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Constitutional Law: Segregation in the Schools - Statute Enabling Governor of Arkansas to Close Integrated Schools

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Constitutional Law: Segregation in the Schools—Statute Enabling Governor of Arkansas to Close Integrated Schools—Act 4 of the Second Extraordinary Session of the 1958 General Assembly empowered the Governor of Arkansas to close any school whenever he felt (1) there was actual or impending domestic violence, (2) Federal troops were stationed in the public school area, or (3) an efficient educational system could not be maintained because of integration of the races in the schools. Acting pursuant to this law, Governor Faubus closed the Little Rick School District on Sept. 15, 1958. Petitioner challenged the constitutionality of Act 4 under both the state and Federal Constitutions. *Held,* Act 4 violated neither the state nor the Federal Constitution. *Garrett v. Faubus*—Ark.—, 323 S.W. 2d 877 (1959). The court declared the Act was valid under the state constitution since it was not unconstitutional on its face, and the court did not feel bound to "speculate on facts that might tend to invalidate this Act."[1] Similarly there was no violation of the Fourteenth Amendment of the United States Constitution since the state merely exercised its police powers "to guide the course of segregation so as to protect the public welfare."[2]

The position which the Arkansas Supreme Court has taken seems irreconcilable with four recent federal court decisions.

Acting on his own initiative in 1957, Governor Faubus ordered the State National Guard to close the schools of the Little Rock School District. The local school board applied for permission to suspend a judicially-approved school integration plan in the light of great domestic violence surrounding the school area. The Supreme Court of the United States denied permission in *Cooper v. Aaron,* stating: "law and order are not to be preserved by depriving the Negro children of their constitutional rights."[3] The court pointed out that these rights were secured by the "equal protection" clause of the Fourteenth Amendment, and the now famous case of *Brown v. Board of Education of Topeka*[4] which declared that a dual system of education was inherently unequal. Therefore, it can be seen that any law such as Act 4 runs contra to the ruling of *Cooper v. Aaron*[5] for it, in effect, gives a state, acting through one of its agencies, the power to frustrate a legitimate desegregation plan proposed by a school board. In *Garrett v. Faubus,*[6] the Governor, in closing the schools of Little Rock, actually suspended the approved integration plan which had been reinstated after the decision in the *Cooper*[7] case.

[1] ——Ark.——, 323 S.W. 2d 877 at 878 (1959).
[2] *Id.* at 882.
[3] 358 U.S. 1 at 16 (1958).
[4] 347 U.S. 483 (1954).
[5] *Supra* note 3.
[6] *Supra* note 1.
[7] *Supra* note 3.

However, a state can exercise flexibility in planning for integration. The Supreme Court in the time-table *Brown*[8] case recognized that the transition from segregation to integration would be strewn with difficulties such as available room, teaching capacity, transportation, and adequacy of the pupil's academic preparation, and the court allowed time for their solution. But that flexibility does not include the power to close schools such as is authorized by Act 4. The Supreme Court in the *Brown*[9] case made it very clear that a prudent start toward integration could be found in token enrollment of Negro children when it said:

> . . . that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. *Once such a start has been made,* the courts may find additional time is necessary to carry out the ruling in an effective manner. (Emphasis added)[10]

It would seem to be a fair implication from this statement that a state is not complying with the *Brown*[11] ruling until it has opened all its schools with the potentiality for integration in each school. To do less would be to deny the equal protection of the laws to those students who had attended schools now closed.

A prime example of flexibility within a state to plan for integration is found in the case of *Evans v. Buchanan*[12] where petitioners brought a class action to compel the State School Board to admit them to a public school on a racially non-discriminatory basis. The Court denied Negro petitioners their request because their admission did not conform to the School Board's plan for desegregation. Noting the case of *Cooper v. Aaron,*[13] the Court said:

> Here, however, we are faced, not with the question of whether there shall be integration at all, but with deciding the most sensible way of carrying out what is already an accomplished fact.[14]

Because wholesale violence threatened the atmosphere, the Court felt it would be more beneficial to the students themselves were integration allowed to proceed at the pre-ordained pace. The *Garrett*[15] case is very different, of course, because there the state court sanctioned a law to close schools which seems to overstep the boundaries of flexibility by abrogating any plan for integration.

Had the Governor closed all the schools of Arkansas his position would have been substantially stronger. There appears to be no question that a state may completely abolish its school system. Such was

[8] Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).
[9] *Ibid.*
[10] *Id.* at 300.
[11] *Ibid.*
[12] 172 F. Supp. 508 (D. Del. 1959).
[13] *Supra* note 3.
[14] *Supra* note 12 at 514.
[15] *Supra* note 1.

the holding in *James v. Almond.*[16] There, Virginia's massive resistance laws,[17] which authorized the Governor to close any integrated school, were tested and declared unconstitutional. The Governor had closed six secondary schools in the city of Norfolk, displacing 9,900 white and 17 colored children, merely because the schools had been integrated. The court said that this was a denial of the "equal protection" of the laws because the remaining schools in the city and throughout the state were allowed to remain open. Similarly in the *Garrett* case, only the schools of the Little Rock district were closed, and yet the Arkansas Supreme Court reached an opposite conclusion as to the constitutionality of a law very similar in substance to the Virginia laws. In order to escape the prohibition of the Fourteenth Amendment the legislative enactment must authorize the closing of all schools simultaneously, thereby depriving both colored and white children the right to education.

It might be argued that Act 4 does in fact give the Governor the power to close *all* the schools of the state. However, this does not seem to be a valid argument, for Act 4 is admittedly an emergency measure to protect the efficiency of the school system, and by the terms of the Act the Governor can *only* close *those* schools surrounded by troops or threatened with violence and inefficiency in maintenance of the school system *because of integration of the races.* These are the only standards to guide the Governor's actions. In closing all the schools, there could be no authority gleaned from the Act that would sustain the closing of an all-white school not threatened by violence and integration.

A very recent federal district court decision lends further credence to the view that Act 4 is unconstitutional on its face. While petitioner Garrett was raising the issue of constitutionality in the state court of Arkansas, petitioner Aaron proceeded directly to the District Court for the Eastern District of Arkansas to test the constitutionality of Act 4. In *Aaron v. McKinley*[18] the court ruled that Act 4 was unconstitutional on its face, citing *Cooper v. Aaron.* The district court there, finding little need to support its position with extensive authority, permanently enjoined the state:

> . . . from engaging in any acts which will directly or indirectly impede, thwart, delay or frustrate the execution of the approved plan for gradual integration of the schools of Little Rock. . . .[19]

While the district court's position is not conclusive, there can be little doubt that the United States Supreme Court would overrule *Garrett v. Faubus.*[20]

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[16] 170 F. Supp. 331 (D. Va. 1959).
[17] Acts 1959, Ex. Sess. ch. 77.
[18] 173 F. Supp. 944 (E.D. Ark. 1959).
[19] *Id.* at 952.
[20] *Supra* note 1.