Integrating the Desegregation Vocabulary--Brown Rides North, Maybe

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INTEGRATING THE DESEGREGATION VOCABULARY—BROWN RIDES NORTH, MAYBE*

J. BRAXTON CRAVEN, JR.**

It is currently popular to suppose that judges, like children, should be seen and not heard; and, if read at all, let it be only in the official reports. Conscious of this sentiment, I think I would not have had the temerity to open my mouth in public on this topic but for your request that I do so. What I say, whether too much or unwisely put, is my responsibility. That I say anything at all is partly yours. One word of circumspection—the opinions I am about to express are good for this day only, or at most, until Monday if that is an opinion day in the Supreme Court. My opinions are continually subject to revision by a majority of the members of the Supreme Court, which is the only body that may speak with final authority in the constitutional area. Finally, with Emerson, I do believe that a foolish consistency is the hobgoblin of small minds. Thus I shall feel entirely free when I vote in school cases next month and next year to be utterly faithless to this speech. But actually that problem will not arise, for votes turn on an application of general principles to a particular set of facts, and tonight I shall be talking only about the principles—to the extent I can tentatively perceive them.

I am not sure that I know what the question is in the school cases, but we might as well start with "What is a unitary school system?" I had thought until recently that a unitary school system had not been defined, but we have it on the highest authority now, from none other than Chief Justice Burger, that it has been. The definition stated in his recent concurring opinion in Northcross v. Board of Education' is that a unitary system is one " within which no

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person is to be effectively excluded from any school because of race or color.'" I have some difficulty with the Northcross definition and so, indeed, does the Chief Justice. He calls it "cryptic," which makes me think of what Humpty-Dumpty said to Alice: "When I use a word it means just what I choose it to mean—neither more nor less."

The foregoing definition of a unitary system—"one within which no person is to be effectively excluded from any school because of race or color"—has a pleasant ring to the ear and unquestionably expresses a noble aspiration to which the majority of Americans, black and white, can bear allegiance. But as the Chief Justice himself recognizes, in the very same paragraph in his concurring opinion in Northcross, it is not an easy definition to apply to a given fact situation. It is sort of like defining a dog as a quadruped mammal. That is perfectly true, but it does not help distinguish a dog from a cat.

In Northcross the Chief Justice, although insisting that the Court had defined a unitary system, frankly recognized that the Court has not yet clearly distinguished the dogs from the cats—the Chief Justice said these questions remain unanswered:

1. Whether, as a constitutional matter, any particular racial balance must be achieved in the schools.

2. to what extent school districts and zones may or must be altered as a constitutional matter.

3. to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.

It is not at all surprising that the Court has not quickly and finally answered these questions. It should not distress, I think, even the most ardent advocate of civil rights that sixteen years after Brown v. Board of Education we still do not know how much and to what extent the decision must be implemented. Interpretations of the Constitution, like the Constitution itself, are intentionally, I think, framed in the broadest terms. The Court is far too wise to fall into the error of precision. Like Humpty-Dumpty, the Court

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3 L. CARROLL, THROUGH THE LOOKING GLASS, 124 (1875).
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sometimes means precisely what it means, neither more nor less, and quite sensibly is willing to take the time to allow the inferior courts to experiment with words, giving content and meaning to the doctrine which has been expounded. The truth is that the Court is wise enough to know that it does not know precisely what ought to be done and must be required. Like the rest of us, the Court learns from experience—the experience of the inferior federal courts. Trial balloons constantly soar aloft from the United States District Courts. Some are shot down in flames by the United States Circuit Courts of Appeals,\(^6\) while others are allowed to orbit indefinitely. My own court thought a decade ago that "freedom of choice" might be the complete and adequate answer to the duty of implementation, but experience showed that it did not work effectively in all factual situations, and finally the Supreme Court itself dealt it a near mortal blow in Green v. New Kent County.\(^7\) Incidentally, it may be significant that Mr. Justice Black's injunction given in the rural context of New Kent—"without a 'white' school and a 'Negro' school, but just schools"—was not repeated as the definition of a unitary system in the urban context of Northcross. Implementing new constitutional dogma is largely a matter, I suggest, of trial and error—with the lower courts trying and the Supreme Court calling the errors.

