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THE SUPREME COURT AND RACIAL DISCRIMINATION*

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The purpose of this essay is to consider the response of the Supreme Court of the United States to two general aspects of racial discrimination: first, discrimination as restrictive of political freedom and, second, discrimination as restrictive of the enjoyment of such social advantages as the acquisition and occupancy of real estate, transportation and education.

Political Freedom: Suffrage Restrictions

Political freedom implies, among other things, the right of general participation in the processes of political decision and control and, as bases for this right, the enjoyment of the fundamental rights of free speech, press, assembly and petition. Here consideration of discrimination in relation to political freedom will be confined, in the main, to restrictions which have from time to time been imposed upon the freedom of the suffrage. This, of course, involves consideration of the fifteenth amendment as well as the fourteenth.

The direct and indirect circumventions of the fifteenth amendment by Southern states since 1870 are too familiar to justify recounting here in detail, even if space permitted. For some two decades after the fifteenth amendment established the right of Negroes to vote by declaring that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," the members of this race were effectively disfranchised by violence, threats of violence, intimidation, and the like. However, the more responsible leaders of the South soon saw that such methods could bring no permanent solution of the problem and resort was had to more formal methods which, it was thought, could be brought technically within the limitations of the Constitution. The original purpose of those measures was, of course, the elimination of Negro suffrage as a factor in elections. The attempt has been, over the years, to prevent first the Negroes, and later certain other citizens, from voting, through such indirect devices as so-called literacy tests, grandfather clauses, poll taxes and the "white primary." Typical of these literacy tests was that of Mississippi which required that the voter be able to read the state constitution and to understand and give a reasonable interpretation of it when read to him. This provision, as those similar to it in other

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states, was unquestionably designed to prevent the Negroes from voting by discriminatory administration. But the Supreme Court of the United States held, in *Williams v. Mississippi*[1] in 1898, that it did not violate the fifteenth amendment, since it did not on its face discriminate against Negro voters and there was no showing that it had been so administered as to accomplish this end.

Prior to 1915 restrictions on Negro suffrage had met with little opposition from the Supreme Court. In that year the Oklahoma "grandfather clause" was struck down by the Court in *Guinn v. United States*[2] as a violation of the fifteenth amendment. This ingenious device was similar to those which had been earlier adopted in some half dozen other Southern states. The clause set up a literacy test based on the ability to read and write any section of the Oklahoma Constitution, and then provided a loophole for the escape of illiterate whites by exempting those whose ancestors were qualified to vote as of January 1, 1866—a date which would not apply to Negroes since none was then qualified to vote. This made it clear, the Court held, that the "grandfather clause" effected racial discrimination in voting since there could have been no other reason for selecting the date of January 1, 1866 as the basis of classifying citizens.

Oklahoma later sought to secure the same end through a "sophisticated" registration procedure. In 1916, the year following the invalidation of the "grandfather clause," the Oklahoma legislature enacted a new suffrage law which provided that those who had voted in the general election of 1914, which had been held under the invalid "grandfather clause," were automatically placed on the register of voters for life. All other voters were required to register within a specified twelve-day period or be permanently disfranchised. In an action brought by a Negro citizen who was refused the right to vote in 1934 because he had failed to register within this prescribed period in 1916, the Court held this registration scheme to be racial discrimination in violation of the fifteenth amendment.[3] Said Justice Frankfurter for the Court: "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."[4] But these decisions did not dampen the zeal of those States bent on disfranchising the Negro. The "white primary" and the poll tax proved to be effective weapons in this enterprise. To these a more extended consideration will now be given.

1. 170 U.S. 213 (1898).
2. 238 U.S. 347 (1915).
3. Lane v. Wilson, 307 U.S. 268 (1939).
4. *Id.* at 275.

The White Primary

The advent of the direct primary election towards the end of the last century and its widespread development in the first two decades of the present century furnished the South—ironically enough—with a new weapon against Negro suffrage. If the Negro could be barred from the Democratic primary, he would, of course, be effectively disfranchised, since in the South the choice made in the Democratic primary is determinative of the choice in the final election which merely formalizes and legalizes the primary.

Inspiration for the first legislative prescription of the white primary apparently came from the inconclusive decision of the Supreme Court in *Newberry v. United States*,[5] in which Mr. Justice McReynolds, speaking for himself and three of his brethren (one Justice concurred on other grounds), declared that a primary is no part of election and that the part of the Federal Corrupt Practices Act purporting to limit the expenditures of a senatorial candidate in a primary was unconstitutional. Soon after this decision the Texas legislature enacted a law barring Negroes from the polls in any Democratic primary in the State of Texas. This law was invalidated by the Supreme Court in *Nixon v. Herndon*[6] as a violation of the equal protection of the laws clause of the fourteenth amendment. The attempt to vest the same power of discrimination in the State Central Committee of the Party failed because the Committee received its authority to act from the legislature and hence was an agent of the state.[7] But in *Grovey v. Townsend*,[8] in 1935, the Court upheld the exclusion of a Negro voter from the Democratic primary under a resolution of the State Democratic Convention without benefit of statute. Here the Court declared that to deny a vote in a primary was a mere refusal of party membership in a private organization with which "the state need have no concern." The action was not state action.

The great turning point in this situation came in 1941 when, in the *Classic* case,[9] the Court held that section 4 of article I of the Constitution authorizes Congress to regulate primaries as well as general elections where the primary is by law an integral part of the procedure of choice [of a representative in Congress], or where in fact the primary effectively controls the choice. The Court also held that it was the right of a qualified citizen of the United States to vote in a congressional primary and to have his vote counted as cast.

It should be noted that this case did not settle the question as to whether white people were free to exclude Negroes from primaries

5. 256 U.S. 232 (1921).
6. 273 U.S. 536 (1927).
7. Nixon v. Condon, 286 U.S. 73 (1932).
8. 295 U.S. 45 (1935).
9. United States v. Classic, 313 U.S. 299, 318 (1941).

at which only state and local officers were chosen, or at primaries for the selection of national officers which were not by state law directly made a part of the state election machinery. There was still *Grovey v. Townsend.*

But in 1944 the Court in *Smith v. Allwright*[10] outlawed the "white primary" as violative of the fifteenth amendment, and declared that the constitutional right to be free from racial discrimination in voting "is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." The Court after declaring that "It may now be taken as a postulate that the right to vote in . . . a primary . . . without discrimination by the State . . . is a right secured by the Constitution," went on to hold that since by state law the primary was made an integral part of the state election machinery, the action of the party in excluding Negroes was action by the state and consequently in violation of the fifteenth amendment. Thus the controlling issue here as in the *Grovey* case was whether the Negro had been barred from the primary by *state* action. The Court held that he had, and consequently *Grovey v. Townsend* was overruled.

Although this decision greatly stimulated Negro participation in Southern primaries,[11] the resistance to it in most of the affected states was prompt and determined. These efforts at circumvention can be illustrated by consideration of the experience of South Carolina and Alabama, from both of which states issued important court decisions.[12]

South Carolina promptly repealed all statutory[13] and constitutional[14] laws relating to primaries and the Democratic primary was thereafter conducted under rules prescribed by the Democratic party. This bold attempt to circumvent the *Allwright* decision was struck down by the United States district court in *Elmore v. Rice,*[15] on July 12, 1947; the decision was sustained by the Court of Appeals of the Fourth Circuit on December 30, 1947,[16] and on April 19, 1948, the Supreme Court of the United States refused to review the latter ruling.[17]

Elmore was denied the right to vote in the Democratic primary under rules promulgated by the Democratic Convention limiting the right to vote in the primary to white persons. Both the district court and the court of appeals ruled that the party and the primary were

10. 321 U.S. 649 (1944).
11. Weeks, *The White Primary: 1944-1948,* 42 AM. POL. SCI. REV. 500 (1948). See also Strong, *The Rise of Negro Voting in Texas,* 42 AM. POL. SCI. REV. 510 (1948).
12. For efforts in other Southern states, see Weeks, *supra* note 11.
13. S.C. Acts 1944, § 2323.
14. S.C. CONST. art. 2 § 10.
15. 72 F. Supp. 516 (E.D.S.C. 1947).
16. Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947).
17. 333 U.S. 875 (1948).

still used as instruments of the state in the electoral process despite the repeal of all laws relating to primaries.[18]

It is worth noting that the primary involved in the *Allwright* case was conducted under the provisions of state law and not merely under party rules as in this case. Here the state had *permitted* the party to discriminate against the Negro voter in violation of the Constitution. The court of appeals put the question before it sharply in this way:

> The question presented for our decision is whether, by *permitting* a party to take over a part of its election machinery, a state can avoid the provisions of the Constitution forbidding racial discrimination in elections and can deny to a part of the electorate, because of race and color, any effective voice in the government of the state. It seems perfectly clear that the question must be answered in the negative.[19] (Emphasis added.)

