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The Desegregation Opinion Revisited: Legal or Sociological?

Morris D. Forkosch*

Professor Forkosch finds incorrect the charge which has frequently been levelled against the Warren Court, and particularly against the Chief Justice, that the Desegregation Case of 1954 was an improper and unconstitutional entry into the educational and social life of the nation. The author shows that the same decision-making process as that employed in the 1896 case of Plessy v. Ferguson was used in the 1954 decision; therefore, he concludes that no judicial usurpation of power has occurred.

It is the thesis of this article that the Supreme Court, regardless of its decision for or against the state laws, had the judicial ability and jurisdiction to render the opinion in the Desegregation Case of 1954.¹ A distinction is drawn here between the judicial power to decide a case regardless of any attendant consequences, and the reasons given for that decision. When reasons which were supposedly valid seventy years ago are now rejected, there is nothing illogical in this rejection so long as the Court still adheres to the identical procedure used earlier; but when the substance within the procedure has changed drastically then the procedure, still the same, must reflect, as an end result, this change. In other words, the decision may have been wrong, the opinion's reasoning may have been fallacious and even improper in the material it used, and the Justices may have been biased and emotional, and yet this does not detract from their ability to decide and opine as they did.

However, beginning with this decision, the attacks upon the Warren Court range from the basest of personal ones upon the Chief Justice's integrity and loyalty to the most professional and scholarly involving his reasoning and legal ability. For example, a political scientist has put "The Supreme Court on Trial,"² and his jumping-off

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1. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). On "decision" and "opinion" see note 23 *infra*. *Brown* embraced four lower decisions involving Kansas, South Carolina, Virginia, and Delaware, although the singular "case" is used; all were based upon the equal protection clause of the fourteenth amendment. See also *Bolling v. Sharpe*, 347 U.S. 497 (1954), based upon the due process clause of the fifth amendment, because, as Chief Justice Warren phrased it, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.* at 500. See, on the later implementation of the 1954 *Brown* decision, the second decision in 349 U.S. 294 (1955), as well as *Cooper v. Aaron*, 358 U.S. 1 (1958), which involved and eventually resulted in the Little Rock incident discussed *infra* note 22.

2. C. HYNEMAN, *THE SUPREME COURT ON TRIAL* (1963).

spot³ is the Desegregation Case; a professor of law has written that beginning with this decision, "the Justices have wrought more fundamental changes in the political and legal structure of the United States than during any similar span of time since the Marshall Court,"⁴ so that, since it does not "account directly to the electorate, [it] should be obligated to provide adequate explanation for its actions, lest fiat be substituted for reason;"⁵ numerous law enforcement officials, including district attorneys, have pleaded for a diminution in the "judicial takeover" in criminal law which has "tragically weakened" their efforts and is "destroying the nation;"⁶ incursions into religion, voting, apportionment, economics, and other areas have provided the bases for charges of an unconstitutional judicial usurpation of power;⁷ and the prestigious Conference of [State] Chief Justices also has inveighed against federal pre-emption of state power where Congress has not so intended.⁸

The Warren Court began when the Chief Justice was sworn in on October 5, 1953; the Desegregation Case was reargued December 7-9, 1953, and then decided on May 15, 1954, so that Mr. Justice Warren had a bare seven months' judicial background⁹ before writing one of the landmark cases in this country's history.¹⁰ This *Brown* opinion sparked the Southern resistance to the decision and its progeny; it underscores Professor Hyneman's massive indictment;¹¹ it begins what Professor Kurland terms the "fateful decade;"¹² and it provides the foundation for the charge by the Conference that in the field of federal-state relations "the Supreme Court too often has tended to

3. Term used by this writer, Book Review, 9 VILL. L. REV. 364, 366 (1964).

4. Kurland, *Foreword to The Supreme Court 1963 Term*, 78 HARV. L. REV. 143 (1964).

5. Kurland, *The Supreme Court Today as I See It*, 3 TRIAL 12, 14 (1967).

6. Quoted in Forkosch, *Attacks on the Constitution, Violence, and the Necessity for Disobedience*, 35 FORD. L. REV. 71, 86 (1966).

7. E.g., C. HYNEMAN, *supra* note 2; see also Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119 (P. Kurland ed. 1965). The Court was, in two early matters, writing "history essentially for political reasons, that is, in an attempt to solve by judicial intervention some major contemporary socio-political problem upon which the case at hand could be made to bear." *Id.* at 126.

8. REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS 9 (1958). See also reply to this report by Rostow, *The Court and Its Critics*, 4 S. TEX. L.J. 160 (1959).

9. Earl Warren is treated sympathetically by J. WEAVER, *WARREN* (1967), KATCHER, *WARREN* (1967), and L. HUSTON, *PATHWAY TO JUDGMENT* (1966). All go into his life history in detail.

10. These few months of subjection to the decision-making process gave rise to charges of inexperience, ineptitude, a desire for self-glorification and even a charge of sinister implications concerning the Republican nomination for the presidency to be made.

11. HYNEMAN, *supra* note 2.

12. Kurland, *supra* note 4, at 144.

adopt the role of policy maker without proper judicial restraint"¹³

It is questionable whether any other decisions, save *Marbury*¹⁴ and *Dred Scott*,¹⁵ have had the political and social repercussions which followed *Brown*, or whether any other decision, save *Marbury*, spawned so many related determinations in other fields.¹⁶ It is also doubtful that any other decision so quickly heralded the activism of a particular Court. Whether this fountainhead¹⁷ opinion has a constitutional-legal base and is thus within the stream of adjudications properly subject to judicial examination, reappraisal, and reversal, or whether it represents the socio-psychological whim of nine appointed individuals who have usurped the political, legislative and executive functions constitutionally apportioned to the other elected branches and have barged into a judicially untouchable area, is still an open question in the opinion of many. If the first alternative above is correct, as here contended, a direct challenge is made to contrary views held by, for example, Hyneman.

That author's sophisticated approach is based upon his belief that past judicial interpretations had limited immediate legal consequences;

13. See note 8 *supra*. The latest high-level general attack upon the judiciary's activism is by Gov. Ronald Reagan (California) who feels that "[t]here is a growing tendency among certain judges to violate traditional concepts and thus usurp the authority of the executive and the legislative bodies." A newspaper reported that he had suggested that some judges had substituted personal policy for legal interpretations. N. Y. TIMES, Sept. 20, 1967, at 25, col. 1.

14. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Concerning this doctrine of judicial review there was much outcry by numerous people, for example, the following year Jefferson wrote that it "would make the judiciary a despotio branch. . . ." 8 WORKS 310-11n (1897). Chief Justice Gibson, of the Pennsylvania Supreme Court, rejected the opinion because its arguments were "inconclusive," and because of "the weakness of the position which he attempts to defend. . . ." *Eakin v. Raub*, 12 S. & R. 330, 345 (1825), although he later retracted in *Norris v. Clymer*, 2 Pa. 277, 281 (1845).

15. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), was the first case holding an act of Congress unconstitutional; *Dred Scott* was the second. This second holding was, of course, "reversed" by the Civil War and the thirteenth and fourteenth amendments. On whether this latter amendment was "constitutionally" ratified, not here discussed, See, e.g., A. AVINS, *THE RECONSTRUCTION AMENDMENTS' DEBATES* xv-xvi, 317-34 (1967); Lawrence, *Rectifying An Error of 100 Years Ago*, U.S. NEWS & WORLD REPORT, Oct. 30, 1967, at 99-100.

16. E.g., those given in M. FORKOSCH, *CONSTITUTIONAL LAW* § 461 (1963).

17. See, e.g., HUSTON, *supra* note 9, at 4, where some of these later opinions are generalized: "The school decision was just the first of a series of constitutional interpretations . . . that had an explosive effect upon the educational, social, and political life of the nation. After it came the school prayer ruling . . . judgments that reversed convictions of Communists; broader definitions of what constitutes obscenity; decisions that frowned upon investigative and enforcement practices of police officers and upheld constitutional rights of criminals; a few judgments that branded investigative methods of Congressional committees as violative of the rights of individuals; and the legislative apportionment bombshell that jolted the political structures of states to their foundations."

although the 1857 *Dred Scott* case¹⁸ had enormous political consequences, the immediate legal effect "did not require any notable alteration of political or social institutions, and it did not order the abandonment of deeply rooted attitudes and practices of the population." Hyneman says that the statute denounced in *Dred Scott* "was intended to force highly significant social changes; the Court's decision delayed the necessity of making those changes."

In other words, prior to 1954 the Court's judicial power was exercised negatively, and applied to property and legal relations, whereas now *Brown* "had a social consequence of a vastly different order," calling for a rewriting of state and federal legislation relating to public education.¹⁹ The consequence of this new judicial activism therefore "required a basic revision of social structure and a root change in human relationships," compelling "social relationships that had never prevailed" in the South, so that "the nonsegregation orders are without precedent for comprehensive and deep-cutting social consequences. . . ."²⁰ In effect the complaint boils down not necessarily and solely to judicial ability and jurisdiction but to a judicial intrusion which results in a forced upheaval of a social structure²¹ and human relationships and which is initiated by a non-elected judiciary, incapable of sympathetic understanding and not responsive to the needs of the people.²² Thus it is basically the philosophical and jurisprudential approach in *Brown* and the consequences of the decision, rather than the opinion itself,²³ which make for its rejection. This

18. 60 U.S. (19 How.) 393 (1856).

