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Segregation and the Fourteenth Amendment

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SEGREGATION AND THE FOURTEENTH AMENDMENT *

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Slightly more than 75 years ago, Senator Boutwell said:

> "The thirteenth, fourteenth and fifteenth amendments did limit the power of the States; they did extend the power of the General Government; and the question we are considering almost continually is the extent to which the power of the States has been limited by these amendments and the extent to which the power of the General Government has been carried by these several amendments."[1]

However definitively some constitutional problems may have been left behind, those created by the Civil War Amendments are still before us almost in the identical terms in which Senator Boutwell stated them. Perhaps the reason is not so much that they are insoluble as that they have only recently been receiving adequate consideration.

Their eclipse and emergence can be sketched quickly. In the name of federalism, the Supreme Court at the outset eviscerated the amendments and the statutes passed to implement them.[2] In a day which hears much talk of judicial activism, it is not inappropriate to recall how deliberately judicial power was wielded in what was believed to be a statesmanlike blocking of political efforts to realize in fact the Christian and humanistic ideals which were in large part responsible for the Civil War.

But the freedom of the States from federal interference was not long-lived. Developing in response to demands wholly different from those which primarily brought about passage of the Fourteenth Amendment,[3] the concept of substantive due process thrust the Federal Government deeply into the affairs of the states, although by way of the judicial veto rather than the legislative decree. Once fully developed with reference to economic interests, it was nautral that sooner or later the doctrine should expand to bring personal liberties also under the Supreme Court's protecting wing. This in turn resulted in a re-examination of the reach of the Fourteenth Amendment in protecting basic personal rights from infringement otherwise than by the formal act of the state. That re-examination is continuing, and with particular urgency on the question of segregation.

In considering basic doctrines which are in flux, one cannot avoid having some convictions or attitudes about the historical meaning of the Civil War

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1. 3 CONG. REC. 1792 (1875).

2. See Watt & Orlikoff, *The Coming Vindication of Mr. Justice Harlan,* 44 ILL. L. REV. 13 (1949).

3. The notion that the due process clause was smuggled into the Constitution just to protect corporate interests has been effectively upset. Graham, *The "Conspiracy Theory" of the Fourteenth Amendment,* 47 YALE L.J. 371, 48 YALE L.J. 171 (1938).

amendments. Fortunately our generation has the benefit of a re-examination of the historical data. When Mr. Justice Black, to support his position that the Fourteenth Amendment incorporated the first eight Amendments,[4] planted himself on Horace Flack's 50-year old study of the making of the Fourteenth Amendment,[5] that study got the benefit of a new look. Professor Fairman has given us a powerful brief[6] challenging the incorporation thesis. By the way, he has provided us with a comprehensive survey of the views expressed about the first and fifth clauses of the Fourteenth Amendment, when the Amendment was adopted in Congress and ratified by the States. Professor Frank has re-examined with care the genesis and contemporary understanding of the equal protection clause.[7] And Mr. Graham has given a luminous account of the early antecedents of sections 1 and 5 in the activities of the abolitionists of the mid-west in the 1830's and 1840's.[8]

From these studies, two conclusions emerge quite clearly. The first is that the anticipated enlargement of federal power was the heart of the controversy over the adoption of sections 1 and 5. A typical charge was that section 1 "consolidates everything in one imperial despotism."[9] The second is that there lay behind section 1 the high idealism of men who, believing slavery and all that it implied to be incompatible with the Christian ethic as well as the assumptions of American political life, and finding that their fellow citizens could not be won to corrective action by evangelical appeal, deliberately resolved to turn to national political power to achieve their goals. Mr. Graham's analysis shows how precisely the three-part formulation of section 1 reflects the ideas painfully ground out of the doctrinal controversies of thirty years earlier.

This review of the history clearly shows that sections 1 and 5 of the Fourteenth Amendment are not properly to be regarded with suspicion, as parts of a sordid scheme to maintain political power. Rather they represent the culmination of an idealistic effort to eliminate the degrading concomitants as well as the bare fact of chattel slavery.

This result should be achieved, if possible, without impairment of the essence of federalism; this much the whole structure of the Constitution demands. But if judicial ingenuity falters, and doctrines cannot be found which give adequate power to effectuate the goals of the Amendment with-

4. Dissenting, in Adamson v. California, 332 U.S. 46, 68, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947).

5. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908).

6. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949).

7. Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131 (1950).

8. Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment,* 1950 WIS. L. REV. 479 & 610.

9. Quoted in Fairman, *supra* note 6, at 49.

out sweeping enlargement of federal power, then the historical record shows that the intent was to give whatever power was needed to accomplish these goals, not to deny it altogether. There remain, of course, limits of a political character on the exercise of the power; they have proved to be far from insignificant.

In *Plessey v. Ferguson,*[10] the Supreme Court in 1896 had to consider the question whether by enforcing segregation between whites and negroes the states were denying the equal protection assured by the Fourteenth Amendment. The heart of the Court's argument is contained in two famous sentences: "We consider the underlying fallacy of the plaintiff's argument to consist 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."[11] Of all the *ex cathedra* pronouncements on nonlegal questions by the Court, this must surely be the most unrealistic as well as the most blighting in its effect on American life. As Mr. Justice Harlan plainly saw and stated then, and as every person willing to look must see now, there can be no doubt but that segregation has been enforced as a means of subordinating the negro.[12] Yet fifty years is not a short time, even in the life of social institutions. Judicial assumptions cannot be dislodged without giving some consideration to what has been built upon them. Certainly such considerations will be widely urged and courts will have to reckon with them.

