

Runnymede or *Marbury*<sup>4</sup> or *Yick Wo v. Hopkins*.<sup>5</sup> The Harvard philosopher Josiah Royce saw the whole of ethics and civilization and law rooted in the ideal of "loyalty to loyalty." "Loyalty to loyalty to law" best epitomizes Dean Pound's vision of our inheritance and our future. Grateful readers of these lectures accordingly can hope for another series on the problems inherent in contemporary due process and equal protection—themes brilliantly discussed in recent articles by Judge Hastie<sup>6</sup> and Professor Kadish.<sup>7</sup> The lessons and the way ahead again are fit subjects for the Dean of American jurisprudence.

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DESEGREGATION AND THE LAW. By Albert P. Blaustein and Clarence Clyde Ferguson, Jr. New Brunswick, New Jersey: Rutgers University Press. 1957. Pp. xiv, 327. \$5.00.

After four years the decision of the Supreme Court in the school segregation cases<sup>1</sup> is still defied in large areas of the country. This defiance by people who regard themselves as law-abiding is necessarily coupled with a deep feeling that the Court's decision lacks legal justification: that the Constitution itself does not bar racial segregation and that the Supreme Court stepped outside its competence as interpreter of the Constitution to impose upon the South the personal preferences of the justices.

The authors of *Desegregation and the Law* have devoted their book to this critical impasse. They seem to have realized that the situation calls not only for accurate information but also for a calm and temperate attitude which alone can permit a reasoned approach to the problem. The authors bring both, in generous measure, to the book. Their stated goal is not to debate the constitutional issues but rather to explain the

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4. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

5. 118 U.S. 356 (1886). "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Id.* at 373.

6. Hastie, *Judicial Method in Due Process Inquiry*, in *GOVERNMENT UNDER LAW* 326 (Sutherland ed. 1956).

7. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L.J.* 319 (1957).

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

legal and historical process which produced the decision and to describe the legal situation which now confronts the country. The authors try manfully—although of course without complete success—to put to one side their own judgments about the decision. The result is a book which in some respects will not satisfy the extremists in either camp but which can be read by both without apoplexy and with enlightenment.

The authors are sensitive to the fact that polemics over the case tear the decision from its historical and legal context. About a third of the book is therefore devoted to filling in the background; the role of precedent in the course of constitutional development, the development (from *Dred Scott*) of legal views about the rights of Negroes, and the setting in which the Fourteenth Amendment laid down the controlling principle that no state shall deny to any person the equal protection of the laws.

The crucial point in any analysis of the *Brown v. Board of Education*<sup>2</sup> decision is the Court's conclusion that racial segregation imposes special harmful effects upon Negro children. The opinion stated that separating the Negro children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone."<sup>3</sup> The Court quoted from the finding of the Kansas court that segregation by force of law "is usually interpreted as denoting the inferiority of the Negro group" and produces a "sense of inferiority" which "affects the motivation of a child to learn."<sup>4</sup> The Court then concluded: "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority."<sup>5</sup> At this point the Court dropped a footnote which referred to several sociological studies on the relationship between racial segregation and the development of Negro children.

This is the point in the Court's opinion which has drawn the strongest fire, aimed at establishing that the decision is not "law" but "sociology." And this is the crucial point in the opinion, for if it is now found that racial segregation has a special damaging effect upon Negroes, it is clear, contrary to the assumption of earlier decisions, that separation is *not* equal and that the Fourteenth Amendment's requirement of equality has been violated. Also reduced in significance are arguments

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2. 347 U.S. 483 (1954).

3. *Id.* at 494.

4. *Ibid.*

5. *Ibid.*

that the framers of the Amendment did not anticipate integrated schools, for any such assumption would have reflected a judgment concerning the facts to which their basic constitutional standard would apply; under conventional legal traditions, as the facts change or become more clearly perceived, the results required by the basic standard also must change.

