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THE ROLE OF THE LEGAL PROFESSION

SCHOOL INTEGRATION: A LAWYER'S VIEW

Howard C. Westwood*

The most important single point highlighted in this Symposium is the fact that thousands and thousands of sincere people in the South actually believe that it is possible to defy the Supreme Court, that they need only hold out against compliance, even against the least compromise with the Court's orders, and the threat of school integration will pass away. What is most needed for the solution of the integration problem is an understanding by these sincere people that a delusion has been foisted upon them.

To this end the legal profession has a heavy responsibility. If it stands by in silence while demagogues mock the supremacy of the law, the profession will forfeit its claim to respect. If it slinks away from the issue, it will have betrayed every precept that entitles it to be treated as a profession.

Defiance of the Court, when it is rationalized (if ever it is), rests upon a claim that a state has the right to determine for itself what the Constitution means. Whether pursued with the "legalism" of interposition or massive resistance or with the crudity of mob violence, it amounts in the end to the assertion that there is a point where a state can insist upon its own view of the mandates of the Constitution, the agencies of federal power to the contrary notwithstanding.

Lawyers — who are supposed to know our legal and political history rather better than most people — recognize that this assertion became a delusion a century ago. It is a proposition which was fought out and settled in the Civil War.

There is a popular conception that the war raged over slavery.¹ That misses the real point of the war, blinking its most pertinent lesson.

While the war, of course, settled the slavery issue,² there was but a small minority in the North who, in 1861 before the firing on Sumter, would have voted to abolish slavery.³ Very probably a large majority of the people

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¹ James F. Rhodes is typical of Northern historians of the post-Civil War generation who claimed that slavery was the fundamental cause of the War. RHODES, LECTURES ON THE AMERICAN CIVIL WAR (1913). This view still prevails in some circles. See SCHLESINGER, The Causes of the Civil War: A Note on Historical Sentimentalism, 16 PARTISAN REV. 969-81 (1949).


³ The 1860 Republican platform included the following plank: Resolved, That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential.... In his first inaugural address, Lincoln quoted this plank in support of his declaration that he had no right or inclination "to interfere with the institution of slavery in the States where it exists." 6 NICOLAY & HAY, COMPLETE WORKS OF ABRAHAM LINCOLN 170 (1905).
of the North really did not much care one way or the other about the slavery question.\footnote{Moderate statesmen such as Douglas and Lincoln had no strong feelings over the issue of slavery. They were in fact against granting political and social equality to the Negro race. See \textsc{Munford, Virginia's Attitude Toward Slavery and Secession} 167-68 (1909). Wiley points out that "Letters and diaries of Union soldiers indicate that very few — no more than one in ten — of those who wore the blue were fighting primarily for the emancipation of slaves." Wiley, \textit{supra} note 2, at 104.} And in the states that seceded, there was a large percentage of people — perhaps even a majority — who felt that slavery was undesirable and should be abolished in due course.\footnote{\textsc{Smith, The Borderland in the Civil War} 31-32 (1927); \textsc{Munford, \textit{op. cit. supra} note 4} at 82-103. It is at least interesting that the Confederate Constitution contained a much stronger prohibition against the importation of slaves than did the United States Constitution. 1 \textsc{Davis, Rise and Fall of the Confederate Government} 261-62 (1881).}

The real issue of the war was the right of constitutional self-determination by a state when it felt that other states or the federal power had trespassed upon its rights, or threatened to do so. This asserted right was founded on the view that the Constitution was a compact among sovereign states rather than an act of the people of the nation, that the states had not relinquished their independence but had merely banded together under an inter-state agreement to provide a joint machinery of federal government for dealing with mutual concerns.\footnote{\textsc{Id.} at 134-40, 146-56; 1 \textsc{Stephens, A Constitutional View of the Late War Between the States} 51-59, 116-70, 441-46 (1868).} Most clearly, under this view, agencies of the federal government, the mere instruments of the sovereign states, could not impose their views of the compact upon a disagreeing state if that state wished to insist upon its rights.\footnote{\textsc{Davis, \textit{op. cit. supra} note 5, at 141-46; \textsc{Stephens, \textit{op. cit. supra} note 6, at 419-76.}}

Prior to 1861 this constitutional position was eminently respectable. It was not even peculiarly Southern. On the very eve of the war — in 1859 — the Wisconsin legislature adopted a resolution proclaiming:

\begin{quote}
... that the Government formed by the Constitution of the United States was not made the exclusive or the final judge of the extent of the powers delegated to itself; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.\footnote{\textsc{Journal of the General Assembly of Wisconsin, Session 1859}, 863-65. This resolution was adopted as a protest against a Supreme Court decision which reaffirmed the constitutionality of the Federal Fugitive Slave Law. An abolitionist had been convicted of a violation of the Fugitive Slave Law in the federal court, but this was nullified by a habeas corpus proceeding in the Supreme Court of Wisconsin which discharged the prisoner from the custody of the Federal authorities, \textit{In re Booth}, 3 \textit{Wis.} 13 (1855). The United States Supreme Court reversed the judgment of the state court and remanded the prisoner to federal custody. \textsc{Ableman v. Booth}, 62 U.S. 506 (1859). It is notable that the portion of the Wisconsin resolution quoted in the text was taken, almost verbatim, from the Kentucky Resolutions of 1798. \textit{Infra}, note 10.}
\end{quote}

This view of the state of the "Iron Brigade" was precisely the same as the constitutional views of Jefferson Davis and of Alexander Stephens.\footnote{\textsc{Stephens, \textit{op. cit. supra} note 6, at 419-76.}}

Nor was Wisconsin unique in its support of the constitutional views of the Southland. In the seventy years between the founding of the Union and the formation of the Confederacy there had been repeated episodes indicat-
ing a real question as to the ultimate supremacy of the federal power and particularly that of the Supreme Court.\(^{10}\)

The necessary implication of the right of self-determination was the right of secession.\(^{11}\) Indeed, there was considerable logic in the view that secession was the only means for vindicating the right — that as long as a state remained in the Union, and therefore a party to the compact, it should abide by the determinations of federal agencies.