19. HYNEMAN, *supra* note 2, at 198-99. So, too, does the author oppose other cases, *e.g.*, the Reapportionment Case, *Baker v. Carr*, 369 U.S. 186 (1962), discussed at 221, 269. Undoubtedly *Gideon v. Wainwright*, 372 U.S. 335 (1963), would likewise be so attacked because it affirmatively demanded that the states provide counsel for indigents so requesting in criminal cases, and thereby make outlays in money, even though 22 states joined in an amicus brief supporting *Gideon*, while only two joined Florida in opposing him.

20. HYNEMAN, *supra* note 2, at 199. To an extent the judiciary itself does not disagree, and itself revolts at the logical implications and consequences of and attendant upon *Brown* and its philosophy, *e.g.*, Mr. Justice Harlan's dissent in *Reynolds v. Sims*, 377 U.S. 533, 624-25 (1964).

21. Of course the political structure is included, *e.g.*, the one man-one vote decision as in *Reynolds v. Sims*, 377 U.S. 533 (1964), as are the economic and other structures, *e.g.*, note 29 *infra*.

22. *E.g.*, *Watson v. City of Memphis*, 373 U.S. 526 (1963) (where desegregation of public recreational facilities was required despite allegations of possible violence); cases cited note 1 *supra*, resulting in Excc. Order No. 10,730, 22 Fed. Reg. 7628 (1957), ordering the use of federal troops in Little Rock, Arkansas, to enforce school desegregation. *See, e.g.*, 2 RACE REL. L. REP. 931-65 (1957), and Miller & Hewell, *Interposition, Nullification and the Delicate Division of Power in a Federal System*, 5 J. PUB. L. 1, 18 (1956) (the attempted Southern use of doctrinal support).

23. To this writer it appears that even if the reasoning in the opinion were unsailable from a legal standpoint, the opponents of the decision's consequences would still reject everything, attack the opinion as the personal policy views of individuals,

is so because these consequences are allegedly in the extra-legal sphere of our national distribution of powers.

If this is an accurate statement of Hyneman's position, then, on historical grounds, one may seriously question his view, that is that the Supreme Court has always and necessarily determined non-legal matters solely within a legal setting. For example, should the federal or state governments exclusively or concurrently have power over local and domestic commerce? This question, argue a legal historian²⁴ and a constitutional authority,²⁵ was resolved by the founding fathers in favor of the national government to the exclusion of the local, so that judicial holdings to the contrary are incorrect; the economic and social consequences to the nation flowing from these decisions are incalculable, yet no such violent legal and physical resistance as attended *Brown* has occurred.²⁶ Moreover, while unabated controversy continues because of the Court's decisions in the areas of religion,²⁷ street demonstrations, anti-communist oaths, congressional investigations,²⁸ and even antitrust and patent litigation,²⁹ the original waves have become ripples, whose remaining force continues to dissipate. Judicial intrusion has, even before 1789 and 1803, been an economic and social fact in our history and it is a necessary political fact in our constitutionally oriented form of government, since the political and social *mores* of the people early disclosed an inclination toward adjudicating disagreements. Furthermore, since these disagreements cut across the entirety of our domestic and international existence, their resolution has sometimes become a judicial function subject only³⁰ to

and continue the identical forms of resistance. In effect, therefore, it seems that the alleged weakness of the opinion *qua* its reasoning is merely an excuse, not a reason, for attacking the decision.

24. M. FARRAND, *THE FRAMING OF THE CONSTITUTION* 45 (1913).

25. W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* I, 4 (153).

26. There were, of course, vociferous objections to many of the Marshall decisions, and invectives and defiances were common, *e.g.*, note 14 *supra*. Although a somewhat more workable accommodation has been practically effected whereby the states now maintain a degree of coordinated control over commerce nevertheless, as this writer has elsewhere written, the national power over the economy is today subject to little, if any, practical limitations, whether because of the commerce clause, the war, tax or some other power. Forkosch, *Governments and Governed in the United States* in *RECUEILS DE LA SOCIÉTÉ JEAN BODIN* XXVI, 311-402 (1965). *See also* M. FORKOSCH, *CONSTITUTIONAL LAW* § 221 (1963).

27. *See, e.g.*, M. FORKOSCH, *CONSTITUTIONAL LAW* § 399 (1963), and especially *School Dist. v. Schempp*, 374 U.S. 203 (1963).

28. *See, e.g.*, *Adderley v. Florida*, 385 U.S. 39 (1967); *Cox v. Louisiana*, 379 U.S. 536 (1965).

29. *See, e.g.*, *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945).

30. Of course a valid statute may be so judicially interpreted that the legislature rejects and amends it, requiring the court to accept the statute's new approach. *See, e.g.*, *Consolidated Flour Mills Co. v. Kansas Gas & Elec. Co.*, 119 Kan. 47, 237 P. 1037

the amending power.³¹ The national will has demonstrated time and again a devotion to judicial independence in these areas.³² One may also point to the fact that a lapse of time does not make for decisional, legal, economic or political stability,³³ so that when religious, social, and like areas of conduct are so affected there seems to be no valid reason, save emotion, to lay a shadow. Regardless, the question whether *Brown* was "properly" and "correctly" decided still remains.³⁴

Brown rejected *Plessy v. Ferguson*,³⁵ but two aspects are necessarily involved and require analysis: the Court's *statement* in *Brown* was that "any language in *Plessy v. Ferguson* contrary to this finding is rejected,"³⁶ yet the *holding* on the exact facts in *Plessy* had long before been outmoded. This means that the rejection of *Plessy* is not necessarily because of its facts but because of its reasoning, and that the superficial "law" established by *Plessy* was not being followed. These two aspects must be examined separately for a proper understanding of exactly what *Brown* did in order to determine whether the Chief Justice is guilty in this case of the charges levelled against him.

Before *Plessy* came to the Supreme Court in 1896, the concept of "equal, but separate, accommodation for the white and colored races" in land or water transportation had been judicially settled in several decisions. *Plessy* merely confirmed prior views and holdings to the effect that the states were free to provide as they pleased, that is, to require or to reject segregation in transportation, so long as interstate commerce was not directly burdened. For example, the reconstructed Louisiana Constitution provided that "all persons shall enjoy equal rights and privileges upon any conveyance of a public character," and by an 1869 statute designed to effectuate this provision common

(1925), an even more egregious illustration, where a state supreme court repudiated the federal Supreme Court's interpretation of a state statute.

31. See Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 MINN. L. REV. 1053 (1967). Reversals, that is, internal self-corrections, are of course available to the Court.

32. E.g., the failure of the Roosevelt court-packing bill in 1937, on which see BAKER, BACK TO BACK (1967), a popular, if not satisfactory, account of the effort.

33. E.g., *United States v. South Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), reversing *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), making history in legal and other federal-state relations. In the economic field see also *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935), and related cases and discussions in M. FORKOSCH, CONSTITUTIONAL LAW §§ 208-42, 291-99 & *passim* (1963). On the political side see *Reynolds v. Sims*, 377 U.S. 533 (1964). Of course there may be exceptions, e.g., *Toolson v. New York Yankees*, 346 U.S. 356 (1953).

34. There are many discussions and analyses of the Desegregation Case, too numerous to cite, but none of which approaches the opinion in all details as is done here.

35. 163 U.S. 537 (1896).

36. 347 U.S. 483, 494-95 (1954). See also note 57 *infra*.

carriers were permitted to refuse admission to their railroad cars to any person who refused to pay the fare, who was of infamous character, or who was disorderly, "[p]rovided, said [carrier] rules and regulations make no discrimination on account of race or color"³⁷ This constitutional and legislative effort to eliminate discrimination based upon color was successfully attacked in 1878 as a burden upon interstate commerce.³⁸ However, the decision was confined "to the statute in its effect upon foreign and interstate commerce, expressing no opinion as to its validity in any other respect."³⁹ There was one concurring Justice, however, whose twenty-six page opinion may be contrasted with the four page opinion of the majority, and who devoted two of these twenty-six pages to a slight discussion of "questions of a kindred character [which] have arisen in several of the States, which support these [commerce oriented] views in a course of reasoning entirely satisfactory and conclusive."⁴⁰ This reference was to six cases decided in five states which, based upon the reasonableness of the classification, upheld separate schools for white and colored children.⁴¹ The concurring Justice said of one such holding that "former statutes of the State invested the directors [of the schools] with such discretion to admit, and it is impliedly conceded that it would be competent for the legislature again to confer that authority."⁴² In effect what he did was to rush into the general area deliberately left open by the majority, and say that intrastate commerce

37. The statute is set forth in *Hall v. DeCuir*, 95 U.S. 485, 486 (1878).

38. In *Hall v. DeCuir*, 95 U.S. 485 (1878), a steamboat licensed by the United States transported freight and passengers along the Mississippi River, between New Orleans and Vicksburg, Miss., touching at intermediary landings within and without Louisiana as occasion required. Josephine DeCuir embarked at New Orleans for such an intermediary point at Hermitage, La., but was refused space in the "white" cabins solely because of color. She sued the master and owner of the vessel for damages for her mental and physical suffering. The defense was that the statute was void because of the commerce clause. This defense was finally upheld, when the Supreme Court immediately rejected any construction or application of the statute "as a regulation of internal commerce, or as affecting anything else than commerce among the States." 95 U.S. at 487. The statute was denounced because ten different states might all have different internal requirements with which a master would otherwise successively have to comply; this would slow down, burden, and otherwise interfere with the trip—that is, commerce. 95 U.S. at 489.

