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FOREWORD

One of the conspicuous results of the ordeal through which our world has been passing is a widespread disposition to re-examine the concepts of racial superiority which have been the source of so much human misery. Historical causes reaching far back into North American origins have made the Negro race the chief victims here. Since emancipation and the War Amendments to the Constitution many questions of law growing out of the plight of this handicapped minority have found their way into the Supreme Court. So far as the writer knows no attempt has been made hitherto to assemble all such cases in the order of their hearing and decision, and with sufficient detail to give to each case its proper place as a link in the chain of adaptation of Federal law to changing economic and social conditions, and the growth of public intelligence and conscience. This is such an attempt.¹

At the outset the writer disclaims approach to his task from the standpoint of an expert in constitutional law or legal history. Indeed, for his purpose little professional qualification has been found necessary beyond familiarity with the terminology of the courts. His aim has been to present a record of facts,—facts from

*Judge of the District Court for the Fourth District, Minnesota, 1911-1941 (retired).
¹The writer is indebted to the well-known books of Carson, Warren, Mangum and Stephenson; but these serve only partially the purpose which he has set before himself in this study. Valuable also is Osmond K. Fraenkel's article, One Hundred and Fifty Years of the Bill of Rights, 23 MINNESOTA LAW REVIEW 719 (1939), with the three supplements issued by the American Civil Liberties Union in 1941, 1944, and 1945.
that most authoritative source, the official reports of the United States Supreme Court. The issues, the events out of which they have arisen, the decisions, are facts. The quotations from decisions and dissents are facts. The chronological sequence of cases is an important fact. Except for indulgence in occasional comment, the only risk of being hampered by his own limitations which he has incurred is in his effort to present in each case the important point decided and in many instances summarize the reasons stated for the decision, and in the selection of quotations designed to give the essence of majority and minority views. To do this has called for study, discrimination and a degree of objectivity, and if he has failed in these respects his work is of little value. If, however, he has succeeded in his attempt to be accurate and fair, the result may prove to be worth while.

The record of the Supreme Court for ability, integrity and freedom from political bias and social prejudice is one of which our people may well be very proud. But even in the pure atmosphere of the Washington court-room and consultation chamber members of the Court do not cease to be human beings. Instances have been frequent in which as members of the Court men who have been active in political life, and professionally associated with special business interests, have been able to break away completely from the prejudices and preconceptions of their former environment; but it is nevertheless true that in the history of the Court there can be traced the influence of current public sentiment. "The Supreme Court feels the touch of public opinion. Opinion is stronger in America than anywhere else in the world, and judges are only men . . . Of course whenever the law is clear, because the words of the Constitution are plain or the cases interpreting them decisive on the point raised, the Court must look solely to those words and cases, and cannot permit any other consideration to affect its mind. But when the terms of the Constitution admit of more than one construction, and when previous decisions have left the true construction so far open that the point in question may be deemed new, is a court to be blamed if it prefers the construction which the bulk of the people deem suited to the needs of the time?" These words of Sir James Bryce² will hardly be resented by the staunchest admirers of the Court, and there have not been wanting critics who have put the point in harsher terms.

To thus evaluate the decisions is no part of the writer's purpose. The material is here and readers may interpret it as they see

²The American Commonwealth, p. 273.
fit. Neither has he sought to trace the decisions in the narrow field here studied to the legal concepts developed by the Court in other fields. He presents the judicial facts encountered in his study; the political, economic, social—and sometimes, perhaps, personal—causes of those facts are left for the consideration of others.

When the lawyer is seeking for a precedent the point decided and the argument by which the decision is reached are the matters of importance. When the student of law, government or social welfare is seeking for truth dissenting opinions in the law reports which are not precedents may have great value. Therefore a generous amount of space has been given to quotations from dissents. Chief Justice Hughes has said: "Unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort. . . . This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice. . . . Dissenting opinions enable a judge to express his individuality. . . . He is not under the compulsion of speaking for the court and thus of securing the concurrence of a majority. In dissenting he is a free lance. A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day."

May the writer add a personal word? He believes this review gives a fair and reasonably accurate picture of almost ninety years' progress toward justice for the Negro race in the nation's highest court. It has been slow and halting progress, but where it can be found he has made no attempt to conceal his satisfaction. Slow as the advance has been, from the Dred Scott Case to that of Morgan vs. Virginia is a long way. He opened his eyes upon a torn and distracted country when the fires from the Dred Scott eruption were kindling civil war. In his early years he was impressed with the enormity of our national crime. Perhaps he has been moved, in part, to undertake this study because there echoes in his memory the refrain of a song familiar in his childhood—

"John Brown's body lies a-mouldering in the grave,  
But his soul goes marching on!"

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3The Supreme Court of the United States (1928), pp. 67, 68.
Among notable decisions of the United States Supreme Court, the *Dred Scott Case* stands out like a mountain shrouded in thunder-clouds. It held in substance (two Justices, McLean and Curtis, dissenting) that none of the provisions of the United States Constitution establishing or protecting rights of citizens applied to a member of "the Negro African race," even though free in the state of his residence. In building up the historical argument in support of this conclusion Chief Justice Taney said, in reference to conditions in the Thirteen Colonies at and prior to the framing of the Constitution: "In the opinion of the Court, the legislation and history 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 part of the people, nor intended to be included in the general words used in that memorable instrument. . . . 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." In fairness to the majority, as represented by the Chief Justice, it should be said that they seem to have mildly deprecated this state of public opinion, which they declare to have "prevailed in the civilized and enlightened portions of the world." The Court further, for the second time in its history, declared an Act of Congress to be unconstitutional and void,—the so-called "Missouri Compromise" of 1820; thereby denying the power of Congress to prohibit slavery in any of the states or territories of the Union.

The decision was never formally over-ruled, and yet it has never been cited by the Court as an authoritative precedent, except on certain procedural points, and in a few instances by quotations of language of the Chief Justice on uncontroverted matters. Concerning it an editorial writer in the American Law Review said while the country was in the throes of Reconstruction: "The calmer judgment of posterity may, perchance, say that as an abstract question of constitutional law the Chief Justice rightly interpreted the law as it was, and that the dissenting voices only proclaimed

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4 *Dred Scott v. Sandford* (1857) 19 How. 393, 15 L. Ed. 691.
5 At p. 407 of 19 How.
what it should have been. Revolution has confirmed their dissent, and if amendment were needed, the sword has amended the construction now."

Twice afterward before its earlier phases were submitted to the arbitrament of war "the Negro question" came before the Supreme Court. In Ableman vs. Booth, a controversy between the State of Wisconsin and the Federal Government, arising under the Fugitive Slave Law, Chief Justice Taney, without dissent, sustained the constitutionality of that statute "in all its provisions," and declared the supremacy of the Court in all matters of interpretation and execution of powers claimed under the Constitution and Acts of Congress. Ex parte Kentucky vs. Dennison came up in March, 1861. A Kentucky statute made it a crime to assist a slave to escape. One Lago was indicted under this statute and took refuge in Ohio. On demand of the State of Kentucky that he be surrendered for trial the Governor of Ohio refused. Thereupon an application was made to the Supreme Court for a writ of mandamus, on the ground that the Constitution made it the duty of the Governor of Ohio to comply. The Court, by Taney, C. J., recognized the obligation but held that it was only a moral one which could not be enforced by mandamus.

Before the Negro was again in the Supreme Court came the Civil War, the Freedmen's Bureau, the Reconstruction Act, and the 13th, 14th and 15th Amendments. The administration of the Freedmen's Bureau practically superseded state legislation affecting Negroes and this policy was continued with varying success during Reconstruction. In 1872 the General Amnesty Act was

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67 Am. Law Rev. 327 (1872), quoted with approval by Warren, The Supreme Court in United States History, Vol. 3, p. 120.
7(1859) 21 How. 506, 16 L. Ed. 169.
8(1861) 24 How. 66, 16 L. Ed. 717.

For the convenience of the reader the immediately relevant portions of these Amendments are here reproduced: Art. XIII, Sec. 1, ratified in 1865: "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..."

Art. XIV, Sec. 1, ratified in 1868: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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..."

Art. XV, Sec. 1, ratified in 1870: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude..." Each Amendment contains a section providing that Congress shall have power to enforce it by appropriate legislation.
passed, by 1877 "carpet-bag" government had come to an end, and by 1879 the whites had regained virtual control throughout the South.

II

CHIEF JUSTICE CHASE

The first case in which the Court was called upon to interpret any of the Acts of Congress passed for the purpose of giving effect to the new Amendments was *Blyew vs. U. S.*,\(^{10}\) a criminal case which came up from the U. S. Circuit Court, District of Kentucky. The indictment was drawn under the original Civil Rights Act of April 9, 1866, which had been passed in order to implement the 13th Amendment, and charged Blyew and another, who were whites, with the murder of a Negro woman who was a citizen of the United States. It was averred that the crime was witnessed by certain colored persons, also citizens of the United States, who were denied the right to testify against the defendants in the courts of Kentucky solely because of their race and color. There was a verdict of guilty and an appeal from the denial of a motion in arrest of judgment. The point presented for decision was whether the Circuit Court had jurisdiction of the offense. The constitutionality of the Act was attacked in the briefs of counsel for the plaintiffs in error, but was not considered by the Court.

The first section of the Act declared that all persons born in the United States, and not subject to any foreign power, exclusive of Indians not taxed, were citizens of the United States; and also provided that "Such citizens, of every race and color, shall have the same rights in every State and Territory of the United States, to make and enforce contracts; to sue, to be parties and give evidence; to inherit, to purchase, lease, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding." The second section provided penalties for violation of the Act: "That any person who, under color of any law, statute, ordinance, regulation or custom" shall deprive "any inhabitant of any State or Territory"

\(^{10}\)(1872) 13 Wall. 581, 20 L. Ed. 638.
of rights secured by the first section "on account of such persons having at any time been held in a condition of involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, shall be guilty of a misdemeanor," etc. The third section gave the District Courts of the United States, concurrently with the Circuit Courts, exclusive jurisdiction "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the state or the locality where they may be, any of the rights secured to them by the first section of this Act."

