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The Warren Court and Desegregation

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I.

WHEN Chief Justice Warren assumed his post in October 1953, the underpinnings of the "separate but equal"[1] concept had become unmoored beyond restoration. Full-scale argument on the validity of apartheid in public education was only weeks away, and the portent of change in the constitutional doctrine governing American race relations was unmistakable. Although the groundwork had been carefully prepared[2] for the Chief Justice's announcement in *Brown v. Board of Education*[3] that fundamental principles forbade racial segregation in the nation's public schools, the decision, when it was delivered on May 17, 1954, was more than a break with the past. In interpreting the fourteenth amendment as guaranteeing and securing to Negroes equality in substance rather than in mere form, the *Brown* decision was a revolutionary statement of race relations law.

Brown was the culmination of a trend, evident as early as *Missouri ex rel. Gaines v. Canada*,[4] away from the arid and sophistical reading of the Civil War amendments marked by the legalisms of *Plessy v. Ferguson*.[5] Instead, the Supreme Court in the first half of this century had begun to address itself to the task of formulating a pragmatic and realistic interpretation of what those amendments demanded in respect to the Negro's civil and political status. "Sophisticated as well as simpleminded" modes of racial discrimination were understood to be within the Constitution's reach.[6] The fourteenth amendment's guaranty of equal educational opportunity was said to be open-ended; it insured material equality;[7] it encompassed intangibles not subject to objective measurement;[8] and it forbade restrictions impairing and inhibiting a

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

2. P. FREUND, THE SUPREME COURT OF THE UNITED STATES 172-73 (1961). Actually, McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), had forecast what the Court would decide in *Brown*.

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

4. 305 U.S. 337 (1938).

5. 163 U.S. 537 (1896).

6. Lane v. Wilson, 307 U.S. 268, 275 (1939).

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

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

black student's ability to study and exchange views with other students.[9]

With the decision in *Brown*, enforced racial segregation in education was put beyond the pale. More than that, the approach to which the Warren Court was fully committed required an examination and evaluation of any act, practice, or device which was undertaken with government sponsorship, in order to determine whether in purpose or effect black students were thereby denied their constitutional right to truly equal educational opportunity. Similarly, a like test seemed to be applicable in all other areas of governmental activity. *Brown* thus extended to its natural consequences could mean that the fetters binding the Negro were at last being struck, and that he would henceforth be able to stretch himself to his full potential.

Decision in the school desegregation cases began the Warren Court's long involvement in the development of race relations law. Subsequent opinions soon underscored the universality, permanence, and enduring nature of the newly announced constitutional doctrine. Segregation was struck down in public parks,[10] in intrastate[11] and interstate[12] commerce, at public golf courses[13] and other recreational facilities,[14] in airports[15] and interstate bus terminals,[16] in libraries,[17] and in the facilities of public buildings[18] and courtrooms.[19] Unlawful discrimination was found in the listing of candidates for public office by race on the ballot;[20] in the Southern custom of addressing black witnesses by their first name;[21] and in making marriage[22] and sexual relations[23] between blacks and whites a crime.

In its refusal to tolerate open attempts to evade[24] or frustrate[25]

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

10. Watson v. Memphis, 373 U.S. 526 (1963); New Orleans City Park Improvement Assn. v. Detiege, 358 U.S. 54 (1958) (memorandum decision).

11. Gayle v. Browder, 352 U.S. 903 (1956) (memorandum decision).

12. Boynton v. Virginia, 364 U.S. 454 (1960) (application of Interstate Commerce Act).

13. Holmes v. City of Atlanta, 350 U.S. 879 (1955) (memorandum decision).

14. Watson v. Memphis, 373 U.S. 526 (1963); Mayor & City Council of Baltimore City v. Dawson, 350 U.S. 877 (1955) (memorandum decision).