Hence, "no election machinery can be upheld if its purpose or effect is to deny to the Negro on account of his race or color any effective voice in the government of his country or the state or community wherein he lives."[20]

Not despairing, the Democratic Party authorities of South Carolina sought to evade the *Elmore* decision by vesting control of primaries in clubs to which Negroes were not admitted, and by requiring of those who desired to vote in the primaries an oath which was particularly objectionable to Negroes, stipulating among other things that they believed in the social and educational separation of the races. This effort failed in both the district court[21] and the court of appeals[22] on the strength of the principle enunciated in the *Elmore* case.

Although South Carolina now yielded to the proscription of the white primary, she still sought to reduce Negro voting to the lowest possible level by the requirement that all voters be able to read and write *or own* property assessed at $300 or more.[23]

The principle enunciated in the *Elmore* case was approved and applied by the Supreme Court of the United States in *Terry v. Adams*[24] in 1953. Here Fort Bend County, Texas, had for more than sixty years deprived Negroes of the ballot by setting up an association, including all-white voters on the official list of the county, and barring Negroes from membership. This organization, known as the Jaybird Democratic Association, claimed to be only a voluntary, private club with no connection whatever with the state political or elective

18. Rice v. Elmore, 165 F.2d 387, 388 (4th Cir. 1947).
19. *Id.* at 387-89.
20. *Id.* at 392.
21. Brown v. Baskin, 78 F. Supp. 933 (E.D.S.C. 1948).
22. Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949).
23. S. C. CODE § 23-51(4) (1952).
24. 345 U.S. 461 (1953).

machinery. Its ostensible duty was merely to pick candidates for recommendation to the regular party primary. Expenses were met by assessing the candidates and no reports or certification of candidates were made to any state or party officials. Here Justice Black declared that the facts and findings of this case bring it squarely within the reasoning and holding of the Court of Appeals of the Fourth Circuit in the *Elmore* case in which the principle was laid down "that no election machinery could be sustained if its purpose or effect was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state, or community."[25] Indeed, as already pointed out, essentially the same principle had previously been enunciated in *Smith v. Allwright* when the Supreme Court said that the constitutional right to be free from racial discrimination in voting "is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election."[26]

The preceding cases taken as a whole would seem to stand for the proposition that no action of any group or organization which controls the choice of public officials and the decision of public issues and the right of qualified citizens to participate in that choice and in that decision is private action. Every attempt at preserving the substance of the white primary has ultimately failed in the courts, and it does not seem likely that future subterfuges will succeed except as delaying tactics.

Alabama refused to follow the example of South Carolina and repeal her primary legislation as a method of circumventing *Smith v. Allwright,* apparently because of fear that primary elections could not be properly policed without state regulation. Instead she sought to limit registration, and consequently voting, to "properly qualified persons." In 1946 the so-called Boswell Amendment to the Constitution of Alabama was adopted providing that only persons who can "understand and explain" any article of the Constitution of the United States, who are possessed of "good character" and who understand "the duties and obligations of good citizenship under a republican form of government," may qualify as electors.[27]

Under the statutory law the applicant for registration must "understand and explain" the duties and obligations of good citizenship to the reasonable satisfaction of the boards of registrars for the several counties of the state.[28]

It is, of course, not surprising, that a federal district court found that the amendment was intended as a grant of arbitrary power to

25. Rice v. Elmore, 165 F.2d 387, 392, (4th Cir. 1947).
26. 321 U.S. at 664.
27. ALA. CONST. § 181.
28. ALA. CODE ANN. tit. 17, § 21 (1940).

evade the decision of the Supreme Court in *Smith v. Allwright* and to restrict voting on the basis of color, that evidence showed that it had in fact been arbitrarily administered for the purpose of excluding Negro applicants from the franchise, whereas white applicants with comparable qualifications were accepted, and that as a rule only Negroes were required to submit to the tests. Thus the amendment "both in its object and the manner of its administration, is unconstitutional, because it violates the Fifteenth Amendment."[29] The Supreme Court refused to overrule this decision.[30]

Constitutional Aspects of the Poll Tax

There are now only five Southern states—Alabama, Arkansas, Mississippi, Virginia and Texas—that make the payment of a poll tax prerequisite to the exercise of the suffrage.[31] Such requirements in their original purpose were designed to disfranchise the Negro but in later years they often operated to disfranchise whites as well. On the national level efforts to eliminate the poll tax as a suffrage requirement have been confined largely to two methods: (1) invalidation by the courts and (2) failing in this, the outlawry of the tax by act of Congress. Each of these methods will now be examined briefly.

The contention that a poll tax as a qualification for voting in a state or federal election is unlawful was brought before the Supreme Court in *Breedlove v. Suttles*[32] in 1937. The plaintiff had been excluded from both state and national elections because of failure to pay a poll tax imposed by the State of Georgia. Against the contention of Breedlove that the privilege of voting for federal officials is one to which he is entitled under the fourteenth amendment, the Court concluded that to make the payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the fourteenth amendment. The "privilege of voting," said Mr. Justice Butler for the Court, "is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate."[33] Incidentally Mr. Justice Butler's langnage is in error as applied to the privilege of voting for members of the Congress. To be sure the qualifications of electors of members of the Congress are defined by

29. Davis v. Schnell, 81 F. Supp. 872 (E.D. Ala. 1949).
30. Schnell v. Davis, 336 U.S. 933 (1949).
31. Technically it could be said that Tennessee should be added to this list, but the legislature of that state has made such extensive exemptions as to amount to repeal of the tax. See KEY, POLITICS, PARTIES AND PRESSURE GROUPS, 622-23 (1952).
32. Breedlove v. Suttles, 302 U.S. 277 (1937).
33. *Id.* at 283.

state law, as we shall presently note again, but the right to vote for such officials is derived from the Constitution of the United States.[34]

Later cases involving the poll tax as a requirement for the exercise of the suffrage regard the matter as conclusively determined in *Breedlove v. Suttles.*[35]

Federal Anti-Poll Tax Legislation

Since 1939 more than a half dozen bills designed to prohibit the imposition of a poll tax as a prerequisite to voting in a primary or other election for national officers have passed the House of Representatives but have failed in the Senate either through death in committee or senatorial filibuster—chiefly the latter. All of these bills are virtually identical in substance. A typical example is the one introduced by Senator Humphrey[36] in the first session of the Eighty-second Congress on June 25, 1951. Section 3 of this bill would make it unlawful "to levy, collect or require the payment of any poll tax" as a condition of voting in any national election and declares that any such action "shall be deemed an interference with the manner of holding such elections, an abridgment of the right and privilege of citizens of the United States to vote" for national officers "and an obstruction of the operations of the Federal Government."

Most of the debate on this series of anti-poll tax bills has centered about their constitutionality. Those who deny the constitutionality of this legislation base their case largely on section 2 of article I of the Constitution which provides that "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislature," and on decisions of the federal courts upholding the power of the states to fix the qualifications of electors in national elections, subject to the limitations of the fifteenth and nineteenth amendments.

As early as 1884 the Supreme Court of the United States in *Ex parte Yarbrough*[37] declared that the states "define who are to vote for the popular branch of their own legislature and the Constitution of the United States says the same persons shall vote for members of Congress in that state. It adopts the qualifications thus furnished as the qualifications of its own electors for members of Congress."[38]

34. United States v. Classic, 313 U.S. 299, 315 (1941); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

35. Pirtle v. Brown, 118 F.2d 218 (6th Cir.), *cert. denied,* 314 U.S. 621 (1941); Butler v. Thompson, 97 F. Supp. 17 (E.D. Va.), *aff'd per curiam* 341 U.S. 937 (1951).