A Kentucky statute in effect when the indictment was found provided "that a slave, Negro or Indian, shall be a competent witness in the case of the Commonwealth for or against a slave, Negro or Indian, and in a civil case to which Negroes or Indians are parties, but in no other case." The claim that the cause was one "affecting" the murdered woman, within the meaning of the third section of the Act, was thus summarily disposed of: "We need hardly add that the jurisdiction of the Circuit Court is not sustained by the fact averred in the indictment that Lucy Armstrong, the person murdered, was a citizen of the African race, and for that reason denied the right to testify in the Kentucky courts. In no sense can she be said to be affected by the cause. Manifestly the Act refers to persons in existence." Justice Strong, who wrote the Court's opinion, posed the essential question to be decided as follows: "Was, then, the prosecution or indictment against these defendants a cause affecting any such person or persons?" (i.e., "persons who are denied and cannot enforce in the courts . . . of the state . . . any rights secured to them by the first section of the Act.") This question was answered in the negative and jurisdiction denied. Neither the Chief Justice nor Justice Nelson took part.

The case is noteworthy because of the broad language used by Justice Bradley (Swayne, J., concurring)—in his dissenting opinion, which seems to contrast strongly with the position which he took eleven years later when he spoke for the Court in the very important Civil Rights Cases. Commenting on Sec. 1 he said: "This is the fundamental section of the Act. All that follows is intended to secure or vindicate, to the objects of it, the rights herein declared, and to establish the requisite machinery to that end. This section is in direct conflict with those state laws which forbade a free colored person to remove to or to pass through the

11 At p. 593 of 13 Wall.
state, from having firearms, from exercising the functions of a minister of the gospel, or from keeping a house of entertainment; laws which prohibited all colored persons from being taught to read and write, from holding or conveying property, and from being witnesses in any case where a white person was concerned; and laws which subjected them to cruel and ignominious punishments not imposed upon white persons, such as to be sold as vagrants, to be tied to the whipping post, etc., etc. All these, and all other discriminations, were intended to be abolished and done away with. . .

It is evident that the provisions of the second section, making it a criminal offense to deprive a person of his rights or to subject him to a discriminating punishment, would fail to reach a great number of cases which the broad and liberal provisions of the first section were intended to cover and protect. The clause in question is intended to reach these cases, or at least a large class of them. It provides a remedy where the state refuses to give one; where the mischief consists in inaction, or refusal to act, or refusal to give requisite relief; whereas the second section provides for actual positive invasion of rights. . .

Suppose that in any state assault and battery, mayhem—nay, murder itself, could be perpetrated upon a colored man with impunity, no law being provided for punishing the offender, would not that be a case of denial of rights to the colored population of that state? . . . Would not the clause of the Civil Rights Bill now under consideration give jurisdiction to the United States Courts in such a case? . . .

The case before us is just as clearly within the scope of the law as such a case would be. I do not put it upon the ground that the witnesses of the murder, or some of them, are colored persons; disqualified by the laws of Kentucky to testify, but on the ground that the cause is one affecting the rights of the person murdered; as well as the whole class of persons to which she belonged. Had the case been simple assault and battery, the injured party would have been deprived of a right, enjoyed by every white citizen, of entering a complaint before a magistrate, or the grand jury, and of appearing as a witness in the trial of the offender. . . . To deprive a whole class of the community of this right, to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families and their property unprotected by law. It gives unrestricted license to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case. To say that actions or prosecutions intended for the redress of such outrages are not
'causes affecting the persons' who are the victims of them, is to take, it seems to me, a view of the law too narrow, too technical and too forgetful of the liberal objects it had in view. . . . If the case above supposed is within the Act (as it assuredly must be) does it cease to be so when the violence offered is so great as to deprive the victim of life? . . . The reason for its existence is stronger than before. If it would have been a cause affecting him when living, it will be a cause affecting him though dead. The object of prosecution and punishment is to prevent crime as well as to vindicate public justice. . . . Should not the colored man have the aegis of this protection to guard his life, as well as to guard his limbs or property? . . . At all events it cannot be denied that the entire class of persons under disability is affected by prosecutions for wrongs done to one of their number, in which they are not permitted to testify in the State Courts.123 Though the majority opinion did not discuss the constitutionality of the statute, Justice Bradley declared himself on this point: "I have no doubt of the power of Congress to pass the laws now under consideration. Slavery, when it existed, extended its influence in every direction, depressing, disfranchising the slave in every possible way. . . . The power to enforce the Amendment (13th) by appropriate legislation must be a power to do away with the incidents and consequences of slavery, and to instate the freedmen in full enjoyment of that civil liberty and equality which the abolition of slavery meant."14

Although the crime considered in this case was committed after the ratification of the 14th Amendment, no reference to that Amendment was made either in the briefs of counsel or the opinions. The case has never been cited as an authority in any Supreme Court opinion,—perhaps on account of the early repeal of the Kentucky statute and modification of the original Civil Rights Act; but comparison with one of the later cases mentioned in this review, Screws v. U. S.,15 will suggest the great advance made since 1872 in the protection of the civil rights of Negroes under the Constitution.

Later in 1872 U. S. vs. Avery,16 came before the Court on a certificate of division of opinion from South Carolina. The de-

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12 At pp. 595-601 of 109 U. S.
14 Justice Swayne, sitting in the United States Circuit Court, District of Kentucky, had already held the Act of April 6, 1866, to be constitutional in all respects, and had construed it in line with the dissenting opinion; U. S. v. Rhodes, (1866) 27 Fed. Cas. N.Y. 16151.
16 (1872) 13 Wall. 251, 20 L. Ed. 610.
fendants were indicted under Section 6 of the Enforcement Act of May 31, 1870, for conspiring to prevent a Negro from voting and from exercising his constitutional right to carry arms, and for hanging him in pursuance of the conspiracy. The Circuit Court Judges presented two important questions, one of them constitutional, which were disposed of as follows by Chief Justice Chase:

"A majority of the Court are of the opinion that this case is controlled by the decision in the case of The U. S. vs. Rosenberg. I am unable to concur in that opinion, but the case must be dismissed." U. S. vs. Rosenberg

16a had held merely that the Court could not acquire jurisdiction upon a certificate of division of opinion on the question as to whether a motion to quash an indictment ought to be granted. Surely it is not without significance that in 1872 a Supreme Court consisting wholly of men appointed from the loyal states dismissed, on a point of procedure, a case involving the lynching of a Negro, without a word of comment, ignoring the constitutional question which was involved.

The 14th Amendment came first before the Court for interpretation in the much-discussed Slaughter-House Cases, 17 a five-to-four decision handed down in April, 1873. The majority opinion establishes certain important principles which have been consistently adhered to,—that the Constitution provides for a citizenship of the United States as distinct from state citizenship; that privileges and immunities of citizens of the United States which are placed under the protection of Congress by the 14th Amendment "are those which arise out of the nature and essential character of the national government, the provisions of its Constitution or its laws and treaties made in pursuance thereof." It was further held that the second clause of Sec. 1 of the 14th Amendment "protects from the hostile legislation of the state the privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the states. These latter . . . embrace generally those fundamental civil rights for the security and establishment of which organized society is instituted, and they remain, with certain exceptions mentioned in the Federal Constitution, under the care of the state governments."

The case before the Court involved the constitutionality of legislation in Louisiana, which, it was claimed, established a business monopoly; and the attack was made under various provisions of the Constitution,—chiefly those of the 14th Amendment. The

16a (1869) 7 Wall. 580, 19 L. Ed. 263.
17 (1873) 16 Wall. 36, 21 L. Ed. 395.
majority sustained the statute as a proper exercise of the police power of the state, but declined to go further in defining "the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so."\textsuperscript{18}

In reaching a restrictive interpretation of the 14th Amendment the Court declared that its primary purpose, as shown both by its history and its terms, was to confer rights of citizenship on members of the Negro race, and protect them from injustices to which they were being subjected, notwithstanding their release from slavery. On this point there was no disagreement in the Court; but the minority (Chase, C. J., Field, Bradley and Swayne, JJ.,—Justice Bradley writing the main dissenting opinion, and Justice Swayne supplementing it) argued vigorously for a more liberal view of the protection actually given by the Amendment, claiming that in spite of the possibility of undue interference with state legislation it should be construed as covering "the natural and inalienable rights which belong to all citizens,"\textsuperscript{19} which they considered to be invaded by the Louisiana statute.

Few cases more pregnant with vast results have ever been in any court. In the prevailing opinion Justice Miller says: "No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several states to each other, and to the citizens of the states and of the United States, have been before this Court during the official life of any of its members"; and Justice Swayne concludes his dissenting opinion with the solemn words—"I personally hope that the consequences to follow may prove less serious and far-reaching than the minority fear they will be." In \textit{Twining vs. New Jersey},\textsuperscript{20} the unanimous Court speaking by Moody, J., said: "There can be no doubt, so far as the decision in the \textit{Slaughter-House Cases} has determined the question, that the civil rights sometimes described as fundamental and inalienable, which, before the War Amendments, were enjoyed by state citizenship and protected by state government, were left untouched by this clause (i. e., the privileges and immunities) of the 14th Amendment. Criticism of this case has never entirely ceased, nor has it ever received universal as-

\textsuperscript{18}At p. 79 of 16 Wall.
\textsuperscript{19}For a demonstration that this was the view of those who framed the Amendment and supported it in Congress, see Horace E. Flack, The Adoption of the Fourteenth Amendment, (1908).
\textsuperscript{20}(1908) 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97.
sent by members of this Court. Undoubtedly it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others. On the other hand, if the views of the minority had prevailed it is easy to see how far the authority and independence of the states would have been diminished, by subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the national government. But we need not now inquire into the merits of the original dispute. This part, at least, of the *Slaughter-House Cases* has been steadily adhered to by the Court.” It would require a bold and active imagination to conjecture what the judicial history of the United States during the last seventy years would have been, had one other Justice joined the dissenting group.

