

**CIVIL RIGHTS AT A CROSSROAD**

**LAW 805/SECTION 1**

**FALL 2021**

**PROFESSOR JAMES M. DOUGLAS**

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## THE PROFESSOR

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**LOCATION:** Room 221H

**OFFICE HOURS:** Monday, Wednesday and Friday  
11:00 a.m. – 2:00 p.m.  
Thursday  
11:00 a.m. – 2:00 p.m.

**(Other times by appointment)**

### **NOTE FROM THE PROFESSOR:**

The dates listed on the assignment sheet are tentative, and our actual schedule may be slightly faster or slower. We will, however, complete “all” of the assignments before the end of the semester.

I know that this appears to be a lot of work and it is. But this is fun work, and at the end of the fall semester, we will all know a lot more about civil rights, the US Constitution, society and about ourselves. This includes me. Let’s have fun and remember reading and learning is “fundamental”!

## **COURSE BOOKS & MATERIAL**

1. Course materials prepared by Professor James Douglas
2. Supplemental Materials  
Assigned during the semester

## **COURSE DESCRIPTION & OBJECTIVE**

### **DESCRIPTION:**

This course will introduce you to changing faces of civil rights, as it relates to African Americans in the United States. It begins with a look at judicial opinions during slavery and ends with issues related to affirmative action. The course also uncovers the impact social and cultural climate has on judicial opinions and how social activism influences a change in public opinion which in turn produces a change in laws.

### **OBJECTIVE:**

To increase your understanding of the relationship between lawyers and social activists and the role both play in changing the law. You will also have a better understanding of the role of public opinion in decisions made by the Supreme Court.

## STUDENT LEARNING OUTCOMES

At the end of the course students will:

- a. Have a better understanding of how and why common law gets made.
- b. Have a better understanding of the role social pressure and politics play in the development of common law rules.
- c. The role the US Supreme Court plays in establishing social policy.
- d. The role social activist play in establishing social policy and changes in common law.
- e. A real understanding of how laws get made.

## **GRADING**

Your grade for the course will be determined as follows:

- Class Participation: 25%
- Final Paper: 75%

## ACCOMMODATIONS

Reasonable accommodations will be made if they would allow a person with disabilities to effectively participate in the law school program. Reasonable accommodations may include:

1. A change in the law school program, so long as it does not alter the program's fundamental nature;
2. Structural modifications (i.e., ramps, wide doorways, accessible bathrooms);
3. Providing modified equipment (i.e., braille keyboard on a word processor); and/or
4. Providing aids such as interpreters or readers.

**PLEASE REFER TO THE STUDENT ACCOMMODATIONS HANDBOOK FOR SPECIFIC PROCEDURES.**





# THURGOOD MARSHALL SCHOOL OF LAW

## COVID-19 INFORMATION SHEET

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### HEALTH AND SAFETY ON CAMPUS

1. The University does not require COVID-19 vaccination as a condition for attending school. As a protective measure, students are encouraged to get vaccinated. The St. Luke's vaccination clinic, located on campus in the Nabrit Science Building, is open and accessible to the entire University community, Monday-Friday, 9 a.m. – 7 p.m. There is no cost for the vaccination.
2. Students are expected to continuously self-screen for the symptoms of COVID-19. If you have symptoms and are not fully vaccinated, you should call the Student Health Center at (713) 313-7173. Please remember to exercise caution and be courteous of your fellow students.
3. Students who experience a medical emergency on campus should call (713) 313-7000. If off campus, call 911. Please inform the dispatch operator if you are experiencing shortness of breath, difficulty breathing, coughing, or have a fever.
4. Students who are unable to attend classes for health reasons, including those relating to COVID-19, should immediately contact the Associate Dean of Student Services, Amy Ratra (miami.ratra@tsu.edu), for further guidance.
5. Students who contract the COVID-19 virus must report the information to the Associate Dean of Student Services, Amy Ratra, and the Student Accessibility Services Office (SASO), by phone at 713-313-4210 or by email at disabilityservices@tsu.edu.
6. Students who contract the COVID-19 virus will be required to quarantine under the advice of Student Accessibility Services Office (SASO). Such students are required to submit Release of Care documentation from a licensed health care professional to SASO and notify the Associate Dean of Student Services, Amy Ratra, before they return to the law school.
7. While on campus and in classrooms, students are encouraged to conduct themselves in a manner conducive to the health and safety of the entire TSU community.
  - a. Students should practice hand hygiene, cough etiquette, and general cleanliness.
  - b. Face coverings (over the nose and mouth) are not required as per the guidelines from the State of Texas. However, students are strongly encouraged to wear face coverings (over the nose and mouth) while in the law school building.

- c. Students should wash or disinfect their hands before each class and after physical interaction with other persons in the classroom.
  - d. Students should maintain classroom cleanliness. Students should create a clean classroom environment by putting away unnecessary personal items and cleaning their seating area intermittently.
  - e. Students who do not conduct themselves on campus in a manner conducive to the health and safety of those with whom they come in contact may be subject to discipline up to expulsion from law school.
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## **ATTENDANCE POLICY**

8. Law school classes will be fully in-person this fall. The law school attendance policy will be strictly enforced.
  9. Students who contract the COVID-19 virus will be barred from attending in-person classes until submitting Release of Care documentation from a licensed health care professional to Student Accessibility Services Office (SASO). Such students will be required to study and keep up with the prescribed readings.
  10. Students that are excused from in-person class attendance because they contracted the COVID-19 virus should designate a student in each of their classes to make audio recordings of the lectures. Professors are required to allow such recordings to be made. Furthermore, professors are required to meet with such students to answer questions about the materials covered during their COVID-19-related absence.
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## **UNIVERSITY RESOURCES**

11. COVID-19 TESTING  
Location: H&PE 109  
Hours of Operation: No appointments are necessary. Tuesday – Thursday 8 a.m. – 11:30 p.m.  
Results will be available within 24 hours if the test is taken by 11:30 a.m.
12. The St. Luke's vaccination clinic is open and accessible to all University personnel and community, Monday – Friday, 9 am – 7 pm in the Nabrit Science Building.
13. STUDENT HEALTH SERVICES
  - a. Student Health Services is open 8:00 a.m. – 5:00 p.m. Monday – Friday by appointment only.

- b. A nurse is available at (713) 313-7173, Monday – Friday, from 8:00 a.m. – 5:00 p.m. to schedule appointments.
- c. Appointments will be scheduled virtually and in-person, as needed.
- d. If you are currently enrolled and need a copy of your immunization record go to <https://tsu.medicatconnect.com>.
- e. If you are off campus but in the local area and need assistance contact the Harris County Health Department COVID-19 hotline: [www.ReadyHarris.org](http://www.ReadyHarris.org). If you don't have the internet, call (832) 927-7575 or Houston Health Department COVID-19 Call Center: (832) -393-4220.

#### 14. UNIVERSITY COUNSELING CENTER

- a. The University Counseling Center (UCC) is providing convenient Telemental Health Services to all students.
- b. Students may call 713-313-7800 to request an appointment. If someone does not answer, please leave your T-Number, name, and a contact number. Students may also complete this form to request an appointment, and someone will contact them during business hours:  
[https://forms.office.com/Pages/ResponsePage.aspx?id=ViJL72KUK0Su4urH7Z-1ZFNJ2YNoWsVPstLk4r8W\\_X1UOUk2SUxMRVoyVEdQTVkzV09YRVBLNU5OTy4u](https://forms.office.com/Pages/ResponsePage.aspx?id=ViJL72KUK0Su4urH7Z-1ZFNJ2YNoWsVPstLk4r8W_X1UOUk2SUxMRVoyVEdQTVkzV09YRVBLNU5OTy4u).
- c. Students may receive a call from a blocked or private number, please answer, as it may be your counselor trying to contact you.
- d. If a student experiences a crisis outside of regular business hours, the student can call 833-848-1765.
- e. Other resources for support outside of the UCC include:
  - i. Crisis text line – Text Steve to 741-741.
  - ii. National Suicide Hotline - 800-273-TALK (8255).

## **Title IX Policy**

Texas Southern University is committed to fostering a safe learning environment. As professor, one of my responsibilities is to help create a safe learning environment in class. Texas Southern University and Federal Regulations (Title IX) policy prohibit discrimination based on sex and this includes sexual harassment, sexual violence and misconduct, dating violence, domestic violence, and stalking. Texas Southern University understands that these incidents can undermine a student's academic success, so Texas Southern University encourages students who have experienced sexual conduct prohibited by university policy to report these incidents when they happen to the University's Title IX Coordinator or University Confidential Resource so that the student can get the help they may need.

It is my goal that you feel able to share information related to your life experiences in classroom discussions, in your written work, and in one-to-one meetings. I will seek to keep information you share private to the greatest extent possible. However, I also have a mandatory responsibility to notify the University's Title IX Coordinator when I become aware of incidents of prohibited conduct that violate the university's Title IX policy.

Students may speak confidentially to the University Counseling Center. Please feel free to visit their website [www.tsu.edu/ucc](http://www.tsu.edu/ucc) for more information about their services. Also, students may speak with the University's Title IX Coordinator by calling 713.313.1371 or emailing [titleix@tsu.edu](mailto:titleix@tsu.edu).

## **PARTICIPATION, ATTENDANCE & PROFESSIONALISM**

### **Class Attendance:**

Class attendance is required. As per Article III, §9 of the Student Rules of Matriculation, if you miss more than two (2) classes you may have your grade reduced up to two (2) letter grades, depending how far you exceed the limit. A dismissal from class for lack of proper preparation will count as a missed class. You are required to arrive at class on time and remain until dismissal. Those who arrive late, leave early, or who take restroom breaks during the class, disrupt the rest of us. It is, therefore, expected that you will arrive on time, remain until class is over and take restroom breaks before or after class. **The class attendance rule will be strictly enforced.**

### **Class Preparation:**

Prior to each class you are required to prepare written briefs for each case included in the Reading assignment and to develop a complete understanding of the cases. All briefs must be in your own hand writing. No printed materials will be allowed in class. The class discussion will center on your understanding of the cases and the social and historical climate of the country at the time the case was decided. It is expected that you will completely understand the assigned cases and materials when you enter the classroom.

Class is not a place for me to explain the cases and the textual materials to you. The classroom is, instead, the place for us to take what you learned from the cases and the historical materials to the next level. That is, we do not ask the question “what?” It is not helpful for me to ask “what if” unless you already know “what.”

### **Class Participation:**

The classroom experience is not designed to provide an opportunity for me to demonstrate the depth of my knowledge about the subject matter. In fact, the classroom experience is designed to provide for you, the student, an opportunity to demonstrate to me the depth of your knowledge base. I will pose a series of questions to you based on the reading assignment. You will be expected to correctly answer all questions posed by me. If you are unable to properly respond to my questions, it says to me that you are not adequately prepared for class. **Any student not adequately prepared will immediately be excused from class and will be registered as not present. One point will also be deducted from your total points for class participation.**

## **POLICIES & PROCEDURES**

### **Student Rules:**

It is the responsibility of each student to know the rules and regulations of Thurgood Marshall School of Law. You can access the Rules and Regulations Handbook on TMSL's website, [www.tsulaw.edu](http://www.tsulaw.edu), and clicking on the **"Students" tab, then "Student Affairs," "Student Rules and Regulations,"** and finally **"Student Rules and Regulations 2018-2019."**

### **Computers and Cell Phones:**

The use of laptops, tablets, cell phones, or any other internet access/electronic device during a class session is strictly prohibited. Any student violating this policy will receive a letter grade reduction.



# THURGOOD MARSHALL SCHOOL OF LAW

## TEXAS SOUTHERN UNIVERSITY ACADEMIC CALENDAR 2021 – 2022

### FALL SEMESTER 2021 (SEVENTY DAYS OF CLASSES)

Orientation	Mon-Fri	August 9 – 13, 2021
<b>First Day of Class</b>	<b>Monday</b>	<b>August 16, 2021</b>
Last Day to ADD/DROP	Wednesday	August 18, 2021
<b>Labor Day (NO CLASSES)</b>	<b>Monday</b>	<b>September 6, 2021</b>
<i>Purge of all unpaid course selections</i>	Monday	September 15, 2021
<b>Mid Term Examinations</b>	<b>Mon – Fri</b>	<b>October 11-15, 2021</b>
Last Day to Drop a Class with grade of “W”	Friday	November 5, 2021
<b>Last Day of Classes</b>	<b>Tuesday</b>	<b>November 23, 2021</b>
First Year Professors’ Grades due	Tuesday	November 23, 2021
Reading Period (NO CLASS)	Wednesday	November 24, 2021
Thanksgiving Holiday	Thurs – Fri	November 25-26, 2021
Reading Period	Sat – Sun	November 27-28, 2021
<b>Final Examinations</b>	<b>Mon – Fri</b>	<b>Nov 29 – Dec. 10, 2021</b>
Commencement Exercises	Saturday	December 11, 2021

## READING ASSIGNMENTS

**ALL READING ASSIGNMENTS ARE FROM THE REQUIRED  
COURSE MATERIALS (CM) EXCEPT WHERE STATED OTHERWISE**

August 16	<b>Read: pp. 17-34</b> Cleveland State Article Marbury v. Madison and Ford v Ford
August 23	<b>Read: pp. 34-50</b> Scott v. Sandford Wood v. Ward
August 30	<b>Read: pp. 50-73</b> The Civil Rights Cases Plessy v. Ferguson
September 6	<b>Read: pp. 73-94</b> Powell v. Alabama Gaines v. Canada
September 13	<b>Read: pp. 94-116</b> Smith v. Allwright Korematsu v. United States Ex parte Mitsuye Endo
September 20	<b>Read: pp. 116-130</b> Sipuel v. Board of Regents Shelley v. Kraemer Sweat v. Painter
September 27	<b>Read: pp. 130-138</b> Brown v. Board of Education Hernandez v. Texas
October 4	<b>Read: pp. 138-154</b> Heart of Atlanta Motel, Inc. v. U.S. Mr. American White Man Loving v. Virginia



October 11

**Read: pp. 155-192**

San Antonio School District v. Rodriguez

Defunis v. Odegaard

University of California Regents v. Bakke

America Will Always Be Racist

October 18

**Read: pp. 192-214**

Batson v. Kentucky

Gratz v. Bollinger

Grutter v. Bollinger

Equal Doesn't Mean Fair

October 25

**Paper**

November 1

**Paper**

November 11

**Paper**

November 15

**Paper**

November 22

**Paper**

## **REQUIRED COURSE MATERIALS**

## The Distinction between Lawyers as Advocates and as Activists; And the Role of the Law School Dean in Facilitating the Justice Mission

James Douglas

*Texas Southern University*

### I. INTRODUCTION

When David Barnhizer invited me to be involved in the Justice Mission conference I jumped at the opportunity; because justice is an issue that is extremely important to me, especially being a person of color in America. In presenting my ideas about the justice mission, I will be talking about two distinct concerns. One is the role of the law school dean in facilitating the justice mission in the law schools. The second is related but applies even more broadly since it draws upon the experiences of lawyers both in their roles as practitioners and as social activists. The point I will be making is that the two roles are very different and this is often not well understood by activist lawyers or law professors.

### II. THE DISTINCTION BETWEEN ADVOCACY AND ACTIVISM

A friend of mine who was doing historical research about the civil rights movement in the 1960's, once hypothesized that Martin Luther King, Jr. could have been more effective and could have accomplished more had he been a lawyer. I disagree with this position. I think Martin Luther King, Jr. would have been *less* effective if he had been a "true lawyer" because the law and the role of a lawyer require you to consider every aspect of an issue, not just the particular one you advocate. A good lawyer learns to understand both sides of every issue. To do so causes one to appreciate the good and bad of both sides. The real social activist, instead, acts out of emotion, not out of logic. Thus, the social activist is less likely to have respect for the other side, or even for people who don't fully ally themselves with the activist's cause. I am, therefore, doubtful whether Martin Luther King, Jr. would have accomplished as much if he had been a lawyer because, as a lawyer, he would have considered to a greater degree the rule of law and would have been less likely to breach the rule. Social activists are not concerned with the rule of law; they are, instead, concerned with changing society and the way members of society interrelate with each other. The social activist is therefore, more likely to breach the rule if to do so might result in the accomplishment of the desired goal, a change in society.

Yesterday in his presentation, Haywood Burns mentioned that one of his friends had made the statement that lawyers were not activists for social change, and that this disturbed him. I am that friend. What I said to Haywood Burns is caused by a mistake I believe we, as legal educators, tend to make in our law school teaching when we discuss our ability as lawyers to bring about social change. I came to this conclusion in part because of the frustration experienced by many of my long-time colleagues, many of whom went to law school with me. These are people of the 1960's who had looked at law as the profession to pursue if one wanted to make a strong social statement. Many people went to law school in the late 1960's and early 1970's because they

wanted to make a positive change in American society and they saw law as the means that would allow them to help make those changes.

It was my belief then, and it is a belief that has stayed with me, and the reason I am less frustrated with my legal career than most of my lawyer friends, that law is "only" a set of rules that govern the interrelationship between members of a given society. I repeat: Law is "only" a set of rules that govern the interrelationship between members of a given society. Lawyers are the people who *describe* those rules and the people who try to *implement* those relationships. But I do not see lawyers as the *definers* of those rules. It is the belief that lawyers are the definers of the relationship between the members of a society that causes frustration for many of my colleagues.

My colleagues become frustrated because they think they can, as lawyers, define the rules of the game when in fact society itself defines changes in the rules of relationships, and lawyers then describe these new sets of rules necessitated by the changes in relationships. If one wants to change the definitions of the rules that govern the interrelationships of members of the society, one cannot change the definitions while operating as a lawyer. One can only seek to change the definition of a rule by functioning as a social activist. The dilemma is that a lawyer's role in society is not to change the rules of the game, but to assist in maintaining the rules and to help resolve conflicts under the established rules.

I do agree, however, with Haywood Burns on the point that some lawyers have also been social activists and as social activists have worked to change fundamental social relationships. And so, for example, while I agree that a revolutionary social activist such as Fidel Castro is a lawyer, he is a lawyer only in a technical sense. He did not achieve profound social change and did not redefine the terms of Cuban society and the relations among nations in the Western Hemisphere while acting in the role of a lawyer. Castro did not lead the revolution in Cuba by going into a court of law. Castro led the revolution in Cuba as a social activist, by acting outside the legal system and using tools unavailable to lawyers functioning in their professional context. I also agree with Haywood Burns that Abraham Lincoln was a lawyer and an activist. But again, Abraham Lincoln did not make a name for himself primarily as a lawyer except in a small area of Illinois and he did not redefine relationships in this country by functioning as a lawyer. He changed the definition of social relationships as a political and social activist.

When I talk to my students about their roles as lawyers, I say to them that those people who want to change society have to step outside of their role as a lawyer and become social activists. This is not to say that lawyers cannot contribute to the changes in society. It is intended to say, however, that lawyers are limited in what they can do by virtue of the nature of their basic roles. As lawyers, they cannot *move* the description of the societal relationships they dislike nor change the direction of society too far from the center of belief of those in power. For when one attempts to change the rule in a manner that moves the new rule too far from the center of societal belief, the change results in an ineffective legal rule that members of the society honor more in the breach than apply it as a standard for governing their behavior.

In order to make major changes in critical societal relationships that you consider unjust or unfair you must not only change "the law", you must also change the way people think about the values

and assumptions that underlie the rule that allows the injustice. Social activists change the way people think; lawyers do not. Lawyers, instead, describe the changes in the rules caused by changes in the way people think and this new thought process was caused by the social activist.

I have not yet heard at this conference the question I hope we are going to address: namely how are we to bring about change in the relationship of the members of a society and how are we to change the rules that govern the resolution of conflicts between the members of the society. I have always liked the fact about Socrates that he was not satisfied to simply talk about change but developed disciples who carried forth his teachings. I have not yet heard us talking about the necessity for law faculty who believe in the justice mission to develop disciples among our law students. This is an important step. If we believe in a justice mission for law schools, we must begin to talk about how to impart our ideas and our sense of "justice" to a larger group of disciples, i.e., our students who will then go out into society and become social activists. These people will redefine the ways people interrelate with the law rather than just describe a world that needs to be changed.

### III. THE ROLE OF THE LAW DEAN

The role of the law dean in promoting the "justice mission" is to be a leader by example. First, I am going to discuss the dean's leadership role. Then, I want to describe the *real way* to approach the "justice" issue in law school.

In terms of justice, people have often said that it is better for the faculty to set an example for the students. But I believe that the best way to teach law students about justice is to first help students understand what the concept of justice means. "Justice" can best be described as doing what is right. Doing what is right, however, frequently depends on the type of relationship that exists between the people involved. People are more likely to do what is right when the relationship is one of respect, and they are more likely not to do what is right when there is a lack of respect. In order to have a just society, members of the society must have a relationship with each other that is based on respect of other persons and of self. In order to promote and facilitate the ability of those within the law school to understand and "do" justice, the dean must develop a healthy relationship with the faculty, the staff, and the students. Thus, the way in which the dean manages the law school environment, and its functions, sets an example for the students.

In order to promote justice, the dean must strive to involve the students in all aspects of the law school's operations, especially its governance. The dean should request that students serve on the important committees, i.e., the hiring committee and the rank and tenure committee. With this as an example, the students will better understand that the dean believes that they, the students, are a part of the total law school environment.

I also believe that the dean sets a good example by being actively involved in various professional associations. If the dean says that service in professional organizations is important, then the dean must set an example by his or her service and involvement with professional organizations. If the dean says that it is important to represent indigent clients, then the dean must in some way set an example by assisting indigent clients, either by taking cases, giving advice, or serving on boards of legal service organizations that represent the poor and the needy.

Probably the most important thing that a dean can do is to help students understand the relationship between "law" and "justice." One of the responsibilities of a prophet is to tell the truth. I am not a prophet, but I always try to tell the truth. We require that all incoming first-year law students arrive a week prior to the beginning of classes for a period of orientation. During this orientation week, we introduce the students to the law school experience. We do so because we discovered that few entering first-year students have any idea as to what will happen to them during the first year of law school. Even more unfortunate is that most students go through three years and then graduate from law school and still do not understand what has happened to them. Therefore, what I try to do during this week of orientation is to get them to understand what their responsibilities are likely to be as lawyers.

One of the things we as legal educators can do for our students is to be truthful about the role of the lawyer in our society. I already discussed the distinction between lawyers functioning as lawyers and people who happen to be lawyers engaging in social activism. Each role is important but distinct and we must better explain the differences between the two roles to our students. I am not talking about the role of the lawyer as an individual member of society but the role of the "lawyer" as a professional member of society. Think back to the example of Fidel Castro. He was a lawyer who became the leader of Cuba. Yet, Castro became the leader of Cuba not because he was a lawyer but because he was a revolutionary who seized power through military force. An individual does not need to be a lawyer to be a revolutionary but an individual does need to be a lawyer to represent others in court. Castro could have become the leader of Cuba even if he had not been a lawyer.

The other example was Abraham Lincoln who brought about fundamental change because he was a great politician, not because he was a lawyer. As deans, we must make students understand this distinction. We must constantly remind law students that they each have a role as an individual member of society and as a member of the legal profession. It is of utmost importance they not confuse the two roles.

When I began working in law school admissions, I came to better understand this vital distinction. In 1971, almost everyone who applied to law school applied because he or she had a "mission"; each wanted to drastically change society for the better. After years in law practice, most revealed an extreme level of frustration with their jobs as lawyers because they had been unable to make any societal changes even though they had worked hard as good lawyers. They were frustrated because they did not understand that the role of a lawyer is not to change society. They did not understand that it is the social activist, instead, who brings about change in society.

The primary role of the lawyer, we must remember, is to help resolve conflicts that occur between members of a given society. The society lives under the rule of law and functions within the established system. If one wants to change the system, one must change the rule of law. We must also remember that the best way to create an effective rule is to be certain it is "in synch" with the beliefs and values of a majority of the members of society. The best example of this theory is our society's response to murder. Nearly every member of this society believes it is wrong to take the life of another member of this society. Therefore, when the law enacts a rule that said it is wrong for one member of society to take the life of another member of society, the

rule is followed, at least most of the time, because the rule grew out of the culture and beliefs of the society.

People do not respect institutions that advocate beliefs too distant from their dominant beliefs. Therefore, rules enacted by the institutions of law generally tend to reflect the beliefs of most members of society. If, however, a legal rule does not emanate directly from the culture and beliefs of the society then the rule is likely to be followed only if the members of the society respect (or fear greatly) the institution from which the rule emanates, be it the administration, the legislature or the courts. The members of society are more likely to follow a rule out of respect for these branches of our government, "the institution", than out of respect for the rule. When the members of society follow the rule because they respect the institution whether local or national, it is generally because the newly enacted rule is not too far from the center of accepted belief held by members of the society. Thus, if one wants to drastically change the law, one must change the society's belief in what the rule ought to be. And lawyers don't change the views and beliefs of the society-social activists do.

When we, as law school deans, talk about justice, too many of us try to "intellectualize" about what justice is and what it should mean to our students. Justice is what society *believes* justice is. Thus, if you want to change justice, you must first change the views and beliefs of society. Take the United States Supreme Court for example. One hundred years from now people will probably look back at us and think our notions of justice were primitive. Not because they will be better people than us but because society's view of justice will have changed over time.

Lawyers can only change law and society at the edges, not at the center. Lawyers who want to accomplish more must do so not as lawyers, but as social activists. And everyone can be a social activist. The failure of legal educators to draw this critical distinction between one's role as a lawyer and one's role as a social activist will leave many future lawyers frustrated.

#### IV. THE LIMITS OF THE LAWYER'S ROLE

The one thing we must do as deans is to make students aware of and sensitive to the legal needs of the social activists. Because when the social activists are trying to change the laws, the lawyers must be their advocates and make the legal arguments on their behalf. And most important, when a change is acceptable to the society, the lawyers must be ready to describe this new social relationship in legal terms. It is in this way that a lawyer can help change society.

Thurgood Marshall and his work with the NAACP is a great example of the role a lawyer plays in social change. When this country was ready to move towards more inclusion of African-Americans as members of the society, a lawyer was ready to help in the description of this new resolution, and he did. Had Thurgood Marshall or some other lawyer raised the same arguments fifty years earlier rather than in *Brown v. Board of Education*,<sup>2</sup> the outcome would have been totally different, because his arguments would have fallen upon deaf ears operating according to very different cultural beliefs. That is why the same institution, the United States Supreme Court, could at one point in American history hold that African-Americans were something less than human; at another point in American history hold that separate but equal was legal, and yet, at still another point in American history, hold that separate but equal is not legal. The reason these



conflicts in opinion by the United States Supreme Court can occur is because society changes. The fact that society does not accept a given rule of law today does not mean that society will not accept the same rule tomorrow. So if you really want to affect the justice mission, you must change the way society thinks. Therefore, if we, as legal educators, do not want our students to leave the legal profession in frustration, we must understand and teach the difference between working within the rule of law and *truly* changing the rule of law. Lawyers work within the rules of law, social activists work to change the rules of law.

You should always remember that lawyers are problem solvers; they solve human problems. They solve the problems that arise between members of society and in solving these problems, they use a set of rules we call laws. When I first started teaching, I taught commercial law. One day, a student came up to me and said: "Professor Douglas, I really want to take your course, but I want to practice poverty law and, therefore, I have no reason to take commercial transactions." I quickly replied: "What type of problems do you think poor people have? In fact, not only must you take my class but you must also excel in it." That is why I like to use Christopher Langdell's case method of teaching. I told the student, "By using the Socratic method of teaching you learn to solve problems and develop analytical skills. If you want to represent unpopular causes, and when you represent poor people you represent unpopular causes, you, as a lawyer, have to be much better than the lawyers who oppose you. And that can only be accomplished by developing better analytical skills. In a real sense, the lawyer is like a carpenter; when a problem arises, the lawyer must find the right tool to fix the problem and the tools of the lawyer is the set of rules we call laws." Just as a master carpenter is called on to solve great problems of building and construction, the master lawyer is called on to solve great societal problems. Each, however, is limited by the tools he or she has in the tool box.

Thus, if a lawyer understands his or her role as a lawyer and his or her role as a member of society, which includes one's role as a social activist, he or she is not likely to one day decide to leave the profession in frustration. What we must do as deans is to provide the tools and lead the way to an understanding of this crucial distinction between the role a lawyer plays in changing societal relationships and the role a social activist plays in changing societal relationships.

What is justice? It really depends on whose interest is being served. It is hard to define justice but, at the bottom of any definition, justice involves inclusion. Thus, the manner in which the deans include and treat the students as part of the law school society will set an example for the way in which students will strive to achieve justice for others in society.



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*Marbury v. Madison*

5 U.S. 137 \*; 2 L. Ed. 60 \*\*; 1803 U.S. LEXIS 352 \*\*\*; 1 Cranch 137

Supreme Court of the United States

February 24, 1803, Decided

**Overview**

The applicant and two others contended that the late President of the United States had nominated them to the Senate and that the Senate had advised and consented to their appointments as justices of the peace. The commissions were signed by the late President and the seal of the United States was affixed to the commissions by the Secretary of State. The commissions were withheld from the applicants and they requested their delivery. The Court granted a rule to show cause, requiring the Secretary to show cause why a mandamus should not issue to direct him to deliver to the commissions. No cause was shown and the applicant filed a motion for a mandamus. The Court determined that the applicant had a vested legal right in his appointment because his commission had been signed by the President, sealed by the Secretary of State, and the appointment was not revocable. The Court found that because the applicant had a legal title to the office, the laws afforded him a remedy. However, the Court held that § 13 of the Act of 1789, giving the Court authority to issue writs of mandamus to an officer, was contrary to the Constitution as an act of original jurisdiction, and therefore void.

**Syllabus**

The supreme court of the United States has not power to issue a mandamus to a secretary of state of the United States, it being an exercise of original jurisdiction not warranted by the constitution. Congress have not power to give original jurisdiction to the supreme court in other case than those described in the constitution. An act of congress repugnant to the constitution can not become a law. The courts of U. States are bound to take notice of the constitution. [\*\*\*3] A commission is not necessary to the appointment of an officer by the executive -- Semb. A commission is only evidence of an appointment.

Delivery is not necessary to the validity of letters patent. The President cannot authorize a secretary of state to omit the performance of those duties which are enjoined by law.

A justice of peace in the district of Columbia is not removable at the will of the President. When a commission for an officer not holding his office at the will of the President, is by him signed and transmitted to the secretary of state to be sealed and recorded, it is irrevocable; the appointment is complete. A mandamus is the proper remedy to compel a secretary of state to deliver a commission to which the party is entitled.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be

exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, [\*\*\*70] is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited [\*177] and acts allowed, are of equal obligation. [\*\*\*71] It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be [\*\*\*72] lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

[\*178] So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of **[\*\*74]** these conflicting rules governs the case. This is of the **[\*\*\*73]** very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement **[\*\*\*74]** on political institutions -- a written constitution -- would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

[\*179] Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered **[\*\*\*75]** in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that "no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the fame overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution [\*180] contemplated that instrument, as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly [\*\*\*76] applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on the subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution [\*\*\*77] itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

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***Ford v. Ford***

26 Tenn. 92 \*; 1846 Tenn. LEXIS 68 \*\*; 7 Hum. 92

Supreme Court of Tennessee, Knoxville

September, 1846, Decided

**Prior History:** **[\*\*1]** Loyd Ford on the 1st of March, 1840, made a will, which directed an emancipation of his slaves, John Ford and others, and appointed two of his sons, James and Grant Ford, ex'rs.

These sons refused to act as executors, and the slaves by their next friend, Phebe Stuart, offered the will for probate in the County Court of Washington county. The case was certified to the Circuit Court of Washington county. An issue was made up on the validity of the will, and tried by Judge Luckey and a jury at the October term of the said court, in 1845, and a verdict and judgment given, establishing the will, from which the defendants appealed.

**Disposition:** Reversed and remanded.

**Procedural Posture**

Defendant sons sought review of the verdict of the Circuit Court of Washington County (Tennessee) that established the validity of the decedent's will, which emancipated plaintiff slaves.

**Opinion**

GREEN, J. delivered the opinion of the court.

This is an issue of *devisavit vel non*. A paper was propounded for probate, as the will of Loyd Ford, in the County Court of Washington county, by Phebe Stewart, as the next friend of the defendants in error, who are persons of color, and were the slaves of the said Loyd Ford. In the said will there is a **[\*\*2]** bequest to the said slaves of their freedom, and a devise to them of a portion of the testator's real estate. The executors named in the will appeared in the County Court and renounced the execution thereof, and thereupon a portion of the distributees and heirs at law of the said Loyd Ford appeared and contested the probate of the paper as the will of Loyd Ford. The court thereupon certified to the Circuit Court, the fact of such contestation, to the end, that an issue might be made up in said court; and the executors named in the will having renounced, the court appointed Joseph Crouch administrator, *pendente lite*. The contestants thereupon entered into bond to said Crouch, conditioned, to prosecute the contest with effect, or pay all costs. When the proceedings of the County Court were brought to the

Circuit Court, an order was made, that an issue be made up to try and determine whether the paper aforesaid, is in truth and in fact the last will and testament of the said Loyd Ford, deceased. On the trial of this issue, the jury found, that the paper produced is the last will and testament of Loyd Ford, deceased. The contestants moved that the verdict be set aside, and a new trial [\*\*3] be awarded, which the court refused, and thereupon this appeal in error is prosecuted.

The counsel for the plaintiffs in error insists, that the judgment in this cause should be reversed for the following errors:

1st. It is said that there are not proper parties to this suit; that devisees are not proper parties in any case, and that in this case, the devisees are slaves, have no rights, and can be parties to no legal proceedings. The act of the 20th February, 1836, ch. 18, sec. 2, provides, that where a will shall be presented for probate, and shall be contested, it shall be the duty of the court to require of the persons so contesting, to enter into bond and security, payable to the executors mentioned in said will, [\*94] conditioned, for the prosecution of the suit, or the payment of costs. The legislature thus indicate, that the executor is the proper party with whom the contesting party is to make up the issue. But as in this case, it may often occur that the executor named in the will, may refuse to propound the will for probate, and may renounce the office of executor. In such case the executor named cannot be a party. But it does not follow that no issue can be made. [\*\*4] If this were so, then the executor named in the will, might, by refusing to propound it and declining to act as executor, defeat all the interests, however important and valuable, of the devisees in the will. This cannot be. But it is argued, that some person ought to make up the issue who shall represent the entire estate of the testator, and in case the executor shall renounce and refuse to propound the will for probate, the County Court should appoint some person to make up the issue and conduct the investigation of the case. It is not easy to perceive what relation such person would sustain to the estate, or what authority he could exercise. The court appointed an administrator, *pendente lite*, to take care of the estate during the litigation; but he has nothing to do with the will, nor any connection with the litigation in relation to it. Nothing in any of our statutes on this subject, requires that a party shall represent the entire estate, nor, in our opinion, is there any reason why he should do so. A will may contain the disposition of only a single article of property bequeathed to one legatee, the testator choosing to die intestate as to the remainder of his estate. In [\*\*5] such case, if there were an executor, he would represent, probably, but a small portion of the estate. Besides, it is the settled law, that if an issue be made by only one, of many heirs, whose interest it may be to defeat the probate of the will, the decision of that issue is conclusive upon all others, whether they are parties or not. The reason is, that it is in the nature of a proceeding *in rem*, where a decision in relation to the thing in controversy, settles the rights of all persons interested therein forever. There seems to be no more reason, why all the interests in the establishment of a will shall be represented by some one person, than that all those opposed to its probate should be necessary parties. It may often happen, [\*95] that no one but the persons interested in the establishment of a will, can be induced to exert any agency in the matter; and as the statutes do not prescribe the manner in which the issue shall be framed, nor who shall be parties, we are of opinion, that when the executor refuses to propound a will for probate, any legatee may do so; and whoever shall seek to contest the probate, contests with the party thus propounding. The



act of January [\*\*6] the 25th, 1836, ch. 5, sec. 9, declares that when the County Court certifies a contested will to the Circuit Court, "an issue shall be made up in the Circuit Court, and the validity of the will tried therein." No particular form is required, but the party propounding the paper affirms it to be the testator's will and the contesting party denies it. The judgment of the court, upon an issue thus made up by parties interested on the one side to establish, and on the other to defeat the probate, will be conclusive of the fact, although others, not parties, may be interested on either side of the question. But it is said, the devisees in this case are slaves, and have no rights, either perfect or inchoate, until the will manumitting them shall be proved; because it is a principle of law, that rights derived through a last will and testament to personalty, can be evidenced, only, by the probate. It is certainly true, that the probate is the only legal evidence of the will, and, by consequence, of the rights derived through the will. But this does not prove that parties may not have rights in reference to a paper purporting to be a will before it shall be proved. We only know it is the will [\*\*7] of the party by the probate; but the existence of a paper, purporting to be a will, and containing certain provisions, gives to the parties, in reference to whom those provisions are made, rights as to the paper, which others cannot claim. Thus, if A be named as executor, he has a right to the possession of the paper, and a right to propound it for probate. So, if the executor refuse to act or propound the will, we have said a legatee may do it. But we are met with the objection, that none but free persons have a right to sue, and that the persons of color in this case are still slaves. A slave is not in the condition of a horse or an ox. His liberty is restrained, it is true, and his owner controls his actions and claims his services. But he is made [\*\*96] after the image of the Creator. He has mental capacities, and an immortal principle in his nature, that constitute him equal to his owner, but for the accidental position in which fortune has placed him. The owner has acquired conventional rights to him, but the laws under which he is held as a slave, have not and cannot extinguish his high born nature, nor deprive him of many rights which are inherent in man. Thus, while he [\*\*8] is a slave, he can make a contract for his freedom, which our laws recognize, and he can take a bequest of his freedom, and by the same will he can take personal or real estate.

A will must take effect on the death of the testator, and yet a devise of property to a slave, in a will bequeathing him his freedom, is valid. To hold that it is so, necessarily implies that the bequest of freedom confers rights before the will is proved. For if a devise of property were made to the slave of another, and after the death of the testator the slave should be emancipated, he could not take under the will. The devise would be void. The conclusion is that, although until the will is proved, they have no legal evidence that they are free, yet the bequest of freedom in the paper purporting to be a will, confers upon them a right to invoke the action of the proper tribunal, that this evidence of their freedom may be afforded. If this were not so, the right of the owner to emancipate, and the right of the slave to receive his freedom, might be alike frustrated, if the executor named in the will shall refuse to act; a conclusion which would shock humanity, and be an indellible stigma on our jurisprudence. [\*\*9] But if it were conceded, as the counsel contends, that the County Court should have appointed some person to make up the issue, we do not perceive why the next friend Phebe Stuart, may not be regarded in that light. She propounded the will, and prosecutes the enquiry into its validity in behalf of the slaves, and was recognized by the County Court in that character.

2. The paper propounded is witnessed by Robert G. Hale, Sarah Hale, and Elizabeth Jane

Hale, the two last of whom make their mark. It is contended by the plaintiffs in error, that a marksman cannot be a witness to a will under our statute. By the act of 1784, ch. 22, sec. 11, it is provided, that "no last [\*97] will and testament shall be good or sufficient, either in law or equity, to convey or give any estate in lands, tenements or hereditaments, unless such last will and testament shall have been written in the testator's life time, and signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of which shall be interested in the devise of said lands." It is contended that the requirement of this statute, that the will shall be subscribed [\*\*10] by two witnesses, excludes the idea that it is competent for a party to be a witness who does not write his name; that the term subscribed, signifies under-written. We do not concur with the counsel in this construction of the statute. A party subscribes an instrument, if his name is under-written by another person by his direction, and by him recognized as his signature. The statute requires that the name of the witness be under-written, but it does not require that it shall be done by his own hand. It may be done by another, and in legal contemplation, be just as much his act as though it were done by himself. It is the unquestioned doctrine in England, that a marksman is a good witness to a will: 8 Ves. 185.

3. It is insisted, that this paper is not the will of Loyd Ford, because he was of unsound mind at the date of it, and ever afterwards until his death. The proof shows, that the testator was very old, and that his memory had greatly failed. But without entering into a minute examination of the testimony, it is sufficient to say, that the body of evidence clearly establishes the mental capability of the testator to make an intelligent disposition of his estate.

[\*\*11] 4. It is also insisted, that the will made by the testator was destroyed, and that the paper now produced has been forged by the witness, R. G. Hale. This question depends upon the credibility of the witnesses to the will. A great number of persons have been examined in relation to the credit of these witnesses. Many support, and some discredit them. It was peculiarly the province of the jury to decide upon this question. The attacking and sustaining witnesses were before them, and they could best judge of the existence of prejudice on the part of the attacking witnesses. The witnesses attacked, too, were [\*98] before them, and they could be greatly aided in the estimate to be placed upon their character, by their appearance, manner of swearing, &c., elements for the formation of an opinion, which this court cannot possess. As a general proposition, too, it may be observed, that where a witness is strongly attacked on the one side, and sustained on the other, the attacking witnesses are often the personal enemies of the party assailed, and in such case, however honest they may be, their opinion of the party they discredit, has been formed under the influence of passions, and [\*\*12] prejudices which wholly unfit a man to judge impartially of another. The sustaining witnesses are not apt to be under such strong influences. They to-be-sure often fail to speak out their real opinion from a reluctance to come into conflict with a neighbor. Upon the whole, we cannot assume that these witnesses are not credible. The jury believed them, and from the record they were authorized to do so.

5. It is insisted, the court erred in admitting proof that the negroes were reputed to be the children of the testator. One of the grounds upon which the probate of this will is contested is,



that the testator was not of sound mind. As conducing to establish the sanity of the testator, it was competent to show the relationship that existed between himself and the object of his bounty; presenting an adequate motive for a sane man to make the bequests of the will. This proposition is not contested. But it is said, reputation cannot be heard to establish the pedigree of illegitimate offspring. We see no reason why it may not be heard, whenever the existence of the relationship becomes a material fact. In the nature of things, reputation is almost the only evidence which would tend to establish **[\*\*13]** that fact. Legitimate offspring may be proved by positive evidence; and yet, because of the difficulty that must often exist in making the proof, the law allows this secondary evidence. In cases where it may be important to establish the paternity of illegitimate children, other proof can scarcely ever be produced, and as a matter of necessity, evidence of the reputation of the fact may be heard. But in this case it was more clearly admissible, because the testator had frequently said that they were his children, and the evidence that they were reputed to be so, corroborated **[\*99]** his assertion, and tended to establish his sanity when the will was made.

6. The court charged the jury, that the law presumed every person of sound mind, "and when a will is sought to be invalidated or impeached by reason of insanity of the testator, it is incumbent upon those who impeach the will, to show by satisfactory proof, that the maker was not of sound mind at the date of the will." It is supposed this charge is erroneous, because it was competent to have proved the state of the testator's mind, both before and after the date of the will, and if it had been shown he was insane before the date **[\*\*14]** of the will, this fact established, would have placed the *onus* upon the other side, to prove actual sanity at the date of the will. We do not perceive that this argument places his honor, the circuit judge, in the wrong. He said, that it was incumbent upon those who impeach the will, to prove that the testator was not of sound mind at the date of the will. This certainly was the issue upon that point, whether at the date of the will he was insane, and it devolved on the party impeaching the will to prove this. Whether this proof might be made, by proving that he was insane before the date of the will, and so place the *onus* of proof on the other side, or by proving an unsound state of mind both before and after the date of the will, and thus enable the jury to infer that his mind was unsound at the date of the will, is another question, and one which the charge of the court does not touch. Doubtless, if testimony of this character had been offered it would have been heard, but still the question would have been the same, namely, whether all this proof showed that he was of unsound mind at the date of the will. In this part of the charge there is no error.