39. 95 U.S. at 490-91.

40. 95 U.S. at 504, *per* Mr. Justice Clifford.

41. That is, "where both classes of children . . . enjoy substantially equal advantages in different schools, and the separate school for colored children is clearly authorized by the statute, the only doubt that arises is as to the constitutional validity of the law which authorizes such separation [solely] on the basis of color: and that is the real question in this case." *State ex rel. Carnes v. McCann*, 21 Ohio St. 198, 207 (1871), cited and digested by Mr. Justice Clifford in *Hall*, 95 U.S. at 504. *See also* *Bertonneau v. Board of Directors*, 3 Wood's Rep. 177 (5th Cir. 1878), upholding similar Louisiana conduct and citing Mr. Justice Clifford's views.

42. 95 U.S. at 505, citing *Clark v. Board of Directors*, 24 Iowa 266 (1868).

is within a state's competence and it could require or reject carrier segregation by analogy to education and the judicial views thereon. Although pure dictum, this suggestion was nevertheless followed in a lower federal court for Louisiana itself.⁴³

Regardless of its chagrin at finding the commerce aspect determinative of the constitutionality of the 1869 statute, in 1873 that state enacted a civil rights law declaring that every Louisiana and federal citizen residing there "shall have and enjoy equal and impartial accommodations, advantages, facilities and privileges from all common carriers on land or water, from inn-keepers and from all public places of resort licensed by the State or by any municipal corporation."⁴⁴ However, by 1890 reconstruction had long since ended, and a new Louisiana statute required all railway companies and their officials to "provide equal but separate accommodations for the white, and colored races . . ."⁴⁵ The state's highest court held this to be "confined in its application to passengers traveling exclusively within the borders of the State,"⁴⁶ so that when *Plessy* came to a head the question of state jurisdiction to require or to reject segregation was, in effect, already settled; the only question was whether interstate commerce was burdened or involved. Mr. Justice Brown wrote for the *Plessy* majority that "[i]n the present case no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both of its termini within the State of Louisiana. . . ."⁴⁷

The facts disclosed that Plessy paid for and took possession of a first-class seat, despite the conductor's request that he go to a "colored" coach. A police officer assisted in ejecting Plessy, who was thereafter prosecuted for violating the law. The state's Supreme Court upheld the statute's constitutionality as against fourteenth amendment claims saying, *inter alia*, that if the act were "applicable to interstate passengers . . . it would be unconstitutional, because in violation of the exclusive right vested in Congress to regulate commerce between the states . . ."⁴⁸ The Supreme Court agreed with this statement of the

43. *Bertonneau v. Board of Directors*, 3 Wood's Rep. 177 (5th Cir. 1878).

44. Act 84, L. 1873, § 1, in La. Rev. Laws 96 (1897). The other provisions gave the offended citizen a right to damages, and made violators guilty of a misdemeanor.

45. La. Rev. Laws 762 (1897).

46. *State ex rel. Abbott v. Hicks*, 44 La. Ann. 770, 774, 11 So. 74, 75 (1892), quoting at length from and following the lead of *Louisville, N. O. & T. Ry. v. Mississippi*, 133 U.S. 587, 592 (1890).

47. 163 U.S. at 548.

48. *Ex parte Plessy*, 45 La. Ann. 80, 11 So. 948 (1893). The court cited its own prior holding to that effect but held "no such application of the statute" was involved as "it appears on the face of the information that relator was proceeded against as a passenger traveling wholly within the limits of the state of Louisiana on a passenger train belonging to the East Louisiana Railroad Company carrying passengers in their

law, citing its own 1878 *Hall* holding to that effect.⁴⁹ Of the Justices sitting in *Plessy* only Justices Harlan and Field sat on the 1878 bench; thus in the earlier case all the Justices based their determination upon commerce, with the lone concurrence using an educational analogy merely to bolster his own commerce reasoning. In *Plessy*, of the eight Justices participating,⁵⁰ seven (including Mr. Justice Field) did what the earlier concurrer had done, namely, used burden on interstate commerce as the determining factor with the educational analogy coming in to support their views in repelling a fourteenth amendment attack. There was, however, one difference—in 1878 the educational analogy had been used to show that the states had complete power over their internal affairs, whereas now the separate fourteenth amendment argument was itself required to be met, on its own grounds,⁵¹ that is, that the amendment “prohibits certain restrictive legislation on the part of the States.”⁵² The two *Hall* opinions never touched upon this new constitutional argument,⁵³ and so the 1868 amendment was never before technically considered as applied to state segregation of carrier transportation.⁵⁴

In effect, therefore, the activities of the Louisiana railway involved in *Plessy* were held to be intrastate commerce, not impinging upon the federal commerce powers. This possibility brought the Court to the only other question in the case, namely, the interpretation and application of the new fourteenth amendment. If *Plessy* were to have arisen in 1954, the commerce clause would have been determinative, and the unquestioned burden upon interstate commerce, however slight, would have been found sufficient to warrant condemnation.

coaches within the state of Louisiana.’ It thus appears that the [commerce clause] is not involved.” *Id.* at 82-83, 11 So. at 949.

49. While not particularly mentioning prior cases bearing on these views, it had earlier held in a railroad-segregation case that the state’s judicial interpretation limiting the statute to intrastate commerce was binding on the Supreme Court and therefore the statute, not burdening interstate commerce, would otherwise be upheld. *Louisville, N. O. & T. Ry. v. Mississippi*, 133 U.S. 587 (1890). Mr. Justice Harlan dissented (as did Mr. Justice Bradley) in feeling that *Hall* was determinative, even though requiring nonsegregation. See 133 U.S. at 594. Mr. Justice Harlan also said he would not consider “other grounds upon which . . . the Statute . . . might properly be held to be repugnant to the Constitution . . .” 133 U.S. at 594-95.

50. Mr. Justice Brewer did not participate in the decision. 163 U.S. at 552.

51. A thirteenth amendment contention was given short shrift. 163 U.S. at 542-43.

52. 163 U.S. at 542. On federal affirmative, and not merely corrective, power, see notes 54 & 91 *infra*.

53. Although the majority’s final expression that it was “expressing no opinion as to [the statute’s] validity in any other respect,” mentioned previously as referring to any interstate commerce burden, may also be interpreted as referring to the new amendment. 95 U.S. at 490-91.

54. Of course Mr. Justice Bradley’s opinion in the Civil Rights Cases, 109 U.S. 3 (1883), had held that the amendment’s prohibitions reached only state action and the grant of enforcement powers to Congress was for corrective, not direct, legislation. See 163 U.S. at 546-47. See also note 91 *infra*.

The proof of this view is not difficult in the light of what the Supreme Court said long before and since *Brown*,⁵⁵ so that on its facts, and with relation solely to commerce, the 1896 holding had been overruled prior to 1954! *Plessy*, therefore, as a holding, had no commerce significance and could not be of any importance in this field six decades later; it is only because the fourteenth amendment had never been so raised that the 1896 Court was confronted by the meaning and application of the new and separate constitutional language to a state's law requiring such local conduct by a carrier. *Plessy's* answer, later extended broadly in other areas of conduct and therefore significant in *Brown*, was twofold. First there was an examination of the background of the new amendment, and then there was a rejection of the discrimination contention.⁵⁶ *Plessy's* opening paragraph lumps these two aspects together:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.⁵⁷

This paragraph is obviously a conclusory one, and the opinion bears the burden of supporting it. The first analogical reference⁵⁸ is to

55. Most of these opinions, with excerpts, may be found in M. FORKOSCH, CONSTITUTIONAL LAW 199-241 (1963), and see especially the dissent by Mr. Justice McReynolds in *NLRB v. Fainblatt*, 306 U.S. 601, 609-10 (1939), as well as *Wickard v. Filburn*, 317 U.S. 111 (1942), and *United States v. Sullivan*, 332 U.S. 689 (1948), and, more recently, Mr. Justice Black's concurrence in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

56. In effect, this bears upon the italicized "statement" aspect of the dichotomy earlier suggested for examination, for here the subjective contention is involved. In other words the *Brown* holding on its facts and its statement rejecting *Plessy* has been distinguished. See notes 35-36 *supra* & accompanying text. Shortly, it will be shown that by 1954 the *Plessy* holding as law had long since been overturned; yet the *Plessy* language still remained, even though *obiter*, and it is this language which is being analyzed now. This *Plessy* language occurred because of the fourteenth amendment argument raised in such a factual context and for the first time. In *Plessy* this argument is met by the two-fold method discussed in the text, and of this new dichotomy it is the subjective aspect which relates to the *Brown* statement rejecting *Plessy*.

57. 163 U.S. at 544.