Later in 1873 the Negro came into the Court again, in *Washington, A. & G. R. R. Co. vs. Brown.* The plaintiff in error operated a railroad under an incorporating Act of Congress, passed in 1863, which provided that no one should be excluded from its cars on the ground of color. A Negro woman who, solely by reason of her color, was ejected from a car reserved for white women, sued for damages, and her right to do so was sustained. No constitutional question was involved.

III.

**Chief Justice Waite**

*U. S. vs. Reese* was the first case involving the 15th Amendment to reach the Court. It was a criminal case from Kentucky, a prosecution under Sections 3 and 4 of the Enforcement Act of May 31, 1870, for refusing to receive the vote of a Negro at a municipal election. It was held that the Amendment did not confer a right of franchise, but merely a right not to be discriminated against with respect thereto by any state because of color. Said Chief Justice Waite in the prevailing opinion (Clifford, J., concurred on different grounds, and Hunt, J., dissented, taking a very broad view of the scope of the Amendment and the interpretation of the statute): “The Amendment has invested the citizens of the United States with a new constitutional right which is

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21 Chief Justice Chase had died and his successor had not yet been commissioned.
22 (1873) 17 Wall. 445, 21 L. Ed. 675.
23 (1876) 92 U. S. 214, 23 L. Ed. 563.
within the protecting care of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. This, under the express provisions of the 2nd section of the Amendment, Congress may enforce by 'appropriate legislation.'" It was held, however, that Sections 3 and 4, by reason of being too general in their terms, were not "appropriate legislation" and were unconstitutional.

The Act in question was a substantial reenactment of the original Enforcement Act of 1866, with some changes and additions designed especially to implement the 15th Amendment. Section 1 provided that all citizens of the United States, otherwise qualified to vote, should be "entitled and allowed" to vote at any election "without distinction of race, color or previous condition of servitude." Section 2 provided in general terms for penalties for the violation of Section 1. Sections 3 and 4 related specifically to acts done by officials to obstruct the performance by a citizen of a legal requirement for voting, and as construed by the majority did not in express terms provide that the wrongful act should be one of race discrimination. The view of the majority was that since Sections 3 and 4 were not limited to race discrimination an indictment including this as an element of the offense charged was invalid, since, the statute being a criminal one, such limitation must clearly appear; and that in their general terms the sections were not warranted by the 15th Amendment. The Court said: "We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. . . . The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."25

At the same term with the Reese Case, there was decided a case under Section 6 of the Enforcement Act of 1870, U. S. vs. Cruikshank.26 The doctrine of The Slaughter-House Cases was strictly applied, and each of the counts of the indictment found not

24 At p. 218 of 92 U. S.
25 At p. 221 of 92 U. S.
26 (1876) 92 U. S. 542, 23 L. Ed. 588.
to state a criminal offense against the United States, sometimes because the pleading was insufficient, sometimes because the right alleged to have been denied or invaded was not incident to United States citizenship. The case has been so frequently cited that it seems proper to consider it in this inquiry with a degree of detail which is hardly warranted by its value as a precedent. Section 6 of the Act in question provided: “That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this Act, or to injure, oppress, threaten or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be guilty of a felony” and shall be punished in the manner thereinafter prescribed. Cruikshank and certain co-defendants were tried on an indictment of sixteen counts and were found guilty generally upon all of them. The case came to the Supreme Court on a certificate of division of opinion from the United States Circuit Court for the District of Louisiana, which considered a motion in arrest of judgment. It involved an instance of fraud and violence to prevent Negroes from voting, and is thus summarized by the Court: “The general charge in the first eight counts is that of ‘banding’ and in the second eight that of ‘conspiring’ together to injure, oppress, threaten and intimidate Levi Nelson and Alexander Tillman, citizens of the United States of African descent and persons of color, with the intent thereby to hinder and prevent them in the free exercise and enjoyment of the rights and privileges ‘granted and secured’ to them ‘in common with all other good citizens of the United States by the Constitution and laws of the United States.’”

The opinion, presented by Chief Justice Waite, began by recognizing the duality of citizenship, and the differentiation between rights arising from citizenship of the United States and state citizenship, established by *The Slaughter-House Cases*. The relation between the national government and that of the states was discussed and it was again declared that the former “can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.”

The specific rights charged in the indictment to have been violated were (1) “to peaceably assemble together with each other

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27 At p. 548 of 92 U. S.
28 At p. 550 of 92 U. S.
and with other citizens of the United States for a peaceful and lawful purpose;” (2) “to bear arms for a lawful purpose;” (3) “to be secure against deprivation of life and liberty of person ‘without due process of law;’” (4) “to vote at any election thereafter to be held by the people in and of the said State of Louisiana.” The first was declared to be a right not created by the Constitution, but one antedating the Constitution and “found wherever civilization exists.” The indictment did not fall within the First Amendment because it did not allege that the assembly alleged to have been interfered with was for the purpose of petitioning the Government for the redress of grievances. “If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute and within the scope of the sovereignty of the United States.”

Concerning the second right the Court said: “This is not a right granted by the Constitution. Neither is it in any manner dependent on that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this... means no more than that it shall not be infringed by Congress.”

As to the third right: “The rights of life and personal liberty are natural rights of man.... It is no more the duty nor within the power of the United States to punish for conspiracy to falsely imprison or murder within a state than it would be to punish for false imprisonment or murder itself. The 14th Amendment prohibits any state from depriving any person of life or property without due process of law; but this adds nothing to the rights of one citizen against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society.”

As to the right to vote the Court said, citing U. S. vs. Reese, just decided: “The right of suffrage is not a necessary attribute of national citizenship; but exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states; but the right of exemption from the prohibited discrimination comes from the United States.... Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, etc., it does not appear that it was their intent to interfere with any right granted or secured by the

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29 At p. 552 of 92 U. S.
30 At p. 553 of 92 U. S.
31 At pp. 553, 554 of 92 U. S.
Constitution or laws of the United States. We may suspect that 'race' was the cause of the hostility; but it is not so averred. This is material to the substance of the offense, and cannot be supplied by implication.

Two other counts charged an intent to deprive Nelson and Tillman of their right to the benefit of laws of the state and the United States equal to that enjoyed by white persons. In response to this, the Court said: "There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States. The 14th Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. . . . Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the Amendment guarantees, but no more."

Two other counts charged an intent to intimidate and injure Nelson and Tillman because they had voted at previous elections. These were found subject to the same defects which had been found to vitiate the charge of intent to prevent future voting.

There remained four counts of the indictment, the 5th, 8th, 13th and 16th. The 5th and 13th charged an intent to interfere with "rights, privileges, immunities and protection" to which the parties were entitled as citizens of the United States and of Louisiana, because they were Negroes; the 8th and 16th made like allegations as to "rights and privileges granted and secured to them by the Constitution and laws of the United States." There being here no specification of any particular rights claimed to have been violated, the language was held too broad to give the accused persons notice of the crime charged against them, in accordance with established rules of criminal pleading.

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32 It was averred, however, in both the counts thus disposed of, that Nelson and Tillman were Negroes.
33 At pp. 535 and 550 of 92 U. S.
34 At p. 555 of 92 U. S.
The cause was remanded with instructions to discharge the defendants. Justice Clifford concurred in the result, "but for reasons quite different from those given by the Court." There was no dissent.

The briefs of counsel for defendants argued against the constitutionality of the Enforcement Act; but this question was not touched by the Court. Except for the conclusions that the rights of assembly and bearing arms "for lawful purposes," the right to be secure from unlawful violence, and the general right to vote at a state election, were not protected against individuals by the 14th and 15th Amendments, all that was decided was that most of the indictment was defective. The case is of importance because of its strong and lucid reassertion of the interpretation given the two Amendments in the *Slaughter-House* and *Reese Cases*; but the writer ventures to raise a question whether, as an authoritative precedent, it has not been considerably overworked.

"Jim Crow," in his constitutional relations, first came before the Court in 1877 in *Hall vs. DeCuir*.[36] A Louisiana statute, passed in 1869, during the Reconstruction period, provided that "All persons within this State, in the business of common carriers of passengers," may make rules covering service to passengers, "provided said rules and regulations make no discrimination on account of race or color." A Negro woman took passage on a steamboat engaged in interstate commerce, for transportation from New Orleans to another point in Louisiana. She was ejected from a cabin specially set apart for white persons, and brought an action for damages. Her claim was sustained in the State Supreme Court, which was reversed, Chief Justice Waite delivering the opinion.

"For the purposes of this case," it was said, "we must treat the statute as requiring those engaged in interstate commerce to give all persons traveling in Louisiana, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below, and it is conclusive on us as the construction of a state law by the state courts. It is with this provision of the statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the states."[37] It was held that the inci-

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36 Excluding the Chief Justice, all members of the Court had sat in the Slaughter-House Cases.
36 (1877) 95 U. S. 485, 24 L. Ed. 547.
37 At p. 487 of 95 U. S.
dent was one of interstate commerce, and that under the Commerce Clause of the Constitution only Congress, and not a state legislature, could so regulate interstate commerce. How far the Court was willing to go in order to find the incident one of interstate commerce can be seen by the following: "While it (the statute in question) purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect, in a greater or less degree, those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodation of that cabin with such colored persons as may come on board afterwards, if the law is enforced."\textsuperscript{38} . . . "No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if, on one side of a state line, his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations may be. . . . This power of regulation may be exercised without legislation as well as with it. By refraining from action Congress in effect adopts as its own regulations those which the common law, or the civil law where that prevails, has provided for the government of such business, and those which the states, in the regulation of their domestic concerns, have established, affecting commerce but not regulating it within the meaning of the Constitution. In fact, congressional action is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the Court in \textit{Welton vs. Missouri}, 91 U. S. 282, 'Inaction (by Congress) . . . is equivalent to a declaration that interstate commerce shall remain free and untrammeled.' Applying that principle to the circumstances of this case, congressional inaction left Benson (owner of the boat-line) at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing his voyage in Louisiana or

\textsuperscript{38}At p. 489 of 95 U. S.
without, as seemed to him most for the interest of all concerned. . . .