7. The court charged the jury that "if, after the execution of the will in 1840, the testator went to the person **[\*\*20]** who held it, and told him to burn it, and it was not done, although he might have supposed it to have been burned, it is no revocation, although he might have been of sound mind. If he told them to burn it, and he was of unsound mind, and it was not done, it of course is no revocation." In this direction, it is alledged there is error. It appears from the proof that when the will was executed, it was left in the custody of R. G. Hale, who had written and witnessed it and that he had given it to his wife to take care of. Some time after its execution, the testator, who was ninety years old, went to the house of the witness and in great apparent distress and excitement asked for his will. He was told to go and get his son, Loyd, and some neighbor and get the will. He replied that his son had driven him there, having drawn a club on him and threatened to beat him, if he did not come and get the will. He was so excited and earnest that the witness told his wife to get the will. She brought a paper which, by the old man's direction, was

thrown in the fire. The testator was in great trepidation and alarm, and seemed to be out of his head. The paper thrown into the fire was not the will, [\*\*21] but was an old school article. Some days afterwards the testator was at Hale's house, and enquired of Sarah Hale, (the wife of R. G. Hale,) if she had his will yet; she told him [\*103] she had. He then said, she must keep it, and do what he had before told her to do with it.

Upon this evidence, it is insisted, that the jury were justified in rendering a verdict establishing the will, although the testator directed it to be cancelled and another paper was burned in his presence, which, at the time he believed to be his will. It is certainly true, that if a will be wholly or partially destroyed by the testator, whilst of unsound mind, it will be established as it existed in its integral state; that being ascertainable. 1 Wms. on Ex'rs. 78. If, therefore, the jury believed that the testator was of unsound mind when he directed the paper to be burned, and that it was not his voluntary act, the facts that occurred would not amount to a revocation. But this matter should have been left to them to decide from the testimony.

It is also insisted that as the will was not destroyed, the testator afterwards knew that it was in existence, and intended that it should stand for his will, and [\*\*22] that these facts are sufficiently proved by one witness. Upon this subject we concur with the following propositions laid down in the case of *Burns vs. Burns*, 4 *Serg & Rawle* 105, 297. "If a man having two wills in his hand, intending to destroy the one last made, by mistake destroys that first executed, the law does not require in order to revive and establish the will intended to be destroyed, such proof as is necessary to give validity to an original will, viz: proof by two witnesses. \* \* \* \* Such will remaining in existence, it is a matter of fact in the first place, whether the testator intended to burn it or not, and in the second place, it is also a matter of fact, whether supposing he did intend to burn it, he did not afterwards know that it was in existence, and intend that it should stand for his will. Those facts are to be proved as facts in general, and not according to the mode prescribed by statute for the probate of a will. So the evidence given of testator's intention and which will he intended to destroy, may be rebutted by contrary evidence, though but by one witness," 1 Wms. on Ex'rs 72, note 1. Thus in this case, if the testator knew that Sarah Hale still [\*\*23] had his will, and intended it should stand for his will, her [\*104] evidence alone, if the jury believed her, would have been sufficient to establish those facts, and would if left to the jury upon a proper charge, have authorized their verdict establishing the will. But his honor did not leave these several questions to the jury, upon a proper statement of the law in reference to them.

The court submitted the naked proposition to the jury that if the testator, being of sound mind, told the witnesses to burn the will, and it was not done, although he might have supposed it to have been burned, it is no revocation. And this charge is made in reference to a transaction, in which, from the proof the testator was deceived by the burning of another paper, which he supposed was his will. We cannot concur with the Circuit Court in the principle above stated. It is true, an intention to revoke, however strong, will not amount to a revocation, unless some act be done. But Mr. Williams in his *Treatise on Executors*, p. 73, says: "With respect to what shall amount to a cancellation, or obliteration, sufficient to operate a revocation, the principle appears to be, that if the intention to [\*\*24] revoke is apparent, an act of destruction or revocation shall carry that intention into effect, although not literally an effectual destruction, or cancellation,

provided the testator has completed all he designed to do for that purpose." If a man having two wills of different dates by him, should direct the former to be cancelled, and through mistake the person directed should cancel the latter, such an act would be no revocation of the latter will. 1 P. W'ms, 345: 1 W'ms on Ex'rs, 68. Here, although there was an actual cancellation, it was no revocation, because the intention to revoke was wanting. Upon the same principle, if an act be done, which was intended as a revocation, it will so operate, if the testator has completed all he designed to do for that purpose, and believes the will to be cancelled. Thus a testator opened his will, gave it a "rip" with his hands so as almost to tear a bit off, then rumbled it together in his hands and threw it in the fire, but it fell off; it would soon have been burnt, had not one Mary Wilson, who was present, taken it up and put it in her pocket. The testator suspected she had it, and said it should not be his will, and bid her [\*\*25] destroy it. He afterwards [\*\*105] told a person he had destroyed his will, and should make no other until he could see his brother. The will was not destroyed, but the jury, with the concurrence of the judge, thought this a revocation. But the counsel for the defendants in error, insist that the judge did not err, because he did not say that the facts stated would be no revocation if the testator intended to revoke. It is true, his honor simply stated that if the testator directed his will to be burned, and it was not done, it would be no revocation, although he might have supposed it was burned. But the presumption of law *prima facie*, is, that acts of obliteration, or cancellation are done *animo revocandi*. 1 Wms. on Ex'rs, 68. We think, therefore, that in this instruction his honor erred, and that, although upon a proper charge, we should have been satisfied with the verdict upon this evidence, yet the misdirection of the court was calculated to mislead the jury, and to direct their attention to the investigation of the case in a manner to leave out of view the true grounds upon which the verdict should have been based. We think, also, that his honor erred in his direction [\*\*26] to the jury, as to the grounds an impeaching witness should form his opinion of a party whose credit is assailed, and that for these errors, the judgment must be reversed, and the cause remanded for another trial.

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***Scott v. Sandford***  
**60 U.S. (19 How.) 393 (1857) (order of presentation revised)**

Mr. Chief Justice TANEY delivered the opinion of the court.

...There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And
2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the army of the United States. In the year 1834, he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the

Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and Harriet intermarried, at Fort Snelling, with the consent of Dr. Emerson, who then claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat *Gipsey*, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant in the State of Missouri, and he brought this action in the Circuit Court of the United States for that district to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood and who were brought into this country and sold as slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court overruled the plea, and gave judgment that the defendant should answer over. And he thereupon put in sundry pleas in bar, upon which issues were joined, and at the trial the verdict and judgment were in his favor. Whereupon the plaintiff brought this writ of error.

Before we speak of the pleas in bar, it will be proper to dispose of the questions which have arisen on the plea in abatement.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated.

If the question raised by it is legally before us, and the court should be of opinion that the facts stated in it disqualify the plaintiff from becoming a citizen, in the sense in which that word is used in the Constitution of the United States, then the judgment of the Circuit Court is erroneous, and must be reversed.

It is suggested, however, that this plea is not before us, and that, as the judgment in the court below on this plea was in favor of the plaintiff, he does not seek to reverse it, or bring it before the court for revision by his writ of error, and also that the defendant waived this defence by pleading over, and thereby admitted the jurisdiction of the court.

But, in making this objection, we think the peculiar and limited jurisdiction of courts of the United States has not been adverted to. This peculiar and limited jurisdiction has made it necessary, in these courts, to adopt different rules and principles of pleading, so far as jurisdiction is concerned, from those which regulate courts of common law in England and in the different States of the Union which have adopted the common law rules.

... In this case, the citizenship is averred, but it is denied by the defendant in the manner required by the rules of pleading, and the fact upon which the denial is based is admitted by the demurrer. And, if the plea and demurrer, and judgment of the court below upon it, are before us upon this record, the question to be decided is whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

We think they are before us. The plea in abatement and the judgment of the court upon it are a part of the judicial proceedings in the Circuit Court and are there recorded as such, and a writ of error always brings up to the superior court the whole record of the proceedings in the court below. And in the case of the United States v. Smith, 11 Wheat. 171, this court said, that the case being brought up by writ of error, the whole record was under the consideration of this court. And this being the case in the present instance, the plea in abatement is necessarily under consideration, and it becomes, therefore, our duty to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

The question is simply this: can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution?

It will be observed that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State in the sense in which the word "citizen" is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments as much so as if an ocean had separated the red man from the white, and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war, and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race, and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupillage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States, and if an individual should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is whether



the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And, for the same reason, it cannot introduce any person or description of persons who were not intended to be embraced in this new political family which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country or who might afterwards be imported, who had then or should afterwards be made free in any State, and to put it in the power of a single State to make him a citizen of the United States and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons who were, at the time of the adoption of the Constitution, recognised as citizens in the several States became also citizens of this new political body, but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognised as the people or citizens of a State whose rights and liberties had been outraged by the English Government, and who declared their independence and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence and when the Constitution of the United States was framed and



adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics which no one thought of disputing or supposed to be open to dispute, and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion. And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa and sold them or held them in slavery for their own use, but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different colonies furnishes positive and indisputable proof of this fact.

It would be tedious, in this opinion, to enumerate the various laws they passed upon this subject. It will be sufficient, as a sample of the legislation which then generally prevailed throughout the British colonies, to give the laws of two of them, one being still a large slaveholding State and the other the first State in which slavery ceased to exist.

The province of Maryland, in 1717, ch. 13, s. 5, passed a law declaring

"that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the justices of the county court where such marriage so happens shall think fit, to be applied by them towards the support of a public school within the said county. And any white man or white woman who shall intermarry as aforesaid with any negro or mulatto, such white man or white woman shall become servants during the term of seven years, and shall be disposed of by the justices as aforesaid, and be applied to the uses aforesaid."

The other colonial law to which we refer was passed by Massachusetts in 1705 (chap. 6). It is entitled "An act for the better preventing of a spurious and mixed issue," &c., and it provides, that

"if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at the discretion of the justices before whom the offender shall be convicted."

And

"that none of her Majesty's English or Scottish subjects, nor of any other Christian nation, within this province, shall contract matrimony with any negro or mulatto; nor shall any person, duly authorized to solemnize marriage, presume to join any such in marriage, on pain of forfeiting the sum of fifty pounds; one moiety thereof to her Majesty, for and towards the support of the Government within this province, and the other moiety to him or them that shall inform and sue for the same, in any of her Majesty's courts of record within the province, by bill, plaint, or information."

...We refer to these historical facts for the purpose of showing the fixed opinions concerning that race upon which the statesmen of that day spoke and acted. It is necessary to do this in order to determine whether the general terms used in the Constitution of the United States as to the rights of man and the rights of the people was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The language of the Declaration of Independence is equally conclusive:

It begins by declaring that,

"[w]hen in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation."

It then proceeds to say:

"We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of

Independence would have been utterly and flagrantly inconsistent with the principles they asserted, and instead of the sympathy of mankind to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

...This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the people of the United States -- that is to say, by those who were members of the different political communities in the several States -- and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808 if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. ...

No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery, and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

It is very true that, in that portion of the Union where the labor of the negro race was found to be unsuited to the climate and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence, and when the Constitution was adopted, it had entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race, but because it was discovered from experience that slave labor was unsuited to the climate and productions of these States, for some of the States where it had ceased or nearly ceased to exist were actively

engaged in the slave trade, procuring cargoes on the coast of Africa and transporting them for sale to those parts of the Union where their labor was found to be profitable and suited to the climate and productions. And this traffic was openly carried on, and fortunes accumulated by it, without reproach from the people of the States where they resided. And it can hardly be supposed that, in the States where it was then countenanced in its worst form -- that is, in the seizure and transportation -- the people could have regarded those who were emancipated as entitled to equal rights with themselves.

And we may here again refer in support of this proposition to the plain and unequivocal language of the laws of the several States, some passed after the Declaration of Independence and before the Constitution was adopted and some since the Government went into operation.

...The ... naturalization law, which was passed at the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens "*to aliens being free white persons.*"

Now the Constitution does not limit the power of Congress in this respect to white persons. And they may, if they think proper, authorize the naturalization of anyone, of any color, who was born under allegiance to another Government. But the language of the law above quoted shows that citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.

Congress might, as we before said, have authorized the naturalization of Indians because they were aliens and foreigners. But, in their then untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they had but recently committed, when they were the allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. No one supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word white was not used with any particular reference to them.

Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore there was no necessity for using particular words to exclude them.

It would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery and governed at their own pleasure.

Another of the early laws of which we have spoken is the first militia law, which was passed in 1792 at the first session of the second Congress. The language of this law is equally plain and significant with the one just mentioned. It directs that every "free able-bodied white male citizen" shall be enrolled in the militia. The word *white* is evidently used to exclude the African race, and the word "citizen" to exclude unnaturalized foreigners, the latter forming no part of the sovereignty, owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the Government, whether they were

slave or free, but it is repudiated, and rejected from the duties and obligations of citizenship in marked language.

The third act to which we have alluded is even still more decisive; it was passed as late as 1813, 2 Stat. 809, and it provides:

"That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, *or* persons of color, natives of the United States."

Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons, and authorized to be employed, if born in the United States.

...Upon the whole, therefore, it is the judgment of this court that it appears by the record before us that the plaintiff in error is not a citizen of Missouri in the sense in which that word is used in the Constitution, and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued directing the suit to be dismissed for want of jurisdiction.

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**Side Bar:** Dred Scott did, in fact, get his freedom, but not through the courts. Irene Emerson's second husband, the abolitionist doctor Calvin Chaffee, now a Massachusetts representative, learned that his wife owned the most famous slave in America just



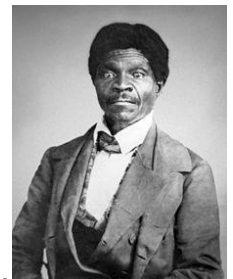
Taylor Blow

before the court handed down its momentous decision in Scott's case on March 6, 1857. Defenders of slavery ridiculed the hypocrisy of a man who owned slaves and yet spoke out against slavery. *Since at that time a husband controlled his wife's property*, Chaffee immediately transferred ownership of Scott and his family to Taylor Blow in St. Louis; Missouri law allowed only citizens of the state

to emancipate slaves there. Irene Emerson Chaffee insisted, however, that she receive the wages the Scotts had earned during the preceding seven years, a sum of \$750 that had been tied up because of the court proceedings.

On May 26, 1857, Dred and Harriet Scott appeared in the St. Louis Circuit Court and were formally freed. Scott then took a job as a porter at Barnum's Hotel in the city and became a celebrity of sorts. Unfortunately, he did not live to enjoy his free status very long. On September 17, 1858, he died of tuberculosis and was buried in St. Louis. Harriet Scott lived until June 1876, long enough to see the Civil War and the Thirteenth Amendment finally abolish slavery in the United States.

<https://www.britannica.com/biography/Dred-Scott>



Dred Scott



Harriet Scott

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***Wood v. Ward***

30 F. Cas. 479 \*; 1879 U.S. App. LEXIS 2272 \*\*; 2 Flip. 336; 8 Cent. Law J. 188; 25 Int. Rev. Rec. 64  
February 15, 1879  
Case No. 17,966

**Case Summary**

**Procedural Posture**

Plaintiff, a freed slave that was kidnapped and sold into slavery in another state, appealed the order dismissing her petition filed for the purposes of regaining her liberty from defendant slave owner.

**Overview**

Plaintiff freed slave was kidnapped and sold into slavery in another state. On her release, she filed a petition for the purpose of regaining her liberty, averring that she was a free woman. Defendant slave owner answered that she was not a free woman, but his slave. The trial court dismissed the petition. The slave appealed. On appeal, the court held that she alleged her freedom. To permit the trial court decree, obtained under such circumstances against a human being for the time treated as a chattel and without legal capacity to sue to operate as a bar or an estoppel would have been a just reproach to the jurisprudence of any country. The slave offered full and satisfactory evidence of her freedom at the time of the committing of the several grievances complained of, while the slave owner offered no opposing testimony. Accordingly, judgment was entered for the slave.

**Outcome**

Judgment was entered for the freed slave.

**Opinion by: BAXTER**

[\*480] BAXTER, Circuit Judge. The plaintiff is a woman of color. For several years prior to her removal to Cincinnati, she resided with a Mrs. Cirode, in Louisville, Ky., as a slave. About 1847 Mrs. Cirode left Louisville, taking the plaintiff with her and settled in Cincinnati, where she executed and delivered to the plaintiff a formal instrument of emancipation. Thus the plaintiff became, so far as Mrs. Cirode, her apparent owner, could confer the boon, a free person, endowed with all the rights and immunities incident to freedom. And from that time until the restraint imposed by the defendant, to be hereinafter fully stated, the plaintiff remained in Cincinnati, in the undisputed and undisturbed enjoyment of personal freedom.

We infer, however, from the depositions given in another suit (but which are not evidence in this case), to be hereinafter mentioned, between these parties in Kentucky, that the children of Mrs. Cirode claimed some title to or interest in the plaintiff, as a slave, conjointly with or adversely to



their mother's title; and that they repudiated [\*\*2] their mother's action in the premises, and desired to regain possession of her. But no active steps seem to have been taken to effect that object until the spring of 1853. At or about this time they united in a assumed to convey the plaintiff as a slave to the defendant in consideration of \$300 to be paid in the event he succeeded in obtaining possession of her. The defendant then resided in Covington, Ky. Shortly after said conditional sale, the plaintiff was inveigled by one Rebecca Boyd, in whose service she was then employed, across the Ohio river and into the state of Kentucky, where by chance or pre-arrangement they were met by defendant, who claimed the plaintiff as his slave, forcibly restrained her of her liberty, and sent her back to Lexington, and had her there confined in a private slave prison belonging to one Lewis C. Robards.

Whilst thus imprisoned, to-wit: on the 10th of June, 1853, a petition was filed in the Fayette county circuit court in plaintiff's name for the purpose of regaining her liberty. In it she averred that she was a free woman. To this petition Lewis C. Robards, the proprietor of the prison in which [\*\*3] she was detained, was made a defendant. But at defendant's instance an interlocutory order was soon after entered in the cause, substituting the defendant "Zeb. Ward as a defendant in the place of Lewis C. Robards," and dismissing her petition as to Robards.

The defendant Ward then answered, and in his answer alleged "that the plaintiff was not a free woman, but his slave."

Upon the issue thus made proofs were taken and the case regularly heard, when a final decree (24th June, 1854) was entered in the following terms: "This cause having been heard and the court advised, decrees and orders that the plaintiff's petition be dismissed."

From this decree the plaintiff appealed to the court of appeals.

There is no transcript of the record from the court of appeals, and consequently we are not advised of the action of that court, except in so far as the same is supplied by the record offered from the Fayette county circuit court. From this we see that, on the 13th day of February, 1855, the following entry was made in said last named court: "The defendant, Zeb. Ward, produced a mandate of the court of appeals, which is ordered to be recorded as follows: 'Court of Appeals, January [\*\*4] 20, 1855. Henrietta Wood, appellant, vs. Zeb. Ward, appellee. Appeal from a judgment of the Fayette circuit court. The court being sufficiently advised, it seems to them that there is no error in the judgment. It is therefore adjudged that said judgment be affirmed, which is ordered to be certified to said court.'"

Here the litigation between these parties in Kentucky terminated. Whereupon the defendant, soon after the termination, sold the plaintiff to one Wm. Pulliam. He caused her to be conveyed to Mississippi and sold to one Girard Brandon. Brandon continued to subject her to his service in the states of Mississippi and Texas until the latter part of 1865, and until she was emancipated by the *thirteenth amendment* to the national constitution. On being thus the second time emancipated from slavery, the plaintiff began preparations to return to her home in Cincinnati, but owing to various hindrances, not necessary to be enumerated here, she did not get back to Cincinnati until some time in the year 1869.

During all this time, from 1853 to 1870, the defendant resided in Kentucky and Tennessee. He visited Cincinnati in 1870, when this suit was instituted. Plaintiff's **[\*\*5]** petition, which, under the practice in Ohio, is filed as a substitute for a declaration, embodies substantially the facts hereinbefore stated – except those connected with the Kentucky litigation.

The defendant's answer interposed three defenses: First, a general denial of the facts charged; second, the statutes of limitation; third, the adjudication of the Kentucky court hereinbefore referred to.

The plaintiff replied, and the issues thus made came on and were tried at the last April term, 1878, before the honorable the district judge and a jury, resulting in a verdict for the plaintiff, and an assessment of \$2,500 damages. [See Case No. 17,966.]

The defendant then moved for a new trial, **[\*481]** and it is this motion that it now before us for determination.

Defendant's exceptions upon the trial were numerous. He excepted to the rulings of the judge on questions of admitting and excluding evidence, as well as to his instructions given in relation to the statutes of limitation, and in relation to the force and effect of the decree rendered in Kentucky, and pleaded and relied on as a defense to this action.

We have neither the time nor the inclination to discuss in **[\*\*6]** detail all the exceptions that were taken, nor is it, in our judgment, necessary for us to do so. If the court fell into error in the admission or exclusion of testimony, or indulged in instructions upon immaterial and abstract matters, the errors in no way affect the merits of this controversy, or prejudice the defendant's right. With the charge relating to the statutes of limitation we are entirely satisfied. The real contest, as we think, arises out of the defendant's third defense, to-wit: "Is the plaintiff, by reason of the decree rendered in her suit, by the Fayette county circuit court of Kentucky, precluded from a re-examination in this court of the same question decided in that case?" If she is, then that judgment is a full and complete defense to this action. The question is an important one, and deserves, as it has received, the most thorough consideration.

The facts, as we have detailed them, present a case of peculiar and complicated oppression. The plaintiff was quietly, and, as she believed, securely domiciled, under the protection of the laws, in a community friendly to her aspirations, and within a jurisdiction which prohibited slavery, and presumed everything **[\*\*7]** in favor of freedom. But while thus reposing in confidence she was, by false pretenses, decoyed into Kentucky, and there enslaved by violence. It was a most grievous wrong to have been thus betrayed into a distant and unfriendly jurisdiction, in which her color was prima facie evidence of servility, and forced to submit to the deprivation of liberty, or litigate in a tribunal where the presumptions of law, supposed public policy and established prejudices of long standing, combined to defeat her claim. And when these we add that, pending the controversy, the plaintiff was prima facie under the ban of slavery with all attendant disabilities, left in defendant's custody, subject to his unrestrained will and amenable to his punishment, and without the means necessary to defray the expenses of litigation, her wrongs appear more and more obvious, and appeal strongly to the sympathies of the court for redress.



But these considerations cannot prevail with the court unless a remedy can be found within recognized legal principles. A judge dare not know and code of morals higher than the constitution and the laws enacted in pursuance of that instrument. These, as they then existed, [\*\*8] not only recognized, but protected the slave owner in the enjoyment of that species of property, and we must administer the law as it then existed, uninfluenced by the subsequent change in public sentiment on this interesting subject.

By the national constitution -- the instrument under and in virtue of which we hold our office -- we are required "to give full faith and credit to the records, public acts and judicial proceedings" of the several states. It follows that the decree of the Kentucky court is entitled at our hands to the same force and legal effect that ought, under the laws of Kentucky, to be accorded to it in that state. The question therefore narrows itself down to the single inquiry: Does the decree rendered by the court of Kentucky and here pleaded and relied on as a bar to this action forever preclude the plaintiff from a re-examination of the issue decided in that case? If it does, as we have already said, it is a complete defense to the plaintiff's present suit.

Judgments of courts are not always conclusive upon the litigant parties in collateral or other proceedings. The jurisdiction of the court is always open to inquiry. In order to confer jurisdiction [\*\*9] the suit must be by and against parties competent to sue and be sued. But the plaintiff was repelled by the Kentucky court, on the ground that she was a slave. If a slave, she was a chattel, a mere piece of property, without civil rights, and incompetent to prosecute or defend a suit. 14 Am. Cyclopaedia, tit. "Slavery," p. 92. This status is inseparably connected with slavery, and has prevailed in the slave-holding states of the Union, including Kentucky, from the time slavery was first legalized to the abolition of the institution in 1865.

Their disabilities have been iterated and reiterated by the courts in a uniform current of decisions, covering almost every possible phase of the subject. Where a slave finds lost property, it inures to the benefit of the master until the true owner can be found. *Brandon v. Planters' & Merchants' Bank of Huntsville*, 1 Stew. (Ala.) 320. A special plea that either plaintiff or defendants is a slave is a good plea in bar. *Amy v. Smith*, 1 Litt. (Ky.) 326, and *Bentley v. Cleaveland*, 22 Ala. 814.

Slaves cannot appear as suitors, either in courts of law or equity. *Bland v. Dowling*, 9 Gill & J. 19. Nor can a master sue his slave. *Catiche v. [\*\*10] Circuit Court*, 1 Mo. 608. Slaves are incapable of entering into valid contracts, or of taking property, by demise or otherwise, to themselves, directly or through the intervention of a trustee. *Hall v. Mullin*, 5 Har. & J. 190; *Taylor v. Embry*, 16 B. Mon. 340; *Trotter v. Blocker*, 6 Port. (Ala.) 269; *Lamb v. Girtman*, 26 Ga. 625; *Graves v. Allan*, 13 B. Mon. 190; *Jones v. Lipscomb*, 14 B. Mon. 239; *Turner v. Smith*, 12 La. Ann. 417; *Hinds v. Brazealle*, 3 Miss. 837; and *Cunningham v. Cunningham*, Cam. & N. 353.

Even a bond executed by a slave, with a free man as surety, is against public policy and void. *Batten v. Faulk*, 4 Jones (N.C.) [\*482] 233. Money acquired by a slave by permission of his master, inures to the latter. *Jenkins v. Brown*, 6 Humph. 299.

Courts of chancery, with their ample powers, cannot enforce a contract between master and slave, though fully performed on the part of the slave. 1 Leigh, 72. And a conveyance of lands

and slaves in trust, to allow the slaves to occupy and receive the rents of the land, and the profits of their own labor, is void. *Smith v. Betty*, 11 *Grat.* 752. It is not felony in Georgia, by the common law, to kill a slave. *Neal v. Farmer*, 9 [\*\*11] *Ga.* 555. It is lawful to track runaway slaves with dogs, provided it is done with caution and circumspection. *Moran v. Davis*, 18 *Ga.* 722. They are recognized, in a restricted sense, as human beings, in this: Masters have no right to inflict such cruel and inhuman punishment, even to enforce obedience, as must result in death or loss of limb as a consequence of the punishment. *Craig v. Lee*, 14 *B. Mon.* 119.

But unconditional submission of the slave is due to the authority of the master; and the master may, therefore, use such force and means as may be necessary to enforce submission to his authority, even to the destruction of life or limb of the slave. *Oliver v. State*, 39 *Miss.* 526. The law of slavery is absolute authority on the part of the master, and unconditional submission on the part of the slave. And the master may punish the slave at will, in such manner and degree as his judgment and humanity may dictate, provided he does not maim or kill. *State v. David*, 4 *Jones (N.C.)* 353. The right of the master to obedience and submission in lawful things is perfect. The power to inflict any punishment not affecting life or limb, which the master considers necessary to enforce obedience [\*\*12] to his commands, is secured to him by the law. Now, if in the exercise of his authority, the slave resists and slays the master, it is murder, and not manslaughter, because the law cannot recognize the violence of the master as a legitimate provocation. *Jacob v. State*, 3 *Humph.* 493.

Mutuality is an essential ingredient in all estoppels, and as slaves are not answerable civilly; as they are subject to no suit; as no civil liability can attach to them, and they can neither be bound by covenant nor hindered by an estoppel, the law will not allow them to claim the benefit of an estoppel against others. *Bentley v. Cleaveland*, *supra*. A judgment rendered against a slave, in an action in which he appeared, is a nullity. *Stenhouse v. Bonum*, 12 *Rich. Law*, 620.

From these authorities, which might be indefinitely extended, it will be seen that although slaves are protected as persons against the destruction of life and limb, they are in all other respects treated as property, and subjected to all the disabilities incident to that condition. They are without power to contract, to acquire, or hold property, sue or defend a suit. And being without capacity to sue or defend, no valid judgment [\*\*13] can be rendered against them. It would be an anomaly to hold that any one could be concluded by a judgment or decree rendered in a judicial proceeding which he had no legal capacity to prosecute or defend.

It is true that such a suit was brought by the plaintiff, and prosecuted in her name, and that the Kentucky court did entertain, sit in judgment upon and decide it. Similar suits were not infrequent in the courts of the slave states. But these suits were always entertained upon the allegations that the plaintiff was free. If free, the plaintiff had a right to sue; but when the question of freedom was traversed, and put in issue, it was equivalent to denying the plaintiff's right to sue, and whenever the court reached the conclusion that the plaintiff was a slave, the litigation, whatever its scope, necessarily ceased for the want of a competent plaintiff. In other words, the courts held there was no suit pending, and dismissed the proceeding without further inquiry. In *Bentley v. Cleaveland*, *supra*, the court ordered the allegation that complainants were slaves to stand as a plea to be first disposed of before it would take cognizance of the other parts of the complaint. The [\*\*14] same principle, as we understand the record, was applied by the

Kentucky court to the proceeding instituted by the plaintiff against the defendant. Plaintiff alleged her freedom. This, prima facie, gave jurisdiction. But as soon as the court reached the conclusion that plaintiff was a slave, it found itself without jurisdiction for the want of a plaintiff competent to sue, and did the only thing which, under the circumstances, it could have done -- struck the case from the docket. The decree simply dismisses plaintiff's petition. There is no declaration of facts, no special findings, no judgment for costs, and no execution awarded.

In the opinion of the court, the plaintiff was defendant's property. She, and all she had, and all that she might afterwards acquire, belonged to him.

To permit such a decree, obtained under such circumstances, against a human being, for the time treated as a chattel, and without legal capacity to sue, to operate as a bar, or an estoppel, and conclude the plaintiff in a matter of such vital importance as is involved in this case, would be a just reproach to the jurisprudence of any country.

On the trial of this case in this court, the plaintiff [\*\*15] offered full and satisfactory evidence of her freedom at the time of the committing of the several grievances complained of, whilst defendant offered no opposing testimony. He rested his case wholly on the judgment pleaded and relied on by him. As this judgment does not, in our opinion, conclude the plaintiff, the verdict of the jury must stand. The damages are not excessive; the motion for a new trial will be disallowed, and judgment entered thereon in plaintiff's favor.

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Supreme Court of the United States  
'THE CIVIL RIGHTS CASES.'  
UNITED STATES

v.

STANLEY. [On a Certificate of Division in  
Opinion between the Judges of the Circuit Court  
of the United States for the District of Kansas.]  
UNITED STATES

v.

RYAN. [In Error to the Circuit Court of the  
United States for the District of California.]  
UNITED STATES

v.

NICHOLS. [On a Certificate of Division in Opinion  
between the Judges of the Circuit Court of the  
United States for the Western District of Missouri.]  
UNITED STATES

v.

SINGLETON. [On a Certificate of Division  
in Opinion between the Judges of the  
Circuit Court of the United States for

the Southern District of New York.]  
ROBINSON and wife  
v.  
MEMPHIS & CHARLESTON R. CO. [In  
Error to the Circuit Court of the United  
States for the Western District of Tennessee.]

3 S.Ct. 18  
October 15, 1883.

### Opinion

BRADLEY, J.

\*4 These cases are all founded on the first and second sections of the act of Congress known as the 'Civil Rights Act,' passed March 1, 1875, entitled 'An Act to protect all citizens in their civil and legal rights.' 18 St. 335. Two of the cases, those against Stanley and Nichols, are indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, are, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theater, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theater in San Francisco; and the indictment against Singleton being for denying to another person, whose color is not stated, the full enjoyment of the accommodations of the theater known as the Grand Opera House in New York, 'said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude.' The case of Robinson and wife against the Memphis & Charleston Railroad Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee, to recover the penalty of \$500 given by the second section of the act; and the *gravamen* was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent.

The jury rendered a verdict for the defendants in this case upon the merits under a charge of the court, to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the act of Congress; and the principal point made by the exceptions was that the judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the judge charged the jury, in substance, that if this was the conductor's *bona fide* reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company. The case is brought here by writ of error at the suit of the plaintiffs. The cases of Stanley, Nichols, and Singleton come up on certificates of division of opinion between the judges below as to the constitutionality of the first and second sections of the act referred to; and the case of Ryan, on a writ of error to the judgment of the Circuit Court for the District of California sustaining a demurrer to the information.

**\*\*20** It is obvious that the primary and important question in all **\*9** the cases is the constitutionality of the law; for if the law is unconstitutional none of the prosecutions can stand. The sections of the law referred to provide as follows:

‘Sec. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

‘Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of \$500 to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall, also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$500 nor more than \$1,000, or shall be imprisoned not less than 30 days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by state statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any state: *And provided, further*, that a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.’

Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part. The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, **\*10** public conveyances, and theaters; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves.

Its effect is to declare that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement, as are enjoyed by white citizens; and *vice versa*. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the **\*\*21** Constitution before the adoption of the last three

amendments. The power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished Senators, advanced while the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that Congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the Fourteenth Amendment,—which is the one relied on,—after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that: \*11 \*‘no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ‘It is State action of a particular character that is prohibited.

Individual invasion of individual rights is not the subjectmatter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State law and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, \*\*22 and be directed to the correction \*12 of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *U.S. v. Cruikshank*, 92 U. S. 542; *Virginia v. Rives*, 100 U. S. 313, and *Ex parte Virginia*, Id. 339.

It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the states. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals



shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. 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 as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may **\*\*24** not Congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law, (and the amendment itself does suppose this,) why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theaters. The truth is that the implication of a power to legislate in this manner is based **\*15** upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

We have not overlooked the fact that the fourth section of the act now under consideration has been held by this court to be constitutional. That section declares ‘that no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.’ In *Ex parte Virginia*, 100 U. S. 339, it was held that an indictment against a State officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the State government, carry into effect such a rule of disqualification. In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute book of the State actually laid down any such rule of disqualification or not, the State, through its officer, enforced such a rule; and it is against such State action, through its officers and agents, that the last clause of the section is directed. **\*16** This aspect of the law was deemed sufficient to

divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering.

**\*20** But the power of Congress to adopt direct and primary, as distinguished from corrective, legislation on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares ‘that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United **\*\*28** States, or any place subject to their jurisdiction;’ and it gives Congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force it abolished slavery, and established universal freedom. Still, legislation may be necessary and

proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. It is true that slavery cannot exist without law any more than property in lands and goods can exist without law, and therefore the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States; and upon this assumption it is claimed that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of public amusement; the argument being that the denial of such equal accommodations and privileges is in itself a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that that **\*21** Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges, and immunities of citizens which cannot rightfully be abridged by state laws under the Fourteenth Amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the National Assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another, were servitudes or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom which had **\*\*29** the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a state law, there can be no doubt that the law would be repugnant to



the Fourteenth, no less than to the Thirteenth Amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted.

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theater, of its accommodations and privileges to an individual, even through the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery? It may be that by the Black Code, (as it was called,) in the times when slavery prevailed, the proprietors of inns and public \*22 conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of the party's legal right as a citizen, and amenable to the prohibitions of the Fourteenth Amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterwards received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that \*\*30 time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

\*23 We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different: the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents.

Under the Fourteenth Amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities which have the effect to abridge any deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful \*24 avocations allowed to others. What is called CLASS legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not to the prohibitions of the Fourteenth Amendment but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to another. The Thirteenth Amendment has respect, not to distinctions of race, or \*\*31 class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some state sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance, or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or, if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment.

On the whole, we are of opinion that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned. This conclusion disposes of the cases now under consideration. In the cases of *United States v. Ryan*, and of *Richard A. Robinson and wife v. Memphis & The Charleston \*26 Railroad Company*, the judgments must be affirmed.

In the other cases, the answer to be given will be, that the first and second sections of the act of Congress of March 1, 1875, entitled ‘An Aact to protect all citizens in their civil and legal rights,’ are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly. *And it is so ordered.*

HARLAN, J., dissents.

**\*\*33** HARLAN, J., *dissenting.*

The opinion in these cases proceeds, as it seems to me, upon grounds entirely too narrow and artificial. The substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. ‘It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body; the sense and reason of the law is the soul.’ Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency or policy. I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.

The purpose of the first section of the act of Congress of March 1, 1875, was to prevent *race* discrimination. It does not assume to define the general conditions and limitations under which inns, public conveyances, and places of public amusement may be conducted, but only declares that such conditions and limitations, whatever they may be, shall not be applied, by way of **\*27** discrimination, *on account of race, color, or previous condition of servitude*. The second section provides a penalty against any one denying, or aiding or inciting the denial, to any citizen that equality of right given by the first section, except for reasons by law applicable to citizens of every race or color, and regardless of any previous condition of servitude.

There seems to be no substantial difference between my brethren and myself as to what was the purpose of Congress; for they say that the essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theaters, but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. The effect of the statute, the court says, is that

colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white persons, and *vice versa*.

The court adjudges that Congress is without power, under either the Thirteenth or Fourteenth Amendment, to establish such regulations, and that the first and second sections of the statute are, in all their parts, unconstitutional and void.

We next come to the Fugitive Slave Act of 1850, the constitutionality of which rested, as did that of 1793, solely upon the implied power of Congress to enforce the master's rights. The provisions of that act were far in advance of previous legislation. They placed at the disposal of the master seeking to recover his fugitive slave, substantially, the whole power of the nation. It invested commissioners, appointed under the act, with power to summon the *posse comitatus* for the enforcement of its provisions, and commanded 'all good citizens' to assist in its prompt and efficient execution whenever their services were required as part of the *posse comitatus*. Without going into the details of that act, it is sufficient to say that Congress omitted from it nothing which the utmost ingenuity could suggest as essential to the successful enforcement of the master's claim to recover his fugitive slave. And this court, in *Ableman v. Booth*, 21 How. 526, adjudged it to be, 'in all of its provisions, fully authorized by the Constitution of the United States.'

The only other decision prior to the adoption of the recent amendments, to which reference will be made, is *Dred Scott v. Sandford*, 19 How. 393. That suit was instituted in a circuit court of the United States by Dred Scott, claiming to be a citizen of Missouri, the defendant being a citizen of another State. Its object was to assert the title of himself and family to freedom. The defendant pleaded in **\*\*36** abatement to the jurisdiction of the court that Scott—being of African descent, whose ancestors, of pure African blood, were brought into this country, and sold as slaves—was not a *citizen*. The only matter in issue, said the court, was whether the descendants of slaves so imported **\*31** and sold, when they should be emancipated, or who were born of parents who had become free before their birth, are citizens of a State in the sense in which the word 'citizen' is used in the Constitution of the United States.

In determining that question the court instituted an inquiry as to who were citizens of the several States at the adoption of the Constitution, and who, at that time, were recognized as the people whose rights and liberties had been violated by the British government. The result was a declaration by this court, speaking through Chief Justice Taney, that the legislation and histories of the times, and the language used in the Declaration of Independence, showed 'that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that instrument:' that 'they had for more than a century before been regarded as beings of an inferior race, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit;' that he was 'bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it;' and that 'this opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well

as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without for a moment doubting the correctness of this opinion.'

The judgment of the court was that the words 'people of the United States' and 'citizens' meant the same thing, both describing 'the political body who, according to our republican institutions, form the sovereignty and hold the power and conduct the government through their representatives;' that 'they are what we familiarly call the 'sovereign people,' and \*32 every citizen is one of this people and a constituent member of this sovereignty;' but that the class of persons described in the plea in abatement did not compose a portion of this people, were not 'included, and were not intended to be included, under the word 'citizens' in the Constitution;' that, therefore, they could 'claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States;' that, 'on the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the \*\*37 dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.' Such were the relations which, prior to the adoption of the Thirteenth Amendment, existed between the government, whether national or state, and the descendants, whether free or in bondage, of those of African blood who had been imported into this country and sold as slaves.

The first section of the Thirteenth Amendment provides that 'neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.' Its second section declares that 'Congress shall have power to enforce this article by appropriate legislation.' This amendment was followed by the Civil Rights Act of April 9, 1866, which, among other things, provided that 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.' 14 Stat. 27. The power of Congress, in this mode, to elevate the race thus liberated to the plane of national citizenship, was maintained, by the supporters of the act of 1866, to be as full and complete as its power, by general statute, to make the children, being of full age, of persons naturalized in this country, citizens of the United States without going through the process of naturalization. The act of 1866, in this respect, was also likened to that of 1843, in which congress declared 'that the Stockbridge tribe of Indians, and each and every one of them, shall be deemed to be, and are hereby declared to be, citizens of the United States to \*33 all intent and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens, and shall in all respects be subject to the laws of the United States.' If the act of 1866 was valid, as conferring national citizenship upon all embraced by its terms, then the colored race, liberated by the Thirteenth Amendment, became citizens of the United States prior to the adoption of the Fourteenth Amendment. But, in the view which I take of the present case, it is not necessary to examine this question. The terms of the Thirteenth Amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States. No race, as such, can be excluded from the benefits or rights thereby conferred. Yet it is historically true that that amendment was suggested by the condition, in this country, of that race which had been declared, by this court, to have had— according to the opinion entertained by the most civilized



portion of the white race, at the time of the adoption of the Constitution— ‘no rights which the white man was bound to respect,’ none of the privileges or immunities secured by that instrument to citizens of the United States. It had reference, in a peculiar sense, to a people **\*\*38** which (although the larger part of them were in slavery) had been invited by an act of Congress to aid, in saving from overthrow a government which, theretofore, by all of its departments, had treated them as an inferior race, with no legal rights or privileges except such as the white race might choose to grant them.

These are the circumstances under which the Thirteenth Amendment was proposed for adoption. They are now recalled only that we may better understand what was in the minds of the people when that amendment was being considered, and what were the mischiefs to be remedied, and the grievances to be redressed.

We have seen that the power of Congress, by legislation, to enforce the master's right to have his slave delivered up on claim was *implied* from the recognition of that right in the national Constitution. But the power conferred by the Thirteenth Amendment does not rest upon implication or **\*34** inference. Those who framed it were not ignorant of the discussion, covering many years of the country's history, as to the constitutional power of Congress to enact the Fugitive Slave Laws of 1793 and 1850. When, therefore, it was determined, by a change in the fundamental law, to uproot the institution of slavery wherever it existed in this land, and to establish universal freedom, there was a fixed purpose to place the power of Congress in the premises beyond the possibility of doubt. Therefore, *ex industria*, the power to enforce the Thirteenth Amendment, by appropriate legislation, was expressly granted. Legislation for that purpose, it is conceded, may be direct and primary.

But to what specific ends may it be directed? This court has uniformly held that the national government has the power, whether expressly given or not, to secure and protect rights conferred or guaranteed by the constitution. *U. S. v. Reese*, 92 U. S. 214; *Strauder v. West Virginia*, 100 U. S. 303. That doctrine ought not now to be abandoned, when the inquiry is not as to an implied power to protect the master's rights, but what may congress do, under powers expressly granted, for the protection of freedom, and the rights necessarily inhering in a state of freedom.

The Thirteenth Amendment did something more than to prohibit slavery as an *institution*, resting upon distinctions of race, and upheld by positive law. My brethren admit that it established and decreed universal *civil freedom* throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery?

Was nothing more intended than to forbid one man from owning another as property? Was it the purpose of the nation simply to destroy the institution, and then remit the race, theretofore held in bondage, to the several states for such protection, in their civil rights, necessarily growing out of freedom, as those States, in their discretion, choose to provide? Were the States, against whose protest the institution was destroyed, **\*\*39** to be left free, so far as national interference was concerned, to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights which by universal concession, that inhere in a state of freedom? **\*35** Had the Thirteenth Amendment stopped with the sweeping declaration, in its first section, against the existence of slavery and involuntary servitude, except for crime, Congress would have had the

power, by implication, according to the doctrines of *Prigg v. Commonwealth of Pennsylvania* repeated in *Strauder v. West Virginia*, to protect the freedom established, and consequently to secure the enjoyment of such civil rights as were fundamental in freedom. That it can exert its authority to that extent is made clear, and was intended to be made clear, by the express grant of power contained in the second section of the Amendment.

What has been said is sufficient to show that the power of Congress under the Thirteenth Amendment is not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted to the extent at least of protecting the liberated race against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race.