The authors deal somewhat delicately with this issue by suggesting that on other occasions underlying social facts have been important in applying a rule of law. Indeed, the early case of *Plessy v. Ferguson*,<sup>6</sup> in accepting the concept of "separate but equal" stated there was no basis for concluding "that the enforced separation of the two races stamps the colored race with a badge of inferiority."<sup>7</sup> With this assumption underlying the earlier cases, it is not surprising that the Court should have turned to current evidence on whether or not racial segregation is a device for social control which tends to keep one group in an inferior position. And, although some who support the decision feel that there was an obvious answer to this question which was only beclouded by the sociological data, there are at least as many in the other camp who stoutly assert that segregation has been a reasonable and benevolent way of dealing with the problem. The authors minimize the importance of the sociological material by stressing that the Court declared as a matter of *law* the *per se* invalidity of racial classifications. But the route to this new rule of law is sufficiently difficult and important to justify further probing.

The problem suffers from inherent difficulty which can easily blur analysis. As has already been noted, the essential issue is one of *fact*—whether segregation involves special harm for Negroes and therefore violates the constitutional standard of equality. But the basic factual issue can not be relitigated in each case which involves the question. Rather, the factual question seems to be merely a phase in the Court's development of constitutional wisdom, comparable to that involved in deciding the extent to which the constitutional ideal of a federal system permits states and nation to tax each other, or permits state taxation of interstate commerce.

Answering such questions calls for wisdom based on information which often is too diffuse for presentation in a trial; the most that can be done is to call the Court's attention in the briefs to responsible studies which have been made of the question. But there are times when some of the evidence of social or economic questions could well be submitted to the clash of cross-examination and rebuttal which is possible only at the trial. The social scientists supporting the plaintiffs submitted the

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6. 163 U.S. 537 (1896).

7. *Id.* at 551.

results of specific experiments concerned with a specific question of fact: the psychological effect of segregation. These cases had representative counsel from both great camps in attendance. For this reason, it seems appropriate to have employed the trial as a laboratory for investigation of such data to help in the necessary education of the Court. The chief pity is that counsel for the states did not adequately use their opportunity for cross-examination and rebuttal, with the result that the reliability of some of the data can remain open to conjecture.

But the relevance of the issues on which the social scientists wrote and testified is inescapable, although it does not serve the usual narrow function of closing the record of a particular case but instead leads to a general constitutional ruling which will govern subsequent cases until the basic factual assumptions can be shown to be wrong. And there must be opportunity for such further proof. For example, representatives of southern states, in a case in which adequate warning is given to responsible representatives of the opposite camp, should have the opportunity to marshal evidence—including testimony by social scientists—in support of the proposition that a system of segregation does not handicap the Negro. If such a showing were made, the current constitutional rule that segregation violates the constitutional requirement of equality would have to be modified.

Never before has the relationship between the Court's view of underlying social facts and the making of constitutional rules been so clearly dramatized. And to digress a bit farther from the material covered by the book, it appears that partisans at both extremes of the legal spectrum tend to leap from the inescapable fact that the Court is working out new answers to old constitutional questions to the conclusion that constitutional adjudication is merely the exercise of the personal preferences of the justices. But, in spite of the peculiarity of constitutional law, it is possible to retain it as a rational part of government so long as men of different social backgrounds (as was true of the 1954 Court) can be forced by new facts to new conclusions consistent with basic constitutional standards. Indeed, if the settlement of constitutional questions by judges is to retain sufficient respect to justify its retention in the body politic, such must be both its ideal and practice.

The most useful parts of the book are perhaps the concluding chapters on the various legislative measures which the states have developed to avoid the effect of the Court's decision. The authors analyze the probable effectiveness of these measures in the light of accepted legal doctrine and the difficulties of litigation by private parties who are subject to intimidat-

tion and reprisal, and demonstrate the need for effective civil rights legislation authorizing enforcement by the United States Attorney General. In short the authors have provided us with a valuable guidebook for the further work which must be done in the course of the coming years in order to move towards a solution of our most tenacious and explosive domestic problem.

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