We think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation it must come from Congress and not from the states." The decision rested the "reasonableness" of the carrier's rule, as applied to interstate passengers, solely on the "great inconvenience and unnecessary hardship" which would result from a contrary practice in the business of interstate transportation of passengers. There was no dissent. 40

Federal troops were withdrawn from the "reconstructed" states in 1877, and cases involving alleged violation of the rights of Negroes under the 14th Amendment began to come before the Court more frequently. Three such cases were argued in October, 1879, and decided the following January. Strauder vs. West Virginia 41 came up on writ of error to the Supreme Court of West Virginia. A Negro had been convicted of murder by a jury selected under a state law which made only white men eligible for jury service. The opinion was by Justice Strong, Justices Clifford and Field dissenting, and it was held that the plaintiff in error had been deprived of the right secured to him by the 14th Amendment to be tried by a jury selected without statutory discrimination as to color. It was stated that the Amendment not only gave citizenship and the privileges of citizenship to persons of color, but that it denied to any state the power to withhold from them the equal protection of the laws, and invested Congress with power, by appropriate legislation, to enforce its provisions. Citing the provisions of the Amendment the Court says, in words which have not always governed the disposition of later cases,—"What is this but declaring that the law in the states shall be the same for the black as for the white; 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? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a

39At p. 489 of 95 U. S.
40It is not difficult to guess what sort of a dissenting opinion Justice Harlan, who had come to the Court a month before this decision was handed down, would have written had he taken part. See his comments in L. N. O. & T. Ry. Co. v. Miss., (1890) 133 U. S. 587, 592, 10 S. Ct. 348, 33 L. Ed. 784.
41(1880) 100 U. S. 303, 25 L. Ed. 664.
positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights others enjoy, and discriminations which are steps toward reducing them to a subject race." An important social fact, too often ignored, is pointed out in the statement that legislation of the sort in question is "practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."  

Virginia vs. Rives was decided the same day. Though often cited, it contains nothing further of importance to this review except a declaration that a state may act through its executive or judicial authorities, as well as through its legislature, in a way to violate the Amendment. The case involved the construction of certain sections of the United States Revised Statutes providing for the removal to Federal Courts "of causes commenced in any State Court . . . against any person who is denied or cannot enforce in the judicial tribunals of the state . . . any right secured to him by any law providing for the equal civil rights of citizens of the United States." It was said that "the object of these statutes, as of the Constitution authorizing them, was to place the colored race, in respect to civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same." It was held, however, that the right of removal to a Federal Court under Section 641 of the United States Revised Statutes, which was recognized in the Strauder Case, was not present here under the facts. Justice Strong again spoke for the Court. Justices Field and Clifford concurred in the result but dissented from the views of the majority as to the scope and application of the Amendment.  

Ex parte Virginia was also decided the same day. A county judge in Virginia was indicted in the United States District Court under Section 4 of the Act of March 1, 1875, making it a criminal offense for "any officer or other person, charged with any duty in the summoning or selection of jurors, to exclude or fail to sum-

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42 At p. 307 of 100 U. S.  
43 At p. 308 of 100 U. S.  
44 (1880) 100 U. S. 313, 25 L. Ed. 667.  
45 (1880) 100 U. S. 339, 25 L. Ed. 676.
mon any citizen, otherwise qualified for jury service, 'on account of race, color or previous condition of servitude.'" It appeared that the defendant had such duties, and the question before the Court, considered on habeas corpus, was whether the statute was valid under the 13th and 14th Amendments. "One great purpose of these Amendments," said Justice Strong, again speaking for the Court, "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. They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the states and enlargements of the power of Congress. . . . Whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power."46 The declaration in the Rives Case that action by other state agencies besides the legislature would be regarded as action by the state was made more emphatic: "Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name (of) and for the state, and is clothed with the state's power, his act is that of the state."47 The writ prayed for was accordingly denied. This decision was the heaviest blow "state sovereignty" had suffered in many years, and it was opposed by Justice Field in a vigorous dissenting opinion in which Justice Clifford concurred.

The doctrine announced as above in 1880 was reaffirmed a year later in Neal vs. Delaware.48 Justice Harlan wrote the opinion. Its effect was substantially this: The Constitution of Delaware adopted in 1831, and the words of which had never been changed, gave the right of suffrage to free white male citizens. And the statute of the state, adopted in 1848 and never repealed, restricted the selection of jurors to those qualified to vote at a general state election. The legal effect of the adoption of the Amendments to the Federal Constitution and the laws passed for their enforcement was to annul so much of the State Constitution as was inconsistent

40 At p. 345 of 100 U. S.
47 At p. 347 of 100 U. S.
48 (1881) 103 U. S. 370, 26 L. Ed. 567.
therewith, including the provision restricting suffrage to the white race. Thenceforward the jury statute was enlarged in its operation so as to render colored citizens, otherwise qualified, competent to serve on juries in the state courts. Although the Delaware court was sustained in its refusal of removal to a Federal Court under Section 641 of the Revised Statutes, it was held, under a liberal construction of the facts involved, that a motion to quash the indictment on the ground of exclusion of Negroes from the grand jury because of color was improperly denied, and the judgment and verdict were set aside. The Chief Justice dissented from the Court’s view of the facts, and Justice Field from the interpretation given to the 14th and 15th Amendments. Justice Clifford, deceased, had been succeeded by Justice Woods, appointed from Georgia by President Hayes. In Bush vs. Kentucky exclusion of Negroes from grand jury service by the state was again held to be in contravention of the 14th Amendment. Justice Field again dissented, as did the Chief Justice and Justice Gray on a point not involving the construction of the Amendment.

In Pace vs. Alabama provisions in the Code of Alabama punishing adultery or fornication between persons one of whom was of the white race and the other of the Negro race more severely than the same crime when committed between persons of the same color, was held not a violation of the 14th Amendment, since the same punishment applied to both black and white offenders. Justice Field wrote the opinion and there was no dissent.

Section 5519 of the Revised Statutes of the United States, originally one of the sections of the Enforcement Act of April 20, 1871, sometimes styled “the Ku Klux Act,” made it a federal offense to conspire, etc., “for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws.” In United States vs. Harris the constitutionality of this section was attacked, and the Government sought to sustain it under Article IV, Section 2, of the Constitution and the 13th, 14th, and 15th Amendments. It was held that none of these provisions covered the offense defined in the section, since no action of the State of Tennessee was involved, and the acts prohibited were equally criminal whether committed against white or colored persons. Justice Woods wrote the opinion. Justice Harlan dissented without a written opinion.

49(1883) 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354.
50(1883) 106 U. S. 583, 1 S. Ct. 637, 27 L. Ed. 207.
51(1883) 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290.
Hardly less a landmark in our field than *The Slaughter-House Cases* is *The Civil Rights Cases*.52 Five cases, coming up from Kansas, California, Missouri, New York and Tennessee, composed the group which were considered and decided together in October, 1883. Section 1 of an Act of Congress "to Protect all Citizens in their Civil and Legal Rights," passed March 1, 1875, was as follows:—Section 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 and 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." Section 2 provided penalties for violation of Section 1. The New York case involved discrimination in an opera house against a person whose color was not stated; the others, discrimination against colored persons,—two in hotels, another in a theater, and the fourth on a railway train. In each instance the violation was charged against a person or corporation, with no claim of authority under state legislation. The common question presented was whether the Civil Rights Act of 1875 was authorized under the last three Amendments to the Constitution. The Court, by Justice Bradley, carefully limiting its decision so as to cover nothing else, held that Sections 1 and 2 of the Act were unconstitutional in their application to such incidents as those complained of. The legislation authorized by the 14th Amendment is declared not to be "direct legislation on the matters respecting which the states are prohibited from making or enforcing certain laws, or doing certain acts, but corrective legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts." It was further held that though the 13th Amendment, "by its reflex action, establishes universal freedom in the United States, and Congress may probably pass laws directly enforcing its provisions," such action as is covered by the sections in question "imposes no badge of slavery or involuntary servitude upon the party," and does not come within the field of congressional legislation by virtue of the 13th Amendment, "but at most infringes rights which are protected from state aggression by the 14th Amendment."53 "It would be running the slavery argument into the ground," said the Court, "to make it apply to every act of discrimination which

52(1883) 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835.
53This language is taken from Headnote 3 of the official syllabus.
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 theater, or deal with in other matters of intercourse or business. . . . If the laws themselves make any unjust discrimination, amenable to the prohibitions of the 14th Amendment, Congress has full power to afford a remedy, under that Amendment and in accordance with it." Justice Harlan alone dissented, and in a powerful argument which should be read in full by every American interested in that vitally important national problem which is sometimes styled "the Negro question," he develops the thesis set forth in the opening sentence of his opinion: "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." This result, reached "by a subtle and ingenious verbal criticism," he attacked under "the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted."

In considering this decision its reservations seem hardly less important than its conclusions. Besides that implied in Headnote 3 quoted above, the following paragraphs appear in the official syllabus of the case: "4. Whether the accommodations and privileges sought to be protected by the 1st and 2nd sections of the Civil Rights Act, are or are not rights constitutionally demandable; and if they are in what form they are to be protected, is not now decided. . . . 5. Nor is it decided whether the law as it stands is operative in the Territories and District of Columbia—the decision only relating to its validity as applied to the states. . . . 6. Nor is it decided whether Congress under the commercial power, may or may not pass a law securing to all persons equal accommodations on lines of public conveyance between two or more states."

