Volume 60 | Issue 2 Article 16

February 1958

Desegregation and the Law: The Meaning of Effect of the School Segregation Cases

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BOOK REVIEWS

DESEGREGATION AND THE LAW: The Meaning and Effect of the School Segregation Cases. By Albert P. Blaustein and Clarence Clyde Ferguson, Jr., New Brunswick, New Jersey: Rutgers University Press. 1957. Pp. XIV, 333. $5.00.

Throughout the United States each fall the main topic of conversation shifts from the weather to school segregation. The ringing of the school bells marks an increase in the efforts of Negroes to enter formerly all-white schools and in the activities by others to thwart their admission. Heretofore quiet cities and towns have experienced turbulence which has made their names known throughout the world. Little Rock, Clinton, and Sturgis are no longer just communities in the upper South, but are names which long will be associated with the struggle to desegregate their schools. Persons such as Bryant Bowles, John Kasper, and Orval Faubus have achieved nationwide notoriety almost overnight because of their pro-segregation activities.

In spite of public interest in desegregation, few people have an adequate knowledge of the question. Its political, moral, and social aspects have been more fully reported to the public and better comprehended by it than the legal ones. Most laymen, and perhaps most lawyers also, have no real understanding of the legal issues involved. They have not read the *School Segregation Cases;*[1] they have no clear concept as to the meaning of the relevant constitutional provisions. All too often explanations of the law have been so intermixed with other arguments that they have all but disappeared from the popular consciousness. Yet the legal side of the problem provides the framework for all progress toward integration and for all lawful resistance to desegregation. The time has arrived for a full-dress legal study of the meaning and effect of the *School Segregation Cases.*

Desegregation and the Law is a book written for laymen as well as for lawyers. In nontechnical terms it provides an explanation of the law controlling desegregation. While it presents a pro-integration point of view, it is not just another political or philosophical text. It shows how the issue of discrimination came through a lengthy course of litigation and how finally it reached the Supreme

[1] Brown v. Board of Education, 349 U.S. 294 (1955); Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Education, 347 U.S. 483 (1954).

Court. It defends the legal decision of the high court by tracing its legal history and background. And it illuminates some of the legal results stemming from the doctrines of the Court, both as to the efforts to circumvent them by legislation and as to their use as precedent for determining other cases.

In 1954 twenty-two states and the District of Columbia had laws either requiring or permitting segregation by race of students in schools.[2] On May seventeenth of that year the Supreme Court determined that such laws were inconsistent with the Constitution of the United States. The violated constitutional provisions were the equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment. Because laws necessarily affect different people in different ways, it is quite clear that not all legislative classifications are precluded by the equal protection clause; for if they were, all laws would be unconstitutional. The test for constitutionality of a classification is that of reasonableness. The Court in *Brown v. Board of Education*[3] determined that categorization of students by race was so unreasonable as to deny equal protection.

The case from the District of Columbia, *Bolling v. Sharpe*,[4] involved interpretation of the fifth amendment due process clause, since by the fourteenth amendment only the states are prohibited from denial of equal protection. Chief Justice Warren in his opinion maintained that:

> "Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."[5]

The legal objections raised as to the constitutional positions adopted by the Court—objections relating to the change from prior law and objections as to the content and source of the new law—are considered and answered by Professors Blaustein and Ferguson. Their answers form the bulk of their book.

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[2] For a list of such statutes, see Leflar and Davis, *Segregation in the Public Schools*—1953, 67 HARV. L. REV. 377, 378 (1954). The applicable West Virginia provisions are W. VA. CONST. art. XII, § 8; W. VA. CODE c. 18, art. 5, §§ 14, 16 (Michie 1955).

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

[4] 347 U.S. 497 (1954).

[5] *Id.* at 500.

Perhaps the favorite legal argument from southern forces against the *School Segregation Cases* is the contention that the decisions made therein were contrary to the prior expressed position of the Court. By giving earlier cases narrow interpretations—while southerners insist on expansive ones—the authors conclude that not until *Brown v. Board of Education* did the Supreme Court face and answer "the ultimate question: Is racial segregation in public schools unconstitutional *per se*?" (p. 112) They note that nowhere in *Plessy v. Ferguson*,[6] the case purportedly establishing the pre-1954 constitutional standard of "separate but equal," did the Court say that the constitution permits segregation where equal facilities are provided. The judges merely upheld the Louisiana transportation segregation laws as "reasonable." They left unanswered the "two critical questions: What are the criteria for measuring equality? What is the proper judicial remedy where inequality is found to exist?" (pp. 98-99)