15. Turner v. Memphis, 369 U.S. 762 (1962).

16. Thomas v. Mississippi, 380 U.S. 524 (1965); Boynton v. Virginia, 364 U.S. 903 (1956) (memorandum decision).

17. Brown v. Louisiana, 383 U.S. 131 (1966).

18. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

19. Johnson v. Virginia, 373 U.S. 61 (1963).

20. Anderson v. Martin, 375 U.S. 399 (1964).

21. Hamilton v. Alabama, 376 U.S. 650 (1964).

22. Loving v. Virginia, 388 U.S. 1 (1967).

23. McLaughlin v. Florida, 379 U.S. 184 (1964).

24. Cooper v. Aaron, 358 U.S. 1 (1958).

25. Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964).

compliance with *Brown*, the Warren Court made clear that the new doctrine was a fixed and permanent aspect of its approach to constitutional adjudication in the race relations field. In addition, a broadened definition of state action, encompassing all situations in which the state was significantly involved in supporting or encouraging discrimination, extended the reach of the fourteenth amendment.[26] The Court ruled that a state is under no affirmative obligation to enact antidiscrimination legislation, and that when such laws are promulgated, they may be repealed; but the Court added the precautionary caveat that if in the process of repeal the state tips the political balance in favor of racial discrimination, it violates the fourteenth amendment.[27]

The Court also sought to strengthen and further the desegregation process by protecting and undergirding the peaceful self-help activities of those individuals and groups seeking to eliminate segregation. The rationale for extending the constitutional guarantees of freedom of association and expression to membership in civil rights groups and their sponsorship of test litigation reveals the Warren Court at its best in adapting the Constitution's safeguards to real-life situations. Until the Civil Rights Act of 1964[28] empowered the federal government to use its resources in furthering desegregation, the only method available to secure compliance with *Brown* in the face of resistance was affirmative action by individuals or groups. The Supreme Court was sensitive to this problem, and when Alabama sought to still concerted group agitation and activity for desegregation by requiring public identification of all NAACP members in the state, the Court realized that such enforced disclosure would expose the members to coercion, intimidation, reprisals, and harassment. Recognizing that this would impair, if not destroy, concerted civil rights activity, the Court concluded that the constitutional guaranty of freedom of association embraced and included privacy in one's associational relationships, absent a countervailing state interest of compelling dimensions.[29] Subsequently, in

26. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

27. Reitman v. Mulkey, 387 U.S. 369 (1967). A variation on the *Reitman* formula involving a referendum repealing an open housing ordinance and barring all such future legislation except on referendum of the electorate is now pending before the Supreme Court. Hunter v. Erickson, #63, Oct. Term 1968.

28. 42 U.S.C. §§ 2000 (1964).

29. NAACP v. Alabama, 357 U.S. 449 (1958); Louisiana v. NAACP, 366 U.S. 293 (1961); *accord,* Bates v. Little Rock, 361 U.S. 516 (1960). Shelton v. Tucker, 364 U.S. 479 (1960), dealt with a more difficult aspect of the question than forced disclosure of membership. An Arkansas statute, broadly requiring public school teachers to list all organizational connections over a stated period of time as a prerequisite to employment, was held to be too unselective and sweeping. In Gibson v. Florida Legis-

striking down state efforts to make group sponsorship of civil rights litigation unlawful, the Court correctly classified such court action as a protected form of political expression for the black community[30] —and indeed for many years it was the only effective method of political expression available.

On the other hand, the Court's concern for keeping peaceful protest activity alive and its pragmatic approach to decision-making led to a rather bizarre development in the sit-in cases. While the Court was determined to support the efforts of college students to break the pattern of racial segregation in the South by organized sit-in activities, it was not prepared to extend *Shelly v. Kraemer*[31] in order to prohibit state enforcement of private discrimination in places of public accommodation, or to break new ground by adopting some other approach to decision that would bar state use of its breach of the peace or trespass laws to defeat this kind of civil rights effort.[32] Instead, it held to an ad hoc method of adjudication, rendering decisions good for one case and one case only.[33] The Court came

