Palmer v. Thompson: Everybody out of the Pool

Helen M. Cake

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Almost ten years ago a federal district judge in Jackson, Mississippi declared that three black residents had a right to the integrated use of all its public recreation facilities. In response to his declaration, city officials determined not to integrate but to close all municipal swimming pools. Last year their choice was upheld by the United States Supreme Court in *Palmer v. Thompson*, a suit by black plaintiffs seeking an order that the pools be reopened on an integrated basis. The Court held that because the record disclosed "no state action affecting blacks differently from whites," municipal authorities had not violated the equal protection clause of the Fourteenth Amendment. The late Justice Black spoke for the majority:

Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of 'the equal protection of the laws.'

Among the six justices who wrote opinions in *Palmer*, none thought the case was governed by past decisions of the Court. The majority and concurring authors made clear their views that a contrary holding would carry the country into new and undesirable constitutional territory. Justice Black was shocked by the mere notion that "cities could be forced by five lifetime judges to [maintain] swimming pools which they choose not to operate for any reason, sound or unsound." The chief justice suggested that "[t]o find an equal protection issue [in the discontinuance of a municipal service] would distort beyond reason the meaning of . . . important constitutional guarantee[s]," while Justice Blackmun expressed the belief that an order to reopen the pools would be "punitive toward Jackson for its past constitutional sins of segregation."

The outcome of *Palmer* seems to have been predicated in part on the majority and concurring justices pragmatic appraisal of the possible consequences of an affirmative order directing the city of Jackson to

3. Id. at 225.
4. Id. at 226.
5. Id. at 227.
6. Id. at 228.
7. Id. at 230 (Blackmun, J., concurring).
reopen its public swimming pools. However, the decision as promulgated raises major Fourteenth Amendment questions as to whether equal protection should only be given to certain activities deemed important enough to warrant special attention, and whether the motivation behind state action is a factor to be considered or ignored in evaluating the constitutionality of such action under the Thirteenth and Fourteenth Amendments.

Two major conceptual differences are reflected in the majority and dissenting justices' characterizations of the questions raised in Palmer. First, by defining the question as whether or not a city can be required to continue the maintenance of recreational facilities once it has undertaken to provide them for its citizens, the majority avoided answering the gravamen of plaintiffs' complaint: that "the City's action in closing its pools must stand or fall on a city's right to close a recreational facility on the grounds of race and opposition to desegregation." Justice White spoke directly to that issue in his dissent and emphasized that it is the right of Mississippi's black citizens to be protected against all racial discrimination by state officers in the performance of their official duties that is of paramount importance—not just their right to swim in municipally operated pools with white residents of Jackson.

Second, although the majority in Palmer stated categorically that motivation is not susceptible to constitutional scrutiny, the Court did in fact look to the reasons advanced by Jackson officials in order to reach the conclusion that the state's action was permissible under the federal constitution. The city's act was found to be nondiscriminatory under the equal protection clause by five members of the Court largely because they chose to believe the closing of the pools was based on economic and safety reasons. Four dissenting justices reached the opposite conclusion that because it was racially motivated the result could not withstand constitutional challenge. None of the justices gave expression to the inherent difficulty of divorcing motive and consequence in a case in which the actual effect of the challenged action depends for its characterization on the motivation of the actors.

If, as suggested by Justice Black, cities should be permitted to discontinue given municipal services for any reason, the argument can be made that future litigants will be unable to sustain a cause of action based on allegations of racially motivated termination of any public service if that service is in fact discontinued for all members of the com-

9. 403 U.S. at 259.
10. Id. at 224-25.
11. See note 66 & accompanying text infra.
12. 403 U.S. at 234-36, 240-42.
munity. *Palmer* conceivably may be read to support the proposition that the Court will not look behind the facade of reasons erected by state officials in support of local action where any rational basis can be found to obviate the necessity for equal protection scrutiny, and that under the guise of promoting public safety and preserving fiscal economy, a state may exercise its police power to block integration efforts. The majority and concurring opinions may signal a halt to the Court's expansive interpretation of Fourteenth Amendment rights and the beginning of a policy of judicial abstention where the purpose of state action is in issue. This may be true, particularly when protection is sought for activities seen by the Court as “nice-to-have but not essential.”

The danger inherent in future applications of *Palmer* to situations involving the maintenance or termination of other municipal facilities lies in the lack of any acceptable standard by which courts may determine whether selected government services are in fact essential or expendable under the *Palmer* rationale. If motivation is to be discounted in appraising the constitutional validity of state actions, and if local judges are to be free to classify discontinued functions as unimportant or nonessential, litigants may be unable to avoid undesirable ramifications of the majority opinion, particularly when the superficial equal application treatment relied on by Justice Black lends credence to the results of such patently subjective reasoning. To minimize the possibilities for basically arbitrary decisions under the *Palmer* holding, the precedential value of the case should be strictly confined to its factual situation.

Further support for a narrow reading of *Palmer* is found in *Swann v. Charlotte-Mecklenburg Board of Education,* a unanimous decision announced just two months before *Palmer,* in which the Court addressed the problem of eliminating state imposed dual school systems throughout the nation. In contrast to the views expressed in *Palmer* about recreation facilities, the Court observed that as to school assignments “[r]acially neutral . . . may be inadequate.” In a discussion of the broad remedial powers to be exercised by district courts in school

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13. Justice Black suggested as much in James v. Valtierra, 402 U.S. 137 (1971), another recent defeat for equal protection proponents. In a five to three decision, the Court upheld article 43 of the California Constitution requiring community approval by referendum before the construction of any federally funded low income housing development. Justice Black stated that the three-judge court's holding that article 34 denied to plaintiffs the equal protection of the laws “could be affirmed only by extending Hunter, and this we decline to do.” *Id.* at 141 (emphasis added).

14. 403 U.S. at 229.
16. *Id.* at 28.
desegregation cases, the chief justice emphasized "the sense of basic fairness inherent in equity"\textsuperscript{17} and stated that "[s]ubstance, not semantics, must govern."\textsuperscript{18} That philosophy is not apparent in Palmer, a case in which racial neutrality was employed to immunize Jackson's action against constitutional scrutiny and semantics or form appeared to control the substantive interpretation of plaintiffs' complaint.

In Swann the Court noted "desegregation of schools ultimately will have impact on other forms of discrimination."\textsuperscript{19} The other form of discrimination recognized by the dissenting justices in Palmer will have a detrimental impact on the very children who stand to benefit from Swann, and the distinction drawn in Palmer between education and recreation, and the Court's apparent disinclination to extend equal protection to the latter, is inconsistent with the basic philosophy of the school case. Viewed in light of Swann, Palmer should be strictly contained, lest municipal authorities in their magnanimous concern for public safety and fiscal economy, undo after school what progress has been made toward interracial harmony in the educational experience.