It is no wonder, therefore, that the mere assertion of the right of secession — and the actual fact of secession — did not suffice to call the

\(^{10}\) The Virginia and Kentucky Resolutions of 1798, anticipating a Supreme Court ruling upholding the Alien and Sedition Laws, asserted that neither state would consider such decision binding. The first of the Kentucky Resolutions of 1798, drafted by Thomas Jefferson, was one of the earliest statements of this doctrine. It stated:

"Resolved, that the several States composing the United States of America, are not united on the principle of unlimited submission to their government; but that by compact under the style and title of a Constitution for the United States and amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving each State to itself, the residuary mass of right to its own self-government; and that whenever the general government assumes undelegated powers, its acts are unauthorized, void, and of no force: That to this compact each state acceded as a State, and is an integral party, its co-States forming, as to itself, the other party: That the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to it; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress." Foner, Basic Writings of Thomas Jefferson 326 (1944).

It was in the Virginia Resolutions that Madison first expounded the doctrine of interposition. The third Resolution stated: "That this Assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no further valid than they are authorized by the grants enumerated in that compact; and that, in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States, who are parties thereto, have the right and in duty are bound to interpose for arresting the progress of the evil, maintaining within their respective limits the authorities, rights, and liberties appertaining to them." 6 The Writings of James Madison 326 (Hunt ed.) Also see Report on the Resolutions, Id. at 341-406.

In 1814 New England similarly proclaimed State supremacy. The unpopular war of 1812 and the stoppage of commerce intensified the discontent of the New England States with the Federal Government. The Hartford Convention, composed of representatives from Massachusetts, Connecticut, Rhode Island, New Hampshire and Vermont, adopted resolutions that repeated the gist of the Virginia Resolutions of 1798. They declared: "In case of deliberate, dangerous, and palpable infractions of the Constitution, affecting the sovereignty of a State, and liberties of the people; it is not only the right but the duty of such a State to interpose its authority for their protection. . . . When Emergencies occur . . . States, which have no common umpire, must be their own judges, and execute their own decisions." See public documents containing proceedings of the Hartford Convention of Delegates, as quoted in 4 Channing, History of the United States 556 (1936).

In 1828 the South Carolina legislature adopted an "exposition" which declared the right of a state to nullify federal laws that it regarded unconstitutional. When the Tariff Act of 1832 reaffirmed the objectionable protectionist features of the 1828 Act, South Carolina carried the doctrine to its logical conclusion and, in a state convention assembled for the purpose, passed an Ordinance of Nullification which declared that the tariffs of 1828 and 1832 were "null, void and no law" and not "binding upon this state, its officers or citizens." Sydnor, The Development of Southern Sectionalism, 1819-1848, at 203-15 (1948).

See generally 5 Schlesinger, The State Rights Fetish, Points in American History 220-43 (1922). Also, for a review of instances of state opposition to Supreme Court decisions, see the address of J. Lee Rankin, Solicitor General, delivered before the Pittsburgh Regional Meeting of the American Bar Association on Mar. 13, 1959. Jefferson Davis also cited several "northern precedents" for state resistance to federal action in his book. 6 Davis, op. cit. supra note 5, at 70-76.

\(^{11}\) "Who was to be the umpire . . . ? Not the United States Government, for it was the creature of the States, it possessed no inherent, original sovereignty. . . . The umpireship is, therefore, expressly on the side of the States, or the people. When the State of South Carolina, through a sovereign convention, withdrew from the Union, she exercised the umpireship which rightly belonged to her, and which no other could exercise for her." 2 Davis, op. cit. supra note 5, at 16.
North to arms. On the contrary, a great editor of the New York press had counseled that the erring sisters should be allowed to depart in peace.\textsuperscript{12} Throughout the North there was much sympathy for the South. As recently as 1858 Jefferson Davis had been received in Boston with "enthusiasm . . . which defies description," when he spoke in Faneuil Hall — and he spoke, by the way, in defense of the South's stand on slavery.\textsuperscript{13}

The sympathy which the South found in the North was by no means confined to a sympathy with its constitutional theory. There was a very real sympathy, too, with its deep feeling of the Negro's inferiority.\textsuperscript{14} Lincoln's own State of Illinois had adopted a Constitution by vote of the people in 1848, Article VI, Section 1 of which denied suffrage to Negroes, and Article XIV, Section 1 of which directed the state legislature to pass at its first session under the new constitution effective laws to prevent Negroes from immigrating to the state.\textsuperscript{15} A series of such laws followed, and in 1853 an act was passed "to prevent the immigration of free negroes into this state."\textsuperscript{16} In 1862 the constitutional convention incorporated the provisions of this statute into Article XVIII of the proposed constitution.\textsuperscript{17} This article was submitted to the popular vote separately from the body of the constitution. Although the proposed constitution was rejected by over 16,000 majority, Article XVIII was supported by a majority of 100,590. This was barely a month before Lincoln's first Emancipation Proclamation.\textsuperscript{18} One of the great difficulties faced by southern slaveholders in their efforts to free their slaves and provide them a place to live in dignity and comfort had been the cruel attitude of many northern communities which refused their resettlement.\textsuperscript{19} And it was Abraham Lincoln himself who said, not once but often, in his debates with Senator Douglas, that he did not favor either social or political equality for the black race, that he would deny the Negro even the right to vote.\textsuperscript{20}

How, then, could the war have come?

It came because a relatively small number of extremists, some in the North and some in the South, with incredible foolishness, insisted upon every jot and tittle of their respective positions in defiance of federal power and constitutional obligation.

Consider first the foolishness of the northern extremists.

\textsuperscript{12} Horner, Lincoln and Greeley 188-89 (1953), quoting the New York Tribune of Nov. 9, 1860.

\textsuperscript{13} The Boston Morning Post, Oct. 12, 1858, quoted in Strode, Jefferson Davis 1808-1861, at 310 (1955).

\textsuperscript{14} Negroes were subjected to various forms of civil, social and political discrimination in the northern states — even in such "Yankee" strongholds as Connecticut, New York, New Jersey and Pennsylvania. Munford, op. cit. supra note 4, at 169-70.

\textsuperscript{15} Verlie, Illinois Constitutions, 13 Illinois State Historical Library Collections 78, 98 (1919).

\textsuperscript{16} Williams, History of Negro Race in America 123 (1883).

\textsuperscript{17} Journal of the Constitutional Convention of 1862, 692-93, 1098 (1862).

\textsuperscript{18} Moses, Illinois, Historical and Statistical 658; Munford, op. cit. supra note 4, at 171-72.

\textsuperscript{19} In at least the states of Ohio, Indiana, Illinois and Oregon, either by constitutional provisions or statutes, immigration or settlement of Negroes was specifically prohibited. Munford, op. cit. supra note 4, at 170-73.