**\*\*41** It remains now to inquire what are the legal rights of colored persons in respect of the accommodations, privileges, and facilities of public conveyances, inns, and places of public amusement.

Congress has not, in these matters, entered the domain of state control and supervision. It does not, as I have said, assume to prescribe the general conditions and limitations under which inns, public conveyances, and places of public amusement shall be conducted or managed. It simply declares in effect that since the nation has established universal freedom in this country for all time, there shall be no discrimination, based merely upon race or color, in respect of the legal rights in the accommodations \*43 and advantages of public conveyances, inns, and places of public amusement.

I am of the opinion that such discrimination practiced by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude, the imposition of which Congress may prevent under its power. By appropriate legislation, to enforce the Thirteenth Amendment; and consequently, without reference to its enlarged power under the Fourteenth Amendment, the act of March 1, 1875, is not, in my judgment, repugnant to the Constitution.

It is, therefore, an essential inquiry what, if any, right, privilege, or immunity was given by the nation to colored persons when they were made citizens of the State in which they reside? Did the national grant of State citizenship to that race, of its own force, invest them with any rights, privileges, and immunities whatever? That they became entitled, upon the adoption of the Fourteenth Amendment, 'to all privileges and immunities of citizens in the several States,' within the meaning of section 2 of article 4 of the Constitution, no one, I suppose, will for a moment question. What are the privileges and immunities to which, by that clause of the constitution, they became entitled? To this it may be answered, generally, upon the authority of the adjudged cases, that they are those which are fundamental in citizenship in a free government, 'common to the citizens in the latter States under their constitutions and laws by virtue of their being citizens.' Of that provision it has been said, with the approval of this court, that no other one in the constitution has tended so strongly to constitute the citizens of the United States one people. *Ward v. Maryland*, 12 Wall. 430; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Paul v. Virginia*, 8 Wall. 180; *Slaughter-house Cases*, 16 Wall. 77.

Although this court has wisely forbore any attempt, by a comprehensive \*\*48 definition, to indicate all the privileges and immunities to which the citizens of a State is entitled, of right, when within the jurisdiction of other States, I hazard nothing, in view of former adjudications, in saying that no State can sustain her denial to colored citizens of other States, while within her limits, of privileges or immunities, fundamental in republican citizenship, upon the ground that she accords such privileges and immunities only to her white citizens and withholds them from her colored citizens. The colored citizens of other States, within the jurisdiction of that State, could claim, in virtue of section 2 of article 4 of the Constitution, every privilege and immunity \*48 which that State secures to her white citizens. Otherwise, it would be in the power of any State, by discriminating class legislation against its own citizens of a particular race or color, to withhold from citizens of other States, belonging to that proscribed race, when within her limits, privileges and immunities of the character regarded by all courts as fundamental in citizenship; and that, too, when the constitutional guaranty is that the citizens of each State shall be entitled to ‘all privileges and immunities of citizens of the several States.’ No State may, by discrimination against a portion of its own citizens of a particular race, in respect of privileges and immunities fundamental in citizenship, impair the constitutional right of citizens of other States, of whatever race, to enjoy in that State all such privileges and immunities as are there accorded to her most favored citizens.

A colored citizen of Ohio or Indiana, while in the jurisdiction of Tennessee, is entitled to enjoy any privilege or immunity, fundamental in citizenship, which is given to citizens of the white race in the latter State. It is not to be supposed that any one will controvert this proposition.

But what was secured to colored citizens of the United States—as between them and their respective States—by the grant to them of State citizenship? With what rights, privileges, or immunities did this grant from the nation invest them? There is one, if there be no others—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same State. That, surely, is their constitutional privilege when within the jurisdiction of other States. And such must be their constitutional right, in their own State, unless the recent amendments be ‘splendid baubles,’ thrown out to delude those who deserved fair and generous treatment at the hands of the nation. Citizenship in this country necessarily imports equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals, or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude. In *U. S. v. Cruikshank*, 92 U. S. 555, it was said at page 555, that the rights of life and personal liberty are natural rights of man and \*49 that ‘the equality of rights of citizens is a principle of republicanism.’ And in *Ex parte Virginia*, 100 U. S. 344, the emphatic language of this court is that ‘one great purpose of these amendments \*\*49 was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the states.’ So, in *Strauder v. West Virginia*, Id. 306, the court, alluding to the Fourteenth Amendment, said: ‘This is one of a series of constitutional provisions having a common purpose, namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.’ Again, in *Neal v. Delaware*, 103 U. S. 386, it was ruled that this amendment was designed, primarily, ‘to secure to the colored race, thereby invested with the rights, privileges,



and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons.’

How then can it be claimed in view of the declarations of this court in former cases, that exemption of colored citizens within their States from race discrimination, in respect of the civil rights of citizens, is not an immunity created or derived from the national constitution?

**\*57** It was said of the case of *Dred Scott v. Sandford* that this court there overruled the action of two generations, virtually inserted a new clause in the constitution, changed its character, and made a new departure in the workings of the federal government. I may be permitted to say that if the recent amendments are so construed that Congress may not, in its own discretion, and independently of the action or non-action of the States, provide, by legislation of a primary and direct character, for the security of rights created by the national Constitution; if it be adjudged that the obligation to protect the fundamental privileges and immunities granted by the Fourteenth Amendment to citizens residing in the several States, rests, primarily, not on the nation, but on the States; if it be further adjudged that individuals and corporations exercising public functions, or wielding power under public authority may, without liability to direct primary legislation on the part of Congress, make the race of citizens the ground for denying them that equality of civil rights which the Constitution ordains as a principle of republican citizenship; then, not only the foundations upon which the national supremacy has always securely rested will be materially disturbed, but we shall enter upon an era of constitutional law when the rights of freedom and American citizenship cannot receive from the nation that efficient protection which heretofore was unhesitatingly accorded to slavery and the rights of the master.

My brethren say, that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation, through congress, has sought to accomplish in reference to that race is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more. It was deemed enough “to help the feeble up, but to support him after.” The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens.

The difficulty has been to compel a recognition of the legal right of the black race to take that rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. **\*62** At every step in this direction, the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, ‘for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot.’ To-day it is the colored race which is denied,

by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time it may be some other race that will fall under the ban of race discrimination. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, Congress has been invested with express power—every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.

For the reasons stated I feel constrained to withhold my assent to the opinion of the court.

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*Plessy v. Ferguson*

Argued April 13, 1896

May 18, 1896

**Syllabus**

The statute of Louisiana, acts of 1890, No. 111, requiring railway companies carrying passengers in their coaches in that State, to provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; and providing [\*\*\*\*5] that no person shall be permitted to occupy seats in coaches other than the ones assigned to them, on account of the race they belong to; and requiring the officers of the passenger trains to assign each passenger to the coach or compartment assigned for the race to which he or she belongs; and imposing fines or imprisonment upon passengers insisting on going into a coach or compartment other than the one set aside for the race to which he or she belongs; and conferring upon officers of the trains power to refuse to carry on the train passengers refusing to occupy the coach or compartment assigned to them, and exempting the railway company from liability for such refusal, are not in conflict with the provisions either of the *Thirteenth Amendment* or of the *Fourteenth Amendment to the Constitution of the United States*.

**Counsel:** Mr. A. W. Tourgee and Mr. S. F. Phillips for plaintiff in error. Mr. F. D. McKenney was on Mr. Phillips's brief.

Mr. James C. Walker filed a brief for plaintiff in error. Mr. Alexander Porter Morse for defendant in error. Mr. M. J. Cunningham, Attorney General of the State of Louisiana, and Mr. Lionel Adams were on his brief.

## Opinion

[\*540] [\*\*\*\*6] [\*\*\*257] [\*\*1139] MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts "that all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: Provided, That this section shall not be construed to apply to street railroads. No person or persons, shall be admitted to occupy seats in coaches, other than, the ones, assigned, to them on account of the race they belong to."

By the second section it was enacted "that the officers of such passenger trains shall have power and are hereby required [\*541] to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into [\*\*\*\*7] a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twentyfive dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State."

The third section provides penalties for the refusal or neglect of the officers, directors, conductors and employees of railway companies to comply with the act, with a proviso that "nothing in this act shall be construed as applying to nurses attending children of the other race." The fourth section is immaterial.

The information [\*\*\*\*8] filed in the criminal District Court charged in substance that Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred.

The petition for the writ of prohibition averred that petitioner was seven eighths Caucasian and one eighth African blood; that the [\*\*1140] mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a

coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate [\*542] said coach and take a seat in another assigned to persons of the colored race, and having refused to comply with such demand he was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality [\*\*\*\*9] of this act is attacked upon the ground that it conflicts both with the *Thirteenth Amendment of the Constitution*, abolishing slavery, and the *Fourteenth Amendment*, which prohibits certain restrictive legislation on the part of the States.

1. That it does not conflict with the *Thirteenth Amendment*, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude -- a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. This amendment was said in the Slaughter-house cases, *16 Wall. 36*, to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican [\*\*\*258] peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case that this amendment [\*\*\*\*10] was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; and that the *Fourteenth Amendment* was devised to meet this exigency.

So, too, in the Civil Rights cases, *109 U.S. 3, 24*, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but [\*543] only as involving an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery argument into the ground," said Mr. Justice Bradley, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, [\*\*\*\*11] or deal with in other matters of intercourse or business."

A statute which implies merely a legal distinction between the white and colored races -- a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color -- has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. Indeed, we do not understand that the *Thirteenth Amendment* is strenuously relied upon by the plaintiff in error in this connection.

2. By the *Fourteenth Amendment*, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the State wherein they reside; and the States are forbidden from making or enforcing any law which shall abridge

the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the Slaughterhouse cases, 16 [\*\*\*\*12] Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States.

[\*544] The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state [\*\*\*\*13] legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts v. City of Boston*, 5 Cush. 198, in [\*\*1141] which the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools.

"The great principle," said Chief Justice Shaw, p. 206, "advanced by the learned and eloquent advocate for the plaintiff," (Mr. Charles Sumner,) "is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, [\*\*\*\*14] that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security." It was held that the powers of the committee extended to the establishment [\*545] of separate schools for children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools. Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev. Stat. D.C. §§ 281, 282, 283, 310, 319, as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the courts.

*State v. McCann*, 21 Ohio St. 198; *Lehew v. Brummell*, 15 S.W. Rep. 765; *Ward v. Flood*, 48 California, 36; *Bertonneau v. School Directors*, 3 Woods, 177; [\*\*\*\*15] *People v. Gallagher*, 93 N.Y. 438; *Cory v. Carter*, 48 Indiana, 327; *Dawson v. Lee*, 83 Kentucky, 49.

[\*\*\*259] Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State. *State v. Gilbson*, 36 Indiana, 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus in *Strauder v. West Virginia*, 100 U.S. 303, it was held that a law of West Virginia limiting to white male persons, 21 years of age and citizens of the State, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility.

Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in [\*\*\*\*16] a number of cases. *Virginia v. Rives*, 100 U.S. 313; *Neal v. Delaware*, 103 U.S. 370; *Bush v. Kentucky*, 107 U.S. 110; *Gibson v. Mississippi*, 162 U.S. 565. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of [\*546] color, we have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons. *Railroad Company v. Brown*, 17 Wall. 445.

Upon the other hand, where a statute of Louisiana required those engaged in the transportation of passengers among the States to give to all persons travelling within that State, upon vessels employed in that business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such a vessel, who excluded colored passengers on account of their color from the cabin set aside by him for the use of whites, it was held to be [\*\*\*\*17] so far as it applied to interstate commerce, unconstitutional and void. *Hall v. De Cuir*, 95 U.S. 485. The court in this case, however, expressly disclaimed that it had anything whatever to do with the statute as a regulation of internal commerce, or affecting anything else than commerce among the States. In the Civil Rights case, 109 U.S. 3, it was held that an act of Congress, entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theatres and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void, upon the ground that the *Fourteenth Amendment* was prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the States were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation, such as might be necessary or proper for



counteracting and redressing the effect of such [\*\*\*\*18] laws or acts. In delivering the opinion of the court Mr. Justice Bradley observed that *HN8*[ ] the *Fourteenth Amendment* "does not invest Congress with power to legislate upon subjects that are within the [\*547] domain of state legislation; but to provide modes of relief against [\*\*1142] state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the *Fourteenth Amendment*; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect."

Much nearer, and, indeed, almost directly in point, is the [\*\*\*\*19] case of the *Louisville, New Orleans &c. Railway v. Mississippi*, 133 U.S. 587, wherein the railway company was indicted for a violation of a statute of Mississippi, enacting that all railroads carrying passengers should provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations.

The case was presented in a different aspect from the one under consideration, inasmuch as it was an indictment against the railway company for failing to provide the separate accommodations, but the question considered was the constitutionality of the law. In that case, the Supreme Court of Mississippi, 66 Mississippi, 662, had held that the statute applied solely to commerce within the State, and, that being the construction of the state statute by its highest court, was accepted as conclusive. "If it be a matter," said the court, p. 591, "respecting commerce wholly within a State, and not interfering with commerce between the States, then, obviously, there is no violation of the commerce clause of the Federal Constitution. . . . [\*\*\*\*20] No question arises under this section, as to the power of the State to separate in different compartments interstate passengers, [\*548] or affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races; that affecting only commerce within the State is no invasion of the power given to Congress by the commerce clause."

A like course of reasoning applies to the case under consideration, since the Supreme Court of Louisiana in the case of the *State ex rel. Abbott v. [\*\*\*260] Hicks, Judge, et al.*, 44 La. Ann. 770, held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers travelling exclusively within the borders of the State. The case was decided largely upon the authority of *Railway Co. v. State*, 66 Mississippi, 662, and affirmed by this court in 133 U.S. 587. In the present case no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both its termini [\*\*\*\*21] within the State of Louisiana. Similar statutes for the separation of the two races upon public conveyances were held to be constitutional in *West Chester &c. Railroad v. Miles*, 55 Penn. St. 209; *Day v. Owen*, 5 Michigan, 520; *Chicago &c.*

Railway v. Williams, 55 Illinois, 185; Chesapeake &c. Railroad v. Wells, 85 Tennessee, 613; Memphis &c. Railroad v. Benson, 85 Tennessee, 627; *The Sue*, 22 Fed. Rep. 843; Logwood v. Memphis &c. Railroad, 23 Fed. Rep. 318; *McGuinn v. Forbes*, 37 Fed. Rep. 639; *People v. King*, 18 N.E. Rep. 245; *Houck v. South Pac. Railway*, 38 Fed. Rep. 226; *Heard v. Georgia Railroad Co.*, 3 Int. Com. Com'n, 111; S.C., 1 Ibid. 428.

While we think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the *Fourteenth Amendment*, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act, that denies to the passenger [\*\*\*\*22] compensation [\*549] in damages for a refusal to receive him into the coach in which he properly belongs, is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the State's attorney, that such part of the act as exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white, and who a colored person. This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race.

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes [\*\*\*\*23] of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his [\*\*1143] action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side [\*550] of the street is as good as the other, [\*\*\*\*24] or that a house or vehicle of one color is as good as one of another color. The reply to all this is that *HN9*[ ] every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class. Thus in *Yick Wo v. Hopkins*, 118 U.S. 356, it was held by this court that a municipal ordinance of the city of San Francisco, to regulate the carrying on the public laundries within the limits of the municipality, violated the provisions of the Constitution of the United States, if it conferred upon



the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense, of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature [\*\*\*\*25] passed in the exercise of the police power. *Railroad Company v. Husen*, 95 U.S. 465; *Louisville & Nashville Railroad v. Kentucky*, 161 U.S. 677, and cases cited on p. 700; *Daggett v. Hudson*, 43 Ohio St. 548; *Capen v. Foster*, 12 Pick. 485; *State ex rel. Wood v. Baker*, 38 Wisconsin, 71; *Monroe v. Collins*, 17 Ohio St. 665; *Hulseman v. Rems*, 41 Penn. St. 396; *Orman v. Riley*, 15 California. 48.

So far, then, as a conflict with the *Fourteenth Amendment* is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the [\*\*\*261] two races in public conveyances [\*551] is unreasonable, or more obnoxious to the *Fourteenth Amendment* than the acts of Congress requiring separate schools [\*\*\*\*26] for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

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. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition.

If the two races are to meet upon terms of social equality, it must be the result [\*\*\*\*27] of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N.Y. 438, 448, "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate.

When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties

of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly [\*552] or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to [\*\*\*\*28] constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black [\*\*1144] blood stamps the person as belonging to the colored race, (State v. Chavers, 5 Jones, [N.C.] 1, p. 11); others that it depends upon the preponderance of blood, ( Gray v. State, 4 Ohio, 353; *Monroe v. Collins*, 17 Ohio St. 665); and still others that the predominance of white blood must only be in the proportion of three fourths. (People v. Dean, 14 Michigan, 406; Jones v. Commonwealth, 80 Virginia, 538.) But these are question to be determined under the laws of each State and are not properly put in issue in this case. Under the allegations of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

The judgment of the court below is, therefore, Affirmed.

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*Powell v. Ala.*

October 10, 1932, Argued  
November 7, 1932, Decided

### Syllabus

1. The rule denying the aid of counsel to persons charged with felony, which (except as to legal questions) existed in England when our Constitution was formed, was rejected in this country by the Colonies before the Declaration of Independence, and is not a test of whether the right to counsel in such cases is embraced in the guarantee of "due process of law." P. 65.
2. The rule that no part of the Constitution shall be treated as superfluous is an aid to construction which, in some instances, may be conclusive, but which must yield to more compelling considerations whenever they exist. P. 67.
3. The fact that the right of an accused person to have counsel for his defense was guaranteed expressly (as respects the federal Government) by the *Sixth Amendment*, notwithstanding the presence of the *due process clause in the Fifth Amendment*, [\*\*\*\*2] does not exclude that right from the concept "due process of law." Pp. 66-68.
4. The right of the accused, at least in a capital case, to have the aid of counsel for his defense,

which includes the right to have sufficient time to advise with counsel and to prepare a defense, is one of the fundamental rights guaranteed by the *due process clause of the Fourteenth Amendment*. Pp. 68-71.

5. In a capital case, where the defendant is unable to employ counsel, and is incapable of making his own defense adequately because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time and under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. P. 71.
6. In a case such as this, the right to have counsel appointed, when necessary, is a logical corollary to the right to be heard by counsel. P. 72.
7. In such circumstances, the trial court has power, even in the absence of statute, to appoint an attorney for the accused; and the attorney, as [\*\*\*\*3] an officer of the court, is bound to serve. P. 73.

**Counsel:** Mr. Walter H. Pollak, with whom Messrs. Carl S. Stern and George W. Chamlee were on the brief, for petitioners.

Mr. Thomas E. Knight, Jr., Attorney General of Alabama, with whom Mr. Thos. Seay Lawson, Assistant Attorney General, was on the brief, for respondent.

The phrase "due process of law" antedates the establishment of our institutions. It embodies one of the broadest and most far reaching guaranties of personal and property rights. It is necessary for the enjoyment of life, liberty and property that this constitutional guaranty be strictly complied with. However, it is imperative that this Court under our system of government see that the States be not restricted in their method of administering justice in so far as they do not act arbitrarily and discriminatingly. *Frank v. Mangum*, 237 U.S. 309; *Holden v. Hardy*, 169 U.S. 366, 389; *Missouri v. Lewis*, 101 U.S. 22, 31; *Hurtado v. California*, 110 U.S. 516, 535.

A defendant in a criminal case has been accorded due process of law when there is a law creating or defining the offense, [\*\*\*\*4] a court of competent jurisdiction, accusation in due form, notice and opportunity to answer the charge, trial according to the established course of judicial proceedings, and a right to be discharged unless found guilty. No particular form of procedure is required. The question of due process is determined by the law of the jurisdiction where the offense was committed and the trial was had. *Missouri v. Lewis*, 101 U.S. 22; *Hurtado v. California*, 110 U.S. 516; *Brown v. New Jersey*, 175 U.S. 172; *Jordan v. Massachusetts*, 225 U.S. 167; *Rogers v. Peck*, 199 U.S. 425; *Garland v. Washington*, 232 U.S. 642; *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40; *Miller v. Texas*, 153 U.S. 535; *Ong Chang Wing v. United States*, 218 U.S. 272; *Hodgson v. Vermont*, 168 U.S. 262.

Here the trials were in accordance with the constitution and statutes of Alabama, the provisions of which are in no way attacked as being unconstitutional. They were conducted in compliance with the rules, practice, and procedure long prevailing in the State. The court of last resort

decided these cases in compliance with those rules of appeal and [\*\*\*\*5] error which they apply in all cases.

Under the laws of Alabama the petitioners were entitled to counsel. Const., Art. 1, § 6. When it appears that a defendant charged with a capital offense has not employed counsel, it is the duty of the court to appoint attorneys for his defense. Code (1923), § 5567. A compliance with this section is shown. At the time of the arraignment there were nine defendants; and while the record does not disclose the number of attorneys practicing at the Scottsboro bar, we venture to say that there were not as many as eighteen attorneys at that bar, the number which the court could have appointed under the statute.

If there had been only one defendant, it does not seem plausible to us that he could correctly contend that he had been denied due process of law because the court appointed more than two lawyers to represent him. This was at most, a mere irregularity which would not invalidate a conviction.

The petitioners were represented by counsel from Chattanooga and by two members of the bar of Scottsboro. They were not put to trial until one week after counsel were appointed. The record affirmatively shows that counsel had conferred with them [\*\*\*\*6] and had done everything that they knew how to do.

Henry Ching v. United States, 264 Fed. 639, cert. den., 254 U.S. 630.

There was no demand or motion made for a continuance. The defendants were represented by capable counsel, one of whom has enjoyed a long and successful practice before the courts of Jackson County. Counsel, by their own statements, show that they not only had time for preparation of their case, but that they knew and proceeded along proper lines for a week prior to the trial.

## **Opinion**

MR. JUSTICE **SUTHERLAND** delivered the opinion of the Court.

These cases were argued together and submitted for decision as one case.

[\*\*57] The petitioners, hereinafter referred to as defendants, are negroes charged with the crime of rape, committed upon the persons of two white girls. The crime is said to have been committed on March 25, 1931. The indictment was returned in a state court of first instance on March 31, and the record recites that on the same day the defendants were arraigned and entered pleas of not guilty. There is a further recital to the effect that upon [\*\*\*\*7] the arraignment they were represented by counsel. But no counsel had been employed, and aside from a statement made by the trial judge several days later during a colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed. During the colloquy referred to, the trial judge, in response to a question, said that he had appointed all the members of the bar for the purpose [\*\*\*161] of arraigning the defendants and then of course anticipated that the members of the bar would

continue to help the defendants if no counsel appeared. Upon the argument here both sides accepted that as a correct statement of the facts concerning the matter.

There was a severance upon the request of the state, and the defendants were tried in three several groups, as indicated above. As each of the three cases was called for trial, each defendant was arraigned, and, having the [\*50] indictment read to him, entered a plea of not guilty. Whether the original arraignment and pleas were regarded as ineffective is not shown. Each of the three trials was completed within a single day.

Under the Alabama statute the [\*\*\*\*8] punishment for rape is to be fixed by the jury, and in its discretion may be from ten years imprisonment to death.

The juries found defendants guilty and imposed the death penalty upon all. The trial court overruled motions for new trials and sentenced the defendants in accordance with the verdicts. The judgments were affirmed by the state supreme court. Chief Justice Anderson thought the defendants had not been accorded a fair trial and strongly dissented. *224 Ala. 524; id. 531; id. 540; 141 So. 215, 195, 201.*

In this court the judgments are assailed upon the grounds that the defendants, and each of them, were denied due process of law and the equal protection of the laws, in contravention of the *Fourteenth Amendment*, specifically as follows: (1) they were not given a fair, impartial and deliberate trial; (2) they were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial; and (3) they were tried before juries from which qualified members of their own race were systematically excluded. These questions were properly raised and saved in the courts below.

The only one of the assignments which we shall consider [\*\*\*\*9] is the second, in respect of the denial of counsel; and it becomes unnecessary to discuss the facts of the case or the circumstances surrounding the prosecution except in so far as they reflect light upon that question.

The record shows that on the day when the offense is said to have been committed, these defendants, together with a number of other negroes, were upon a freight train on its way through Alabama. On the same train were seven white boys and the two white girls. A fight took [\*51] place between the negroes and the white boys, in the course of which the white boys, with the exception of one named Gilley, were thrown off the train. A message was sent ahead, reporting the fight and asking that every negro be gotten off the train. The participants in the fight, and the two girls, were in an open gondola car. The two girls testified that each of them was assaulted by six different negroes in turn, and they identified the seven defendants as having been among the number. None of the white boys was called to testify, with the exception of Gilley, who was called in rebuttal.

Before the train reached Scottsboro, Alabama, a sheriff's posse seized the defendants and [\*\*\*\*10] two other negroes. Both girls and the negroes then were taken to Scottsboro, the county seat. Word of their coming and of the alleged assault had preceded them, and they were met at Scottsboro by a large crowd. It does not sufficiently appear that the defendants were seriously

threatened with, or that they were actually in danger of, mob violence; but it does appear that the attitude of the community was one of great hostility. The sheriff thought it necessary to call for the militia to assist in safeguarding the prisoners. Chief Justice Anderson pointed out in his opinion that every step taken from the arrest and arraignment to the sentence was accompanied by the military. Soldiers took the defendants to Gadsden for safekeeping, [\*\*\*162] brought them back to Scottsboro for arraignment, returned them to Gadsden for safekeeping while awaiting trial, escorted them to Scottsboro for trial a few days later, and guarded the court house and grounds at every stage of the proceedings. It is perfectly apparent that the proceedings, from beginning to end, took place in an atmosphere of tense, hostile and excited public sentiment. During the entire time, the defendants were closely confined or [\*\*\*\*11] were under military guard.

The record does not disclose their ages, except that one of them [\*\*58] was nineteen; but the [\*52] record clearly indicates that most, if not all, of them were youthful, and they are constantly referred to as "the boys." They were ignorant and illiterate. All of them were residents of other states, where alone members of their families or friends resided.

However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial.

With any error of the state court involving alleged contravention of the state statutes or constitution we, of course, have nothing to do. The sole inquiry which we are permitted to make is whether the federal Constitution was contravened ( *Rogers v. Peck*, 199 U.S. 425, 434; *Hebert v. Louisiana*, 272 U.S. 312, 316); and as to that, we confine ourselves, as already suggested, to the inquiry whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the *due process clause of the Fourteenth Amendment*.

[\*\*\*\*12] *LEdHN[2][ ] [2]First*. The record shows that immediately upon the return of the indictment defendants were arraigned and pleaded not guilty. Apparently they were not asked whether they had, or were able to employ, counsel, or wished to have counsel appointed; or whether they had friends or relatives who might assist in that regard if communicated with. That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavor to obtain counsel is demonstrated by the fact that, very soon after conviction, able counsel appeared in their behalf. This was pointed out by Chief Justice Anderson in the course of his dissenting opinion. "They were nonresidents," he said, "and had little time or opportunity to get in touch with their families and friends who were scattered throughout two other states, and time has demonstrated [\*\*53] that they could or would have been represented by able counsel had a better opportunity been given by a reasonable delay in the trial of the cases, judging from the number and activity of counsel that appeared immediately or shortly after their conviction." 224 Ala., at pp. 554-555; 141 So. 201.

[\*\*\*\*13] *LEdHN[3][ ] [3]*It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite



or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. This will be amply demonstrated by a brief review of the record.

April 6, six days after indictment, the trials began. When the first case was called, the court inquired whether the parties were ready for trial. The state's attorney replied that he was ready to proceed. No one answered for the defendants or appeared to represent or defend them. Mr. Roddy, a Tennessee lawyer not a member of the local bar, addressed the court, saying that he had not been employed, but that people who were interested had spoken to him about the case. He was asked by [\*\*\*163] the court whether he intended to appear for the defendants, and answered that he would like to appear along with counsel that the court might appoint.

The record then proceeds:

"The Court: If you appear for these defendants, then I will not appoint counsel; if local [\*\*\*\*14] counsel are willing to appear and assist you under the circumstances all right, but I will not appoint them.

"Mr. Roddy: Your Honor has appointed counsel, is that correct?

"The Court: I appointed all the members of the bar for the purpose of arraigning the defendants and then of course I anticipated them to continue to help them if no counsel appears.

[\*54] "Mr. Roddy: Then I don't appear then as counsel but I do want to stay in and not be ruled out in this case.

"The Court: Of course I would not do that --

"Mr. Roddy: I just appear here through the courtesy of Your Honor.

"The Court: Of course I give you that right; . . ."

And then, apparently addressing all the lawyers present, the court inquired:

". . . well are you all willing to assist?

"Mr. Moody: Your Honor appointed us all and we have been proceeding along every line we know about it under Your Honor's appointment.

"The Court: The only thing I am trying to do is, if counsel appears for these defendants I don't want to impose on you all, but if you feel like counsel from Chattanooga --

"Mr. Moody: I see his situation of course and I have not run out of anything yet. Of course, if Your Honor purposes to [\*\*\*\*15] appoint us, Mr. Parks, I am willing to go on with it. Most of the bar have been down and conferred with these defendants in this case; they did not know what else to do.

"The Court: The thing, I did not want to [\*\*59] impose on the members of the bar if counsel unqualifiedly appears; if you all feel like Mr. Roddy is only interested in a limited way to assist, then I don't care to appoint --

"Mr. Parks: Your Honor, I don't feel like you ought to impose on any member of the local bar if the defendants are represented by counsel.

"The Court: That is what I was trying to ascertain, Mr. Parks.

"Mr. Parks: Of course if they have counsel, I don't see the necessity of the Court appointing anybody; if they haven't counsel, of course I think it is up to the Court to appoint counsel to represent them.

[\*55] "The Court: I think you are right about it Mr. Parks and that is the reason I was trying to get an expression from Mr. Roddy.

"Mr. Roddy: I think Mr. Parks is entirely right about it, if I was paid down here and employed, it would be a different thing, but I have not prepared this case for trial and have only been called



into it by people who are interested in these boys from Chattanooga. [\*\*\*\*16] Now, they have not given me an opportunity to prepare the case and I am not familiar with the procedure in Alabama, but I merely came down here as a friend of the people who are interested and not as paid counsel, and certainly I haven't any money to pay them and nobody I am interested in had me to come down here has put up any fund of money to come down here and pay counsel. If they should do it I would be glad to turn it over -- a counsel but I am merely here at the solicitation of people who have become interested in this case without any payment of fee and without any preparation for trial and I think the boys would be better off if I step entirely out of the case according to my way of looking at it and according to my lack of preparation of it and not being familiar with the procedure in Alabama, . . ."

Mr. Roddy later observed:

"If there is anything I can do to be of help to them, I will be glad to do it; I am interested to that extent.

"The Court: Well gentlemen, if Mr. Roddy only appears as assistant that way, I think it is proper that I [\*\*\*164] appoint members of this bar to represent them, I expect that is right. If Mr. Roddy will appear, I wouldn't of course, I would not [\*\*\*\*17] appoint anybody. I don't see, Mr. Roddy, how I can make a qualified appointment or a limited appointment. Of course, I don't mean to cut off your assistance in any way -- Well gentlemen, I think you understand it.

[\*56] "Mr. Moody: I am willing to go ahead and help Mr. Roddy in anything I can do about it, under the circumstances.

"The Court: All right, all the lawyers that will; of course I would not require a lawyer to appear if --

"Mr. Moody: I am willing to do that for him as a member of the bar; I will go ahead and help do anything I can do.

"The Court: All right."

And in this casual fashion the matter of counsel in a capital case was disposed of. It thus will be seen that until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants. Prior to that time, the trial judge had "appointed all the members of the bar" for the limited "purpose of arraigning the defendants." Whether they would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court. Such a designation, even if made for all purposes, [\*\*\*\*18] would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel. How many lawyers were members of the bar does not appear; but, in the very nature of things, whether many or few, they would not, thus collectively named, have been given that clear appreciation of responsibility or impressed with that individual sense of duty which should and naturally would accompany the appointment of a selected member of the bar, specifically named and assigned.

That this action of the trial judge in respect of appointment of counsel was little more than an expansive gesture, imposing no substantial or definite obligation upon any one, is borne out by the fact that prior to the calling of the case for trial on April 6, a leading member of the local bar accepted employment on the side of the prosecution [\*57] and actively participated in the trial. It is true that he said that before doing so he had understood Mr. Roddy would be employed as counsel for the defendants. This the lawyer in question, of his own accord, frankly stated to the court; and no doubt he acted with the utmost good faith. Probably other members of the bar had

[\*\*\*\*19] a like understanding. In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and [\*\*60] preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself. *People ex rel. Burgess v. Risley*, 66 How. Pr. (N. Y.) 67; *Batchelor v. State*, 189 Ind. 69, 76; 125 N. E. 773.

Nor do we think the situation was helped by what occurred on the morning of the trial. At that time, as appears from the colloquy printed above, Mr. Roddy stated to the court that he did not appear as counsel, but that he would like to appear along with counsel that the court might appoint; that he had not been given an opportunity to prepare the case; that he was not familiar with the procedure in Alabama, but merely came down as a friend of the people [\*\*\*165] who were interested; that he thought the boys would be better off if he should step entirely out of the case. [\*\*\*\*20] Mr. Moody, a member of the local bar, expressed a willingness to help Mr. Roddy in anything he could do under the circumstances. To this the court responded, "All right, all the lawyers that will; of course I would not require a lawyer to appear if -- ." And Mr. Moody continued, "I am willing to do that for him as a member of the bar; I will go ahead and help do any thing I can do." With this dubious understanding, the trials immediately proceeded. The defendants, young, ignorant, [\*58] illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.

It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity [\*\*\*\*21] to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: ". . . the record indicates that the appearance was rather *pro forma* than zealous and active . . ." Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense.

It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob. As the court said in *Commonwealth v. O'Keefe*, 298 Pa. 169, 173; 148 Atl. 73: "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity [\*\*\*\*23] to acquaint himself with the facts or law of the case. . . ." A prompt

and vigorous administration of the criminal law is commendable and we have no desire to clog the wheels of justice. What we here decide is that to force a defendant, charged with a serious misdemeanor, to trial within five hours of [\*\*\*166] his arrest, is not due process of law, regardless of the merits of the case." Compare *Reliford v. State*, 140 Ga. 777, 778; 79 S. E. 1128.

*Second.* The Constitution of Alabama provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel; and a state statute requires the court in a capital case, where the defendant [\*60] is unable to employ counsel, to appoint counsel for him. The state supreme court held that these provisions had not been infringed, and with that holding we are powerless to interfere. The question, however, [\*\*61] which it is our duty, and within our power, to decide, is whether the denial of the assistance of counsel contravenes the *due process clause of the Fourteenth Amendment to the federal Constitution*.

If recognition of the right of a defendant charged with a felony to have the aid of counsel [\*\*\*\*24] depended upon the existence of a similar right at common law as it existed in England when our Constitution was adopted, there would be great difficulty in maintaining it as necessary to due process. Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel. After the revolution of 1688, the rule was abolished as to treason, but was otherwise steadily adhered to until 1836, when by act of Parliament the full right was granted in respect of felonies generally. 1 Cooley's Const. Lim., 8th ed., 698, *et seq.*, and notes.

An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers. As early as 1758, Blackstone, although recognizing that the rule was settled at [\*\*\*\*25] common law, denounced it as not in keeping with the rest of the humane treatment of prisoners by the English law. "For upon what face of reason," he says, "can that assistance be denied [\*61] to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?" 4 Blackstone 355. One of the grounds upon which Lord Coke defended the rule was that in felonies the court itself was counsel for the prisoner. 1 Cooley's Const. Lim., *supra*. But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

The rule was rejected by the colonies. Before the adoption of the federal Constitution, the Constitution of Maryland had declared "That, in all criminal prosecutions, every man hath a right . . . to be allowed counsel; . . ." (Art. XIX, Constitution of 1776). The Constitution [\*\*\*\*26] of Massachusetts, adopted in 1780 (Part the First, Art. XII), the Constitution of New Hampshire, adopted in 1784 (Part I, Art. XV), the Constitution of New York of 1777 (Art. XXXIV), and the Constitution of Pennsylvania of 1776 (Art. IX), had also declared to the same effect. And in the case of Pennsylvania, as early as 1701, the Penn Charter (Art. V) declared that "all Criminals

shall have the same Privileges of Witnesses and Council as their Prosecutors"; and there was also a provision in the Pennsylvania statute of May 31, 1718 (Dallas, Laws of Pennsylvania, 1700-1781, Vol. 1, p. 134), that in capital cases [\*\*\*167] learned counsel should be assigned to the prisoners.

It thus appears that in at least twelve of the thirteen colonies the rule of the English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all [\*65] criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to prisoners are allowed the full advantage of witnesses, but excepting in a few cases, the common law is enforced, in denying them counsel, except as to points of law.

"Our ancestors, when they first enacted their laws respecting crimes, influenced by the illiberal principles which they had imbibed in their native country, denied counsel to prisoners to plead for them to anything but points of law. It is manifest that there is as much necessity for counsel to investigate matters of fact, as points of law, if truth is to be discovered. "The legislature has become so thoroughly convinced of the impropriety and injustice of shackling and restricting a prisoner with respect to his defence, that they have abolished all those odious laws, and every person when he is accused of a crime, is entitled to every possible privilege in making his defence, and manifesting his innocence, by the instrumentality of counsel, and the testimony of witnesses."

One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England [\*\*\*31] before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited [\*\*63] to the civil and political conditions of our ancestors by having been followed in this country after it became a nation. *Lowe v. Kansas*, 163 U.S. 81, 85. Compare *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276-277; [\*\*\*169] *Twining v. New Jersey*, 211 U.S. 78, 100-101. Plainly, as appears from the foregoing, this test, as thus qualified, has not been met in the present case.

We do not overlook the case of *Hurtado v. California*, 110 U.S. 516, where this court determined that due process of law does not require an indictment by a grand jury as a prerequisite to prosecution by a state for murder. In support of that conclusion the court (pp. 534-535) referred to the fact that the *Fifth Amendment*, in addition to containing the due process of law clause, provides [\*66] in explicit terms that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . .", and said that since no part of this important amendment could be regarded as superfluous, [\*\*\*\*32] the obvious inference is that in the sense of the Constitution due process of law was not intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case; and that the same phrase, employed in the *Fourteenth Amendment* to restrain the action of the states, was to be interpreted as having been used in the same sense and with no greater extent; and that if it had been the purpose of that Amendment to perpetuate the institution of the grand jury in the states, it would have embodied, as did the *Fifth Amendment*, an express declaration to that effect.

The *Sixth Amendment*, in terms, provides that in all criminal prosecutions the accused shall enjoy the right "to have the assistance of counsel for his defense." In the face of the reasoning of the *Hurtado* case, if it stood alone, it would be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the *Sixth Amendment*, was also within the intendment of the due process of law clause. But the *Hurtado* case does not stand alone. In the later case of *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U.S. 226, 241, this court held that a judgment of a [\*\*\*\*33] state court, even though authorized by statute, by which private property was taken for public use without just compensation, was in violation of the due process of law required by the *Fourteenth Amendment*, notwithstanding that the *Fifth Amendment* explicitly declares that private property shall not be taken for public use without just compensation. This holding was followed in *Norwood v. Baker*, 172 U.S. 269, 277; *Smyth v. Ames*, 169 U.S. 466, 524; and *San Diego Land Co. v. National City*, 174 U.S. 739, 754.

These later cases establish that notwithstanding the sweeping character of the language in the *Hurtado* case, the rule laid down is not without exceptions. The rule is an aid to construction, and in some instances may be conclusive; but it must [\*\*\*\*34] yield to more compelling considerations whenever such considerations exist. The fact that the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (*Hebert v. Louisiana*, 272 U.S. 312, 316), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the *due process clause of the [\*\*\*170] Fourteenth Amendment*, although it be specifically dealt with in another part of the federal Constitution.

Evidently this court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. That some such distinction must be observed is foreshadowed in *Twining v. New Jersey*, 211 U.S. 78, 99, where Mr. Justice Moody, speaking for the court, said that ". . . it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 [\*\*\*\*35] U.S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in [\*68] the conception of due process of law." While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that *HN7*[ ] the right to the aid of counsel is of this fundamental character.

[\*\*64] It never has been doubted by this court, or any other so far as we know, that *HN8*[ ] notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns," have been repeated in varying forms of expression in a multitude of decisions. In *Holden v. Hardy*, 169 U.S. 366, 389, the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice which [\*\*\*\*36] inhere in the very idea of free government which no member of the Union may disregard." And Mr. Justice Field, in an earlier case, *Galpin v. Page*, 18 Wall. 350, 368-369, said that the rule that no one shall be



personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard.

"Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so.

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. *HN9* [ ] The right [\*69] to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for [\*\*\*\*37] himself whether the indictment is good or bad. He is unfamiliar with the 287 U.S. 45, \*66; 53 S. Ct. 55, \*\*63; 77 L. Ed. 158, \*\*\*169; 1932 U.S. LEXIS 5, \*\*\*\*32 rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one.

He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

If in any case, civil or criminal, a state or federal court were arbitrarily [\*\*\*171] to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. The decisions all point to that conclusion. In *Cooke v. United States*, 267 U.S. 517, 537, it was held that where a contempt was not in open court, due process of [\*\*\*\*38] law required charges and a reasonable opportunity to defend or explain. The court added, "We think this includes the assistance of counsel, if requested, . . ." In numerous other cases the court, in determining that due process was accorded, has frequently stressed the fact that the defendant had the aid of counsel. See, for example, *Felts v. Murphy*, 201 U.S. 123, 129; *Frank v. Mangum*, 237 U.S. 309, 344; *Kelley v. Oregon*, 273 U.S. 589, 591. In *Ex parte Hidekuni Iwata*, 219 Fed. 610, 611, the federal district [\*70] judge enumerated among the elements necessary to due process of law in a deportation case the opportunity at some stage of the hearing to secure and have the advice and assistance of counsel. In *Ex parte Chin Loy You*, 223 Fed. 833, also a deportation case, the district judge held that under the particular circumstances of the case the prisoner, having seasonably made demand, was entitled to confer with and have the aid of counsel. Pointing to the fact that the right to counsel as secured by the *Sixth Amendment* relates only to criminal prosecutions, the judge said, ". . . but it is equally true that that provision was inserted in [\*\*\*\*39] the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner." In *Ex parte Riggins*, 134 Fed. 404, 418, a case involving the *due process clause of the Fourteenth Amendment*, the court said, by way of illustration, that if the state should deprive a person of the benefit of counsel, it would not be due

process of law. Judge Cooley refers to the right of a person accused of crime to have counsel as perhaps his most important privilege, and after discussing the development of the English law upon that subject, says: "With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel."

1 Cooley's Const. Lim., 8th ed., 700. The same author, as appears from a chapter which he added to his edition of Story on the Constitution, regarded the right of the accused to the presence, advice and assistance of counsel as necessarily included in due process of law. 2 Story on the Constitution, 4th ed., § 1949, p. 668. The state decisions which refer to the matter, invariably recognize the right to the aid of counsel as fundamental in character. E. g., *People v. Naphaly*, 105 [\*\*\*\*40] Cal. 641, 644; 39 Pac. 29; *Cutts v. State*, 54 Fla. 21, 23; 45 So. 491; *Martin [\*\*65] v. State*, 51 Ga. 567, 568; *Sheppard v. State*, 165 Ga. 460, 464; 141 S. E. 196; *State v. Moore*, 61 Kan. 732, 734; 60 Pac. 748; [\*71] *State v. Ferris*, 16 La. Ann. 424; *State v. Simpson*, 38 La. Ann. 23, 24; *State v. Briggs*, 58 W. Va. 291, 292; 52 S. E. 218.