The major difficulty with school cases arises out of the thought necessity of making the Constitution speak affirmatively\(^9\) rather than with its traditional negative voice.\(^10\) Until recently the Constitution has been more like the Ten Commandments than the Sermon on

\(^6\) Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955), for example, was adhered to by the Fourth Circuit Court of Appeals for many years, but is now dead. See Walker v. School Bd., 413 F.2d 53, 54 n.2 (4th Cir. 1969).

\(^7\) 391 U.S. 430 (1968).

\(^8\) Id. at 442.


\(^10\) The traditional view of the Constitution as a series of limitations upon government was recently epitomized by Justice Black's recent dissent in Goldberg v. Kelly, 397 U.S. 254, 272-273 (1970): "[E]arly settlers [in America] undertook to curb their governments by confining their powers within written boundaries, which eventually became written constitutions. They wrote their basic charters as nearly as men's collective wisdom could do so as to proclaim to their people and their officials an emphatic command that: Thus far and no farther shall you go; and where we neither delegate powers to you, nor prohibit your exercise of them, we the people are left free."
the Mount. Constitutional dogma has ordinarily been framed in terms of "thou shalt not."

E.g., Thou shalt not deny trial by jury.
E.g., Thou shalt not unreasonably search and seize.
E.g., Thou shalt not use a confession or evidence illegally obtained.
E.g., Thou shalt not deny counsel to those charged with crime.
E.g., Thou shalt not inhibit freedom of speech and press.
E.g., Thou shalt not deny the right to vote.
E.g., Thou shalt not suspend the writ of habeas corpus.
E.g., Thou shalt not enact an ex post facto law.
E.g., Thou shalt not grant titles of nobility.
E.g., Thou shalt not burden interstate commerce.
E.g., Thou shalt not make any law respecting the establishment of religion.
E.g., Thou shalt not infringe upon the right of the people to keep and bear arms.
E.g., Thou shalt not take private property for public use without just compensation.
E.g., Thou shalt not inflict cruel and unusual punishment.

When constitutional dogma is reframed in the affirmative, all sorts of practical problems arise. In *Gideon v. Wainwright*\(^1\) the Court decided it was no longer enough that the state might not deny a person charged with crime the right to counsel, and instead affirmatively put upon the state the duty to provide such counsel for indigents. The courts are still engaged in working out the scope and extent of the affirmative duty. Already it has progressed from those charged with crime to those faced with parole revocation, to juvenile delinquents, and my court will soon decide whether it should be extended to protect juveniles at a "waiver hearing" where it is decided whether or not they will be proceeded against as adults.

It has long been settled that the state may not deny a transcript of a trial for use on appeal to one who can pay for it, but the affirmative duty to provide it to indigents has now been engrafted upon the negative right that it not be denied.\(^2\)

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\(^1\) 372 U.S. 335 (1963).
The reason for the exclusionary rules of evidence,\(^{13}\) the application of which sometimes causes absurd results, is an attempt to strike a happy medium between affirmative and negative concepts of the Constitution. To say the Constitution forbids unreasonable searches and seizures gets one nowhere unless there is actually some assurance that they will not occur. That is why some think it is worthwhile to let the criminal go free because the constable blundered. A better solution, but one for which the country may not yet be prepared, might be to abandon the negative exclusionary rules and fashion an affirmative remedy against the state for substantial damages for infringements of constitutional liberty.\(^{14}\)

Judicial innovation in problem-solving is at least as old as John Marshall. The affirmative conception of the Constitution is not new, but the increasing intellectual honesty has become more visible in recent years. Being honest is great but it should not obscure valid theory that even now limits judicial power. Fundamentally it is still true that courts exercise only a veto power in the constitutional domain. In school cases the positive duties arise out of the negative command: thou shalt not practice invidious discrimination in the public schools. The courts have never said that the states must provide public schools or even public school busses:\(^{15}\) only that if they do, it must be on a non-discriminatory basis.