\textsuperscript{20} Nicolay and Hay, op. cit. supra note 2, vol. 3, p. 29; vol. 4, p. 318; vol. 5, p. 142.
Article IV, Section 2, Clause 3 of the Constitution provided that a fugitive slave “shall be delivered up on claim” of the slave’s owner. Yet with state personal liberty laws (cf. “massive resistance”) and even with mob violence (cf. Little Rock) enforcement of the Constitution often was frustrated in the Northern States. It was this constitutional violation that gave the South its clearest justification for assertion of its right of secession as a remedy for breach of the compact by the Northern parties thereto.

South Carolina seceded on December 20, 1860. At once there began the most sober soul-searching, both North and South. At the instance of Virginia, a Peace Convention was convoked in the City of Washington on February 4, 1861. It was presided over by an ex-President of the United States and was attended by representatives of twenty-one of the states then still in the Union. It labored conscientiously to find a way out of the imbroglio into which the states were drifting. Laboring, too, were members of Congress. Although the Republicans had working control of the House of Representatives by January 12, 1861, and of the Senate by February 4, 1861, the halls of Congress hardly breathed fire and brimstone in those fateful days between December 1860 and April 1861. On the contrary there was a sincere effort to achieve an accommodation between the sections through a Committee of Thirteen in the Senate and a Committee of Thirty-three in the House. Even Seward, the apostle of the Irrepressible Conflict,
became a champion of “utmost moderation, forbearance and conciliation.”

On January 12, 1861, he told the Senate:

If misapprehension of my position needs so strong a remedy, I am willing to vote for an amendment of the Constitution, declaring that it shall not, by any future amendment, be so altered as to confer on Congress a power to abolish [slavery] or interfere [with it] in any State.

And he held out his hand to the withdrawing Senators of seceded States:

I am for leaving these seats here for those Senators . . . to be resumed at their own time and in their good pleasure.

On the day of South Carolina’s secession Lincoln, in conference with Thurlow Weed, drew up three resolutions for Weed to take to Washington with Lincoln’s thought that Seward should introduce them and that if “unanimously supported by our friends” they “would do much good.” The resolutions focused directly on the fugitive slave problem and the personal liberty laws of Northern States. They provided for enforcement of the fugitive slave clause of the Constitution by Congress and punishment of resistance thereto; declared that all state laws in conflict with such a law of Congress should be repealed; and proclaimed that the Union must be preserved.

Yet compromise efforts foundered. And one of the main reasons — perhaps the principal one — was the northern extremists’ refusal to abide by the clear constitutional requirement for the return of fugitive slaves. It is most likely that an acceptance of that obligation — which had been written in most explicit terms into the Constitution — would have cut the ground from under the southern secessionists, leaving the thin tier of the cotton states without the support of the borderland region of North Carolina, Virginia, Tennessee, and Arkansas. Had this occurred, the government of Mont-

interference, was offered by Representative Palmer of New York, Republican and a long-time champion of the suppression of the slave trade, and speedily adopted by the House by an overwhelming majority of 116 to 4. 30 Cong. Globe 855 (1861). As late as Mar. 2, 1861, Republican Senator Baker of Oregon, who was to die in the war as a Union Army Major General, supported H.R. 80 and pleaded that he had “an abiding hope” that the people of North Carolina “do not mean to get out,” and that he would vote for the Constitutional amendment “to allay your apprehensions” that “we really do, in our secret hearts,” intend to interfere with slavery in the States. 30 Cong. Globe 1366 (1861).

In its resolution inviting the states to participate in a Peace Convention the General Assembly of Virginia stated its opinion that the Crittenden Compromise (with minor modifications) would “constitute the basis” for an adjustment of “the unhappy controversy which now divides the States.” Crittenden, op. cit. supra note 25 at 9-10. It would seem that the proposition for a revival of the Missouri Compromise was largely symbolic — slavery in the Territories south of that line almost certainly would have been of little practical importance. The really substantial proposition was the full implementation of the right to the return of fugitive slaves as guaranteed by the Constitution.

The advocacy, by Virginia, of a restoration of the Missouri Compromise suggests that the Dred Scott decision, under which that Compromise would have been invalid, was of only limited significance...
gometry would soon have withered away. The Bonnie Blue Flag with but seven stars could not have flown very long.

Even more foolish — if that is possible — were the extremists of the South. There were four slave states that never seceded. At least two of them, Missouri and Kentucky, and perhaps a third, Maryland, were natural allies of the South. Their support was of critical importance to the South. With them, the Confederacy had much better than a fighting chance. Without them, the war was lost to the Confederacy before it began.

Lincoln understood this vital political fact. But the extremists of the South were too intent upon full vindication of their position to be politically smart. They let themselves be jockeyed by a master of county courthouse politics into a position which forfeited the support of states without which they could not win.

Missouri called a convention to consider its relations with the Nation which met on February 28, 1861. Its 104 delegates were overwhelmingly pro-South. They elected as their presiding officer Sterling Price, who was to become a renowned general of the Confederate armies. Their speeches and resolutions made it clear that, however attached they were to the Union, if a war were brought on by the North they would feel compelled to go with the South. Although they received the ambassador from seceded Georgia with something less than enthusiasm, they were deeply conscious of the historic ties that bound them Southward. In short, they were ripe for cultivation by Montgomery.

Yet Montgomery, if it had heeded their speeches, should have known that they had not blinded themselves to constitutional and political realities. Even when they were recognizing their sisterhood with the other slave states, they recognized, too, that Lincoln had taken an oath to support the Constitution and that he had no choice but to endeavor to carry out at least his minimum constitutional functions. They might refuse to countenance the use of force by the North to impose the constitutional duties upon the South.

in contributing to the final impasse between the States. Violently condemned in the North, even by moderates, and ardently embraced by Southern extremists, that decision doubtless did much to exacerbate feeling. But the great likelihood is that, if the fugitive slave problem had been settled, the question of slavery in the Territories could have been worked out to the satisfaction of the border States without much regard to the apparent legal consequences of Dred Scott. Indeed it is virtually certain that, if the war had been postponed by progress toward compromise satisfactory to the border States, Dred Scott would soon have been modified or overruled.