In the light of the facts outlined in the forepart of this opinion -- the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives --we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances [\*\*\*172] just stated, the necessity of counsel [\*\*\*\*41] was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the *Fourteenth Amendment*. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that *HN11*[ ] in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, "that there are certain immutable principles of justice which inhere in the very idea of free government which [\*72] no member of the Union may disregard." *Holden v. Hardy*, *supra*. In a case such as this, whatever may be the rule in other cases, [\*\*\*\*42] *HN12*[ ] the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel. Compare *Carpenter & Sprague v. Dane County*, 9 Wis. 274; *Dane County v. Smith*, 13 Wis. 585, 586. *Hendryx v. State*, 130 Ind. 265, 268-269; 29 N. E. 1131; *Cutts v. State*, 54 Fla. 21, 23; 45 So. 491; *People v. Goldenson*, 76 Cal. 328, 344; 19 Pac. 161; *Delk v. State*, 99 Ga. 667, 669-670; 26 S. E. 752.

In *Hendryx v. State*, *supra*, there was no statute authorizing the assignment of an attorney to defend an indigent person accused of crime, but the court held that such an assignment was necessary to accomplish the ends of public justice, and that the court possessed the inherent



power to make it. "Where a prisoner," the court said (p. 269), "without legal knowledge, is confined in jail, absent from his friends, without the aid of legal advice or the means of investigating the charge against him, it is impossible to conceive of a fair trial where he is compelled to conduct his cause in court, without the aid of counsel. . . . Such a trial is not far removed from an *ex parte* proceeding."

Let us suppose [\*\*\*\*43] the extreme case of a prisoner charged with a capital offence, who is deaf and dumb, illiterate and feeble minded, unable to employ counsel, with the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law; and we venture to think that no appellate court, state or federal, would hesitate so to decide. See *Stephenson v. State*, 4 *Ohio App.* 128; *Williams v. State*, 163 *Ark.* 623, 628; [\*73] 260 *S. W.* 721; *Grogan v. Commonwealth*, 222 *Ky.* 484, 485; 1 *S. W. 2d* 779; *Mullen v. State*, 28 *Okla. Cr.* 218, 230; 230 *Pac.* 285; *Williams v. Commonwealth*, (*Ky.*), 110 *S. W.* 339, 340. The duty of the trial court to appoint counsel under such circumstances is clear, as it is clear under circumstances such as are disclosed by the record here; and its power to do so, even in the absence of a statute, can not be questioned. **HNI13**[ ] Attorneys are officers of the court, and are bound [\*\*\*\*44] to render service when required by such an appointment. See *Cooley*, *Const. Lim.*, *supra*, 700 and note.

The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is [\*\*\*173] limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right.

The judgments must be reversed and the causes remanded for further proceedings not inconsistent with this opinion.

*Judgments reversed.*

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***Missouri ex rel. Gaines v. Canada,***  
**305 U.S. 337 (1938)**

Argued November 9, 1938  
Decided December 12, 1938

*CERTIORARI TO THE SUPREME COURT OF MISSOURI*

## *Syllabus*

1. The State of Missouri provides separate schools and universities for whites and negroes. At the state university, attended by whites, there is a course in law; at the Lincoln University, attended by negroes, there is as yet none, but it is the duty of the curators of that institution to establish one there whenever in their opinion this shall be necessary and practicable, and pending such development, they are authorized to arrange for legal education of Missouri negroes, and to pay the tuition charges therefor, at law schools in adjacent States where negroes are accepted and where the training is equal to that obtainable at the Missouri State University. Pursuant to the State's policy of separating the races in its educational institutions, the curators of the state university refused to admit a negro as a student in the law school there because of his race; whereupon he sought a mandamus, in the state courts, which was denied.

### *Held:*

(1) That inasmuch as the curators of the state university represented the State, in carrying out its policy, their action in denying the negro admission to the law school was state action within the meaning of the Fourteenth Amendment.

(2) The action of the State in furnishing legal education within the State to whites while not furnishing legal education within the State to negroes was a discrimination repugnant to the Fourteenth Amendment. P

If a State furnishes higher education to white residents, it is bound to furnish substantially equal advantages to negro residents, though not necessarily in the same schools.

(3) The unconstitutional discrimination is not avoided by the purpose of the State to establish a law school for negroes whenever necessary and practicable in the opinion of the curators of the University provided for negroes.

(4) Nor are the requirements of the equal protection clause satisfied by the opportunities afforded by Missouri to its negro citizens for legal education in other States.

The basic consideration here is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. By the operation of the laws of Missouri, a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there, and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

(5) The 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. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities each responsible for its own laws establishing the rights and duties of persons within its borders.

(6) The fact that there is but a limited demand in Missouri for the legal education of negroes does not excuse the discrimination in favor of whites.

(7) Inasmuch as the discrimination may last indefinitely -- so long as the curators find it unnecessary and impracticable to provide facilities for the legal education of negroes within the State, the alternative of attendance at law schools in other States being provided meanwhile -- it cannot be excused as a temporary discrimination.

2. The state court decided this case upon the merits of the federal question, and not upon the propriety of remedy by mandamus. 342 Mo. 121; 113 S.W.2d 783, reversed.

CERTIORARI, *post*, p. 580, to review a judgment affirming denial of a writ of mandamus.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Petitioner Lloyd Gaines, a negro, was refused admission to the School of Law at the State University of Missouri. Asserting that this refusal constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution, petitioner brought this action for mandamus to compel the curators of the University to admit him. On final hearing, an alternative writ was quashed and a peremptory writ was denied by the Circuit Court. The Supreme Court of the State affirmed the judgment. 113 S.W.2d 783. We granted certiorari, October 10, 1938.

Petitioner is a citizen of Missouri. In August, 1935, he was graduated with the degree of Bachelor of Arts at the Lincoln University, an institution maintained by the State of Missouri for the higher education of negroes. That University has no law school. Upon the filing of his application for admission to the law school of the University of Missouri, the registrar advised him to communicate with the president of Lincoln University, and the latter directed petitioner's attention to § 9622 of the Revised Statutes of Missouri (1929), providing as follows:

"Sec. 9622. *May arrange for attendance at university of any adjacent state -- Tuition fees.* -- Pending the full development of the Lincoln university, the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, and which are not taught at the Lincoln university and to pay the reasonable tuition fees for such attendance; *provided* that, whenever the board of curators deem it advisable, they shall have the power to open any necessary school or department. (Laws 1921, p. 86, § 7.)" Petitioner was advised to apply to the State Superintendent of Schools for aid under that statute. It was admitted on the trial that petitioner's "work and credits at the Lincoln

University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible."

He was refused admission upon the ground that it was "contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri." It appears that there are schools of law in connection with the state universities of four adjacent States, Kansas, Nebraska, Iowa and Illinois, where nonresident negroes are admitted.

The clear and definite conclusions of the state court in construing the pertinent state legislation narrow the issue. The action of the curators, who are representatives of the State in the management of the state university (R.S.Mo. § 9625), must be regarded as state action. The state constitution provides that separate free public schools shall be established for the education of children of African descent (Art. XI, § 3), and, by statute, separate high school facilities are supplied for colored students equal to those provided for white students (R.S.Mo. §§ 9346-9349). While there is no express constitutional provision requiring that the white and negro races be separated for the purpose of higher education, the state court, on a comprehensive review of the state statutes, held that it was intended to separate the white and negro races for that purpose also. Referring in particular to Lincoln University, the court deemed it to be clear "that the Legislature intended to bring the Lincoln University up to the standard of the University of Missouri, and give to the whites and negroes an equal opportunity for higher education -- the whites at the University of Missouri, and the negroes at Lincoln University."

Further, the court concluded that the provisions of § 9622 (above-quoted) to the effect that negro residents "may attend the university of any adjacent State with their tuition paid, pending the full development of Lincoln University," made it evident "that the Legislature did not intend that negroes and whites should attend the same university in this State." In that view, it necessarily followed that the curators of the University of Missouri acted in accordance with the policy of the State in denying petitioner admission to its School of Law upon the sole ground of his race.

In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. *[footnotes omitted]* Respondents' counsel has appropriately emphasized the special solicitude of the State for the higher education of negroes as shown in the establishment of Lincoln University, a state institution well conducted on a plane with the University of Missouri so far as the offered courses are concerned. It is said that Missouri is a pioneer in that field and is the only State in the Union which has established a separate university for negroes on the same basis as the state university for white students. But, commendable as is that action, the fact remains that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes negroes from the advantages of the law school it has established at the University of Missouri.

It is manifest that this discrimination, if not relieved by the provisions we shall presently discuss, would constitute a denial of equal protection. That was the conclusion of the Court of Appeals of

Maryland in circumstances substantially similar in that aspect. *University of Maryland v. Murray*, 169 Md. 478, 182 A. 590. It there appeared that the State of Maryland had "undertaken the function of education in the law," but had "omitted students of one race from the only adequate provision made for it, and omitted them solely because of their color"; that, if those students were to be offered "equal treatment in the performance of the function, they must, at present, be admitted to the one school provided." *Id.*, p. 489. A provision for scholarships to enable negroes to attend colleges outside the State, mainly for the purpose of professional studies, was found to be inadequate (*Id.* pp. 485, 486), and the question "whether with aid in any amount it is sufficient to send the negroes outside the State for legal education" the Court of Appeals found it unnecessary to discuss. Accordingly, a writ of mandamus to admit the applicant was issued to the officers and regents of the University of Maryland as the agents of the State entrusted with the conduct of that institution.

The Supreme Court of Missouri in the instant case has distinguished the decision in Maryland upon the grounds -- (1) that, in Missouri, but not in Maryland, there is "a legislative declaration of a purpose to establish a law school for negroes at Lincoln University whenever necessary or practical", and (2) that, "pending the establishment of such a school, adequate provision has been made for the legal education of negro students in recognized schools outside of this State." 113 S.W.2d p. 791.

As to the first ground, it appears that the policy of establishing a law school at Lincoln University has not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough. The provision for legal education at Lincoln is at present entirely lacking. Respondents' counsel urge that, if, on the date when petitioner applied for admission to the University of Missouri, he had instead applied to the curators of Lincoln University, it would have been their duty to establish a law school; that this "agency of the State," to which he should have applied, was "specifically charged with the mandatory duty to furnish him what he seeks." We do not read the opinion of the Supreme Court as construing the state statute to impose such a "mandatory duty" as the argument seems to assert. The state court quoted the language of § 9618, R.S.Mo.1929, set forth in the margin, making it the mandatory duty of the board of curators to establish a law school in Lincoln University "whenever necessary and practicable in their opinion." This qualification of their duty, explicitly stated in the statute, manifestly leaves it to the judgment of the curators to decide when it will be necessary and practicable to establish a law school, and the state court so construed the statute. Emphasizing the discretion of the curators, the court said:

"The statute was enacted in 1921. Since its enactment, no negro, not even appellant, has applied to Lincoln University for a law education. This fact demonstrates the wisdom of the legislature in leaving it to the judgment of the board of curators to determine when it would be necessary or practicable to establish a law school for negroes at Lincoln University. Pending that time, adequate provision is made for the legal education of negroes in the university of some adjacent State, as heretofore pointed out."

The state court has not held that it would have been the duty of the curators to establish a law school at Lincoln University for the petitioner on his application. Their duty, as the court defined it, would have been either to supply a law school at Lincoln University as provided in § 9618 or

to furnish him the opportunity to obtain his legal training in another State, as provided in § 9622. Thus, the law left the curators free to adopt the latter course. The state court has not ruled or intimated that their failure or refusal to establish a law school for a very few students, still less for one student, would have been an abuse of the discretion with which the curators were entrusted. And, apparently, it was because of that discretion, and of the postponement which its exercise in accordance with the terms of the statute would entail until necessity and practicability appeared, that the state court considered and upheld as adequate the provision for the legal education of negroes, who were citizens of Missouri, in the universities of adjacent States. We may put on one side respondent's contention that there were funds available at Lincoln University for the creation of a law department and the suggestions with respect to the number of instructors who would be needed for that purpose and the cost of supplying them. The president of Lincoln University did not advert to the existence or prospective use of funds for that purpose when he advised petitioner to apply to the State Superintendent of Schools for aid under § 9622. At best, the evidence to which argument as to available funds is addressed admits of conflicting inferences, and the decision of the state court did not hinge on any such matter. In the light of its ruling, we must regard the question whether the provision for the legal education in other States of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection as the pivot upon which this case turns.

The state court stresses the advantages that are afforded by the law schools of the adjacent States -- Kansas, Nebraska, Iowa and Illinois -- which admit nonresident negroes. The court considered that these were schools of high standing where one desiring to practice law in Missouri can get "as sound, comprehensive, valuable legal education" as in the University of Missouri; that the system of education in the former is the same as that in the latter, and is designed to give the students a basis for the practice of law in any State where the Anglo-American system of law obtains; that the law school of the University of Missouri does not specialize in Missouri law, and that the course of study and the case books used in the five schools are substantially identical. Petitioner insists that, for one intending to practice in Missouri, there are special advantages in attending a law school there, both in relation to the opportunities for the particular study of Missouri law and for the observation of the local courts and also in view of the prestige of the Missouri law school among the citizens of the State, his prospective clients. Proceeding with its examination of relative advantages, the state court found that the difference in distances to be traveled afforded no substantial ground of complaint, and that there was an adequate appropriation to meet the full tuition fees which petitioner would have to pay.

We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri, a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there, and must go



outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

The equal protection of the laws is "a pledge of the protection of equal laws." *[footnote omitted]* Manifestly, the 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. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities -- each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system. It seems to be implicit in respondents' argument that, if other States did not provide courses for legal education, it would nevertheless be the constitutional duty of Missouri, when it supplied such courses for white students, to make equivalent provision for negroes. But that plain duty would exist because it rested upon the State independently of the action of other States. We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination, but cannot serve to validate it.

Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favor of whites. ... It [makes] ... the constitutional right "depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded." *Id.* *[footnote omitted]*

Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

It is urged, however, that the provision for tuition outside the State is a temporary one -- that it is intended to operate merely pending the establishment of a law department for negroes at Lincoln University. While, in that sense, the discrimination may be termed temporary, it may nevertheless continue for an indefinite period by reason of the discretion given to the curators of Lincoln University and the alternative of arranging for tuition in other States, as permitted by the state law as construed by the state court, so long as the curators find it unnecessary and



impracticable to provide facilities for the legal instruction of negroes within the State. In that view, we cannot regard the discrimination as excused by what is called its temporary character.

We do not find that the decision of the state court turns on any procedural question. The action was for mandamus, but it does not appear that the remedy would have been deemed inappropriate if the asserted federal right had been sustained. In that situation, the remedy by mandamus was found to be a proper one in *University of Maryland v. Murray, supra*. In the instant case, the state court did note that petitioner had not applied to the management of Lincoln University for legal training. But, as we have said, the state court did not rule that it would have been the duty of the curators to grant such an application, but, on the contrary, took the view, as we understand it, that the curators were entitled under the state law to refuse such an application and, in its stead, to provide for petitioner's tuition in an adjacent State. That conclusion presented the federal question as to the constitutional adequacy of such a provision while equal opportunity for legal training within the State was not furnished, and this federal question the state court entertained and passed upon. We must conclude that, in so doing, the court denied the federal right which petitioner set up and the question as to the correctness of that decision is before us. We are of the opinion that the ruling was error, and that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State.

*The judgment of the Supreme Court of Missouri is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion. [Emphasis added.]*

*Reversed.* [footnotes omitted]



Lloyd Gaines

*Side Bar: Three months after winning the case before the United States Supreme Court, on a cool, rainy night in March 1939, Lloyd Gaines threw on an overcoat and journeyed into the streets of south Chicago. On his way out, he told the door attendant that he was on a quick errand to buy some stamps. The 28-year-old Gaines was never seen or heard from again. Days would pass before anyone realized Gaines was missing. It would take another seven months before his disappearance became public. Newspapers across the country carried his photo. Anyone with information into his whereabouts was urged to contact the National Association for the Advancement of Colored People. None of those efforts produced any solid leads.*

*It became clear that even after the Supreme Court ruling, Gaines' fight to enter the University of Missouri was far from over. In January 1939 Missouri legislators fast-tracked a bill to provide Lincoln University with \$275,000 for the establishment of a black law school. In May of that year the bill was signed into law, and Lincoln University went about jury-rigging the now-demolished Poro Beauty College in north St. Louis into its law school.*

*The facility opened its doors September 21, 1939, under the condemnation of some 200 protesters who formed a picket line around the "Jim Crow" school. A total of 30 students showed up for classes that first day. Lloyd Gaines was not among them.*

*His NAACP attorneys planned to argue that the hastily thrown-together Lincoln Law School was not equal to the University of Missouri's program. In October his lawyers began taking depositions, only to realize that Gaines hadn't been heard from in months.*

*In recent decades that the University of Missouri has acknowledged its role in Gaines' historic struggle. In 1995 the school established a law scholarship in his honor and later named its Black Culture Center after Gaines and another black student denied admission to the university because of her race.*

For more see <https://www.riverfronttimes.com/stlouis/the-mystery-of-lloyd-gaines/Content?mode=print&oid=2479115>

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***Smith v. Allwright, 321 U.S. 649 (1944)***

Argued November 10, 12, 1943

Reargued January 12, 1944

Decided April 3, 1944

***CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT***

***Syllabus***

1. The right of a citizen of the United States to vote for the nomination of candidates for the United States Senate and House of Representatives in a primary which is an integral part of the elective process is a right secured by the Federal Constitution, and this right of the citizen may not be abridged by the State on account of his race or color.
2. Whether the exclusion of citizens from voting on account of their race or color has been effected by action of the State -- rather than of individuals or of a political party -- is a question upon which the decision of the courts of the State is not binding on the federal courts, but which the latter must determine for themselves.
3. Upon examination of the statutes of Texas regulating primaries, *held*: that the exclusion of Negroes from voting in a Democratic primary to select nominees for a general election -- although, by resolution of a state convention of the party, its membership was limited to white citizens -- was State action in violation of the Fifteenth Amendment.

When, as here, primaries become a part of the machinery for choosing officials, state and federal, the same tests to determine the character of discrimination or abridgment should be applied to the primary as are applied to the general election.

4. While not unmindful of the desirability of its adhering to former decisions of constitutional questions, this Court is not constrained to follow a previous decision which, upon reexamination, is believed erroneous, particularly one which involves the application of a constitutional principle, rather than an interpretation of the Constitution to evolve the principle itself. *[citations to transcript omitted]*

131 F. 2d 593, reversed.

Certiorari, 319 U.S. 738, to review the affirmance of a judgment for the defendants in a suit for damages under 8 U.S.C. § 43.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings here for review a claim for damages in the sum of \$5,000 on the part of petitioner, a Negro citizen of the 48th precinct of Harris County, Texas, for the refusal of respondents, election and associate election judges, respectively, of that precinct, to give petitioner a ballot or to permit him to cast a ballot in the primary election of July 27, 1940, for the nomination of Democratic candidates for the United States Senate and House of Representatives, and Governor and other state officers. The refusal is alleged to have been solely because of the race and color of the proposed voter.

The actions of respondents are said to violate §§ 31 and 43 of Title 8 of the United States Code, 8 U.S.C. §§ 31 and 43, in that petitioner was deprived of rights secured by §§ 2 and 4 of Article I and the Fourteenth, Fifteenth and Seventeenth Amendments to the United States Constitution. The suit was filed in the District Court of the United States for the Southern District of Texas, which had jurisdiction under Judicial Code § 24, subsection 14.

The District Court denied the relief sought, and the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grovey v. Townsend*, 295 U. S. 45. We granted the petition for certiorari to resolve a claimed inconsistency between the decision in the *Grovey* case and that of *United States v. Classic*, 313 U. S. 299. 319 U.S. 738.

The State of Texas by its Constitution and statutes provides that every person, if certain other requirements are met which are not here in issue, qualified by residence in the district or county "shall be deemed a qualified elector." Constitution of Texas, Article VI, § 2; Vernon's Civil Statutes (1939 ed.), Article 2955. Primary elections for United States Senators, Congressmen and state officers are provided for by Chapters Twelve and Thirteen of the statutes. Under these chapters, the Democratic Party was required to hold the primary which was the occasion of the alleged wrong to petitioner. A summary of the state statutes regulating primaries appears in the footnote. These nominations are to be made by the qualified voters of the party. Art. 3101.

The Democratic Party of Texas is held by the Supreme Court of that state to be a "voluntary association," *Bell v. Hill*, 123 Tex. 531, 534, protected by § 27 of the Bill of Rights, Art. 1, Constitution of Texas, from interference by the state except that:

"In the interest of fair methods and a fair expression by their members of their preferences in the selection of their nominees, the State may regulate such elections by proper laws." That court stated further:

"Since the right to organize and maintain a political party is one guaranteed by the Bill of Rights of this state, it necessarily follows that every privilege essential or reasonably appropriate to the exercise of that right is likewise guaranteed, including, of course, the privilege of determining the policies of the party and its membership. Without the privilege of determining the policy of a political association and its membership, the right to organize such an association would be a mere mockery. We think these rights, that is, the right to determine the membership of a political party and to determine its policies, of necessity are to be exercised by the State Convention of such party, and cannot, under any circumstances, be conferred upon a state or governmental agency."

The Democratic party, on May 24, 1932, in a state convention adopted the following resolution, which has not since been "amended, abrogated, annulled or avoided":

"Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such, entitled to participate in its deliberations."

It was by virtue of this resolution that the respondents refused to permit the petitioner to vote.

Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government. The Fourteenth Amendment forbids a state from making or enforcing any law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgement by a state of the right of citizens to vote on account of color. Respondents appeared in the District Court and the Circuit Court of Appeals and defended on the ground that the Democratic party of Texas is a voluntary organization, with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary. Such action, the answer asserted, does not violate the Fourteenth, Fifteenth or Seventeenth Amendment, as officers of government cannot be chosen at primaries, and the Amendments are applicable only to general elections, where governmental officers are actually elected. Primaries, it is said, are political party affairs, handled by party, not governmental, officers. No appearance for respondents is made in this Court. Arguments presented here by the Attorney General of Texas and the Chairman of the State Democratic Executive Committee of Texas, as *amici curiae*, urged substantially the same grounds as those advanced by the respondents.

The right of a Negro to vote in the Texas primary has been considered heretofore by this Court. The first case was *Nixon v. Herndon*, 273 U. S. 536. At that time, 1924, the Texas statute, Art. 3093a, afterwards numbered Art. 3107 (Rev.Stat.1925) declared "in no event shall a Negro be eligible to participate in a Democratic party primary election . . . in the State of Texas." Nixon was refused the right to vote in a Democratic primary, and brought a suit for damages against the election officers under R.S. § 1979 and 2004, the present §§ 43 and 31 of Title 8, U.S.C., respectively. It was urged to this Court that the denial of the franchise the Nixon violated his Constitutional rights under the Fourteenth and Fifteenth Amendments. Without consideration of the Fifteenth, this Court held that the action of Texas in denying the ballot to Negroes by statute was in violation of the equal protection clause of the Fourteenth Amendment, and reversed the dismissal of the suit.

The legislature of Texas reenacted the article, but gave the State Executive Committee of a party the power to prescribe the qualifications of its members for voting or other participation. This article remains in the statutes. The State Executive Committee of the Democratic party adopted a resolution that white Democrats and none other might participate in the primaries of that party. Nixon was refused again the privilege of voting in a primary, and again brought suit for damages by virtue of § 31, Title 8 U.S.C. This Court again reversed the dismissal of the suit for the reason that the Committee action was deemed to be State action, and invalid as discriminatory under the Fourteenth Amendment. The test was said to be whether the Committee operated as representative of the State in the discharge of the State's authority. *Nixon v. Condon*, 286 U. S. 73. The question of the inherent power of a political party in Texas "without restraint by any law to determine its own membership" was left open. *Id.*, 286 U. S. 84-85.

In *Grove v. Townsend*, 295 U. S. 45, this Court had before it another suit for damages for the refusal in a primary of a county clerk, a Texas officer with only public functions to perform, to furnish petitioner, a Negro, an absentee ballot. The refusal was solely on the ground of race. This case differed from *Nixon v. Condon*, *supra*, in that a state convention of the Democratic party had passed the resolution of May 24, 1932, hereinbefore quoted. It was decided that the determination by the state convention of the membership of the Democratic party made a significant change from a determination by the Executive Committee. The former was party action, voluntary in character. The latter, as had been held in the *Condon* case, was action by authority of the State. The managers of the primary election were therefore declared not to be state officials in such sense that their action was state action. A state convention of a party was said not to be an organ of the state. This Court went on to announce that to deny a vote in a primary was a mere refusal of party membership, with which "the state need have no concern," *loc.cit.* 295 U. S. 55, while for a state to deny a vote in a general election on the ground of race or color violated the Constitution. Consequently, there was found no ground for holding that the county clerk's refusal of a ballot because of racial ineligibility for party membership denied the petitioner any right under the Fourteenth or Fifteenth Amendments.

Since *Grove v. Townsend* and prior to the present suit, no case from Texas involving primary elections has been before this Court. We did decide, however, *United States v. Classic*, 313 U. S. 299. We there held that § 4 of Article I of the Constitution authorized Congress to regulate primary, as well as general, elections, 313 U.S. at 313 U. S. 316, 313 U. S. 317, "where the primary is by law made an integral part of the election machinery." 313 U.S. at 313 U. S. 318.



Consequently, in the *Classic* case, we upheld the applicability to frauds in a Louisiana primary of §§ 19 and 20 of the Criminal Code. Thereby, corrupt acts of election officers were subjected to Congressional sanctions because that body had power to protect rights of Federal suffrage secured by the Constitution in primary as in general elections. 313 U.S. at 313 U. S. 323. This decision depended, too, on the determination that, under the Louisiana statutes, the primary was a part of the procedure for choice of Federal officials. By this decision, the doubt as to whether or not such primaries were a part of "elections" subject to Federal control, which had remained unanswered since *Newberry v. United States*, 256 U. S. 232, was erased. The *Nixon* cases were decided under the equal protection clause of the Fourteenth Amendment without a determination of the status of the primary as a part of the electoral process. The exclusion of Negroes from the primaries by action of the State was held invalid under that Amendment. The fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. This is not to say that the *Classic* case cuts directly into the rationale of *Grovey v. Townsend*. This latter case was not mentioned in the opinion. *Classic* bears upon *Grovey v. Townsend* not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process, but because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state. When *Grovey v. Townsend* was written, the Court looked upon the denial of a vote in a primary as a mere refusal by a party of party membership. 295 U.S. at 295 U. S. 55. As the Louisiana statutes for holding primaries are similar to those of Texas, our ruling in *Classic* as to the unitary character of the electoral process calls for a reexamination as to whether or not the exclusion of Negroes from a Texas party primary was state action.

The statutes of Texas relating to primaries and the resolution of the Democratic party of Texas extending the privileges of membership to white citizens only are the same in substance and effect today as they were when *Grovey v. Townsend* was decided by a unanimous Court. The question as to whether the exclusionary action of the party was the action of the State persists as the determinative factor. In again entering upon consideration of the inference to be drawn as to state action from a substantially similar factual situation, it should be noted that *Grovey v. Townsend* upheld exclusion of Negroes from primaries through the denial of party membership by a party convention. A few years before, this Court refused approval of exclusion by the State Executive Committee of the party. A different result was reached on the theory that the Committee action was state authorized, and the Convention action was unfettered by statutory control. Such a variation in the result from so slight a change in form influences us to consider anew the legal validity of the distinction which has resulted in barring Negroes from participating in the nominations of candidates of the Democratic party in Texas. Other precedents of this Court forbid the abridgement of the right to vote. *United States v. Reese*, 92 U. S. 214, 92 U. S. 217; *Neal v. Delaware*, 103 U. S. 370, 103 U. S. 388; *Guinn v. United States*, 238 U. S. 347, 238 U. S. 361; *Myers v. Anderson*, 238 U. S. 368, 238 U. S. 379; *Lane v. Wilson*, 307 U. S. 268.

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. *United States v. Classic*, 313 U.S. at 313 U. S. 314; *Myers v.*

*Anderson*, 238 U. S. 368; *Ex parte Yarbrough*, 110 U. S. 651, 110 U. S. 663 *et seq.* By the terms of the Fifteenth Amendment, that right may not be abridged by any state on account of race. Under our Constitution, the great privilege of the ballot may not be denied a man by the State because of his color.

We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. Despite Texas' decision that the exclusion is produced by private or party action, *Bell v. Hill*, *supra*, Federal courts must for themselves appraise the facts leading to that conclusion. It is only by the performance of this obligation that a final and uniform interpretation can be given to the Constitution, the "supreme Law of the Land." [citations omitted] Texas requires electors in a primary to pay a poll tax. Every person who does so pay and who has the qualifications of age and residence is an acceptable voter for the primary. Art. 2955. Texas requires by the law the election of the county officers of a party. These compose the county executive committee. The county chairmen so selected are members of the district executive committee and choose the chairman for the district. Precinct primary election officers are named by the county executive committee. Statutes provide for the election by the voters of precinct delegates to the county convention of a party and the selection of delegates to the district and state conventions by the county convention. The state convention selects the state executive committee. No convention may place in platform or resolution any demand for specific legislation without endorsement of such legislation by the voters in a primary. Texas thus directs the selection of all party officers.

Primary elections are conducted by the party under state statutory authority. The county executive committee selects precinct election officials and the county, district or state executive committees, respectively, canvass the returns. These party committees or the state convention certify the party's candidates to the appropriate officers for inclusion on the official ballot for the general election. No name which has not been so certified may appear upon the ballot for the general election as a candidate of a political party. No other name may be printed on the ballot which has not been placed in nomination by qualified voters who must take oath that they did not participate in a primary for the selection of a candidate for the office for which the nomination is made.

The state courts are given exclusive original jurisdiction of contested elections and of mandamus proceedings to compel party officers to perform their statutory duties.

We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. The plan of the Texas primary follows substantially that of Louisiana, with the exception that, in Louisiana, the state pays the cost of the primary, while Texas assesses the cost against candidates. In numerous instances, the Texas statutes fix or limit the fees to be charged. Whether paid directly by the state or through state requirements, it is state action which compels. When primaries become a part of the machinery for choosing officials, state and national, as they have



here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. ....

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice 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. Constitutional rights would be of little value if they could be thus indirectly denied. ....



The privilege of membership in a party may be, as this Court said in *Grove v. Townsend*, 295 U. S. 45, 295 U. S. 55, no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state. In reaching this conclusion, we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle, rather than

an interpretation of the Constitution to extract the principle itself. Here, we are applying, contrary to the recent decision in *Grove v. Townsend*, the well established principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen's right to vote. *Grove v. Townsend* is overruled.

*Judgment reversed.*

MR. JUSTICE FRANKFURTER concurs in the result. *Footnotes omitted*

*Side Bar:* Lonnie Smith was a well-known dentist in Houston, Texas, an officer in the Houston branch of the National Association for the Advancement of Colored People (NAACP), and a civil rights activist. Smith was born in Yoakum, Texas in 1901. He graduated from Providence Hill High School in 1919 and then attended Prairie View A & M College for two years. He earned a Doctor of Dental Surgery degree from Meharry College in Nashville, Tennessee in 1924. Smith married Janie Mae Dunn that same year and in 1925 he opened a dental practice in

Galveston, Texas. Smith moved his practice to Houston in 1929. Dr. Lonnie Smith voted regularly in Houston after 1944 and went on to serve as a Democratic Precinct Committee Member in the same precinct where he was once denied a ballot. He also served as president of the A. A. Lucas chapter of the NAACP in Houston before his death in that city in 1971. The Lonnie E. Smith Public Library is located at 3624 Scott Street in Houston, Texas less than a mile from Texas Southern University. For more information see <https://tshaonline.org/handbook/online/articles/fsm60>

**Richard Randolph Grovey** was born in 1889 in Brazoria County, Texas. He graduated from Moore High School at Waco in 1910 and Tillotson College at Austin in 1914. He served as



principal of a rural school shortly before moving in 1917 to Houston, where he owned a successful barbershop. He started the Third Ward Civic Club with the objective of organizing professional and working-class African Americans in an effort to assert their political rights. In 1928 he joined Carter Wesley and J. Alston Atkins, the owners of Houston's black newspaper, the *Informer* (later the *Houston Informer* and *Texas Freeman*); James Nabrit, a lawyer; and others, to advance a court case against the white primary. By suing the election judge, Albert Townsend, for less than \$20 in damages they were able to avoid the higher state courts and go directly to the United States Supreme Court, which agreed to hear *Grovey v. Townsend* in January 1935. Although in April 1935 the Supreme Court ruled against Grovey, in *Smith v. Allwright* (1944) the court reversed the decision. In January 1932, the group organized the Harris County

Negro Democratic Club. See <https://tshaonline.org/handbook/online/articles/fgrat>



**Dr. Lawrence Aaron Nixon** was born in Marshall, Texas and graduated from Wiley College (1902) and Meharry Medical College (1906). He began his medical practice in Cameron, Texas but moved to El Paso in 1909. In 1910, he was joined in El Paso by his first wife Esther (nee Calvin) and their infant son. While practicing as a physician in El Paso, Dr. Nixon became a founder, organizer and member of Myrtle Avenue Methodist Church as well as a charter member of the El Paso branch of the National Association for the Advancement of Colored People (NAACP). A registered Democrat, Dr. Nixon challenged a 1923 state law that barred African Americans from participating in that party's electoral primaries.

<http://www.blackpast.org/aaw/nixon-lawrence-1883-1966> and see

<https://tshaonline.org/handbook/online/articles/fni10>

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## *Korematsu v. United States*

October 11, 12, 1944, Argued ; December 18, 1944, Decided

### Syllabus

1. Civilian Exclusion Order No. 34 which, during a state of war with Japan and as a protection against espionage and sabotage, was promulgated by the Commanding General of the Western Defense Command under authority of Executive Order No. 9066 and the Act of March 21, 1942, and which directed the exclusion after May 9, 1942 from a described West Coast military area of all persons of Japanese ancestry, *held* constitutional as of the time it was made and when the petitioner -- an American citizen of Japanese descent whose home was in the described area -- violated it. P. 219.
2. The provisions of other orders requiring persons of Japanese ancestry to report to assembly centers and providing for the detention of such persons in assembly and relocation centers were separate, and their validity is not in issue in this proceeding. P. 222.
3. Even though evacuation and detention in the assembly center were inseparable, the order under which the petitioner was convicted was nevertheless [\*\*\*\*2] valid. P. 223.

### Opinion

The petitioner, an [\*\*\*\*3] American citizen of Japanese descent, was convicted in a federal district court for Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded [\*\*\*199] from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, <sup>1</sup> and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case [\*\*\*\*4] prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, which provides that

". . . whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty

of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$ 5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially [\*217] based upon Executive Order No. 9066, 7 *Fed. Reg. 1407*. That order, issued after we were at war with Japan, declared [\*\*\*\*5] that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. "

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, remaining in San Leandro, California, a "Military Area," \_contrary to Civilian Exclusion Order No. 34 of the Commanding General [\*216] of the Western subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi v. United States*, 320 U.S. 81, we sustained a conviction obtained for violation of the curfew order. The *Hirabayashi* conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the [\*\*\*\*6] Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude [\*218] those of Japanese ancestry from [\*\*195] the West [\*\*\*\*200] Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close [\*\*\*\*7] relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the *Hirabayashi* case, *supra*, at p. 99, ". . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated [\*\*\*\*8] and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of [\*219] whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to [\*\*\*\*9] swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

We uphold the exclusion order as of the time it was made and when the petitioner violated it. Cf. *Chastleton Corporation v. Sinclair*, 264 U.S. 543, 547; *Block v. Hirsh*, 256 U.S. 135, 154-5. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. Cf. *Ex parte Kawato*, 317 U.S. 69, 73. But hardships are part of war, and war is an aggregation of hardships. [\*\*\*\*10] All citizens alike, both in and out of [\*\*\*201] uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory [\*220] exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is argued that on May 30, 1942, [\*\*196] the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.

There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area, but its effect was specifically limited in time "until and to the extent that a future proclamation [\*\*\*\*11] or order should so permit or direct." 7 Fed. Reg. 2601. That "future order," the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did "direct" exclusion from the area of all persons of Japanese ancestry, before 12 o'clock noon, May 9; furthermore it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942 Act of Congress.



Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order, which he stipulated in his trial that he had violated, knowing of its existence. There is therefore no basis for the argument that on May 30, 1942, he was subject to punishment, under the March 27 and May 3 orders, whether he remained in or left the area.

It does appear, however, that on May 9, the effective date of the exclusion order, the military authorities had [\*221] already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry, [\*\*\*\*12] at central points, designated as "assembly centers," in order "to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration." Public Proclamation No. 4, 7 *Fed. Reg.* 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 *Fed. Reg.* 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the [\*\*\*\*13] trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military [\*\*\*202] orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear [\*222] when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be [\*\*\*\*14] noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. Cf. *Blockburger v. United States*, 284 U.S. 299, 304. There is no reason why violations of these orders, insofar as they were promulgated pursuant to Congressional enactment, should not be treated as separate offenses.

The *Endo* case, *post*, p. 283, graphically illustrates [\*\*197] the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.



Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. [\*\*\*\*15] It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion [\*223] Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving [\*\*\*\*16] the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers -- and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies -- we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities [\*\*\*203] feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders -- as inevitably it must -- determined that they should have the power to do just this. There was evidence of disloyalty on the part [\*\*\*\*17] of some, the military authorities considered that the need for [\*224] action was great, and time was short. We cannot -- by availing ourselves of the calm perspective of hindsight -- now say that at that time these actions were unjustified.

*Affirmed.*

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*Ex parte Mitsuye Endo*

October 12, 1944, Argued  
December 18, 1944, Decided

Syllabus

1. The War Relocation Authority, whose power over persons evacuated from military areas derives from Executive Order No. 9066, which was ratified and confirmed by the Act of March 21, 1942, was without authority, express or implied, to subject to its leave procedure a concededly loyal and law-abiding citizen of the United States. P. 297.
2. Wartime measures are to be interpreted as intending the greatest possible accommodation between the Constitutional liberties of the citizen and the exigencies of war. P. 300.
3. The sole purpose of the Act of March 21, 1942 and Executive Orders Nos. 9066 and 9102 was the protection of the war effort against espionage and sabotage. P. 300.
4. Power to detain a concededly loyal citizen may not be implied from the power to protect the war effort against espionage and sabotage. P. 302.
5. The power to detain [\*\*\*\*2] a concededly loyal citizen or to grant him a conditional release can not be implied as a useful or convenient step in the evacuation program. P. 302.
6. The Act of March 21, 1942 and Executive Orders Nos. 9066 and 9102 afford no basis for keeping loyal evacuees of Japanese ancestry in custody on the ground of community hostility. P. 302.
7. The District Court having acquired jurisdiction upon an application for habeas corpus, and there being within the district one responsible for the detention and who would be an appropriate respondent, the cause was not rendered moot by the removal of the applicant to another circuit pending appeal from a denial of the writ, and the District Court has jurisdiction to issue the writ. *United States v. Crystal*, 319 U.S. 755, distinguished. P. 305.

Opinion

This case comes here on a certificate of the Court of Appeals for the Ninth Circuit, certifying to us questions of law upon which it desires instructions for the decision of the case. Judicial Code § 239, 28 U. S. C. § 346. Acting under that section we ordered the entire record to be certified to this Court so that we might proceed to a decision, as if the case had been brought here by appeal.

Mitsuye Endo, hereinafter designated as the appellant, is an American citizen of Japanese ancestry. She was [\*285] evacuated from Sacramento, California, in 1942, pursuant to certain military orders which we will presently discuss, and was removed to the Tule Lake War Relocation Center located at Newell, [\*\*\*\*4] Modoc County, California. In July, 1942, she

filed a petition for a writ of habeas corpus in the District Court of the United States for the Northern District of California, asking that she be discharged and restored to liberty. That petition was denied by the District Court in July, 1943, and an appeal was perfected to the Circuit Court of Appeals in August, 1943. Shortly thereafter appellant was transferred from the Tule Lake Relocation Center to the Central Utah Relocation Center located at Topaz, Utah, where she is presently detained. The certificate of questions of law was filed here on April 22, 1944, and on May 8, 1944, we ordered the entire record to be certified to this Court. It does not appear that any respondent was ever served with process or appeared in the proceedings. But the United States Attorney for the Northern District of California argued before the District Court that the petition should not be granted. And the Solicitor General argued the case here.

The history of the evacuation of Japanese aliens and citizens of Japanese ancestry from the Pacific coastal regions, following the Japanese attack on our Naval Base at Pearl Harbor on December 7, 1941, and [\*\*\*\*5] the declaration of war against Japan on December 8, 1941 (55 Stat. 795), has been reviewed in *Hirabayashi [\*\*\*247] v. United States*, 320 U.S. 81. It need be only briefly recapitulated [\*\*211] here. On February 19, 1942, the President promulgated Executive Order No. 9066, 7 *Fed. Reg.* 1407. It recited that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities, as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November [\*286] 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104)." And it authorized and directed "the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to [\*\*\*\*6] enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order."

Lt. General J. L. De Witt, Military Commander of the Western Defense Command, was designated to carry out the duties prescribed by that Executive Order. On March 2, 1942, he promulgated Public Proclamation No. 1 (7 *Fed. Reg.* 2320) which recited that the entire Pacific Coast of the United States "by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations."

It designated certain [\*\*\*\*7] Military Areas and Zones in the Western Defense Command and announced that certain persons might subsequently be excluded from these areas. [\*287] On March 16, 1942, General De Witt promulgated Public Proclamation No. 2 which contained similar recitals and designated further Military Areas and Zones. 7 *Fed. Reg.* 2405.

On March 18, 1942, the President promulgated Executive Order No. 9102 which established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority. 7 Fed. Reg. 2165. It recited that it was made "in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security." It provided for a Director and authorized and directed him to "formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision."

The Director was given the authority, among [\*\*\*\*8] other things, to prescribe regulations necessary or desirable to promote effective execution of the program.

Congress shortly enacted legislation which, as we pointed out in *Hirabayashi v. United States*, *supra*, ratified and confirmed Executive Order No. 9066. See 320 U.S. pp. 87-91. It did so by the Act of March 21, [\*\*\*248] 1942 (56 Stat. 173) which provided:

"That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should [\*288] have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$ 5,000 or to imprisonment for not more than one year, or both, for each offense."

[\*\*212] Beginning on March 24, 1942, a [\*\*\*\*9] series of 108 Civilian Exclusion Orders<sup>1</sup> were issued by General De Witt pursuant to Public Proclamation Nos. 1 and 2. Appellant's exclusion was effected by Civilian Exclusion Order No. 52, dated May 7, 1942. It ordered that "all persons of Japanese ancestry, both alien and non-alien" be excluded from Sacramento, California, beginning at noon on May 16, 1942. Appellant was evacuated to the Sacramento Assembly Center on May 15, 1942, and was transferred from there to the Tule Lake Relocation Center on June 19, 1942.

[\*\*\*\*10] [\*289] On May 19, 1942, General De Witt promulgated Civilian Restrictive Order No. 1 (8 Fed. Reg. 982) and on June 27, 1942, Public Proclamation No. 8. 7 Fed. Reg. 8346. These prohibited evacuees from leaving Assembly Centers or Relocation Centers except pursuant to an authorization from General De Witt's headquarters. Public Proclamation No. 8 recited that "the present situation within these military areas requires as a matter of military necessity" that the evacuees be removed to "Relocation Centers for their relocation, maintenance and supervision," that those Relocation Centers be designated as War Relocation Project Areas, and that restrictions on the rights of the evacuees to enter, remain in, or leave such areas be promulgated. These restrictions were applicable to the Relocation Centers within the Western Defense Command and included both of those in which appellant has been confined -- [\*\*\*249] Tule Lake Relocation Center at Newell, California and Central Utah Relocation Center at Topaz, Utah. And Public Proclamation No. 8 purported to make any

person who was subject to its provisions and who failed to conform to it liable to the [\*\*\*\*11] penalties prescribed by the Act of March 21, 1942. [\*\*\*\*12] [\*290] By letter of August 11, 1942, General De Witt authorized the War Relocation Authority [\*\*\*\*13] to issue permits for persons to leave these areas. By virtue of that delegation [\*\*213] and the authority conferred by Executive Order No. 9102, the War Relocation Authority was given control over the ingress and egress of evacuees from the Relocation Centers where Mitsuye Endo was confined.