**Background of the Case: Clark v. Thompson**

In 1962 three Mississippi Negroes began the legal battle which culminated in Palmer. In Clark v. Thompson,\textsuperscript{20} a class action against the mayor and other named civic officials of Jackson, plaintiffs alleged the city's maintenance of segregated park and recreation facilities constituted a violation of the equal protection clause. They sought an injunction prohibiting enforcement of three specific Mississippi segregation statutes,\textsuperscript{21} which had enabled the alleged discrimination, and a de-

\textsuperscript{17} Id. at 31.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 22-23.
\textsuperscript{20} 204 F. Supp. 30 (S.D. Miss. 1962).
\textsuperscript{21} At the time of Clark v. Thompson, the law of Mississippi included a directive that "the entire executive branch of the government . . . give full force and effect in the performance of their official and political duties to the Resolution of Interposition . . . and are further directed and required to prohibit by any lawful, peaceful, and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court . . . and to prohibit by any lawful, peaceful and constitutional means, the causing of a mixing or integration of the white and Negro races in public schools, public waiting rooms, public places of amusement, recreation or assembly in this state . . ." Miss. Laws 1956, ch. 254, §§ 1-2 *codified* at Miss. Code Ann. § 4065.3 (repealed 1970). For two or more persons to conspire "[t]o overthrow or violate the segregation laws of [the] state" was punishable as criminal conspiracy. Miss. Code Ann. § 2056(7) (1956), as amended, (Supp. 1970). A statutory authorization that "[e]very person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the [s]tate . . . [m]ay choose or select the person or persons he or it desires to do business with . . ." is found in the present laws of Mississippi. *Id.* § 2046.5 (1956).
claratory judgment as to the constitutional infirmity of both the statutes and the impermissible state action carried on under the legislative mandate. A three-judge district court ruled that if the statutes were construed to permit or encourage denial of access to public facilities solely because of race, they would be "so plainly unconstitutional as not to require a three-judge court." However, plaintiffs' evidence failed to show that the conduct in question emanated from enforcement of statutes; rather, they were attacking a local practice, seeking to enjoin an established behavior pattern and not challenging the constitutional validity of the Mississippi provisions, according to the per curiam opinion. The three-judge court was dissolved in April of 1962.

The second reported opinion in *Clark v. Thompson* was delivered by Chief Judge Mize of the District Court for the Southern District of Mississippi a month later. After some obviously biased introductory remarks on the virtues of the city of Jackson, Judge Mize announced his decision that plaintiffs had not established their eligibility to speak for other Negroes in Jackson, or in the rest of Mississippi, and were entitled only to personal relief; the validity of the challenged statutes was not before the court; and injunctive relief would not be appropriate. Feeling sure the "outstanding, high class gentlemen" who govern the city of Jackson would "obey the mandate of the Court without an injunction hanging over their heads," he confined his grant of affirmative relief to a statement that "[t]he three plaintiffs are entitled

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The latter statute was recently before the Supreme Court and was the subject of the following comment: "It is clear that, to the extent that the statute authorizes and empowers restauranteurs to discriminate on the basis of race, it cannot pass muster under the Fourteenth Amendment." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 196 (1970) (Brennan, J., concurring in part, dissenting in part).

23. *Id.* at 31. 28 U.S.C. § 2281 (1970) provides that "[a]n interlocutory or permanent injunction restraining the enforcement . . . [of any state] statute . . . shall not be granted by any district court or judge thereof upon the ground of the constitutionality of such statute unless the application thereof is heard and determined by a district court of three judges. . . ." The decision to dissolve the three-judge court in *Clark v. Thompson* was based on the authority of *Bailey v. Patterson*, 369 U.S. 31 (1962) in which the Supreme Court found the three-judge requirement inapplicable in a similar case involving a Mississippi statute.

24. It should be noted that 28 U.S.C. § 1253 (1970) provides direct appeal to the Supreme Court from a three-judge court's order denying or granting an injunction under section 2281. Consequently, plaintiffs suffered an important procedural defeat when remanded to a single judge court.

26. The court spoke of Jackson as a "progressive" city, "noted for its . . . lack of racial friction except for the period in 1961 when the self-styled Freedom Riders made their visits." *Id.* at 541.
27. *Id.* at 543.
28. *Id.*
to an adjudication of their personal claims of right to unsegregated use of public recreation facilities by a declaratory judgment herein. His decision was affirmed in a summary per curiam opinion by the court of appeals the following year. The United States Supreme Court denied certiorari.

In compliance with the mandate of Clark v. Thompson, the city of Jackson desegregated its zoo, its auditorium, its public golf course and public parks. But the city also closed all municipally operated swimming pools. These were the stipulated facts when the issue was joined anew in Palmer v. Thompson.

Palmer v. Thompson

The Lower Courts

Palmer began when a group of black citizens filed a second class action in the district court alleging that discriminatory conduct by the mayor and other defendants—to wit, closing all public pools to avoid integration—constituted a violation of the equal protection clause and of the Thirteenth Amendment. They sought a judicial mandate for the reopening of the facilities but the district court dismissed the complaint and appeal followed once again.

Plaintiffs relied on Griffin v. County School Board of Prince Edward County and Reitman v. Mulkey to support their theory that the state action challenged in Palmer could not stand because it was racially motivated, because it gave expression to an official policy of segregation, and because it constituted state encouragement of private discrimination. In Griffin the Supreme Court held that an educational

29. Id. at 542.
30. 313 F.2d 637 (5th Cir. 1963).
33. In the principal Supreme Court dissent in Palmer Justice White observed that the city had also removed the benches from a public park in Jackson and closed all public rest rooms in the municipal court building. 403 U.S. at 253 n.11.
34. 391 F.2d 324 (5th Cir. 1967), aff'd on rehearing en banc, 419 F.2d 1222 (5th Cir. 1970), aff'd, 403 U.S. 217 (1971).
35. The opinion of the district court in Palmer is not reported. Plaintiffs sought two judicial mandates, one of which—reopening the swimming pools—is the topic of this note. As to their second objective, an order that the city jail be desegregated, they were denied standing because none of them had ever been in jail. The denial of standing was affirmed by the court of appeals. 391 F.2d 324 (5th Cir. 1967). On rehearing, argument was confined to the swimming pool complaint. 419 F.2d 1222 (5th Cir. 1970).
36. See note 35 supra.
system designed to avoid integration by closing public schools and providing grants to children attending private segregated schools violated the equal protection clause because the state's objective was unconstitutional. In Reitman the Court accepted the California Supreme Court's assessment of an initiative measure by which the state electorate voted to repeal all previously enacted antidiscrimination housing laws. The California court found that by virtue of the resulting state constitutional provision permitting discrimination in the sale or rental of private housing, the state was placed in the untenable position of encouraging discrimination on grounds of race and consequently involved in racial discrimination to an unconstitutional degree.