58. If this educational reference is merely to support the transportation holding, then Chief Justice Warren's statement terming it "the so-called 'separate but equal' doctrine

eight local cases on educational separation,⁵⁹ Mr. Chief Justice Shaw's 1849 Massachusetts opinion is given major recognition through quotation,⁶⁰ while the other state courts are only cited, and "[s]imilar laws have been enacted by Congress under its general power of legislation over the District of Columbia . . ."⁶¹ The second analogical reference is to "[l]aws forbidding the intermarriage of the two races," with only one state case cited. Next, continued the *Plessy* Court, "[t]he distinction between laws interfering with the political equality of the Negro and those requiring the separation of the two races in schools, theatres and [intrastate] railway carriages has been frequently drawn by this court," for example, a political discrimination preventing a Negro from sitting upon a jury "was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. . . ."⁶²

At this point *Plessy* illustrates the political, theatre and railway

announced by this Court in *Plessy* . . ." is technically incorrect, although permissible because of its subsequent judicial use. *Brown v. Board of Educ.*, 347 U.S. 483, 488 (1954).

59. See text accompanying note 87 *infra*.

60. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), where the language so quoted speaks of "civil and political powers," and of the "rights of all, as they are settled and regulated by law . . ." 163 U.S. at 544. In the state opinion, however, "colored persons . . . are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and soeial," although "[l]egal rights must, after all, depend upon the provisions of law; certainly all those rights of individuals which can be asserted and maintained in any judicial tribunal." 59 Mass. (5 Cush.) at 206. "We must then resort to the law, to ascertain what are the rights of individuals, in regard to the schools." 59 Mass. (5 Cush.) at 207. Chief Justice Shaw, it is suggested, confuses the concepts involved, for today's rights are discussed and understood in separate terms, *e.g.*, political as distinguished from civil. Thus a particular right may or may not be one explicitly set forth in the Constitution; it may be a penumbral one, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and yet be entitled to that document's protection. Another right may be explicitly set forth in a state's statute which creates, grants, or recognizes it where it is not so constitutionally protected. Such a statutory right depends upon the law's provisions, *e.g.*, workmen's compensation. Other statutorily expressed state rights may repeat the federal Constitution and thus be doubly protected (if that is necessary). In effect Shaw's views were conditioned not only by his times but also by the absence of any fourteenth amendment limitations upon the powers of a state. His opinion nowhere mentions or cites any statute but the one there involved, and it does not refer to any case or opinion in any jurisdiction to support his reasoning. The Chief Justice therefore utilized a *tabula rasa* to express his personal views (and those accepted by his four brethren), and the *Plessy* opinion utilizes these for its justification.

61. 163 U.S. at 545, with only the statutory citation given. Congress had, prior to 1874, left to the locally elected officials the handling of this educational aspect, but in that year substituted a presidentially appointed three-man board, and since 1906 had required the federal district court judges there to appoint the members; in 1967, the House approved a bill to return this power to the locality and it should, as of this writing, be enacted.

62. 163 U.S. at 545. See also note 92 *infra*.

distinction by discussing the Civil Rights Cases⁶³ to show that the fourteenth amendment did not apply to private amusements, and then discussing the rail cases and their inter-intra distinction already analyzed.⁶⁴ For the purpose of defending its views on the fourteenth amendment the *Plessy* opinion need not have referred to these railway cases on the basis of commerce; therefore, the only purpose must have been to show that color was not a bar to state segregation where no political right was involved, and, additionally, that any non-political separation of the whites and blacks did not result in a violation of any kind of legally-protected right per se.⁶⁵

It is this second aspect which is the nub of the *Brown* rejection. In *Plessy* the plaintiff's suit was for writs of prohibition and common-law certiorari against a judge of the state's criminal court in order to prevent that court from proceeding further with a prosecution under the state's carrier-segregation requirements.⁶⁶ The constitutionality of the law was attacked, however, on grounds of the fourteenth amendment's privileges and immunities, due process, and equal protection clauses. The application of the first such clause was rejected, as disclosed by the foregoing analysis; the due process and equal protection arguments were somewhat interchangeably discussed, with overlapping language used, but the two clauses may be discussed separately.⁶⁷ Thus due process was raised by the contention that "in any mixed community, the reputation of belonging to the dominant [here white] race . . . is *property*, in the same sense that a right of action, or of inheritance, is property."⁶⁸ This substantive due

63. 109 U.S. 3 (1883).

64. Some cases other than those cited above are referred to and discussed, but these do not add to the analysis. The *Plessy* opinion, after so mentioning these cases, says: "A like course of reasoning applies to the case under consideration, since the Supreme Court of Louisiana . . . held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers travelling exclusively within the borders of the State." 163 U.S. at 54.

65. The Court, however, offered a sop to the plaintiff by writing that "we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act, that denies to the passenger compensation in damages for a refusal to receive him into a coach in which he properly belongs, is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the state's attorney, that such part of the act as exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white, and who a colored person. This question, though indicated in the brief of the plaintiff in error, does not properly arise in the record in this case . . ." 163 U.S. at 548-49.

66. See also note 65 *supra*.

67. For a discussion of equal protection see notes 87-90 *infra* & accompanying text.

68. 163 U.S. at 549 (emphasis in original).

process claim was rejected⁶⁹ by a *tour de force*, the Court saying that if a white man were assigned to a colored coach so that his reputation were thereby damaged he could justifiably sue on the above premise, but if he were a colored man and were so assigned, how could there be damage to non-existent property "since he is not lawfully entitled to the reputation of being a white man."⁷⁰ This conclusion was not bolstered by any citation, but was raised to answer an argument then advanced which involved a *reductio ad absurdum*: that if states were so permitted to separate the two races in carriers, then the same conclusion would support such a separation of whites whose hair was differently colored, or who were aliens, or who were of different nationalities; or, even further, to require whites to paint their homes white, blacks black, require "their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color."⁷¹ In reply the Court pointed with pride to its earlier judicial holdings to the contrary, the three reasons given for the decisions being that the statutes were there unreasonable, enacted in bad faith, and oppressive to a particular class.⁷² To determine here

whether the statute of Louisiana is a reasonable regulation . . . there must

69. The rejection language may variously be termed subjective, emotional, biased, a product of the dominant *mores*, conditioned by one's upbringing—in short, the predilections of humans who, because of their position, are final in the judicial sphere and its related areas. While this may be a somewhat heady use of terms, the reason, if not the justification, is to drive home the point being made by this writer, namely, that here, as well as later in the equal protection discussion, the Court was using subjective evaluations to determine the factual situation. A counter to this approach is that it impliedly, if not expressly, discloses antipathy to the Court's use of a personal equation in solving problems, and that this is exactly what the Warren Court is doing today; thus, to be logically consistent, this writer must now criticize most of the current decisions. The answer is that, regardless of one's overall views concerning this aspect, that is, whether or not the Court should so formulate decisions, the actual use of such a method in 1896 provides a justification for similar use in deciding an analogous factual problem in 1954.

70. 163 U.S. at 549. Here the Court seems to assume, if not imply, that a "white" man per se has a certain reputation which is or can be termed property, and that no colored person could possess this particular property. This is highly questionable on strict logical analysis but, for this article, the point is made that such a statement by the Court involves subjective evaluations and reasoning.

71. 163 U.S. at 549-50.

72. "The reply to all this is that every exercise of the police power must be [1] reasonable, and [2] extend only to such laws as are enacted in good faith for the promotion of the public good, and [3] not for the annoyance or oppression of a particular class." 163 U.S. at 550. The Court discussed *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), where a municipal license was required of laundries operated in other than brick or stone buildings, but the application of this classification was denounced because "directed so exclusively against a particular class of persons" and resulting in "so unequal and oppressive" a result "as to amount to a practical denial . . . [of] equal protection." 118 U.S. at 373. The Court also referred to analogous judicial determinations of state views.

necessarily be a large discretion on the part of the legislature. In determining the [due process] question of reasonableness it is at liberty to act [1] with reference to the established usages, customs, and traditions of the people, and [2] with a view to [a] the promotion of their comfort, and [b] the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.⁷³

What the Court did in this quotation was to set up its own standard and to uphold the law under this standard. Then the Court mentioned the analogous federal law in education to show that federally such usages, customs, and traditions were to be found, and that the Louisiana statute could not be more obnoxious under the due process clause in the fourteenth amendment than federal statutes could be under the fifth.⁷⁴ In the same breath, the Court flagellated the attorneys for the petitioner by asking pointedly why these federal and state laws had not "been questioned," that is, because such laws were admittedly constitutional. Even if this entire reasoning *qua* justification is accepted, then why the mention of peace and order as a goal, unless the Court feared that the South's resistance to a different decision might result in another Dred Scott-Civil War situation, or in a threat to peace and order,⁷⁵ or at the least felt that the "promotion of [the people's] comfort" was required. Just who these "people" were and are, insofar as the Court refers to their "established usages, customs and traditions . . . [and] comfort. . . ." is a political and social mystery;⁷⁶ obviously the "people" did not include the blacks, as they had no self-established usages concerning this separation; the "people" probably did not embrace the lowest economic and social classes in the North and West, to whom the struggle for existence was sufficiently grim not to have them shoulder another cross; and there were also neo-abolitionists and others who likewise refused to embrace such a philosophy.⁷⁷ By "people," the majority now created its own reflected image and, in effect, imagined the absolutely necessary consequences which, in a latter-day setting, ultimately if not immediately proved to be false. Thus the "reasonableness" of the Louisiana statute was not so easily and simply to be determined,

73. 163 U.S. at 550-51.