[\*\*\*\*14] [\*291] The program of the War Relocation Authority is said to have three main features: (1) the maintenance of Relocation Centers as interim places of residence for evacuees; (2) the segregation of loyal from disloyal evacuees; (3) the continued detention of the disloyal and so far as possible the relocation of the No. 1 (which included the City of Sacramento) were prohibited "from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct."

Prior to this Proclamation a system of voluntary migration had been in force under which 4,889 persons left the military areas under their own arrangements. Final Report, Japanese Evacuation from the West Coast (1943), p. 109. The following reasons are given for terminating that program:

"Essentially, the objective was twofold. First, it was to alleviate tension and prevent incidents involving violence between Japanese migrants and others. Second, it was to insure an orderly, supervised, and thoroughly controlled evacuation with adequate provision for the protection of the persons of evacuees as well as their property." Final Report, *supra*, p. 105.

On February 16, 1944, the President by Executive Order No. 9423 transferred the War Relocation Authority to the Authority established a procedure for obtaining leave from Relocation Centers. That procedure, so far as indefinite leave is concerned, presently provides as follows: [\*\*\*\*15] [\*292] [\*\*214] Application for leave clearance is required. An investigation of the applicant is made for the purpose of ascertaining "the probable effect upon the war program and upon the public peace and security of issuing indefinite leave" to the applicant.

But even if an applicant meets those requirements, no leave will issue when the proposed place of residence or employment is within [\*\*\*\*17] a locality where it has been ascertained that "community sentiment is unfavorable" or when the applicant plans to go to an area which has been closed by the Authority to the issuance of indefinite leave. Nor will such leave issue if the area where the applicant plans to reside or work is one which has not been cleared [\*\*\*\*251] for relocation. Moreover, the applicant agrees to give the Authority prompt notice of any change of employment or residence. And the indefinite leave which is granted does not permit entry into a prohibited military area, including those from which these people were evacuated.

[\*\*\*\*18] Mitsuye Endo made application for leave clearance on February 19, 1943, after the petition was filed in the District [\*294] Court. Leave clearance was granted her on August [\*\*215] 16, 1943. But she made no application for indefinite leave.

[\*\*\*\*19] Her petition for a writ of *habeas corpus* alleges that she is a loyal and law-abiding

citizen of the United States, that no charge has been made against her, that she is being unlawfully detained, and that she is confined in the Relocation Center under armed guard and held there against her will.

It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge or that she is even suspected of disloyalty. Moreover, they do not contend that she may [\*295] be held any longer in the Relocation Center. They concede that it is beyond the power of the War Relocation Authority to detain citizens against whom no charges of disloyalty or subversiveness have been made for a period longer than that necessary to separate the loyal from the disloyal and to provide the necessary guidance for relocation. But they maintain that detention for an additional period after leave clearance has been granted is an essential step in the evacuation program. Reliance for that conclusion is [\*\*\*252] placed on the following circumstances.

When compulsory evacuation from the [\*\*\*\*20] West Coast was decided upon, plans for taking care of the evacuees after their detention in the Assembly Centers, to which they were initially removed, remained to be determined. On April 7, 1942, the Director of the Authority held a conference in Salt Lake City with various state and federal officials including the Governors of the intermountain states. "Strong opposition was expressed to any type of unsupervised relocation and some of the Governors refused to be responsible for maintenance of law and order unless evacuees brought into their States were kept under constant military surveillance." Sen. Doc. No. 96 the center to the extent authorized by the Western Defense Command."

Final Report, *supra*, note 2, pp. 43-44. The Authority thereupon abandoned plans for assisting groups of evacuees in private colonization and temporarily put to one side plans for aiding the evacuees in obtaining private employment. [\*\*\*\*22] As an alternative the Authority "concentrated on establishment of Government-operated centers with sufficient capacity and facilities to accommodate the entire evacuee population." Sen. Doc. No. 96, *supra*, note 7, p. 4.

Accordingly, it undertook to care for the basic needs of these people in the Relocation Centers, to promote as rapidly as possible the permanent resettlement of as many as possible in normal communities, and to provide indefinitely for those left at the Relocation Centers. An effort was made to segregate the loyal evacuees from the others. The leave program which we have discussed was put into operation and the resettlement program commenced. [\*\*216] It is argued that such a planned and orderly relocation was essential to the success of the evacuation program; that but for such supervision there might have been a [\*297] dangerously disorderly migration of unwanted people to unprepared communities; that unsupervised evacuation [\*\*\*\*23] might have resulted in hardship and disorder; that the success of the evacuation program was thought to require the knowledge that the federal government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and that of the nation; that although community hostility towards the evacuees has diminished, it has not disappeared and the continuing control [\*\*\*253] of the Authority over the relocation process is essential to the success of the evacuation program. It is argued that supervised relocation, as the chosen method of terminating the evacuation, is the final step in the entire process and is a consequence of the first step taken. It is conceded that appellant's detention pending compliance with the leave



regulations is not directly connected with the prevention of espionage and sabotage at the present time. But it is argued that Executive Order No. 9102 confers power to make regulations necessary and proper for controlling situations created by the exercise of the powers expressly conferred for protection against espionage and sabotage. The leave regulations are said to [\*\*\*\*24] fall within that category.

*First.* We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.

It should be noted at the outset that we do not have here a question such as was presented in *Ex parte Milligan*, 4 Wall. 2, or in *Ex parte Quirin*, 317 U.S. 1, where the jurisdiction of military tribunals to try persons according to the law of war was challenged in *habeas corpus* proceedings. [\*298] Mitsuye Endo is detained by a civilian agency, the War Relocation Authority, not by the military. Moreover, the evacuation program was not left exclusively to the military; the Authority [\*\*\*\*25] was given a large measure of responsibility for its execution and Congress made its enforcement subject to civil penalties by the Act of March 21, 1942. Accordingly, no questions of military law are involved.

Such power of detention as the Authority has stems from Executive Order No. 9066. That order is the source of the authority delegated by General De Witt in his letter of August 11, 1942. And Executive Order No. 9102 which created the War Relocation Authority purported to do no more than to implement the program authorized by Executive Order No. 9066.

[\*\*\*\*26] We approach the construction of Executive Order No. 9066 as we would approach the construction of legislation in this field. That Executive Order must indeed be considered along with the Act of March 21, 1942, which ratified and confirmed it (*Hirabayashi v. United States*, *supra*, pp. 87-91) as the Order and the statute together laid such basis as there is for participation by civil agencies of the federal government in the evacuation program. Broad powers frequently granted to the President or other executive officers by Congress so that they [\*\*217] may deal with the exigencies of wartime problems have been sustained.

And the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment [\*\*\*254] and [\*299] discretion so that war might be waged effectively and successfully. *Hirabayashi v. United States*, *supra*, p. 93. At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual [\*\*\*\*27] as it is in its enumeration of the powers of his government. Thus it has prescribed procedural safeguards surrounding the arrest, detention and conviction of individuals. Some of these are contained in the Sixth Amendment, compliance with which is essential if convictions are to be sustained. *Tot v. United States*, 319 U.S. 463. And the *Fifth Amendment* provides that no person shall be deprived of liberty (as well as life or property) without due process of law. Moreover, as a further safeguard against invasion of the basic civil rights of the individual it is provided in Art. I, § 9 of the Constitution that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." See *Ex parte Milligan*, *supra*.

We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality. Those [\*300] analogies are suggestive here. We must assume that the Chief Executive and members of Congress, as well as [\*\*\*\*29] the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

[\*\*\*\*30] The Act of March 21, 1942, was a war measure. The House Report (H. Rep. No. 1906, 77th Cong., 2d Sess., p. 2) stated, "The necessity for this legislation arose from the fact that the safe conduct of the war requires the fullest possible protection against either espionage or sabotage to national defense material, national defense premises, and national defense utilities." That was the precise purpose of Executive Order No. 9066, for, as we have seen, it gave as the reason for the exclusion of persons from prescribed military areas the protection of such [\*\*\*255] property "against espionage and against sabotage." And Executive Order No. 9102 which established the War Relocation Authority did so, as we have noted, "in order to provide for the removal from designated areas [\*\*218] of persons whose removal is necessary in the interests of national security." The purpose and objective of the Act and of these orders are plain. Their single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be [\*\*\*\*31] construed.

Neither the Act nor the orders use the language of detention. The Act says that no one shall "enter, remain [\*301] in, leave, or commit any act" in the prescribed military areas contrary to the applicable restrictions. Executive Order No. 9066 subjects the right of any person "to enter, remain in, or leave" those prescribed areas to such restrictions as the military may impose. And apart from those restrictions the Secretary of War is only given authority to afford the evacuees "transportation, food, shelter, and other accommodations." Executive Order No. 9102 authorizes and directs the War Relocation Authority "to formulate and effectuate a program for the removal" of the persons covered by Executive Order No. 9066 from the prescribed military areas and "for their relocation, maintenance, and supervision." And power is given the Authority to make regulations "necessary or desirable to promote effective execution of such program." Moreover, unlike the case of curfew regulations (*Hirabayashi v. United States, supra*), the legislative history of the Act of March 21, 1942, is silent on detention. And that silence may have special significance in [\*\*\*\*32] view of the fact that detention in Relocation Centers was no part of the original program of evacuation but developed later to meet what seemed to the officials in charge to be mounting hostility to the evacuees on the part of the communities where they sought to go.

We do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking. Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purposes of this case that initial detention in Relocation Centers was authorized. But we stress the silence of the legislative history and of the Act and the Executive Orders on the power to detain to emphasize that any such authority which exists must be implied. If there is to be [\*302] the greatest possible accommodation of the liberties of the citizen with this [\*\*\*\*33] war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program.

A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.

Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. If we assume (as we do) that the original evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community [\*\*\*256] hostility to this group of American citizens. The evacuation program rested explicitly on the former ground not on the latter as the [\*\*\*\*34] underlying legislation shows. The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. If we held that the authority to detain continued thereafter, we would transform an espionage or sabotage measure into something else. That was not done by Executive Order No. 9066 or by the Act of March 21, 1942, which ratified it. What they did not do we cannot do. Detention which furthered the campaign against espionage and sabotage would be one thing. But detention which has no relationship to that campaign is of a distinct character. Community hostility even to loyal evacuees may have been (and perhaps still is) a serious problem. But if authority [\*303] for their custody and supervision is to be sought on that ground, the Act of March 21, 1942, Executive Order No. 9066, [\*\*219] and Executive Order No. 9102, offer no support. And none other is advanced. To read them that broadly would be to assume that the Congress and the President intended that this discriminatory action [\*\*\*\*35] should [\*304] be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country. We cannot make such an assumption. As the President has said of these loyal citizens:

"Americans of Japanese ancestry, like those of many other ancestries, have shown that they can, and want to, accept our institutions and work loyally with the rest of us, making their own valuable contribution to the national wealth and well-being. In vindication of the very ideals for which we are fighting this war it is important to us to maintain a high standard of fair, considerate, and equal treatment for the people of this minority as of all other minorities." [\*\*\*257] Sen. Doc. No. 96, *supra*, note 7, p. 2. [\*\*\*\*36] Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority.

*Second.* The question remains whether the District Court has jurisdiction to grant the writ of *habeas corpus* because of the fact that while the case was pending in the Circuit Court of Appeals appellant was moved from the Tule Lake Relocation Center in the Northern District of California where she was originally detained to the Central Utah Relocation Center in a different district and circuit.

That question is not colored by any purpose to effectuate a removal in evasion of the *habeas corpus* proceedings. It appears that appellant's removal to Utah was part of a general segregation program involving many of these people and was in no way related to this pending case. Moreover, there is no suggestion that there is no one within the jurisdiction of the District Court who is responsible for the detention of appellant and who would be an appropriate respondent. We are indeed advised by the Acting Secretary of the Interior [\*\*\*\*37] that if the writ [\*305] issues and is directed to the Secretary of the Interior or any official of the War Relocation Authority (including an assistant director whose office is at San Francisco, which is in the jurisdiction of the District Court), the corpus [\*\*220] of appellant will be produced and the court's order complied with in all respects. Thus it would seem that the case is not moot.

In *United States ex rel. Innes v. Crystal*, 319 U.S. 755, the relator challenged a judgment of court martial by *habeas corpus*. The District Court denied his petition and the Circuit Court of Appeals affirmed that order. After that decision and before his petition for certiorari was filed here, he was removed from the custody of the Army to a federal penitentiary in a different district and circuit. The sole respondent was the commanding officer. Only an order directed to the warden of the penitentiary [\*\*\*\*38] could effectuate his discharge and the warden as well as the prisoner was outside the territorial jurisdiction of the District Court. We therefore held the cause moot. There is no comparable situation here.

The fact that no respondent was ever served with process or appeared in the proceedings is not important. The United States resists the issuance of a writ. A cause exists in that state of the proceedings and an appeal lies from denial of a writ without the appearance of a respondent. *Ex parte Milligan*, *supra*, p. 112; *Ex parte Quirin*, 317 U.S. 1, 24. Hence, so far as presently appears, the cause is not moot and the District Court has jurisdiction to act unless the physical presence of appellant in that district is essential.

We need not decide whether the presence of the person detained within the territorial jurisdiction of the District Court is prerequisite to filing a petition for a writ of [\*\*\*\*39] *habeas corpus*. See *In re Boles*, 48 F. 75; *Ex parte Gouyet*, 175 F. 230, 233; *United States v. Day*, 50 F.2d 816, 817; [\*306] *United States v. Schlotfeldt*, 136 F.2d 935, 940. But see *Tippitt v. Wood*, 140 F.2d 689, 693. We only hold that the District Court acquired jurisdiction in this case and that the removal of Mitsuye Endo did not cause it to lose jurisdiction where a person in whose custody she is remains within the district.

There are expressions in some of the cases which indicate that the [\*\*\*258] place of confinement must be within the court's territorial jurisdiction in order to enable it to issue the writ. See *In re Boles*, *supra*, p. 76; *Ex parte Gouyet*, *supra*; *United States v. Day*, *supra*; *United States v. Schlotfeldt*, *supra*. But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner. As Judge Cooley stated in *In the Matter of Samuel W. Jackson*, 15 Mich. 417, 439-440:

"The important fact to be observed [\*\*\*\*40] in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent;" And see *United States v. Davis*, 5 Cranch C. C. 622, Fed. Cas. No. 14,926; *Ex parte Fong Yim*, 134 F. 938; *Ex parte Ng Quong Ming*, 135 F. 378, 379; *Sanders v. Allen*, 100 F.2d 717, 719; *Rivers v. Mitchell*, 57 Ia. 193, 195, 10 N. W. 626; *People v. New York Asylum*, 57 App. Div. 383, 384, 68 N. Y. S. 279; *People v. New York Asylum*, 58 App. Div. 133, 134, 68 N. Y. S. 656. The statute upon which the jurisdiction of the District Court in *habeas* [\*\*\*\*41] *corpus* proceedings rests (Rev. Stat. § 752, 28 U. S. C. § 452) gives it power "to grant writs of habeas corpus for the purpose of [\*307] an inquiry into the cause of restraint of liberty." [\*\*\*\*42] [\*\*221] That objective may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court. That end may be served and the decree of the court made effective if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was begun.

The judgment is reversed and the cause is remanded to the District Court for proceedings in conformity with this opinion.

*Reversed.*

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***Sipuel v. Board of Regents,*  
332 U.S. 631 (1948)**

Argued January 7-8, 1948  
1948

Decided January 12,

PER CURIAM.



On January 14, 1946, the petitioner, a Negro, concededly qualified to receive the professional legal education offered by the State, applied for admission to the School of Law of the University of Oklahoma, the only institution for legal education supported and maintained by the taxpayers of the Oklahoma. Petitioner's application for admission was denied solely because of her color.

Petitioner then made application for a writ of mandamus in the District Court of Cleveland County, Oklahoma. The writ of mandamus was refused, and the Supreme Court of the Oklahoma affirmed the judgment of the District Court. We brought the case here for review.

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although, during the same period, many white applicants have been afforded



legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment, and provide it as soon as it does for applicants of any other group. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337.

The judgment of the Supreme Court of Oklahoma is reversed, and the cause is remanded to that court for proceedings not inconsistent with this opinion. The mandate shall issue forthwith.

*Reversed.*

*Side Bar:* Although Ada Lois Sipuel Fisher was permitted to attend the law school, she was forced to sit in the back of the room behind a row of empty seats and a wooden railing with a sign designated "colored." All black students enrolled at the University of Oklahoma were provided separate eating facilities and restrooms, separate reading sections in the library, and roped-off stadium seats at the football games. These conditions persisted through 1950. In August 1952 Fisher graduated from the University of Oklahoma College of Law. She earned a master's degree in history from the University of Oklahoma in 1968. After briefly practicing law in Chickasha, Fisher joined the faculty of Langston University in 1957 and served as chair of the Department of Social Sciences. She retired in December 1987 as assistant vice president for academic affairs. In 1991 the University of Oklahoma awarded Fisher an honorary doctorate of humane letters.

On April 22, 1992, Gov. David Walters symbolically righted the wrongs of the past by appointing Dr. Ada Lois Sipuel Fisher to the Board of Regents of the University of Oklahoma, the same school that had once refused to admit her to its College of Law. As the governor said during the ceremony, it was a "completed cycle." The lady who was once rejected by the university was now a member of its governing board. On October 18, 1995, Dr. Ada Lois Sipuel Fisher died. In her honor the University of Oklahoma subsequently dedicated the Ada Lois Sipuel Fisher Garden on the Norman campus.

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***Shelley v. Kraemer***  
**334 U.S. 1 (1948)**

Opinion

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:



‘\* \* \* the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as (sic) not in subsequent conveyances and shall attach to the land, as a condition precedent to the sale of the same, that hereafter no part of said property or any \*5 portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.’

The entire district described in the agreement included fifty- seven parcels of land. The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed. The trial court found that owners of seven out of nine homes on the south side of Labadie Avenue, within the restricted district and ‘in the immediate vicinity’ of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

\*6 On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

\*\*839 The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question.

The second of the cases under consideration comes to this Court from the Supreme Court of Michigan. The circumstances presented do not differ materially from the Missouri case. In June, 1934, one Ferguson and his wife, who then owned the property located in the city of Detroit which is involved in this case, executed a contract providing in part:

‘This property shall not be used or occupied by any person or persons except those of the Caucasian race. \*7 ‘It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction.’

The agreement provided that the restrictions were to remain in effect until January 1, 1960. The contract was subsequently recorded; and similar agreements were executed with respect to eighty percent of the lots in the block in which the property in question is situated.

By deed dated November 30, 1944, petitioners, who were found by the trial court to be Negroes, acquired title to the property and thereupon entered into its occupancy. On January 30, 1945, respondents, as owners of property subject to the terms of the restrictive agreement, brought suit against petitioners in the Circuit Court of Wayne County. After a hearing, the court entered a decree directing petitioners to move from the property within ninety days. Petitioners were further enjoined and restrained from using or occupying the premises in the future. On appeal, the Supreme Court of Michigan affirmed, deciding adversely to petitioners' contentions that they had been denied rights protected by the Fourteenth Amendment.

Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment. Specifically, \*8 petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

## I.

[1] Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider. Only two cases have been decided by this Court which in any way have involved the enforcement of such agreements. The first of these was the case of *Corrigan v. Buckley*, 1926, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969. There, suit was brought in the courts of the District of Columbia to enjoin a threatened violation of certain restrictive covenants relating to lands situated in the city of Washington. Relief was granted, and the case was brought here \*\*840 on appeal. It is apparent that that case, which had originated in the federal courts and involved the enforcement of covenants on land located in the District of Columbia, could present no issues under the Fourteenth Amendment; for that Amendment by its terms applies only to the States. Nor was the question of the validity of court enforcement of the restrictive covenants under the Fifth Amendment properly before the Court, as the opinion of this Court specifically recognizes. The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue \*9 before this Court on appeal, was the validity of the covenant agreements as such. This Court concluded that since the inhibitions of the constitutional provisions invoked, apply only to governmental action, as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private property owners, were invalid. Accordingly, the appeal was

dismissed for want of a substantial question. Nothing in the opinion of this Court, therefore, may properly be regarded as an adjudication on the merits of the constitutional issues presented by these cases, which raise the question of the validity, not of the private agreements as such, but of the judicial enforcement of those agreements.

The second of the cases involving racial restrictive covenants was *Hansberry v. Lee*, 1940, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 A.L.R. 741. In that case, petitioners, white property owners, were enjoined by the state courts from violating the terms of a restrictive agreement. The state Supreme Court had held petitioners bound by an earlier judicial determination, in litigation in which petitioners were not parties, upholding the validity of the restrictive agreement, although, in fact, the agreement had not been signed by the number of owners necessary to make it effective under state law. This Court reversed the judgment of the state Supreme Court upon the ground that petitioners had been denied due process of law in being held estopped to challenge the validity of the agreement on the theory, accepted by the state court, that the earlier litigation, in which petitioners did not participate, was in the nature of a class suit. In arriving at its result, this Court did not reach the issues presented by the cases now under consideration.

It is well, at the outset, to scrutinize the terms of the restrictive agreements involved in these cases. In the Missouri case, the covenant declares that no part of the \*10 affected property shall be (355 Mo. 814, 198 S.W.2d 681) ‘occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property \* \* \* against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.’ Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of the excluded class, but as construed by the Missouri courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested. The restriction of the covenant in the Michigan case seeks to bar occupancy by persons of the excluded class. It provides that (316 Mich. 614, 25 N.W.2d 642) ‘This property shall not be used or occupied by any person or persons except those of the Caucasian race.’

It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color.; ‘simply that and nothing more.’

**\*\*841** [2] It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, \*11 s 1978 of the Revised Statutes, derived from s 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

'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.'

This Court has given specific recognition to the same principle. *Buchanan v. Warley*, 1917, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, L.R.A.1918C, 210, Ann.Cas.1918A, 1201.

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of *Buchanan v. Warley*, supra, a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: 'The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire \*12 property without state legislation discriminating against him solely because of color.'

In *Harmon v. Tyler*, 1927, 273 U.S. 668, 47 S.Ct. 471, 71 L.Ed. 831, a unanimous court, on the authority of *Buchanan v. Warley*, supra, declared invalid an ordinance which forbade any Negro to establish a home on any property in a white community or any white person to establish a home in a Negro community, 'except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the City to be affected.'

The precise question before this Court in both the *Buchanan* and *Harmon* cases, involved the rights of white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color. But that such legislation is also offensive to the rights of those desiring to acquire and occupy property and barred on grounds of race or color, is clear, not only from the language of the opinion in *Buchanan v. Warley*, supra, but from this Court's disposition of the case of *City of Richmond v. Deans*, 1930, 281 U.S. 704, 50 S.Ct. 407, 74 L.Ed. 1128. There, a Negro, barred from the occupancy of certain property by the terms of an ordinance similar to that in the *Buchanan* case, sought injunctive relief in the federal courts to enjoin the enforcement of the ordinance on the grounds that its provisions violated the terms of the Fourteenth Amendment. Such relief was granted, and this Court affirmed, finding the \*\*842 citation of *Buchanan v. Warley*, supra, and *Harmon v. Tyler*, supra, sufficient to support its judgment.

But the present cases, unlike those just discussed, do not involve action by state legislatures or city councils. \*13 Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

[3] Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. Cf. *Corrigan v. Buckley*, supra.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive \*14 terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

## II.

[4] That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in *Commonwealth of Virginia v. Rives*, 1880, 100 U.S. 313, 318, 25 L.Ed. 667, this Court stated: 'It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.' In *Ex parte Commonwealth of Virginia*, 1880, 100 U.S. 339, 347, 25 L.Ed. 676, the Court observed: 'A State acts by its legislative, its executive, or its judicial

authorities. It can act in no other way.' In the Civil Rights Cases, 1883, 109 U.S. 3, 11, 17, 3 S.Ct. 18, 21, 27 L.Ed. 835, this Court pointed out that the Amendment makes void 'state action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'state authority \*\*843 in the shape of laws, customs, or judicial or executive proceedings.' Language to like effect is employed \*15 no less than eighteen times during the course of that opinion.

Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action on the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided.



In *Twining v. New Jersey*, 1908, 211 U.S. 78, 90, 91, 29 S.Ct. 14, 16, 53 L.Ed. 97, the Court said: 'The judicial act of the highest court of the state, in authoritatively construing and enforcing its laws, is the act of the state.' In *Brinkerhoff —Faris Trust & Savings Co. v. Hill*, 1930, 281 U.S. 673, 680, 50 S. Ct. 451, 454, 74 L. Ed. 1107, the Court, through Mr. Justice Brandeis, stated: 'The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.' Further examples of such declarations in the opinions of this Court are not lacking.

[5] One of the earliest applications of the prohibitions contained in the Fourteenth Amendment to action of state **\*16** judicial officials occurred in cases in which Negroes had been excluded from jury service in criminal prosecutions by reason of their race or color. These cases demonstrate, also, the early recognition by this Court that state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute. Thus, in *Strauder v. West Virginia*, 1880, 100 U.S. 303, 25 L.Ed. 664, this Court declared invalid a state statute restricting jury service to white persons as amounting to a denial of the equal protection of the laws to the colored defendant in that case. In the notice and opportunity to defend, *Ex parte Virginia*, supra, held that a similar discrimination imposed by the action of a state judge denied rights protected by the Amendment, despite the fact that the language of the state statute relating to jury service contained no such restrictions.

The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, supra. Cf. *Pennoyer v. Neff*, 1878, 95 U.S. 714, 24 L.Ed. 565.

In numerous cases, this Court has reversed criminal convictions in state courts for failure of those courts to provide the **\*\*844** essential ingredients of a fair hearing. Thus it has been held that convictions obtained in state courts under the domination of a mob are void. *Moore v. Dempsey*, 1923, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543. And see *Frank v. Mangum*, 1915, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969. Convictions obtained by **\*17** coerced confessions, by the use of perjured testimony known by the prosecution to be such, or without the effective assistance of counsel, have also been held to be exertions of state authority in conflict with the fundamental rights protected by the Fourteenth Amendment.

[6] But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. Thus, in *American Federation of Labor v. Swing*, 1941, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855, enforcement by state courts of the common-law policy of the State, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion. In *Cantwell v. Connecticut*, 1940, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352, **\*18** a conviction



in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. In *Bridges v. California*, 1941, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, 159 A.L.R. 1346, enforcement of the state's common-law rule relating to contempts by publication was held to be state action inconsistent with the prohibitions of the Fourteenth Amendment. And cf. *Chicago, B. & Q.R. Co. v. Chicago*, 1897, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979.

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

### III.

[7] Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements **\*\*845** in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

**\*19** We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

[8] The enforcement of the restrictive agreements by the state courts courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for **\*20** want of the requisite number of signatures. In the Michigan case, the order of

enforcement by the trial court was affirmed by the highest state court. The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

[9] We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by **\*\*846** other citizens of different race or **\*21** color. The Fourteenth Amendment declares 'that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.' *Strauder v. West Virginia*, supra, 100 U.S. at 307, 25 L.Ed. 664. Only recently this Court has had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws. *Oyama v. California*, 1948, 332 U.S. 633, 68 S.Ct. 269. Nor may the discriminations imposed by the state courts in these cases be justified as proper exertions of state police power. Cf. *Buchanan v. Warley*, supra.

[10] The problem of defining the scope of the restrictions which the Federal Constitution **\*\*847** imposes upon exertions of power by the States has given rise to many of the most persistent and fundamental issues which this Court has been called upon to consider. That problem was foremost in the minds of the framers of the Constitution, **\*23** and since that early day, has arisen in a multitude of forms. The task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly. Where, however, it is clear that the action of the Respondents urge, however, that since State violates the terms of the fundamental charter, it is the the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does **\*22** not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights ceated by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be

induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

[11]Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by obligation of this Court so to declare.

[12]The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.

Reversed.

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**Sweatt v. Painter**  
**339 U.S. 629 (1950)**

Argued April 4, 1950

Decided June 5, 1950

*CERTIORARI TO THE SUPREME COURT OF TEXAS*

*Syllabus*

Petitioner was denied admission to the state supported University of Texas Law School, solely because he is a Negro and state law forbids the admission of Negroes to that Law School. He was offered, but he refused, enrollment in a separate law school newly established by the State for Negroes. The University of Texas Law School has 16 full-time and three part-time

professors, 850 students, a library of 65,000 volumes, a law review, moot court facilities, scholarship funds, an Order of the Coif affiliation, many distinguished alumni, and much tradition and prestige. The separate law school for Negroes has five full-time professors, 23 students, a library of 16,500 volumes, a practice court, a legal aid association, and one alumnus admitted to the Texas Bar, but it excludes from its student body members of racial groups which number 85% of the population of the State and which include most of the lawyers, witnesses, jurors, judges, and other officials with whom petitioner would deal as a member of the Texas Bar.

*Held:* The legal education offered petitioner is not substantially equal to that which he would receive if admitted to the University of Texas Law School, and the Equal Protection Clause of the Fourteenth Amendment requires that he be admitted to the University of Texas Law School. Pp. 343 U. S. 631-636.

*Reversed.*

A Texas trial court found that a newly established state law school for Negroes offered petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas," and denied mandamus to compel his admission to the University of Texas Law School. The Court of Civil Appeals affirmed. 210 S.W.2d 442. The Texas Supreme Court denied writ of error. This Court granted certiorari. 338 U.S. 865. *Reversed*, p. 339 U. S. 636.

**MR. CHIEF JUSTICE VINSON** delivered the opinion of the Court.

This case and *McLaurin v. Oklahoma State Regents*, *post*, p. 339 U. S. 637, present different aspects of this general question: to what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court. We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible. *Rescue Army v. Municipal Court*, 331 U. S. 549 (1947), and cases cited therein. Because of this traditional reluctance to extend constitutional interpretations to situations or facts which are not before the Court, much of the excellent research and detailed argument presented in these cases is unnecessary to their disposition.

In the instant case, petitioner filed an application for admission to the University of Texas Law School for the February, 1946, term. His application was rejected solely because he is a Negro. Petitioner thereupon brought this suit for mandamus against the appropriate school officials, respondents here, to compel his admission. At that time, there was no law school in Texas which admitted Negroes.

The state trial court recognized that the action of the State in denying petitioner the opportunity to gain a legal education while granting it to others deprived him of the equal protection of the

laws guaranteed by the Fourteenth Amendment. The court did not grant the relief requested, however, but continued the case for six months to allow the State to supply substantially equal facilities. At the expiration of the six months, in December, 1946, the court denied the writ on the showing that the authorized university officials had adopted an order calling for the opening of a law school for Negroes the following February. While petitioner's appeal was pending, such a school was made available, but petitioner refused to register therein. The Texas Court of Civil Appeals set aside the trial court's judgment and ordered the cause "remanded generally to the trial court for further proceedings without prejudice to the rights of any party to this suit."

On remand, a hearing was held on the issue of the equality of the educational facilities at the newly established school as compared with the University of Texas Law School. Finding that the new school offered petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas," the trial court denied mandamus. The Court of Civil Appeals affirmed. 210 S.W.2d 442 (1948). Petitioner's application for a writ of error was denied by the Texas Supreme Court. We granted certiorari, 338 U.S. 865 (1949), because of the manifest importance of the constitutional issues involved.

The University of Texas Law School, from which petitioner was excluded, was staffed by a faculty of sixteen full-time and three part-time professors, some of whom are nationally recognized authorities in their field. Its student body numbered 850. The library contained over 65,000 volumes. Among the other facilities available to the students were a law review, moot court facilities, scholarship funds, and Order of the Coif affiliation. The school's alumni occupy the most distinguished positions in the private practice of the law and in the public life of the State. It may properly be considered one of the nation's ranking law schools.

The law school for Negroes which was to have opened in February, 1947, would have had no independent faculty or library. The teaching was to be carried on by four members of the University of Texas Law School faculty, who were to maintain their offices at the University of Texas while teaching at both institutions. Few of the 10,000 volumes ordered for the library had arrived, nor was there any full-time librarian. The school lacked accreditation.

Since the trial of this case, respondents report the opening of a law school at the Texas State University for Negroes. It is apparently on the road to full accreditation. It has a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association, and one alumnus who has become a member of the Texas Bar.

Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the

administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and prestige which only a history of consistently maintained excellence could command, would claim that the opportunities afforded him for legal education were unequal to those held open to petitioner. That such a claim, if made, would be dishonored by the State is no answer. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U. S. 1, 334 U. S. 22 (1948).

It is fundamental that these cases concern rights which are personal and present. This Court has stated unanimously that "The State must provide [legal education] for [petitioner] in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group."

*Sipuel v. Board of Regents*, 332 U. S. 631, 332 U. S. 633 (1948). That case "did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes."

*Fisher v. Hurst*, 333 U. S. 147, 333 U. S. 150 (1948). In *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 305 U. S. 351 (1938), the Court, speaking through Chief Justice Hughes, declared that "petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity."

These are the only cases in this Court which present the issue of the constitutional validity of race distinctions in state supported graduate and professional education.



In accordance with these cases, petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State. We cannot, therefore, agree with respondents that the doctrine of *Plessy v. Ferguson*, 163 U. S. 537 (1896), requires affirmance of the judgment below. Nor need we reach petitioner's contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation. *See supra*, p. 339 U. S. 631.

We hold that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School. The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

*Reversed.*



*Footnotes omitted*

*Side Bar: Sweatt enrolled in the University of Texas law school but did not complete his studies there. For additional information see "Our Story-Thurgood Marshall School of Law Edition. Written by Urban Research and Resource Center, Texas Southern University, Anticipated publication date winter 2018.*

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**Brown v. Board of Education of Topeka**  
**347 U.S. 483 (1954)**

Argued December 9, 1952  
1954\*

Reargued December 8, 1953

Decided May 17,

**MR. CHIEF JUSTICE WARREN** delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to

deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences, as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states, and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*, *supra*, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there

have been six cases involving the "separate but equal" doctrine in the field of public education. In *Cumming v. County Board of Education*, 175 U. S. 528, and *Gong Lum v. Rice*, 275 U. S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Sipuel v. Oklahoma*, 332 U. S. 631; *Sweatt v. Painter*, 339 U. S. 629; *McLaurin v. Oklahoma State Regents*, 339 U. S. 637. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, *supra*, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

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

We come then to the question presented: does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, *supra*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, *supra*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . .

his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational 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."

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question -- the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

*It is so ordered.*

\*Together with No. 2, *Briggs et al. v. Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9-10, 1952, reargued

December 7-8, 1953; No. 4, *Davis et al. v. County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7-8, 1953, and No. 10, *Gebhart et al. v. Belton et al.*, on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.



The students represented in *Brown et al. v. Board of Education of Topeka*.

(L to R: Vicki Henderson, Donald Henderson, Linda Brown, James Emanuel, Nancy Todd, and Katherine Carper)

Photo by Carl Iwasaki/Time Life Pictures/Getty Images

Side Bar: It begins sixty miles to the east of Topeka in the Kansas City suburb of Merriam, Kansas, where Esther Brown, a thirty-year-old white Jewish woman, became incensed at the local school board's reluctance to make modest repairs in a dilapidated school for area black students, even while it passed a bond issue to construct a spanking new school for whites. Eventually, Esther's empathy would cause her to push the state's NAACP chapter to launch a campaign to end segregation in Kansas schools--a campaign that would lead to victory on May 17, 1954 when a unanimous Supreme Court declared that the Topeka Board of Education's policy of segregation violated the Equal Protection Clause of the United States Constitution.



Esther Brown, civil rights activist

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For additional information see: <http://www.famous-trials.com/brownvtopeka/666-home>

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### *Hernandez v. Texas*

January 11, 1954, Argued  
May 3, 1954, Decided

#### **Overview**

Texas employed a system that relied on jury commissioners to select prospective grand jurors from the community at large. The qualifications for grand jurors required that they be a citizen of Texas and a qualified voter, among other things. Prior to defendant's trial for murder, he brought timely motions to quash the indictment and the jury panel on the basis that persons of Mexican descent who were otherwise qualified were systematically excluded from service as



jury commissioners, grand jurors, and petit jurors, in violation of defendant's rights as a member of the class. The trial court denied the motions, and the court of appeals affirmed. On certiorari, the Court reversed the conviction. The Court held that it taxed credibility to say that mere chance resulted in there being no members of defendant's class among the over 6,000 jurors called in the prior 25 years. The result bespoke discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner.

### **Outcome**

The court reversed defendant's conviction.

### **Syllabus**

[\*\*\*\*1] The systematic exclusion of persons of Mexican descent from service as jury commissioners, grand jurors, and petit jurors in the Texas county in which petitioner was indicted and tried for murder, although there were a substantial number of such persons in the county fully qualified to serve, deprived petitioner, a person of Mexican descent, of the equal protection of the laws guaranteed by the *Fourteenth Amendment*, and his conviction in a state court is reversed. Pp. 476- 482.

The constitutional guarantee of equal protection of the laws is not directed solely against discrimination between whites and Negroes. Pp. 477-478.

(a) When the existence of a distinct class is demonstrated, and it is shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. P. 478.

(b) The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the *Fourteenth Amendment*. Pp. 478-479.

(c) The evidence in this case was sufficient to prove that, in the county in question, persons [\*\*\*\*2] of Mexican descent constitute a separate class, distinct from "whites." Pp. 479-480.

(d) A prima facie case of denial of the equal protection of the laws was established in this case by evidence that there were in the county a substantial number of persons of Mexican descent with the qualifications required for jury service but that none of them had served on a jury commission, grand jury or petit jury for 25 years. Pp. 480-481.

(e) The testimony of five jury commissioners that they had not discriminated against persons of Mexican descent in selecting jurors, and that their only objective had been to select those whom they thought best qualified, was not enough to overcome petitioner's prima facie case of denial of the equal protection of the laws. Pp. 481-482.



(f) Petitioner had the constitutional right to be indicted and tried by juries from which all members of his class were not systematically excluded. P. 482.

### Opinion

The petitioner, Pete Hernandez, was indicted for the murder of one Joe Espinosa by a grand jury in Jackson County, Texas. He was convicted and sentenced to life imprisonment. The Texas Court of Criminal Appeals affirmed the judgment of the trial court. *Tex. Cr. R., 251 S. W. 2d 531*. Prior to the trial, the petitioner, by his counsel, offered timely motions to quash the indictment and the jury panel. He alleged that persons of Mexican descent were systematically excluded from service as jury commissioners, grand jurors, and petit jurors, although there were such persons fully [\*477] qualified to serve residing in Jackson County. The petitioner asserted that exclusion of this class deprived him, as a member of the class, of the equal protection of the laws [\*\*\*\*4] guaranteed by the *Fourteenth Amendment of the Constitution*. After a hearing, the trial court denied the motions. [\*\*670] At the trial, the motions were renewed, further evidence taken, and the motions again denied. An allegation that the trial court erred in denying the motions was the sole basis of petitioner's appeal. In affirming the judgment of the trial court, the Texas Court of Criminal Appeals considered and passed upon the substantial federal question raised by the petitioner. We granted a writ of certiorari to review that decision. *346 U.S. 811*.

In numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers. Although the Court has had little occasion to rule on the question directly, it has been recognized since *Strauder v. West Virginia, 100 U.S. 303*, [\*\*\*870] that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws. The State of Texas would have us hold that there are only two classes -- white and Negro -- within the contemplation of the *Fourteenth Amendment*. The decisions of this Court [\*478] do not support that view. And, except where the question presented involves the exclusion of persons of Mexican descent from juries, Texas courts have taken a broader view of the scope of the *equal [\*\*\*\*6] protection clause*.

[\*\*\*\*7] Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The *Fourteenth Amendment* is not directed solely against discrimination due to a "two-class theory" -- that is, based upon differences between "white" and Negro.

As the petitioner acknowledges, the Texas system of selecting grand and petit jurors by the use of jury commissions is fair on its face and capable of [\*\*671] being utilized [\*479] without discrimination. But as this Court has held, the system is susceptible to abuse and can be employed in a discriminatory manner. The exclusion of otherwise eligible [\*\*\*\*8] persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the *Fourteenth Amendment*. The Texas statute makes no such discrimination, but the petitioner alleges that those administering the law do.

The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from "whites." One method by which this may inconsistency with the spirit of the amendment." *100 U.S., at 308. Cf. American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 92.*

Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof established by *Norris v. Alabama, 294 U.S. 587*. In that case, proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the "rule of exclusion," has been applied in other cases, and it is available in supplying proof of discrimination against any delineated class.

The petitioner established that 14% of the population of Jackson County were persons with Mexican or Latin-American surnames, and that 11% of the males over 21 bore such names. [\*\*\*\*12] The County Tax Assessor testified [\*481] that 6 or 7 percent of the freeholders [\*\*\*\*11] on the [\*\*672] tax rolls of the County were persons of Mexican descent. The State of Texas stipulated that "for the last twenty- five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County." The parties also stipulated that "there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, householders, or freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury."

The petitioner met the burden of [\*\*\*\*872] proof imposed in *Norris v. Alabama, supra*. To rebut the strong prima facie case of the denial of the equal protection of the laws guaranteed by the Constitution thus established, the State offered the testimony of five jury commissioners that they had not discriminated against persons of Mexican or Latin-American descent in selecting jurors. They stated that their only objective had been to select those whom they thought were best qualified. This testimony is not enough to overcome the petitioner's case. As the Court said in *Norris v. Alabama*:

"That showing as to the long-continued exclusion of negroes from jury service, and as to the many negroes qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions [\*\*\*\*13] by officials of their performance of duty were to be accepted as an adequate the same reasoning is applicable to these facts.

Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner. The judgment of conviction must be reversed.

To say that this decision revives the rejected contention that the *Fourteenth Amendment* requires proportional representation of all the component ethnic groups of the community on every jury 16 ignores the facts. The petitioner [\*\*\*\*14] did not seek proportional representation, nor did he claim a right to have persons of Mexican descent sit on the particular juries which he faced. [\*\*673] His only claim is the right to be indicted and tried by juries from which all members of his class are not systematically excluded -- juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution.

*Reversed.*

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*Heart of Atlanta Motel, Inc. v. U. S.*

**379 U.S. 241 (1964)**

Mr. Justice CLARK delivered the opinion of the Court

This is a declaratory judgment action, 28 U.S.C. s 2201 and s 2202 (1958 ed.) attacking the constitutionality of Title II of the Civil Rights Act of 1964, 78 Stat. \*243 241, 241. In addition to declaratory relief the complaint sought an injunction restraining the enforcement of the Act and damages against appellees based on allegedly resulting injury in the event compliance was required. Appellees counterclaimed for enforcement under s 206(a) of the Act and asked for a three-judge district court under s 206(b). A three-judge court, empaneled under s 206(b) as well as 28 U.S.C. s 2282 (1958 ed.) sustained the validity of the Act and issued a permanent injunction on appellees' counterclaim restraining appellant from continuing to violate the Act which remains in effect on order of Mr. Justice BLACK, 85 S.Ct. 1. We affirm the judgment.

*1. The Factual Background and Contentions of the Parties.*

The case comes here on admissions and stipulated facts. Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting

patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of **\*\*351** State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

The appellant contends that Congress in passing this Act exceeded its power to regulate commerce under **\*244** Art. I, s 8, cl. 3, of the Constitution of the United States; that the Act violates the Fifth Amendment because appellant is deprived of the right to choose its customers and operate its business as it wishes, resulting in a taking of its liberty and property without due process of law and a taking of its property without just compensation; and, finally, that by requiring appellant to rent available rooms to Negroes against its will, Congress is subjecting it to involuntary servitude in contravention of the Thirteenth Amendment.