The Court of Appeals for the Fifth Circuit stated that neither Griffin nor Reitman extended "so far as to prevent the City from closing its swimming pools when they cannot be operated economically or safely as integrated pools." Affidavits supplied by two defendants, the mayor and the park director of Jackson, were viewed by the court as substantial evidence that economic pressures and concern for public safety triggered the city's decision to close the pools.

On rehearing en banc the Fifth Circuit again affirmed the district court's dismissal of the complaint. Seven members of the court felt that an official policy of segregation could not be inferred in the face of "substantial and legitimate objects which motivated the City's closing, to wit, the preservation of order and maintenance of economy in municipal activity. . . ." Six judges disagreed. "It is astonishing . . . to find that half of the members of this court accept at face value the two excuses the City of Jackson offered for closing its swimming pools . . . ."

The majority distinguished Reitman and Griffin by contrasting the factual contexts in which they were decided from that of Palmer, pointing out that in Reitman the subject in question, public housing, continued to exist after the decision, while the subject matter of Palmer, Jackson's public pools, is no longer present. In Griffin the state participated financially in the maintenance of private schools, whereas in Palmer there was no showing of support for privately maintained swimming pools by the city. Furthermore, the court reasoned that because maintaining public swimming pools is not an essential government func-

40. 387 U.S. at 380.
41. 391 F.2d at 326.
42. 419 F.2d 1222 (5th Cir. 1970).
43. Id. at 1228.
44. Id. at 1229 (Wisdom, J., dissenting).
45. Id. at 1226.
46. Id. at 1227.
tion, but a discretionary municipal activity, the city should have a wide freedom of operation.\(^\text{47}\) By eliminating the cause of the controversy, the court found the city treated all of its citizens with perfect equality.

The court of appeals dissenters found the equal application argument a "tired contention," one that has been "overworked in civil rights cases."\(^\text{48}\) In a carefully reasoned dissent, Judge Wisdom made short work of the notion that equal application of an otherwise offensive state act will save its validity. By analogy to two earlier Supreme Court decisions,\(^\text{49}\) he found the evidence of equal application "irrelevant because race was the factor upon which the statute[s] operated, just as race was the factor that led the City of Jackson to close its pools."\(^\text{50}\) Furthermore, he challenged the assumption that closing the pools did have the same effect on both blacks and whites, quoting a phrase from Justice Black's \textit{Griffin} opinion to suggest that the city's action "bears more heavily"\(^\text{51}\) on members of one race and is therefore a denial of equal protection.

Judge Wisdom's analysis of the facts in \textit{Palmer} demonstrated the appropriateness of a three-part test outlined by the California Supreme Court in \textit{Mulkey v. Reitman}\(^\text{52}\) and approved by the United States Supreme Court.\(^\text{53}\) Using that test, the judge first examined the "historical context and conditions" prior to the closing of the pools, and found ample evidence of Mississippi's official opposition to integration.\(^\text{54}\) Second, his inquiry into the "immediate objective" of the city's act disclosed that its purpose was to avoid desegregation.\(^\text{55}\) Lastly, he spoke to the "ultimate effect" of that action:

\[\text{[F]or white persons the first effect . . . was to encourage private enterprise to supply segregated pools for white patrons. For Ne-}\]

\(\text{47. Id. at 1226. The court concluded, furthermore, that "[e]ven though [the city's] motive obviously stemmed from racial considerations, we know of no prohibition to bar the City from taking such factors into account and being guided by conclusions resulting from their consideration." Id. at 1228.}\)

\(\text{48. Id. at 1232 (Wisdom, J., dissenting).}\)

\(\text{49. Loving v. Virginia, 388 U.S. 1 (1967) (Virginia's miscegenation statute applied equally to black and white citizens but was nevertheless held unconstitutional); Anderson v. Martin, 375 U.S. 399 (1964) (uniform application to members of both races did not validate a statute requiring racial designation of all candidates for public office on the official ballot).}\)

\(\text{50. 419 F.2d at 1232-33 (Wisdom, J., dissenting).}\)

\(\text{51. Id. at 1233.}\)

\(\text{52. 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), aff'd, 387 U.S. 369 (1967).}\)

\(\text{53. 387 U.S. 369 (1967).}\)

\(\text{54. "[W]e again take judicial notice that the State of Mississippi has a steel-hard inflexible, undeviating official policy of segregation." 419 F.2d at 1235, quoting United States v. City of Jackson, 318 F.2d 1, 5 (5th Cir. 1963).}\)

\(\text{55. 419 F.2d at 1235.}\)
The first effect was punitive: they were denied the opportunity of using even their segregated pool.\textsuperscript{58}

The tenor of Judge Wisdom's powerful dissent is reflected in his quotation of a familiar passage on the "majestic equality of the law."\textsuperscript{57} His observation that the long range effects of the \textit{Palmer} decision must be considered and the subsequent disposition of the case by the Supreme Court pose a critical question as to whether courts may, in their neutral application of the equal protection clause, deny the black as well as the white access to public facilities of greater significance than municipal swimming pools.

\textbf{The Supreme Court}

The United States Supreme Court affirmed the decision of the court of appeals by a vote of five to four.\textsuperscript{58} Chief Justice Burger and Justices Black, Blackmun, Harlan and Stewart comprised the majority; Justices Brennan, Douglas, Marshall and White dissented. Justice Hugo Black authored the opinion of the Court which may be read as the last expression of his judicial philosophy on the role of the federal government, speaking through its highest court, in adjudicating matters of local concern. Chief Justice Burger and Justice Blackmun, concluding their first terms on the Court, concurred with the result. Of the dissenters only Justice Brennan did not express an individual opinion. Mr. Justice White wrote the principal dissent.

\textit{Justice Black's Majority Opinion}

For Justice Black the factual context in which \textit{Palmer} came before the Court was simple and determinative. The city of Jackson maintained public swimming pools as a matter of discretion; in its discretion it chose to discontinue that service. Because the decision to close the pools operated equally on members of all races, black citizens were not denied the equal protection of the law.