Segregation is, of course, only one facet of the problem of how far the Fourteenth Amendment goes in the direction of assuring to minority groups in the United States full standing as human beings and citizens. One related development that eannot pass without notice is the recent decision of the Court of Appeals for the Ninth Circuit that the Federal Government has the power to protect against private invasion the right of persons to assemble to consider questions of national concern.[13] This holding merely honors the promise made 75 years ago in the dictum of the *Cruikshank* case.[14] The dissenting opinion raises questions of statutory construction rather than constitutional doubts about this degree of encroachment upon state freedom. Presumably the Supreme Court has granted review in order to settle the construction of an important and rather obscurely worded statute. It would be rather a shock to find that the Federal Government lacked the power to protect its citizens in the discharge of their duties of citizenship, when

10. 163 U.S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256 (1896).
11. *Id.* at 551.
12. MYRDAL, AN AMERICAN DILEMMA 575, 581-85 (1944).
13. Hardyman v. Collins, 183 F.2d 308 (9th Cir. 1950), 4 VAND. L. REV. 166, *cert. granted,* 340 U.S. 809 (1950).
14. United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588 (1875).

hostile local sentiment led to a failure of police protection.[15] The possibility of federal intervention in this type of situation would seem calculated to awaken rather than to deaden local incentive to protect unpopular groups in their lawful public activities.

A second recent development that has bearing on the segregation problem is the firm establishment of the doctrine that the Fourteenth Amendment applies to state officials even when their improper action is unauthorized or forbidden by state law. The explicit holding to this effect in the *Screws* case[16] has crystallized in a growing number of lower court decisions.[17] The application of this doctrine, like the one mentioned above, involves an intrusion by the Federal Government into an area normally regarded as belonging to the states and their citizens exclusively. The result is surely in harmony with the spirit of the Fourteenth Amendment, and the most that can be said against the result is that it is possible to read the letter of the Amendment the other way.

A third and closely related development is the holding of the voting cases[18] that the Fifteenth Amendment is invoked when what is clearly a governmental function is being performed, despite efforts to strip the acting agency of all formal vestiges of state authority.[19] An unresolved issue is the application of this doctrine when the function is not strictly a governmental one, but is being performed through the joint efforts of public and private groups. A state may not, it seems clear, bar negroes from a housing project which it has constructed, any more than it could bar negroes by ordinance from portions of the residential land.[20] But may a privately financed residential project which would have been impossible of accomplishment without substantial state assistance bar negroes? The New York Court of Appeals said yes, in a case in which a privately owned $90 million redevelopment project was made possible by the action of New York City in exercising the condemnation power to assemble the plot, in closing certain streets, and

15. A recent episode of similar character was the disturbance at Peekskill, New York, August 27 and September 4, 1949. See VIOLENCE IN PEEKSKILL (1950), a report of the American Civil Liberties Union. The complaint in an action growing out of these events was sustained in Robeson v. Fanelli, 94 F. Supp. 62 (S.D.N.Y. 1950).

16. Screws v. United States, 325 U.S. 91, 65 Sup. Ct. 1031, 89 L. Ed. 1495 (1945).

17. See, *e.g.*, Brandhove v. Tenney, 183 F.2d. 121 (9th Cir. 1950), *cert. granted*, 340 U.S. 903 (1950); Campo v. Niemeyer, 182 F.2d 115 (7th Cir. 1950); Williams v. United States, 179 F.2d 644 and 656 (5th Cir. 1950), *cert. granted*, 340 U.S. 850 (1950); McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949); Burt v. New York, 156 F.2d 791 (2d Cir. 1946); Picking v. Pennsylvania R.R., 151 F.2d 240 (3rd Cir. 1945).

18. Smith v. Allwright, 321 U.S. 649, 64 Sup. Ct. 757, 88 L. Ed. 987 (1944); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948), 1 VAND. L. REV. 645.

19. *Cf.* Marsh v. Alabama, 326 U.S. 501, 66 Sup. Ct. 276, 90 L. Ed. 265 (1946).

20. Buchanan v. Warley, 245 U.S. 60, 38 Sup. Ct. 16, 62 L. Ed. 149 (1917); *cf.* Shelley v. Kraemer, 334 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161 (1948); Birmingham v. Monk, 185 F.2d 859 (5th Cir. 1950).

in granting a 25-year tax exemption on the enhanced value of the property.[21] Three of the seven judges argued powerfully that the answer should be no. The case authorities are meagre, naturally, because the undertaking is of a novel character. Yet the issues are vital. Redevelopment laws are on the books of 25 states. If our cities are to be remade on a grand scale, in a pattern which will endure for several generations, it would be a major calamity for segregation in housing to be frozen into the pattern. The argument has been that private enterprise must be encouraged if redevelopment is to become a fact. The conclusive answer is that too high a price can be paid for enlisting private enterprise, and that if private enterprise wants to exploit opportunities for which it needs extensive public aid, it must forego its prejudices and accept aid on terms that the public itself would have to meet.[22] The failure of the Supreme Court to review the case would be disturbing if it were not that the broad issue was clouded by the fact that after extended discussion at an earlier stage between New York City and the builder it had been the City's deliberate decision not to demand a nondiscrimination clause in the agreement.

In education, as in housing, the limitations on official state action are sharply in dispute at the present time. Professor Frank's study disclosed that when the Fourteenth Amendment was adopted there was a substantial cleavage in opinion as to whether or not the equal protection sought to be guaranteed would exclude racial segregation in education.[23] There was at least strong opinion that it should. And there can be no doubt that unsegregated education, like other experiences in living, working and playing, could contribute greatly to the breakdown of the divisive group attitudes that poison so much of American life today. Yet courts as conscious agencies of social control cannot ignore the force of entrenched patterns of behaviour, hallowed by judicial pronouncements of venerable weight. In the light of present knowledge about society it cannot be doubted that segregated education is incompatible with the kind of equal protection the Fourteenth Amendment sought to provide. But an abrupt and complete outlawing of segregated education might be thought by the Supreme Court to create too violent resistance to be a wise policy, particularly so soon after the first, belated beginnings of the enforcement of the negro right to vote and of legal pressure on segregation in certain areas.[24]

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21. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

22. *Cf.* Abrams, *Stuyvesant Town's Threat to Our Liberties*, 8 COMMENTARY 426 (Nov. 1949).

23. Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131 (1950).

24. Among the more adequate law review discussions of segregation in education, see Notes, 49 COL. L. REV. 629 (1949), 17 GEO. WASH. L. REV. 208 (1949), 3 U. OF FLA. L. REV. 358 (1950).

In *Sweatt v. Painter*[25] and *McLaurin v. Oklahoma State Regents*[26] the Supreme Court was invited to repudiate forthrightly the untenable dictum of *Plessy*. It did not do so, but elected rather to particularize the inherent lack of equality in segregated education at the professional level.[27] Analogous reasoning could be employed to produce the same result at each level of the educational process. And it is not easy to resist the force of the analogy. Yet the Court may feel that distinctions which can be drawn achieve validity, if not from logic, then from the differing impact on established patterns of behaviour and the probable differing degrees of resistance. Certainly if the Court is to apply the analogies all the way down to and including primary education, the path will have to be smoothed by a convincing sociological showing that the common expectation as to the depth of resistance is ill-founded.

Even if the Court is unwilling to go all the way, there is an argument, particularly difficult to answer, against segregation in vocational high schools. The relationship between such schools and employers would seem to be so close as to require the conclusion that, as with law students, segregation in education precludes equal preparation and opportunity for work. If this conclusion is correct, the status of the segregated state college becomes unclear, even assuming that equality of staff can be established.[28] A possible distinction would be whether or not the college offers primarily vocational or cultural training. If the distinction seemed too thin, all secondary and higher education might be found to be too closely tied in with working opportunities to permit segregation. That would still leave primary education untouched. And it is likely that the resistance to enforced association would be at its greatest in just that area.

However the Court finally chooses among the available paths, it is certain that economic pressure is going to be increasingly exerted against segregation. Dual school systems are expensive if neither can be neglected. And courts everywhere are making continued neglect of the negro school systems im-

25. 339 U.S. 629, 70 Sup. Ct. 848, 94 L. Ed. 1114 (1950).

26. 339 U.S. 637, 70 Sup. Ct. 851, 94 L. Ed. 1149 (1950). And see the earlier Supreme Court cases of Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 59 Sup. Ct. 232, 83 L. Ed. 208 (1938); Sipuel v. University of Oklahoma, 332 U.S. 631, 68 Sup. Ct. 299, 92 L. Ed. 247 (1948); Fisher v. Hurst, 333 U.S. 147, 68 Sup. Ct. 389, 92 L. Ed. 604 (1948).

27. Among recent lower federal cases and state cases with similar holdings, see Wilson v. Board of Supervisors, 92 F. Supp. 986 (E.D. La. 1950); Swanson v. Rector and Visitors of University of Virginia, U.S.D.C., W.D. Va., Sept. 5, 1950, noted in 36 VA. L. REV. 797 (1950); Johnson v. Board of Trustees, 83 F. Supp. 707 (E.D. Ky. 1949); University of Maryland v. Murray, 169 Md. 478, 182 Atl. 590, 103 A.L.R. 706 (1936); *cf.* Epps v. Carmichael, 93 F. Supp. 327 (M.D.N.C. 1950); State *ex rel.* Hawkins v. Board of Control, 47 So.2d 608 (Fla. 1950).

28. In Parker v. University of Delaware, 75 A.2d 225 (Del. Ch. 1950), the undergraduate facilities of the University of Delaware and Delaware State College were found not to be equal, and admittance to the University was ordered. In State *ex rel.* Tolliver v. Board of Education, 230 S.W.2d 724 (Mo. 1950), negro and white state teachers' colleges were held to provide substantially equal facilities. *Cf.* State *ex rel.* Hawkins v. Board of Control, 47 So.2d 608 (Fla. 1950), and companion cases.

possible. Unequal salary scales have been found to be unjustifiably discriminatory[29] and corrective action ordered, although in a Georgia case federal court relief was held to have been improvidently granted because of failure to exhaust state administrative remedies.[30] The Court of Appeals for the Fourth Circuit has required the correction of curricular dificiencies and facilities for extracurricular work.[31] Federal district courts in Arkansas and Texas have taken similar action.[32] It may be justifiable to allow a certain amount of time to achieve equality.[33] But there is no justification for Judge Atwell's conclusion that additional courses are not to be required for the negro school unless there are as many as ten students for each class.[34] Two school systems are likely to be uneconomical at best; they become a real luxury where the negro population is very small. But if curricular opportunities are to be equal, as they clearly must be, this beomes a part of the necessary cost of segregation. Could white children then complain that their facilities were unequal because of the larger classes? There would seem to be no logical answer to such a complaint, if it should be presented for judicial consideration.

Apart from the economic pressure exerted by an honest insistence on equality, the application of the "separate but equal" doctrine to schools raises a difficult theoretical problem. In his dissent in the District of Columbia case, Judge Edgerton argued forcefully that equality is impossible of achievement as long as there is segregation.[35] His premise was the unassailable one that the equality guaranteed by the Constitution is individual equality. This proposition underlies the holding in *Shelley v. Kraemer*.[36] The Fourth Circuit Court of Appeals has also stressed that since the protected rights are indi-

29. Freeman v. County School Board, 82 F. Supp. 167 (E.D. Va. 1948) *aff'd mem.*, 171 F.2d 702 (4th Cir. 1948); *cf.* Whitmyer v. Lincoln Parish School Board, 75 F. Supp. 686 (W.D. La. 1948).

30. Cook v. Davis, 178, F.2d 595 (5th Cir. 1949) *cert. denied*, 340 U.S. 811 (1950); *cf.* East Coast Lumber Terminal v. Babylon, 174 F.2d 106 (2d Cir. 1949).