36. S. 1734, 82d Cong., 1st Sess. (1951).

37. 110 U.S. 651 (1884).

38. *Id.* at 663.

The alleged competence of the Congress to prohibit state poll tax requirements in national elections is grounded upon a variety of arguments, but the principal arguments are: (1) that the requirement of the payment of a poll tax is not a qualification in contemplation of section 2 of article I of the Constitution and (2) that even if the tax is a qualification under this action it is limited by section 4 of article I.

Those who advance the first argument concede the general proposition that the Constitution adopts for national elections the voting qualifications fixed by the states but they insist the poll tax is not such a qualification. It is only a means, an unconstitutional means, of denying a fundamental right. Thus the power of Congress to outlaw the poll tax is brought under section 4 of article I, and if Congress acts under its power to regulate the time, manner and places of electing federal officials, *Breedlove* and other cases are no longer significant because Congress has not legislated on the question as it relates to the manner of holding elections.[39]

This argument seems to ignore both the language of the pertinent constitutional provision and the circumstances in which it was framed and adopted. The qualifications of electors prescribed by the state constitutions of 1787 would seem to furnish strong evidence of what the framers of the Constitution meant to include within the term "qualifications." Most of these constitutions required poll tax payments or property tax payments as a condition of voting.[40] Surely the framers of the Federal Constitution had these provisions of state constitutions in mind in the Convention of 1787, and, therefore, considered the qualifications fixed therein as among qualifications of electors for members of the House of Representatives.[41]

But this historical evidence does not dispose of the argument of those who, though admitting that poll tax payment is a qualification, nevertheless contend that the provision of section 2 of article I of the Constitution authorizing the states to fix qualifications of electors for members of the House of Representatives is limited by section 4 of the same article.[42] Such a position seems to rely entirely on the dictum of Mr. Justice Stone in the *Classic* case in which he stated that "While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action

39. See S. REP. No. 530, 78th Cong., 1st Sess. (1943) (III SEN. MISC. REP. 2-3).

40. 5 THORPE, CHARTERS AND CONSTITUTIONS 3083, 3096, 2623, 2787 (1909). Also 6 *id.* at 3248.

41. See Note, 11 GEO. WASH. L. REV. 73, 77 (1942).

42. See statement in *Hearings Before the Subcommittee on Elections of the House Committee on House Administration,* 80th Cong., 1st Sess., at 16 (1947).

by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' "[43]

Viewed in isolation, the quoted dictum lends plausibility to the contention made. But can such a dictum be reliably interpreted in isolation? Viewed in context, the language of the Justice seems clearly to refer to the first part of section 2 of article I relating to the popular choice of representatives rather than to the second part relating to qualifications.

The *Classic* case in no way involved the qualifications of voters. The defendants were indicted for wilfully altering and falsely counting and certifying ballots of qualified voters cast in a primary election and the opinion throughout presupposes that the ballots in question were those of qualified voters.

At another point in his opinion Justice Stone, after referring to the primary in Louisiana as an essential part of the procedure of popular choice of Congressmen, stated that "the right of qualified voters to vote at the congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice."[44]

That Justice Stone was referring to popular choice of representatives and not to qualifications is more clearly corroborated at an earlier point in the opinion when he states: "Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise, a wide discretion in the formulation of a system for the *choice* by the people of representatives in Congress."[45] (Emphasis added.) Considered in context, then, it would seem clear that the Stone dictum affords no support for congressional regulation of the qualifications of electors of national officers.

It is also insisted with great repetition that the Supreme Court has declared repeatedly that the right to participate in congressional elections, including primaries, is a right derived from the United States Constitution and not from the states.[46] All of this is quite true but it proves nothing. The cases cited most frequently in this connection are *Ex parte Yarbrough, United States v. Classic,* and *Smith v. Allwright,* and in all of these cases the plaintiffs were qualified voters under state law and no question was raised on this point. There is no question that the elector's right to vote in the election of Representatives,

43. 313 U.S. at 315.
44. *Id.* at 314.
45. *Id.* at 311.
46. Comment, 44 ILL. L. REV. 199, 205 (1949). See also. S. REP. No. 530, 78th Cong., 1st Sess. 3 (1943).

Senators and presidential electors is derived from the Constitution of the United States and that the federal government may safeguard him in the exercise of this right, but the states, within the limits of the same constitution, have the sole authority to define his qualifications.[47]

Finally, it should be noted that even if the proposed federal prohibition of the poll tax were constitutionally valid, it still would afford only a partial remedy for the poll tax evil. Proponents admit that the prohibition could not be extended to the poll tax as a requirement for electors of state officers and they have consequently limited their bills to national elections. The poll tax is equally as bad a qualification for state as for national electors.

But whatever the merits of the constitutional arguments relative to national prohibition of the poll tax, there can be no justification, consistent with political democracy, for the responsible leaders of the five remaining poll tax states to take any stand against state repeal of the restriction. This would be the more appropriate, as well as the more effective way, to eliminate it. The only other method that seems to be either constitutional or practicable is that of constitutional amendment.

Inequality through Dilution of Vote

A very effective variant on the more widespread methods of denying equality of suffrage in the South is found in the so-called county unit system of Georgia. This device does not deprive certain classes of citizens of the suffrage outright, but it has the effect of so diluting their votes as to render them relatively ineffective. In that state the nominations of state officers and of United States Senator are effected by a county unit vote rather than by popular vote.

Under this system each county is allotted twice as many unit votes as it has representatives in the lower house of the legislature. This formula gives six unit votes each to the eight largest counties of the state, four each to the thirty next largest, and two each to the remaining 121 counties. The total unit vote of a county goes to the candidate receiving a plurality of the popular vote of that county, and the winning candidate in the primary must have the majority of the unit votes.

When a group of voters of Fulton County, the most populous in the state, attacked this system as violative of their rights under the fourteenth and seventeenth amendments in the United States district court, they showed that their votes had on the average but one tenth of the weight of those in other counties, that a vote in one county would be worth 120 times each of their votes and that in forty-five

47. See *Ex parte* Yarbrough, 110 U.S. 651 (1884).

counties a vote would be worth twenty times the vote of each of them.

The district court dismissed their petition and was sustained by the Supreme Court of the United States in *South v. Peters*,[48] with only the comment that "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from the state's geographical distribution of electoral strength among its political subdivisions." Thus the Court exercised its discretion and evaded the situation by the traditional practice of washing its hands of political questions. Justice Douglas, with whom concurred Justice Black, thought this was not an appropriate case for such restraint. He thought the evidence showed that Georgia's system of consolidating votes in primary elections makes a discrimination as invidious as if the state should reduce the votes of Negroes, Catholics or Jews so that each got only one tenth of a vote, in which latter case he doubts not the Court would strike the law down. The substantial discrimination is against the citizens in the more populous counties and this, he insists, is in clear violation of the equal protection of the laws clause of the fourteenth amendment. "The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government."[49]

Certain previous opinions of the Court support the view that the federally protected right of qualified citizens to vote includes their right to have their expression of choice given full value and effect by not having their votes impaired, . . . diminished, or diluted."[50] It is clear that in this case the right suffers as substantial a "dilution" as in the case of bribery of voters or the stuffing of ballot boxes.

Clearly the Court may not interfere with political decisions made under laws affording an equal voice to each citizen at the ballot box, but in the *South* case it is clear that some voters were prevented from taking part in the choice of their officials on an equal basis with others, and thus the channels of free political process were in large part closed.

Regardless of the merits of the constitutional question involved, the blow to political democracy remains. In a democracy the freely expressed voice of each voter must be as nearly equal as possible. The emphasis must be upon the dignity and integrity of each individual voter rather than upon the equality of political districts without regard to people. Of course there will be differences in influence growing out of differences in character and intellect, but once a voice is freely expressed at the ballot box it must not be subject to any weighing process.

48. 339 U.S. 276, 77 (1950).
49. *Id.* at 279.
50. United States v. Saylor, 322 U.S. 385 (1944).