The three pre-New Deal Supreme Court school segregation cases are similarly treated. In connection with *Cummings v. Board of Education*,[7] the first case in which petitioners asserted before the high court that state-supported separate schools were unconstitutional, it is noted that the conclusion adverse to the claimants rested on a matter of technical legal procedure, the contention came too late, instead of on the validity of "separate but equal." (p. 100) *Berea College v. Kentucky*[8] and *Gong Lum v. Rice*,[9] the other two early "separate but equal" cases are similarly disposed of as not directly validating the continuance of separate school systems. (pp. 100-02) The authors do, however, admit that Supreme Court failure to face the issue squarely did, for all practical purposes, permit the "separate but equal" concept to achieve "de facto constitutionality in the field of public education as a minimum constitutional requirement." (p. 103)

After reviewing *Plessy* and the three early education cases, Professors Blaustein and Ferguson turn to four cases dealing with law school and graduate education.[10] In these cases, while the

[6] 163 U.S. 537 (1896).
[7] 175 U.S. 528 (1899).
[8] 211 U.S. 45 (1908).
[9] 275 U.S. 78 (1927).
[10] These cases are: Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Board of Regents, 339 U.S. 147 (1950); Sipuel v. Board of Education, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

Court did not purport to disturb the "separate but equal" doctrine, it did order the admission of Negroes to formerly all-white state-supported institutions on the ground that in the particular instances involved separate education could not by its very nature be equal. In none of these cases did the Court have to reach the point of declaring racial classification unconstitutional *per se*. Since their net result was to require integration of Negro students, they tended to undermine, rather than further, the constitutional basis of school segregation.

Assuming, as the lawyers from the South do, that "separate but equal" was the law, we are then faced with the contention that in the *School Segregation Cases* the justices ignored a fundamental maxim of the common law—the principle of stare decisis. Did they do so? It depends upon what is meant by the doctrine of precedent. If it is viewed as a rigid doctrine by which courts are inexorably governed by prior cases in point, then it was badly bent, if not broken, in *Brown v. Board of Education*. But stare decisis is not so viewed by the authors. According to the general view it makes room for reconsideration of past determinations in the light of present conditions; it gives way before "the dynamic component of history."[11] Cardozo stated that:

> "If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie in helpless submission the hands of their successors."[12]

This is especially true of constitutional law where the legislature cannot mitigate the rigors of strict adherence to precedent.[13]

The second major branch of the attack on the Supreme Court's desegregation views relates to the questions raised concerning the source and content of the new law. It is contended that nowhere in the Constitution is the federal government given any power over education. That is true. But neither is there any constitutional mention of laundries. Yet in *Yick Wo v. Hopkins*,[14] when San Francisco authorities exercised their discretion in such a way as to grant laundry permits to all whites and deny them to all Chinese, the Supreme Court struck down the practice as a denial of equal

[11] DOUGLAS, STARE DECISIS 9 (1949).
[12] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 152 (1921).
[13] Davis, *The Doctrine of Precedent as Applied to Administrative Decisions*, 59 W. VA. L. REV. 111, 120 n.63 (1957).
[14] 118 U.S. 356 (1886).

protection. The equal protection clause is addressed to matters belonging to the states, "and it declares an all-pervading principle from which no state may find refuge. . . . Under it the only problem is whether racially segregated schools can truly be equal."[15] This problem is very much the business of the federal government—not only that of Congress, but also that of the courts.

It has been said, though, that the mid-1950's desegregation opinions violate the intent of the draftsmen of the fourteenth amendment not to strike down then prevailing school segregation practices.[16] The Court, however, found no conclusive history as to intent[17] and proceeded to interpret the amendment without legislative intent as the basis of their action. The function of the judiciary in constitutional interpretation is examined in *Desegregation and the Law.* In accord with most informed opinion as to the nature of constitutional interpretation, the authors conclude with Justice Holmes that:

> "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."[18]

The case deciding function of judges of necessity requires them to "make" law, whether we like it or not.

It has also been asserted that the segregation decisions rested on "sociology" rather than on law. This argument overlooks the fact that the law school cases, especially *Sweatt v. Painter,*[19] provide powerful precedent for the view adopted. If racial segregation in legal education is violative of the constitutional mandate, is not all such segregation open to question? The appeal of the Chief Justice to psychological and sociological knowledge as well as to the cases has raised a good deal of controversy. Yet when a case will have a bearing on such matters and when they relate to the case it is purest folly for judges to close their eyes to all but purely legal sources. In fact it is submitted that they cannot do so. Like

[15] Fairman, *The Attack on the Segregation Cases,* 70 HARV. L. REV. 83, 86, (1956).

[16] For a recent statement of that sort, see Harv. L. Record, Dec. 12, 1957, p. 1, col. 1 (quoting Senator J. Strom Thurmond (D) of South Carolina).

[17] 347 U.S. at 489.

[18] Gompers v. United States, 233 U.S. 604, 610 (1913).

[19] 339 U.S. 629 (1950).