lative Investigation Comm., 372 U.S. 539 (1963), Florida sought disclosure of the names of all members of the NAACP in Miami to determine the extent of the organization's infiltration by Communists. The Court held that enforced disclosure could be allowed only after a showing of a nexus between the organization about which the membership inquiry was being made and subversion. For a more detailed discussion of this development, *see* Carter, *Association: Civil Liberties and the Civil Rights Movement*, in LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT 181 (1965). In addition to aiding this form of self-help, the Court granted certiorari in NAACP v. Webb's City, 375 U.S. 939 (1963), to review the validity of a state injunction barring peaceful consumer picketing sponsored by a civil rights group to pressure store owners to abandon their policy of segregation. The question was not decided, however, because on respondent's suggestion of mootness, the judgment was vacated and remanded to effectuate respondent's representation that the injunction would be set aside. 376 U.S. 190 (1964).

30. NAACP v. Button, 371 U.S. 415 (1963).

31. 334 U.S. 1 (1948).

32. In Bell v. Maryland, 378 U.S. 226 (1964), the six members of the Court who were prepared to decide on a constitutional basis the validity of state trespass convictions of sit-in demonstrators for refusing to leave a restaurant on orders from the owner were evenly divided. The three other members of the Court were not prepared to face the issue, and thus the case was remanded to state court for reconsideration in light of the newly enacted law barring discrimination in places of public accommodations.

33. *See, e.g.*, Garner v. Louisiana, 368 U.S. 157 (1961) (no evidentiary basis for conviction for breach of peace, and conviction for criminal trespass could not be sustained since not charged); Peterson v. City of Greenville, 373 U.S. 244 (1963) (city ordinance held to require restaurant discrimination, hence exclusion of Negroes was unconstitutional state action requiring setting aside conviction for criminal trespass); Lombard v. Louisiana, 373 U.S. 267 (1963) (statements of mayor and chief of police construed as mandating continuation of the racial exclusion by restaurant owners and unconstitutional state action thus involved); Robinson v. Florida, 378 U.S. 153 (1964) (invalid state action embodying a state policy discouraging restaurant owners from serving the two groups without discrimination found in state regulations issued by the state board of health requiring restaurant owners with both white and black

out on the right side in supporting and sustaining this form of peaceful protest, but its reasoning was strained and tortured. Its decisions kept the sit-in movement viable until enactment of the Civil Rights Act of 1964, which reduced racial discrimination in places of public accommodation to an issue of minor significance.[34]

During the past fifteen years, the Supreme Court has undoubtedly concerned itself more with the affirmative development of substantive constitutional doctrine upholding equal rights than at any other time during its history. It has been criticized for its decisions and for its activism, but the criticism is misplaced. The Court in *Brown,* in requiring the elimination of enforced racial segregation as an essential prerequisite to equal education, did no more than the *Plessy v. Ferguson* Court had done in devising the separate-but-equal standard as an appropriate constitutional yardstick. Both Courts attempted to give what they saw as effective and meaningful import to the fourteenth amendment's guaranty of equal protection and, in so doing, both made national policy in the race relations field. *Plessy* paid homage to the equal rights verbiage of the fourteenth amendment while in fact legitimizing governmental subordination of blacks to whites. The rhetoric of *Brown,* on the other hand, sought to make the same grant of equality an ingredient of real life in the Negro community.

The problem is that while the Warren Court's rhetoric is broad and sweeping, its decisions have kept to a rather narrow path. It has in the main addressed itself solely to the task of outlawing formalized public discrimination—to the appearance rather than the substance of racism. The Court has not expanded or extended *Brown.* It has not dealt with the question of de facto school segregation—an issue which is as potentially explosive today as was formal segregation in 1954.[35] Therefore, we do not know what equal education

employees to provide separate lavatories for each race and each sex); Griffin v. Maryland, 378 U.S. 130 (1964) (special policeman employed by park was a deputy sheriff and arrested demonstrators in his role as state official, unlawful state action thus found). For full discussion of sit-in cases, *see* Paulson, *The Sit-In Cases of 1964: "But Answer Came There None,"* 1964 SUP. CT. REV. 137.

34. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). Katzenbach v. McClung, 379 U.S. 294 (1964), upheld the constitutionality of Title II of Civil Rights Act of 1964, 42 U.S.C. § 2000A (1964) (barring discrimination in public accommodations). In Hamm v. City of Rock Hill, 379 U.S. 306 (1964), the Court construed the federal civil rights law barring discrimination in places of public accommodation as requiring the abatement of all criminal prosecution under state law, both prior and subsequent to the passage of the Act, growing out of efforts to secure unsegregated access to public accommodation facilities.

35. *See* Bell v. School City of Gary, *Indiana* 213 F. Supp. 819 (N.D. Ind.), *aff'd,* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964) (holding that de facto school

means in the context of Northern-style school segregation.[36] Although the Court supported and protected the sit-in movement, it developed no cutting principles of law which would bar states from lending their weight, under the guise of enforcing criminal trespass laws, to the support of private discrimination practiced by restaurant or hotel owners.[37]

White supremacy, with or without formalized public discrimination, is the pervasive evil—the unyielding and persistent deterrent to fulfillment of the aims of the thirteenth, fourteenth, and fifteenth amendments. However, while the Warren Court did not go as far as it could have in the development of the substantive constitutional doctrine which *Brown* augured, what it did accomplish is of great significance. The broad rhetoric is there to build upon in the future. As stated earlier, the Court has attempted to deal forthrightly with one aspect of the race relations question—formalized public discrimination. And here, except for the troublesome problem of school segregation, it has done quite well. Moreover, the Court's perseverance has helped considerably in revealing the true dimensions of the race problem which confronts the nation today. What is now crystal clear is that solution of this problem will involve state and

segregation raised no constitutional question); Dowell v. School Bd., 244 F. Supp. 971 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967), (avoidance of de facto segregation constitutionally required). Balaban v. Rubin, 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct. 1963), *aff'd*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964) (local school board's deliberate effort to eliminate racial imbalance constitutionally permissible). *See also* Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965). An interesting phenomenon is Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965), and Dowell v. School Bd., *supra*. These two cases involved similar situations and like principles. In both cases transition from pre-*Brown* segregation to a unitary school system which *Brown* required was said to be completed. In *Downs*, when the transition resulted in a de facto situation which confined the black children to virtually the same educational isolation that had existed before, the courts held that no constitutional question was involved. In *Dowell* the trial court ruled that the transition necessitated an avoidance of a substitution of de facto school segregation for pre-*Brown* school segregation. The Supreme Court refused to review either holding, clearly demonstrating that it is not yet prepared to face the question. *See generally* Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 W. RES. L. REV. 502 (1965); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Peck & Cohen, *The Social Context of School Segregation*, 16 W. RES. L. REV. 475 (1965); Wright, *Public School Desegregation: Legal Remedies for De Facto School Segregation*, 40 N.Y.U. L. REV. 285 (1965).

36. For a most comprehensive analysis of that question, *see* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967). *See also* Rousselot, *Achieving Equal Educational Opportunity for Negroes of the North and West: The Emerging Role for Private Constitutional Litigation*, 35 GEO. WASH. L. REV. 698 (1967).

37. The difficulty the ad hoc decision poses can be seen in comparing Edwards v. South Carolina, 372 U.S. 229 (1963), with Adderley v. Florida, 385 U.S. 39 (1966), where, on virtually the same set of facts, the Court reached opposite results.

federal efforts of the greatest magnitude. The elimination of formalized public discrimination will not suffice.