*Ex parte Yarborough* was decided in March, 1884. Yarborough and others had been convicted in the United States Circuit Court for the Northern District of Georgia upon indictments drawn

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54 At pp. 24, 25 of 109 U. S.
55 The Court was composed of the following members, all appointed by Republican Presidents: Chief Justice Waite and Justice Blatchford, Bradley, Field, Gray, Harlan, Matthews, Miller, and Woods.
56 At p. 26 of 109 U. S.
57 (1884) 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274.
under Sections 5508 and 5520 of the Revised Statutes. They applied to the Supreme Court for habeas corpus, which was denied. The charges were conspiracy to injure, etc., a citizen in the exercise of a right secured to him by the Constitution and laws of the United States, and to prevent him by force from voting at an election for member of Congress, offenses specified in the two sections. The terms of both sections are general, no reference being made to race, color or previous condition of servitude. It was alleged in the indictments that Saunders, the object of the conspiracy, was a Negro, and that the acts complained of were done because of this fact. The decision, however, was not based on discrimination, but on the implied power of Congress to safeguard the election of officials of the National Government. Justice Miller wrote the opinion and there was no dissent. The following November, in United States vs. Waddell, Section 5508 was held to apply to a conspiracy to prevent a person from completing a homestead entry. The record does not specifically show that a Negro was involved, but the circumstances leave little doubt of that fact.

IV.

Chief Justice Fuller

The “Commerce Clause” of the Constitution on which the Court had rested its decision in Hall vs. DeCuir, came up again in L. N. O. & T. Ry. Co. vs. Mississippi. A Mississippi statute required railways operating within the state to provide (Sec. 1) separate but equal accommodations for white and colored passengers, and to enforce (Sec. 2) the segregation thus provided for. Section 3 fixed penalties for non-compliance. The railway company was prosecuted and convicted for violation of Section 1. The Supreme Court of Mississippi had construed the statute as relating only to commerce within the state. This construction was held conclusive, and so construed the statute was held not unconstitutional. The opinion by Justice Brewer includes the following language: “This is not a civil action brought by an individual to recover damages...”

59Substantially the same as Section 6, Act of May 31, 1870. See U. S. v. Avery, supra, p. 227. The summary character of the earlier decision is especially noteworthy by contrast, in view of the fact that in the instant case the Court had indicated that it must deny the writ on other grounds before it took up the constitutional question presented by the record.
60(1884) 112 U. S. 76, 5 S. Ct. 35, 28 L. Ed. 673.
61The case came up from Arkansas on a certificate of division of opinion.
62See p. 235, supra.
63(1890) 133 U. S. 587, 10 S. Ct. 348, 33 L. Ed. 784.
for being compelled to occupy one particular compartment, or prevented from riding on the train; and hence there is no question of personal insult or alleged violation of personal rights. The question is limited to the power of the state to compel railroad companies to provide within the state separate accommodations for the two races. Whether such accommodation is to be a matter of choice or compulsion does not enter into the case. . . . No question arises under this section as to the power of the state to separate in different compartments interstate passengers, or to 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. Hall vs. DeCuir was distinguished by the fact that in that case the Supreme Court had recognized the act as invalid, because it undertook to regulate interstate commerce, while the instant case was limited to operations within the state. Notwithstanding the carefully guarded language of this decision Justice Harlan dissented. He maintained that if the Court's reasoning was sound in the earlier case it was equally applicable here. "I am unable to perceive," he said, "how the former (i. e., the Louisiana statute) is a regulation of interstate commerce and the other (i. e., the Mississippi statute) is not." Justice Bradley concurred in the dissent.

Wood vs. Brush was an appeal from a judgment in the U. S. Circuit Court, South District of New York, denying a writ of habeas corpus. The appellant was a Negro, convicted of murder, who claimed discrimination by which citizens of the African race were excluded from the juries by which he was indicted and tried. The laws of New York made no such discrimination, but it was alleged to have been made by the officials who selected the jury lists. It was held that the conclusions of the trial court on this point could not be reviewed on habeas corpus. Justice Harlan wrote the opinion and Justice Field concurred in the result, but repeated his

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63 At pp. 589, 591 of 133 U. S.
64 At p. 594 of 133 U. S.
65 Ten years later this case was followed in a closely parallel case, C. & O. Ry. Co. v. Kentucky, (1900) 179 U. S. 388, 21 S. Ct. 101, 45 L. Ed. 244 (opinion by Brown, J., Harlan, J., dissenting). See also So. Covington & Cinn. St. Ry. Co. v. Kentucky, (1920) 252 U. S. 399, 40 S. Ct. 378, 64 L. Ed. 631, and C. C. & E. Ry. Co. v. Kentucky, (1920) 252 U. S. 408, 40 S. Ct. 381, 64 L. Ed. 637. These cases were decided by a divided Court on a rather complicated state of facts, the majority holding that in view of the relations between the leasing and operating corporations the Kentucky Separate Coach Law, as applied to the acts charged in the indictment, did not constitute an unreasonable regulation of interstate commerce. No point of law germane to this inquiry was determined.
66 (1891) 140 U. S. 278, 11 S. Ct. 738, 35 L. Ed. 505.
dissent, as in *Neal vs. Delaware*, from the constitutional views expressed or implied in Justice Harlan's opinion.

Section 5508 of the Revised Statutes was again before the Court in *Logan vs. United States* decided in April, 1892, and was construed to cover an offense against the right of a citizen of the United States, in the custody of a United States Marshal under a lawful commitment to answer for an offense against the United States, to be protected from mob violence. The offense charged against the persons assaulted was larceny in the Indian country, within the exclusive jurisdiction of the United States. It does not appear in the record that these men (two of whom were murdered) were Negroes, but the case was of great importance to members of the Negro race in view of the prevalence of extreme mob violence against them in certain portions of the South. In the opinion by Justice Gray in *United States vs. Reese, United States vs. Cruikshank, Strauder vs. West Virginia, Ex parte Virginia, United States vs. Harris*, the *Civil Rights Cases, Ex parte Yarborough*, and *United States vs. Waddell*, were reviewed and interpreted as follows: "The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the states, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that every right, created by, arising under, or dependent upon the Constitution of the United States may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object." It is held, however, that: "In the case at bar the right in question does not depend on any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try and punish for crime, and to arrest the accused and hold them in safekeeping until trial, must have the

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67 See p. 239, supra.
68 See Andrews v. Swartz, (1895) 156 U. S. 272, 15 S. Ct. 389, 39 L. Ed. 422, a unanimous decision holding that habeas corpus was not the proper remedy.
69 (1892) 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429.
71 At p. 293 of 144 U. S.
power and the duty to protect against unlawful interference its prisoners so held, as well as its executive and judicial officers charged with keeping them and trying them." On account of errors at the trial the conviction in the lower court (U. S. Circuit Court, Northern District of Texas) was set aside and a new trial ordered. Justice Lamar dissented from the construction given to Section 5508.

In *Gibson vs. Mississippi*, Justice Lamar dissented from the construction given to Section 5508. In *Neal vs. Delaware*, Section 641 did not warrant the removal from a state to a Federal Court on the ground that jury commissioners, without authority derived from the constitution and laws of the state, had excluded colored citizens from juries on account of their race. The conviction in the state court was affirmed; but Justice Harlan, speaking for the unanimous court, took occasion to reaffirm the constitutional principles announced in the *Neal Case*. Justice Field, though still a member of the Court, did not note a dissent. The *Gibson Case* was followed in *Smith vs. Mississippi*, decided the same day, and in *Murray vs. Louisiana*. In the *Smith Case* (opinion by Justice Harlan) it was held that although the motion to quash was verified by the affidavits of the defendants, this alone, without other evidence or offer of evidence, did not entitle the motion to consideration. On this point the case was followed in *Tarrance vs. Florida*, Justice Brewer writing the opinion and Justice Harlan taking no part, and in *Martin vs. Texas*, in which Justice Harlan wrote the opinion.

To champions of the Negro race against discriminations by whites, *Plessy vs. Ferguson*, was a crushing blow. The Court was composed of six justices appointed by Republican presidents and three by President Cleveland. A Negro (\(\frac{3}{8}\) Caucasian and \(\frac{3}{8}\) African blood), while a railway passenger between local points in Louisiana, was ejected from a coach reserved for whites and prosecuted for forcible resistance. A Louisiana statute provided that a railway carrying passengers within the state must provide "equal but separate accommodations for the white and colored races" by separate coaches or partitions; and that no persons should be "permitted to occupy seats in coaches other than the

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72 At p. 294 of 144 U. S.
73 (1896) 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075.
74 See p. 239, supra.
75 (1896) 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082.
76 (1896) 163 U. S. 101, 16 S. Ct. 990, 41 L. Ed. 87.
77 (1903) 188 U. S. 519, 23 S. Ct. 402, 47 L. Ed. 572.
78 (1906) 200 U. S. 316, 26 S. Ct. 338, 40 L. Ed. 497.
79 (1896) 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256.
ones assigned to them on account of the race they belong to.” Stringent provisions for the enforcement of the policy were incorporated in the statute. The right of the state to enact this sort of legislation was for the first time squarely before the Court and was decided in the affirmative. Justice Brown spoke for the Court (Justice Brewer did not sit in the case), and Justice Harlan alone dissented. The arguments on both sides are stated in terms which, half a century afterward, are still so familiar in the discussion of questions of segregation that it seems of interest to quote them rather freely. Said Justice Brown: “A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded on 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 re-establish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied on by the plaintiff in error in this connection... The object of the (14th) 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 distinction based on color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by states where the political rights of the colored race have been longest and most earnestly enforced.”