31. Carter v. School Board, 182 F.2d 531 (4th Cir. 1950); Corbin v. County School Board, 177 F.2d 924 (4th Cir. 1949).

32. Butler v. Wilemon, 86 F. Supp. 397 (N.D. Tex. 1949); Pitts v. Board of Trustees, 84 F. Supp. 975 (E.D. Ark. 1949). But not all suits have been successful. See Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950).

33. *Cf.* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351-52, 59 Sup. Ct. 232, 83 L. Ed. 208 (1938); Pitts v. Board of Trustees, 84 F. Supp. 975 (E.D. Ark. 1949); Wrighten v. Board of Trustees, 72 F. Supp. 948 (E.D.S.C. 1947).

34. Butler v. Wilemon, 86 F. Supp. 397 (N.D. Tex. 1949); see McCabe v. Atchison, T. & S.F.R.R., 235 U.S. 151, 35 Sup. Ct. 69, 59 L. Ed. 169 (1914). In Brown v. Ramsey, 185 F.2d 225 (8th Cir. 1950), the court stated that instruction offered in the white schools had to be available to qualified negro students, however few. But the court held that none of the plaintiffs had standing to raise this point. In State *ex rel.* Brewton v. Board of Education, 233 S.W.2d 697 (Mo. 1950), a negro high school student not offered a course in aeromechanics in his high school was held entitled to admission to the white high school.

35. Carr v. Corning, 182 F.2d 14, 22, 32-33 (D.C. Cir. 1950); *cf.* Mendez v. Westminister School District, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd on other grounds*, 161 F.2d 774 (9th Cir. 1947).

36. 334 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161 (1948), 2 VAND. L. REV. 119.

vidual and personal, compliance with the constitutional requirement cannot be established by averaging facilities throughout the community.[37]

Since the Constitution requires individual equality, the question arises as to the standard for determining equality: against whom is a given child to be measured? Presumably against the actual or hypothetical child similarly situated in respects relevant to school attendance such as age, ability and previous education. If the hypothetical child, being white, would have better facilities than the child in question, it would seem that there is a denial of equal protection. If the range of negro schools is equal to the range of white schools, then, on the facts thus far stated, the white child does not have better facilities.[38] But if the factor of residential location is added to the elements being considered, the problem changes. Then individual equality is denied so long as the white child in the same area has better school facilities. But if the negro and white schools in the same area are substantially equal, it would seem to be immaterial that white schools elsewhere are superior. Since segregated patterns of dwelling are still the fact, this conclusion would seem to permit inferior schools for negroes. On the other hand, if the over-all school facilities for the two groups must be equal, improvement in negro school facilities would seem to be a more a likely consequence.

These problems did not confront the Supreme Court in the *Shelley* and *Sweatt* cases when they declared that the right to equal facilities was an individual one. In the *Shelley* case, the asserted equality lay not in the availability of accommodations equal to those being purchased, but merely equality in legal opportunity similarly to exclude others. In the *Sweatt* case, as in the *Canada* case,[39] the issue involved the adequacy of facilities considered on a state-wide basis, without reference to the residential location of applicants. Considering these elements of difference, the Court may define the required equality in educational facilities in terms of the facilities available in the community as a whole.[40]

37. Corbin v. County School Board, 177 F.2d 924 (4th Cir. 1949).

38. If all white schools in a community were identical, the test of the equality of negro schools would be the same on an individual or an averaging basis. But it is assumed that the quality of white schools in any large urban community varies considerably. Proof that this variation was the result of a deliberate practice of favoring the more well-to-do segments of the community would presumably support a claim of denial of equal protection. But the burden of proof would seem to be insurmountable; hence the determination of the equality of the negro schools is considered in the light of the stated assumption that white schools do vary.

39. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 59 Sup. Ct. 232, 83 L. Ed. 208 (1938).

40. It has been held that a plan for regional education does not meet the requirements of equal protection even though the out-of-state regional school is superior to the state school. McCready v. Byrd, 73 A.2d 8 (Md. 1950) *cert. denied,* 340 U.S. 827 (1950); see Notes, 1 VAND. L. REV. 403 (1948), 13 Mo. L. REV. 286 (1948); *cf.* Missouri *ex. rel.* Gaines v. Canada, 305 U.S. 337, 59 Sup. Ct. 232, 93 L .Ed. 208 (1938).

On the right of educational institutions not publicly owned, to exclude negroes, and the effect of state contributions, *compare* Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945), *cert. denied,* 326 U.S. 721 (1945), *with* Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948).

A very similar problem is involved in the question of negro access to public recreational facilities. In *Lopez v. Seccombe,*[41] the federal district court in California merely enjoined discriminatory exclusion of Mexicans from the San Bernardino swimming pool. There was no suggestion of other facilities being available. In a case recently arising in Baltimore, the Court of Appeals for the Fourth Circuit affirmed the dismissal of an action against city officials grounded upon segregation of athletic activities in the city's public parks and playgrounds. The petitioners there refrained from contending that equal facilities were not offered.[42] A district court recently issued an injunction against the exclusion of negroes from the sole municipally-operated swimming pool.[43] The court rejected as unsound the argument of the city that a proposal to build a swimming pool in the negro section of the city at some future time was a present answer to petitioners' assertion of their constitutional rights.

Thus far the problem is relatively simple; it is like the school situation considered on a city-wide basis. Complications arise when the single facility is offered exclusively for the use of different groups at different hours of the day and on different days of the week. This solution was suggested by a district court in upholding the arrangements for Baltimore's municipal golf course[44] and, as adopted by the city of Miami, was upheld by the Florida Supreme Court.[45] The United States Supreme Court has recently told the Florida Supreme Court to re-examine the question in the light of *McLaurin.*[46] No doubt individual equality is not achieved by temporal segregation if the time intervals are substantial. As they become less substantial, the discrimination approaches the trivial, as, for example, in the case of tennis courts available to the two races on alternate hours. It is not trivial in the Florida case, where proportionate demand by the two races was the ostensible test, resulting, at the time of the suit, in negroes being allowed to use the golf course one day a week, whites, six days. Time is certainly a factor in considering the availability of accommodations, and where the discrepancy is as great as here, negroes as a class simply do not have equal facilities for golfing. The Florida court's suggestion that the system was self-correcting because increased demand by negroes would increase the number of days

41. 71 F. Supp. 769 (S.D. Cal. 1944).

