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## Constitutional Law—Equal Protection—Integration in Public Schools

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inly difficult and would impose an inordinate amount of work on the appellate courts.

The Court in the instant case apparently applied the "substantial evidence" rule. If the view is taken that this test is more restricted than the broad factual review seemingly contemplated by section 93-216, it would appear that the Court has assumed a legislative function and repealed or severely limited the statute by construction. It may well be that the practical necessities of appellate review demand something less than *de novo* review of all the facts in appeals from equity decrees. However, until such time as the legislature sees fit to modify the 1903 statute, it would seem that the Court should frame its rules on the scope of equity review with reference to that statute.

The instant case does not clarify the confused state of Montana law on equity decrees.<sup>9</sup> It is almost impossible to predict how much weight the Supreme Court will give the trial court's findings in any given equity appeal. A more uniform standard is highly desirable. If the legislature is unwilling to modify section 93-216, the entire burden will remain on the Court to effect a clarification.

DAVID O. DE GRANDPRE

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CONSTITUTIONAL LAW — EQUAL PROTECTION — INTEGRATION IN PUBLIC SCHOOLS — Petitioners, members of the Board of Directors of the Little Rock, Arkansas, Independent School District, attempted to secure a delay in the desegregation plan which they approved and adopted on May 24, 1955. This plan was adopted in an attempt to effectuate the mandate of the Supreme Court of the United States in *Brown v. Board of Education*,<sup>1</sup> that racial segregation in public schools be terminated. Pursuant to the plan, nine Negro students were scheduled to enroll in the high school in the fall of 1957. The governor of the state declared the school off-limits to Negro students and ordered units of the Arkansas National Guard to prevent their entrance. These troops were removed only after the governor and officers of the national guard were enjoined from preventing Negro attendance at the high school. Thereafter, the nine Negro students entered school but were removed following public demonstrations. Units of the United States Army were stationed at the school by Presidential order to prevent any further disorder and the Negro students re-entered classes. During the remainder of the year fires, bomb scares, and altercations within the school created unrest and turmoil which inhibited effective education. The Court of Appeals for the Eighth Circuit held that the public violence and opposition could not justify the delay petitioners sought for their desegregation plan. On certiorari to the Supreme Court of the United States, *held*, affirmed. Interference by the governor, state legislature, and general public did not constitute a justifiable excuse for a

<sup>9</sup>The historic foundations of the conflicting Montana approaches to the scope of equity review were analyzed and explained in detail in Clark, *Appeals from Equity Decrees in Montana*, 12 MONT. L. REV. 36 (1951).

<sup>1</sup>347 U.S. 483 (1954). This case is hereafter referred to as the first *Brown* case.

delay by the local school board in integrating the high school. "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper v. Aaron*, 78 Sup. Ct. 1401, 1410, (1958).

This case presents two issues fundamental to a federal system. First, what was the intended scope of the Court's statement that the states could not constitutionally support segregated education by any means? Second, can the southern states sustain segregated education by turning over public education to purely private organizations?

The question of state support of segregated schools through devious means was not directly presented to the court in the instant case. The real question of law was whether public violence and state opposition gave the school board justification for delaying their court-approved integration plan. Therefore the instant case could not, strictly speaking, be *stare decisis* on questions involving state support of a segregated educational system. It might even be said that the Court's position on *any* type of state support for segregation in the schools is only dictum. But whether it is dictum or not, the uncompromising view was probably stated for at least two reasons: first, to influence the lower federal courts by clearly indicating how the Supreme Court would react to a case which did squarely present the question; and second, to state the Court's view so unmistakably that even officials of segregation-minded states could interpret it in only one way.

Ordinarily the Supreme Court will not anticipate questions of constitutional law in advance of the necessity of deciding them. In *Asbury Hospital v. Cass County*,<sup>3</sup> the Supreme Court was asked to pass on the constitutionality of a possible future application of a state statute to the appellant. The Court held that it would not decide hypothetical constitutional issues, nor decide any issue in advance of the necessity of doing so. This, however, is but a self-imposed rule of court under which the Court has avoided passing on a large part of the constitutional questions pressed upon it for decision.<sup>4</sup> Hence, the Court is not bound to follow the rule. In *United States v. Breitling*,<sup>5</sup> the Court said that rules of court are but a means to accomplish the ends of justice, and, "it is always in the power of the court to suspend or modify its own rules, or to except a case from their operation, whenever justice requires it." Even so, the Supreme Court probably did not intend the instant case to be determinative of the constitutionality of any state laws.