Political Rights of Federal Employees

As early as 1882,[51] the Supreme Court sustained an act of Congress, which forbade certain classes of officers of the United States to request from, give to, or receive from, any other officer money, property or anything of value for political purposes.[52]

In 1939, Congress enacted the so-called Hatch Act, section 9(a) of which provides that no employee in the executive branch of the federal government "shall take any active part in political management or in political campaigns," and subjects any one violating this section to immediate removal from his office or position.[53] A divided Court held this law constitutional in a case[54] involving one Poole, a roller in the Mint, who was at the same time serving as a ward executive committeeman of his political party and as a worker at the polls. Against the contention that the statute violated the employee's first amendment rights of free speech and press, necessary elements of political activity, the Court replied that such restrictions clearly fall within the range of congressional power to safeguard the efficiency and integrity of the federal service.

A later amendment, which constitutes section 12 (a) of this act, provides that: "No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall . . . take any active part in political management or in political campaigns." Acting under the authority of this section, the Civil Service Commission of the United States ordered the removal from office of a member of the Oklahoma State Highway Commission, who was at the same time serving as chairman of the State Central Committee of the Democratic Party and was in charge of the arrangement for the committee of a "victory dinner" for the purpose of raising money for the party. In upholding the removal, the Court rejected the contention of the State of Oklahoma that the coercive effect of the authorization to withhold money allocated to a state violated its reserved power under the tenth amendment, and declared that Congress had the right to fix the conditions under which the states shall receive federal loans or grants-in-aid. Oklahoma was free to choose between dismissing the commissioner and refusing to accept the federal funds.[55]

These cases are based on the assumption, which apparently enjoys wide support, that Congress may, as a condition of employment, impose upon those citizens who are public employees restrictions

51. *Ex parte* Curtis, 106 U.S. 371 (1882).
52. Act of August 15, 1876, c. 287, 19 STAT. 169.
53. 53 STAT. 1147 (1939), 5 U.S.C. § 118i (1952).
54. United Public Workers, CIO v. Mitchell, 330 U.S. 75 (1947).
55. Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947).

which it may not impose on other citizens. The general right to engage in political activity does not carry with it a special right to public employment.

RACIAL DISCRIMINATION AND EQUAL PROTECTION OF THE LAWS

Many Supreme Court cases since 1937 have involved the issue of racial discrimination. Only a few of these deemed most significant as charting doctrinal trends can be considered here. It may be noted, however, that these cases, taken as a whole, reflect a consistent, though sometimes cautious, tendency on the part of the Court during these two decades so to interpret the fourteenth amendment and other pertiment provisions of the Constitution as to insure genuine equality of public treatment to racial minorities.

Doctrinal progress in this direction can be illustrated by a brief review of cases concerning segregation with respect to: (1) the acquisition and occupancy of real property; (2) access to public transportation facilities; and (3) the right to equal educational opportunity.

Segregation in Residential Areas

Three cases[56]—all decided since the beginning of 1948—have gone far to free the colored race from old restrictions with respect to the acquisition, occupancy and conveyance of real property. This emancipation has come about largely through an expansion of the concept of state action on the part of the Supreme Court. It had been held in the *Civil Rights* cases[57] as early as 1883 that the fourteenth amendment does not forbid private discrimination against the Negro. This doctrine was, of course, applicable in decisions holding that private property owners may covenant with one another not to sell or lease their property to Negroes. These "restrictive covenants," as they were called, became more important after the Supreme Court ruled in *Buchanan v. Warley*[58] in 1917 that an ordinance of Louisville, Kentucky, setting up exclusive residential areas based on color was in violation of the fourteenth amendment. Such segregation of races in residential areas could still be effected through private covenants if violation of the covenants could be enforced in the courts. In 1926 private covenants forbidding the transfer of land to or its use by Negroes for a period of years was unanimously sustained in *Corrigan v. Buckley*[59] on the ground that the discrimination was not effected by state action.

56. Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948).
57. 109 U.S. 3 (1883).
58. 245 U. S. 60 (1917).
59. 271 U.S. 323 (1926).

The Supreme Court avoided meeting this issue in subsequent cases for more than two decades.[60] In 1948, however, the Court held that racially restrictive covenants may not be enforced in equity by state courts against Negro purchasers.[61] Although such covenants are valid as between private persons, enforcement by the state courts constitutes a denial of the equal protection of the laws. The fact that the state uses its courts to give effect to the discriminatory private contract makes the state a party to the action. In *Hurd v. Hodge*,[62] decided the same day, restrictive covenants in the District of Columbia were held equally unenforceable in federal equity courts. Here the Court sidestepped the constitutional issue and held the restrictive covenants are prohibited by the section of the Civil Rights Act of 1866, which provides that "all citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property. . . ."[63]

In the recent case of *Barrows v. Jackson*[64] the Court went further and ruled by a six-to-one vote that a state court may not for the same reason as set forth in the *Shelley* case take jurisdiction of a damage suit at law for breach of the restrictive covenant brought by one white covenanter against another. For state courts to entertain such damage suits amounts to state encouragement of the use of restrictive covenants, said Mr. Justice Minton, and thus coerces the property owner to continue to use his property in a discriminatory manner. It is, therefore, the state's choice that he either observe the covenant or suffer damages. These cases would seem to invalidate any state assistance to private efforts to enforce racial discrimination with respect to the use or conveyance of property. Nevertheless the Supreme Court in 1950 refused to review a decision of the New York Court of Appeals holding that a private housing corporation could exclude Negroes from a housing project constructed with the assistance of the state's power of eminent domain and city tax exemption for twenty-five years.[65]

It appears from a more recent case[66] that where the state court merely refused to interfere with discrimination arising from a private agreement the action of the court is not state action as in *Shelley* and *Barrows* where the agreement had been ineffective without judicial

60. Hansberry v. Lee, 311 U.S. 32 (1940); Mays v. Burgess, 147 F.2d 869 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 868 (1945).
61. Shelley v. Kraemer, 334 U.S. 1 (1948).
62. 334 U.S. 24 (1948).
63. REV. STAT. § 1978 (1875), 42 U.S.C. § 1982 (1952).
64. 346 U.S. 249 (1953).
65. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).
66. Black v. Cutter Laboratories, 351 U.S. 292 (1956). See also Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955).

intervention. In these cases the action of the court had the effect of forcing discrimination on parties willing to deal on a non-discriminatory basis.

Segregation in Transportation Facilities

Cases involving segregation in public transportation facilities have been decided under such diverse constitutional provisions as the commerce and equal protection clauses. Under both provisions the Supreme Court has followed a tortuous and confusing course in the determination of the difficult questions that have come before it. In the first Jim Crow case[67] the court in 1878 held invalid as a burden on interstate commerce a Louisiana reconstruction statute forbidding steamboats on the Mississippi River to segregate passengers according to race. In this case a Negro woman was refused accommodations in the white cabins on a Mississippi steamer traveling from New Orleans to Vicksburg, Mississippi. This, the Court said, was a subject requiring uniformity of regulation which only Congress could adopt, and in the absence of congressional regulation the carrier was free to enforce such regulations for the arrangements of his pasengers as he might deem "most for the interest of all concerned."

But some years later the Court sustained laws requiring segregation within a state on the ground that they regulated only intrastate commerce and hence imposed no burden on interstate commerce.[68]

In *Plessy v. Ferguson*[69] in 1896 the equal protection clause of the fourteenth amendment likewise failed as a bulwark against Jim Crow legislation. Here a Louisiana statute providing separate but equal accommodations for white and colored persons on railroads in the state was held not to deny equal protection of the laws. On the contrary, it was a valid exercise of the state police power to preserve public peace and good order.

Justice Brown rested the conclusions of the Court largely on the observation that the underlying fallacy in the argument of the Negro plaintiff consisted in "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[70] But Justice Harlan declared in dissent that "there can be no doubt but that segregation has been enforced as a means of subordinating the Negro, and that "the thin disguise of 'equal' accommodations . . . will not mislead anyone, nor atone for the wrong this day done."[71]

67. Hall v. DeCuir, 95 U.S. 485 (1878).
68. Louisville, No. O. & T. R. Co. v. Mississippi, 133 U.S. 587 (1890).
69. 163 U.S. 537 (1896).
70. *Id.* at 551.
71. *Id.* at 562.