42. Boyer v. Garrett, 183 F.2d 582 (4th Cir. 1950); *cf.* Winkler v. Maryland, 69 A.2d 674 (Md. 1949), *cert. denied,* 339 U.S. 919 (1950). See Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari,* 99 U. OF PA. L. REV. 293, 310 (1950).

43. Draper v. St. Louis, 92 F. Supp. 546 (E.D. Mo. 1950); *cf.* Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948).

44. Law v. Baltimore, 78 F. Supp. 346 (D. Md. 1950).

45. Rice v. Arnold, 45 So.2d 195 (Fla. 1950), *cert. granted,* 340 U.S. 848 (1950).

46. In taking certiorari, the Court remanded the case to the Florida Supreme Court "for reconsideration in the light of subsequent decisions of this Court," in *Sweatt* and *McLaurin.* 340 U.S. 848.

allotted to them seems unrealistic, because negroes may not be in a position to make their demands known by putting in an appearance on the prescribed day.

The obvious next question is what happens when equal facilities are offered, but at places substantially separated in space. In the St. Louis swimming pool case, the district judge said, referring to the proposed future swimming pool for negroes: "Even when completed such a pool may mitigate discrimination, but it will not validate it as to other sections of the City."[47] Assuming the pools to be physically equal, or substantially so, any negro has the same opportunity that any white has to go swimming. But if the factor of residence location is included, and if transportation time be regarded as a material factor in considering the availability of facilities, then negroes near the white swimming pool are discriminated against, as are whites near the negro swimming pool. One answer is to say that transportation is not a material factor. That answer is hardly honest, at least for the cases in which the travel time is very great. Suppose, then, the negro swimming pool were put near the white one. This element of difference would disappear; equality would be achieved at the expense of inconvenience for the negroes. Here, as in the case of school facilities, if segregation continues to be allowed in theory, it might be wiser to make the determination of substantial equality without reference to the residential location of individual persons entitled to use the facilities. If the average equivalence test is used, then facilities for negroes would apparently have to be located in somewhat the same relationship to the center of negro population that the white facilities bear to the white center of population.

These complexities emphasize the inherent defects of the proposition that segregated facilities can be equal. But unless the Court is ready to reject the proposition directly, it is not likely to permit itself to be driven to that result by logical extension of the ruling that the protected constitutional rights are individual rights. And to press the logic of the ruling too far may only result in hindering the effort to achieve practical equality.[48]

Thus far, the problems discussed have involved some immediate action by, or attributed to, the state which establishes the discrimination. At least as significant are those cases in which the attempt to discriminate is made without compulsion of state law by a person who is not an official of the state. Private discrimination in the form of exclusion of individuals on grounds of race or color results, of course, in segregation. And such segregation does not automatically assure equal facilities for the excluded groups. The problem

47. Draper v. St. Louis, 92 F. Supp. 546, 550 (E.D. Mo. 1950).

48. If Myrdal is correct in believing that segregation is in large measure a device for effecting discrimination (AN AMERICAN DILEMMA c.28), strong pressure to force equality should have a basic corrective result.

might be described as that of state enforcement of private discrimination. It was apparently put at rest by the declaration in the *Civil Rights Cases,*[49] that discrimination by private individuals was beyond the reach of the Fourteenth Amendment. But *Shelley v. Kraemer* reopened the problem by holding that state courts may not issue an injunction to support uncompelled contractual undertakings not to allow real estate to be sold to or occupied by negroes. The result was hard to avoid in the face of the well-settled determination that states or their subdivisions were not permitted by legislation to prevent negroes from living in certain areas. The decision does raise, however, the broad question whether all private acts of discrimination, depending as they ultimately do, upon the sanction of the state, are not forbidden by the Fourteenth Amendment. Professor Hale in two notable articles pursued this analysis to its ultimate conclusion.[50] Perhaps his thesis may be summed up in the proposition that in civilized society any exercise of rights of property or contract is possible only to the extent that the force of society stands ready to make them effective. Professor Hale's only suggestion for a limiting factor was that the subject matter of the action should be a matter of "high public interest."[51] But if the viewpoint is taken that racial discrimination is inherently evil, contributing to a malignant growth in our society, then every act of discrimination would seem to be a matter of high public concern.

Several recent cases touch upon this issue. One was before the Court of Appeals for the Sixth Circuit—*Whiteside v. Southern Bus Lines.*[52] A negro passenger on an interstate bus trip was asked, when the bus came into Kentucky, to move from a front seat to a rear seat. Upon her refusal to comply, the bus driver called a policeman, who put her off. She instituted a common law action for damages to her person and her property. The court of appeals reversed the district court's dismissal of the complaint. The grounds of decision are not too clear. Reliance was placed on the commerce clause, although no state or local law required the bus company to segregate its passengers. The court observed that no state action was necessary to invalidate conduct which burdened interstate commerce. But the court went on to observe that if state action were required, it was to be found in the participation of the policeman.[53] The interesting point is the suggestion that

49. 109 U.S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835 (1883).

50. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion,* 35 COL. L. REV. 149 (1935); Hale, *Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals,* 6 LAW. GUILD REV. 627 (1946).

51. Hale, *Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals,* 6 LAW. GUILD REV. 627, 630 (1946), taking the phrase from Mr. Justice Cardozo in Nixon v. Condon, 286 U.S. 73, 88, 52 Sup. Ct. 484, 76 L. Ed. 984 (1932).