The language in the instant case prohibiting state support of segregated education has been attacked on the grounds that it is the rendition of an advisory opinion intended to control lower courts when controversies arise because of certain actions of the states in supporting segregated education. The federal courts do not have the power to give advisory opinions. As

<sup>3</sup>326 U.S. 207 (1945).

<sup>4</sup>See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (concurring opinion of Brandeis).

<sup>5</sup>61 U.S. 252, 254 (1857).

was stated in *Liberty Warehouse Co. v. Grannis*:<sup>8</sup> "It is not open to question that the judicial power vested by Article III of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them." An advisory opinion is one in which the court gives an opinion concerning some controversial matter at the request of individuals or some other department or branch of the government. There is nothing in the record which indicates that the language referring to state support of segregated education in the instant case was so rendered.

The first *Brown* case contained no specific language as to state support of segregated schools. However, prohibition of such support is implicit in that opinion. The fourteenth amendment provides that no state shall deny any person equal protection of the laws. The second *Brown*<sup>9</sup> case recognized that if a state were to support segregated education through any means, it would surely be denying Negroes their rights guaranteed by the fourteenth amendment. After observing that racial discrimination in public education is unconstitutional the Court stated, "All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."<sup>7</sup> Therefore, the instant case does not establish any new principle; it merely delineates more carefully a principle of constitutional law which was implicit in the first *Brown* case, and explicit in the second *Brown* decision.

The second major problem posed by the instant case is whether the states can retain segregated education by leasing school facilities to purely private organizations, or by selling the facilities and completely abandoning public education as a state function.

A somewhat analogous problem was presented in *Department of Conservation and Development v. Tate*.<sup>8</sup> The state there attempted to sustain segregation in a public park by leasing it to a private corporation. The court said, "[C]itizens have the right to the use of the public parks of the state without discrimination on the grounds of race . . . it is equally clear that this right may not be abridged by leasing of the parks with ownership retained in the state."<sup>9</sup> If a state leased the schools, it would retain title to the facilities, and would in effect be encouraging the use of publicly owned facilities to further segregation. In the past, any form of state participation in a segregation plan has been stricken. For example, private realty covenants against selling residential property to Negroes have been held unenforceable as soon as state courts were used to give them legal effect.<sup>10</sup>

Research has disclosed no case in which the Supreme Court has upheld a segregation plan involving even remote and indirect state participation. It would therefore appear that any attempt by the states to lease existing

<sup>8</sup>273 U.S. 70, 74 (1927).

<sup>9</sup>*Brown v. Board of Education*, 349 U.S. 294 (1955). This case, referred to hereafter as the second *Brown* case, was an action to determine how the decree in the first *Brown* case was to be carried out.

<sup>7</sup>*Id.* at 298.

<sup>8</sup>231 F.2d 615 (4th Cir. 1956).

<sup>9</sup>*Id.* at 616.

<sup>10</sup>*Shelly v. Kraemer*, 334 U.S. 1 (1948).

state educational facilities to private corporations, in an effort to preserve segregation, will be similarly stricken.

However, if a state should elect to sell its educational facilities outright, and entirely abandon education as a public service, a much more fundamental constitutional problem is presented. No provision of the federal constitution makes public education a federal function. In the absence of a provision in a state constitution making education a state function, it is problematical whether the instant decision can be enforced against a state which withdraws completely from the educational picture and allows private organizations to discriminate in the field as they please. The fourteenth amendment does not prohibit invasion of civil rights by private parties or agencies.<sup>11</sup>

The first *Brown* case, however, indicates that the present Court does regard public education as a vital governmental function. That opinion said that "education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education."<sup>12</sup> Saying that education is a state *function* does not necessarily require a holding that it is a *duty* which the state may not abandon. However the above language is indicative of the Court's probable position.

In *Tonkins v. City of Greensboro*,<sup>13</sup> a city was allowed to avoid integration in its municipal swimming pool by selling it to a private corporation, because the city was under no obligation to furnish recreational facilities. If education were treated similarly, it would seem that the principal decision could not be enforced against a state which sold its educational facilities. However, it seems more likely that the dictum in the first *Brown* case probably represents the view the federal courts will follow.

In a series of cases striking discriminatory qualifications imposed by state political parties on the voting rights of Negroes in primary elections, the courts have furnished an analogy which might be used to preclude the states from avoiding educational integration by the "sale and abandonment" device.