Thus segregation with respect to transportation facilities became constitutionally reconcilable with equality, and the formula of "separate but equal" operated for more than a half century to perpetuate what later came to be regarded as a gap between the theory and practice of equality of the races before the law. To be sure, the separate accommodations must be equal, but the Court until the 1930's was extremely lenient in its construction of the requirements of equality. This was especially true with respect to equality of educational opportunity as we shall see shortly.

After the *Plessy* decision the opponents of segregation again turned to the commerce clause since the *De Cuir* case had not actually been overruled. But it was not until a half century after *Plessy* that the commerce clause was successfully invoked against segregation in public transportation. However, there was a tendency in some earlier cases to interpret more rigidly the requirements of equality. For example, in *McCabe v. Atchison, T. & S. Fe Ry.*[72] in 1914, an Oklahoma statute which permitted carriers to provide sleeping and dining cars for white persons only was held invalid, despite the legislative recognition that there would be little demand for them by colored people.

Finally in *Mitchell v. United States,*[73] decided in 1941, the Court construed the Interstate Commerce Act to require equal accommodation for Negroes. A. W. Mitchell, a Negro Congressman from Chicago, travelled from Chicago to Hot Springs, Arkansas, on a ticket which entitled him to Pullman accommodations. After crossing the Arkansas border he was ejected from the Pullman car and forced to ride in a day coach reserved for colored passengers. The railroad purported to provide Negroes with separate but equal facilities required by the Arkansas statute, by permitting Negroes who wished Pullman accommodations to buy drawing room space at ordinary Pullman rates and no such space was available on this occasion. It was not disputed that there was little demand for Pullman space by Negroes. Mitchell filed a complaint with the Interstate Commerce Commission claiming discriminatory treatment in violation of the Interstate Commerce Act. The Commission dismissed his complaint, but the Supreme Court, speaking through Chief Justice Hughes, unanimously held that Mitchell was entitled to relief. He was entitled to seek this relief under the Federal statute since it forbids discriminatory treatment by railroads on account of race. The test of equality was not met, the Court pointed out, by giving Negroes with first class tickets accommodations equal to those used by white persons traveling on second class tickets nor by allowing them to buy drawing room space, if available. Nor is inequality to be justified by the small number of Negroes desiring

72. 235 U.S. 151 (1914).
73. 313 U.S. 80 (1941).

Pullman accommodations. It is the individual who is entitled to the equal protection of the law.

It is clear, of course, that neither of the two preceding cases challenged the constitutionality of segregation in interstate commerce. They do, however, reveal a new determination on the part of the Court that the constitutional requirement of equality shall be meaningful. Then, in 1946 the Court in *Morgan v. Virginia*[74] reverted to the *De Cuir* doctrine and held invalid a Virginia statute which required segregation on all buses in interstate as well as intrastate commerce. The case involved the prosecution of a Negro woman who refused to move to the back of the bus on the request of the driver when traveling from Virginia to Baltimore. Reversing the state supreme court of appeals which had affirmed the passenger's conviction, the Supreme Court of the United States held the segregation law to be a burden on interstate commerce in matters where uniformity is necessary. As indicated, the Court here followed *Hall v. De Cuir,* and in doing so opened the way, as Mr. Justice Burton suggested in dissent, for other suits in eighteen states where segregation was prohibited. So in *Bob-Lo Excursion Co. v. Michigan,*[75] the Court found the commerce clause being invoked to protect discrimination. In this case the Michigan Civil Rights Act was invoked against an amusement park company which operated a boat between Detroit and an island on the Canadian side of the Detroit River and which refused to transport a Negro girl to the island in company with white girls. The defense was that the state law could not be validly applied to foreign commerce. The majority of the Court held that, although the commerce was technically foreign, the Canadian island was so close to Detroit as to be an amusement adjunct of the Michigan city. *De Cuir* and *Morgan* did not involve such "locally insulated" situations. Finally, the judicial drive against segregation in transportation was continued in the 1950 case of *Henderson v. United States,*[76] but again the Court sidestepped the constitutional issue of whether segregation as such denied equality. The Court found that the practice of the Southern Railway Company in assigning one table in the dining car for the exclusive use of Negroes, separated by a curtain from ten other tables reserved for whites, violated the provisions of the amended Interstate Commerce Act which made it "unlawful for any railway engaged in interstate commerce to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatever."[77] The Court rejected the argument that the segregation was rendered

74. 328 U.S. 373 (1946).
75. 333 U.S. 28 (1948).
76. 339 U.S. 816 (1950).
77. 54 STAT. 902, 49 U.S.C. § 3(1) (1946).

reasonable by the possibility that white passengers could be subjected to the same disadvantage as Negroes.

Despite the Court's insistence upon a more genuine equality in these later transportation cases, it carefully avoided making any assault upon the citadel of "separate but equal." This historic feat was reserved for the field of education.

It may be stated at this point that following the segregation case of *Brown v. Board of Education*,[78] which will be discussed presently, the Court, in a series of per curiam opinions, held[79] segregation on intrastate buses, on public golf courses, public beaches, parks and playgrounds to be a denial of the equal protection of the laws clause of the fourteenth amendment. In all of these cases the Court simply cited *Brown v. Board of Education.*

Segregation in Education

With *Missouri ex rel Gaines v. Canada*[80] in 1938, the Supreme Court started on a course of doctrinal liberalism in the interpretation of the equal protection clause in relation to educational opportunity which carried it, without deviation to the climactic school segregation decisions of May 17, 1954. From this case on the Court consistently enforced a much more rigid test of equality. It insisted on reviewing more critically the facts of the cases brought before it to ascertain whether equality was in truth afforded. In the education cases decided in the nearly sixty years between *Plessy v. Ferguson* and the school segregation cases of 1954, the Supreme Court at first evaded the "separate but equal" issue,[81] then apparently tacitly accepted it without confronting it head-on, and finally interpreted the "equal" side of the formula so rigidly as to make it virtually impossible to comply with it under segregation.

Under the *Plessy* doctrine, which was never directly ruled on by the Supreme Court in an education case until the cases of 1954, the public segregation is valid only if the separate facilities provided for the races are equal. Prior to 1938 the Court was as lenient in construing the requirements of "equality" in the school system of the segregated states as it had been with respect to public transportation facilities. Indeed the disingenuousness of the protection afforded by the "separate but equal" formula is even more apparent in the field of education than in other areas. It is common knowledge that Negro schools in segregated states have been conspicuously inferior to white schools, and only in recent years have they approached, and in some

78. 349 U.S. 294 (1954).

79. Owen v. Browder, 352 U.S. 903 (1956); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955); Holmes v. Atlanta, 350 U.S. 879 (1955).

80. 305 U.S. 337 (1938).

81. See Cumming v. County Board of Education, 175 U.S. 528 (1899).

cases achieved, substantial equality. For many years, as indicated above, the Supreme Court was able to avoid recognition of this fact. In the first school case to reach the Court after *Plessy v. Ferguson,* the Court found no denial of the protection of equal laws in the action of a local school board in discontinuing for economic reasons a Negro high school while continuing to operate the existing high school for whites.[82] In this case the fact of segregation was not challenged. Negro taxpayers simply sought to restrain the school board from using tax money to support a white high school until equal facilities for Negroes were provided.

In 1908 the Court sustained a Kentucky statute,[83] even as applied to a private college, forbidding the teaching of white and colored persons in the same institution. The Court was again able to escape passing on the segregation problem by basing its decision on the right of the state to withhold privileges from one of its own created corporations.

In *Gong Lum v. Rice,*[84] in 1927, the Court held that an American-born Chinese girl could be compelled, without denial of the protection of equal laws, to attend a school for colored children in a neighboring school district against her desire to attend the nearby school for white children. Again the "separate but equal" doctrine was not challenged. The petitioner took the position that because there were no separate schools for Mongolians she was entitled to enter the white public schools in her own district in preference to the Negro schools in another district. Her counsel advanced this interesting argument: "The white race creates for itself a privilege that it denies to other races; exposes the children of other races to risks and dangers to which it would not expose its own children. This is discrimination." But Chief Justice Taft treated the interesting equal protection issue posed here as though it had already been well settled by the Court. If the question were new it would call for "full argument and consideration," he said, but he thought "it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts . . . ." It should be noted that the precedents cited by the Chief Justice are either state or lower federal court decisions. The Supreme Court had never ruled directly on the issue of segregation and equal protection in public educational institutions, although the equal but separate doctrine had apparently received the blessing of the Court in dicta.