“...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

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standard we cannot say that the act in question is unreasonable or more obnoxious to the Fourteenth Amendment than the Acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of the 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 could 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 on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."

The Court seems to have interpreted the broad language of Strauder vs. West Virginia and other like decisions to cover only "civil" and "political" rights (not defined), and to have classed the right of the plaintiff in error to choose his seat in a railway train without discrimination on the ground of race or color as a "social" right (also undefined), not covered by the 14th Amendment. Yick Wo vs. Hopkins was recognized as holding that exercises of the police power must be reasonable. In that case, it should be noted, the standard was found in essential justice; here, in the local "usages, customs and traditions."

Referring to the Louisiana statute Justice Brown says: "Similar statutes for the separation of the two races upon public conveyances were held constitutional in West Chester and P. R.R. Co. vs. Miles, 55 Pa. 209" and eleven other cases cited. The statement, however, is not supported by any one of the citations. Having made so bold an assertion the writer feels compelled to maintain it by

\[\text{At pp. 550, 551 of 163 U. S.}\]
\[\text{See p. 237, supra.}\]
\[\text{(1886) 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.}\]
summaries of the cases, believing the space thus required to be justified by the great importance of the decision. The Pennsylvania case was a common law action and did not in any way involve a statute or a constitutional point. It was decided before the ratification of the 14th Amendment and turned upon the reasonableness of separation under a regulation of the carrier. The majority rested its conclusion chiefly on divine law, “the law of races established by the Creator himself.” However, between the occurrence of the facts out of which the case arose and the date of the decision the Pennsylvania legislature had flown in the face of Providence by passing the Act of March 22, 1867, forbidding all distinctions between passengers on account of race or color. Day vs. Owen84 was decided in 1858. In Chicago & N. W. R. Co. vs. Williams,85 1870, no constitutional question was raised or discussed. The discrimination at issue was found unlawful and an award of damages sustained. Chesapeake, O. & S. R. Co. vs. Wells86 is a very summary decision under the state statute, and no constitutional question is referred to. In People vs. King87 the act complained of was the exclusion of Negroes from a place of public amusement; and on the authority of Munn vs. Illinois,88 Strauder vs. Virginia,89 Ex parte Virginia90 and Virginia vs. Rives,91 a conviction under the New York Penal Code forbidding such discrimination was sustained, in the light of the war Amendments, as a valid exercise of the police power, against attack upon the statute as an unconstitutional interference with the lawful use of private property. Justice Peckham, who was then a member of the New York Court of Appeals, and who voted with the majority in the Plessy Case, dissented without opinion. The Sue,92 in admiralty, involved transportation on a steamer employed in public navigable waters between points in Maryland and Virginia. “It is therefore,” the court said, “a matter which cannot be regulated by state law, and Congress having refrained from legislating on the subject, the owners of the boat are left at liberty to adopt in reference thereto such reasonable regulations as the common law allows (citing Hall vs. DeCuir93). One of the restrictions which the com-

84(1858) 5 Mich. 520
85(1870) 55 Ill. 185.
86(1887) 85 Tenn. 613.
87(1888) 110 N. Y. 418.
88(1877) 94 U. S. 113, 24 L. Ed. 77.
89See p. 237, supra.
90See p. 238, supra.
91See p. 238, supra.
93See p. 238, supra.
mon law imposes is that such regulations must be reasonable and tend to the comfort and safety of passengers generally, and that accommodations equal in comfort and safety must be afforded to all alike who pay the same price." It was held that in the case at bar the accommodations afforded to a Negro were inferior, and damages were awarded. Logwood vs. Memphis & C. R. Co.,\textsuperscript{94} involving intrastate transportation, consists of a charge to a jury, and the court announced that it adopted the Sue Case as a proper statement of the law. McGuinn vs. Forbes\textsuperscript{95} was an action in admiralty involving transportation on a steamer from Maryland to Virginia, and was based on mistreatment of libelant, a Negro who is described by the court as "a well-behaved, educated minister of the Christian religion," by other passengers in a dining-room. It was claimed that the officers of the boat made no proper effort to protect him. The Sue Case was cited and there was no constitutional question. The court said: "There is some ground for a suspicion that the petitioner was not sufficiently protected by the officers of the steamboat from the threats and indignities at the hands of certain passengers, but the proof fails to establish it, and they testified they did all they could to prevent it. I therefore must dismiss the libel, but without costs." Houck vs. So. Pac. R. Co.\textsuperscript{96} was a suit for damages by an intrastate passenger for ejection from a car reserved for white people. The court said: "The undisputed evidence in the case shows that Mrs. Houck is a young married woman with some degree of Negro blood in her veins; that casually looking at her and her husband it would be difficult to distinguish either of them from white persons; that she is a graduate of one of the high-schools in Texas where colored persons are educated for school teaching." The opinion is taken up with a description of the poor condition of the car into which she was ordered to go, the treatment she received from the brakeman and conductor, and other circumstances of her journey. There was no discussion of any question of law. On the facts there was an award of both exemplary and actual damages. In Heard vs. Georgia Railroad Company\textsuperscript{97} it was held that the petitioner (again a Negro clergyman) was deprived of equal accommodations in violation of Section 3 of the Interstate Commerce Act.\textsuperscript{98} The same result was

\textsuperscript{94} (Cir. Ct. W. D. Tenn. 1885) 23 Fed. 318.
\textsuperscript{95} (Dist. Ct. Mde. 1889) 37 Fed. 639.
\textsuperscript{96} (Cir. Ct. W. D. Tex. 1888) 38 Fed. 226.
\textsuperscript{97} (1888) 1 I. C. C. R. 428.
\textsuperscript{98} See Mitchell v. U. S., at p. 286, infra.
reached in *Heard vs. Georgia Railroad Company* on facts arising out of another interstate journey of the same man over the same railway. In the earlier case the railway company was ordered “to furnish for all passengers paying the same fare cars in all respects equal.” This time it was ordered to do so “without any further delay.”

Discussing the general scope of the 13th, 14th and 15th Amendments, Justice Harlan said: “These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this Court has said, a common purpose, namely, to secure ‘to a race recently emancipated ... all the civil rights that the superior race enjoy.’ They declared, in legal effect, this Court has further said, ‘that the law in the states shall be the same for the black as for the white; 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 Amendments are primarily designed, that no discrimination shall be made against them by law because of their color.’ We also said ‘The words of the Amendment ... contain a necessary implication of a ... right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race. ... The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not that it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the

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99 (1889) 3 I. C. C. R. 111.
conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in *The Dred Scott Case*. . . . The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent Amendments of the Constitution. . . . Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under sanction of law. What can more certainly arouse race hate . . . than state enactments which in fact proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana. . . . It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race, if his rights under the law were recognized. But he objects, and ought never to cease objecting, to the proposition that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach, on a public highway. . . . The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone, or atone for the wrong this day done."

Whether the conclusions of the majority in this case, which has meant so much to our Negro fellow-citizens, were right or wrong, the cynical and superficial character of the opinion cannot escape notice; and it is disturbing to find that for fifty years it has stood as an authoritative precedent, without direct criticism in the Court except from Justice Harlan. The language of the Court's unanimous opinion in the recent *Mitchell Case*\(^\text{100}\) shows quite a different spirit, although the prevailing construction of the 14th Amendment is not questioned.

\(^{100}\) At pp. 555, 559-562 of 163 U. S.

The question of a Negro’s rights in the selection of jurors to try him was again before the Court in *Williams vs. Mississippi.* It was held therein that certain provisions of the constitution and code of Mississippi, “do not, on their face, discriminate between the white and Negro races, and do not amount to a denial of the equal protection of the law, secured by the Fourteenth Amendment to the Constitution; and it has not been shown that their actual administration was evil, but only that evil was possible under them.” Under the constitution of the state one had to be an elector and have his taxes fully paid in order to be eligible as a juror; and it was alleged that the constitution and laws were framed and administered with the purpose of excluding Negroes from voting. The Court, by McKenna, J., quoted as follows from the Supreme Court of Mississippi, in a prior case cited by counsel, in reference to the convention which framed the state constitution of 1890: “Within the field of permissible action under the limitations imposed by the Federal Constitution the (state constitutional) convention swept the circle of expediency to obstruct the exercise of the franchise by the Negro race. . . . By reason of its previous condition of servitude and dependence this race had acquired or accentuated certain peculiarities of habit, of temperament and of character, which clearly distinguished it, as a race, from that of the whites,—a patient, docile people, but careless, landless and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the Federal Constitution from discriminating against the Negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone” (the reference here being to crimes for which conviction was a constitutional disqualification for the ballot,—“bribery, burglary, forgery, embezzlement or bigamy”). On this Justice McKenna’s comment was: “But nothing tangible can be deduced from this. If weakness were the test taken advantage of, it was done ‘within the field of permissible action under the limitations imposed by the Federal Constitution,’ and the means of it were the alleged characteristics of the Negro race, not the administration of the law by the officer’s of the state. Besides, the operation of the (state) constitution and laws is not limited to their language or effects on one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented

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102(1898) 170 U. S. 213, 18 S. Ct. 583, 42 L. Ed. 1012.
by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime."103 Another aspect of the case involved a question of fact as to the manner in which the grand jury had been selected. There had been a motion in the trial court to quash the indictment on the ground that there was discrimination resulting in the exclusion of Negroes, and that thereby the defendant was deprived of the equal protection of the laws. This motion was supported by affidavits, and it does not appear that these were met by counter-affidavits. The motion was denied and the denial was assigned as error. The Court said: "We gather from the statements of the motion that certain officers are vested with discretion in making up lists of electors and that this discretion can and has been exercised against the colored race, and from these lists jurors are selected. The Supreme Court of Mississippi, however, decided in a case presenting the same questions as the one at bar, 'that jurors are not selected from or with reference to any lists furnished by such election officers.' "104 Williams, a Negro indicted and convicted by all-white juries, was therefore remanded to be duly hanged. Study of the cases will disclose a growing contrast between the Court's attitude here toward the crucial question of fact, and that taken in later cases.