*Brown v. Board of Education*\(^{16}\) was argued to the Supreme Court December 8-11, 1952, reargued December 7-9, 1953, and decided May 17, 1954. It overruled *Plessy v. Ferguson*\(^{17}\) and held that segregation of children in public schools solely on the basis of race deprived the children of the minority group of equal educational op-


\(^{14}\) See *Kerr v. City of Chicago*, 424 F.2d 1134 (7th Cir. 1970). Although this case did afford an affirmative remedy, the cause of action was against individual policemen and not against the municipality of Chicago. The court held that claims of indemnity are not consolidated with tort claims, unless there is another contested issue such as the duty of indemnitor to defend. *Monroe v. Pape*, 365 U.S. 167 (1960) has also held that Congress did not intend to bring municipal corporations within the ambit of 42 U.S.C. § 1983, which gives the injured party a cause of action in a civil suit where there has been a deprivation of rights.

A similar question is currently under consideration by a panel of the United States Court of Appeals for the Fourth Circuit in *Jenkins v. Averett*, 4th Cir. No. 13,627.


\(^{17}\) 163 U.S. 537 (1896).
portunity. The Court postponed for further argument the question of whether an appropriate decree should provide that “within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice,” or whether the Court might “permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinction.”

*Brown v. Board of Education*⁴⁰ decided May 31, 1955, reiterated “the fundamental principle that racial discrimination in public education is unconstitutional. . . .”¹² It held that “[a]ll provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle.”²² The Court put upon school authorities the “primary responsibility” for making the transition to a system of public education freed of racial discrimination. It put upon the inferior courts the duty to consider whether the action of school authorities constitutes good faith implementation of the holding of *Brown I*, that racial discrimination in public education is unconstitutional. Also placed upon the inferior courts was the duty to consider the adequacy of any plans to effectuate a transition to a racially non-discriminatory school system. The Court contemplated difficulties with “the school transportation system. . . [and] revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis. . . .”²³

The first gloss of any consequence rubbed on *Brown I* and *II* was that of Chief Judge Parker of my court in *Briggs v. Elliott.*²⁴ Not surprisingly in that era, Judge Parker took the traditional negative approach to the Constitution and wrote that “the Constitution does not require integration. It merely forbids discrimination.”²⁵

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¹⁹ *Id.* at 496 n.13 (b).
²⁰ 349 U.S. 294 (1955) [hereinafter referred to as *Brown II*].
²¹ *Id.* at 298.
²² *Id.*
²³ *Id.* at 300-01.
²⁵ [I]t is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the
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With that rubric, freedom of choice was a foregone conclusion and apparently a complete answer. Pretty soon people began talking about de facto and de jure segregation, and this distinction was thought, and may still be thought in some high places, to justify continued segregation in the North while requiring some integration in the South to dismantle formerly dual school systems. The flaw in the de jure-de facto dichotomy is that from the moment Brown I was announced, all federal, state and local laws requiring or permitting segregation were void and of no effect. On and after May 31, 1955, there plainly could be, it seems to me, no de jure racial discrimination in any school system in the United States. What was left, North and South, was segregation in the schools in fact. The de jure concept was never of any importance except as a handle upon which to hang state action and an affirmative duty to dismantle. If one accepts an affirmative conception of the Constitution, the de

right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.


The court held that the Fourteenth Amendment did not require that all children in the state of South Carolina be required to attend school at an age when they and their parents thought it was desirable for the education of their children to be such that it would be consistent with the exercise of the right and freedom of the State of South Carolina to maintain education for all children. The court held that the state of South Carolina was free to determine the age at which children should be admitted to school. It held that the state of South Carolina was also free to determine the method by which children should be chosen for admission to school. It held that the state of South Carolina was also free to determine the qualifications of the children that were to be admitted to school.

jure idea becomes worthless and distinctions, North and South, intolerable.