The appellees counter that the unavailability to Negroes of adequate accommodations interferes significantly with interstate travel, and that Congress, under the Commerce Clause, has power to remove such obstructions and restraints; that the Fifth Amendment does not forbid reasonable regulation and that consequential damage does not constitute a 'taking' within the meaning of that amendment; that the Thirteenth Amendment claim fails because it is entirely frivolous to say that an amendment directed to the abolition of human bondage and the removal of widespread disabilities associated with slavery places discrimination in public accommodations, beyond the reach of both federal and state law.

At the trial the appellant offered no evidence, submitting the case on the pleadings, admissions and stipulation of facts; however, appellees proved the refusal of the motel to accept Negro transients after the passage of the Act. The District Court sustained the constitutionality of the sections of the Act under attack (ss 201(a), (b)(1) and (c)(1)) and issued a permanent injunction on the counterclaim of the appellees. It restrained the appellant from '(r)efusing to accept Negroes as guests in the motel by reason of their race or color' and from '(m)aking any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities **\*245** privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.'

### *1. The History of the Act.*

Congress first evidenced its interest in civil rights legislation in the Civil Rights or Enforcement Act of April 9, 1866. There followed four Acts, with a fifth, the Civil Rights Act of March 1, 1875, culminating the series. In 1883 this Court struck down the public accommodations sections of the 1875 Act in the Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835. No major legislation in this field had been enacted by Congress for 82 years when the Civil Rights Act of 1957 became law. It was followed by the Civil Rights Act of 1960. Three years later, on June 19, 1963, the late President Kennedy called for civil rights legislation in a message to Congress to which he attached a proposed bill. Its stated purpose was 'to promote the general welfare by eliminating discrimination based on race, color, religion, or

national origin in \* \* \* public accommodations through the exercise by Congress of the powers conferred upon it \* \* \* **\*\*352** to enforce the provisions of the fourteenth and fifteenth amendments, to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.’ H.R.Doc.No. 124, 88th Cong., 1st Sess., at 14.

**\*246** Bills were introduced in each House of the Congress, embodying the President's suggestion, one in the Senate being S. 1732 and one in the House, H.R. 7152. However, it was not until July 2, 1964, upon the recommendation of President Johnson, that the Civil Rights Act of 1964, here under attack, was finally passed.

After extended hearings each of these bills was favorably reported to its respective house. H.R. 7152 on November 20, 1963, H.R.Rep.No.914, 88th Cong., 1st Sess., and S. 1732 on February 10, 1964, S.Rep.No.872, 88th Cong., 2d Sess. Although each bill originally incorporated extensive findings of fact these were eliminated from the bills as they were reported. The House passed its bill in January 1964 and sent it to the Senate. Through a bipartisan coalition of Senators Humphrey and Dirksen, together with other Senators, a substitute was worked out in informal conferences. This substitute was adopted by the Senate and sent to the House where it was adopted without change. This expedited procedure prevented the usual report on the substitute bill in the Senate as well as a Conference Committee report ordinarily filed in such matters. Our only frame of reference as to the legislative history of the Act is, therefore, the hearings, reports and debates on the respective bills in each house.

The Act as finally adopted was most comprehensive, undertaking to prevent through peaceful and voluntary settlement discrimination in voting, as well as in places of accommodation and public facilities, federally secured programs and in employment. Since Title II is the only portion under attack here, we confine our consideration to those public accommodation provisions.

**\*247** 3. *Title II of the Act.*

This Title is divided into seven sections beginning with s 201(a) which provides that:

‘All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.’

There are listed in s 201(b) four classes of business establishments, each of which ‘serves the public’ and ‘is a place of public accommodation’ within the meaning of s 201(a) ‘if its operations affect commerce, or if discrimination or segregation by it is supported by State action.’ The covered establishments are:

‘(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

‘(2) any restaurant, cafeteria \* \* \* (not here involved);

‘(3) any motion picture house \* \* \* (not here involved);

‘(4) any establishment \* \* \* which is physically located within the premises of any establishment otherwise covered by this subsection, or \* \* \* within the premises of which is physically located any such covered establishment \* \* \* (not here involved).’

Section 201(c) defines the phrase ‘affect commerce’ as applied to the above establishments. **\*\*353** It first declares that ‘any inn, hotel, motel, or other establishment which provides lodging to transient guests’ affects commerce perse. Restaurants, cafeterias, etc., in class two affect **\*248** commerce only if they serve or offer to serve interstate travelers or if a substantial portion of the food which they serve or products which they sell have ‘moved in commerce.’ Motion picture houses and other places listed in class three affect commerce if they customarily present films, performances, etc., ‘which move in commerce.’ And the establishments listed in class four affect commerce if they are within, or include within their own premises, an establishment ‘the operations of which affect commerce.’ Private clubs are excepted under certain conditions. See s 201(e).

Section 201(d) declares that ‘discrimination or segregation’ is supported by state action when carried on under color of any law, statute, ordinance, regulation or any custom or usage required or enforced by officials of the State or any of its subdivisions.

In addition, s 202 affirmatively declares that all persons ‘shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.’

Finally, s 203 prohibits the withholding or denial, etc., of any right or privilege secured by s 201 and s 202 or the intimidation, threatening or coercion of any person with the purpose of interfering with any such right or the punishing, etc., of any person for exercising or attempting to exercise any such right.

The remaining sections of the Title are remedial ones for violations of any of the previous sections. Remedies are limited to civil actions for preventive relief. The Attorney General may bring suit where he has ‘reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to **\*249** the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described \* \* \*.’ s 206(a).

A person aggrieved may bring suit, in which the Attorney General may be permitted to intervene. Thirty days’ written notice before filing any such action must be given to the appropriate authorities of a State or subdivision the law of which prohibits the act complained of and which has established an authority which may grant relief therefrom. s 204(c). In States where such condition does not exist the court after a case is filed may refer it to the Community Relations Service which is established under Title X of the Act. s 204(d). This Title establishes such service in the Department of Commerce, provides for a Director to be appointed by the



President with the advice and consent of the Senate and grants it certain powers, including the power to hold hearings, with reference to matters coming to its attention by reference from the court or between communities and persons involved in disputes arising under the Act.

#### 4. *Application of Title II to Heart of Atlanta Motel.*

It is admitted that the operation of the motel brings it within the provisions of s 201(a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on s 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, s 8, cl. 3, of the Constitution.

**\*\*354\*250 [1]** The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’ At the same time, however, it noted that such an objective has been and could be readily achieved ‘by congressional action based on the commerce power of the Constitution.’ S.Rep. No. 872, *supra*, at 16—17. Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. Nor is s 201(d) or s 202, having to do with state action, involved here and we do not pass upon either of those *sections*. 5. *The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18 (1883), and their Application.*

In light of our ground for decision, it might be well at the outset to discuss the Civil Rights Cases, *supra*, which declared provisions of the Civil Rights Act of 1875 unconstitutional. 18 Stat. 335, 336. We think that decision inapposite, and without precedential value in determining the constitutionality of the present Act. Unlike Title II of the present legislation, the 1875 Act broadly proscribed discrimination in ‘inns, public conveyances on land or water, theaters, and other places of public amusement,’ without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, \*251 except where state action is involved. Further, the fact that certain kinds of businesses may not in 1875 have been sufficiently involved in interstate commerce to warrant bringing them within the ambit of the commerce power is not necessarily dispositive of the same question today. Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today. Although the principles which we apply today are those first formulated by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23 (1824), the conditions of transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce. The sheer increase in volume of interstate traffic alone would give discriminatory practices which inhibit travel a far larger impact upon the Nation's commerce than such practices had on

the economy of another day. Finally, there is language in the Civil Rights Cases which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power. Though the Court observed that ‘no one will contend that the power to pass it was contained in the constitution before the adoption of the last three amendments (Thirteenth, Fourteenth, and Fifteenth),’ the Court went on specifically to note that the Act was not ‘conceived’ in terms of the commerce power and expressly pointed out:

‘Of course, these remarks (as to lack of congressional power) do not apply to those cases in which congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes \* \* \*. In these cases congress has \*252 power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals in respect thereof.’ 109 U.S. at 18, 3 S.Ct. at 26.

**\*\*355** Since the commerce power was not relied on by the Government and was without support in the record it is understandable that the Court narrowed its inquiry and excluded the Commerce Clause as a possible source of power. In any event, it is clear that such a limitation renders the opinion devoid of authority for the proposition that the Commerce Clause gives no power to Congress to regulate discriminatory practices now found substantially to affect interstate commerce. We, therefore, conclude that the Civil Rights Cases have no relevance to the basis of decision here where the Act explicitly relies upon the commerce power, and where the record is filled with testimony of obstructions and restraints resulting from the discriminations found to be existing. We now pass to that phase of the case.

- *The Basis of Congressional Action.*

While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. See Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess.; S.Rep. No. 872, supra; Hearings before Senate Committee on the Judiciary on S. 1731, 88th Cong., 1st Sess.; Hearings before House Subcommittee No. 5 of the Committee on the Judiciary on miscellaneous proposals regarding Civil Rights, 88th Cong., 1st Sess., ser. 4; H.R.Rep. No. 914, supra. This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances \*253 or secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight, S.Rep. No. 872, supra, at 14—22; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself ‘dramatic testimony to the difficulties’ Negroes encounter in travel. Senate Commerce Committee Hearings, supra, at 692—694. These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is ‘no question that this discrimination in the North still exists to a large degree’ and in the West and Midwest as well. Id., at 735, 744. This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler’s pleasure and convenience that resulted when he

continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. *Id.*, at 744. This was the conclusion not only of the Under Secretary of Commerce but also of the Administrator of the Federal Aviation Agency who wrote the Chairman of the Senate Commerce Committee that it was his ‘belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations.’ *Id.*, at 12—13. We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

- *The Power of Congress Over Interstate Travel.*

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. Its meaning was first enunciated 140 years ago by the great \*254 Chief Justice John Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23 (1824), in these words:

‘The subject to be regulated is commerce; and \* \* \* to ascertain the extent of the power, it becomes \*\*356 necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities \* \* \* but it is something more: it is intercourse \* \* \* between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. (At 189—190.)

‘To what commerce does this power extend? The constitution informs us, to commerce ‘with foreign nations, and among the several States, and with the Indian tribes.’

‘It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse \* \* \*. No sort of trade can be carried on \* \* \* to which this power does not extend. (At 193—194.)

‘The subject to which the power is next applied, is to commerce ‘among the several States.’ The word ‘among’ means intermingled \* \* \*.

\* \* \* (It may very properly be restricted to that commerce which concerns more States than one. \* \* \* The genius and character of the whole government seem to be, that its action is to be applied to all the \* \* \* internal concerns (of the Nation) which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary \*255 to interfere, for the purpose of executing some of the general powers of the government. (At 194—195.)

‘We are now arrived at the inquiry—What is this power?’

‘It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. \* \* \* If, as has always been understood, the sovereignty of Congress \* \* \* is plenary as to those objects (specified in the Constitution), the power over commerce \* \* \* is vested in

Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments. (At 196—197.)’

In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is ‘commerce which concerns more States than one’ and has a real and substantial relation to the national interest. Let us now turn to this facet of the problem.

That the ‘intercourse’ of which the Chief Justice spoke included the movement of persons through more \*256 States than one was settled as early as 1849, in the Passenger Cases (Smith v. Turner), 7 How. 283, 12 L.Ed. 702, where Mr.

Justice McLean stated: ‘That the transportation of passengers is a part of commerce is not now an open question.’ At 401. Again in 1913 Mr. Justice McKenna, speaking for the Court, \*\*357 said: ‘Commerce among the states, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property.’ *Hoke v. United States*, 227 U.S. 308, 320, 33 S.Ct. 281, 283, 57 L.Ed. 523. And only four years later in 1917 in *Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, Mr. Justice Day held for the Court:

‘The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.’ At 491, 37 S.Ct. at 197.

Nor does it make any difference whether the transportation is commercial in character. *Id.*, at 484—486, 37 S.Ct. at 194 —195. In *Morgan v. Com. of Virginia*, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317 (1946), Mr. Justice Reed observed as to the modern movement of persons among the States: ‘The recent changes in transportation brought about by the coming of automobiles (do) not seem of great significance in the problem. People of all races travel today more extensively than in 1878 when this Court first passed upon state regulation of racial segregation in commerce. (It but) emphasizes the soundness of this Court’s early conclusion in *Hall v. De Cuir*, 95 U.S. 485 (24 L.Ed. 547).’ At 383, 66 S.Ct. at 1056.

The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate \*257 carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling, *Lottery Case (Champion v Ames)*, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903); to criminal enterprises, *Brooks v. United States*, 267 U.S. 432, 45 S.Ct. 345, 69 L.Ed. 699 (1925); to deceptive practices in the sale of products, *Federal Trade*

Comm. v. Mandel Bros., Inc., 359 U.S. 385, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); to fraudulent security transactions, Securities & Exchange Comm. v. Ralston Purina Co., 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953); to misbranding of drugs, Weeks v. United States, 245 U.S. 618, 38 S.Ct. 219, 62 L.Ed. 513 (1918); to wages and hours, United States v. Darby, 312 U.S. 100, 657, 61 S.Ct. 451, 85 L.Ed. 609 (1941); to members of labor unions, National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937); to crop control, Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); to discrimination against shippers, United States v. Baltimore & Ohio R. Co., 333 U.S. 169, 68 S.Ct. 494, 92 L.Ed. 618 (1948); to the protection of small business from injurious price cutting, Moore v. Mead's Fine Bread Co., 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145 (1954); to resale price maintenance, Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U.S. 386, 84 S.Ct. 1273, 12 L.Ed.2d 394 (1964), Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951); to professional football, Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); and to racial discrimination by owners and managers of terminal restaurants, Boynton v. Com. of Virginia, 364 U.S. 454, 81 S.Ct. 182, 5 L.Ed.2d 206 (1960).

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, **\*\*358** Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

**\*258** It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, '(i)f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805 (1949). See National Labor Relations Board v. Jones & Laughlin Steel Corp., supra. As Chief Justice Stone put it in United States v. Darby, supra:

'The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed. 579.' 312 U.S. at 118, 61 S.Ct. at 459.

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear.



Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are:

(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. \*259 If they are, appellant has no 'right' to select its guests as it sees fit, free from governmental regulation.

There is nothing novel about such legislation. Thirty-two States now have it on their books either by statute or executive \*\*359 order and many cities provide such regulation. Some of these Acts go back fourscore years. It has been repeatedly held by this Court that such laws \*260 do not violate the Due Process Clause of the Fourteenth Amendment. Perhaps the first such holding was in the Civil Rights Cases themselves, where Mr. Justice Bradley for the Court inferentially found that innkeepers, 'by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.' 109 U.S. at 25, 3 S.Ct. at 31.

As we have pointed out, 32 States now have such provisions and no case has been cited to us where the attack on a state statute has been successful, either in federal or state courts. Indeed, in some cases the Due Process and Equal Protection Clause objections have been specifically discarded in this Court. *Bob-Lo Excursion Co. v. People of State of Michigan*, 333 U.S. 28, 34, 68 S.Ct. 358, 361, 92 L.Ed. 455, n. 12 (1948). As a result the constitutionality of such state statutes stands unquestioned. 'The authority of the Federal government over interstate commerce does not differ,' it was held in *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939), 'in extent or character from that retained by the states over intrastate commerce.' At 569—570, 59 S.Ct. at 1011. See also *Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944).

It is doubtful if in the long run appellant Constitution, as interpreted by this Court for 140 years. It may will suffer economic loss as a result of the Act. Experience is to the contrary where discrimination is completely obliterated as to all public accommodations. But whether this be true or not is of no consequence since this Court has specifically held that the fact that a 'member of the class which is regulated may suffer economic losses not shared by others \* \* \* has never been a barrier' to such legislation. *Bowles v. Willingham*, supra, at 518, 64 S.Ct. at 649. Likewise in a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty. See \*261 *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 73 S.Ct. 1007, 97 L.Ed. 1480 (1953), and cases there cited, where we concluded that Congress had delegated law-making power to the District of Columbia 'as broad as the police power of a state' which included the power to adopt a 'law prohibiting discriminations against Negroes by the owners and managers of restaurants in the District of Columbia.' At 110, 73 S.Ct. at 1013. Neither do we find any merit in the claim that the Act is a taking of property without just compensation. The cases are to the contrary. See *Legal Tender Cases*, 12 Wall. 457, 551, 20 L.Ed. 287 (1870); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1923); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958).



We find no merit in the remainder of appellant's contentions, including that of 'involuntary servitude.' As we have seen, 32 States prohibit racial discrimination in public accommodations. These laws but codify the common-law innkeeper rule which long predated the Thirteenth Amendment. It is difficult to believe that the Amendment was intended to abrogate this principle. Indeed, the opinion of the Court in the Civil Rights Cases is to the contrary as we have seen, it having noted with approval **\*\*360** the laws of 'all the States' prohibiting discrimination. We could not say that the requirements of the Act in this regard are in any way 'akin to African slavery.' *Butler v. Perry*, 240 U.S. 328, 332, 36 S.Ct. 258, 259, 60 L.Ed. 672 (1916).

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce **\*262** may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Affirmed.

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Early in life, I had visions of being a great philosopher or essayist, another Henry David Thoreau or another Bertrand Russell; and so I wrote essays. These essays were attempts on my part to reduce some of my ideas to writing.

One day during my senior year at Texas Southern University, in a fit of anger about a racial problem, I know not what, I quickly reduced to written form the heated ideas which controlled my every thought at that moment, and over the years when times are difficult and when my confidence is down, I turn back to those ideas hurriedly written in anger. Because my anger was high, my ideas were not as organized as they should have been, but the ideas were there and, to me, the ideas are inspirational. This essay has no ending but, just as the anger, it comes to an abrupt halt. I call this essay... Dear Mr. American White Man.

### **Dear Mr. American White Man**

My name is James Matthew Douglas. I was born in a small town called Onalaska, Texas, which is approximately 100 miles from Houston. But you see, in a way, I was very fortunate. For at the age of 3 my parents moved to a big city – that city being Houston, Texas. My mother and father, both being hard-working people, were able to secure jobs. At that time, there were then five children in my family with four more to be added in later years.

During those early days of my life, I knew of no word called unhappiness. At the age of 5, I began my quest for an education. That quest has carried me through elementary school, junior high school, senior high school, undergraduate college work and hopefully on into graduate school. I suppose during those years I could see my parents suffer so that we, my sisters and brothers and I, could get an education. The education they had failed to obtain.

During my days of public school, I guess you can say that I was a good student. I graduated in the top percentage of my class in college; I was also fortunate enough to be elected student body president among other honors. My field of study is mathematics which is said to be very high in demand today.

I am now ready to go into the world in order that I may give back that which has been given to me.

I know that you, (Mr. American White Man) as most other people, have read stories similar to this one. Stories of the all-American boy, the boy from humble beginnings that makes good, but this is not that type of story, for I am not an all-American boy. In fact, at times I wonder if I am really an American at all. For, you see, my skin is black, and I am a Negro. Yes, a Negro not an American citizen but an individual who just happens to be so unfortunate as to be born here in America.

I am not a citizen because your great democratic forefathers who founded this country made me only 3/5 of a man and then later in the Dred Scott decision that I was not even that 3/5 of a man but a piece of property to be bought and sold.

Oh! I know that I can't go to school with your children because I curse and smell bad or because my father drinks and beats my mother, and I also know that I can't live next door to you because I won't keep my yard clean or because my father will try to rape your wife. I even know that you are better than me. You see, you are a white American citizen, and I am only 3/5 of a man – for I am a Negro.

But what you, Mr. American White Man, fail to see is that even though I am dumb, illiterate, smell bad, drink excessively, curse, and rape young white girls, I know that a problem exists. You see, you gave me the tool which one of *your* great statesmen said would never allow a man to be ruled, and that tool is an education. You, you told me about Patrick Henry, who gave his life that you, the white American, could be free. And you, you also told me about the Boston Tea Party which took place because of taxation without representation. And you, you told me about the men of the American Revolution who were greatly outnumbered by the British and of the small colonies who had enough nerve to fight such a strong power as Great Britain. And you, you never let me forget that they had only one idea in mind, and that idea was freedom.

But you, Mr. American White Man, you know all of this, for you told me. But what you don't know is that, to me, Medgar Evers is my Patrick Henry, the man who would die so that his people could be free, and what you don't know is that the riots of Chicago, Watts, Harlem and other American cities are my Boston Tea Party. And what you don't know is that the voter registration dives in the far south and in all parts of the United States are my revolution against

taxation without representation. And what you don't know is that you are my Great Britain that greatly outnumbers me and that your government is the strong power which such few people would have enough nerve to fight. And what you don't know is that I can never forget that my people have only one idea in mind, and that idea is freedom.

Yes, Mr. American White Man, you gave me an education and with it the ability to think. To think of war, to think of peace, to think of... (explain events taking place in the sixties)

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*Loving v. Virginia*

*388 U.S. 1 (1967)*

Opinion

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons **\*\*1819** which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court \*3 of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

‘Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.’

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia antimiscegenation

statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after \*4 modifying the sentence, affirmed the convictions. The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U.S. 986, 87 S.Ct. 595, 17 L.Ed.2d 448.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating s 20—58 of the Virginia Code:

‘Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in s 20—59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.’

Section 20—59, which defines the penalty for miscegenation, provides:

‘Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary \*\*1820 for not less than one nor more than five years.’

Other central provisions in the Virginia statutory scheme are s 20—57, which automatically voids all marriages between ‘a white person and a colored person’ without any judicial proceeding, and ss 20—54 and 1—14 which, \*5 respectively, define ‘white persons’ and ‘colored persons and Indians’ for purposes of the statutory prohibitions. The Lovings have never disputed in the course of this litigation that Mrs. Loving is a ‘colored person’ or that Mr. Loving is a ‘white person’ within the meanings given those terms by the Virginia statutes.

\*6 Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. Penalties \*\*1821 for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a ‘white person’ marrying other than another ‘white person,’ a prohibition against issuing marriage licenses until the issuing official is satisfied that \*7 the applicants’ statements as to their race are correct, certificates of ‘racial composition’ to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against

racial intermarriage.

## I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy. *Id.*, at 90, 87 S.E.2d, at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard v. Hill*, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer v. State of Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Skinner v. State of Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element \*8 as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

**\*\*1822** Because we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose.

The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in *New York City, Railway Express Agency, Inc. v. People of State of New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949), or an

exemption in Ohio's ad valorem tax for merchandise owned by a non-resident in a storage warehouse, \*9 *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959).

In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources 'cast some light' they are not sufficient to resolve the problem; '(a)t best, they are inconclusive. The most avid proponents of the post- War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect.' *Brown v. Board of Education of Topeka*, 347 U.S. 483, 489, 74 S.Ct. 686, 689, 98 L.Ed. 873 (1954). See also \*10 *Strauder v. State of West Virginia*, 100 U.S. 303, 310, 25 L.Ed. 664 (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. *McLaughlin v. State of Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964).

The State finds support for its 'equal application' theory in the decision of the Court in *Pace v. State of Alabama*, 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned **\*\*1823** that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated 'Pace represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court.' *McLaughlin v. Florida*, *supra*, 379 U.S. at 188, 85 S.Ct. at 286. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. Slaughter-



House Cases, 16 Wall. 36, 71, 21 L.Ed. 394 (1873); *Strauder v. State of West Virginia*, 100 U.S. 303, 307—308, 25 L.Ed. 664 (1880); *Ex parte Virginia*, 100 U.S. 339, 344—345, 26 L.Ed. 676 (1880); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

**\*11** There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated '(d)istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they 'cannot conceive of a valid legislative purpose \* \* \* which makes the color of a person's skin the test of whether his conduct is a criminal offense.' *McLaughlin v. Florida*, supra, 379 U.S. at 198, 85 S.Ct. at 292, (Stewart, J., joined by Douglas, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied **\*12** the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

## **\*\*1824 II.**

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. *Skinner v. State of Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942). See also *Maynard v. Hill*, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed. It is so ordered. Reversed.

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***SAN ANTONIO SCHOOL DISTRICT v. RODRIGUEZ, (1973)***

Argued: October 12, 1972

Decided: March 21, 1973

MR. JUSTICE POWELL delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas. They brought a class action on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants were the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. The complaint was filed in the summer of 1968 and a three-judge court was impaneled in January 1969. In December 1971 the panel rendered its judgment in a per curiam opinion holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The State appealed, and we noted probable jurisdiction to consider the far-reaching constitutional questions presented. For the reasons stated in this opinion, we reverse the decision of the District Court.

I

... The State, supplying funds from its general revenues, finances approximately 80% of the Program, and the school districts are responsible - as a unit - for providing the remaining 20%. The districts' share, known as the Local Fund Assignment, is apportioned among the school districts under a formula designed to reflect each district's relative taxpaying ability. The Assignment is first divided among Texas' 254 counties pursuant to a complicated economic index that takes into account the relative value of each county's contribution to the State's total income from manufacturing, mining, and agricultural activities. It also considers each county's relative share of all payrolls paid within the State and, to a lesser extent, considers each county's share of all property in the State. Each county's assignment is then divided among its school districts on the basis of each district's share of assessable property within the county. The district, in turn, finances its share of the Assignment out of revenues from local property taxation.

The design of this complex system was twofold. First, it was an attempt to assure that the Foundation Program would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. Second, the Program's architects sought to establish a Local Fund Assignment that would force every school district to contribute to the education of its children but that would not by itself exhaust any district's resources. Today every school district does impose a property tax from which it derives locally expendable funds in excess of the amount necessary to satisfy its Local Fund Assignment under the Foundation Program.

In the years since this program went into operation in 1949, expenditures for education - from state as well as local sources - have increased steadily. Between 1949 and 1967, expenditures increased approximately 500%. In the last decade alone the total public school budget rose from

\$750 million to \$2.1 billion and these increases have been reflected in consistently rising per-pupil expenditures throughout the State. Teacher salaries, by far the largest item in any school's budget, have increased dramatically - the state-supported minimum salary for teachers possessing college degrees has risen from \$2,400 to \$6,000 over the last 20 years.

The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the State's impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan area. Approximately 22,000 students are enrolled in its 25 elementary and secondary schools. The district is situated in the core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is \$5,960 - the lowest in the metropolitan area - and the median family income (\$4,686) is also the lowest. At an equalized tax rate of \$1.05 per \$100 of assessed property - the highest in the metropolitan area - the district contributed \$26 to the education of each child for the 1967-1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed \$222 per pupil for a state-local total of \$248. Federal funds added another \$108 for a total of \$356 per pupil.

Alamo Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly "Anglo," having only 18% Mexican-Americans and less than 1% Negroes. The assessed property value per pupil exceeds \$49,000, and the median family income is \$8,001. In 1967-1968 the local tax rate of \$.85 per \$100 of valuation yielded \$333 per pupil over and above its contribution to the Foundation Program. Coupled with the \$225 provided from that Program, the district was able to supply \$558 per student. Supplemented by a \$36 per-pupil grant from federal sources, Alamo Heights spent \$594 per pupil.

...Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications. If, as previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a "heavy burden of justification," that the State must demonstrate that its educational system has been structured with "precision," and is "tailored" narrowly to serve legitimate objectives and that it has selected the "less drastic means" for effectuating its objectives, the Texas financing system and its counterpart in virtually every other State will not pass muster. The State candidly admits that "[n]o one familiar with the Texas system would contend that it has yet achieved perfection." Apart from its concession that educational financing in Texas has "defects" and "imperfections," the State defends the system's rationality with vigor and disputes the District Court's finding that it lacks a "reasonable basis."

This, then, establishes the framework for our analysis. We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. ...

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that "the grave significance of education both to the individual and to our society" cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. Mr. Justice Harlan, dissenting from the Court's application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that "[v]irtually every state statute affects important rights." In his view, if the degree of judicial scrutiny of state legislation fluctuated, depending on a majority's view of the importance of the interest affected, we would have gone "far toward making this Court a `super-legislature.'" *Ibid.* We would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competence. ...

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. ...

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be pursued by an implemented by judicial intrusion into otherwise legitimate state activities.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. ... we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax

altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." ... The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. ...

It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action," it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny. These same considerations are relevant to the determination whether that system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose. It is to this question that we next turn our attention.

...Reversed.

Mr. Justice Marshall, with whom Mr. Justice Douglas concurs, dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth. More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily

channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.

In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination. I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). I must therefore respectfully dissent.

## I

The Court acknowledges that "substantial interdistrict disparities in school expenditures" exist in Texas and that these disparities are "largely attributable to differences in the amounts of money collected through local property taxation". But instead of closely examining the seriousness of these disparities and the invidiousness of the Texas financing scheme, the Court undertakes an elaborate exploration of the efforts Texas has purportedly made to close the gaps between its districts in terms of levels of district wealth and resulting educational funding. Yet, however praiseworthy Texas' equalizing efforts, the issue in this case is not whether Texas is doing its best to ameliorate the worst features of a discriminatory scheme but, rather, whether the scheme itself is in fact unconstitutionally discriminatory in the face of the Fourteenth Amendment's guarantee of equal protection of the laws. When the Texas financing scheme is taken as a whole, I do not think it can be doubted that it produces a discriminatory impact on substantial numbers of the school-age children of the State of Texas.

## A

Funds to support public education in Texas are derived from three sources: local ad valorem property taxes; the Federal Government; and the state government. It is enlightening to consider these in order.

Under Texas law, the only mechanism provided the local school district for raising new, unencumbered revenues is the power to tax property located within its boundaries. At the same time, the Texas financing scheme effectively restricts the use of monies raised by local property taxation to the support of public education within the boundaries of the district in which they are raised, since any such taxes must be approved by a majority of the property-taxpaying voters of the district.

... The necessary effect of the Texas local property tax is, in short, to favor property-rich districts and to disfavor property-poor ones.

The seriously disparate consequences of the Texas local property tax, when that tax is considered alone, are amply illustrated by data presented to the District Court by appellees. These data



included a detailed study of a sample of 110 Texas school districts for the 1967-1968 school year conducted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute. Among other things, this study revealed that the 10 richest districts examined, each of which had more than \$100,000 in taxable property per pupil, raised through local effort an average of \$610 per pupil, whereas the four poorest districts studied, each of which had less than \$10,000 in taxable property per pupil, were able to raise only an average of \$63 per pupil. And, as the Court effectively recognizes, ante, at 27, this correlation between the amount of taxable property per pupil and the amount of local revenues per pupil holds true for the 96 districts in between the richest and poorest districts.

...Without more, this state-imposed system of educational funding presents a serious picture of widely varying treatment of Texas school districts, and thereby of Texas schoolchildren, in terms of the amount of funds available for public education.

Nor are these funding variations corrected by the other aspects of the Texas financing scheme. The Federal Government provides funds sufficient to cover only some 10% of the total cost of public education in Texas. Furthermore, while these federal funds are not distributed in Texas solely on a per-pupil basis, appellants do not here contend that they are used in such a way as to ameliorate significantly the widely varying consequences for Texas school districts and schoolchildren of the local property tax element of the state financing scheme.

...Despite these facts, the majority continually emphasizes how much state aid has, in recent years, been given to property-poor Texas school districts. What the Court fails to emphasize is the cruel irony of how much more state aid is being given to property-rich Texas school districts on top of their already substantial local property tax revenues. Under any view, then, it is apparent that the state aid provided by the Foundation School Program fails to compensate for the large funding variations attributable to the local property tax element of the Texas financing scheme. And it is these stark differences in the treatment of Texas school districts and school children inherent in the Texas financing scheme, not the absolute amount of state aid provided to any particular school district, that are the crux of this case. There can, moreover, be no escaping the conclusion that the local property tax which is dependent upon taxable district property wealth is an essential feature of the Texas scheme for financing public education.

## B

The appellants do not deny the disparities in educational funding caused by variations in taxable district property wealth. They do contend, however, that whatever the differences in per-pupil spending among Texas districts, there are no discriminatory consequences for the children of the disadvantaged districts. They recognize that what is at stake in this case is the quality of the public education provided Texas children in the districts in which they live. But appellants reject the suggestion that the quality of education in any particular district is determined by money - beyond some minimal level of funding which they believe to be assured every Texas district by the Minimum Foundation School Program. In their view, there is simply no denial of equal educational opportunity to any Texas schoolchildren as a result of the widely varying per-pupil spending power provided districts under the current financing scheme.

In my view, though, even an unadorned restatement of this contention is sufficient to reveal its absurdity. ... We sit, however, not to resolve disputes over educational theory but to enforce our Constitution. It is an inescapable fact that if one district has more funds available per pupil than another district, the former will have greater choice in educational planning than will the latter. In this regard, I believe the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive. That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds - and thus with greater choice in educational planning - may nevertheless excel is to the credit of the child, not the State, cf. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349 (1938). Indeed, who can ever measure for such a child the opportunities lost and the talents wasted for want of a broader, more enriched education? Discrimination in the opportunity to learn that is afforded a child must be our standard.

Hence, even before this Court recognized its duty to tear down the barriers of state-enforced racial segregation in public education, it acknowledged that inequality in the educational facilities provided to students may be discriminatory state action as contemplated by the Equal Protection Clause. As a basis for striking down state-enforced segregation of a law school, the Court in *Sweatt v. Painter*, 339 U.S. 629, 633 -634 (1950), stated:

"[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the [whites-only] Law School is superior. . . . It is difficult to believe that one who had a free choice between these law schools would consider the question close."

...The consequences, in terms of objective educational input, of the variations in district funding caused by the Texas financing scheme are apparent from the data introduced before the District Court. For example, in 1968-1969, 100% of the teachers in the property-rich Alamo Heights School District had college degrees. By contrast, during the same school year only 80.02% of the teachers had college degrees in the property poor Edgewood Independent School District. Also, in 1968-1969, approximately 47% of the teachers in the Edgewood District were on emergency teaching permits, whereas only 11% of the teachers in Alamo Heights were on such permits. This is undoubtedly a reflection of the fact that the top of Edgewood's teacher salary scale was approximately 80% of Alamo Heights'. And, not surprisingly, the teacher-student ratio varies significantly between the two districts. In other words, as might be expected, a difference in the funds available to districts results in a difference in educational inputs available for a child's public education in Texas. For constitutional purposes, I believe this situation, which is directly attributable to the Texas financing scheme, raises a grave question of state-created discrimination in the provision of public education.

... Alternatively, the appellants and the majority may believe that the Equal Protection Clause cannot be offended by substantially unequal state treatment of persons who are similarly situated so long as the State provides everyone with some unspecified amount of education which evidently is "enough." The basis for such a novel view is far from clear. It is, of course, true that the Constitution does not require precise equality in the treatment of all persons. As Mr. Justice Frankfurter explained:

"The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. . . . The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." ...But this Court has never suggested that because some "adequate" level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that "all persons similarly circumstanced shall be treated alike."

...In my view, then, it is inequality - not some notion of gross inadequacy - of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible and without directing principle. Here, appellees have made a substantial showing of wide variations in educational funding and the resulting educational opportunity afforded to the schoolchildren of Texas. This discrimination is, in large measure, attributable to significant disparities in the taxable wealth of local Texas school districts. This is a sufficient showing to raise a substantial question of discriminatory state action in violation of the Equal Protection Clause.

## C

Despite the evident discriminatory effect of the Texas financing scheme, both the appellants and the majority raise substantial questions concerning the precise character of the disadvantaged class in this case. The District Court concluded that the Texas financing scheme draws "distinction between groups of citizens depending upon the wealth of the district in which they live" and thus creates a disadvantaged class composed of persons living in property-poor districts. See 337 F. Supp., at 282. See also *id.*, at 281. In light of the data introduced before the District Court, the conclusion that the schoolchildren of property-poor districts constitute a sufficient class for our purposes seems indisputable to me.

Appellants contend, however, that in constitutional terms this case involves nothing more than discrimination against local school districts, not against individuals, since on its face the state scheme is concerned only with the provision of funds to local districts. The result of the Texas financing scheme, appellants suggest, is merely that some local districts have more available revenues for education; others have less. In that respect, they point out, the States have broad discretion in drawing reasonable distinctions between their political subdivisions. [citations omitted]

But this Court has consistently recognized that where there is in fact discrimination against individual interests, the constitutional guarantee of equal protection of the laws is not inapplicable simply because the discrimination is based upon some group characteristic such as geographic location. [citations omitted] Texas has chosen to provide free public education for all its citizens, and it has embodied that decision in its constitution. Yet, having established public education for its citizens, the State, as a direct consequence of the variations in local property wealth endemic to Texas' financing scheme, has provided some Texas schoolchildren with substantially less resources for their education than others. Thus, while on its face the Texas scheme may merely discriminate between local districts, the impact of that discrimination falls directly upon the children whose educational opportunity is dependent upon where they happen to live. Consequently, the District Court correctly concluded that the Texas financing scheme discriminates, from a constitutional perspective, between schoolchildren on the basis of the amount of taxable property located within their local districts.

In my Brother STEWART'S view, however, such a description of the discrimination inherent in this case is apparently not sufficient, for it fails to define the "kind of objectively identifiable classes" that he evidently perceives to be necessary for a claim to be "cognizable under the Equal Protection Clause." He asserts that this is also the view of the majority, but he is unable to cite, nor have I been able to find, any portion of the Court's opinion which remotely suggests that there is no objectively identifiable or definable class in this case. In any event, if he means to suggest that an essential predicate to equal protection analysis is the precise identification of the particular individuals who compose the disadvantaged class, I fail to find the source from which he derives such a requirement. Certainly such precision is not analytically necessary. So long as the basis of the discrimination is clearly identified, it is possible to test it against the State's purpose for such discrimination - whatever the standard of equal protection analysis employed. This is clear from our decision only last Term in *Bullock v. Carter*, 405 U.S. 134 (1972), where the Court, in striking down Texas' primary filing fees as violative of equal protection, found no impediment to equal protection analysis in the fact that the members of the disadvantaged class could not be readily identified. The Court recognized that the filing-fee system tended "to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor." *Id.*, at 144. The Court also recognized that "[t]his disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause . . . ." *Ibid.* Nevertheless, it concluded that "we would ignore reality were we not to recognize that this system falls with unequal weight on voters . . . according to their economic status." *Ibid.* The nature of the classification in *Bullock* was clear, although the precise membership of the disadvantaged class was not. This was enough in *Bullock* for purposes of equal protection analysis. It is enough here.

It may be, though, that my Brother STEWART is not in fact demanding precise identification of the membership of the disadvantaged class for purposes of equal protection analysis, but is merely unable to discern with sufficient clarity the nature of the discrimination charged in this case. Indeed, the Court itself displays some uncertainty as to the exact nature of the discrimination and the resulting disadvantaged class alleged to exist in this case. It is, of course, essential to equal protection analysis to have a firm grasp upon the nature of the discrimination at

issue. In fact, the absence of such a clear, articulable understanding of the nature of alleged discrimination in a particular instance may well suggest the absence of any real discrimination. But such is hardly the case here.

A number of theories of discrimination have, to be sure, been considered in the course of this litigation. Thus, the District Court found that in Texas the poor and minority group members tend to live in property-poor districts, suggesting discrimination on the basis of both personal wealth and race. The Court goes to great lengths to discredit the data upon which the District Court relied, and thereby its conclusion that poor people live in property-poor districts. ...

I believe it is sufficient that the overarching form of discrimination in this case is between the schoolchildren of Texas on the basis of the taxable property wealth of the districts in which they happen to live. To understand both the precise nature of this discrimination and the parameters of the disadvantaged class it is sufficient to consider the constitutional principle which appellees contend is controlling in the context of educational financing. In their complaint appellees asserted that the Constitution does not permit local district wealth to be determinative of educational opportunity. This is simply another way of saying, as the District Court concluded, that consistent with the guarantee of equal protection of the laws, "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole." 337 F. Supp., at 284. Under such a principle, the children of a district are excessively advantaged if that district has more taxable property per pupil than the average amount of taxable property per pupil considering the State as a whole. By contrast, the children of a district are disadvantaged if that district has less taxable property per pupil than the state average. The majority attempts to disparage such a definition of the disadvantaged class as the product of an "artificially defined level" of district wealth. But such is clearly not the case, for this is the definition unmistakably dictated by the constitutional principle for which appellees have argued throughout the course of this litigation. And I do not believe that a clearer definition of either the disadvantaged class of Texas schoolchildren or the allegedly unconstitutional discrimination suffered by the members of that class under the present Texas financing scheme could be asked for, much less needed. Whether this discrimination, against the schoolchildren of property-poor districts, inherent in the Texas financing scheme, is violative of the Equal Protection Clause is the question to which we must now turn.

## II

To avoid having the Texas financing scheme struck down because of the interdistrict variations in taxable property wealth, the District Court determined that it was insufficient for appellants to show merely that the State's scheme was rationally related to some legitimate state purpose; rather, the discrimination inherent in the scheme had to be shown necessary to promote a "compelling state interest" in order to withstand constitutional scrutiny. The basis for this determination was twofold: first, the financing scheme divides citizens on a wealth basis, a classification which the District Court viewed as highly suspect; and second, the discriminatory scheme directly affects what it considered to be a "fundamental interest," namely, education.

This Court has repeatedly held that state discrimination which either adversely affects a "fundamental interest," ... or is based on a distinction of a suspect character ... must be carefully



scrutinized to ensure that the scheme is necessary to promote a substantial, legitimate state interest. The majority today concludes, however, that the Texas scheme is not subject to such a strict standard of review under the Equal Protection Clause. Instead, in its view, the Texas scheme must be tested by nothing more than that lenient standard of rationality which we have traditionally applied to discriminatory state action in the context of economic and commercial matters. ... By so doing, the Court avoids the telling task of searching for a substantial state interest which the Texas financing scheme, with its variations in taxable district property wealth, is necessary to further. I cannot accept such an emasculation of the Equal Protection Clause in the context of this case.

#### A

To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. ... The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review - strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued - that is, an approach in which "concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."

I therefore cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally protected rights. Thus, discrimination against the guaranteed right of freedom of speech has called for strict judicial scrutiny. ... Further, every citizen's right to travel interstate, although nowhere expressly mentioned in the Constitution, has long been recognized as implicit in the premises underlying that document: the right "was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." Consequently, the Court has required that a state classification affecting the constitutionally protected right to travel must be "shown to be necessary to promote a compelling governmental interest." But it will not do to suggest that the "answer" to whether an interest is fundamental for purposes of equal protection analysis is always determined by whether that interest "is a right . . . explicitly or implicitly guaranteed by the Constitution," ante, at 33-34.

I would like to know where the Constitution guarantees the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), or the right to vote in state elections, e. g., *Reynolds v. Sims*, 377 U.S. 533 (1964), or the right to an appeal from a criminal conviction, e. g., *Griffin v. Illinois*, 351 U.S. 12 (1956). These are instances in which, due to the importance of the interests



at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection.

Thus, in *Buck v. Bell*, 274 U.S. 200 (1927), the Court refused to recognize a substantive constitutional guarantee of the right to procreate. Nevertheless, in *Skinner v. Oklahoma*, supra, at 541, the Court, without impugning the continuing validity of *Buck v. Bell*, held that "strict scrutiny" of state discrimination affecting procreation "is essential," for "[m]arriage and procreation are fundamental to the very existence and survival of the race." Recently, in *Roe v. Wade*, 410 U.S. 113, 152 -154 (1973), the importance of procreation has, indeed, been explained on the basis of its intimate relationship with the constitutional right of privacy which we have recognized. Yet the limited stature thereby accorded any "right" to procreate is evident from the fact that at the same time the Court reaffirmed its initial decision in *Buck v. Bell*.