With the *Gaines* case[85] in 1938, the Court began to take much more seriously the "equal" part of the "separate but equal" formula. In this case the Court held that Missouri denied equal protection of the

82. *Ibid.*
83. Berea College v. Kentucky, 211 U.S. 45 (1908).
84. 275 U.S. 78 (1927).
85. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

laws to Gaines, a Negro, in refusing him admission to the University of Missouri Law School when the state had provided no substantially equal facilities for Negroes within its jurisdiction. Missouri, like other Southern states, had provided for the payment of tuition fees of qualified Negro citizens of the state in the law schools of unsegregated states and insisted that by this arrangement it had met the "separate but equal" requirement.

This contention was flatly rejected by the Court. Chief Justice Hughes, speaking for the Court, asserted that equal protection requires that Missouri provide equal facilities for Negroes and whites within its own boundaries. "The admissibility of laws separating the races in the enjoyment of privileges afforded by the state rests wholly upon the quality of privileges which the law gives to the separated groups within the state," declared the Chief Justice. The provision for the payment of tuition fees in another state does not remove the discrimination, for "obligation of the state to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction."

Nor did the state's argument that there was little demand for legal education on the part of Negroes in Missouri have any bearing on the issue. The right asserted by the petitioner, said the Court, was a personal one and could not be abridged because no other Negroes sought the same opportunity.

In a similar case in 1948, the Court applied and clarified the *Gaines* ruling by holding that the State of Oklahoma must not only provide a young Negro woman "an opportunity for legal education withim the state equal to that provided the whites but must provide it as soon as it does for applicants of any other group."[86]

The big surge towards repudiation of the "separate but equal" theory came in 1950 when the Court in two vitally significant cases, unanimously and emphatically condemned racial segregation in the professional and graduate schools of state universities. In the first of these cases, *Sweatt v. Painter*,[87] the Court held that the barring of a Negro applicant from the University of Texas Law School had deprived him of the equal protection of the laws, even though Texas had, at considerable expense, provided a separate law school for Negroes within the state. In effect, the Court found that a segregated law school for Negroes could not provide them equal educational opportunities. In reaching such a conclusion, against the argnment of the State of Texas that the new law school for Negroes afforded equal facilities, the Court relied heavily on "those qualities which are incapable of objective measurement but which make for greatness

86. Sipuel v. Board of Regents, 332 U.S. 631 (1948).
87. 339 U.S. 629 (1950).

in a law school." Chief Justice Vinson contrasted the two law schools with respect to such matters as the reputation of the faculties, the size of the student bodies and libraries, the influence and prestige of the large body of alumni of the University Law School as against the single alumnus of the Negro law school, the experience of the administration, and the traditions and prestige of the University Law School in general. The Court also pointed to the practical disadvantages incident to the state's exclusion from the Negro law school of eighty-five per cent of the population of the state, which group includes most of the lawyers, judges, jurors, witnesses and other officials with whom Negro lawyers would necessarily have to deal in the practice of their profession.

In short, legal education equivalent to that offered by the state to white students was not available to Negroes in a separate law school as offered by the state. Nevertheless, the Court, adhering to the principle of deciding constitutional questions only in the context of the particular case before it, explicitly refused either to affirm or to re-examine the doctrine of *Plessy v. Ferguson.* It simply held that the equal protection clause of the fourteenth amendment required Sweatt to be admitted to the University of Texas Law School. But it raised the standard of equality to such a level as to make it virtually impossible for any scheme of segregation to meet the test of constitutionality.

The *Sweatt* ruling was reinforced in the *McLaurin* case[88] where the Court held that enforced segregation of the scholastic activities of a Negro graduate student who had been admitted to the state university under Court order was a denial of equal protection in that it handicapped him in the effective pursuit of his graduate studies. McLaurin was segregated from his fellow students with respect to seating arrangements in the university dining room, the library and the classroom. These restrictions, said Chief Justice Vinson, "impair and inhibit his ability to study, to engage in discussions, and exchange views with other students, and, in general, to learn his profession." Against the argument that McLaurin's fellow students might refuse to associate with him regardless of state discrimination, the Court retorted that this was irrelevant. "There is a vast difference—a constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of students to commingle where the state presents no such bar."

Here the Court leaned even more heavily upon psychological and other intangible factors than in the *Sweatt* case, but again it refused to re-examine the *Plessy* case. In both of these cases the Court had,

88. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

in effect, rejected segregation without repudiating or overruling the "separate but equal" doctrine. It was able to do this because there was before it in these, as in earlier cases, a specific racial discrimination within the pattern of segregation and it could, therefore, grant relief to the Negro plaintiffs without the necessity of re-examining the "separate but equal" doctrine. Nevertheless, these two cases had the effect of divesting *Plessy v. Ferguson* of its constitutional substance and paved the way for the historic segregation decisions of May 17, 1954.

The School Segregation Cases

The Supreme Court's consideration of these cases was marked by extraordinary caution and deliberation. When the Court convened in the fall of 1952, five cases in which racial segregation of children in public schools was squarely challenged as unconstitutional, awaited its consideration. Four of these cases arose from the States of South Carolina, Virginia, Delaware and Kansas and one from the District of Columbia. After hearing argument on the five cases in December, 1952, the Court failed to reach a decision in the 1952 term, and on June 8, 1953, ordered the cases restored to the docket for re-argument in the 1953 term. On this occasion the Court resorted to the unusual practice of requesting counsel to provide answers, if possible, to certain important questions posed by the Court.

Essentially what the Court wanted to know was: first, whether there was historical evidence to show the intentions of those who proposed and approved the fourteenth amendment with respect to its effect upon racial segregation in the public schools; and second, if the Court should find segregation in violation of the fourteenth amendment, what sort of decree could and should be issued to effect an orderly termination of segregation? Especially on this latter point, may the Court, "in the exercise of its equity powers, permit an effective gradual adjustment . . . from existing segregated systems to a system not based on color distinctions?"

The cases were re-argued in December, 1953, with elaborate briefs on the intention of the framers and ratifiers of the fourteenth amendment. The Court still proceeded with caution and deliberation and did not hand down its decision until May 17, 1954.

The four cases arising from the aforementioned states were considered in a consolidated opinion under the style of *Brown v. Board of Education.*[89] In these cases the question of the constitutional consistency of racial segregation and equal protection of the laws was directly presented to the Court. Findings of fact in the lower courts showed that colored and white schools had been equalized, or were

89. 347 U.S. 483 (1954).

being equalized, in so far as tangible factors were concerned. The charge made here was that public segregation per se denied equal protection.

Chief Justice Warren, again emphasizing the intangible factors of *Sweatt* and *McLaurin,* declared for the unanimous Court that such considerations apply with added force to children in grade and high schools. To separate children of the minority group from others of similar age and qualifications solely because of their race creates a feeling of inferiority as to their status in the community, and this sense of inferiority affects the motivation of the child to learn. Hence the Supreme Court agreed with the Kansas court that "Segregation with the sanction of law . . . has a tendency to [retard] the education and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." The Court, therefore, concludes that the doctrine of "separate but equal" has no place in the field of public education, that "separate educational facilities are inherently unequal," and that the plaintiffs here involved "have been deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[90]

In reaching this conclusion the Court considered "public education in the light of its full development and its present place in American life throughout the Nation." "In approaching this problem," said the Chief Justice, "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written." Moreover, the historical evidence submitted by counsel and supplemented by the Court's own investigation was inconclusive as to the intended effect of the fourteenth amendment on public education.

The Court did not issue a decree putting its decision into effect on May 17, 1954, but rather ordered the cases restored to the docket for further argument in the 1954 term of the Court on the nature of the decrees by which its decision is to be given effect. This postponement seemed wise in view of the difficulties and complexities of the problems that must be faced and solved in the several affected states.

Certainly no case of such vital national, and even international, importance has been decided by the Supreme Court in the present century. Indeed one of the foremost students of American constitutional law thinks "It is doubtful if the Supreme Court in its entire history has rendered a decision of greater social and ideological significance than this one."[91]

Whatever the difficulties of adjustment to this historic decision—

90. *Id.* at 495. Segregation in the District of Columbia was held in Bolling v. Sharpe, 347 U.S. 497 (1954), to violate the due process clause of the fifth amendment.