Justice Black devoted most of his opinion to distinguishing the cases relied on by petitioners, of which he found that "the only two which even plausibly support their argument are \textit{Griffin v. County School Board of Prince Edward County} . . . and \textit{Reitman v. Mulkey} . . . ."\textsuperscript{59} Plaintiffs advanced the analogy that because officials of Jackson, like those of Prince Edward County, had ordered the closing of a public facility to avoid integration, the result in each case was constitu-

\textsuperscript{56} \textit{Id.}
\textsuperscript{57} "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." \textit{Id.} at 1233.
\textsuperscript{58} 403 U.S. 217 (1971).
\textsuperscript{59} \textit{Id.} at 221.
tionally repugnant. In *Griffin* private segregated schools replaced public segregated schools; in *Palmer* private segregated pools replaced public segregated pools.

Although he conceded that a pool previously leased by the city from the YMCA and currently operating under the auspice of that organization was apparently open to whites only, and another previously city-owned pool was functioning for blacks only at Jackson State College, Justice Black found "nothing . . . to show the city is directly or indirectly involved in the funding or operation of either pool." In *Griffin* the state did provide financial assistance to so-called private schools which were open to whites only; consequently *Griffin* did not control the case before the Court.

Justice Black's answer to petitioners' argument that state action motivated by racial animosity violates the equal protection clause was that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." He distinguished his own language in *Griffin*, "which may suggest that the motive or purpose behind a law is relevant to its constitutionality," by stating that the actual effect of a state's action, not the motive, was the focus in earlier cases, and reiterating his conclusion that action by the city of Jackson did not affect blacks differently from whites.

According to Justice Black, *Reitman v. Mulkey* provided "no more support to petitioners than . . . *Griffin*" because *Reitman* was "based on a theory that the evidence was sufficient to show the State was abetting a refusal to rent apartments on racial grounds," a finding of the California Supreme Court which was accepted by the Supreme Court. The record in *Palmer* failed to make clear that the dis-

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60. *Id.* at 222.
61. *Id.* at 224.
62. In 1964 Justice Black wrote for a unanimous Court: "But the record in the present case could not be clearer that Prince Edward's public schools were closed . . . for one reason, and one reason only: to ensure . . . that white and colored children in Prince Edward County would not . . . go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218, 231 (1964) (emphasis added). Justice Black's interpretation of motive as a determining factor is further clouded by his footnote reference to *Bush v. Orleans Parish School Bd.*, 187 F. Supp. 42 (E.D. La. 1960), *aff'd mem.*, 365 U.S. 569 (1961), in which he remarked that "[o]f course there was no serious problem of probing the motives of a legislature in *Bush* because most of the Louisiana statutes explicitly stated they were designed to forestall integrated schools." 403 U.S. at 221 n.6.
63. 403 U.S. at 225.
64. *Id.* at 224.
65. By his disposition of petitioner's *Reitman* claim, Justice Black seems to
trect court even considered the question of state encouragement of discriminatory practices, according to the majority opinion.

Although the majority in Palmer emphasized that a city should be free to discontinue a municipal operation for any reason, the opinion does accept the reasons given by the city to justify its action: "[T]he pools were closed because the city council felt they could not be operated safely and economically on an integrated basis." The only evidence on which that finding rests, two affidavits from defendants in the case, was not criticized by Justice Black. In fact, he seems to have suggested that a similar holding would result without such a finding, but he did not speak directly on this point.

Petitioners advanced a final argument which characterized Jackson's action in denying Negroes the opportunity to swim with white Mississippians in public pools as the imposition of a "badge or incident of slavery," citing Jones v. Alfred H. Mayer Co. as authority for a broad reading of the Thirteenth Amendment. Justice Black found the suggestion "faint and unpersuasive." He concluded, "[t]o reach that result from the Thirteenth Amendment would severely stretch its short and simple words and do violence to its history." According to Justice Black, if a city's authority to inaugurate or terminate public recreation facilities is to be controlled by the federal government, Congress may legislate to that effect under the enabling act of the amendment; the Court should not intrude its judgment, for to do so would be the exercise of a "law-making power far beyond the imagination of the amendment's authors."

Chief Justice Burger's Concurring Opinion

In joining the opinion of Justice Black, Chief Justice Burger spoke briefly of the probability of increasing curtailment of public services

have suggested that a state court may undertake an examination of the motives behind local action and that the Court will accept its findings. Whether or not a further implication may be drawn that the Supreme Court will never, of its own motion, take judicial notice of state action which perpetuates or encourages private racial discrimination, the late Justice Black may have limited the applicability of Reitman to litigation in which the highest state court has assessed the impact of local action and found it unacceptable under the equal protection clause.

66. 403 U.S. at 225.

67. See text accompanying note 5 supra.

68. 392 U.S. 409 (1968).

69. Jones dealt with the scope of federal legislation prohibiting racial discrimination in the sale and rental of housing. The Court held that under the Thirteenth Amendment Congress had authority to prohibit both public and private racial discrimination in property transactions. Id.

70. 403 U.S. at 226.

71. Id.

72. Id. at 227.
by financially burdened local governments.\textsuperscript{73} He argued that the constitution would be unreasonably distorted if an equal protection question were raised by every closing of a public recreation facility:

[The Court] would do a grave disservice, both to elected officials, and to the public, were we to require that every decision of local governments to terminate a desirable service be subjected to a microscopic scrutiny for forbidden motives rendering the decision unconstitutional.\textsuperscript{74}

The chief justice characterized plaintiffs' quest for judicial relief as a request that the Court hold "on a very meagre record that the Constitution requires that public swimming pools, once opened, may not be closed."\textsuperscript{75}

\textit{Justice Blackmun's Concurring Opinion}

The key vote in \textit{Palmer} belongs to Justice Blackmun, whose concurring opinion rests squarely on the facts of the case. Caught between the divergent views of Justices Black and White, he finds "much to be said on each side" of an admittedly "hard" case, which he realized "may have significant implications."\textsuperscript{76} His affirming vote is cast after a consideration of specific factors which, taken together, lend credence to the majority view. Other city recreation facilities have been integrated and remain open; maintenance of the pools is a nonessential function on which the city has lost money; and the pools are not connected with the Jackson public school system.\textsuperscript{77}

Justice Blackmun does not agree with his dissenting colleagues that the city's action reflects an expression of official apartheid policy or that the closing will have a deterrent effect on Mississippi Negroes seeking vindication of constitutional rights. Furthermore, he is distressed by the possibility that the city of Jackson might be "locked-in"\textsuperscript{78} to continued operation of a money-losing facility by virtue of a contrary decision. Finally, he reflects that "the present case, if reversed, would take us farther than any before."\textsuperscript{79}