Similarly, the right to vote in state elections has been recognized as a "fundamental political right," because the Court concluded very early that it is "preservative of all rights." For this reason, "this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S., at 336 (emphasis added). The final source of such protection from inequality in the provision of the state franchise is, of course, the Equal Protection Clause. Yet it is clear that whatever degree of importance has been attached to the state electoral process when unequally distributed, the right to vote in state elections has itself never been accorded the stature of an independent constitutional guarantee.

Finally, it is likewise "true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." Nevertheless, discrimination adversely affecting access to an appellate process which a State has chosen to provide has been considered to require close judicial scrutiny.

The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. And I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective "picking-and-choosing" between various interests or that it must involve this Court in creating "substantive constitutional rights in the name of guaranteeing equal protection of the laws." Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees. Procreation is now understood to be important because of its interaction with the established

constitutional right of privacy. The exercise of the state franchise is closely tied to basic civil and political rights inherent in the First Amendment. And access to criminal appellate processes enhances the integrity of the range of rights implicit in the Fourteenth Amendment guarantee of due process of law. Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.

The effect of the interaction of individual interests with established constitutional guarantees upon the degree of care exercised by this Court in reviewing state discrimination affecting such interests is amply illustrated by our decision last Term in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In *Baird*, the Court struck down as violative of the Equal Protection Clause a state statute which denied unmarried persons access to contraceptive devices on the same basis as married persons. The Court purported to test the statute under its traditional standard whether there is some rational basis for the discrimination effected. *Id.*, at 446-447. In the context of commercial regulation, the Court has indicated that the Equal Protection Clause "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." [citations omitted] And this lenient standard is further weighted in the State's favor by the fact that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived [by the Court] to justify it." *McGowan v. Maryland*, *supra*, at 426. But in *Baird* the Court clearly did not adhere to these highly tolerant standards of traditional rational review. For although there were conceivable state interests intended to be advanced by the statute - e. g., deterrence of premarital sexual activity and regulation of the dissemination of potentially dangerous articles - the Court was not prepared to accept these interests on their face, but instead proceeded to test their substantiality by independent analysis. ... Such close scrutiny of the State's interests was hardly characteristic of the deference shown state classifications in the context of economic interests. [citations omitted] Yet I think the Court's action was entirely appropriate, for access to and use of contraceptives bears a close relationship to the individual's constitutional right of privacy. [citations omitted]

A similar process of analysis with respect to the invidiousness of the basis on which a particular classification is drawn has also influenced the Court as to the appropriate degree of scrutiny to be accorded any particular case. The highly suspect character of classifications based on race, nationality, or alienage is well established. The reasons why such classifications call for close judicial scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as "discrete and insular minorities" who are relatively powerless to protect their interests in the political process. [citations omitted] Moreover, race, nationality, or alienage is "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, [citations omitted] Instead, lines drawn on such bases are frequently the reflection of historic prejudices rather than legislative rationality. It may be that all of these considerations, which make for particular judicial solicitude in the face of discrimination on the basis of race, nationality, or alienage, do not coalesce - or at least not to the same degree - in other forms of discrimination. Nevertheless, these considerations have undoubtedly influenced the care with which the Court has scrutinized other forms of discrimination.

In *James v. Strange*, 407 U.S. 128 (1972), the Court held unconstitutional a state statute which provided for recoupment from indigent convicts of legal defense fees paid by the State. The

Court found that the statute impermissibly differentiated between indigent criminals in debt to the State and civil judgment debtors, since criminal debtors were denied various protective exemptions afforded civil judgment debtors. The Court suggested that in reviewing the statute under the Equal Protection Clause, it was merely applying the traditional requirement that there be "some rationality" in the line drawn between the different types of debtors. *Id.*, at 140. Yet it then proceeded to scrutinize the statute with less than traditional deference and restraint. Thus, the Court recognized "that state recoupment statutes may betoken legitimate state interests" in recovering expenses and discouraging fraud. ...

Similarly, in *Reed v. Reed*, 404 U.S. 71 (1971), the Court, in striking down a state statute which gave men preference over women when persons of equal entitlement apply for assignment as an administrator of a particular estate, resorted to a more stringent standard of equal protection review than that employed in cases involving commercial matters. The Court indicated that it was testing the claim of sex discrimination by nothing more than whether the line drawn bore "a rational relationship to a state objective," which it recognized as a legitimate effort to reduce the work of probate courts in choosing between competing applications for letters of administration. *Id.*, at 76. Accepting such a purpose, the Idaho Supreme Court had thought the classification to be sustainable on the basis that the legislature might have reasonably concluded that, as a rule, men have more experience than women in business matters relevant to the administration of an estate. This Court, however, concluded that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . ." This Court, in other words, was unwilling to consider a theoretical and unsubstantiated basis for distinction - however reasonable it might appear - sufficient to sustain a statute discriminating on the basis of sex.

*James* and *Reed* can only be understood as instances in which the particularly invidious character of the classification caused the Court to pause and scrutinize with more than traditional care the rationality of state discrimination. Discrimination on the basis of past criminality and on the basis of sex posed for the Court the specter of forms of discrimination which it implicitly recognized to have deep social and legal roots without necessarily having any basis in actual differences. Still, the Court's sensitivity to the invidiousness of the basis for discrimination is perhaps most apparent in its decisions protecting the interests of children born out of wedlock from discriminatory state action. [citations omitted].

...In summary, it seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find that discriminatory state action is almost always sustained, for such interests are generally far removed from constitutional guarantees. Moreover, "[t]he extremes to which the Court has gone in dreaming up rational bases for state regulation in that area may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls." *Dandridge v. Williams*, 397 U.S., at 520 (dissenting opinion). But the situation differs markedly when discrimination against important individual interests with constitutional

implications and against particularly disadvantaged or powerless classes is involved. The majority suggests, however, that a variable standard of review would give this Court the appearance of a "superlegislature." Ante, at 31. I cannot agree. Such an approach seems to me a part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document. In truth, the Court itself will be open to the criticism raised by the majority so long as it continues on its present course of effectively selecting in private which cases will be afforded special consideration without acknowledging the true basis of its action. Opinions such as those in Reed and James seem drawn more as efforts to shield rather than to reveal the true basis of the Court's decisions. Such obfuscated action may be appropriate to a political body such as a legislature, but it is not appropriate to this Court. Open debate of the bases for the Court's action is essential to the rationality and consistency of our decision making process. Only in this way can we avoid the label of legislature and ensure the integrity of the judicial process.

Nevertheless, the majority today attempts to force this case into the same category for purposes of equal protection analysis as decisions involving discrimination affecting commercial interests. By so doing, the majority singles this case out for analytic treatment at odds with what seems to me to be the clear trend of recent decisions in this Court, and thereby ignores the constitutional importance of the interest at stake and the invidiousness of the particular classification, factors that call for far more than the lenient scrutiny of the Texas financing scheme which the majority pursues. Yet if the discrimination inherent in the Texas scheme is scrutinized with the care demanded by the interest and classification present in this case, the unconstitutionality of that scheme is unmistakable.

## B

Since the Court now suggests that only interests guaranteed by the Constitution are fundamental for purposes of equal protection analysis, and since it rejects the contention that public education is fundamental, it follows that the Court concludes that public education is not constitutionally guaranteed. It is true that this Court has never deemed the provision of free public education to be required by the Constitution. Indeed, it has on occasion suggested that state-supported education is a privilege bestowed by a State on its citizens. See *Missouri ex rel. Gaines v. Canada*, 305 U.S., at 349 . Nevertheless, the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.

The special concern of this Court with the educational process of our country is a matter of common knowledge. Undoubtedly, this Court's most famous statement on the subject is that contained in *Brown v. Board of Education*, 347 U.S., at 493 :

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It

is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . ."

... Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life. This Court's decision in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), speaks of the right of students "to inquire, to study and to evaluate, to gain new maturity and understanding . . . ." Thus, we have not casually described the classroom as the "marketplace of ideas." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The opportunity for formal education may not necessarily be the essential determinant of an individual's ability to enjoy throughout his life the rights of free speech and association guaranteed to him by the First Amendment. But such an opportunity may enhance the individual's enjoyment of those rights, not only during but also following school attendance. Thus, in the final analysis, "the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable."

Of particular importance is the relationship between education and the political process. "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes. Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation. A system of "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." ... But of most immediate and direct concern must be the demonstrated effect of education on the exercise of the franchise by the electorate. The right to vote in federal elections is conferred by Art. I, 2, and the Seventeenth Amendment of the Constitution, and access to the state franchise has been afforded special protection because it is "preservative of other basic civil and political rights," .... Data from the Presidential Election of 1968 clearly demonstrate a direct relationship between participation in the electoral process and level of educational attainment; and, as this Court recognized in *Gaston County v. United States*, 395 U.S. 285, 296 (1969), the quality of education offered may influence a child's decision to "enter or remain in school." It is this very sort of intimate relationship between a particular personal interest and specific constitutional guarantees that has heretofore caused the Court to attach special significance, for purposes of equal protection analysis, to individual interests such as procreation and the exercise of the state franchise.

While ultimately disputing little of this, the majority seeks refuge in the fact that the Court has "never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice." This serves only to blur what is in fact at stake. With due respect, the issue is neither provision of the most effective speech nor of the most informed vote. Appellees do not now seek the best education Texas might provide. They do seek, however, an end to state discrimination resulting from the unequal distribution of



taxable district property wealth that directly impairs the ability of some districts to provide the same educational opportunity that other districts can provide with the same or even substantially less tax effort. The issue is, in other words, one of discrimination that affects the quality of the education which Texas has chosen to provide its children; and, the precise question here is what importance should attach to education for purposes of equal protection analysis of that discrimination. As this Court held in *Brown v. Board of Education*, 347 U.S., at 493\_, the opportunity of education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." The factors just considered, including the relationship between education and the social and political interests enshrined within the Constitution, compel us to recognize the fundamentality of education and to scrutinize with appropriate care the bases for state discrimination affecting equality of educational opportunity in Texas' school districts - a conclusion which is only strengthened when we consider the character of the classification in this case.

### C

The District Court found that in discriminating between Texas schoolchildren on the basis of the amount of taxable property wealth located in the district in which they live, the Texas financing scheme created a form of wealth discrimination. This Court has frequently recognized that discrimination on the basis of wealth may create a classification of a suspect character and thereby call for exacting judicial scrutiny. [citations omitted] The majority, however, considers any wealth classification in this case to lack certain essential characteristics which it contends are common to the instances of wealth discrimination that this Court has heretofore recognized. We are told that in every prior case involving a wealth classification, the members of the disadvantaged class have "shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." I cannot agree.

In *Harper*, the Court struck down as violative of the Equal Protection Clause an annual Virginia poll tax of \$1.50, payment of which by persons over the age of 21 was a prerequisite to voting in Virginia elections. In part, the Court relied on the fact that the poll tax interfered with a fundamental interest - the exercise of the state franchise. In addition, though, the Court emphasized that "[I]ines drawn on the basis of wealth or property . . . are traditionally disfavored." Under the first part of the theory announced by the majority, the disadvantaged class in *Harper*, in terms of a wealth analysis, should have consisted only of those too poor to afford the \$1.50 necessary to vote. But the *Harper* Court did not see it that way. In its view, the Equal Protection Clause "bars a system which excludes [from the franchise] those unable to pay a fee to vote or who fail to pay." *Ibid.* (Emphasis added.) So far as the Court was concerned, the "degree of the discrimination [was] irrelevant." *Ibid.* Thus, the Court struck down the poll tax in toto; it did not order merely that those too poor to pay the tax be exempted; complete impecunity clearly was not determinative of the limits of the disadvantaged class, nor was it essential to make an equal protection claim.

Similarly, *Griffin* and *Douglas* refute the majority's contention that we have in the past required an absolute deprivation before subjecting wealth classifications to strict scrutiny. The Court



characterizes Griffin as a case concerned simply with the denial of a transcript or an adequate substitute therefore, and Douglas as involving the denial of counsel. But in both cases the question was in fact whether "a State that [grants] appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." *Griffin v. Illinois*, supra, at 18 (emphasis added). In that regard, the Court concluded that inability to purchase a transcript denies "the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance," *ibid.* (emphasis added), and that "the type of an appeal a person is afforded . . . hinges upon whether or not he can pay for the assistance of counsel," *Douglas v. California*, supra, at 355-356 (emphasis added). The right of appeal itself was not absolutely denied to those too poor to pay; but because of the cost of a transcript and of counsel, the appeal was a substantially less meaningful right for the poor than for the rich. It was on these terms that the Court found a denial of equal protection, and those terms clearly encompassed degrees of discrimination on the basis of wealth which do not amount to outright denial of the affected right or interest.

This is not to say that the form of wealth classification in this case does not differ significantly from those recognized in the previous decisions of this Court. Our prior cases have dealt essentially with discrimination on the basis of personal wealth. Here, by contrast, the children of the disadvantaged Texas school districts are being discriminated against not necessarily because of their personal wealth or the wealth of their families, but because of the taxable property wealth of the residents of the district in which they happen to live. The appropriate question, then, is whether the same degree of judicial solicitude and scrutiny that has previously been afforded wealth classifications is warranted here.

As the Court points out, no previous decision has deemed the presence of just a wealth classification to be sufficient basis to call forth rigorous judicial scrutiny of allegedly discriminatory state action. That wealth classifications alone have not necessarily been considered to bear the same high degree of suspectness as have classifications based on, for instance, race or alienage may be explainable on a number of grounds. The "poor" may not be seen as politically powerless as certain discrete and insular minority groups. Personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups. But personal poverty is not a permanent disability; its shackles may be escaped. Perhaps most importantly, though, personal wealth may not necessarily share the general irrelevance as a basis for legislative action that race or nationality is recognized to have. While the "poor" have frequently been a legally disadvantaged group, it cannot be ignored that social legislation must frequently take cognizance of the economic status of our citizens. Thus, we have generally gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests. See *Harper v. Virginia Bd. of Elections*, supra.

When evaluated with these considerations in mind, it seems to me that discrimination on the basis of group wealth in this case likewise calls for careful judicial scrutiny. First, it must be recognized that while local district wealth may serve other interests, it bears no relationship whatsoever to the interest of Texas schoolchildren in the educational opportunity afforded them by the State of Texas. Given the importance of that interest, we must be particularly sensitive to the invidious characteristics of any form of discrimination that is not clearly intended to serve it,

as opposed to some other distinct state interest. Discrimination on the basis of group wealth may not, to be sure, reflect the social stigma frequently attached to personal poverty. Nevertheless, insofar as group wealth discrimination involves wealth over which the disadvantaged individual has no significant control, it represents in fact a more serious basis of discrimination than does personal wealth. For such discrimination is no reflection of the individual's characteristics or his abilities. And thus - particularly in the context of a disadvantaged class composed of children - we have previously treated discrimination on a basis which the individual cannot control as constitutionally disfavored. ...

The disability of the disadvantaged class in this case extends as well into the political processes upon which we ordinarily rely as adequate for the protection and promotion of all interests. Here legislative reallocation of the State's property wealth must be sought in the face of inevitable opposition from significantly advantaged districts that have a strong vested interest in the preservation of the status quo, a problem not completely dissimilar to that faced by underrepresented districts prior to the Court's intervention in the process of reapportionment.

Nor can we ignore the extent to which, in contrast to our prior decisions, the State is responsible for the wealth discrimination in this instance. Griffin, Douglas, Williams, Tate, and our other prior cases have dealt with discrimination on the basis of indigency which was attributable to the operation of the private sector. But we have no such simple de facto wealth discrimination here. The means for financing public education in Texas are selected and specified by the State. It is the State that has created local school districts, and tied educational funding to the local property tax and thereby to local district wealth. At the same time, governmentally imposed land use controls have undoubtedly encouraged and rigidified natural trends in the allocation of particular areas for residential or commercial use, and thus determined each district's amount of taxable property wealth. In short, this case, in contrast to the Court's previous wealth discrimination decisions, can only be seen as "unusual in the extent to which governmental action is the cause of the wealth classification."

In the final analysis, then, the invidious characteristics of the group wealth classification present in this case merely serve to emphasize the need for careful judicial scrutiny of the State's justifications for the resulting interdistrict discrimination in the educational opportunity afforded to the schoolchildren of Texas.

#### D

The nature of our inquiry into the justification for state discrimination is essentially the same in all equal protection cases: We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interest. See *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95 . Differences in the application of this test are, in my view, a function of the constitutional importance of the interests at stake and the invidiousness of the particular classification. In terms of the asserted state interests, the Court has indicated that it will require, for instance, a "compelling," *Shapiro v. Thompson*, 394 U.S., at 634 , or a "substantial" or "important," *Dunn v. Blumstein*, 405 U.S., at 343 , state interest to justify discrimination affecting individual interests of constitutional significance. Whatever the differences, if any, in these descriptions of the character of the state interest necessary to sustain such discrimination, basic to each is, I believe, a concern with the

legitimacy and the reality of the asserted state interests. Thus, when interests of constitutional importance are at stake, the Court does not stand ready to credit the State's classification with any conceivable legitimate purpose, but demands a clear showing that there are legitimate state interests which the classification was in fact intended to serve. Beyond the question of the adequacy of the State's purpose for the classification, the Court traditionally has become increasingly sensitive to the means by which a State chooses to act as its action affects more directly interests of constitutional significance. [citations omitted] Thus, by now, "less restrictive alternatives" analysis is firmly established in equal protection jurisprudence. [citations omitted] It seems to me that the range of choice we are willing to accord the State in selecting the means by which it will act, and the care with which we scrutinize the effectiveness of the means which the State selects, also must reflect the constitutional importance of the interest affected and the invidiousness of the particular classification. Here, both the nature of the interest and the classification dictate close judicial scrutiny of the purposes which Texas seeks to serve with its present educational financing scheme and of the means it has selected to serve that purpose.

The only justification offered by appellants to sustain the discrimination in educational opportunity caused by the Texas financing scheme is local educational control. Presented with this justification, the District Court concluded that "[n]ot only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications." 337 F. Supp., at 284. I must agree with this conclusion.

At the outset, I do not question that local control of public education, as an abstract matter, constitutes a very substantial state interest. . . . even if we accept Texas' general dedication to local control in educational matters, it is difficult to find any evidence of such dedication with respect to fiscal matters. It ignores reality to suggest - as the Court does - that the local property tax element of the Texas financing scheme reflects a conscious legislative effort to provide school districts with local fiscal control. If Texas had a system truly dedicated to local fiscal control, one would expect the quality of the educational opportunity provided in each district to vary with the decision of the voters in that district as to the level of sacrifice they wish to make for public education. In fact, the Texas scheme produces precisely the opposite result. Local school districts cannot choose to have the best education in the State by imposing the highest tax rate. Instead, the quality of the educational opportunity offered by any particular district is largely determined by the amount of taxable property located in the district - a factor over which local voters can exercise no control.

The study introduced in the District Court showed a direct inverse relationship between equalized taxable district property wealth and district tax effort with the result that the property-poor districts making the highest tax effort obtained the lowest per-pupil yield. The implications of this situation for local choice are illustrated by again comparing the Edgewood and Alamo Heights School Districts. In 1967-1968, Edgewood, after contributing its share to the Local Fund Assignment, raised only \$26 per pupil through its local property tax, whereas Alamo Heights was able to raise \$333 per pupil. Since the funds received through the Minimum Foundation School Program are to be used only for minimum professional salaries, transportation costs, and operating expenses, it is not hard to see the lack of local choice - with respect to higher teacher salaries to attract more and better teachers, physical facilities, library books, and facilities,

special courses, or participation in special state and federal matching funds programs - under which a property-poor district such as Edgewood is forced to labor. In fact, because of the difference in taxable local property wealth, Edgewood would have to tax itself almost nine times as heavily to obtain the same yield as Alamo Heights. At present, then, local control is a myth for many of the local school districts in Texas. As one district court has observed, "rather than reposing in each school district the economic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes)."

In my judgment, any substantial degree of scrutiny of the operation of the Texas financing scheme reveals that the State has selected means wholly inappropriate to secure its purported interest in assuring its school districts local fiscal control. ...If, for the sake of local education control, this Court is to sustain interdistrict discrimination in the educational opportunity afforded Texas school children, it should require that the State present something more than the mere sham now before us.

### III

In conclusion, it is essential to recognize that an end to the wide variations in taxable district property wealth inherent in the Texas financing scheme would entail none of the untoward consequences suggested by the Court or by the appellants.

First, affirmance of the District Court's decisions would hardly sound the death knell for local control of education. It would mean neither centralized decisionmaking nor federal court intervention in the operation of public schools. Clearly, this suit has nothing to do with local decisionmaking with respect to educational policy or even educational spending. It involves only a narrow aspect of local control - namely, local control over the raising of educational funds. In fact, in striking down interdistrict disparities in taxable local wealth, the District Court took the course which is most likely to make true local control over educational decisionmaking a reality for all Texas school districts.

Nor does the District Court's decision even necessarily eliminate local control of educational funding. The District Court struck down nothing more than the continued interdistrict wealth discrimination inherent in the present property tax. ... Still, we are told that this case requires us "to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interest." Yet no one in the course of this entire litigation has ever questioned the constitutionality of the local property tax as a device for raising educational funds. The District Court's decision, at most, restricts the power of the State to make educational funding dependent exclusively upon local property taxation so long as there exists interdistrict disparities in taxable property wealth. But it hardly eliminates the local property tax as a source of educational funding or as a means of providing local fiscal control.

The Court seeks solace for its action today in the possibility of legislative reform. The Court's suggestions of legislative redress and experimentation will doubtless be of great comfort to the schoolchildren of Texas' disadvantaged districts, but considering the vested interests of wealthy school districts in the preservation of the status quo, they are worth little more. The possibility of

legislative action is, in all events, no answer to this Court's duty under the Constitution to eliminate unjustified state discrimination. In this case we have been presented with an instance of such discrimination, in a particularly invidious form, against an individual interest of large constitutional and practical importance. To support the demonstrated discrimination in the provision of educational opportunity the State has offered a justification which, on analysis, takes on at best an ephemeral character. Thus, I believe that the wide disparities in taxable district property wealth inherent in the local property tax element of the Texas financing scheme render that scheme violative of the Equal Protection Clause.

I would therefore affirm the judgment of the District Court.

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Side Bar: Demetrio Rodriguez led plaintiffs in the class-action suit that challenged Texas's method of funding public schools. Rodriguez was born into a migrant farm working family who served in the United States military. He fought the state so that his children would receive the quality public education that Texas was mandated by the state constitution to provide. He died in 2013 at the age of 87 years but his lawsuit sparked numerous challenges of the Texas public school funding methods over the years, the most recent ending in 2016.

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*DeFunis v. Odegaard*

*416 U.S. 312 (1974)*

**Opinion**

In 1971 the petitioner Marco DeFunis, Jr., applied for admission as a first-year student at the University of Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the Law School received some 1,600 applications for these 150 places. DeFunis was eventually notified that he had been denied admission. He thereupon commenced this suit in a Washington trial court, contending that the procedures and criteria employed by **\*\*1705** the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

DeFunis brought the suit on behalf of himself alone, and not as the representative of any class, against the various respondents, who are officers, faculty members, and members of the Board of Regents of the University of Washington. He asked the trial court to issue a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September 1971, on the ground that the Law School admissions policy had resulted in the unconstitutional denial of his application for admission. The trial court agreed with his claim and



granted the requested relief. \*315 DeFunis was, accordingly, admitted to the Law School and began his legal studies there in the fall of 1971. On appeal, the Washington Supreme Court reversed the judgment of the trial court and held that the Law School admissions policy did not violate the Constitution. By this time DeFunis was in his second year at the Law School.

He then petitioned this Court for a writ of certiorari, and Mr. Justice Douglas, as Circuit Justice, stayed the judgment of the Washington Supreme Court pending the ‘final disposition of the case by this Court.’ By virtue of this stay, DeFunis has remained in law school, and was in the first term of his third and final year when this Court first considered his certiorari petition in the fall of 1973. Because of our concern that DeFunis' third-year standing in the Law School might have rendered this case moot, we requested the parties to brief the question of mootness before we acted on the petition. In response, both sides contended that the case was not moot. The respondents indicated that, if the decision of the Washington Supreme Court were permitted to stand, the petitioner could complete the term for which he was then enrolled but would have to apply to the faculty for permission to continue in the school before he could register for another term.

We granted the petition for certiorari on November 19, 1973. 414 U.S. 1038, 94 S.Ct. 538, 38 L.Ed.2d 329. The case was in due course orally argued on February 26, 1974.

In response to questions raised from the bench during the oral argument, counsel for the petitioner has informed the Court that DeFunis has now registered ‘for his final \*316 quarter in law school.’ Counsel for the respondents have made clear that the Law School will not in any way seek to abrogate this registration. In light of DeFunis' recent registration for the last quarter of his final law school year, and the Law School's assurance that his registration is fully effective, the insistent question again arises whether this case is not moot, and to that question we now turn.

The starting point for analysis is the familiar proposition that ‘federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.’ *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). The inability of the federal judiciary ‘to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the **\*\*1706** existence of a case or controversy.’ *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964); see also *Powell v. McCormack*, 395 U.S. 486, 496 n. 7, 89 S.Ct. 1944, 1950, 23 L.Ed.2d 491 (1969); *Sibron v. New York*, 392 U.S. 40, 50 n. 8, 88 S.Ct. 1889, 1896, 20 L.Ed.2d 917 (1968). Although as a matter of Washington state law it appears that this case would be saved from mootness by ‘the great public interest in the continuing issues raised by this appeal,’ 82 Wash.2d 11, 23 n. 6, 507 P.2d 1169, 1177 n. 6 (1973), the fact remains that under Art. III ‘(e)ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction.’ *North Carolina v. Rice*, supra, 404 U.S., at 246, 92 S.Ct., at 404.

The respondents have represented that, without regard to the ultimate resolution of the issues in this case, \*317 DeFunis will remain a student in the Law School for the duration of any term in which he has already enrolled. Since he has now registered for his final term, it is evident that he will be given an opportunity to complete all academic and other requirements for



graduation, and, if he does so, will receive his diploma regardless of any decision this Court might reach on the merits of this case. In short, all parties agree that DeFunis is now entitled to complete his legal studies at the University of Washington and to receive his degree from that institution. A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel that result, and could not serve to prevent it. DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School. He was not only accorded that remedy, but he now has also been irrevocably admitted to the final term of the final year of the Law School course. The controversy between the parties has thus clearly ceased to be ‘definite and concrete’ and no longer ‘touch(es) the legal relations of parties having adverse legal interests.’ *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240—241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937).

It matters not that these circumstances partially stem from a policy decision on the part of the respondent Law School authorities. The respondents, through their counsel, the Attorney General of the State, have professionally represented that in no event will the status of DeFunis now be affected by any view this Court might express on the merits of this controversy. And it has been the settled practice of the Court, in contexts no less significant, fully to accept representations such as these as parameters for decision. See *Gerende v. Election Board*, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745 (1951); *Whitehill v. Elkins*, 389 U.S. 54, 57—58, 88 S.Ct. 184, 185—186, 19 L.Ed.2d 228 (1967); \*318 *Ehlert v. United States*, 402 U.S. 99, 107, 91 S.Ct. 1319, 1324, 28 L.Ed.2d 625 (1971); cf. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 162—163, 91 S.Ct. 720, 726—727, 27 L.Ed.2d 749 (1971).

There is a line of decisions in this Court standing for the proposition that the ‘voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.’ *United States v. W. T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953); *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 308—310, 17 S.Ct. 540, 546—547, 41 L.Ed. 1007 (1897); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43, 65 S.Ct. 11, 14, 89 L.Ed. 29 (1944); *Gray v. Sanders*, 372 U.S. 368, 376, 83 S.Ct. 801, 806, 9 L.Ed.2d 821 (1963); *United States v. Phosphate Export Assn.*, 393 U.S. 199, 202—203, 89 S.Ct. 361, 363—364, 21 L.Ed.2d 344 (1968). These decisions and the doctrine they reflect would be quite relevant if the question of mootness here had arisen by reason of a unilateral change in the admissions procedures of the Law School. For it was the admissions procedures that were the target of \*\*1707 this litigation, and a voluntary cessation of the admissions practices complained of could make this case moot only if it could be said with assurance ‘that ‘there is no reasonable expectation that the wrong will be repeated. ‘‘*United States v. W. T. Grant Co.*, supra, 345 U.S., at 633, 73 S.Ct., at 897. Otherwise, ‘(t)he defendant is free to return to his old ways,’ *id.*, at 632, 73 S.Ct., at 897, and this fact would be enough to prevent mootness because of the ‘public interest in having the legality of the practices settled.’ *Ibid.* But mootness in the present case depends not at all upon a ‘voluntary cessation’ of the admissions practices that were the subject of this litigation. It depends, instead, upon the simple fact that DeFunis is now in the final quarter of the final year of his course of study, and the settled and unchallenged policy of the Law School to permit him to complete the term for which he is now enrolled.

It might also be suggested that this case presents a question that is ‘capable of repetition, yet

evading \*319 review,' Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911); Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147 (1973), and is thus amenable to federal adjudication even though it might otherwise be considered moot. But DeFunis will never again be required to run the gantlet of the Law School's admission process, and so the question is certainly not 'capable of repetition' so far as he is concerned. Moreover, just because this particular case did not reach the Court until the eve of the petitioner's graduation from Law School, it hardly follows that the issue he raises will in the future evade review. If the admissions procedures of the Law School remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken. This case, therefore, in no way presents the exceptional situation in which the Southern Pacific Terminal doctrine might permit a departure from '(t)he usual rule in federal cases . . . that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated.' Roe v. Wade, supra, at 125, 93 S.Ct., at 712; United States v. Munsingwear, Inc., 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950).

Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of \*320 Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties. Accordingly, the judgment of the Supreme Court of Washington is vacated, and the cause is remanded for such proceedings as by that court may be deemed appropriate.

It is so ordered. Vacated and remanded.

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### Spring 1976

A little over a 100 years ago the United States had just seen the end of its only violent civil war. Shortly thereafter, the country enacted the 14<sup>th</sup> amendment to its constitution. This amendment was enacted for the purpose of assuring that the newly freed slaves would also have available to them, the rights and privileges afforded all whites. After the civil war there followed a period of reconstruction which led most black people to believe that they would indeed enjoy the benefits of freedom enjoyed for so long by the rest of America.

Unfortunately, this period of joy was short lived. Through so called legal means blacks were soon to discover that equality did not really mean that treatment had to be the same, only the treatment had to be similar. And so segregation and the idea of separate but equal was born, or created, as a child of the American judicial system.

Recently blacks enjoyed a new birth. We have just seen the end of peaceful civil war of the 60's and the enactment of many pieces of legislation aimed at assuring the continual existence of these newly won rights.

### But Again Entered the Courts

The Supreme Court of the United States decided yesterday to hear a California case involving the issue of reverse discrimination. And believe it or not the legal argument supporting the suit is that the program violates the 14<sup>th</sup> Amendment to the Constitution. The very amendment enacted to protect the rights of Black People.

Will history repeat itself. Will my people once again lose all the rights we fought so hard to enjoy?

Is America really for me? Or better yet, is America really for my people?

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### ***UNIVERSITY OF CALIFORNIA REGENTS v. BAKKE***

Argued: October 12, 1977

Decided: June 28, 1978

MR. JUSTICE POWELL, concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies.
2. Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause.
3. Since petitioner could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions program, he must be admitted.

Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies.
2. Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently

important to justify petitioner's remedial use of race. Thus, the judgment below must be reversed in that it prohibits race from being used as a factor in university admissions.

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Mr. Justice Stevens, joined by The Chief Justice, Mr. Justice Stewart, and Mr. Justice Rehnquist, being of the view that whether race can ever be a factor in an admissions policy is not an issue here; that Title VI applies; and that respondent was excluded from Davis in violation of Title VI, concurs in the Court's judgment insofar as it affirms the judgment of the court below ordering respondent admitted to Davis.

... Mr. Justice Powell announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant. It modified that portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment.

I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concur in this judgment.

Affirmed in part and reversed in part.

MR. JUSTICE MARSHALL.

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200

years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

## I

### A

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.

The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as "self-evident" that "all men are created equal" and are endowed "with certain unalienable Rights," including those to "Life, Liberty and the pursuit of Happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men. An earlier draft of the Declaration of Independence, submitted by Thomas Jefferson to the Continental Congress, had included among the charges against the King that

"[h]e has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither." Franklin 88.

The Southern delegation insisted that the charge be deleted; the colonists themselves were implicated in the slave trade, and inclusion of this claim might have made it more difficult to justify the continuation of slavery once the ties to England were severed. Thus, even as the colonists embarked on a course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights.

The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution, which treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the States. Art. I, 2. The Constitution also contained a clause ensuring that the "Migration or Importation" of slaves into the existing States would be legal until at least 1808, Art. I, 9, and a fugitive slave clause requiring that when a slave escaped to another State, he must be returned on the claim of the master, Art. IV, 2. In their declaration of the principles that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that "we the people," for whose protection the Constitution was designed, did not include those whose skins were the wrong color. As Professor John Hope Franklin has observed, Americans "proudly accepted the challenge and

responsibility of their new political freedom by establishing the machinery and safeguards that insured the continued enslavement of blacks."

The individual States likewise established the machinery to protect the system of slavery through the promulgation of the Slave Codes, which were designed primarily to defend the property interest of the owner in his slave. The position of the Negro slave as mere property was confirmed by this Court in *Dred Scott v. Sandford*, 19 How. 393 (1857), holding that the Missouri Compromise - which prohibited slavery in the portion of the Louisiana Purchase Territory north of Missouri - was unconstitutional because it deprived slave owners of their property without due process. The Court declared that under the Constitution a slave was property, and "[t]he right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States . . . ." *Id.*, at 451. The Court further concluded that Negroes were not intended to be included as citizens under the Constitution but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . ." *Id.*, at 407.

## B

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." *Slaughter-House Cases*, 16 Wall. 36, 70 (1873). Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.

Congress responded to the legal disabilities being imposed in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time it seemed as if the Negro might be protected from the continued denial of his civil rights and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann



Woodward: "By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights."

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. [citations omitted] Then in the notorious Civil Rights Cases, 109 U.S. 3 (1883), the Court strangled Congress' efforts to use its power to promote racial equality. In those cases the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to "inns, public conveyances, theaters and other places of public amusement." *Id.*, at 10. According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the State. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. *Id.*, at 24-25. "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state," the Court concluded, "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . ." *Id.*, at 25. As Mr. Justice Harlan noted in dissent, however, the Civil War Amendments and Civil Rights Acts did not make the Negroes the "special favorite" of the laws but instead "sought to accomplish in reference to that race . . . - what had already been done in every State of the Union for the white race - to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.*, at 61.

The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in *Plessy v. Ferguson*, 163 U.S. 537 (1896). In upholding a Louisiana law that required railway companies to provide "equal but separate" accommodations for whites and Negroes, the Court held that the Fourteenth Amendment was not intended "to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." *Id.*, at 544. Ignoring totally the realities of the positions of the two races, the Court remarked:

"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." *Id.*, at 551.

Mr. Justice Harlan's dissenting opinion recognized the bankruptcy of the Court's reasoning. He noted that the "real meaning" of the legislation was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.*, at 560. He expressed his fear that if like laws were enacted in other States, "the effect would be in the highest degree mischievous." *Id.*, at 563. Although slavery would have disappeared, the States would retain the power "to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens . . . ." *Ibid.*

The fears of Mr. Justice Harlan were soon to be realized. In the wake of Plessy, many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts. In 1898, after Plessy, the Charlestown News and Courier printed a parody of Jim Crow laws:

"If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court - and a Jim Crow Bible for colored witnesses to kiss."

The irony is that before many years had passed, with the exception of the Jim Crow witness stand, "all the improbable applications of the principle suggested by the editor in derision had been put into practice - down to and including the Jim Crow Bible."

Nor were the laws restricting the rights of Negroes limited solely to the Southern States. In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns. Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was "not humiliating but a benefit" and that he was "rendering [the Negroes] more safe in their possession of office and less likely to be discriminated against."

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools - and thereby denied the opportunity to become doctors, lawyers, engineers, and the like - is also well established. It is of course true that some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court in a series of decisions leading up to *Brown v. Board of Education*, 347 U.S. 483 (1954). [citations omitted] Those decisions, however, did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.

## II

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely \$110 more than a white male who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.

The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

## III

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

## A

This Court long ago remarked that

"in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy . . . ." Slaughter-House Cases, 16 Wall., at 72.

It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes. The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes. [citations omitted] The bill's supporters defended it - not by rebutting the claim of special treatment - but by pointing to the need for such treatment:

"The very discrimination it makes between 'destitute and suffering' negroes, and destitute and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection." *Id.*, at App. 75 (remarks of Rep. Phelps).

Despite the objection to the special treatment the bill would provide for Negroes, it was passed by Congress. *Id.*, at 421, 688. President Johnson vetoed this bill and also a subsequent bill that contained some modifications; one of his principal objections to both bills was that they gave special benefits to Negroes. 8 Messages and Papers of the Presidents 3596, 3599, 3620, 3623 (1897). Rejecting the concerns of the President and the bill's opponents, Congress overrode the President's second veto. *Cong. Globe*, 39th Cong., 1st Sess., 3842, 3850 (1866).

Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. It "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color," to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.

## B

As has been demonstrated in our joint opinion, this Court's past cases establish the constitutionality of race-conscious remedial measures. Beginning with the school desegregation cases, we recognized that even absent a judicial or legislative finding of constitutional violation, a school board constitutionally could consider the race of students in making school-assignment decisions. We noted, moreover, that a

"flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann*, the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful as starting points in shaping a remedy. An absolute prohibition against use of such a device - even as a starting point - contravenes the implicit command of *Green v. Country School Board*, 391 U.S. 430

(1968), that all reasonable methods be available to formulate an effective remedy." Board of Education v. Swann, 402 U.S. 43, 46 (1971).

As we have observed, "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes."

Only last Term, in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), we upheld a New York reapportionment plan that was deliberately drawn on the basis of race to enhance the electoral power of Negroes and Puerto Ricans; the plan had the effect of diluting the electoral strength of the Hasidic Jewish community. We were willing in *UJO* to sanction the remedial use of a racial classification even though it disadvantaged otherwise "innocent" individuals. In another case last Term, *Califano v. Webster*, 430 U.S. 313 (1977), the Court upheld a provision in the Social Security laws that discriminated against men because its purpose was "the permissible one of redressing our society's longstanding disparate treatment of women." *Id.*, at 317, quoting *Califano v. Goldfarb*, 430 U.S. 199, 209 n. 8 (1977) (plurality opinion). We thus recognized the permissibility of remedying past societal discrimination through the use of otherwise disfavored classifications.

Nothing in those cases suggests that a university cannot similarly act to remedy past discrimination. It is true that in both *UJO* and *Webster* the use of the disfavored classification was predicated on legislative or administrative action, but in neither case had those bodies made findings that there had been constitutional violations or that the specific individuals to be benefited had actually been the victims of discrimination. Rather, the classification in each of those cases was based on a determination that the group was in need of the remedy because of some type of past discrimination. There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of that discrimination.

#### IV

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to

remedy the effects of past discrimination. In the Civil Rights Cases, *supra*, the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." We cannot in light of the history of the last century yield to that view. Had the Court in that decision and others been willing to "do for human liberty and the fundamental rights of American citizenship, what it did . . . for the protection of slavery and the rights of the masters of fugitive slaves," we would not need now to permit the recognition of any "special wards."

Most importantly, had the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the "Constitution is color-blind" appeared only in the opinion of the lone dissenter. The majority of the Court rejected the principle of color blindness, and for the next 60 years, from *Plessy* to *Brown v. Board of Education*, ours was a Nation where, by law, an individual could be given "special" treatment based on the color of his skin.

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.

It has been said that this case involves only the individual, Bakke, and this University. I doubt, however, that there is a computer capable of determining the number of persons and institutions that may be affected by the decision in this case. For example, we are told by the Attorney General of the United States that at least 27 federal agencies have adopted regulations requiring recipients of federal funds to take "affirmative action to overcome the effects of conditions which resulted in limiting participation . . . by persons of a particular race, color, or national origin." Supplemental Brief for United States as Amicus Curiae 16 (emphasis added). I cannot even guess the number of state and local governments that have set up affirmative-action programs, which may be affected by today's decision.

I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the Civil Rights Cases and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. Now, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.

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Side Bar:





Allan Bakke was born in 1940. He received his bachelor's degree in Engineering from the University of Minnesota. He then served 4 years with the U.S. Marines in Vietnam. After returning from home, he obtained a masters degree from Stanford. He got a job with NASA near San Francisco. At NASA he was involved with testing the effects of weightlessness and radiation on animals. This work increased his interest in medicine. In 1972, he applied for admission into medical school at the University of California, Davis. His MCAT score was above the 90th percentile in 3 out of 4 categories. UC Davis admitted 100 students in medical school every year. They "reserved" 16 seats for "economically or educationally disadvantaged" candidates. He had a lesser score than those in the general admission pool. He reapplied in 1973 and was rejected.

Bakke had been rejected from 13 medical schools due to his age (34). According to the state Medical Examiners Board, the Minneapolis native earned his medical degree June 18, 1982, from the University of California Medical School at Davis. He served a four-year residency at the Mayo Clinic and was licensed to practice medicine in Minnesota in 1983. Bakke was married and had 3 children. He is now practicing as an anesthesiologist in Rochester, Minnesota.

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Side Bar II: In another controversial Supreme Court ruling, *Grutter v. Bollinger*, the majority ruled in favor of an affirmative action admissions policy at the University of Michigan Law School. The majority included Justices O'Connor, Stevens, Souter, Ginsburg and Breyer. The four dissenters were Chief Justice Rehnquist, and Justices Scalia, Kennedy and Thomas.

Justice O'Connor wrote that the United States Constitution "does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." The Court held that the law school's interest in obtaining a "critical mass" of minority students was indeed a "tailored use. The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

While the opinion did not give a deadline for affirmative action of 25 years (which ends 2028) it clearly recognized the use of affirmative action as a remedy without describing what the wrong was that was being remedied. For many the 25 years is viewed as a hard and fast year that all affirmative action would be eliminated. See 539 U.S. 306 (2003).

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## Racism and America Are One

Before I speak to people I like for them to know a little something about me personally so that they might better understand what I say and why I say what I say. In order to do so this morning I would like to share with you a discourse I penned on June 28, 1978. June 28, 1978 is important because it was on that day that the U.S. Supreme Court issued its opinion in the *Bakke v. University of California Board of Regents* case. This decision was the first major judicial blow to affirmative action.

(June 28, 1878)

### America Will Always Be Racist

The evening is warm but pleasant, the temperature is in the mid 80's but it's not unusually hot in this large southwestern city. A young black male about the age of six stands on a street corner in the heart of the business district, awaiting the arrival of the next bus which will take him away from all these foreign surroundings and back to the warmth of his home.

As he stands, his eyes wander in total amazement. The bright lights seem to be dancing against the clouds. The buildings seem to sprout from the ground which surrounds them and continues skyward for infinity. This is a structurally beautiful city and as this small human stands surveying another wonderful creation of man, his body is filled with happiness and joy. For he is thinking not of the past, not even of the present, but he thinks only of the future and the brightness which only the future can hold.

His beautiful state of suspension is suddenly broken by the unpleasant sound and the foul odor of the arrival of the bus. Not being in much of a hurry, he patiently awaits as all the others, who have until now gone unnoticed, board the vehicle. Sensing that it is time to move or be left standing on the sidewalk, he quickly springs on board with one powerful motion. Never bothering to touch the intermediate steps but instead going from the sidewalk directly to the top.

His eyes quickly scan the interior of the bus and he thinks to himself that this is a pleasant way to travel. Being young and without responsibility he seems undisturbed about the long periods of time bus riders must wait until "their" bus arrives. But the bus is clean and comfortable and to him this is pleasant. Almost immediately he realizes that the bus is crowded and initially it appears to him that all the seats are taken. But just as he is preparing himself for a long stand during his ride home, he spots an empty seat just behind the driver. He moves his small body slowly in the direction of the empty seat and smoothly turns and slides himself into it.