35 The Montgomery government was established on the same day the Peace Convention assembled in Washington, Feb. 4, 1861.


37 JOURNAL OF THE MISSOURI STATE CONVENTION 14 (1861).

38 Thus, a resolution offered by John T. Redd read in part:

"We deem it due to our Northern Brethren, to declare that it is the determination of the people of Missouri, that in the event that any Southern State is invaded for the purpose of carrying [the doctrine of coercion] in effect, to take their stand by the side of their Southern Brethren and resist the invader at all hazards." Id. at 21. See also id. at 25-26, 29.

39 The resolution to receive the "Commissioner" was adopted by a vote of 62 to 35. PROCEEDINGS OF THE MISSOURI STATE CONVENTION 13-17 (1861).

40 The delegates to the Convention took an oath "to support the Constitution of the United States; and of the State of Missouri." JOURNAL, op. cit. supra note 37 at 12.

41 See Report and Resolutions of the Committee on Federal Relations, id., at 34-37; Minority Report of the Committee on Federal Relations, id., at 38-40. See also PROCEEDINGS, op. cit. supra note 39, at 38-43, 64-68, 77-80.
but they were no less intolerant of the use of force by the South to frustrate the efforts of the President to abide by his constitutional oath. Thus, the convention's Committee on Federal Relations introduced a resolution stating that:

... in the opinion of this Convention, the employment of military force by the Federal Government to coerce the submission of the seceding States, or the employment of force by the seceding States to assail the government of the United States, will inevitably plunge this country into civil war, and thereby extinguish all hope of an amicable settlement of the fearful issues now pending before the county; we therefore earnestly entreat, as well the Federal Government as the seceding States, to withhold and stay the arm of military power, and on no pretense whatever to bring upon the nation the horrors of civil war.

The resolution was adopted, with an amendment, by an overwhelming majority of 89 to 6.

This simple fact was ignored by the fire-eaters of the South. When Lincoln, playing his game with foxy caution, merely sought to provide food to the garrison of besieged Fort Sumter, the Confederate government at Montgomery let Beauregard open the ball with blazing cannon. It gave old man Ruffin a thrill, no doubt, to jerk the lanyard. No doubt, too, it satisfied Senator Wigfall's thirst for blood. But it lost Missouri to the Confederacy. When the Missouri convention, which had been adjourned, reassembled in July 1861, 86 of its original 104 delegates appeared, and overwhelmingly they established a state government loyal to the Union.

In the fire-eaters' mad attack on Sumter, Lincoln won the war. For, whereas secession had not provoked the North to arms, armed defiance by the South unified the North, alienated the critical area of Missouri and Kentucky from the South's cause, gave western Virginia its long sought opportunity for breaking away from Richmond, and assured that "Maryland, My Maryland" would be but a romantic dream with a rude awakening at Sharpsburg.

So the war came. It came because of foolish defiance of constitutional obligation among the extremists of the North and foolish defiance of con-

42 See Majority Report, JOURNAL, op. cit. supra note 37 at 34-36. See also PROCEEDINGS, op. cit. supra note 39 at 5-6, 20-21, 30-31, 68, 173-75, 248-54.
43 JOURNAL, op. cit. supra note 37 at 36.
44 The amendment recommended that the Federal Government withdraw its garrison at Fort Sumter in order to save the country from the "ruins of Civil War" and restore "harmony and fraternal feelings" between the two sections. Id. at 48-49.
46 SWANBERG, op. cit. supra note 45, at 298.
47 Id. at 277-78.
48 The result of roll calls discloses that 86 delegates were present at one time or another during the reconvened Convention. JOURNAL OF THE MISSOURI CONVENTION (Reconvened) 9-10 (1861).
49 The convention declared vacant the offices of the governor, lieutenant-governor, secretary of state, and members of the legislature and filled the executive offices with men of its own choosing. Hamilton R. Gamble, a conservative Union man who had worked for restoration of the Union by compromises, was elected governor. JOURNAL, op. cit. supra note 48, at 20-22, 123-33 (1861).
50 SMITH, op. cit. supra note 5, at 263-312.
51 Id. at 185-220, 359-65.
The role of the legal profession among the extremists of the South. Both extremist elements were in the minority in their sections, but they had emotion and hysteria on their side to silence the soberer counsels of the majority. The war that few wanted, that most feared, was blunderingly brought upon the Nation. Defiance of federal power in the North and in the South spelled the doom of a happy land. And in the end, when battle flags were furled at Appomatox, it was the South which lay in ruin, the victim of force begotten by force.

This chapter in our history settled once and for all the issue of the right of self-determination, by a state, of the meaning of the constitutional compact. In 1861 the compact theory became a mere historical speculation. Jefferson Davis, in a land of free speech, could still write an impassioned two volumes in its support twenty years later but he wrote for antiquarians. From 1861 onward our band of states was a federal Nation.

I refer to this chapter in our history not to reopen old wounds. I refer to it because it was the bitterest experience in our country’s life. We should have the wit to learn from that experience.

As the war has receded beyond the memories of the living, it has become romanticized. Much is written of it today suggesting that it was a great sporting event, a clash of knightly champions. In fact it was nothing of the sort. It was bloody.

In all the major American wars, beginning with the Revolution and coming on through the recent Korean conflict, excepting only the Civil War, some 606,000 Americans lost their lives from battle and non-battle causes. In the Civil War alone more than 618,000 American servicemen lost their lives. In other words, more American servicemen perished in the Civil War than in all our other wars combined. The war was succeeded by a period of prostration in the South which threw out of joint the whole future development of our economy; only in most recent years has Southern industry finally approached a level of development comparable to that of other sections. The South was denied its birthright, because of the war and its inevitable aftermath, for the better part of a full century.

Surely, from such a disaster, we are capable of learning the obvious lesson that, ultimately, constitutional dispute must be settled, rightly or wrongly, but settled nonetheless, by the federal agencies, which means in last analysis by the Supreme Court.

But there is an even more pertinent lesson. The war came because extremists North and South blindly insisted upon the fullest measure of their respective positions. Each was firmly convinced that it was right and the other was wrong. Each refused to give an inch.

52 Thomas Corwin, chairman of the Committee of Thirty-three created to find a compromise between the sections, wrote to Lincoln on Jan. 16, 1861:

I cannot comprehend the madness of the times. Southern men are theoretically crazy. Extreme Northern men are practical fools. The latter are really quite as mad as the former. Horner, op. cit. supra note 12, at 201-02.