52. 177 F.2d 949 (6th Cir. 1949).

53. A contrary result was reached by the Fourth Circuit Court of Appeals in Day v. Atlantic Greyhound Corp., 171 F.2d 59 (1948).

forbidden state action might be involved in the assistance furnished by the policeman. What is true of public transportation vehicles should be true of all places of public resort. If a theatre owner calls a policeman to eject a negro who has succeeded in entering the theatre against the wishes of the proprietor, are the policeman and proprietor liable in an action of trespass? The presence of a state statute or local ordinance barring negroes from white theatres would be forbidden state action. In the absence of such a law, the justification for the assault upon the negro would be the privilege of the property owner to exclude from his premises those whom he chose to exclude. That privilege, of course, is state-conferred. Is it, then, prohibited state action?

The Third Circuit case of *Valle v. Stengel*[54] also comes very close to presenting the question squarely. A group of negroes and whites had gone into Pallisades Amusement Park in New Jersey. Several of them had tickets for the swimming pool. When the rest sought to get tickets, the attendant refused to sell them to the negroes. Those negroes who did have tickets were nevertheless denied access to the pool. An argument ensued which was terminated by the eviction of the patrons by the local chief of police, who had been summoned by the management. Suit was brought under various provisions of the Civil Rights Acts and the court of appeals held the action well-founded. Various grounds were relied on. Reference was made to the rarely invoked provisions forbidding interference with the rights of person to make and enforce contracts.[55] But these provisions would seem to have been intended to penalize third persons who prevent the making and enforcing of contracts between willing parties, rather tban, as here, to penalize unwilling parties for refusing to make or perform contracts with negroes. A similar comment may be made as to the claim that denial of admission to the swimming pool, upon presentation of a ticket already purchased, was a denial of the right to lease or hold real or personal property, also protected by the statute.[56]

An additional argument relied upon by the court of appeals was that the defendants acted under color of law to deny the privileges and immunities conferred by the Constitution.[57] Plaintiffs were residents of New York, and thereby of the United States. By New Jersey law, all persons within the jurisdiction are entitled by equal accommodations and privileges at any place of public amusement. Since any citizen of New Jersey was entitled to use the swimming pool, the court reasoned, plaintiffs, as citizens of the United States, were also entitled to use it. Denial of that right by the police chief was therefore a denial, under color of state law, of civil rights guaranteed to

54. 176 F.2d 697 (3d Cir. 1949).
55. REV. STAT. § 1977 (1875), 8 U.S.C.A. § 41 (1942).
56. REV. STAT. § 1978 (1875), 8 U.S.C.A. § 42 (1942).
57. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. Art. IV, § 2.

the plaintiffs by the Fourteenth Amendment. The corporate defendant and its managers were retained as parties defendant, one judge dissenting, on the ground that evidence might support the allegation that they had caused the unlawful acts of the official. This ground of decision seems somewhat questionable if it be assumed, as was probably the fact, that negro citizens of New Jersey as well as of other states were being denied access to the swimming pool.

Another basis for the decision may be suggested. If the law of the state barred negroes, clearly there would have been a denial of equal protection. Normally, in the absence of such a law, the holding of the *Civil Rights Cases* would appear to preclude federal action against a private landowner who discriminates against negroes in allowing entrance upon and the use of his property. Normally, also, official assistance may be invoked by the landowner, without transgressing the Fourteenth Amendment, to effectuate his determination thus to exclude. But in the present situation that privilege of exclusion had been curtailed: the effect of New Jersey's civil rights law was to prevent operators of places of public amusement from discriminating against negroes. Lacking the sanction derived from the existence of the privilege of the property owner, the action of the police chief becomes an arbitrary interference under color of state law with the exercise of equal rights.

The line of argument gives only limited scope for the invocation of federal assistance against discrimination motivated solely by the desires of the private owner. Generally, if there are civil rights statutes in force in the state, they will afford protection and redress if it is desired. But the broader basis for intervention is also hinted at in the eighth circuit case of *Watkins v. Oaklawn Jockey Club*.[58] There the operator of a race track hired the local sheriff to escort Mr. Watkins from the premises, should be venture to appear. When he did appear, after duly purchasing a ticket, he was escorted out by the sheriff. No question of color was involved. The proprietor apparently had a personal dislike of Watkins' conduct. Watkins sued the club for damages for false arrest and false imprisonment and the deprivation of federally protected rights. The complaint was dismissed after trial on the ground that there was no substantial evidence to support a finding that the sheriff and his assistants, in ejecting the plaintiff, were acting in an official capacity. Rather, it was concluded, they were shown to have been acting only as agents of the club, using reasonable means to evict a person whose license to be there had been revoked by the owner of the premises. The court of appeals affirmed on these grounds.

Currently accepted doctrine certainly casts no doubt on the correctness of the result. The interesting aspect of the case is the narrow ground of

58. 183 F.2d 440 (8th Cir. 1950).

decision, with the implication that perhaps the result might have been different if the sheriff and his assistants had been acting in their official capacity when they removed Watkins at the request of the operator of the race track. Unlike the *Valle* situation, the present one does not involve any state law limiting the privilege of the landowner to exclude. Is it the ultimate implication of the *Shelley* case that a landowner in the last analysis owes to the state any effective right he may have to exclude unwanted persons from his property and, therefore, any official action which supports such exclusion is within the reach of the Fourteenth Amendment? If so, and if the policeman had been acting in an official capacity, he and the race track operator would have been subject to suit under whatever of the civil rights statutes might be construed to fit, or in a common law action in which the obvious defenses would be disallowed as unconstitutional.

This conclusion, of course, would appear to upset the long-repeated pronouncement of the *Civil Rights Cases* that the Fourteenth Amendment has nothing to do with private acts of discrimination.