Lately, the Court has seemed to show signs of wanting the executive and legislative branches of government to take over responsibility for fulfilling the commitment which the nation made to the black community in the Civil War amendments. It has made clear that Congress, in implementing the objectives of the fourteenth amendment, has power to prohibit private discrimination as well as that supported by the state.[38] Last term, instead of waiting for the open housing provisions of the Civil Rights Act of 1968[39] to take effect on January 1, 1969,[40] the Court resurrected the Civil Rights Act of 1866[41] as a viable federal law applicable to discrimination in the public and private sale or rental of housing.[42] The Court noted that racial discrimination which "herds men into ghettos and makes their ability to buy property turn on the color of their skin . . . is a relic of slavery."[43]

II.

After declaring in *Brown I* that segregated education denied the constitutional guaranty of equal protection, a year later in *Brown II* the Warren Court addressed itself to the question of what remedy should be granted.[44] The formula adopted by the Court—requiring a "good faith" start in the transformation from a dual to a unitary school system, with compliance being accomplished with "all deliberate speed"—was a grave mistake. It has kept the Court mired in the vexing problems of progress in school desegregation for the past thirteen years. Although the Court denied that this formula was intended to do more than allow time for necessary administrative changes which transformation to a desegregated school system required, it is clear that what the formula required was movement toward compliance on terms that the white South could accept. Until *Brown II*, constitutional rights had been defined as personal and present. In the exercise of that ephemeral quality called judicial statesmanship, the Warren Court sacrificed individual and immediate vindication of the newly discovered right to desegregated education in favor of a mass solution. This was frequently reflected by the Court's tendency to avoid individual solutions in favor of ap-

38. United States v. Guest, 383 U.S. 745 (1966).
39. 82 Stat. 73, tit. VIII.
40. Tit. VIII, § 803(a)(2).
41. 42 U.S.C. §§ 1981-82 (1964).
42. Jones v. Mayer Co., 392 U.S. 409 (1968).
43. 392 U.S. at 442-43.
44. 349 U.S. 294 (1955).

proving long-range desegregation plans that would presumably benefit large groups of students in the future.[45]

The Court undoubtedly failed to realize the depth or nature of the problem. It undertook to oversee the pace of desegregation and apparently believed that its show of compassion and understanding of the problem facing the white South would help develop a willingness to comply. Instead, the "all deliberate speed" formula aroused the hope that resistance to the constitutional imperative would succeed. As indicated above, the Court did condemn open resistance with firm resolve; but since its concern was to secure "an initial break in the long established pattern of excluding Negro children from schools attended by white children, the principal focus was in obtaining for these Negro children courageous enough to break with tradition a place in the white school."[46]

In its anxiety to get the desegregation process moving at all costs, the Court condoned the application of procedural requirements and pupil placement laws which it knew were designed to delay or evade substantial compliance with the principles enunciated in *Brown I*. For eight years after its implementation decision, the Court refused to review any case in which questions were raised concerning the validity of pupil placement regulations or the appropriateness of applying the doctrine of exhaustion of administrative remedies to frustrate suits seeking to vindicate the right to a desegregated education.[47] Plans which called for the desegregation of only one grade per year were left standing.[48]

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45. In Hawkins v. Board of Control of Florida, 350 U.S. 413 (1956), the Court made clear that its "all deliberate speed" formula was applicable only to grade and secondary school desegregation. The personal and present nature of the right to equal education remained unimpaired at all other educational levels and thus required immediate vindication. More recently, in Watson v. Memphis, 373 U.S. 526 (1963), involving segregation in a public park, it made the same point.

46. Green v. County School Bd., 391 U.S. 430, 435 (1968).

47. Covington v. Edwards, 264 F.2d 780 (4th Cir. 1959), *cert. denied*, 361 U.S. 840 (1959) (pupil placement law validated and procedures established required to be followed); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1956) (exhaustion of administrative remedies); Hood v. Board of Trustees, 232 F.2d 626 (4th Cir. 1956), *cert. denied*, 352 U.S. 870 (1956) (exhaustion of administrative remedies required); Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala. 1958), *aff'd* (on the limited ground on which the district court rested its decision), 358 U.S. 101 (1958); *accord*, Holt v. Raleigh City Bd. of Educ., 265 F.2d 95 (4th Cir.), *cert. denied*, 361 U.S. 818 (1959) (requirement that parent and child follow procedures established by pupil placement board sustained); DeFebio v. County Bd., 199 Va. 511, 100 S.E.2d 760 (1957), *appeal dismissed and cert. denied*, 357 U.S. 218 (1958).