53 Davis, op. cit. supra note 5.

The northern extremists had mesmerized themselves into believing that a conspiring slave power would spread slavery throughout the Nation if it were not stifled.  

The southern extremists, no less hysterical, had gradually beguiled themselves, over a period of thirty years, into a persecution complex, confident that the entire North was intent upon ruthless exploitation of the South for the benefit of northern commerce through the tariff and other measures, and finally through suppression of the South's "peculiar institution."  

We can see now how wrong both elements were — and how foolish both were not to give an inch toward an accommodation that would have been relatively easy to effect to the great benefit of each.  

When we turn back to the present problem, the application of the lesson of our bitterest experience becomes clear.  

On nearly any phase of the race issue, the views of the most extreme racist in the South are quite likely to find tolerance and even sympathy in a substantial part of the rest of the country. That was certainly true in 1861, even in Lincoln's home state. In the North today the evidence of sympathy is still to be found on every hand. In the North there are still negro ghettos. There is even, in some quarters of the North, less than wholehearted acceptance of school desegregation. Moreover, there are thoughtful people aplenty in the North even among those who fully accept racial equality who understand that the South has a social problem that cannot be solved by a mere edict of law. After all, it was a negro educator who recently said to Mr. Harris Wofford, after having watched negro children entering a negro school in the deep South:

I watched those little boys and girls, so many of them in dirty, ragged clothes, carrying their shoes to put on when they went into the new school building. I saw their uncombed tangled hair, and I remembered the shacks and tenements and broken homes they had just come from. . . . I knew that even one who believed in brotherhood, even one who thought the Supreme Court was right, would look at those little Negro children and say, 'No, not now, not with them, not my child, not yet.'  

But what sincere and decent people of the South apparently do not realize — what has been kept from them — is that once action is taken in the South amounting to defiance of the Court or of other agencies of federal power, whether it be United States marshals or the President himself, the issue is shifted from the race issue to the issue of supremacy of law. And on that issue an otherwise divided people will close ranks. That is exactly what happened when Sumter was shelled. Little Rock should be sufficient warning that the oath to support the Constitution that Lincoln took is still being taken, and taken seriously, and the country will sustain the integrity of that oath. He would be dull indeed who, upon reading our history, would assume

56 Keitt, Southern Wealth and Northern Profits (1860); Helper, Impending Crises of the South (1860); 6 Channing, op. cit. supra note 10, at 258-59.  
that the Nation would long tolerate any action which subordinates the federal law and its process to the will of a state or the defiance of a mob.

The good people of the South should be brought to an understanding of a corollary fact of vital importance to them, in their own interest, if they are really concerned about the dangers of integration. Today, under the Court's decisions, and with the full support of public opinion in the rest of the country, they have great room for maneuver, for delaying and minimizing integration, even for compromising the apparent breadth of the Court's dicta. There is nothing in the rest of the country like the pre-Civil War abolitionist societies of the North. On the contrary, there has been surprisingly little excited interest in the other sections about the integration issue in the South. There is too much glass in the walls of the house of the North to warrant stone throwing, and the NAACP has been virtually alone in aggressive steps. Outside the South public feeling is generally characterized by sheer apathy among the great majority and a very deliberate judgment among a more thoughtful minority that it is wiser to leave the South alone to work out its own problem without "interference."

But this attitude could change, and a change could come more swiftly than the South might presently think possible.

Suppose, for example, that extreme intransigence continues and that no steps are taken — not even the most grudging — toward admission of some negro children to the schools of the deep South. If this were to happen, every lawyer in the country, including the Southland, knows that it is only a question of time, and not such a long time at that, before some quite specific court decrees will be entered. And every lawyer knows that if court decrees multiply the risk grows that room for maneuver will be narrowed. Sooner or later, if the authorities in the deep South do not take the initiative in taking some steps looking to some apparent compliance to some degree with the Court's decisions, judges are going to frame orders prescribing the steps to be taken. Every southerner lawyer knows, in his heart, that it is virtually certain that such orders will go much further than is likely if the issue posed for court decision is whether a particular step taken by the state authorities in purported compliance with "integration" is sufficient.58

58 In the Brown decision, the Court recognized that 'Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principle.' 349 U.S. 294, at 299. Later in the same decision, the Court points to circumstances which might lead a lower court to find that 'additional time is necessary to carry out the ruling in an effective manner.' Id., at 300. Courts are likely to be tolerant of an apparent step toward integration; they cannot tolerate an obvious attempt to avoid any action in that direction. History of the Aaron case amply illustrates this point. In 1956 the District Court found a plan for desegregation of Little Rock schools, over a period of seven years to be a 'prompt and reasonable start towards full compliance.' Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956). The Court of Appeals agreed. Aaron v. Cooper, 243 F. 2d 361, 363-64 (8th Cir. 1957). After the Little Rock incident, however, the District Court granted the school board's request for an order suspending the integration plan until 1961 on the ground that to continue the plan would continue chaos and disorder without any resulting benefit to the negro children. Aaron v. Cooper, 163 F. Supp. 13 (E.D. Ark. 1958). The Court of Appeals reversed the trial court. Aaron v. Cooper, 257 F. 2d 33 (8th Cir. 1958). The Supreme Court sustained the Court of Appeals. Cooper v. Aaron, 358 U.S. 1 (1958).
When judicial decrees are entered, public opinion in the other sections of the Nation undoubtedly will be strongly behind their enforcement. For then the issue is, not an aspect of racism, but the supremacy of the law. The South, thinking it is fighting the battle of race, will find itself on different terrain where it cannot possibly win.

Another factor in the present situation should be understood in the South. Southern extremists have been enjoying something of an orgy of accusation of conspiracy: a three-cornered conspiracy between the Supreme Court Justices, the NAACP, and the Communists to undermine law and order in the South. However seriously this extravagance may be entertained in the South, it has been regarded with amused bewilderment elsewhere. It is fair to say that thus far few people elsewhere have believed that those who utter such nonsense have meant anything but a rhetorical exercise. But if it is indeed the tactic of the southern extremists to seek to undermine confidence in the Court by attacking that body as an agency of "the Communist conspiracy," and if such attacks long continue, the apathy elsewhere inevitably will be stirred awake and extremism will breed extreme reaction. A nation which would not sit still for a trifling with the Court by a President whose popularity at the time knew scarcely any bounds — and at a time when the Court had sunk to its lowest ebb in public esteem — will not countenance much longer the puerile charges and innuendoes that some southern demagogues have cast broadside.