Before re-examining the *Civil Rights Cases,* it may be appropriate to see if there is any earlier stopping point to the holding of the *Shelley* case. A possible argument is that the case merely prohibits the use of the injunction to support private discrimination; that an injunction, being such a unique and powerful form of judicial intervention, has a special character, akin to legislation. This suggestion is not very persuasive. What an injunction does is exert state judicial power in a particular way to induce a contracting party to discharge his obligations. Whether or not an action for damages for breach of contract would be an equally effective persuader would depend upon a variety of factors. Such an action could be most effective in the particular kind of situation here under consideration. A landowner contemplating the sale of real estate to negroes in violation of a restrictive covenant might well be deterred by the threat of multiple suits by cocovenantors. There may be some legal difficulties in the way of proving damages. But that would be rather meagre comfort, particularly in a community in which judge and jury could be expected to be hostile to the seller. In the light of the practical problem involved, the distinction between state coercion in the form of an injunction and state coercion in the form of damage actions seems too trivial to hold. The Missouri Supreme Court thought it would.[59] But Judge Holtzoff, in the District of Columbia, seems to have been clearly right in rejecting the distinction. He stated the holding of the *Shelley* case to be "that it was contrary to the Fourteenth and Fifeenth Amendments to the Constitution and contrary to public policy to aid in the enforcement of such covenants by judicial proceedings."[60]

59. Weiss v. Leaon, 225 S.W.2d 127 (Mo. 1949).
60. Roberts v. Curtis, 93 F. Supp. 604 (D.D.C. 1950).

Judicial enforcement of contractual obligations to discriminate in ways that would be prohibited by the Fourteenth Amendment if required by legislation seems to be banned. The principle might be restated as follows: states are prohibited by the Fourteenth Amendment from compelling private individuals to discriminate, irrespective of whether the obligation to discriminate is imposed by a legislative command or is voluntarily assumed by entering into a contract. In the latter case, of course, individual contract rights are frustrated. But the rights frustrated are somewhat remote: the person most directly involved is seeking to escape a restraint on his own freedom of action.

This principle is a plausible one upon which to stand in attempting to delimit the implications of the *Shelley* case. But even if plausible, there is the question of whether it goes far enough to serve the purposes of the Fourteenth Amendment. But there are other plausible stopping points, short of a ban upon all private discrimination, which would give greater scope to the Amendment without excessive impairment of the principles of federalism.

Deserving of examination in this connection is the proposition that the failure by the state to bar discrimination is state action denying the equal protection of the laws. That state inaction is properly to be regarded as state action under some circumstances is not a novel idea.[61] By general acceptance, the kind of federal antilynching legislation least vulnerable to constitutional attack is the assessment of penalties against local officials and communities by whose connivance or neglect lynchings occur.[62] In international law the responsibility of a state for injuries to persons or property as a result of the inaction of the state and its agencies has long been recognized. Professor Hyde has stated that in presenting claims against foreign states the United States "has correctly asserted that when any agency of a territorial sovereign either wantonly or passively fails to use the means at its disposal to prevent violence or to prosecute the perpetrators, a delinquency in an international sense is apparent and responsibility for the consequences of the action of the mob comes into being. . . ."[63] And Professor Frank has shown that the members of Congress in 1871 believed that a state denied equal protection of the laws when it permitted widespread abuses against them because of their color.[64]

We are here concerned with something more than failure to protect against violence to person or property. But the concept of equal protection of the laws involves more. It may be thought to involve the right to be protected against arbitrary restrictions, like those based on color, wherever the power

61. *Cf.* Catlette v. United States, 152 F.2d 902, 907 (4th Cir. 1943).
62. See Notes, 47 MICH. L. REV. 369 (1949), 57 YALE L.J. 855 (1948).
63. 2 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 951 (2d ed. 1947).
64. Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131, 165 (1950).

of the state reaches. This would mean that a state denied equal protection to the extent that, in the face of actual discrimination, it failed to exercise available legislative power to correct it. The Fourteenth Amendment would then be flouted by a state's failure to pass laws prohibiting discrimination in private employment, private schools, perhaps private rental housing, and all places of public accommodation.[65] The measure of the state's obligation would simply be the limits of its power under due process to prohibit discrimination. Presumably under this limitation it would still be permissible for a home-owner to exclude all of his negro acquaintances from a garden party. But it would not be permissible to exclude negroes as such from private rental housing, schools and employment. In these areas self-enforcement of the equal protection clause by invalidation of defenses in trespass actions would not be feasible since contractual understandings must be arrived at. An unwanted seeker of employment removed from the premises of the employer would hardly be able to overcome the property owner's defense of his privilege by pleading discriminatory denial of the chance to become an employee. If this analysis were accepted, therefore, it would seem to provide at most a basis for federal legislation.

Such a broad extension of the area to which the concept of equal protection applies is obviously open to attack. It hardly fell within the contemplation of the draftsmen that the owner of rental real estate would be prohibited, by force of the Amendment, from selecting and rejecting tenants on any basis, however arbitrary.

It is not so easy to brush aside the suggestion that the equal protection of the laws means the right to be free of restrictions upon access to places of public resort. The proprietor who selects individually those with whom he will deal is in a quite different position from the proprietor who throws open his doors to the public at large. The latter would seem to have foregone his right to pick and choose by deliberately seeking the more extensive patronage which will be attracted by wide-open doors. For a state to permit such a person to exclude solely on the basis of color would seem to be a denial of equal protection. Hotels, restaurants, inns, taverns, stores, theatres, places of recreation and public carriers fall within this class. Yet there is under state law a widely accepted differentiation within the class. Unless a franchise has been granted, the right of the owner arbitrarily to exclude individuals from a place thrown open to the public at large has been recognized.[66] Since the equal protection clause goes beyond discrimination on the basis of color

65. State civil rights laws are collected in KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS (1947).

66. See Madden v. Queens County Jockey Club, 296 N.Y. 249, 72 N.E.2d 697 (1947); *cf.* Powell v. Utz, 87 F. Supp. 811 (E.D. Wash. 1949); Nash v. Air Terminal Service, 85 F. Supp. 545 (E.D. Va. 1949).

and covers all arbitrary discrimination against individuals,[67] it is arguable that the state's infraction would exist only with respect to those enterprises which under state law are forbidden to exclude individuals on an arbitrary basis. Yet for constitutional purposes, the state distinction could reasonably be ignored, and the state's obligation measured by the broader class.