Justice Blackmun seems clearly of the impression that such facilities as swimming pools do not warrant the equal protection considerations granted to educational facilities. He did not speak directly to the question of whether the Court should examine the motive behind

\textsuperscript{73.} \textit{Id.} at 227-28.
\textsuperscript{74.} \textit{Id.} at 228.
\textsuperscript{75.} \textit{Id.}
\textsuperscript{76.} \textit{Id.} at 228-29.
\textsuperscript{77.} \textit{Id.} at 229-30. Justice Blackmun seems to suggest that his position would be different if the facility in question were one having a close relationship to education.
\textsuperscript{78.} 403 U.S. at 230 & n.230 \textit{quoting} Transcript of Oral Argument, 43-44.
\textsuperscript{79.} \textit{Id.} at 230.
the closing of Jackson’s pools. However, his decision to affirm the lower court “[o]n the record as presented to us in this case”\textsuperscript{80} indicates that he might have been unwilling to accept the reasons of civic disorder and financial stress relied on by defendants (and the Court majority) had plaintiffs presented a record more conducive to appellate review.

\textit{Justice Douglas' Dissenting Opinion}

Unlike his Brother Blackmun, Justice Douglas felt that the Court should follow the direction indicated by \textit{Reitman} and \textit{Griffin} and go the “whole way.”\textsuperscript{81} Citing \textit{Bush v. Orleans Parish School Board},\textsuperscript{82} in which a three-judge district court enjoined the enforcement of a Louisiana segregation statute, he found “[the law] giving the Governor the right to close any public school ordered integrated . . . undistinguishable from this one.”\textsuperscript{83} His unspoken assumption is that schools and swimming pools require identical treatment by the Court; for him it appears that equal protection should not be limited to select activities but extended to all areas of state action.

Justice Douglas noted that the Constitution contains no directive that states provide either essential or nonessential public services and reasoned that a state might terminate its public school system as well as the operation of public swimming pools.\textsuperscript{84} However, he concluded that the Ninth Amendment bears on the pool problem in that “the right of the people to education or to work or to recreation by swimming or otherwise”\textsuperscript{85} may be among those “retained by the people” under the Ninth Amendment.\textsuperscript{86}

Mr. Justice Douglas suggested that he agreed with the majority that motives are not subject to judicial scrutiny by stating that “[t]he question for the federal judiciary is not what the motive was, but rather what the consequences are.”\textsuperscript{87} However, he retracted that agreement by his

\textsuperscript{80.} \textit{Id.} As noted by Justice White in dissent, the record in \textit{Palmer} contains no live testimony. The case was tried on stipulations and affidavits. \textit{Id.} at 258. Also see note 100 \textit{infra} and accompanying text.

\textsuperscript{81.} \textit{Id.} at 240.


\textsuperscript{83.} 403 U.S. at 232. No Mississippi statute is before the Court in \textit{Palmer}. However, it is interesting to contrast the opinion of the three-judge court in \textit{Clark v. Thompson}, 206 F. Supp. 539 (S.D. Miss. 1962), with the disposition of the statute in \textit{Bush} as affirmed by the Supreme Court.

\textsuperscript{84.} 403 U.S. at 233.

\textsuperscript{85.} \textit{Id.} at 233-34.

\textsuperscript{86.} Justice Douglas did not elaborate on nature of the right to recreation by swimming, or whether it encompasses a right to swim in public pools which municipal authorities are obliged to maintain for the benefit of their citizens.

\textsuperscript{87.} 403 U.S. at 236.
decision to reverse the court of appeals because "[c]losing . . . the pools was at least in part racially motivated." 88

[T]hough a State may discontinue any of its municipal services . . . it may not do so for the purpose of perpetuating or installing apartheid . . . . If that is its reason, then abolition of a designated public service becomes a device for perpetuating a segregated way of life. That a State may not do. 89

Justice Douglas dissented in Palmer because he believes "that freedom from discrimination based on race, creed, or color has become by reason of the Thirteenth, Fourteenth and Fifteenth Amendments one of the 'enumerated rights' under the Ninth Amendment that may not be voted up or voted down." 90

**Justice White's Dissenting Opinion**

The thrust of Justice White's dissenting argument is that an examination of motive is essential to the outcome of Palmer. Finding the city's stated reasons for closing the pools without merit, he reasoned that Jackson official's racially motivated action could not withstand the scrutiny to which any state action having a chilling effect on the exercise of a constitutionally protected right must be subjected. It should be emphasized that the right to which he refers is not the right to swim in integrated public pools, but the right to be protected against racial discrimination on the part of public authorities acting in their official capacities. 91 Apparently Justice White did not consider the question presented by the closed pools as one involving the expansion of equal protection to recreational activities.

Mr. Justice White was not impressed by the reasons advanced in support of Jackson's official reaction to the declaratory judgment rendered in Clark v. Thompson. 92

The circumstances surrounding this action and the absence of other credible reasons for the closings leave little doubt that shutting down the pools was . . . a most effective expression of official policy that Negroes and whites must not be permitted to mingle together when using the services provided by the city. 93

In answer to the majority contention that evidence of a city's motive is not subject to judicial inquiry, he cited specific federal statutes which, as construed by the Court, provide that "conduct falls within the federal proscription only upon proof of forbidden racial motive or ani-

88. *Id.* at 235.
89. *Id.* at 239 (emphasis added).
90. *Id.* at 237.
91. See note 9 *supra* and accompanying text.
93. 403 U.S. at 241.
From *Younger v. Harris* a case decided in the same term with *Palmer* in which the Court held that federal jurisdiction to intervene in pending state prosecutions is limited to instances in which state officials are prosecuting without hope of obtaining valid convictions but merely to harass defendants, Justice White found that "[o]bviously, in order to determine its jurisdiction . . . a federal court must examine and make a determination of the same kind of official motivation which the Court today holds unreviewable."

After outlining the Court's treatment of segregation in public facilities since *Brown v. Board of Education* and offering a detailed recital of the circumstances surrounding *Palmer*, Justice White presented an exactly critical appraisal of the so-called supporting evidence on which the majority based its conclusion that Jackson's decision to close its pools rested on valid reasons. He noted that in previous years Jackson had operated its public pools at a loss, keeping admission fees intentionally low "in order to serve as many people as possible," and that the city offered no evidence to indicate that the operating losses would be increased if the pools were maintained on an integrated basis. He found no indication that law enforcement problems would result from integration of the pools, or that municipal officials would be unable to cope with such problems if they did arise. In short, "the only evidence in this record are the conclusions of the officials themselves, unsupported by even a scintilla of added proof."