A still further factor may effect a swing of opinion in other sections toward hostility to the South. There is no question but that race discrimination in the United States has done our nation incalculable harm in the struggle with Communism throughout the world. Since the most critical theatre for that struggle is among the non-white peoples of Asia — and the day when Africa itself will become a vital arena seems to be fast approaching — whatever magnifies the color line in our nation drives allies from our side in the world conflict. Mr. Nixon saw this happening in his world tour early in his vice-presidency; it had been so compelling a factor that, on his return, he spoke out plainly against race discrimination even when his party still had high hopes of making permanent inroads in the South. As the international crisis spreads and deepens, more and more thoughtful people in other sections will become increasingly intolerant of a program of action in the South perfectly calculated to serve the cause of the Soviets.

In short, the days when the deep South can continue a course of defiance with the rest of the nation only vaguely annoyed and not really stirred to counter-action are numbered. The tacticians of Southern intransigence are not far from over-reaching themselves.

The good people of the South should understand, too, how baseless have been some of the principal arguments against the Court’s decisions where-with some southern lawyers have joined in the fight on integration. There is nothing wrong with criticism of the Supreme Court; there is, indeed, nothing

wrong with disagreement with the Supreme Court; but when lawyers seek to contribute to the weakening of the Court's authority by pretending that Brown v. Board of Education represents some unheard of seizure of power by the Court on purely social grounds without regard to the law, they are shamefully guilty of misleading the people of their states.

There have been two accusations leveled by lawyers or pseudo-lawyers at the Court's decision in Brown which have been especially deceptive.

One is that the Court's decision is unconstitutional because it overruled previous Supreme Court interpretations of the Constitution.

I am aware of the contention that the Supreme Court had never held that desegregated schools are constitutional, that Plessy v. Ferguson dealt with a different question, and that Brown was a decision of a novel point. While it is familiar judicial technique to deem Plessy as having decided nothing more than the specific question there presented, and so not to be controlling upon the point at issue in Brown, candor should compel recognition that the Supreme Court in Brown was departing from and rejecting a principle which, a number of years earlier, had been deemed constitutionally proper — the separate-but-equal principle.

But it is quite another thing to take the further step, taken by some southern legalists, and assure the public that the Supreme Court's departure from precedent shows it to be an unconstitutional usurper. In the first place overruling of past decisions is almost as old as our judicial system itself.

60 Recently Attorney General Rogers has taken the position that the Brown case had been "foreshadowed" by a series of cases holding that separate educational facilities did not provide equal educational opportunities. Address of William P. Rogers delivered before the Los Angeles Annual Meeting of the American Bar Association, 45 A.B.A.J. 23-24 (1959). This position has been rejected by a noted southern lawyer. Bloch, The School Segregation Cases: A Legal Error That Should Be Corrected, 45 A.B.A.J. 29 (1959).


62 A recent article on the Brown decision by a southern lawyer is notable for its restraint. Bloch, op. cit. supra note 60. In spite of his restraint, however, Mr. Bloch expresses "shock" at the fact that the Brown case represents an "overruling" of a prior decision. Id., at 28-30. Yet, he goes on to suggest that the South should seek to have the Brown decision overruled and that there is ample precedent for overruling of past decisions by the Court. Id., at 98-99.

63 The earliest instance I have been able to find in the Supreme Court is Gordon v. Ogden, 28 U.S. (3 Pet.) 32 (1830), which overruled Wilson v. Daniel, 3 U.S. (3 Dal.) 400 (1798). For tabulations of Supreme Court decisions overruling earlier cases see Brandeis, J., dissenting in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 408 (1932); Sharp, Movement in Supreme Court Adjudication, 46 Harv. L. Rev. 361, 393, 795 (1933); Douglas, Stare Decisis, 49 Col. L. Rev. 735 (1949). The list grows longer if one adds those cases where the Court departs radically from doctrines or rules set forth in earlier decisions "without specific overruling or qualification of the earlier cases." Brandeis, J., dissenting in the Coronado Case, 285 U.S. 393, at 408.

Mr. Justice Douglas points out in his article that during the thirty years between 1860 and 1890, the Supreme Court in 18 instances overruled controlling precedents. In 10 of these cases the Court was unanimous. In 13 of the overruled cases the Court had been unanimous. Eight of the 18 cases involved constitutional questions. A noted example is the Legal Tender Cases where the Court
In the second place there has always been a recognition that a decision on a constitutional question does not have the same compulsion as a precedent for the future as decisions in other areas may have.\(^{64}\) This is entirely logical, for constitutional error is not easily corrected — whereas other errors can readily be set right by action of the legislative branch.

Moreover the Southern legalists who assure their people that the Court unconstitutionally usurped power because it departed from a precedent of years past are playing fast and loose when they fail to explain that, if they were right, much of the South's welfare today would be founded on unconstitutional usurpation. Had the Court adhered to universally accepted conceptions of the limits of the commerce clause, much of the underpinning of the South's prosperity today — not to say that of other sections — would long since have been swept away. The lawyer who genuinely believes it when he says that the Court cannot constitutionally depart from the constitutional views of its predecessors has never studied constitutional law.

The other favorite accusation of southern legalists is that the Court defied the law, in Brown, by basing its decision upon sociological treatises instead of upon legal principle. There must be many thousands of good people in the South who have been misled by this canard.

The Court that decided Brown did not invent the practice of consulting and citing non-legal treatises. A great many constitutional questions depend upon the social and economic facts. In Brown the question was whether separate-but-equal school facilities were in fact a reasonable recognition of the constitutionally required equality of privilege. To examine the facts was no more startling or innovating in that case than was a similar examination of facts a century before when, in The License Cases,\(^{65}\) the Court was called upon to determine the constitutionality of laws passed by various New England states restricting the sale of liquor. Just as counsel for the negro children in Brown relied on social facts to support his argument, so did counsel for the states in The License Cases. He argued:

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\(^{64}\) As early as 1848 Taney, C. J., in the Passenger Cases, gave this view as classical expression. He stated: "After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." 48 U.S. (7 How.) 283, 470 (1849). For more recent expressions of the rule see Brandeis, J., dissenting in Burnet v. Coronado Oil & Gas Co., 285 U.S. 398, 406-07 (1931); Reed, J., Smith v. Allwright, 321 U.S. 649, 665-66 (1944); Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736-37 (1949).