Whether the equal protection clause be construed to stand in the way of racial discrimination by enterprises which by state law are required to be available to all who present themselves, or by all places of public resort, the question of conflict with the *Civil Rights Cases* arises. The proposition of law announced in those cases was that the Fourteenth Amendment does not confer upon the Federal Government the power to prohibit discrimination by private persons. The holding of the case, while far from clear, is certainly less broad. Some langnage in the opinion of Mr. Justice Bradley states quite plainly that the effect of section 5 of the Fourteenth Amendment was merely to authorize federal legislation which would render null and void state laws which, contrary to section 2, required establishments to discriminate on grounds of color.[68] Yet the decision appears to have been predicated upon the assumption that state laws did require equal access for all: "Inkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them."[69] Bradley then continued with the observation that if the state laws themselves made any unjust discrimination, Congress had power to afford a remedy. Elsewhere, assuming that admission to a public place is the right of all classes of men, he asked, "is the Constitution violated until the denial of the right has some State sanction or authority?"[70] Again, in the famous passage declaring that the Amendment was intended only to remedy a denial of rights, "for which the States alone were or could be responsible," Bradley stated: "civil rights . . . cannot be impaired by the wrongful acts of individuals unsupported by State authority. . . . [R]ights remain in full force and may presumably be vindicated by resort to the laws of the State. . . ."[71] It appears, therefore, that he did not address himself to the question here being considered, as to the situation in the absence of state legislation. What Bradley appeared to fear most was the Federal Government's taking over the job of enforcing all rights of every character, irrespective of their recognition or enforcement by the states; an entire machinery superimposed on, and largely superseding, that of the

67. Burt v. New York, 156 F.2d 791 (2d Cir. 1946).

68. Civil Rights Cases, 109 U.S. 3, 11, 13, 3 Sup. Ct. 18, 27 L. Ed. 835 (1883).

69. *Id.* at 25. Bradley did not refer to the status of theatres, which were involved in one of the cases.

70. *Id.* at 24.

71. *Id.* at 17.

states. The statute was stricken down because it "applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens and whose authorities are ever ready to enforce such laws, and to those which arise in States that may have violated the prohibition of the Amendment."[72]

The *Civil Rights Cases* may continue to stand for the proposition that general federal action is not authorized to prohibit private persons from discriminating on the ground of color. The decision does not appear to stand in the way of federal legislation limited to those states where color is a tolerated basis of exclusion from places traditionally open to the public at large.

No attempt seems to have been made to explore the way in which such federal legislation might be appropriately limited in scope to meet the objections explicitly raised in the opinion. Granted that a need for federal action must be shown, how is it to be shown? Would a Congressional finding not wholly devoid of plausibility suffice? Or would the Court, because of the issues of federalism at stake, insist upon the closer scrutiny usually given to legislation restricting civil rights? Assuming a need in some states, how is the application of the statute to be limited to those states? These questions should be examined further. The recent court of appeals cases discussed above reflect a new ferment of ideas stimulated by the *Screws* and *Shelley* cases. The time has come for reconsideration of the scope of federal power to cut down discrimination in places of public resort. The foregoing discussion has the very limited purpose of suggesting avenues to be explored and suggesting that the *Civil Rights Cases* do not present as large an obstacle as is commonly assumed.

Sociologists have rejected the old concept, enshrined in William Graham Sumner's *Folkways,* published in 1906, that law must come from the mores, and cannot go beyond them. It is now generally accepted that legal action, within limits, can influence ways of living.[73] Dramatic demonstrations of the validity of the present concepts have been furnished by the extension of negro suffrage in the South and by the enlargement of federal protection of bodily security under the drive of Supreme Court decisions broadening the reach of the Fourteenth and Fifteenth Amendments. Equally important are the current steps to destroy the pattern of second-class education for negroes, whether they are to be limited to rigorous insistence on equality in educational facilities or enlarged to upset the entire concept of segregation. The commerce clause has proved an effective tool for breaking down the barriers

72. *Id.* at 14.

73. See generally, WILLIAMS, THE REDUCTION OF INTERGROUP TENSIONS (Soc. Sci. Res. Council Bull. 57, 1947).

of discrimination and segregation in interstate transportation,[74] and it appears to be adequate for this purpose in the case of employment.[75] It has been suggested here that the possibility exists for effective action in other areas. The possibility should not be foreclosed by a return to a grudging, restrictive interpretation of the Fourteenth Amendment.

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74. See, *e.g.,* Henderson v. United States, 339 U.S. 816, 70 Sup. Ct. 843, 94 L. Ed. 1302 (1950); Morgan v. Virginia, 328 U.S. 373, 66 Sup. Ct. 1050, 90 L. Ed. 1317 (1946). The latest important federal case—Chance v. Lambeth, 186 F.2d 879 (4th Cir. 1951) —is the subject of a comment, *infra* p. 689, which collects and analyzes the authorities.

75. See Hyman, *Constitutional Aspects of the Covenant,* 14 LAW & CONTEMP. PROB. 451, 475-76 (1949); Hunt, *The Proposed Fair Employment Practices Act; Facts and Fallacies,* 32 VA. L. REV. 1, 3-4 (1945). *Cf.* Steele v. Louisville & N.R.R., 323 U.S. 192, 65 Sup. Ct. 226, 89 L. Ed. 173 (1944); Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946).