28 U.S.C. § 2283 (1970) provides that a federal court "may not grant an injunction to stay proceedings in a State court [in an action challenging the constitutional validity of a state statute] except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Under the test enunciated in *Younger*, it can be argued that the Court will look not at the motive for the indictment but at the result of the state prosecution, and that if a conviction is obtained the prosecution may be deemed to have been brought in good faith. But if defendant is acquitted and subsequently charged for another violation of the same statute, the Court will have to make a subjective evaluation as to whether the subsequent charge stems from good law enforcement practice or a prosecutor's bad faith harassment of the defendant.

100. *Id.* at 260. Justice White quoted the affidavits of Mayor Thompson and Park Director Kurts in the body of his opinion. Mayor Thompson stated that "[r]ealizing that the personal safety of all of the citizens of the City and the mainte-
Justice White quoted extensively from *Watson v. City of Memphis*, 1 a case decided by the Supreme Court in 1963, which arose under circumstances similar to those of *Palmer*. *Watson* involved a suit by black residents demanding immediate integration of all public recreation facilities. The city of Memphis answered that, in the words of Justice White, "gradual desegregation, facility by facility, was necessary to prevent interracial strife." 2 The city also put forth financial excuses for the delay.

The Court's unanimous rejection of the city's excuses for delaying integration in *Watson v. Memphis* was found to be directly in point by Justice White, for neither fear of racial violence nor economic difficulty was an acceptable basis on which to rest the denial of plaintiffs' constitutional rights. 3 It is arguable that the *Watson* analogy breaks down if one accepts the majority approach to *Palmer*, which is that because there are no longer any public pools in Jackson, plaintiffs cannot be denied their rights to swim in them. However, Mr. Justice White did not countenance that over-simplification in reaching his conclusion that there are no public pools in Jackson because of that city's official posture against the maintenance of integrated pools. 4

Finally, Justice White found the impact of the city's action doubly severe for Jackson's black residents. First, he observed that Negroes "are stigmatized by official implementation of a policy that the Fourteenth Amendment condemns as illegal." 5 Second, he determined that "[t]he action of the city . . . interposes a major deterrent to seek-

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2. 403 U.S. at 256.
3. "[N]either the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials. . . . Moreover, there was no factual evidence to support the bare testimonial speculations that authorities would be unable to cope successfully with any problems which in fact might arise. . . ."
5. Id.
For Mr. Justice White the record in Palmer is clear and the effect of the majority decision is to limit a principle developed by the court in cases from Brown to Griffin, a limitation he found both unwise and unwarranted. He concluded that action taken by the city of Jackson is in opposition to court-ordered integration and was

"an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race." . . . As such, it "bears a heavy burden of justification . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy."108

**Justice Marshall’s Dissenting Opinion**

The dissent of Justice Marshall is based on two theories: first, that Fourteenth Amendment rights are individual rights and regardless of whether the city of Jackson has denied access to public pools to white and black children alike it has violated the constitutional rights of a single black child if it prevents him from swimming because he is black; second, that recreation facilities and schools have not been distinguished by the Court since Brown. Justice Marshall found the city's rationalization for closing the pools “even more transparent than putting the matter to a referendum vote.”109 As to the fears expressed by Justice Blackmun, with which the chief justice concurred, that the city would be “locked-in” to the operation of public pools by a reversal, Justice Marshall replied that on a proper showing of legitimate reasons for termination “swimming pools [and] schools . . . could be closed.”110

Justice Marshall viewed the result of the majority opinion in Palmer as a retreat from a principle expressed over twenty years ago that it is “no answer . . . to say that the courts may also be induced to deny white persons rights . . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.”111 For him, recreational facilities demand equal protection along with all other

106. Id. at 269.
107. Justice White conceded that Griffin could be distinguished, “but only if one ignores its basic rationale and the purpose and direction of this Court's decisions since Brown.” Id. at 264. To him, “Griffin stands for the proposition that the reasons underlying certain official acts are highly relevant in assessing the constitutional validity of those acts.” Id.
109. 403 U.S. at 273.
110. Id.
111. Id. at 271, quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948).
activities and motive should be a determinative factor in evaluating state action.

**Criticism of the Case**

Since *Brown I* the Court has moved in a progressive direction where the rights of black individuals vis-à-vis government have been involved.\(^{112}\) For Justice Marshall "the majority and concurring opinions [in *Palmer v. Thompson*] turn the clock back 17 years."\(^{113}\) Whether *Palmer* means a line has been drawn and the Court is unwilling to go farther in its expansion of civil rights under the equal protection clause,\(^{114}\) or it is merely a legal aberration, abundant reasons for limiting the precedent value of this controversial decision are found in the dissents of Judge Wisdom and Justice White, the minority spokesmen in two closely divided courts.

By its failure to deal consistently with the issue of state motivation or to resolve the apparent conflict between *Palmer* and *Reitman*, the Court seems to imply that public recreation facilities do not merit equal protection. Because the majority approach to *Palmer* was predicated on the subjective classification of swimming pools as nonessential facilities and because the Court eschewed a holding it feared would lead to undesirable consequences, the constitutional soundness of the decision is questionable. Furthermore, if one accepts the basic distinction drawn by Justice White that *Palmer* involves the right to be protected against invidious discrimination by the state—not just the right of access to integrated swimming pools—the majority implications must be rejected.

**The Invalid Distinction Between Essential and Nonessential Government Functions**

By accepting Jackson's decision to close its public pools and refusing to examine the motivation behind that decision, the *Palmer* court avoided a result it did not want to reach—a pronouncement that public officials may not terminate recreation services because of opposition to integration. Since Justice Black made just such a statement with reference to public schools in the *Griffin* case,\(^{115}\) it seems clear the distinc-

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112. *See* 403 U.S. 243-47 & nn.1-3. A conspicuous exception is *Evans v. Abney*, 396 U.S. 435 (1970), in which the Court affirmed a Georgia ruling that land left in trust to the city of Macon as a park for whites only reverted to the grantor's heirs after a Court determination that the park could not be maintained by the city or by city-appointed private trustees, on a segregated basis. Justice Black found that by eliminating the park instead of integrating it the state treated its black and white citizens with equality. Despite the similarity of results in *Evans* and *Palmer*, Justice Black did not mention the former decision in his majority opinion.

113. 403 U.S. at 272.