If separation by race in the public schools renders educational opportunities inherently unequal (the constitutional fact of Brown I), it seems to me to be purely of historical interest and wholly irrelevant how the practice originated, whether by law, custom or ghetto economics. It is inescapable that an all-black school in Baltimore is just as unequal as an all-black school in Atlanta. Since Brown I is not subject to reargument, and indeed has been generally accepted by the majority of Americans, I think we can more profitably concern ourselves with what is reasonably practicable for a school board to do to correct inequality of educational opportunity—North and South—rather than having our attention diverted to how a particular school system may have become that way. Moreover, I think it is not necessary to disregard history in order to arrive at the same conclusion. People are pretty much the same everywhere, and race prejudice, now and in the past, has not been confined to the southern part of the United States. If South Carolina had laws to enforce segregation and New York did not, it may have been simply because New York did not need them to accomplish the same result, i.e., the Harlem ghetto may have accounted for as many all-black schools as existed in half of South Carolina.

I confess that I have no idea when it may be said that a particular dual school system has been dismantled. The proper question, it seems to me, is not what must be done to dismantle, but what must be done to afford equal protection in terms of equal educational opportunity for all children. If the question be framed that way, it applies North and South. And, in one nation, I think it should.

Although we do not yet know all the answers, we do have some that can be stated with a relative degree of certainty:

E.g., no school system may lawfully operate a dual school bus system with a “white” bus and a “black” bus traveling the same roads to pick up children of different colors.29

E.g., no school district may be deliberately gerrymandered into zones to include and exclude whites and blacks for the purpose of continuing segregation.30

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29 E.g., Kelley v. Altheimer Public School Dist., 378 F.2d 483 (8th Cir. 1967).
30 E.g., Monroe v. Board of Comm’rs, 380 F.2d 955 (6th Cir. 1967).
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E.g., no school having in it black pupils can segregate them in one classroom or deny them equal access to all school activities, including athletics.31

E.g., no qualified Negro applicant may be denied a teaching position because of race.32

E.g., so-called black schools may not be closed and the black teacher complement dismissed without providing black teachers fair and equal employment opportunity in the other schools in the system.33

E.g., new schools must be located and constructed so as not to perpetuate segregation.34

What we do not know has been authoritatively stated by the Chief Justice in Northcross. The unanswered questions are these: (1) May and/or must a school board reassign pupils from their own neighborhood schools to schools located at distant points for the purpose of achieving integration? How far is it to far? (2) May a school board be required to provide bussing to distant schools for those who want it for the purpose of getting an integrated education? Is there any distinction between bussing of black students and bussing of white students? (3) To what extent, if at all, may a school board gerrymander zones for the purpose of achieving integration? To what extent may be it required to do so?

Constitutional rights are seldom implemented perfectly. Although an accused is entitled to a lawyer, he is not entitled to have Clarence Darrow or John W. Davis or even the best lawyer at the local bar.

Similarly, it seems to me, it is doubtful that there is any unconditional right to racial balancing in the schools, or put differently, it may be that such right must be balanced against cost and inconvenience and educational purposes other than integration for its own sake. While no one would seriously suggest, absent a non-invidious reason, that a black school and a white school located back to back may be continued as separate institutions, neither has it been

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31 E.g., Felder v. Harnett County Bd. of Educ., 409 F.2d 1070 (4th Cir. 1969); United States v. Savannah Bd. of Educ., 405 F.2d 925 (5th Cir. 1967).
33 Wall v. Stanley County Bd. of Educ., 378 F.2d 275 (4th Cir. 1967).
34 Wheeler v. Durham County Bd. of Educ., 346 F.2d 768 (4th Cir. 1965).
urged yet, so far as I know, that a new bridge must be built over Puget Sound or San Francisco Bay to permit pairing of black and white schools.

The limits of practicability dictate, perhaps, that courts can require the states “to remedy only the harmful [racial] imbalance that is also unjustified” by rational considerations of time, space, and money.

Although some I have heard seem interminable, even the worst speeches eventually and mercifully come to an end. This one does not. The end has not yet been written and only the Supreme Court can do it. All I can do is to stop it on a plaintive note: nobody knows the trouble I have had, (except you) and will continue to have, figuring out whether a school system is unitary. But it is worth it. Indeed, I cannot think of anything more worthwhile than the efforts of all of us to understand and help implement the dream that this be one nation, indivisible, with liberty and justice for all, and that is what constitutional law is all about.

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