74. Of course as to the District of Columbia the relationship of Congress is to be analogized to that of a state legislature. See M. FORKOSCH, CONSTITUTIONAL LAW § 71 (1963).

75. See also quotation accompanying note 89 *infra*.

76. See Forkosch, *Who Are the "People" in the Preamble to the Constitution*, 19 W. RES. L. REV. _____ (1967).

77. For example, see Mr. Justice Harlan's dissent in *Plessy*. 163 U.S. at 552.

was not so cavalierly to be measured by such a subjectively created standard, and was not to be backed into by casting aspersions upon the attorneys.

However, the Court concluded, "the underlying fallacy of the plaintiff's argument" is "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."⁷⁸ The Court appears to be distinguishing between different kinds of rights, and assumes legislation is impotent to alleviate discrimination. Finally, the Court abnegates its affirmative judicial powers and functions although in reaching its decision, the Court has already negatively exercised them.

The superficial rights distinguished were those of a legal and a social nature, that is, "the civil and political rights of both races" as contrasted with a right to a social commingling. The governments, state and federal, said the Court, cannot do more than secure the legal rights of persons,⁷⁹ and when these are equal then "one cannot be inferior to the other civilly or politically."⁸⁰ Turning then to the social aspect, "the argument . . . assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."⁸¹ This straw-man argument misses the point; the eradication of active discrimination in political, economic, and like non-social areas may be distinguished from the social type of discrimination, and where the former may properly and successfully be the subject of legislation, the latter may be ignored.⁸² However,

78. 163 U.S. at 551.

79. Quoting from and adopting language in *People v. Gallagher*, 93 N.Y. 438, 448 (1883), that "the end for which [government] is organized" is to secure "to each of its citizens equal rights before the law and equal opportunities for improvement and progress," and therefore in attempting to do more the implication must be that this would be unconstitutional. 163 U.S. at 551.

80. 163 U.S. at 551-52. The dissenting views of Mr. Justice Harlan, discussed below, did not disagree with the majority's distinction between political and social, *see* 163 U.S. at 554-66, nor with the holding on jury rights in *Strauder v. West Virginia*, 100 U.S. 303 (1880). The conclusion as to non-inferiority, however, was not acceptable, to Mr. Justice Harlan: "[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds." 163 U.S. at 562.

81. 163 U.S. at 551. In *Plessy* Mr. Justice Harlan did not disagree with these expressions. His dissent in the Civil Rights Cases, 109 U.S. 3 (1883), contained express agreement "that government has nothing to do with social, as distinguished from technically legal, rights of individuals. No government ever has brought, or ever can bring, its people into social intercourse against their wishes." 109 U.S. at 59.

82. These were the arguments used in the 1940s against anti-discrimination laws;

Mr. Plessy was not contending that equal rights are an incident and function of an enforced commingling of blacks and whites. In short, the Court's standard and its instant discussion both make incorrect assumptions which flow from subjective views or beliefs.⁸³

Although incapable of precise reference, the views and beliefs of these seven Justices seem to stem from the historic background given by Mr. Justice Taney in the *Dred Scott* case.⁸⁴ There, speaking of the conditions and *mores* prevailing in the United States and England in the final quarter of the Eighteenth Century, he wrote that the Negro slaves "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect. . . . It was regarded as an axiom in morals as well as in politics, which no one thought of disputing . . . and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern. . . . The legislation of the different Colonies furnishes positive and indisputable proof of this fact."⁸⁵ When *Plessy* was decided *Dred Scott* was but fifty years old, and every sitting Justice had lived through it and its aftermath; on the *Plessy* bench was also Mr. Justice Field, who had served with Justices Taney, Wayne, Catron, Nelson, and Grier, all of whom had supported the *Dred Scott* holding and had also given separate views. The two amazing aspects of the *Plessy* opinions were that the sole dissent was by a Kentuckian, and that the other six who, by their silence accepted Justice Brown's language and views, had not changed an iota from their early attitudes. Mr. Justice Taney had mentioned "the legislation of the States" as showing that "at the time the Constitution was

the reply was along the lines given here. There may or may not be validity in the claim that social discrimination will eventually be affected by the other and be softened, if not eliminated; but this result is not important legally for the question of legislative power.

83. The opinion's final sentence in this paragraph follows along the same vein and is therefore somewhat puzzling: "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." 163 U.S. at 552. Mr. Justice Harlan's response was, in effect, to declare that one's civil rights (which the majority was willing to enforce) embraced one's constitutional "equality" under the fourteenth amendment, *see* note 80 *supra*; if so embraced, the *Plessy* majority was clearly wrong in its conclusion, so that this head-on disagreement had to be resolved. Later courts sought to do this by creating exceptions, but with *Brown* the answer was clear-cut. The repercussions of *Brown* thereafter resulted directly in the overruling of *Plessy* in a public transportation case, *Gayle v. Browder*, 352 U.S. 903 (1956), *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956).

84. 60 U.S. (19 How.) at 407-12.

85. 60 U.S. (19 How.) at 407-08. It may be remarked that Mr. Justice Taney's conjunction of "social or political relations" with "no rights," if followed logically as a conceded major premise, allows the *Plessy* majority to argue that the Civil War amendments removed only the political and not the social relations from discriminatory state action.

adopted, and long afterwards," "the inferior and subject condition of the" Negro, that any change in a "portion of the Union . . . had not been produced by any change of opinion in relation to this race; but because it was discovered, from experience, that slave labor was unsuited to the climate and productions" there, and that such "legislation and histories" show that the slaves were not "then" acknowledged as having status and rights.⁸⁶ The entire tenor of Mr. Justice Taney's opinion was, in effect, to suggest that change⁸⁷ would not be judicially obnoxious and to suggest that the entire thrust of the Civil War, its resulting three amendments and the Reconstruction Period was to make for change. However, according to the *Plessy* majority, the change occurred only in a narrow and legalistic fashion which limited it to civil and political rights; they refused to admit that any social change was possible or should have occurred. The smugness of this attitude is underscored by the use of pre-Civil War citations without recognizing the intervening decades and the impact of change upon these earlier attitudes and usages. This is best illustrated by the Court's answer to the argument that inferiority may be assumed from the forced separation; namely, that if, as has been more than once the case, and is not unlikely to be so again,⁸⁸ "the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption."⁸⁹ This total non sequitur begins with an irrelevant fear psychosis, makes unwarranted assumptions, and now simply draws a conclusion which is itself suspect.⁹⁰

86. 60 U.S. (19 How.) at 416, 412, 407 (emphasis added). It may be noted that such "inferior and subject condition" existed into the Civil War itself, and into the period during which the fourteenth amendment was being framed and presented to the states. See AVINS, *supra* note 15, at 23-298, giving debates in Congress during 1860-68 with congressional awareness of existing national, not only Southern, discrimination, including that in the District of Columbia, concerning schools, continued slavery, inability to testify as witnesses in the federal courts, riding or seating in street-cars and transportation, and voting. Thus no doubt can be had as to the pre-fourteenth amendment existence of such conditions but, it is suggested, this supports the views of Mr. Justice Harlan in 1883 and 1896 that the Negro was supposed to have been freed of these impediments because the amendment was drafted with these discriminations before the Congress. See note 110 *infra*.

87. Referring, of course, to the Reconstruction Period and the carpetbaggers, on which see, e.g., J. RANDALL, *THE CIVIL WAR AND RECONSTRUCTION* (1937); W. DUNNING, *ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION* 176-252 (1931); J. PIKE, *THE PROSTRATE SOUTH: SOUTH CAROLINA UNDER NEGRO GOVERNMENT* (1874).

88. Thus the current "white backlash" and the activities of Black Power advocates seem to have judicial antecedents. See *generally* Forkosch, *supra* note 6.

89. 163 U.S. at 551.

90. See also note 70 *supra*, where the Court feels that a white person assigned to a colored coach could sue for damages to his reputation, but a black person so assigned could not thereby be damaged.

The substantive due process arguments in *Plessy* included and covered the equal protection aspect; nevertheless, these clauses are being treated separately. The *Plessy* majority throughout used "distinction" while Mr. Justice Harlan's dissent used "separation."⁹¹ This language requires a degree of clarification for present understanding, but from it will also emerge the basic fallacy upon which the critics of *Brown* build. Apparently all Justices in *Plessy* understood that "equal protection and security should be given to all under like circumstances."⁹² Put differently, if a community of ten thousand persons were all alike, that is, in like circumstances for a law's purposes and effectuation, then treating one differently would run afoul of the concepts embodied in equal protection. However, if A were properly carved out of this ten thousand, leaving the balance as B, then each group *qua* group could be treated differently, but within each group all persons would have to be treated equally. The question whether this carving, distinction, or classification is a proper one has to be determined first, for if invalid for any reason the A/B line is rejected and the total group has to be treated as all A or all B, not as two groups, otherwise all in like circumstances would not be getting equal protection and security. The drawing of such a classification line separating persons is a legislative function⁹³ but whether or not this classification or scheme itself has a sufficiently legal and constitutional basis becomes a judicial question.

91. See, e.g., "a distinction which is founded in the color of the two races," and "in the nature of things it [the fourteenth amendment] could not have been intended to abolish distinctions based upon color," and "distinctions based upon physical differences." 163 U.S. at 543, 544 & 551 respectively. The dissent notes the "arbitrary separation . . . on the basis of race . . ." 163 U.S. at 562.