91. CUSHMAN, LEADING CONSTITUTIONAL DECISIONS 433 (10th ed. 1955).

and the events since 1955 indicate that they are many, serious and even explosive—an opposite decision would have placed the Court in an awkward position both morally and constitutionally. Recent developments with respect to segregation in both transportation and education had pointed to the decision reached by the Court. Otherwise some back-tracking on *Sweatt* and *McLaurin* would have been necessary, and the Court would have found itself in the absurd position of using the commerce clause to prevent racial segregation in transportation and rejecting equal protection and due process for the same purpose in public education.

Although desegregation in some areas may not in fact follow the decision for years to come, there are many who will argue that the Court has by the very announcement of the decision elevated the Nation's standard of public morality and contributed measurably to the bridging of the gap between American principles and American practices in this important area of human relationships. The ruling is a resounding vindication of Justice Harlan's vigorous and eloquent dissent in the *Plessy* case and, as he would doubtless say, goes far to "atone for the wrong" that day done. "Our Constitution," said Harlan, "is color blind and neither knows nor tolerates classes among citizens." On the other hand there are others who will heatedly insist the decision is not only wrong but even "illegal", and this group is doing, and will continue to do, everything within its power to prevent the enforcement of the decision.

As already pointed out, the Court did not issue a decree putting its decision into effect on May 17, 1954, but rather ordered the cases restored to the docket for further argument on the nature of the decrees by which its decision might be given effect.

In its implementing decision of May 31, 1955,[92] the Court pointed out that its earlier opinions "declaring the fundamental principle that racial discrimination in public education is unconstitutional are incorporated herein by reference" and declared that "all provisions of Federal, state, or local law requiring or permitting such discrimination must yield to this principle." The district courts, to which the cases were remanded, are directed to require that the school authorities "make a prompt and reasonable start towards full compliance" with the Court's May 17, 1954, ruling. Once such a start has been made in good faith, the courts may afford additional time to carry out the ruling. In effecting a gradual transition from segregated to nonsegregated schools, the district courts "may consider problems related to the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system determining admission to the

92. Brown v. Board of Education, 349 U.S. 294 (1955).

public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." While it is clear from the language of the Court that all of these procedures must look towards compliance with the Court's ruling at the earliest practicable date, there is no indication that reasonable time will not be afforded for adjustment to difficult local situations. The Court's opinion recognizes diversity of local conditions, and does not contemplate uniform compliance as of a given date. But the Court does demand a prompt and reasonable start towards good-faith compliance.

There are many moderate, but largely silent, people who regard it as unfortunate that the breathing spell afforded by the Court for assessing problems and planning methods of adjustment to its far-reaching decision has been so defiantly employed by the constituted leadership of some of the affected states. Too often, they feel, the appeal has been, not to the law-abiding instincts of the people, but to their prejudices, their hates and their fears.

Reactions in the affected states range all the way from prompt steps towards compliance in some border states to hostile gestures towards the Supreme Court, as for example in Virginia, to outright declarations of nullification in some states of the deep South. Among the formal declarations of hostility may be mentioned the "Interposition" resolution of the Virginia Legislature and the "Declaration of Constitutional Principles" issued on March 11, 1956, by some one hundred Southern Congressmen from eleven Southern states.

The first of these documents is an official resolution passed by an overwhelming majority of both houses of the General Assembly of Virginia. In this resolution the state is said to "interpose its sovereignty" against the decision of the Court and thereby raise "a question of contested power."[93] The resolution appeals to Virginia's sister states to join her "in taking appropriate steps . . . by which an amendment designed to settle the issue of contested power here asserted may be proposed to all the states," and pending the settlement of this issue by constitutional amendment the legislators pledge their "firm intention" to take all measures "honorably, legally, and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers, and to urge our sister states" to assist in the matter.

The second of these documents, commonly known as the Southern Manifesto,[94] is not, of course, an official document but a statement of a minority of the members of the Senate and the House of Representatives. This statement, like the Virginia resolution, does not merely challenge the correctness or wisdom of the Court's decision, but seems

93. Va. S. Res. No. 3. Senate Journal and Documents, Virginia, 1956.
94. See N.Y. Times, March 12, 1956.

to deny the authority of the Court to render the decision. The Manifesto declares that the Supreme Court, without legal basis for its action, "undertook to exercise their naked judicial power" and pledges its signers "to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution . . . ." Thus to characterize the decision of the Supreme Court as unconstitutional is fantastically absurd. It ignores, if it does not challenge, the constitutional development of more than a century and half through the well-established process of judicial review. The decision may be characterized as wrong, improper, or unwise, but under the American theory of constitutional law it may not be characterized as unconstitutional.

From a legal point of view these statements are of no effect and have no significance whatever. But for the fact that they, along with other more extreme declarations, symbolize the extent and intensity of the resistance to the Court's order, they might be dismissed as merely a dramatic show of bad temper. It is not to be ignored, though, that a campaign of "massive resistance" has been launched by the political leadership of some of the affected areas. It is certain that these leaders will leave no stone unturned to circumvent, evade, and delay the application of the Court's ruling. And the extreme irony of all this is that these determined attempts to evade a unanimous decision of our highest constitutional authority are accompanied by loud protestations of "reliance on the Constitution as the fundamental law of the land."

The Manifesto commendably urges that Southerners "scrupulously refrain from disorder and lawless acts," but the intemperate language of other parts of the Declaration is not calculated to curb such disorder and lawlessness.

Basis of Argument That Court Acted "Illegally"

In so far as legal or constitutional justification is claimed for the circumvention of the Court's decision and its characterization as an act of "naked power" with no legal basis, such justification seems to rest on two false assumptions: one, that since neither the fourteenth amendment nor any other part of the Constitution makes any mention of education, no branch of the federal government has any power with respect to education; two, that the Court was without power to set aside "settled" precedents and that in doing so it changed the meaning of the Constitution.

With respect to the first point, it should be clear that the Court assumed no power over education as such. It simply applied a constitutional limitation on the states which applies to education in the same measure as it applies to state conduct of any other activity. In the

conduct of any function whatsoever the state is forbidden by the fourteenth amendment to "deny to any person within its jurisdiction the equal protection of the laws," and education is granted no immunity from this prohibition. The Court was here concerned not with the grant of power or the reservation of power, but with a constitutional prohibition upon the exercise of power. Finding, as the Court did, that segregation in the public schools was in violation of the equal protection of the laws, it simply applied the old and well-established principle that "the supreme law of the land" overrides any state action in conflict with it.

Certainly the precedents lend no support to the suggestion that education enjoys a special immunity from the application of this principle. As long ago as 1819 in the famous *Dartmouth College* case,[95] the Court struck down a state act amending the charter granted to Dartmouth College in the colonial period so as to convert it into a state university. Later the Court exercised its power in the field of education to invalidate a state constitutional provision requiring a test oath of teachers;[96] to invalidate a statutory provision of Nebraska against teaching the German language in the schools,[97] to strike down a state requirement that pupils salute the flag, regardless of their religious convictions to the contrary,[98] and to prohibit the use of tax supported school buildings for religious instruction.[99] These are but a few of the many instances in which the Court has decided controversies relating to education.

