connotation, the Supreme Court's function is an educational one. It has supplied a standard of Negro-white relationships which fits most fully with the democratic objectives professed by most Americans, operating on the assumption that, given an opportunity, most Americans would prefer to practice what they preach. To put the point this way, however, is not to urge a counsel of supercaution, for the Court must also be bold. Coercive sanctions are, on occasion, an admirable educational technique,⁵⁹ and it may be necessary to employ the full force of contempt proceedings in some instances.⁶⁰ Faced with the threat of legal action, the most

Shivers in Texas, *The New Leader*, Aug. 23, 1954, p. 12, col. 1. Yarborough later did denounce the Court decision and, as a consequence, many Negroes and liberal whites who had voted for him in the primary abstained from participating in the run-off. His loss to Shivers cannot be wholly attributed to this factor, but it apparently played an important part in the outcome.

57. Thus far, twelve of the seventeen compulsory segregation states are still awaiting the Supreme Court's decrees before taking measures towards abolishing segregation. However, in five states (Arkansas, West Virginia, Missouri, Maryland and Delaware) and the District of Columbia, action has been taken in some areas to commence the integration process. *Legal Intelligencer* (Philadelphia, Pa.), Aug. 31, 1954, p. 1, col. 3.

58. See KRECH AND CRUTCHFIELD, *THEORY AND PROBLEMS OF SOCIAL PSYCHOLOGY* 513-29 (1948); REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 82-87 (1947).

59. KRECH AND CRUTCHFIELD, *op. cit. supra* note 58, at 512-13.

60. The use of coercive sanctions raises the general problem of what legal devices are available to the courts to insure compliance with its mandates. Although a detailed discussion of the area is beyond the scope of this article, see generally Note, *Civil and Criminal Contempt in the Federal Courts*, 57 *YALE L.J.* 83 (1947); HART AND WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 420-21 (1953); Note, 20 *TEXAS L. REV.* 358 (1942); Note, 62 *HARV. L. REV.* 659 (1949). For

fiery agitators usually take to cover, and their armies of dedicated supporters turn out to be, at best, rhetorical fictions, at worst, spectators, prepared to join a winning cause, but basically out to see the show.

Turning, in conclusion, to the specific matter of the decrees to be formulated during the 1954-55 term of Court, the following suggestions, advanced with great trepidation, may merit consideration. First, the Court should rule that it can, in the exercise of its equity powers, establish flexible rules to govern desegregation.⁶¹ As indicated in the Ashmore Report,⁶² a monumental inquiry into the problems of Negro education, the physical barriers to integration are in some areas enormous, and not immediately surmountable, even given all the good will in the world. Such areas will need more time to consolidate than others more favorably situated. However, to prevent deliberate stalling, an outside time limit for completion of the whole process—perhaps five years?—should be established.

Second, the Court should appoint a special master charged with recommending the specific tempo of desegregation to be applied in the differing cases. The master should be an outstanding political figure of the genus "elder statesman."⁶³ My nominee is former President Harry S. Truman. Not only would he carry with him to his assignment the special status accruing to former Chief Executives, but he also has behind him the superb training of the presidency. Much of a President's time is taken up with getting subordinates to do what they are supposed to do without *actually* forcing them to obey, and it would be difficult to find a more accurate description of the task facing the special master. Furthermore, Mr. Truman is a Democrat, a man of great political courage, and highly regarded in the South.⁶⁴ The master should be aided by a technical staff competent to assess the actual legal and educational problems.

discussions of the state courts' compliance in disposing of cases remanded to them by the Supreme Court see 67 HARV. L. REV. 1251 (1954); 56 YALE L.J. 574 (1947); 55 HARV. L. REV. 1357 (1942).

61. Future argument on the form of the segregation decree will be partly concerned with the availability of such equity power to allow a gradual adjustment to integrated schools. See question 4(b), quoted in note 35 *supra*.

62. ASHMORE, THE NEGRO AND THE SCHOOLS (1954).

63. Perhaps the most famous use of a special master occurred in *Wisconsin v. Illinois*, 278 U.S. 367 (1929), rehearings, 281 U.S. 179 and 696 (1930), where neighboring states complained that Chicago was lowering the level of the Great Lakes in its use of water for sewage disposal. The Court held for the complainants and employed Charles Evans Hughes as a special master to evolve a suitable plan for gradual discontinuation of Chicago's use of the Great Lakes' water. Hughes was authorized to call witnesses on behalf of each party and also witnesses of his own choosing. For his efforts Hughes was awarded \$30,000 compensation plus his expenses. PUSEY, CHARLES EVANS HUGHES 638-39 (1951).

64. Although we sometimes tend to overlook it, Mr. Truman is a Southern Democrat and, despite some sniping from extremists, a very highly respected one.

This may seem like a strange expedient: why should the Court not simply remand these cases to district courts for final settlement? It might be said in reply that initially the Court must retain control at the center. Perhaps eventually the lower courts can handle these cases, but the fact can not be over emphasized that the first few decrees will be of crucial significance to the success of the whole enterprise. They will tend to establish a pattern for later action. If these decrees are wisely drawn and accepted in good faith, the battle will be half won. But to accomplish this end, more is needed than legal draftsmanship—there must be negotiation, and skilled negotiation at that. This type of negotiation, in which parties get a chance to express their visceral reactions but are eventually brought to a sensible position, is a fine political art. Furthermore, it is an important form of therapy, a fact to which labor lawyers and arbitrators will bear witness. If contesting parties are given an opportunity to express themselves fully—and incidentally, to square themselves with their constituencies—it is surprising how far they will go, if properly induced, in the direction of accepting disagreeable consequences. It seems unnecessary to add that few district judges possess the catalytic skill required for this sort of group guidance.

Some may be distressed by this proposal, feeling that it is a thoroughly "un-legal" way of settling a judicial problem. Perhaps it is, but the cold fact is that the Supreme Court is involved to the limit in an explosive political situation, and its success or failure in settling this critical issue may well hinge on its ability to devise an imaginative political solution. Put bluntly, the Supreme Court has staked its institutional reputation on its capacity to solve the race question in terms of the American ideal. Whether it wins or loses its magnificent gamble will not be determined by the Court's facility with democratic political theory, but by the effectiveness with which it copes with the details of desegregation. The justices have propounded bold thoughts, but before a tombstone can be inscribed "*Plessy v. Ferguson*: R.I.P.," they must match their aspirations with effective actions.