Cumming vs. County Board of Education105 was the first case calling for the application of the 14th Amendment to the compulsory separation of white and Negro children in the public schools.106 The case has been cited several times as though it were an authority for such separation.107 The Court declared, however, by Justice Harlan: "It was said at the argument that the vice in the common school system of Georgia was the requirement that the white and colored children of the state be educated in separate schools. But we need not consider that question in this case. No such issue was made in the pleadings."108 The case involved only the equality of the provisions made in separate schools. In brief, a school board had suspended support of a high school for colored children for the purpose of using the building for instruction in the lower grades, and without making other provision for high school instruction for Negroes; while it had continued two "white" high schools. The trial court entered an order restraining the board

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103 At p. 222 of 170 U. S.
104 At p. 223 of 170 U. S.
105 (1889) 175 U. S. 528, 20 S. Ct. 197, 44 L. Ed. 262.
106 The comments on this question in Plessy v. Ferguson, supra, p. 246, were mainly dicta.
107 See the Gong Lum and Gaines Cases, infra, pp. 271, 282.
108 At p. 543 of 175 U. S.
from using public funds for the support of a white high school in
the county until it should make equal provision for colored chil-
dren. The state Supreme Court reversed, and the correctness of
this reversal was the point considered on appeal. The action of the
board was held to be within its lawful discretion, Justice Harlan
concluding his opinion as follows: "While all admit that the bene-
fits and burdens of public taxation must be shared by citizens with-
out discrimination against any class on account of their race, the
education of people in schools maintained by state taxation is a
matter belonging to the respective states, and any interference on
the part of Federal authority with the management of such schools
cannot be justified except in the case of a clear and unmistakable
disregard of rights secured by the supreme law of the land. We
have here no such case to be determined." 1
The detailed recital of proceedings in the Georgia courts,
showing careful consideration there, and Justice Harlan's con-
sistently liberal attitude upon constitutional questions involving
the rights of Negroes, must predispose fair-minded persons to con-
clude that the case was rightly decided; but in view of the great
importance of the question of discrimination in the public schools,
and (as the writer believes) the inconclusive treatment it has thus
far received in Supreme Court decisions, it is thought appropriate
to quote from an acute criticism of this case found in an editorial
note on "Legality of Race Segregation in Educational Institutions;"
in the University of Pennsylvania Law Review: 11 "A Negro high
school was discontinued because of lack of funds, it being claimed
that the money was needed to teach the Negroes in the lower grades.
Although the high school for white pupils was maintained with
all the usual accommodations, the court refused to order 'white'
funds to be used for colored schools, and said that . . . 'if it ap-
peared that the board's refusal to maintain such a school was in
fact an abuse of discretion and in hostility to the colored population
because of their race, different questions might have arisen in the
state court.' Here is a new test: Not mere factual inequality but
inequality motivated by race hostility. The test is not sound. What
other reason could be given for reducing only the facilities of the
Negro except that the board believed his rights inferior, his edu-
cational needs less important? To the argument that they could
not afford a Negro high school logic, constitutional theory and
justice answer: that which you cannot afford for Negroes you

109 At p. 545 of 175 U. S.
11082 Univ. of Pa. Law Rev. 157, 162 (1933).
cannot afford for white pupils either. . . . The manner in which the Supreme Court of the United States has handled the few cases on the subject which it has been asked to consider, and its analysis, implying that equality between races is a matter of 'discretion' with state authorities, and inequality justified so long as it is not 'hostile,' are most unsatisfactory."

While *Maxwell vs. Doe* 1 did not involve a Negro, it was of such importance that it cannot be overlooked in this review. It made clear the position of the Court on a point which, even if already covered by its decisions, was still so uncertain as to be repeatedly presented. The point is thus stated by Justice Peckham, who wrote the opinion: "It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of Federal power, are by virtue of this Amendment (the 14th) to be regarded as privileges and immunities of a citizen of the United States, and therefore the states cannot provide for any procedure in state courts which could not be followed in a Federal Court because of the limitations contained in those Amendments." After a careful review of the *Slaughter-House* and later cases the Court refused to accept this view. Justice Harlan, true to convictions which he had often expressed during his more than twenty years' service in the Court, concluded his dissenting opinion as follows: "If I do not wholly misapprehend the scope and legal effect of the present decision, the Constitution of the United States does not stand in the way of any state striking down guaranties of life and liberty that English-speaking people have for centuries regarded as vital to personal security, and which the men of the revolutionary period universally claimed as the birthright of freemen." 112

In *Carter vs. Texas* 113 a motion was made in the trial court to quash the indictment on the ground of discrimination in the drawing of grand jurors, "fully and specifically alleged," said Justice Gray, "with almost the precision of a plea in abatement," accompanied with an offer of proof. The court refused to hear evidence and denied the motion. On a second hearing in the Texas Court of Criminal Appeals this was acknowledged to be error, but because neither the motion nor the bill of exceptions named the witnesses by whom it was proposed to prove the alleged discrimina-

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111 (1900) 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597.
112 At p. 617 of 176 U. S.
113 (1900) 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839.
tions the lower court was sustained. The Supreme Court reversed the judgment below and remanded the case.

Chesapeake & O. Ry. Co. vs. Kentucky\textsuperscript{114} was another prosecution of a railway company for failure to furnish separate coaches for white and colored passengers, as required by the Kentucky statute. The terms of the statute need not here be set forth in detail. It was upheld by the Kentucky Court of Appeals as applicable only to traffic within the state, and that court said: “If it were conceded (which it is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the state, and therefore it would be held valid as to such passengers.” Justice Brown, in sustaining the Kentucky court, said: “We are by no means satisfied that the Court of Appeals did not give the correct construction to this statute in limiting its operation to domestic commerce. . . . The Court of Appeals has found such to be the intention of the General Assembly in this case, or, at least, that if such were not its intention the law may be supported as applying alone to domestic commerce. In thus holding the act to be severable, it is laying down a principle of construction from which there is no appeal.”\textsuperscript{115} Justice Harlan dissented without opinion. The Supreme Court cases relied on in support of this decision were\textit{ Hall vs. De Cuir, Louisville N. O. & T. R. R. Co. vs. Mississippi}, and\textit{ Plessy vs. Ferguson}, which have already been discussed herein. The case may well be studied in connection with\textit{ Chiles vs. C. & O. Ry. Co.}\textsuperscript{116}

In\textit{ Brownfield vs. South Carolina}\textsuperscript{117} a Negro was convicted of murder on an indictment found by an all-white grand jury in a county where, it was alleged in a motion to quash, four-fifths of the population and registered voters were Negroes, all of whom were excluded from jury service on account of race and color. Through irregularities in the record, so extreme as to make it difficult to believe that they were not due either to gross incompetence, indifference or collusion on the part of defendant’s counsel, the real issue was not brought before the Court, and Justice Holmes was compelled to say: “The case involves ques-

\textsuperscript{114}(1900) 179 U. S. 388, 21 S. Ct. 101, 45 L. Ed. 244.  
\textsuperscript{115}At p. 394 of 179 U. S.  
\textsuperscript{116}See p. 264, infra.  
\textsuperscript{117}(1903) 189 U. S. 426, 23 S. Ct. 513, 47 L. Ed. 882.
tions of the gravest character, but we must deal with it according to the record and the record discloses no wrong."  

Giles vs. Harris\textsuperscript{118} was a case from Alabama in which, as summarized by Justice Frankfurter in Lane vs. Wilson,\textsuperscript{120} "a bill in equity was brought by a colored man on behalf of himself 'and on behalf more than five thousand Negroes, citizens of the county of Montgomery, Alabama, similarly situated,' which in effect asked the federal court 'to supervise the voting in that state by officers of the Court.'" The bill was dismissed on demurrer in the U. S. Circuit Court for want of jurisdiction. Justice Holmes, writing the opinion, held that no equitable relief could be given, but was "not prepared to say that an action at law could not be sustained on the facts alleged in the bill."\textsuperscript{121} Justices Brewer, Brown and Harlan dissented, Justice Brewer considering that the Circuit Court had jurisdiction to give some relief, and Justice Harlan, that such relief was "in respect to plaintiff's right to be registered as a voter."

Section 5507 of the Revised Statutes of the United States provided as follows: "Every person who prevents, hinders, controls or intimidates another from exercising, or in exercising, the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands or other property, or by threats of refusing to renew leases or contracts for labor; or by threats of violence to himself or family, shall be punished," etc. The very terms of the statute reflect practices which notoriously prevailed in certain states. In James vs. Bowman\textsuperscript{122} appellees were indicted for bribery of certain Negroes at a Congressional election in Kentucky. It was held that as legislation under Section 2 of the 15th Amendment, the statute was unconstitutional, since Section 1 prohibited only action by a state or the United States; also that it could not be sustained under the general power of Congress in respect to the election of its members, since, following U. S. vs. Reëse,\textsuperscript{123} its terms could not be thus judicially limited. Justice Brewer wrote the decision; Justices Harlan and Brown dissented.