\(^{65}\) 46 U.S. (5 How.) 504 (1847).
The train of evils which mark the progress of intemperance is too obvious to require comment. It brings with it degradation of character, impairs the moral and physical energies, wastes the health, increases the number of paupers and criminals, undermines the morals, and sinks its victims to the lowest depths of vice and profligacy.\(^6\)

And he proceeded to cite statistics showing the incidence of alcoholism among paupers, convicts and persons in poor-houses. Though Mr. Justice Grier, in a concurring opinion upholding the constitutionality of the legislation, did not think it necessary to "array the appalling statistics of misery, pauperism and criminality which have their origin in the use or abuse of ardent spirits," he was nonetheless aware of them.\(^7\)

A state prohibition against negro children's attendance at white schools is no more immune to judicial scrutiny of the social facts bearing upon its reasonableness than is a state prohibition of the sale of intoxicating beverage. When, in 1887, the Court considered the constitutionality of the Kansas Prohibition Act it had to examine the social facts just as it did in Brown when it considered the constitutionality of the Kansas prohibition of integrated schools. It said, in 1887, that, "Not every statute enacted ostensibly for the promotion of [the public morals, health and safety] is to be accepted as a legitimate exertion of the police powers of the state," that the courts "are under a solemn duty" to "look at the substance of things."\(^8\) And it proceeded to examine the social facts. In upholding the prohibition it pointed out that it could not

\[\text{shut out of view the fact, within the knowledge of all, that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism and criminality existing in the country are, in some degree at least, traceable to this evil.}\(^9\)

As social legislation increased, so did the necessity for the Court to make findings of social fact. In Holden v. Hardy,\(^10\) the Court upheld the constitutionality of an act passed by the Utah legislature regulating hours of employment in underground mines, after first satisfying itself that mining conditions were different from working conditions in other industries.\(^11\) Eight years later, the Court found quite the opposite to be true of the baking industry:

\[\text{In looking through statistics regarding all trades and occupations, it may be true that the trade of baker does not appear to be as healthy as some other trades, but it is also vastly more healthy than still others. To the common understanding, the trade of a baker has never been regarded as an unhealthy one.}\(^12\)

The minority view expressed by Mr. Justice Harlan, for himself and Justices White and Day, sets forth a lengthy review of treatises and statistics showing

\(^{6}\) Id. at 521.
\(^{7}\) Id. at 631.
\(^{8}\) Mugler v. Kansas, 123 U.S. 623, 661 (1887).
\(^{9}\) Id. at 662.
\(^{10}\) 169 U.S. 366 (1897).
\(^{11}\) Id. at 395-97.
that the baking trade was, quite to the contrary, an extremely unhealthy one.\textsuperscript{73}

Louis D. Brandeis, in his appearances before the Court as an attorney, turned the use of non-legal works into an art. The classic instance is \textit{Muller v. Oregon},\textsuperscript{74} where the Court, sustaining the constitutionality of an Oregon statute regulating hours of work for women, relied on Mr. Brandeis' brief for its detailed citation of treatises, medical opinions and legislation pointing to the social necessity for limiting women's hours of work. Since \textit{Muller v. Oregon}, the Court often has referred to treatises, texts and statistics in passing upon the constitutionality of both state and federal action.\textsuperscript{75}

In short, the good people of the South should understand that they are being hoaxed when they are told that the Court departed from its judicial role by opening its eyes to the teachings of non-legal works. One legitimately can argue that the Court misinterpreted the treatises, or that it failed to consult other equally persuasive works with a contrary message. But wholly spurious is the view that it is unlawful to seek out the social facts bearing upon school desegregation. No lawyer worth his salt in any part of the country would have the slightest hesitation to marshal non-legal treatises in support of his cause whenever he felt they aided his argument.

In the South's own interest, it should see through the delusion that it can defy the Court. It should plot another course of action while it has the chance — before it is put in the strait-jackets of ever stricter judicial decrees and has lost the understanding tolerance of public opinion in other sections of the land. The South in 1860 and early 1861 was in a strong position — so strong that it could have won much of its program had a less extreme leadership appeared to chart a moderate course. That did not happen; and in 1865 the South was prostrate. Obviously a century later there is no danger of anything as catastrophic as a civil war; but alienation of public opinion in other sections of the land could quickly lead to many legislative, judicial, and executive measures which would deprive the South of much of the local freedom it enjoys today.

There are signs that moderates in the South are beginning to be heard and that there is a dawning awareness of the futility of massive resistance. To these signs the favored response of the extremists — when outright suppression fails — is that the public schools will be abolished. In this Symposium Dr. Mollegen has soberly warned of the distressing likelihood of such an abolition.

I am not sure that the danger of public school abolition is as serious as it might at first appear.

There is no gainsaying the tragedy to a given community or state of the wiping out of public schools. The tragedy would be of such proportions that it is very difficult to imagine. But I wonder whether it really could occur — or be seriously attempted — in more than perhaps five states: South Carolina, Georgia, Alabama, Mississippi and Louisiana. In two or three of the other

\textsuperscript{73} \textit{Id.} at 70-71.
\textsuperscript{74} 208 U.S. 412 (1908).
states, to be sure, there has been much talk of such a step, and no doubt there will be still more talk and perhaps even some moves to that end. But the likelihood of such a drastic step on a large scale seems fairly remote except possibly in the five states mentioned. In at least one of those states there is at least one city — Atlanta, Georgia — which is such a progressive and vital metropolis that, despite the rural rule in its legislature to which Mayor Hartsfield has referred, it is hardly conceivable that school abolition could be effectuated.

But even if public school abolition were to occur in those states, it is doubtful that it would last very long. In the first place there is no question but that the courts would finally forbid any semblance of state aid to segregated private education by tuition grants or other subterfuge. Undoubtedly at the moment the delusion fostered in the South has included an impression that the decisions of the Court can be circumvented by such devices, but a Court which, even before Brown, had forbidden the "private" white primary\(^7\) will not tolerate any kind of state aid to the furthering of "private" school segregation. So the immediate prospect of the people in states abolishing the schools — when they awake from their delusion — is that the rich, who can pay for private education, will get it and the great masses of medium and low income will be left without.

Nor will a school-less state be able to attract industry or commercial enterprise. A South on the threshold of great economic development will find itself grinding to a halt. The likelihood is slim that states with the resources and the potential of Georgia, Alabama, and Louisiana would shut the door for any appreciable length of time on the expanding business prospects which they are so favorably situated to enjoy.