114. *See* note 13 *supra*.

115. *See* note 62 *supra*. 
tion he made rested in large part on the nature of the closed facilities in 

Justice Black prefaced his opinion by admonishing his readers to "[note] first that neither the Fourteenth Amendment nor any act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools."\(^{116}\) The chief justice warned that the relief sought by plaintiffs, if granted, would dictate a holding that "the Constitution requires that public swimming pools, once opened, may not be closed."\(^{117}\) Justice Blackmun was influenced in his decision by the fact that pools are a "general municipal service of the nice-to-have but not essential variety."\(^{118}\) The implication seems inescapable that five justices cast affirming votes in \textit{Palmer} because the facility closed was not considered important enough to warrant a contrary holding and because they wished to avoid the possible dilemma seen as a consequence of an opposite decision.

As Justice Douglas stated in his dissent, "[t]here is . . . not a word in the Constitution . . . concerning the right of the people to education or to work or to recreation."\(^{119}\) No provision distinguishes between essential and nonessential governmental functions. Absent any standard by which to classify public activity as necessary or just "nice-to-have," the majority distinction cannot be justified as a basis on which to rest a holding as to the permissible circumstances under which a facility may be closed. The simple expedient of asking what other public service might succumb to the \textit{Palmer} rationale suggests the gross danger inherent in such subjective classification.

The long-range effects are manifold and far-reaching. If the City's pools may be eliminated from the public domain, parks, athletic activities, and libraries also may be closed.\(^{120}\)

Justice Black was distressed by the prospect of five lifetime judges forcing cities to operate public swimming pools.\(^{121}\) A more alarming situation may occur if five lifetime judges may pass judgment on the rights of citizens to any activity or service because they think it is nonessential and, as a consequence of their subjective classification, excluded from the protective breadth of the Fourteenth Amendment.

Justice Blackmun expressed the belief that the city of Jackson would be "locked-in" to maintaining public pools by a decision reversing the lower court in \textit{Palmer},\(^{122}\) while Justice Black suggested that an af-

\(^{116}\) 403 U.S. at 220.
\(^{117}\) \textit{Id.} at 228.
\(^{118}\) \textit{Id.} at 229.
\(^{119}\) \textit{Id.} at 233-34.
\(^{120}\) 419 F.2d 1222, 1236 (5th Cir. 1970) (Wisdom, J., dissenting).
\(^{121}\) See text accompanying note 5 \textit{supra}.
\(^{122}\) See text accompanying note 78 \textit{supra}.
firmative order would be tantamount to judicial law-making.\textsuperscript{123} Neither realized courts might engage in a more invidious form of law-making by "locking-out" residents from pools or parks or libraries, thought to be nonessential by local judges, if Palmer were followed to its illogical conclusion. As suggested by Mr. Justice White, the decision of the Court "places a powerful weapon at the disposal of public officials hostile to fulfilling the promise of the Fourteenth Amendment."\textsuperscript{124}

The chief justice's message to civil rights advocates is clear. For him, not only are recreation facilities not within the scope of "important constitutional guarantees,"\textsuperscript{125} but to hold the motives of local decision-making authorities susceptible to judicial inquiry would invite a flood of unwelcome litigation.\textsuperscript{126} That the regrettable consequences of a contrary decision appear inescapable to Justice Burger is suggested by his choice of language, both in describing the holding he believes would result from an affirmative statement of the rights of citizens in Jackson\textsuperscript{127} and from his emphatic rejection of the notion that state motivation is germane to the basic issue.\textsuperscript{128} Whether or not his outlook is predicated on a desire to avoid results he finds unacceptable to the Court, his choice of words may seem unfortunate to those who feel that the instant case does not require "microscopic scrutiny" to uncover state objectives previously found repugnant to the equal protection clause.

The Exclusion of Motive from Judicial Inquiry

Justice Douglas may have touched on the basic problem in Palmer in his conflicting statements on the role of the federal judiciary in evaluating the motive for questioned state action.\textsuperscript{129} If the actual effect test looked to by Justice Black or the consequences of the state's action examined by Justice Douglas depend for their character on the motivation of Jackson city officials, then the court must examine motive. The actual result of closing the public pools of Jackson does perpetuate a segregated way of life, at least to the extent that black and white citi-

\textsuperscript{123} See text accompanying note 72 supra.
\textsuperscript{124} 403 U.S. 269-70 n.21.
\textsuperscript{125} Id. at 228.
\textsuperscript{126} "Of the work of the Supreme Court I will say only what I have said before, that we cannot keep up with the volume of work and maintain a quality historically expected from the Supreme Court. . . . Either the quantity or quality of the work of the Court must soon yield to realities." Address by Chief Justice Burger, American Bar Association, in New York City, July 5, 1971.
\textsuperscript{127} See text accompanying note 75 supra.
\textsuperscript{128} See text accompanying note 74 supra.
\textsuperscript{129} Compare text accompanying note 87 supra with text accompanying note 89 supra.
zens of that southern bastion cannot publicly engage in aquatic sports together, and this result can logically be retracted to the conclusion that Jackson closed its pools for the purpose of perpetuating apartheid.

In light of the fact that the pools were closed to both blacks and whites, five members of the Court found the action racially neutral. However, their assertion that motive is not amenable to judicial scrutiny is not born out by their repeated emphasis on the city's reasons for the closure. If motive were truly irrelevant, the Court would not have considered those reasons at all or lent credence to the purposes allegedly motivating the closing of all public pools in response to an order that they be integrated.

Justice Douglas was unwilling to accept the reasons promulgated by the city to justify its decision not to operate integrated pools. Instead he ignored them entirely and proceeded from the premise that "racially motivated state action is involved." Thus, Justice Douglas spoke directly to the crucial issue of Palmer (patently avoided by the majority of the Court), but the impact of his dissent is diminished by his failure even to mention the city's purported justifications. Had he demonstrated that those reasons were without merit and then detailed his conclusion that specious excuses cannot immunize racially motivated action which does in actual effect discriminate on black members of the community, the persuasiveness of his opinion would have been greatly enhanced.

Unlike his dissenting colleague, Justice White met the motive issue squarely—first, by demonstrating the need for judicial examination of state motivation and, second, by attacking the reasons supplied by the city. Read together the two dissents go far toward discrediting the inherently contradictory majority contentions that the Court will not examine the motivation of Jackson authorities, on the one hand, and that the action of city officials was constitutionally permissible because motivated by legitimate concern for public safety and financial integrity, on the other.