In *Nixon v. Condon*,<sup>14</sup> the Texas legislature had given the State Executive Committee of the Democratic Party power to determine its own membership qualifications. Pursuant to this power, the committee excluded Negroes from party membership, thereby depriving them of their right to vote in primary elections. The Supreme Court held that this action was an unconstitutional denial of equal protection, saying that the committee should be "classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action."<sup>15</sup>

Subsequently the Texas Democratic Party, by a resolution voted on at the state convention, excluded Negroes from membership. It was thought

<sup>11</sup>Civil Rights Cases, 109 U.S. 3 (1883).

<sup>12</sup>347 U.S. 483, 493 (1954).

<sup>13</sup>162 F. Supp. 549 (M.D.N.C. 1958).

<sup>14</sup>286 U.S. 73 (1932).

<sup>15</sup>*Id.* at 89.

that this action would avoid the connotation of a state action. In *Smith v. Allwright*,<sup>16</sup> this procedure was also stricken as an unconstitutional discrimination by an agent of the state. The Court said, "The party takes its character as a state agency from duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. The action of the party was the action of the state."<sup>17</sup>

Hence if a state were to exercise any statutory control over education, while selling the school facilities to private organizations, discriminatory action by these organizations would probably be held to be an unconstitutional deprivation of equal protection of the laws.

The problem of enforcing the instant decision becomes more difficult if a state were to repeal all laws governing education. A possible solution to this problem is also suggested by analogy to an election case. The South Carolina Democratic Party had also excluded Negroes from party membership. Following the *Smith* decision, the state legislature repealed all laws governing primary elections, and all primary elections were thereafter regulated by the political parties. This device was held unconstitutional in *Rice v. Elmore*.<sup>18</sup> The grounds of that decision are particularly relevant to the instant case. They were:

(1) that political parties had become state institutions through which sovereign power is exercised by the people; and

(2) that because the primary election in South Carolina in fact controlled the ultimate election results, those who participated in denying the Negroes their right to vote were exercising state authority to that end.

It must of course be recognized that any analogy between the election cases and a school discrimination case is an imperfect one. The fifteenth amendment provides that the states shall not discriminate against voters in federal elections. Further, Article I, section 4, of the United States Constitution gives Congress express power to control the manner of holding federal elections. There is no such direct congressional control over education. But the equal protection clause of the fourteenth amendment does give the federal courts power to strike down any state action which denies equal protection of the law.

The existence of a link between overt state activity and discriminatory action by private groups who might subsequently operate the schools is the critical item.

Two factors tend to indicate that the courts will be able to find such a link. The statement in the first *Brown* case that public education is a governmental function is the more obvious. It may imply that a state cannot abandon education as a state function. The second indicator is the position taken by the Court of Appeals for the Fourth Circuit in *Rice v. Elmore*.<sup>19</sup> The court there, quoting from a Supreme Court opinion, said

<sup>16</sup>321 U.S. 649 (1944). The decision in this case was based upon the fifteenth amendment rather than the fourteenth amendment. However, the crucial point in the case was whether there had been state action. The Court said, "The question as to whether the exclusionary action of the party was the action of the State persists as the determinative factor." *Id.* at 661.

<sup>17</sup>*Id.* at 663.

<sup>18</sup>165 F.2d 387 (4th Cir. 1947).

<sup>19</sup>*Ibid.*

that "primary elections and nominating conventions are so closely related to the final election, and the proper regulation so essential to effective regulation of the latter, so vital to representative government that power to regulate them is within the general authority of Congress."<sup>20</sup>

In the *Rice* case the court's finding of the congressional regulatory power was predicated on the *effect* the regulated activity would have on other rights which were clearly within the realm of constitutional protection. It is possible that if the question of state abandonment of public education were squarely presented, the Court might find a state obligation to provide educational opportunities for its citizenry, because of the effect of education, or the lack thereof, on the exercise of all other protected civil liberties.

In any event, the principal case is a landmark decision. The Supreme Court's stand on the unconstitutionality of racial segregation in the public schools is unequivocal and seemingly absolute. The decision clearly specifies that the states cannot constitutionally perpetuate segregated education by any means. The question which cannot yet be answered is whether the states can successfully avoid this decision by complete withdrawal from the field of education. However, it seems likely that any discriminatory educational system, operated by private groups, will be stricken as either a delegation of state authority to a private group or as a sovereign power being exercised by a private group with tacit approval by the state.

It is of course possible that the people of the South will themselves force state officials to intergrate the schools, without court enforcement, if the present crisis results in a continued and material reduction in the quality of education received by Southern children.

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<sup>20</sup>*Id.* at 389.