92. See *Barbier v. Connolly*, 113 U.S. 27, 31 (1885); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Strauder v. West Virginia*, 100 U.S. 303 (1880), where a black was convicted of murder by an all-white jury, the Court said that the amendment did not prevent discriminations: the state "may confine the selection [of jurors] to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. . . . Its [the amendment's] aim was against discrimination because of race or color . . . and to strike down all possible legal discriminations against" the "emancipated race." It therefore concluded that such jury discrimination "because of their color, amounts to a denial of the equal protection of the laws to a colored man . . ." 100 U.S. at 310. See also notes 80 *supra* & 110 *infra*. If there had been any confusion in *Plessy* as to classification or like circumstances, these Justices—Harlan and Field—could have been depended upon to speak up. Their silence assures that the conclusions here given are warranted.

93. In *Plessy*, for example, the majority's concluding paragraph opened: "It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States But these are questions to be determined under the laws of each State . . ." 163 U.S. at 552. And with respect to "whether the statute of Louisiana is a reasonable regulation," the majority said that as "to this there must necessarily be a large discretion on the part of the legislature." 163 U.S. at 550.

The legislature therefore proposes the classification, and the judiciary examines it; if bad, the legislature may try again with another proposed classification; if and when good, the judiciary then separately and additionally examines the impact or method of effectuating the legislation upon the persons in the class or group so affected to determine on grounds other than the classification itself whether the state has independent power so to act.⁹⁴ If the state does not have this power to act, and regardless of the validity of the classification, then a constitutional amendment may be required to enable it to act. If the state has this power to act, then the judiciary finally examines to see if all within the classified group receive equal protection. Only at the very end of such an analysis will "equal protection and security" be required to "be given to all under like circumstances."⁹⁵ To illustrate these concepts is not difficult, for the same *Plessy* bench, eight months later, unanimously⁹⁶ announced that "it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, . . . [but] such classification cannot be made arbitrarily."⁹⁷ They concluded that:

It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.⁹⁸

94. See, e.g., note 65 *supra*, for the *Plessy* suggestion there termed a "sop." These and other grounds there referred to are based on due process, but the commerce clause may enter, as heretofore disclosed in the *Plessy* analysis, and as said in *Truax v. Raich*, 239 U.S. 33 (1915), "It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration . . . is vested solely in the Federal Government. . . ." 239 U.S. at 42.

95. This series of steps need not be undertaken in this order, for a decision may reject a law or its application and the opinion discuss only one, or commingle many; the task of clarifying may rest with the lawyer.

96. *Gulf, Colo. & S. F. Ry. v. Ellis*, 165 U.S. 150 (1897). The decision was 6-3; the dissent did not object to what here follows, but only to the application of these principles because a "creature of statute" was involved, and the constitutionality of such a statute "appears to have been upheld by the courts of most of the States in which it has been challenged." 165 U.S. at 167.

97. 165 U.S. at 155. Compare *Pace v. Alabama*, 106 U.S. 583 (1883), sustaining a racial anti-cohabitation law, which was based upon a "narrow view of the Equal Protection Clause [which] was soon swept away" by the *Ellis* opinion, 165 U.S. 150 (1897).

98. 165 U.S. 165-66. Note the "reasonable ground" basis, and the "just and proper" and "arbitrary" language, all relating to due process concepts, as well as to state police powers. In *Loving v. Virginia*, 388 U.S. 1 (1967), Chief Justice Warren wrote that in dealing with "distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the [miscegenation] case at bar, however, we

Or, to use an opinion written ten years before *Plessy*, a statute is unconstitutional when "it divides the owners or occupiers [of a building] into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld at their mere will and pleasure."⁹⁹ If the *Plessy* opinions had used any of the quoted language, adapted to their own facts, then the term "classification" could now be used unambiguously and meaningfully. While neither opinion used or discussed this term as such, the concept was there as an unexpressed major premise and, as here involved, necessitates that a valid classification be first created, which itself must separately be upheld as reasonable, have some relation to its object and purpose, and otherwise be within the power of the state.¹⁰⁰ The legislative drawing of such a classification may stem from and be based upon many factors, may involve a high degree of selectivity, choice, and discretion, and may run counter to the views of many persons, even those of the Supreme Court itself; but the question involves not the actual classification but the ability to choose that classification. To exercise this ability the legislature must have proper facts before it and must proceed in a proper manner. These facts may include many items, and a people's "established usages, customs, and traditions" are as much an institutional fact as the physical buildings in which the educational process takes place. In ordinary consideration these "man made" facts are, however, intangibles, whereas a building, for example, is a tangible. Equality in the latter, required by the statute involved in *Plessy*, was necessary before a color classification in intangibles would be permitted. Color classification might also be said to have been a man-made statutory tangible, but the drawing of this line was judicially permitted because of the intangibles behind it. Thus the "established usages," into 1896, were held still to be an institutional-social fact entering the judicial examination of the legislative classification.¹⁰¹

deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." 388 U.S. at 9.

99. *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886).

100. See, e.g., M. FORKOSCH, CONSTITUTIONAL LAW 444-53, 468-78 (1963). In areas other than color, see, e.g., *Freeman v. Hewit*, 329 U.S. 249, 252-55 (1946) (a tax case); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (a poll tax case).

101. On whether these man-made institutions are social facts for purposes of entering into this judicial process, see R. MACLVER, SOCIETY—ITS STRUCTURE AND CHANGES 14-17 (1933); Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 452 (1934);

These tangible and intangible factors may nevertheless be insufficient to support a particular color classification and may therefore be held to violate due process; generally it is this due process attack which constitutes the main argument against a classifying law or its enforcement. Ordinarily if a valid classification is found, there is not much support for a claim that within a class so separated or distinguished the law is not being applied equally. In other words the "pure" equal protection argument vanishes.¹⁰² In *Plessy*, however, the major question (after disposing of the commerce argument) involved classification. Was the separation of these persons on the basis of color a constitutionally valid one? For purposes of a criminal jury trial, which involves one's civil or political rights, the majority said no. For purposes of public transportation, where the facilities were equal, the majority said yes. In justification the majority attempted to reason in two ways: analogically, it pointed to a like color classification, with equal facilities required, for public education;¹⁰³ separately, and on the basis of its allegedly independent thoughts and views, it felt that "[i]n determining the question of [the classification's] reasonableness it [the legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."¹⁰⁴ These two methods of reasoning are, however, intertwined and somewhat circular. The "established" *mores* require illustration, and the only illustration given involved public carriers (denounced under commerce distinctions, but used to show the national feeling), intermarriage (decided prior to 1868 on contract impairment grounds, but also demonstrative of national feeling), theatres (not covered by the new amendment where solely private conduct is involved, but also showing national feeling),¹⁰⁵ and education. The illustrations disclosed that in some instances the classification was denounced, and in others upheld; thus, color apparently was not an "established" basis. The majority distinguished between the

Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609 (1923). See also BERGER, *INTRODUCTION TO SOCIOLOGY* (1963); DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* (1938); H. GERTH & C. MILLS, *CHARACTER AND SOCIAL STRUCTURE* (1953); SEELEY, *THE AMERICANIZATION OF THE UNCONSCIOUS* (1967); and note 136 *infra*. Even if these statements and views are rejected, the overall approach is still valid, since the *Plessy* bench did go into this background, and the *Brown* bench could do likewise.

102. Of course a "pure" equal protection violation may occur, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880). But this was because the Court struck down the invalid color classification which automatically threw all whites and blacks into one class (for jury service), so that all in the class had to be treated equally; this equal treatment not being granted on the facts in that case, the statute and its application were thereupon rejected.

103. 163 U.S. at 544-45.

104. 163 U.S. at 550.

105. *The Civil Rights Cases*, 109 U.S. 3 (1883).

civil and political rights of the blacks, and their social rights. Cases rejecting color as the basis for a classification involved the former, whereas the latter could not be touched by legislation or decision. Therefore, since educational classification did not involve any civil or political rights, the classification impliedly fell onto the social base; and, since all of the decisions and the national background showed "usages, customs, and traditions" supporting this classification, then, "[g]auged by this standard"¹⁰⁶ color could be so used.

Granting all the majority says, there still remains the problem of change. Do "established usages" remain forever established? Where are they found? If change is permitted, then how is it to be accomplished? When and how will it be recognized? For example, Congress may lay and collect taxes, but a constitutional limitation prevented any direct tax¹⁰⁷ until the sixteenth amendment removed it; and so, too, may other constitutional amendments change the document. But nowhere in any portion of the Constitution or amendments does "established usages" appear. *Plessy* couples this phrase with the reasonableness of the legislative classification; the phrase must therefore be either a statutory or a judicial creation. If the former then it must be found so expressed or implied, with change occurring by virtue of statute, or by judicial interpretation of a statute. If created judicially (or in combination with a legislative change), then what the judiciary has created, it may itself change, and its reasons may be many or few, legal or personal.¹⁰⁸ In *Plessy* the "established usages" were not in the statute but were adopted by the Court on its own in order to determine and uphold the reasonableness of the classifica-

106. 163 U.S. at 550.

107. Art. 1, § 8, cl. 1, & § 9, cl. 4, although a direct tax could have been laid if "in Proportion to the Census or Enumeration" as required under § 2, cl. 3.