Justice White's exposition of the Palmer facts was not limited to an appraisal of the city's reasons for closing the pools; it included a critical examination of the self-serving evidence employed to put those reasons before the Court. Furthermore, assuming, arguendo, that the mayor and park director honestly believed that closing the pools was necessary to preserve the peace of Jackson or to avert financial problems, he demonstrated that such reasons cannot cure an otherwise racially discriminatory act. Accepting Justice White's realistic assess-

130. 403 U.S. at 239.
131. See text accompanying notes 100 & 103 supra.
132. Id.
ment of the circumstances surrounding the Palmer litigation leads to the conclusion that an examination of motive is essential to a determination of the constitutional issue presented in the case.

In the final analysis, the problem in Palmer is doubly compounded by the majority's attitude toward motive. Not only is a significant issue obscured, but the outcome of the appeal is guaranteed. How could a court which purportedly declines to scrutinize motivation under any circumstance adjudicate a sensitive dispute in which the constitutional validity of an act might turn conclusively on the motivation of the actor?

The Inconsistency with Reitman v. Mulkey

None of the Justices expressing opinions in Palmer resolved the decision's apparent conflict with Reitman v. Mulkey. Justice Black dismissed the latter by stating that it rested entirely on the Court's acceptance of the holding of the California Court and, absent similar findings of fact by the lower court in Palmer, did not control the instant litigation. As a result of that summary treatment, he failed to acknowledge the significance of the 1967 decision.

An analysis of the judicial treatment of motive and impact in Reitman is relevant. Speaking for the state of California, a local justice observed that "[a] state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objectives . . . and for its ultimate effect." On appeal to the Supreme Court, Justice White approved that reasoning and added that "[j]udgments such as these we have frequently undertaken ourselves." Contrasting Justice Black's remark in the slightly different context of Palmer, that since "there are no findings here about any state 'encouragement' [the Court] need not speculate upon such a possibility," with Justice White's statement in Reitman on the "necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations," one is given the impression that Justice Black chose to discount the language of a case in which he vigorously dissented.

In Reitman the California court found and the Supreme Court accepted as fact that "the state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make possible private discriminatory

133. 387 U.S. 369 (1967).
134. See text accompanying notes 64-65 supra.
135. 64 Cal. 2d 529, 533-34, 413 P.2d 825, 828, 50 Cal. Rptr. 881, 884 (1966).
136. 387 U.S. at 373.
137. 403 U.S. at 223-24.
138. 387 U.S. at 380.
practices which previously were legally restricted." Both courts concluded that "the state's abstinence from making the decision to discriminate in a particular instance does not confer upon it the status of neutrality in these circumstances."

In Palmer the city of Jackson, recognizing that it could not continue a direct act of discrimination by operating segregated swimming pools after the decision in Clark v. Thompson, nevertheless proceeded by legislative action of "an entirely negative character" to invite private discrimination. Concededly, the cases are factually distinguishable, but by conferring on the city the "status of neutrality" the Supreme Court in Palmer overlooked the basic premise of Reitman that "a prohibited state involvement could be found 'even where the state can be charged with only encouraging' rather than commanding discrimination." The correct view was expressed by Judge Wisdom, dissenting, in the court of appeals:

When . . . a city closes a public facility for the purpose of avoiding a desegregation order and when the necessary effect of the city's retreat or withdrawal is to discriminate against Negroes the otherwise lawful closure becomes unlawful.

The effect of the Palmer decision on Reitman cannot be assessed in satisfactory terms because the Court did not express an opinion as to the conceptual parallels in the two cases. Only Justice Douglas attempted such an appraisal and he concluded that Reitman "[d]id not precisely control . . . because there state action perpetuated an on going regime of racial discrimination in which the State was implicated." However, he found that state action produced identical results in California and in Mississippi, a conclusion buttressed by the solicitor general's opinion of the situation in Jackson:

[T]o the extent that the municipality had voluntarily undertaken to provide swimming facilities for its citizens, making it unnecessary for the private sector to develop equally adequate facilities, the closing of the pools has insured that racial segregation will be perpetuated.

Justice Douglas thought Reitman went to the verge of a favorable resolution of plaintiffs' complaint in Palmer. Justice White, who authored the majority opinion in Reitman and the principal dissent

139. 64 Cal. 2d at 541-42, 413 P.2d at 834, 50 Cal. Rptr. at 890.
140. Id.
141. 204 F. Supp. 30 (S.D. Miss. 1962).
142. 403 U.S. at 239.
143. 387 U.S. at 375.
144. 419 F.2d 1222, 1234 (5th Cir. 1970).
145. 403 U.S. at 231.
146. Id. at 238.
147. Id. at 240.
in Palmer, did not even mention the California case in his detailed criticism of the majority holding in Palmer. Unfortunately, he failed to cite his earlier decision as authority for the proposition that "a State may not have an official stance against desegregating public facilities and implement it by closing those facilities in response to a desegregation order."\textsuperscript{148} To the extent that such action constitutes encouragement of discrimination, such a pronouncement is clearly within the ambit of Reitman.

Reitman and Palmer are undeniably analogous in that in each case action by the state did pave the way for private discrimination. Regrettably, the district court in southern Mississippi and the court of appeals failed to recognize that underlying similarity. It is difficult to understand why the United States Supreme Court followed suit.

**Conclusion**

For a constitutional issue to be resolved in terms calculated to obviate the problems of a different result for state and local governments may be of practical utility for financially troubled municipalities and heavily burdened judicial systems, but it does not serve to "maintain a quality historically expected from the Supreme Court."\textsuperscript{149} Furthermore, it is difficult to see how a contrary holding would have produced the drastic consequences foreseen by the majority. Had that faction of the Court recognized that the key to Palmer was in racially motivated state action which effectively encouraged discrimination against black residents of Jackson, Mississippi and not in recreation rights, it might have reversed the court of appeals on the authority of Reitman v. Mulkey. Such an adjudication would have fallen far short of requiring all existing public swimming pools to be maintained in perpetuity under the federal constitution, for as noted by Justice Marshall, a city may always discontinue a service for a valid reason.\textsuperscript{150} In Palmer v. Thompson the Supreme Court was asked only to reaffirm its previous declaration that "grounds of race and opposition to desegregation do not qualify as constitutional."\textsuperscript{151}

*Helen M. Cake*

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\textsuperscript{148} Id.
\textsuperscript{149} See note 126 supra.
\textsuperscript{150} See text accompanying note 110 supra.
\textsuperscript{151} Griffin v. School Bd. of Prince Edward County, 377 U.S. 218, 231 (1966).

* Member, Third Year Class