The second argument that the Court in overruling "settled" precedents substituted its own personal and political views for the established law and thereby changed the meaning of the Constitution is equally indefensible. Assuming that the precedents were "settled"—concerning which, as previously shown, there is considerable doubt—the implication that the Court was without power to reconsider them is wholly without merit. The Supreme Court has never considered itself precluded from correcting or modifying interpretations, however long established, which it found upon re-examination and more mature reflection to be erroneous, or which changing conditions had drawn out of harmony with the purposes of the Constitution as a living instrument. The Court has usually taken the view of the nature of the Constitution expressed by Chief Justice Marshall in *McCulloch v. Maryland*,[100] in 1819, when he declared that it is "a constitution intended to endure for ages to come, and consequently, to be adapted

95. Dartmouth College v. Woodward. 17 U.S. (4 Wheat.) 518 (1819).
96. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).
97. Meyer v. Nebraska, 262 U.S. 390 (1923).
98. West Virginia State Board v. Barnette, 319 U.S. 624 (1943).
99. Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948).
100. 17 U.S. (4 Wheat.) 316 (1819).

to the various crises of human affairs." As Mr. Justice Field remarked in 1894, in response to a contention that the position of the Court was in conflict with two of his own previous opinions, "it is more important that the Court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."[101]

Indeed there have been scores of prior decisions which the Court has directly overruled and many more in which previously enunciated doctrines have been substantially modified. A striking example of the Court's responsiveness to changed conditions is the case of *Edwards v. California*.[102] A California statute prohibited any person from knowingly bringing indigents into the state. There had been legislation of this type in California since 1860, and this statute was now applied to Edwards who was convicted in the state court. The Supreme Court, through Mr. Justice Byrnes, struck down the statute as an unconstitutional burden on interstate commerce. To the argument of the state that the underlying concept of the statute, namely, the concept of local responsibility for indigent persons, was firmly rooted in English and American history, Mr. Justice Byrnes retorted that there is "a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character" and that "the theory of the Elizabethan poor laws no longer fits the facts." The language of earlier decisions which seemed to support the California statute was no longer binding on the Court. He pointed out that one of these decisions, *City of New York v. Miln*,[103] was decided in 1837, and that "Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' " In short, the whole context of the problem had changed, the nation's conception of human want had changed, and Mr. Justice Byrnes and his brethren no longer considered themselves bound by the language of an old decision that seemed to them no longer to reflect the enduring purpose of the Constitution.[104] Just so, when the Court is called upon to apply the broad constitutional principles of liberty and equal protection, it takes account of the moral conscience of the nation.

Judicial Response to Delay and Evasion

It is clearly impossible to consider here all of the complex developments of the past three years in connection with the application, or

101. Barden v. Northwestern Pacific R. R., 154 U.S. 288, 322 (1894).
102. 314 U.S. 160 (1941).
103. 36 U.S. (11 Pet.) 357 (1837).
104. Fairman, *Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83 (1956).

lack of application, of the Court's ruling. Suffice it to say that four years after the decision that racial discrimination in public education is unconstitutional, the first step toward desegregation has not been taken in Virginia and several states of the deep South. On the contrary, consideration of the decision in these states looks solely toward the prevention of its application.

Only a few examples of judicial response to these programs of "massive resistance" can be noted here. Of the five original Supreme Court cases which were, in 1955, remanded to the lower courts from which they came for enforcement in accordance with the high Court's order, two are still pending. They are the Prince Edward County, Virginia, case, and the Clarendon County, South Carolina case. The *Prince Edward* case has come up recurrently since 1955 for a total of some four times. After a number of practical and technical delays, the district court early in 1957 again refused to set a date for the beginning of desegregation in accordance with the order of June, 1955—this time because of opposition to the order, and racial tension prevailing in the community and the possible closing of the schools under Virginia statutes enacted at the 1956 Extra Session of the General Assembly, if the order were enforced. On appeal to the Court of Appeals of the Fourth Circuit, that court responded that "The fact that the schools might be closed if the order were enforced is no reason for not enforcing it. A person may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of the action taken or threatened in defiance of such rights."[105] The court of appeals declared that since more than a year and a half had elapsed since the order was entered and the school authorities had taken no steps to comply with it, the time had come to say to them that they must comply without further delay, and that the trial court had erred in not fixing a time limit for compliance. The Supreme Court has refused to review this holding.[106]

Desegregation decrees of the district courts have been sustained by the court of appeals in four other Virginia cases,[107] involving Arlington County and the cities of Charlottesville, Newport News, and Norfolk. In the Arlington and Charlottesville cases Judge Parker, for the court of appeals, pointed out that it had been two years since the first decision of the Supreme Court in *Brown v. Board of Education* and, "despite repeated demands upon them, the boards of education had taken no steps towards removing the requirements of segregation in the schools. . . . This was not 'deliberate speed' in complying with the

105. Allen v. School Board, 249 F.2d 462, 465 (4th Cir. 1957).

106. Allen v. County School Board, 355 U.S. 953 (1958).

107. School Board of Newport News v. Adkins, 246 F.2d 325 (4th Cir. 1957); School Board of Charlottesville v. Allen, 240 F.2d 59 (4th Cir. 1957).

law as laid down by the Supreme Court but was clear manifestation of an attitude of intransigence. . . ." Furthermore he declared, "The decrees are not harsh or unreasonable but merely require that the law be observed and discrimination on the ground of race be eliminated."[108]

The Courts and Evasive Legislation

The judicial success of state legislation enacted to meet the problems growing out of the *Brown* decision seems to depend on whether the laws appear on their face to be a step towards good faith compliance, or whether on the other hand they are designed to preserve segregation. This point may be illustrated by the lower federal courts' response to the Virginia Pupil Placement Act[109] and the North Carolina Enrollment Act. The Virginia Act was declared unconstitutional on its face because the legislative and executive history behind the Act showed it to be part of a calculated design to preserve segregation.[110] This design, Federal District Judge Hoffman pointed out, was shown in the recommendation of the Gray Commission for the preservation of separate schools; in the passage of the "Interposition Resolution" with its urging that Virginia take all possible steps to "resist illegal encroachment upon our sovereign powers;" in the Governor's message to the 1956 Extra Session of the General Assembly, in which he recommended the continuation of segregated schools in Virginia. Because of this fixed and definite policy of segregation and the enactment of other legislation at the same Extra Session, of 1956, providing for the closing of the schools[111] and the withdrawal therefrom of state funds[112] upon any departure from this policy the Pupil Placement Act was held unconstitutional on its face. The Court of Appeals of the Fourth Circuit subsequently sustained Judge Hoffman's holding.[113]

The North Carolina Pupil Enrollment Act on the other hand has been upheld by the district court and sustained by the same court of appeals that invalidated the Virginia Act.[114] It differs from the Virginia Act in several important respects: assignment and enrollment functions are vested in local school boards rather than in a state board; it does not provide for the automatic closing of any school, nor for the cut-off of state or local funds. In other words, the law places no penalty upon desegregation when it occurs; and in fact a small degree of desegregation has occurred in three cities.[115]

108. School Board v. Allen, 240 F.2d 59, 64 (4th Cir. 1957).
109. VA. CODE ANN. § 22-231.1 to 232.16 (Supp. 1956).
110. Adkins v. School Board, 148 F. Supp. 430 (E.D. Va. 1957).
111. VA. CODE ANN. § 22-188.3 to 188.40 (add. Supp. 1956).
112. Va. Acts Extra Session 1956, c. 71.
113. School Board v. Adkins, 246 F.2d 325 (4th Cir. 1957).
114. *Ibid.*
115. SHOEMAKER, WITH ALL DELIBERATE SPEED 89 (1957).

Thus, while the Court was unable to discern any evidence of "good faith" in the provisions of the Virginia Pupil Placement Act, the North Carolina Pupil Enrollment Act did appear on its face to be a step towards good faith compliance with the ruling of the Supreme Court.[116] It should be noted, however, that the latter act was sustained on the assumption that school officials "will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids."

As to the five Virginia communities involved, they are rapidly approaching the point—and Prince Edward County appears to have reached it—where they must choose between the alternatives of closing the schools, refraining from compulsory segregation, or finding further technical and dilatory devices for circumvention of the Supreme Court's ruling. The last alternative seems the most likely for the next year or two. Of course, this is a losing game, but there seems to be an implacable determination to stretch the losing process over as long a period as possible. When it is considered that each separate school district is a potential battleground, it does not seem unlikely that at least a decade of prolific litigation is in prospect.

If these methods are extreme—and certainly many thoughtful people so consider them—it should be noted that extremism is not confined to one side of this important issue. There are extremists among those who would comply with the Court's order in that they would do the near-impossible before undertaking the relatively simple task. The fact that this latter group has greater provocation for extremism renders their action no less unwise. The extremists who would defy or nullify the Court's decision and those on the other side who insist on starting desegregation in areas where it is most difficult, rather than where it would be relatively easy, alike do ill service both to the cause of public education and to the cause of constitutional government. Neither form of extremism appears to be in accordance with the spirit of the Court's implementing decision.

116. School Board v. Adkins, 246 F.2d 325 (4th Cir. 1957); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956).