108. Although Mr. Justice Holmes inveighed against the Constitution's use of Herbert Spencer's Social Statics, dissenting in *Lochner v. New York*, 198 U.S. 45, 75 (1903), he felt that there was no "limit but the sky" to the court's power to invalidate laws, even though the Justices should not "embody . . . economic or moral beliefs" in their actions. See his dissent in *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930). Mr. Justice Stone also decried the use by the Justices of their "own personal economic predilections" in deciding cases. *Morehead v. Tiplado*, 298 U.S. 587, 633 (1936) (dissenting). The Brandeis Brief, presented in *Muller v. Oregon*, 208 U.S. 412, 420-21 (1908), brought before the Court what it said were not technically speaking legal authorities; thus, the Court, continuing the Brandeis Brief, stated that "when a question of fact is debated and debatable and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration . . ." 208 U.S. at 421. The fact is that no bench or individual Justice ever deals in any restricted or purely legal manner with the facts before them, that their training and biases do form a background for their decisions, and they do legislate, even if only interstitially. Regardless of their designation as liberal, conservative, activist or passivist, all Justices may be so "accused." This statement of position should prevent misunderstanding concerning exactly what this writer is urging.

tion, although Mr. Justice Harlan bitterly dissented to the Court's reasoning. His contention was that all these established usages predated the Civil War amendments; that these amendments "removed the race line from our governmental systems;" and that "the most important" state decisions before 1868 "are wholly inapplicable, because rendered prior to the adoption of the last amendments to the Constitution, when colored people had very few rights which the dominant race felt obliged to respect." He thought that "[o]thers were made at a time when public opinion, in many localities, was dominated by the institution of slavery; . . . and when . . . race prejudice was, practically, the supreme law of the land." Mr. Justice Harlan believed that "[t]hose decisions cannot be guides in the new era since 1868;" that therefore "Our Constitution [at least in 1896] is color-blind, and neither knows nor tolerates classes among citizens;" and that state enactments, regulating the enjoyment of civil rights,¹⁰⁹ upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. "The arbitrary separation here . . . on the basis of race . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds."¹¹⁰

The locking of judicial horns is therefore not upon the prior existence of any "usages, customs, and traditions," nor is it upon whether these are subject to change, nor on whether the Supreme Court, without legislative expression, can and should determine if a change has occurred, nor on whether there factually have occurred significant developments in the 1861-1868 period, nor on whether these developments have affected the national existence. Rather, the judicial conflict is whether these prior "usages" have continued unscathed into 1896. The answer of the majority to this last is yes, whereas that of Mr. Justice Harlan is no, and both are entitled to their opinions personally and judicially.

If this overall analysis has been properly developed then a few

109. Mr. Justice Harlan thus impliedly disagrees with the majority in its dichotomy of rights wherein the assignment is based upon race. He also feels that "in respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any people authority to know the race of those entitled to be protected in the enjoyment of such rights." 163 U.S. at 554. *See also* 163 U.S. at 554-55. Mr. Justice Harlan nowhere expresses direct disagreement on the civil rights-social aspect of the majority opinion.

110. 163 U.S. 555.

significant conclusions may be ventured. First, that *Plessy* discloses the judiciary actively determining the constitutionality and legality of a statutory classification upon a standard created, interpreted, and applied by itself, retaining the corresponding ability to change or modify this standard, but refusing to do so because no sufficient reasons appear. Second, that if between 1861 and 1896 this standard was not changed by the facts of national life, this does not necessarily mean that between 1896 and 1954 such a change might not have occurred. Third, whether or not change in this second period did occur, a re-examination is, in the absence of legislative expressions,¹¹¹ within the power and province of the judiciary.¹¹² Finally, that periodic judicial re-examination of such a standard is thus permitted, required, and sanctioned. In effect this permitted and required the Supreme Court, in 1954, to conduct its own examination in the light of current usages, customs, and traditions, to determine afresh whether

111. If a legislative expression is present the judiciary still has ultimate power to determine reasonableness; if unreasonable, then the basic question is whether an area of purely legislative political power is involved. If not, then the judiciary has concurrent power to enter, although it may defer to the legislature. In effect this approach superficially rejects statements such as those of Mr. Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 479 (1965), that "[w]e do not sit as a superlegislature to determine the wisdom, need, and propriety of [state] laws that touch economic problems, business affairs, or social conditions." 381 U.S. at 482. If "ordinarily" were inserted between "not" and "sit," and "purely" inserted between "touch" and "economic," this would be more accurate; for, where the economic, business, or social aspect detrimentally affects one's constitutional rights, the state legislature must bow to the Court's judgment. Citations for this begin with the first overturning of any state legislative enactment, and continue into the quoted case above. Insofar as the federal legislature is concerned, different policies may enter, but, it is suggested, the approach is the same although in practice the effect or consequences may result in differences.

112. Even if the legislature did so amend the statute, the question of the constitutionality of the amended statute, in the light of the admitted change, would still remain, *i.e.*, has the statute kept pace with the change? *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), upholding the state's mortgage moratorium act, one reason being that "[t]he legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended [by the legislature] as virtually to destroy the contracts." 290 U.S. at 447. If circumstances required and the legislature refused to reduce the period of redemption, then the judiciary would declare the statute unconstitutional. *See, e.g.*, *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230 (1945), sustaining a renewal of analogous provisions. In that case the Court said that "[j]ustification for the 1943 [later] enactment is not negated because the factors that induced and constitutionally supported its enactment were different from those which induced and supported the moratorium statute of 1933." Mr. Justice Frankfurter also wrote: "The whole course of the New York moratorium legislation shows the empiric process of legislation at its fairest; frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts." 326 U.S. at 234-35. This last quotation indicates, of course, a situation where the judiciary approves a legislative change which in the *Home Building* quotation is mentioned as necessary when conditions become different.

a color basis for classification in public education was to be upheld. Two questions need first be answered: Should a re-examination be conducted of such an "established" standard, since the nation has lived under it for so long and thereby continued color discrimination? If re-examination should occur, what factors are to be taken into account by the judiciary?

As originally noted, the major objection by Hyneman to the *Brown* decision is the enormity of the social, not political, property or legal, consequences,¹¹³ and that such a judicial determination plus its consequences is without precedent.¹¹⁴ On the other hand, the admonitory language of the 1896 dissent, discloses a fear of enormous social consequences of a decision which permits forced segregation: "What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which in fact proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?"¹¹⁵ Perhaps the rejoinder to Hyneman and others is that they are correct in their desire to mitigate the consequences of the judiciary's incursion into this area, but merely sixty years too late; and the repercussions of *Plessy* were felt in the armed forces in World War II, with its corresponding impact upon the national struggle.¹¹⁶ There may be the further reply that before 1954 there had been rejections of such color classifications,¹¹⁷ and also differentiations or exceptions, for example where the

113. See notes 19-20 *supra*.

114. The "I told you so" prophets also point to the wave of demonstrations, riots and Black Power activities to cluck their tongues at the temerity of the 1954 bench in venturing into this "established" field.

115. 163 U.S. at 560. See Forkosch, *supra* note 6 at 108: "On December 1, 1955, Mrs. Rosa Parks, a Negro seamstress, said she had such a right [to ride in the front of a bus] and refused to move to the rear in a Montgomery bus; the Freedom Movement began from this small incident. . . ."

116. Beginning with the Executive Orders, note 117 *infra*, the nation has recognized the necessity for removing race lines where it is engaged in a struggle for its existence. Today's admitted "total involvement" of the entire civilian population in the event of a large-scale war underlines the significance and necessity of this removal.

117. *E.g.*, the state anti-discrimination laws. See Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 VAND. L. REV. 985 (1965); M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 253 (1966). Somewhat more to the "national" point, the Ramspeck Act of 1940, 5 U.S.C. § 631a (1964), prevented discrimination in federal employment on account of race, color, or creed. See also Roosevelt's Exec. Order No. 8587, 5 Fed. Reg. 4445 (1940); Truman's Exec. Order No. 9691, 11 Fed. Reg. 1331, 1382 (1946), and No. 9980, 13 Fed. Reg. 4311 (1948). For the armed forces see Truman's Exec. Order No. 9981, 13 Fed. Reg. 4313 (1948). BYERS, A STUDY OF THE NEGRO IN MILITARY SERVICE (1947), gives a background to the eventual federal Civil Rights legislation. See also REPORT OF PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 20-30 (1947); Note, *Racial Violence and Civil Rights Law Enforcement*, 18 U. CHI. L. REV. 769 (1951); G. MYRDAL, AN AMERICAN DILEMMA ch. 27 (1944).

racial group was denied the right to acquire and use property,¹¹⁸ or made subject to restrictive covenants in the purchase of homes;¹¹⁹ or¹²⁰ even where a physically equal law school was offered, a law student was held to be deprived of the "rich traditions and prestige" which the white school enjoyed.¹²¹ If ever a background disclosed movement and changes in the national sphere, if not in a quantitatively small but relatively significant group of Southern states, going even beyond Mr. Justice Harlan's description in his *Plessy* dissent, and if ever decisions portended a judicial recognition of such changes, they were here to be found.¹²² In the field of educational policy, an informed professional group articulated its feeling in urging that "as the principle of free public education was the first important step in realizing democratic objectives through our educational system, so completely non-segregated public education is an essential element in reaching that goal."¹²³ Or, phrased differently, while the personal right¹²⁴ of an individual under the equal protection clause to a non-segregated education may be somewhat infinitesimal in the overall picture, still, when added to those of others, the total becomes so large that an impact upon national policy, goals, and efforts necessarily follows. Furthermore, where the nation's political and social goals, and democratic methods and ends are so vitally affected and hindered by a denial of these rights, then prior dams or hinderances which

118. *Buchanan v. Warley*, 245 U.S. 60 (1917).