Southern lawyers whose legal arguments are grounded in their belief in the so-called Southern way of life, judges too are influenced by nonlegal factors. The opinion in *Brown v. Board of Education* would have been freer from attack if Chief Justice Warren had not included footnote 11 and excerpts from the findings of the Kansas and Delaware courts. He could have merely noted that separation cannot be consistent with equality. It is asserted by the authors, however, that "where current economic or psychological thoughts influence judicial decision, as they must, such influence should be exposed and identified." (p. 137)

The legal results flowing from the initial determination by the Court that separation by race of public school students violates the Constitution did not immediately present themselves because of the Court's use of an unusual device. It divided the problem into two parts: the decision and the decree. Although in May of 1954 the judges said segregation was invalid, they delayed a year before issuing a decree as to what should be done about the admittedly unconstitutional practice.[20] This seldom employed technique was coupled with another almost unique device. The district courts were given the power "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."[21] This gave the lower courts discretion in carrying out the Supreme Court mandate. They were given leeway to act "with all deliberate speed."

Just how fast is speed that is deliberate? Professors Blaustein and Ferguson look to the case of *Virginia v. West Virginia*[22] for the first Supreme Court use of this phrase. West Virginia owed money to its mother state, money which Virginia wanted immediately. The Court said it was enough if West Virginia "proceeds . . . with all deliberate speed."[23] It was recognized that a state cannot move as rapidly as an individual. Similarly, in the segregation cases it would have been unreasonable to expect immediate action by state officials. The justices gave the local school authorities and other state officials a chance to work out at a local level the tangled web of

[20] Brown v. Board of Education, 349 U.S. 294 (1955).
[21] *Id.* at 301.
[22] 222 U.S. 17 (1911).
[23] *Id.* at 19.

problems that were sure to arise in connection with changing from operation of schools on a racial basis to their operation on a non-racial one.

It has been suggested that perhaps an order for immediate integration at the time of the first decision would in the long run have been more practical.[24] At any rate hindsight now makes it obvious that the respite given by the Court to the South has been used in many areas to foster plans to circumvent the decision and to stiffen the will for resistance to the Court's order. Not only has the lawless element used the delay, but also responsible government officials in the still-segregated states have seen fit to erect a series of legal barriers to the enforcement of the Court's will.[25]

Superficial compliance with the command to desegregate is proving to be an effective means of promoting continued racial segregation. One such device is the assignment of pupils to schools purportedly on other bases than that of race, but as a matter of fact on a racial pattern. Assignment statutes usually provide a long chain of administrative officials to consider and reconsider the claims of disappointed assignees. Already the federal courts have permitted litigants to invoke their aid without going through the administrative process first. In the *Adkins* case[26] it was made clear that the doctrine of exhaustion of administrative remedies will not require litigants to exhaust a process which basically gives them no remedy. The stage is now set for an attack on the actual assignments themselves.

By their power over the purse state legislators have erected some laws designed to impede the course of integration. They have provided that any school which integrates will lose all state financial aid, and, since the Little Rock crisis, that all state assistance will be cut off from any school at which federal troops are enforcing desegregation orders.[27] Other laws go even further and take the state out of the education business altogether if integration is commanded. These statutes have not as yet been considered by the Supreme Court. When they are it is certain that that body will

[24] MARTIN, THE DEEP SOUTH SAYS NEVER 171-72 (1957).

[25] For a check list of desegregation circumventing statutes, see N.Y. Times, Sept. 29, 1957, § 4, p. 5, col. 4.

[26] Adkins v. School Board, 148 F. Supp. 430 (E.D. Va.), *aff'd*, 246 F.2d 325 (4th Cir.), *cert. denied*, 78 Sup. Ct. 83 (1957).

[27] Texas recently has passed such legislation. Morgantown Post, Dec. 12, 1957, p. 12, col. 5.

consider the possible relevance of the cases which upset the efforts of the South to keep Negroes from voting in primaries by abolishing all primary election machinery.[28] The current efforts will probably meet the same fate. At least that is the judgment of the authors.

Discouragement of potential litigants is discussed by Professors Blaustein and Ferguson in the context of the Southern attack on the NAACP, the organization which in one way or another has been behind almost every desegregation case. (pp. 247-52) They also talk about state actions designed to breathe new life into the long dead and buried pre-Civil War doctrines of nullification and interposition. (pp. 242-47) Such state's rights pronouncements will have little impact on federal judges.

In spite of the attack on the validity of the decisions made in the *School Segregation Cases*, they have entered the books as precedent. And irrespective of the efforts to slow "all deliberate speed" to a dead standstill segregation is on its way out. *Brown v. Board of Education* is the law. It is being used by the Court as precedent not only in the area of public education but also in other areas where legally required segregation by races exists. (c. 12) Although its influence will be writ larger in the future, an understanding of its present impact is important. That understanding is provided in *Desegregation and the Law.*

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[28] See Terry v. Adams, 345 U.S. 461 (1952); Smith v. Allwright, 321 U.S. 649 (1944).