48. Kelley v. Board of Educ., 270 F.2d 209 (6th Cir. 1959), *cert. denied*, 361 U.S. 924 (1959); Slade v. Board of Educ., 252 F.2d 291 (4th Cir. 1958), *cert. denied*, 357 U.S. 906 (1958) (a plan of desegregation spread over a shorter space of time). *But see* Ennis v. Evans, 281 F.2d 385 (3d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961) (state plan calling for desegregation grade-by-grade over twelve-year span, disapproved and total integration ordered by fall 1961); Evans v. Buchanan, 256 F.2d 688 (3d Cir. 1958),

As time passed and no appreciable progress was made, the Warren Court began to manifest impatience. In 1962, it announced in *Bailey v. Patterson*[49] that no substantial question was involved as to the invalidity of state laws requiring segregation; the issue, the Court stated, had been resolved. The following year the Court ruled that the doctrine requiring exhaustion of administrative remedies before relief could be sought in federal court had no application to questions of school desegregation.[50] In *Griffin v. Prince Edward County Board of Education*, which was decided in 1964, the Court stated that the time for mere deliberate speed had run out.[51] And a year later, in *Bradley v. School Board of Richmond*,[52] it stated that "[d]elays in desegregating school systems are no longer tolerable."[53]

In spite of these belated efforts, the Warren Court's formula has actually accomplished very little school desegregation. By the 1963-1964 school year, for example, the eleven states of the old Confederacy had a mere 1.17 per cent of their black students attending schools with white students. In 1964-1965, the percentage had risen to 2.25 per cent because of the effect of the Civil Rights Act of 1964.[54] For the 1965-1966 school year—as a result of guidelines devised by the United States Department of Health, Education, and Welfare—the percentage reached 6.01 per cent.[55] Fear of losing federal funds had become a motivating factor inducing school authorities to effectuate some small measure of desegregation.[56]

The reason for the specific failure of the Court's formula is reasonably clear. The Warren Court had placed the primary responsibility for making the transition from the old standard to the new one upon local public school officials. These people were most prone to resent and resist the changes ordered by the Court, and to look upon the newly enunciated constitutional doctrine as a personal repudiation. Moreover, the lower federal courts were given the elusive standard of "good faith" by which to measure compliance. This led the courts to require a showing of subjective evil intent on the

cert. denied, 358 U.S. 836 (1958) (state superintendent and state board of education under orders to formulate a plan of desegregation for entire state).

49. 369 U.S. 31 (1962).

50. McNeese v. Board of Educ., 373 U.S. 668 (1963).

51. 377 U.S. 216, 234.

52. 382 U.S. 103 (1965).

53. 382 U.S. at 105.

54. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 903 (5th Cir. 1966); SOUTHERN EDUC. REP. SERV. STATISTICAL SUMMARY (15th ed. 1965). *See also* Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 594 (1968).

55. For discussion of effectiveness of the Department of Health, Education, and Welfare guidelines in increasing the pace of desegregation, *see* Dunn, *Title VI, The Guidelines in School Desegregation in the South*, 53 VA. L. REV. 42 (1967).

56. *See, e.g.*, Green v. County School Bd., 391 U.S. 430 (1968).

part of local officials as a prerequisite to granting relief from needless delay.

At present, stricter standards for compliance are in effect. In the 1965 decisions of *Bradley*[57] and *Rogers v. Paul*,[58] the Court apparently concluded that a new yardstick had to be devised to assess compliance efforts. This new approach is to evaluate the desegregation on the basis of its effectiveness—to determine whether the plans gave "meaningful assurance of a prompt and effective disestablishment"[59] of the biracial school system. Effective results in eliminating segregation root and branch are now required, and desegregation plans must hold out a realistic promise of success.