Moreover, states which destroy public education would be no more welcome to the rest of the nation than states which foster disease and crime. No course would be better calculated to incite the rest of the nation to curtail if not cut off the various forms of federal aid — highway grants, location of federal enterprise, promotion of TVA, letting of government contracts, and so on — which play such an important part in the economic life of any single state today. Public education, one of the most distinctive contributions of American society, cannot be obliterated in a Southern state without finally raising the searching question: shall the rest of the nation lend its support to a people choosing to make its children ignorant? It would not take many years for that question to receive a negative answer. The states choosing the path of ignorance would soon find themselves sealed off from federal supports, for taxpayers elsewhere would not acquiesce in extending help to those who refuse to take the most elementary steps to help themselves.

As I see it, the threat to avoid integration by eliminating schools is essentially a pipe dream, in the long view. I can imagine it coming for a time. I cannot imagine it lasting. The few states which might try it would have much less chance of holding to it than the original Confederacy of seven states had

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of surviving as an independent nation if they had been left alone. They at least had the hope of support from abroad; states attempting to secede from the American system of public education would have no support anywhere, at home or abroad.

Therefore, I doubt the need to be particularly concerned over the question whether it would be constitutionally possible to compel a state to provide public schooling. The southern extremists, with triumphant glee, advance the proposition that the court cannot compel them to provide schools. And some of the advocates of integration study with worried care possible constitutional theories to support such compulsion. Such theories are at hand as contemplation of the logic of the white primary decisions will suggest. But I think that long before it becomes necessary to try out that issue in the courts, school abolition will have proved to be a form of slow but inexorable suicide which even the most deluded people will finally reject. I, for one, would be inclined to let the erring sisters have a belly full of the suicide, and see what happens, before becoming concerned with means to apply the Constitution to force a state to provide schools.

In the meantime states neighboring the extreme intransigeants are demonstrating both that many of the terrors of integration are imagined and that the "deliberate speed" enjoined by the Court gives abundant leeway for

77 In 1927 the Court held that the Texas statute which prohibited negro participation in Democratic primaries denied equal protection of laws to a Negro. Nixon v. Herndon, 273 U.S. 536 (1927). The Court did not consider the fifteenth amendment. The Texas legislature then passed a new law which authorized party committees to determine who may vote in primary elections. The State Democratic party promptly adopted a rule which excluded Negroes from the 1928 primary. The Court again held that the statute violated the equal protection clause since the statute authorized the discrimination. Nixon v. Condon, 286 U.S. 73 (1932). In 1932 the State Democratic convention adopted a resolution excluding Negroes from membership. The Court held a Negro was not denied any right under the fourteenth amendment since the white primary was not the result of state action, direct or indirect. Grove v. Townsend, 295 U.S. 45 (1935). Six years later, however, the Court decided that a primary election was an integral part of a general congressional election. United States v. Classic, 313 U.S. 299 (1941). The Classic case obviously cast doubt on the Grovev rule, and, three years later, the Grovev case was overruled. Smith v. Allwright, 321 U.S. 649 (1944). There the Court for the first time invoked the fifteenth amendment to strike down white primaries once and for all.

The Court also has stated in a recent case: "The Constitutional rights of the children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." Cooper v. Aaron, 358 U.S. 1, 17 (1958).

78 There is a striking contrast between the trouble at Little Rock and the course of desegregation in law schools which had been well under way, by virtue of court decision and otherwise, prior to the Brown case. Admission of Negroes to a number of law schools in the South proceeded with extraordinary smoothness. Leflar, Desegregation in Law Schools, 43 A.B.A.J. 145 (1957). Of particular interest is the fact that the University of Arkansas admitted a Negro to its law school, without litigation, as early as January, 1948. Professor Leflar, who was then dean of that law school, states that, "a measure of segregation within the law school was at first enforced but broke down under pressures exerted by the white students." Id., at 146. The nature of this breakdown is significant. Originally there was only one negro student who was taught in a class by himself, and the plan had been to keep Negroes in separate classes. The white students, however, realizing the superiority of small-group instruction, sought admission to the "Negro" class which led to the breakdown in segregated classes. It would be foolish, of course, to suggest that the problems of integration at the law school level are the same as those in elementary and secondary schools, particularly in view of the relatively few Negroes asking or eligible for law school admission. Nonetheless the relative ease of desegregation in a number of southern law schools strongly suggests that serious difficulty in the lower schools, at least when only a few Negroes are involved, could be avoided, and, indeed, is contrived. This suggestion, of course, is abundantly supported by experience in a number of those southern states where integration in the lower schools has proceeded to a significant extent.
softening compromise and even for procrastination. Dr. Carmichael rightly characterized that phrase in the Court's opinion as a flash of statesmanship. To persons unfamiliar with the ways of the law and of judges it may seem strange that courts would be so ready to blink at dragging feet if only the toes are pointed in the desired direction. But lawyers — including Southern lawyers — know that judges are masters of the art of compromise. With blood pressuring frustration, every lawyer has experienced in courts high and low the tendency to let both sides win. This tendency, moreover, is often most pronounced when the question to be decided is one highly charged with political emotion. It was in the courthouse that Lincoln learned his politics, the politics of compromise, of inconsistency, of gradualism. And long before Lincoln, John Marshall had demonstrated how it is possible to win by giving in.70

So, as the experience of the “border states” has shown, the Court's decision and the slow and localized process it decreed for effectuating the principle of its decision provide an unhappy South with the widest possible latitude. Indeed the decision clearly demands very little more than an abandonment of massive resistance; beyond that little is clear except that it has provided the maximum opportunity for men of sincerity to work out their problems in their own way.

But judges are human, and like other humans they can lose patience. I have already suggested that the tactics of the southern extremists can easily lead to tougher and tougher decrees which finally could destroy the latitude the Court provided in Brown. Surely there are men of good will in the South who can see the dangers ahead if leadership is left to the demagogues. Surely there are lawyers in the South who know that those words of Lee who, in the late evening of his life, spoke so wisely:

It should be the object of all to avoid controversy, to allay passion, [and] give full scope to reason and every kindly feeling.80

Surely there are lawyers in the South who know that those words of Lee expressed the spirit of the law: avoid controversy by compromise; let passion be tamed by the realism of reason.

80 4 FREEMAN, R. E. LEE 483 (1935).