At the precise moment that his body touches the bus seat, the young boy suddenly feels his skin being penetrated by the heat transmitted by the eyes of those surrounding him. He wants to hide but there is no place to go. He feels frightened by he knows not why. He searches his body in

order to insure himself that there have been no strange physical changes without his knowledge. He searches his dress to make sure that his fly isn't open or that there are no previously undisclosed flaws in his clothing. Having eliminated both of these possibilities the young boy quietly settles back into his seat for the long frightening ride home. This one-hour episode will be recalled time and time again by the young boy both during adolescence and adulthood. For during the remainder of his life he will never be able to forget that day on the bus and all those hate-filled eyes which seemed to wish him death.

It would be some two to three years before the young boy would be able to understand what happened to him that day on the bus. Before he would learn that there were black people and that there were white people and that in America, people would be judged "only" by the color of their skin. Yes, some two to three years before he would realize that in the southern part of America even little black boys were expected to take seats in the *back* of the bus.

On June 28, 1978 a black man sits in his office overlooking downtown Syracuse, NY. His mind wonders, he is confused, he is sad, he is angry. He thinks of a day some 28 years ago on a bus in a southern city. He thinks of his segregated educational experience. He thinks of the civil war, he thinks of *Brown v. Board of Education*, he thinks of the sixties, he thinks of riots, *he thinks of the U.S. Supreme Court which on this day made public its decision in Bakke v. University of California Board of Regents*, and lastly, he thinks of the racist American society which made all his prior thoughts necessary.

The experience on the bus was my first known encounter with racism. It is an experience I try never to forget. For it is an experience that fueled by drive for continued success. My fight is forever because my fight is against racism.

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***Batson v. Kentucky***  
**476 U.S. 79 (1985)**

Syllabus

During the criminal trial in a Kentucky state court of petitioner, a black man, the judge conducted *voir dire* examination of the jury venire and excused certain jurors for cause. The prosecutor then used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross-section of the community, and under the Fourteenth Amendment to equal protection of the laws. Without expressly ruling on petitioner's request for a hearing, the trial judge denied the motion, and the jury ultimately convicted petitioner. Affirming the conviction, the Kentucky Supreme Court observed that recently, in another case, it had relied on *Swain v. Alabama*, 380 U.S. 202, and had

held that a defendant alleging lack of a fair cross-section must demonstrate systematic exclusion of a group of jurors from the venire.

*Held:*

1. The principle announced in *Strauder v. West Virginia*, 100 U.S. 303, that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded, is reaffirmed.

(a) A defendant has no right to a petit jury composed in whole or in part of persons of his own race. *Strauder v. West Virginia*, 100 U.S. 303, 305. However, the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

(b) The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury. Although a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

2. The portion of *Swain v. Alabama*, *supra*, concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through the State's discriminatory use of peremptory challenges is rejected. In *Swain*, it was held that a black defendant could make out a *prima facie* case of purposeful discrimination on proof that the peremptory challenge system as a whole was being perverted. Evidence offered by the defendant in *Swain* did not meet that standard, because it did not demonstrate the circumstances under which prosecutors in the jurisdiction were responsible for striking black jurors beyond the facts of the defendant's case. This evidentiary formulation is inconsistent with equal protection standards subsequently developed in decisions relating to selection of the jury venire. A defendant may make a *prima facie* showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case.

3. A defendant may establish a *prima facie* case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. The defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an

inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race. Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a *prima facie* showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections.

4. While the peremptory challenge occupies an important position in trial procedures, the above-stated principles will not undermine the contribution that the challenge generally makes to the administration of justice. Nor will application of such principles create serious administrative difficulties.

5. Because the trial court here flatly rejected petitioner's objection to the prosecutor's removal of all black persons on the venire without requiring the prosecutor to explain his action, the case is remanded for further proceedings.

*Reversed and remanded.* [all citations to transcript omitted]

JUSTICE MARSHALL, concurring.

I join JUSTICE POWELL's eloquent opinion for the Court, which takes a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries. The Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by" and be flouted in case after case before a remedy is available. I nonetheless write separately to express my views. The decision today will not end the racial discrimination that peremptories inject into the jury selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

## I

A little over a century ago, this Court invalidated a state statute providing that black citizens could not serve as jurors. *Strauder West Virginia*, 100 U.S. 303 (1880). State officials then turned to somewhat more subtle ways of keeping blacks off jury venires. [citations omitted] Although the means used to exclude blacks have changed, the same pernicious consequence has continued.

Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive. [citations omitted] Prosecutors have explained to courts that they routinely strike black jurors, *see State v. Washington*, 375 So.2d 1162, 1163-1164 (La.1979). An instruction book used by the prosecutor's office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate "any member of a minority group." In 100 felony trials in Dallas County in 1983-1984,

prosecutors peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white.

The Court's discussion of the utter unconstitutionality of that practice needs no amplification. This Court explained more than a century ago that "in the selection of jurors to pass upon [a defendant's] life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color."

*Neal v. Delaware*, 103 U.S. 370, 394 (1881), quoting *Virginia v. Rives*, 100 U.S. 313, 323 (1880). JUSTICE REHNQUIST, dissenting, concedes that exclusion of blacks from a jury, solely because they are black, is at best based upon "crudely stereotypical and . . . in many cases hopelessly mistaken" notions. Yet the Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes -- even an action that does not serve the State's interests. Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks lack the "intelligence, experience, or moral integrity," *Neal, supra*, at 397, to be entrusted with that role.

## II

I wholeheartedly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries on the basis of their race violates the Equal Protection Clause. I would go further, however, in fashioning a remedy adequate to eliminate that discrimination. Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.

Evidentiary analysis similar to that set out by the Court *ante* at 97-98 has been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the limitations of the approach. First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a *prima facie* case. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. *See Commonwealth v. Robinson*, 382 Mass. 189, 195, 415 N.E.2d 805, 809-810 (1981) (no *prima facie* case of discrimination where defendant is black, prospective jurors include three blacks and one Puerto Rican, and prosecutor excludes one for cause and strikes the remainder peremptorily, producing all-white jury); *People v. Rousseau*, 129 Cal.App.3d 526, 536-537, 179 Cal.Rptr. 892, 897-898 (1982) (no *prima facie* case where prosecutor peremptorily strikes only two blacks on jury panel). Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an "acceptable" level.

Second, when a defendant can establish a *prima facie* case, trial courts face the difficult burden of assessing prosecutors' motives. *See King v. County of Nassau*, 581 F.Supp. 493, 501-502 (EDNY 1984). Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as



defendant, *see People v. Hall*, 35 Cal.3d 161, 672 P.2d 854 (1983), or seemed "uncommunicative," *King, supra*, at 498, or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case," *Hall, supra*, at 165, 672 P.2d at 856? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King, supra*, at 502. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As JUSTICE REHNQUIST concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. *Post* at 138; *see also* THE CHIEF JUSTICE's dissenting opinion, *post* at 123. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels -- a challenge I doubt all of them can meet. It is worth remembering that 114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole.

### III

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. *See Van Dyke*, at 167-169; Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 *Loyola (LA) L.Rev.* 247, 269-270 (1973). Justice Goldberg, dissenting in *Swain*, emphasized that [w]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.

I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases.

Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as "essential to the fairness of trial by jury," *Lewis v. United States*, 146 U.S. 370, 376 (1892), and "one of the most important of the rights secured to the accused," *Pointer v. United States*, 151 U.S. 396, 408 (1894). *See Van Dyke*, at 167; Brown, McGuire, & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 *New England L.Rev.* 192 (1978). I would not find that an acceptable solution. Our criminal justice system requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state, the scales are to be evenly held.

We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well.

Much ink has been spilled regarding the historic importance of defendants' peremptory challenges. The approving comments of the *Lewis* and *Pointer* Courts are noted above; the *Swain* Court emphasized the "very old credentials" of the peremptory challenge, 380 U.S. at 212, and cited the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Id.* at 219. But this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. [citations omitted] The potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.

I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause, and I join the Court's opinion. However, only by banning peremptories entirely can such discrimination be ended.

Side Bar: On July 10, 2018, Judge Brett Kavanaugh was officially nominated to fill the seat of retired Justice Anthony Kennedy when his nomination was sent to the United States Senate. In 1989, Kavanaugh wrote a note titled Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings and published in 99 Yale L.J. 187 (1989).

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### *Gratz v. Bollinger*

*539 U.S. 244 (2003)*

**\*\*2413 \*244** *Syllabus* \*

Petitioners Gratz and Hamacher, both of whom are Michigan residents and Caucasian, applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) in 1995 and 1997, respectively. Although the LSA considered Gratz to be well qualified and Hamacher to be within the qualified range, both were denied early admission and were ultimately denied admission. In order to promote consistency in the **\*\*2414** review of the many applications received, the University's Office of Undergraduate Admissions (OUA) uses written guidelines for each academic year. The guidelines have changed a number of times during the period relevant to this litigation. The OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race. During all relevant periods, the University has considered African-Americans, Hispanics, and Native Americans to

be “underrepresented minorities,” and it is undisputed that the University admits virtually every qualified applicant from these groups. The current guidelines use a selection method under which every applicant from an underrepresented racial or ethnic minority group is automatically awarded 20 points of the 100 needed to guarantee admission.

**Petitioners** filed this class action alleging that the University's use of racial preferences in undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981. They sought compensatory and punitive damages for past violations, declaratory relief finding that respondents violated their rights to nondiscriminatory treatment, an injunction prohibiting respondents from continuing to discriminate on the basis of race, and an order requiring the LSA to offer Hamacher admission as a transfer student. The District Court granted petitioners' motion to certify a class consisting of individuals who applied for and were denied admission to the LSA for academic year 1995 and forward and who are members of racial or ethnic groups that respondents treated less favorably on the basis of race. Hamacher, whose claim was found to challenge racial discrimination on a classwide basis, was designated as the class representative. On cross-motions for summary judgment, respondents relied on Justice Powell's principal opinion in *Regents of \*245 Univ. of Cal. v. Bakke*, 438 U.S. 265, 317, 98 S.Ct. 2733, 57 L.Ed.2d 750, which expressed the view that the consideration of race as a factor in admissions might in some cases serve a compelling government interest. Respondents contended that the LSA has just such an interest in the educational benefits that result from having a racially and ethnically diverse student body and that its program is narrowly tailored to serve that interest. The court agreed with respondents as to the LSA's current admissions guidelines and granted them summary judgment in that respect. However, the court also found that the LSA's admissions guidelines for 1995 through 1998 operated as the functional equivalent of a quota running afoul of Justice Powell's *Bakke* opinion, and thus granted petitioners summary judgment with respect to respondents' admissions programs for those years. While interlocutory appeals were pending in the Sixth Circuit, that court issued an opinion in *Grutter v. Bollinger*, *ante*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 upholding the admissions program used by the University's Law School. This Court granted certiorari in both cases, even though the Sixth Circuit had not yet rendered judgment in this one.

*Held:*

1. Petitioners have standing to seek declaratory and injunctive relief. The Court rejects Justice STEVENS' contention that, because Hamacher did not actually apply for admission as a transfer student, his future injury claim is at best conjectural or hypothetical rather than real and immediate. The “injury in fact” necessary to establish standing in this type of case is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586. In the face of such a barrier, to establish standing, a party need only demonstrate that it is able and ready to perform and that a discriminatory \*\*2415 policy prevents it from doing so on an equal basis. *Ibid.* In bringing his equal protection challenge against the University's use of race in undergraduate admissions, Hamacher alleged that the University had denied him the opportunity to compete for admission on an equal basis. Hamacher was denied admission to the University as a freshman applicant even

though an underrepresented minority applicant with his qualifications would have been admitted. After being denied admission, Hamacher demonstrated that he was “able and ready” to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race. Also rejected is Justice STEVENS' contention that such use in undergraduate transfer admissions differs from the University's use of race in undergraduate freshman admissions, so that Hamacher lacks standing to represent absent class members challenging the latter. Each year the OUA produces a document setting forth \*246 guidelines for those seeking admission to the LSA, including freshman and transfer applicants. The transfer applicant guidelines specifically cross-reference factors and qualifications considered in assessing freshman applicants. In fact, the criteria used to determine whether a transfer applicant will contribute to diversity are *identical* to those used to evaluate freshman applicants. The *only* difference is that all underrepresented minority freshman applicants receive 20 points and “virtually” all who are minimally qualified are admitted, while “generally” all minimally qualified minority transfer applicants are admitted outright. While this difference might be relevant to a narrow tailoring analysis, it clearly has no effect on petitioners' standing to challenge the University's use of race in undergraduate admissions and its assertion that diversity is a compelling state interest justifying its consideration of the race of its undergraduate applicants. See *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159, 102 S.Ct. 2364, 72 L.Ed.2d 740; *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534, distinguished. The District Court's carefully considered decision to certify this class action is correct. Cf. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351. Hamacher's personal stake, in view of both his past injury and the potential injury he faced at the time of certification, demonstrates that he may maintain the action. Pp. 2422–2426.

2. Because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted interest in diversity, the policy violates the Equal Protection Clause. For the reasons set forth in *Grutter v. Bollinger*, *ante*, 539 U.S., at 327–333, 123 S.Ct. 2325, 2003 WL 21433492, the Court has today rejected petitioners' argument that diversity cannot constitute a compelling state interest. However, the Court finds that the University's current policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single “underrepresented minority” applicant solely because of race, is not narrowly tailored to achieve educational diversity. In *Bakke*, Justice Powell explained his view that it would be permissible for a university to employ an admissions program in which “race or ethnic background may be deemed a ‘plus’ in a particular applicant's file.” 438 U.S., at 317, 98 S.Ct. 2733. He emphasized, however, the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. See *id.*, at 315, 98 S.Ct. 2733. The current LSA policy does \*\*2416 not provide the individualized consideration Justice Powell contemplated. The only consideration that accompanies the 20–point automatic distribution to all applicants from underrepresented minorities is a factual review to determine whether an individual is a member \*247 of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a “particular black applicant” could be considered without being decisive, see *id.*, at 317, 98

S.Ct. 2733, the LSA's 20-point distribution has the effect of making “the factor of race ... decisive” for virtually every minimally qualified underrepresented minority applicant, *ibid.* The fact that the LSA has created the possibility of an applicant's file being flagged for individualized consideration only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell.

The record does not reveal precisely how many applications are flagged, but it is undisputed that such consideration is the exception and not the rule in the LSA's program. Also, this individualized review is only provided after admissions counselors automatically distribute the University's version of a “plus” that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant. The Court rejects respondents' contention that the volume of applications and the presentation of applicant information make it impractical for the LSA to use the admissions system upheld today in *Grutter*. The fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508, 109 S.Ct. 706, 102 L.Ed.2d 854. Nothing in Justice Powell's *Bakke* opinion signaled that a university may employ whatever means it desires to achieve diversity without regard to the limits imposed by strict scrutiny. Pp. 2426–2430.

3. Because the University's use of race in its current freshman admissions policy violates the Equal Protection Clause, it also violates Title VI and § 1981. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 281, 121 S.Ct. 1511, 149 L.Ed.2d 517; *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375, 389–390, 102 S.Ct. 3141, 73 L.Ed.2d 835. Accordingly, the Court reverses that portion of the District Court's decision granting respondents summary judgment with respect to liability. Pp. 2430–2431.

Reversed in part and remanded.

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### *Grutter v. Bollinger*

539 U.S. 306 (2003)

**\*\*2327 \*306 Syllabus \***

The University of Michigan Law School (Law School), one of the Nation's top law schools, follows an official admissions policy that seeks to achieve student body diversity through compliance with *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750. Focusing on students' academic ability coupled with a flexible assessment of their talents, experiences, and potential, the policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, an essay describing how the applicant will contribute to Law School life and diversity, and the applicant's undergraduate grade **\*\*2328** point average (GPA) and Law School Admission Test (LSAT) score. Additionally, officials must look beyond grades and



scores to so-called “soft variables,” such as recommenders' enthusiasm, the quality of the undergraduate institution and the applicant's essay, and the areas and difficulty of undergraduate course selection. The policy does not define diversity solely in terms of racial and ethnic status and does not restrict the types of diversity contributions eligible for “substantial weight,” but it does reaffirm the Law School's commitment to diversity with special reference to the inclusion of African–American, Hispanic, and Native– American students, who otherwise might not be represented in the student body in meaningful numbers. By enrolling a “critical mass” of underrepresented minority students, the policy seeks to ensure their ability to contribute to the Law School's character and to the legal profession.

When the Law School denied admission to petitioner Grutter, a white Michigan resident with a 3.8 GPA and 161 LSAT score, she filed this suit, alleging that respondents had discriminated against her on the basis of race in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981; that she was rejected because the Law School uses race as a “predominant” factor, giving applicants belonging to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups; and that respondents had no compelling interest to justify that use of race. The District Court found the Law School's use of race as an admissions factor unlawful. The Sixth Circuit reversed, holding that Justice Powell's opinion in *Bakke* was binding precedent establishing \*307 diversity as a compelling state interest, and that the Law School's use of race was narrowly tailored because race was merely a “potential ‘plus’ factor” and because the Law School's program was virtually identical to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion.

*Held:* The Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or § 1981. Pp. 2335–2347.

(a) In the landmark *Bakke* case, this Court reviewed a medical school's racial set-aside program that reserved 16 out of 100 seats for members of certain minority groups. The decision produced six separate opinions, none of which commanded a majority. Four Justices would have upheld the program on the ground that the government can use race to remedy disadvantages cast on minorities by past racial prejudice. 438 U.S., at 325, 98 S.Ct. 2733. Four other Justices would have struck the program down on statutory grounds. *Id.*, at 408, 98 S.Ct. 2733. Justice Powell, announcing the Court's judgment, provided a fifth vote not only for invalidating the program, but also for reversing the state court's injunction against any use of race whatsoever. In a part of his opinion that was joined by no other Justice, Justice Powell expressed his view that attaining a diverse student body was the only interest asserted by the university that survived scrutiny. *Id.*, at 311, 98 S.Ct. 2733. Grounding his analysis in the academic freedom that “long has been viewed as a special concern of the First Amendment,” *id.*, at 312, 314, 98 S.Ct. 2733, Justice Powell emphasized that the “ ‘nation's future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation.” *Id.*, at 313, 98 S.Ct. 2733. However, he also emphasized that “[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups,” that can justify using race. *Id.*, at 315, 98 S.Ct. 2733. Rather, “[t]he diversity that furthers a compelling state interest encompasses a far broader \*\*2329 array of



qualifications and characteristics of which racial or ethnic origin is but a single though important element.” *Ibid.* Since *Bakke*, Justice Powell's opinion has been the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views. Courts, however, have struggled to discern whether Justice Powell's diversity rationale is binding precedent. The Court finds it unnecessary to decide this issue because the Court endorses Justice Powell's view that student body diversity is a compelling state interest in the context of university admissions. Pp. 2335–2337.

**\*308** b) All government racial classifications must be analyzed by a reviewing court under strict scrutiny. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158. But not all such uses are invalidated by strict scrutiny. Race-based action necessary to further a compelling governmental interest does not violate the Equal Protection Clause so long as it is narrowly tailored to further that interest. *E.g., Shaw v. Hunt*, 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207. Context matters when reviewing such action. See *Gomillion v. Lightfoot*, 364 U.S. 339, 343–344, 81 S.Ct. 125, 5 L.Ed.2d 110. Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the government's reasons for using race in a particular context. Pp. 2337–2338.

(c) The Court endorses Justice Powell's view that student body diversity is a compelling state interest that can justify using race in university admissions. The Court defers to the Law School's educational judgment that diversity is essential to its educational mission. The Court's scrutiny of that interest is no less strict for taking into account complex educational judgments in an area that lies primarily within the university's expertise. See, *e.g., Bakke*, 438 U.S., at 319, n. 53, 98 S.Ct. 2733 (opinion of Powell, J.). Attaining a diverse student body is at the heart of the Law School's proper institutional mission, and its “good faith” is “presumed” absent “a showing to the contrary.”

*Id.*, at 318–319, 98 S.Ct. 2733. minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional. *E.g., id.*, at 307, 98 S.Ct. 2733. But the Law School defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes. The Law School's claim is further bolstered by numerous expert studies and reports showing that such diversity promotes learning outcomes and better prepares students for an increasingly diverse work force, for society, and for the legal profession. Major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security. Moreover, because universities, and in particular, law schools, represent the training ground for a large number of the Nation's leaders, *Sweatt v. Painter*, 339 U.S. 629, 634, 70 S.Ct. 848, 94 L.Ed. 1114, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity. Thus, the Law School has a compelling interest in attaining a diverse student body. Pp. 2338–2341.

**\*309** d) The Law School's admissions program bears the hallmarks of a narrowly tailored plan. To be narrowly tailored, a race-conscious admissions program cannot “insulat[e] each category of applicants with certain desired qualifications from **\*\*2330** competition with all other applicants.” *Bakke*, 438 U.S., at 315, 98 S.Ct. 2733 (opinion of Powell, J.). Instead, it may consider race or ethnicity only as a “ ‘plus’ in a particular applicant's file”; *i.e.*, it must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight,” *id.*, at 317, 98 S.Ct. 2733. It follows that universities cannot establish quotas for members of certain racial or ethnic groups or put them on separate admissions tracks. See *id.*, at 315–316, 98 S.Ct. 2733. The Law School's admissions program, like the Harvard plan approved by Justice Powell, satisfies these requirements. Moreover, the program is flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application.

See *id.*, at 317, 98 S.Ct. 2733. The Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single “soft” variable. *Gratz v. Bollinger*, *post*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, 2003 WL 21434002, distinguished. Also, the program adequately ensures that all factors that may contribute to diversity are meaningfully considered alongside race. Moreover, the Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. The Court rejects the argument that the Law School should have used other race-neutral means to obtain the educational benefits of student body diversity, *e.g.*, a lottery system or decreasing the emphasis on GPA and LSAT scores. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative or mandate that a university choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See, *e.g.*, *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260. The Court is satisfied that the Law School adequately considered the available alternatives. The Court is also satisfied that, in the context of individualized consideration of the possible diversity contributions of each applicant, the Law School's race-conscious admissions program does not unduly harm nonminority applicants. Finally, race-conscious admissions policies must be limited in time. The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial **\*310** preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. Pp. 2341–2347.

(e) Because the Law School's use of race in admissions decisions is not prohibited by the Equal Protection Clause, petitioner's statutory claims based on Title VI and § 1981 also fail. See *Bakke*, *supra*, at 287, 98 S.Ct. 2733 (opinion of Powell, J.); *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389–391, 102 S.Ct. 3141, 73 L.Ed.2d 835. P. 2347. 288 F.3d 732, affirmed.

## Opinion

### \*312 I A

The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class \*313 of around 350 students. Seeking to “admit a group of students who individually and collectively are among the most capable,” the Law School looks for individuals with “substantial \*314 promise for success in law school” and “a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others.” App. 110. More broadly, the Law School seeks “a mix of students with varying backgrounds and experiences who will respect and learn from each other.” *Ibid.* In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admissions. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). \*315 Upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential “to contribute to the learning of those around them.” App. 111. The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, \*\*2332 and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. *Id.*, at 83– 84, 114–121. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. *Id.*, at 112. The policy stresses that “no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems.” *Id.*, at 111.

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. *Id.*, at 113. Nor does a low score automatically disqualify an applicant. *Ibid.* Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. *Id.*, at 114. So-called “ ‘soft’ variables” such as “the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection” are all brought to bear in assessing an “applicant's likely contributions to the intellectual and social life of the institution.” *Ibid.*

The policy aspires to “achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts.” *Id.*, at 118. \*316 The policy does not restrict the types of diversity contributions eligible for “substantial weight” in the admissions process, but instead recognizes “many possible bases for diversity admissions.” *Id.*, at 118, 120. The policy does, however, reaffirm the Law School's longstanding commitment to “one particular type of diversity,” that is, “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African– Americans, Hispanics and Native Americans, who without this

commitment might not be represented in our student body in meaningful numbers.” *Id.*, at 120. By enrolling a “‘critical mass’ of [underrepresented] minority students,” the Law School seeks to “ensur[e] their ability to make unique contributions to the character of the Law School.” *Id.*, at 120– 121.

The policy does not define diversity “solely in terms of racial and ethnic status.” *Id.*, at 121. Nor is the policy “insensitive to the competition among all students for admission to the [L]aw [S]chool.” *Ibid.* Rather, the policy seeks to guide admissions officers in “producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession.” *Ibid.*

## B

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 GPA and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the Law School, the Regents of the University of Michigan, Lee Bollinger (Dean of the Law School from 1987 to 1994, and President of the University of Michigan from 1996 to 2002), Jeffrey Lehman (Dean of the Law School), and Dennis Shields (Director of Admissions at the Law School from 1991 \*317 until 1998). Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d; and Rev. Stat. § 1977, as amended, 42 U.S.C. § 1981.

Petitioner further alleged that her application was rejected because the Law School uses race as a “predominant” factor, \*\*2333 giving applicants who belong to certain minority groups “a significantly greater chance of admission than students with similar credentials from disfavored racial groups.” App. 33–34. Petitioner also alleged that respondents “had no compelling interest to justify their use of race in the admissions process.” *Id.*, at 34. Petitioner requested compensatory and punitive damages, an order requiring the Law School to offer her admission, and an injunction prohibiting the Law School from continuing to discriminate on the basis of race. *Id.*, at 36. Petitioner clearly has standing to bring this lawsuit. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993).

The District Court granted petitioner's motion for class certification and for bifurcation of the trial into liability and damages phases. The class was defined as “ ‘all persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School.’ ” App. to Pet. for Cert. 191a–192a.

The District Court heard oral argument on the parties' cross-motions for summary judgment on December 22, 2000. Taking the motions under advisement, the District Court indicated that it would decide as a matter of law whether the Law School's asserted interest in obtaining the educational benefits that flow from a diverse student body was compelling. \*318 The District

Court also indicated that it would conduct a bench trial on the extent to which race was a factor in the Law School's admissions decisions, and whether the Law School's consideration of race in admissions decisions constituted a race-based double standard.

During the 15-day bench trial, the parties introduced extensive evidence concerning the Law School's use of race in the admissions process. Dennis Shields, Director of Admissions when petitioner applied to the Law School, testified that he did not direct his staff to admit a particular percentage or number of minority students, but rather to consider an applicant's race along with all other factors. *Id.*, at 206a. Shields testified that at the height of the admissions season, he would frequently consult the so-called “daily reports” that kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender). *Id.*, at 207a. This was done, Shields testified, to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body. *Ibid.* Shields stressed, however, that he did not seek to admit any particular number or percentage of underrepresented minority students. *Ibid.*

Erica Munzel, who succeeded Shields as Director of Admissions, testified that “ ‘critical mass’ ” means “ ‘meaningful numbers’ ” or “ ‘meaningful representation,’ ” which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. *Id.*, at 208a–209a. Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass. *Id.*, at 209a. Munzel also asserted that she must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores. *Ibid.*

The current Dean of the Law School, Jeffrey Lehman, also testified. Like the other Law School witnesses, Lehman did **\*319** not quantify critical mass in terms of numbers or percentages. *Id.*, at 211a. He indicated that critical mass means numbers **\*\*2334** such that underrepresented minority students do not feel isolated or like spokespersons for their race. *Ibid.* When asked about the extent to which race is considered in admissions, Lehman testified that it varies from one applicant to another. *Ibid.* In some cases, according to Lehman's testimony, an applicant's race may play no role, while in others it may be a “ ‘determinative’ ” factor. *Ibid.*

The District Court heard extensive testimony from Professor Richard Lempert, who chaired the faculty committee that drafted the 1992 policy. Lempert emphasized that the Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom. *Id.*, at 213a. When asked about the policy's “ ‘commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against,’ ” Lempert explained that this language did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination. *Ibid.* Lempert acknowledged that other groups, such as Asians and Jews, have experienced discrimination, but explained they were not mentioned in the policy because individuals who are members of those groups were already being admitted to the Law School in significant numbers. *Ibid.*



Kent Syverud was the final witness to testify about the Law School's use of race in admissions decisions. Syverud was a professor at the Law School when the 1992 admissions policy was adopted and is now Dean of Vanderbilt Law School. In addition to his testimony at trial, Syverud submitted several expert reports on the educational benefits of diversity. Syverud's testimony indicated that when a critical mass of underrepresented minority students is present, \*320 racial stereotypes lose their force because nonminority students learn there is no “ ‘minority viewpoint’ ” but rather a variety of viewpoints among minority students. *Id.*, at 215a.

In an attempt to quantify the extent to which the Law School actually considers race in making admissions decisions, the parties introduced voluminous evidence at trial. Relying on data obtained from the Law School, petitioner's expert, Dr. Kinley Larntz, generated and analyzed “admissions grids” for the years in question (1995–2000). These grids show the number of applicants and the number of admittees for all combinations of GPAs and LSAT scores. Dr. Larntz made “ ‘cell-by-cell’ ” comparisons between applicants of different races to determine whether a statistically significant relationship existed between race and admission rates. He concluded that membership in certain minority groups “ ‘is an extremely strong factor in the decision for acceptance,’ ” and that applicants from these minority groups “ ‘are given an extremely large allowance for admission’ ” as compared to applicants who are members of nonfavored groups. *Id.*, at 218a–220a. Dr. Larntz conceded, however, that race is not the predominant factor in the Law School's admissions calculus. 12 Tr. 11–13 (Feb. 10, 2001).

Dr. Stephen Raudenbush, the Law School's expert, focused on the predicted effect of eliminating race as a factor in the Law School's admission process. In Dr. Raudenbush's view, a race-blind admissions system would have a “ ‘very dramatic,’ ” negative effect on underrepresented minority admissions. App. to Pet. for Cert. 223a. He testified that in 2000, 35 percent of underrepresented minority applicants were admitted. *Ibid.* Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. *Ibid.* Under this scenario, underrepresented minority students would have constituted 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent. *Ibid.*

**\*\*2335 \*321** In the end, the District Court concluded that the Law School's use of race as a factor in admissions decisions was unlawful. Applying strict scrutiny, the District Court determined that the Law School's asserted interest in assembling a diverse student body was not compelling because “the attainment of a racially diverse class ... was not recognized as such by *Bakke* and it is not a remedy for past discrimination.” *Id.*, at 246a. The District Court went on to hold that even if diversity were compelling, the Law School had not narrowly tailored its use of race to further that interest. The District Court granted petitioner's request for declaratory relief and enjoined the Law School from using race as a factor in its admissions decisions. The Court of Appeals entered a stay of the injunction pending appeal.

Sitting en banc, the Court of Appeals reversed the District Court's judgment and vacated the injunction. The Court of Appeals first held that Justice Powell's opinion in *Bakke* was binding precedent establishing diversity as a compelling state interest. According to the Court of Appeals, Justice Powell's opinion with respect to diversity constituted the controlling rationale for the judgment of this Court under the analysis set forth in *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). The Court of Appeals also held that the Law School's use of



race was narrowly tailored because race was merely a “potential ‘plus’ factor” and because the Law School's program was “virtually identical” to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion. 288 F.3d 732, 746, 749 (C.A.6 2002).

Four dissenting judges would have held the Law School's use of race unconstitutional. Three of the dissenters, rejecting the majority's *Marks* analysis, examined the Law School's interest in student body diversity on the merits and concluded it was not compelling. The fourth dissenter, writing separately, found it unnecessary to decide whether diversity was a compelling interest because, like the other dissenters, \*322 he believed that the Law School's use of race was not narrowly tailored to further that interest.

We granted certiorari, 537 U.S. 1043, 123 S.Ct. 617, 154 L.Ed.2d 514 (2002), to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities. Compare *Hopwood v. Texas*, 78 F.3d 932 (C.A.5 1996) (*Hopwood I*) (holding that diversity is not a compelling state interest), with *Smith v. University of Wash. Law School*, 233 F.3d 1188 (C.A.9 2000) (holding that it is).

## II A

We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to “remedy disadvantages cast on minorities by past racial prejudice.”

*Id.*, at 325, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds. *Id.*, at 408, 98 S.Ct. 2733 (opinion of STEVENS, J., joined by Burger, C. J., and Stewart and REHNQUIST, JJ., concurring in judgment in part and dissenting in part). Justice Powell provided a fifth vote not only for invalidating the set-aside program, but \*\*2336 also for reversing the state court's injunction against any use of race whatsoever. The only holding for the Court in *Bakke* was that a “State has a substantial interest that legitimately may be served by a properly devised admissions program involving \*323 the competitive consideration of race and ethnic origin.” *Id.*, at 320, 98 S.Ct. 2733. Thus, we reversed that part of the lower court's judgment that enjoined the university “from any consideration of the race of any applicant.” *Ibid.*

Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies. See, e.g., Brief for Judith Areen et al. as *Amici Curiae* 12–13 (law school admissions programs

employ “methods designed from and based on Justice Powell's opinion in *Bakke* ”); Brief for Amherst College et al. as *Amici Curiae* 27 (“After *Bakke*, each of the *amici* (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion ... and set sail accordingly”). We therefore discuss Justice Powell's opinion in some detail.

Justice Powell began by stating that “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.” *Bakke*, 438 U.S., at 289–290, 98 S.Ct. 2733. In Justice Powell's view, when governmental decisions “touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.” *Id.*, at 299, 98 S.Ct. 2733. Under this exacting standard, only one of the interests asserted by the university survived Justice Powell's scrutiny.

First, Justice Powell rejected an interest in “ ‘reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession’ ” as an unlawful interest in racial balancing. *Id.*, at 306– 307, 98 S.Ct. 2733. Second, Justice Powell rejected an interest in remedying societal discrimination \*324 because such measures would risk placing unnecessary burdens on innocent third parties “who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.” *Id.*, at 310, 98 S.Ct. 2733. Third, Justice Powell rejected an interest in “increasing the number of physicians who will practice in communities currently underserved,” concluding that even if such an interest could be compelling in some circumstances the program under review was not “geared to promote that goal.” *Id.*, at 306, 310, 98 S.Ct. 2733.

Justice Powell approved the university's use of race to further only one interest: “the attainment of a diverse student body.” *Id.*, at 311, 98 S.Ct. 2733. With the important provision that “constitutional limitations protecting individual rights may not be disregarded,” Justice Powell grounded his analysis in the academic freedom that “long has been viewed as a special concern of the First Amendment.” *Id.*, at 312, 314, 98 S.Ct. 2733. Justice Powell emphasized that nothing less than the “ ‘nation's future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.” *Id.*, at 313, 98 S.Ct. 2733 (quoting *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967)). In seeking the “right to select those students who will contribute the most to the ‘robust exchange of ideas,’ ” a university seeks “to achieve a goal that is of paramount importance in the fulfillment of its mission.” 438 U.S., at 313, 98 S.Ct. 2733. Both “tradition and experience lend support to \*\*2337 the view that the contribution of diversity is substantial.” *Ibid.*

Justice Powell was, however, careful to emphasize that in his view race “is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.” *Id.*, at 314, 98 S.Ct. 2733. For Justice Powell, “[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups,” that \*325 can justify the use of race. *Id.*, at 315, 98 S.Ct. 2733. Rather, “[t]he diversity that furthers a compelling state interest encompasses a far broader

array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” *Ibid.*

In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under *Marks*. In that case, we explained that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” 430 U.S., at 193, 97 S.Ct. 990 (internal quotation marks and citation omitted). As the divergent opinions of the lower courts demonstrate, however, “[t]his test is more easily stated than applied to the judgments on the narrowest grounds.” 430 U.S., at 193, 97 S.Ct. 990 (internal quotation marks and citation omitted). As the divergent opinions of the lower courts demonstrate, however, “[t]his test is more easily stated than applied to the various opinions supporting the result in [*Bakke*].” *Nichols v. United States*, 511 U.S. 738, 745–746, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). Compare, e.g., *Johnson v. Board of Regents of Univ. of Ga.*, 263 F.3d 1234 (C.A.11 2001) (Justice Powell's diversity rationale was not the holding of the Court); *Hopwood v. Texas*, 236 F.3d 256, 274–275 (C.A.5 2000) (*Hopwood II*) (same); *Hopwood I*, 78 F.3d 932 (C.A.5 1996) (same), with *Smith v. University of Wash. Law School*, 233 F.3d, at 1199 (Justice Powell's opinion, including the diversity rationale, is controlling under *Marks*).

We do not find it necessary to decide whether Justice Powell's opinion is binding under *Marks*. It does not seem “useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.” *Nichols v. United States*, *supra*, at 745–746, 114 S.Ct. 1921. More important, for the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

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### Equal Doesn't Mean Fair

In recent months much has been spoken and written about the terms

“Affirmative Action,” “Quotas,” “Goals,” “Timetables,” “Race-norming” and “Reverse discrimination.” The speakers and writers on the subject of race have been as varied as one can conceive.

They range from the top elected officials of this country to the homeless individuals sleeping on the streets of our cities. From the leaders of civil rights organizations to the students of some of our most noted law schools. And they all attempt to find some support in the constitution of the United States of the varied positions they have taken on the issue.

Each speaker or writer reviews the constitution as interpreted by the highest court in this country. And each tries to find in the judicial opinions of the Supreme Court some statement to support his or her position. This, I believe is wrong. The Supreme Court of the United States will not

correct the damages caused by past racial discrimination until “the people” of the United States believe the court should do so.

This is true because the Supreme Court does not decide what is “right.” Instead, it decides what is politically correct. How else does one explain that the same forum decided *Dred Scott* (Blacks have no rights), *Plessy v. Ferguson* (separate but equal) and *Brown v. Board of Education* (segregation is illegal)? The same forum that for almost 60 years found state -imposed segregation legal, now finds it illegal. The answer is simply that the political climate of the country changed. The court did not oppose state-imposed segregation at the turn of the century because the court did not believe the politics of this country desired such an outcome.

Variations in judicial decision can occur because the long-held belief by most, that lawyers and the courts reshape society, is untrue. Lawyers do not reshape society. Social Activists and politicians acting as social activists reshape society. Once this reshaping is put in motion, lawyers and judges describe in legal terms this new order and how conflicts will be resolved under it.

In other words, lawyers and courts do not change society. Instead society itself defines relationships and changes in those relationships via agitation and prodding by social activists. Lawyers and courts then describe this new definition that society has already agreed to accept.

### Unequal Treatment

A few years ago, an article in USA Today reported that a study by the Urban Institute found that young African American males looking for entry-level jobs in Chicago and Washington, D.C., were still discriminated against.

Researchers using 10 two-man teams of African American and white students, matched closely in every important employment aspect, had the teams apply for the same entry-level jobs. The study then compared success rates of each individual in his attempt to gain employment. According to the USA Today report, one of the co-authors of the study stated she was confident the “only difference” in the ability of the white applicants, who were three times as successful as the African American applicants in the employment experience, was “their race”.

It is when the members of this society realize that there are no intellectual arguments that can make unequal equal by treating them both the same, will freedom have an identical meaning for all races of people in this great country of ours.

I can illustrate this by relating the story of a small and highly intelligent boy of 10 named James. James sat up straight in his seat when Ms. Smith, his fifth grade teacher, called on him to respond to the question she had originally posed to the entire class. With a puzzled expression written on his face he responded, “Ms. Smith, will you please repeat your question. I’m not sure I completely understand.”

And so once again she quietly said, “how can you make 5 and 10 equal each other and yet always treat both of them the same?” James replied, “Ms. Smith, I know I am not as mature and wise as you, but I believe it is impossible to make unequals equals by treating them both the

same. If we were to add an equal number to both of them the difference between them would still be 5, and if we were to subtract an equal number from both of them the difference would also still be 5.

In fact and even worse, if we were to multiply both of them by an equal number we would increase their differences geometrically rather than arithmetically.

Ms. Smith, I believe the only way to make unequals equals is to treat them different.

“Good,” stated Ms. Smith. “Class, James has just given us the answer to America’s racial problem. According to the laws of nature, you cannot make unequals equals by treating them both the same.”

### True Stories

On a bright, sunny day in the spring of 1973, an African American man boarded a jet in Houston, Texas for a flight to Cleveland, Ohio. Soon after taking his seat, he began to read a magazine he had brought on board with him. The magazine, titled “Ebony,” is published by the Johnson Publishing Company of Chicago and has a purely African American theme. Sitting next to the reader was a very clean-cut, business dressed, white man who appeared to be in his early 60s. After watching the reader for slightly more than an hour, the white man inquired as to the type of magazine the reader found so enjoyable.

When told the theme and nature of the magazine, the white man stated he found it interesting that a magazine would be published that devoted itself exclusively to African American people. The reader quickly reminded his new found friend that most magazines published in the United States were devoted to one race of people and wondered aloud how the white man might have been affected if all magazines he had opened in his life had been devoted to an African American theme.

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In 1959, an African American ninth grader sat quietly in the back of his math class. His mind wandered, but not because of his lack of interest in the subject, the wandering instead was caused by an earlier experience with his counselor.

Earlier that day, the young man had entered the office of his high school counselor filled with joy. This was to be one of the most important days of his life, for he would have an opportunity to discuss with his counselor his career objectives and, he hoped, to receive her advice as to how he could best prepare for his future goals.

“And James, what would you like to be?” Inquired the counselor. “I would like to be a lawyer,” said James. A look of amazement quickly moved across the counselor’s face, even before the last word had completely rolled off James’ lips. “You want to be what?”

“A lawyer,” James repeated again, with as much pride as before.

But you can't be a lawyer, James," whispered the counselor, with so much sadness in her voice that she almost choked up. "You see James, there is not a place for a black lawyer in Houston, and given your aptitude for science, why don't you think instead about becoming a doctor?"

"But I don't want to be a doctor, I want to be a lawyer; and in fact, I will be a lawyer," James blurted out as he quickly made an exit from the office of his counselor. And as he sat in the back of his math class, he knew everyone agreed with his counselor, there were no opportunities for black lawyers in Houston, Texas, in 1959. But he also knew he would never again seek counsel from anyone about his career goals.

When I told his story recently to a group of minority law professors, most of them responded that James' experience had been repeated by thousands of other similarly situated minority high school students. The professors only realized its unusual nature when it was revealed that the counselor was African American and that the story took place in a segregated educational setting.

Each of them understood that this kind of advice is often the norm when given by a white counselor to an African American student, but they did not realize the same advice often was given in the 1950s, 1960s and 1970s where African American counselors attempted to be truthful about professional opportunities in the south for young African American students.

### Taking Action

Today, too many leaders in America would say to little James that he is incorrect, that where race in American is concerned, you can make unequals equals by treating them both the same. If we are, however, even to begin to solve the racial problems of this nation, leaders of this nation must understand that what we need are not racial quotas, not even affirmative action. Instead, in order to solve our racial problems, what this nation needs are corrective action.

When I first sat to write these words I originally wanted them to have great intellectual depth, but I soon realized that to be an impossible task. I realized that instead of being an intellectual discourse, this is a discourse about the rights of human beings. There are some things we do because they have sound logical reasons for being, and there are other things we do just because they are right. And to me, when one race has taken advantage of another for hundreds of years the "right" thing to do is to take corrective action.

Why do I say this? I say this for the lawyers who truly see some solution to the racial problems of this country - - those lawyers who truly wish to correct almost 400 years of wrong. The answer is not found in the development of a new intellectual argument that supports affirmative action or a new intellectual argument that supports timetables, or even a new intellectual argument that supports quotas.

The answer is found in society's willingness to address the problem and agree that each and every citizen of this country will receive "fair", not equal treatment, regardless of his or her color. It is simply impossible after 400 years of unequal treatment to be "fair" by suddenly treating everyone equal. It is only when the members of this society realize, as 10-year old



James did, that there are no intellectual arguments that can make unequals equals by treating them both the same. It is then, and only then, that freedom will mean the same for all races of people in this great country of ours.