With the decision in *Brown I* the Court embarked upon a course designed in the short run to transform the Southern biracial school system into a unitary school system. In the long run, *Brown I* signalled the end of all public impediments, whatever their source, which denied black children their right to equal education. In deciding to oversee the pace of desegregation, which was what *Brown II* entailed, the Warren Court took upon itself an unnecessary responsibility for the South's failure to respond. It would have fared better in not departing from the usual standard—in ordering the immediate vindication of the rights that it had declared to exist in *Brown I*. Such a course probably would not have resulted in desegregation at a faster pace, but it would have kept the Court's image from being tarnished by first yielding fruitlessly to expediency.

III.

Brown v. Board of Education fathered a social upheaval the extent and consequences of which cannot even now be measured with certainty. It marks a divide in American life. The holding that the segregation of blacks in the nation's public schools is a denial of the Constitution's command implies that all racial segregation in American public life is invalid—that all racial discrimination sponsored, supported, or encouraged by government is unconstitutional. As a result of this seminal decision, blacks had the right to use the main, not the separate, waiting room; to choose any seat in the bus; to relax in the public parks on the same terms as any other member of the community. This and more became their birthright under the Constitution.

Equal rights legislation could no longer be regarded as a gift

57. 382 U.S. 103.
58. 382 U.S. 198.
59. Green v. County School Bd., 391 U.S. 430, 435 (1968).

benignly bestowed by an enlightened and liberal-minded electorate. Antidiscrimination laws were no longer great milestones; rather, they served merely as administrative machinery useful for accomplishing what the fundamental law required. While such machinery was, of course, vital and important, these statutes could now be critically assessed not in respect to the "good intentions" which led to their enactment, but rather in terms of the results achieved in alleviating the particular forms of discrimination they were supposed to regulate.

Thus, the psychological dimensions of America's race relations problem were completely recast. Blacks were no longer supplicants seeking, pleading, begging to be treated as full-fledged members of the human race; no longer were they appealing to morality, to conscience, to white America's better instincts. They were entitled to equal treatment as a right under the law; when such treatment was denied, they were being deprived—in fact robbed—of what was legally theirs. As a result, the Negro was propelled into a stance of insistent militancy. Now he was demanding—fighting to secure and possess what was rightfully his. The appeal to morality and to conscience still was valid, of course, but in a nation that was wont to describe itself as a society ruled by law, blacks had now perhaps the country's most formidable claim to fulfillment of their age-old dream of equal status—fulfillment of their desire to become full and equal participants in the mainstream of American life.

Brown's indirect consequences, therefore, have been awesome. It has completely altered the style, the spirit, and the stance of race relations. Yet the pre-existing pattern of white superiority and black subordination remains unchanged; indeed, it is now revealed as a national rather than a regional phenomenon. Thus, *Brown* has promised more than it could give, and therefore has contributed to black alienation and bitterness, to a loss of confidence in white institutions, and to the growing racial polarization of our society. This cannot in any true sense be said to be the responsibility of the Warren Court. Few in the country, black or white, understood in 1954 that racial segregation was merely a symptom, not the disease; that the real sickness is that our society in all of its manifestations is geared to the maintenance of white superiority.

Having opened this Pandora's Box, the Court was left for a long time to handle the problem alone. It is to its credit that the Warren Court did not falter in its resolve or turn away from its commitment to cut away all government support for discrimination.

While I have reservations about what the Court has done or failed to do, I am forced to recognize that even if the Court had functioned as I suggest it should have, we would probably be no nearer to the elimination of racism in this country than we are today. For, whatever the Court does, our society is composed of a series of insulated institutions and interests antithetical to the Negro's best interest. Effective regulation and control of these institutions and interests must come not from the Supreme Court but from the bodies politic.