119. *Shelley v. Kraemer*, 334 U.S. 1 (1948). The companion case of *Hurd v. Hodge*, 334 U.S. 24 (1948), held unenforceable a District of Columbia restrictive covenant under what is now 42 U.S.C. § 1982 (1964). State cases were also decided, some on different grounds. See, e.g., *Pickel v. McCawley*, 329 Mo. 166, 44 S.W.2d 857 (1931); *Yoshida v. Gelbert Improvement Co.*, 58 Pa. D. & C. 321 (1946). In *Barrows v. Jackson*, 346 U.S. 249 (1953), the Court refused to permit damages for breach of a racial restriction. Accord, *Phillips v. Naff*, 332 Mich. 389, 52 N.W.2d 158 (1952). *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App. 1948).

120. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950), although these location disadvantages can be said to be within the "tangible" area.

121. *Sweatt v. Painter*, 339 U.S. 629, 634-35 (1950).

122. See Ransmeier, *The Fourteenth Amendment and the "Separate but Equal" Doctrine*, 50 MICH. L. REV. 203, 238-40 (1951); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

123. Brief for the Committee of Law Teachers Against Segregation in Legal Education, as Amicus Curiae in *Sweatt v. Painter*, 339 U.S. 629 (1950), reprinted in 34 MICH. L. REV. 289, 319 (1950).

124. "The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). See also *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151 (1914), where Mr. Chief Justice Hughes dismissed a suit brought by five persons against five railroads to restrain the railroads from complying with an Oklahoma statute of 1910 which required the roads to provide separate but equal facilities. One reason given for the dismissal was that the plaintiffs could not raise the claim that other Negroes in the state might be or had been injured since their rights were personal and the plaintiffs themselves had to be injured before a restraining order could be issued.

created or continued them should or must be limited or removed.¹²⁵

Assuming re-examination of *Plessy* was required in 1954, what factors had to be considered? Under the separate-but-equal formula a court would consider only the tangible factors in each case and make a comparison of them; if this were to be still determinative in *Brown* then intangibles, even if present, would not be considered where tangible inequality was found, and this because the Court seeks to avoid raising new constitutional issues whenever possible.¹²⁶ Under this view, the Court in *Brown* had first to acknowledge that there was substantial equality as to all such tangible factors.¹²⁷ What intangibles could and would now enter to influence the decision? Assuming the intangibles in *Plessy* were the institutional facts of "established usages, customs, and traditions of the people," then it would be these which had to be considered, because, if modified or changed in any appreciable manner, and especially if discarded by 1954, the doctrine and the formula might no longer be judicially valid.

Plessy accepted the institutional fact of customs and usages as then given and unchanged, but in effect it denied that the judiciary must reject customs and usages as a standard against which to examine the legislative classification; *Brown* could have questioned the continued existence of this institutional fact, to see if it was now still unchanged, and then determine whether to accept or reject it as a standard. However, *Brown* did not expressly do this. Impliedly these institutional facts were examined and discarded, but Chief Justice Warren's language was couched in pragmatic terms, namely, since tangibles were not involved, "we must look instead to the effect of segregation itself on public education," and "must consider public education in the light of its full development and its present place in American

125. Although pre-1954 decisions and opinions are being used, the 1966 language of Mr. Justice Douglas in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), is appropos: "Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. . . the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change Seven of the eight Justices then sitting [in *Plessy* joined] . . . in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954 . . . we repudiated [*Plessy*] we stated: 'In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.'" 383 U.S. at 668, 669-70. Justices Black and Harlan (Stewart joining) wrote dissenting opinions.

126. See, e.g., Mr. Justice Brandeis' famous concurrence in *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936).

127. 347 U.S. at 492 n.9. Chief Justice Warren later added: "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" 347 U.S. at 493.

life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."¹²⁸ It is unnecessary to cite abundant authority to support this practical and necessary approach. Holmes' famous expression that "The life of the law has not been logic: it has been experience,"¹²⁹ is merely one of the dozens of similar views found in books¹³⁰ and legal opinions,¹³¹ and yet it is not sufficient. A recognition of experience must also take into account those who simultaneously experience and react¹³² "lest we erect our prejudices into fixed legal principles."¹³³ Further, as one jurisprudent writes, "The perpetual process of interpretation must inevitably produce an equally active metabolism in the subject matter of usage. Customs become modified, sometimes to such an extent that they cease to exist. But always the jurist or magistrate has to deal with practices derived in the first instance from actual social relationships."¹³⁴

Chief Justice Warren, therefore, first looked at the effects of the segregation on the child and education, and the place of education in the nation, in order to determine the equal protection question. He quoted the findings of the lower courts in the Kansas and Delaware cases that segregation created a sense of inferiority among the children in the minority, had a detrimental and retarding effect upon them especially in their learning motivations and results, and con-

128. 347 U.S. at 492-93.

129. O. HOLMES, *THE COMMON LAW* 1 (1881).

130. *E.g.*, selections by M. COHEN & F. COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* ch. 8 (1951); L. STONE, *THE PROVINCE AND FUNCTION OF LAW* pt. I (1950).

131. *E.g.*, Mr. Justice Sutherland: "Experience is of all teachers the most dependable, and . . . is a continuous process . . ." *Funk v. United States*, 290 U.S. 371, 381 (1933); Mr. Justice Cardozo: "In the revealing light of experience the hazards to be avoided are disclosed to us as the hazards that ensued." *De Haen v. Rockwood Sprinkler Co.*, 258 N.Y. 350, 355, 179 N.E. 764 (1932); Mr. Justice McKenna; "[O]ur surest recourse is in what has been done," *Merrick v. N. W. Halsey & Co.*, 242 U.S. 568, 587 (1917); Mr. Justice Stone, "Only time and costly experience can give the answers," *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 582 (1944).

132. *See* B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921): "Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge." *See also* HOLMES, *supra* note 129, at 1: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining" cases.

133. Mr. Justice Brandeis, in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), or, as Tennyson wrote, "Lest one good custom should corrupt the world." *MORTE D'ARTHUR*.

134. C. ALLEN, *LAW IN THE MAKING* 128 (1964).

cluded that "Separate educational facilities are inherently¹³⁵ unequal."¹³⁶ This conclusion was predicated upon the equality of the tangibles, and thus had to mean that, even so, the separation or classification could not stand because it was "inherently unequal." This, alone, should therefore have been sufficient to invalidate it, but in view of the historic background Chief Justice Warren now pointed up the position occupied by education in the nation's existence:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹³⁷

Whether this or any examination of *Brown* discloses or can disclose the *ability* of the Supreme Court to reject *Plessy's* language depends greatly upon the overall approach with which one views the judicial process. There may be solid disagreement with the conclusions of a court, or with its choice of materials and its use of reasoning or logic, but this ordinarily does not reject the court's jurisdiction or power generally to decide. Because of their peculiar and exceedingly great impact upon people, the nation, and even throughout the world, the Supreme Court's opinions can no longer, if ever they were, be cast against a parochial view of the decision-making process. "The true grounds of decisions are considerations of policy and of social advan-

135. The use of this term involves not only a question of policy, *see, e.g.*, note 138 *infra*, but also a question of approach. *See* Mr. Justice White's statement in *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964), that "Such [race] classifications bear a far heavier burden of justification." To the extent that a new preferred position is being given to racial classification insofar as a justification thereof carries a burden heavier than others, can an analogy be drawn to the first amendment? *See* M. FORKOSCH, *CONSTITUTIONAL LAW* 393-99 (1963).

136. 347 U.S. at 495. These findings of fact had to be supported not only by the evidentiary facts but also as permissible inferences therefrom. *See* M. FORKOSCH, *A TREATISE ON ADMINISTRATIVE LAW* ch. XIV (1956). Thus, said Chief Justice Warren, "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected." 347 U.S. at 494-95. The modern sociological and educational authorities cited by him gave rise to the charges already mentioned at the outset of this paper.

137. 347 U.S. at 493. There were no citations or references given, and these conclusory views are therefore subject to attack. What, then, of the *Plessy* conclusions and views already discussed?

tage . . . which rarely are unanimously accepted, and still more rarely, if ever, are capable of imanswerable proof."¹³⁸ The end of law is to serve man¹³⁹ and neither can strait jacket the other.

138. Holmes, dissenting in *Vegeahn v. Gunter*, 167 Mass. 92, 106, 44 N.E. 1077, 1080 (1896). See also HOLMES, *supra* note 129 at 6, 8, 35, 108; O. HOLMES, COLLECTED LEGAL PAPERS 184 (1920); cf. the analysis of policy as a determinant in the application of the Just Cause Doctrine in M. FORKOSCH, A TREATISE ON LABOR LAW ch. X (2d ed. 1965).

139. See, e.g., Forkosch, *What is Legal History*, in ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER 2, 5 (Forkosch ed. 1966).