\textsuperscript{118}At p. 429 of 189 U. S.  
\textsuperscript{119}(1903) 189 U. S. 475, 23 S. Ct. 639, 47 L. Ed. 909.  
\textsuperscript{120}See infra, p. 284.  
\textsuperscript{121}At p. 485 of 189 U. S.  
\textsuperscript{122}(1903) 190 U. S. 127, 23 S. Ct. 678, 47 L. Ed. 979.  
\textsuperscript{123}See p. 230, supra.
In *Rogers vs. Alabama*\(^{124}\) another Negro convicted of murder sought to attack the indictment by a motion to quash on the ground of unconstitutional discrimination in the selection of grand jurors. The trial court struck out the motion, and the state appellate court sustained this action on the ground of *proximity!* Justice Holmes went behind this pretext and reversed under *Carter vs. Texas*.\(^{125}\)

*Giles vs. Teasley*\(^{126}\) can hardly be briefly summarized. There were two cases, one an action for damages and the other seeking mandamus. In the former the loser in *Giles vs. Harris*, sought to follow out Justice Holmes' hint that he might fare better in an action at law than in equity. The statement of facts in the complaint (admitted upon demurrer) by Justice Day may well be read in full as disclosing one of the ingenious methods resorted to in certain states to disfranchise the Negro,—here the same which were before the Court in *Giles vs. Harris*. The highly technical grounds on which the Court bases its conclusion that there is no error before it which it is competent to review, notwithstanding the acknowledged gravity of complainant's charges, suggests the difficulty encountered by Negro citizens in their long struggle for the right intended to be guaranteed them by the 15th Amendment. Justice McKenna concurred in the result, and Justice Harlan dissented without opinion.\(^{127}\)

Difficulties in securing redress through the courts in other fields are illustrated in *Clyatt vs. U. S.*\(^{128}\) Clyatt had been convicted in a Federal Court in Florida under Sections 1990 and 5526, of the United States Revised Statutes, abolishing peonage and making it a criminal offense to "hold, arrest, return, or cause to be held, arrested, or returned . . . to a condition of peonage." The state of peonage was defined as covered by the prohibition of "involuntary servitude" in the 13th Amendment, and the statutory provisions involved were held to be constitutional and valid. The indictment charged "returning" certain persons to a condition of peonage, but there was no evidence that they had ever before been in such a condition. The Court, by Justice Brewer, said: "The

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\(^{125}\)See p. 256, *supra*.


\(^{127}\)Jones v. Montague, (1904) 194 U. S. 147, 24 S. Ct. 611, 48 L. Ed. 913, involving wholesale disfranchisement of Negroes in Virginia, was dismissed because, on account of changed circumstances since the inception of the case, there was no subject-matter on which the judgment of the court could operate. So also in the companion case of Seldon v. Montague. Following Mills v. Green, (1895) 159 U. S. 651, 16 S. Ct. 132, 40 L. Ed. 293.

testimony discloses that the defendant, with another party, went to Florida and caused the arrest of Gordon and Ridley (Negroes) on warrants issued by a magistrate in Georgia for larceny; but there can be little doubt that these criminal proceedings were only an excuse for securing the custody of Gordon and Ridley and taking them back to Georgia to work out a debt. At any rate, there was abundant testimony from which the jury could have found that to have been the fact. While this is true, there is not a scintilla of testimony to show that Gordon and Ridley were ever theretofore in a condition of peonage," and hence they could not be "returned" to that condition. It was therefore held that the lower court erred in not directing a verdict for defendant, although no motion to that effect had been made at the trial. Justice Harlan, in a dissenting opinion, declares that "it is going very far to hold in a case like this, disclosing barbarities of the worst kind against these Negroes that the trial court erred in sending the case to the jury." The 13th Amendment was again before the Court in Hodges vs. U. S. The plaintiffs in error were indicted and convicted in the U. S. District Court, Eastern District of Arkansas, under R. S., Sections 1977 and 5508. Section 1977 provided that "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts . . . as is enjoyed by white persons . . .," and Section 5508, construed with Section 5510, punished conspiracies "to prevent or hinder" "by reason of his color or race," any citizen in the "free exercise or enjoyment of any right or privilege . . . secured to him by the Constitution or laws of the United States," etc. The acts complained of amounted to an attempt to compel a group of Negroes to desist from the performance of certain contracts of employment. It was held (Justice Brewer presenting the opinion) that the sections as thus applied were not within the authority of Congress under the 13th Amendment; but that the remedy must be sought in the state tribunals, subject to the supervision of the Supreme Court of the United States by writ of error in proper cases. It was conceded by the counsel for the government that unless the injury in question was inflicted, as charged in the indictment, solely by reason of the

129At p. 222 of 197 U. S.

130A South Carolina statute somewhat similar to that of Florida was indirectly questioned in Franklin v. South Carolina, (1910) 218 U. S. 161, 30 S. Ct. 640, 54 L. Ed. 980, but this phase of the case was decided on a procedural point. An Alabama statute was considered in Bailey v. Alabama, (1911) 219 U. S. 219, 31 S. Ct. 145, 55 L. Ed. 191, discussed at p. 263, infra.

131(1906) 203 U. S. 1, 27 S. Ct. 6, 51 L. Ed. 65.
fact that the subjects were Negroes, the indictment was invalid. The Court held, however, that this fact, admitted by the demurrer, did not save the case. Although inability to make contracts was an incident of slavery, interference with the right of a freeman in that case could not be differentiated from the interference involved in any other personal wrong, and was not such a "badge of servitude" as had been recognized in previous decisions. Justice Brown concurred in the result. Justice Harlan dissented, writing an elaborate opinion, in which Justice Day concurred.

The Court passed over the claim that the case was within the 14th Amendment and covered by R.S. Sections 5508 and 5510 with only a very brief comment: "That the 14th and 15th Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the state is complained of. Unless, therefore, the 13th Amendment vests in the nation the jurisdiction claimed, the remedy must be sought through state action and in state tribunals subject to the supervision of this court by writ of error in proper cases." The dissenting Justices maintained that the construction given by the majority to the 13th Amendment was too narrow; that the right in question in the case, the right not to be prevented, by reason of race or color, from continuing in a lawful employment, was one which inhered in the state of freedom declared by the 13th Amendment, with the power in Congress to enforce it in accordance with the terms of Sections 5508 and 5510. Allgeyer vs. Louisiana, although state action was there involved, was cited to show what this freedom included. That case was one of many where the 14th Amendment has served the interests of white people, and the unanimous Court said (by Peckham, J.) that "The liberty mentioned in that Amendment means not only the right of the citizen to be free from the more physical restraints of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." On the authority of the Hodges case, U. S. vs. Powell was decided per curiam in 1909. Justice Moody did not sit.

133 (1897) 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832.
Mob lynching of Negroes, long prevalent in certain Southern states, came before the Court in *U. S. vs. Shipp*.\(^{135}\) On February 11, 1906, one Johnson, a Negro, was convicted in a Tennessee court of rape upon a white woman and was sentenced to death. He petitioned the U. S. Circuit Court for a writ of habeas corpus, alleging illegality in the selection of grand and petit juries, intimidation of counsel and other facts whereby he had been deprived of his constitutional rights. The petition was denied with a stay for appeal. During the stay, on March 19th, the Supreme Court allowed the appeal and ordered the defendant held in custody by the local sheriff. That night a mob broke into the jail, took Johnson out and hanged him. There is no suggestion that any prosecution for this murder was had or contemplated in the state courts, but Shipp (the local sheriff), and others, who were alleged to have participated directly or indirectly, were brought by information before the United States Supreme Court on a charge of contempt of court. The opinion by Justice Holmes cut clearly through the technical objections that were raised, and ordered the trial for contempt to proceed. It did proceed—very slowly. The matter came on for hearing on the merits in March 1909, and was decided the following May, Shipp and certain of his associates being found guilty of contempt as charged. The opinion by the Chief Justice contained a minute analysis of the evidence. Justices Peckham, White and McKenna dissented, their views of the evidence bringing them to an opposite conclusion. No question of law was involved. On November 15 Shipp was sentenced to 90 days imprisonment in the District of Columbia jail. Some of the co-defendants received a like sentence, some 60 days. If the Department of Justice and the Court had then held the views recently announced in the *Screws Case*,\(^{136}\) a somewhat more adequate punishment might have been imposed,—at least on Sheriff Shipp.

It may not be amiss to bring into this survey the bit of "atmosphere" furnished by *Battle vs U. S.*\(^{137}\) The following appears in the opinion of Justice Holmes, concerning an incident at the trial in the Federal Court in Georgia: "An exception was taken to an interruption of the judge, asking the defendant's counsel to make an argument that did not tend to degrade the administration of justice. The reference was an appeal to race prejudice and to

\(^{135}\)(1906) 203 U. S. 563, 27 S. Ct. 165, 51 L. Ed. 319. Lynching was also involved in Riggins v. U. S., (1905) 199 U. S. 547, 26 S. Ct. 147, 50 L. Ed. 303, but only a procedural point was decided.

\(^{136}\)See p. 294, infra.

\(^{137}\)(1908) 209 U. S. 36, 28 S. Ct. 422, 52 L. Ed. 670.
such language as this: "You will believe a white man not on his oath before you will a negro who is sworn. You can swallow those niggers if you want to, but John Randolph Cooper will never swallow them.' The interruption was fully justified.\(^{138}\)

The Negro race sustained a serious setback in November, 1908, when the Court announced its decision in *Berea College vs. Kentucky*.\(^{139}\) A Kentucky statute made it unlawful, with heavy penalties, "for any person, corporation or association of persons to maintain or operate any college, school, or institution where persons of the white and negro races are both received as pupils for instruction." Berea College, a private corporation, was indicted, convicted and fined $1,000 under this statute, and the judgment was affirmed by the Kentucky Court of Appeals. The constitutionality of the whole statute was attacked in the state court and upheld. On writ of error the Supreme Court, by Justice Brewer, expressly declining to consider the constitutional question in its application to individuals, and failing to do so in its application to corporations generally, sustained the conviction on the ground that the highest court of the state had considered the act separable, and while sustaining it as constitutional, had given independent reasons, which could not be attacked on constitutional grounds, for applying it to corporations and particularly the corporation defendant. Justices Holmes and Moody concurred in the result. Justices Day and Harlan dissented—the former without a written opinion.\(^{140}\) One cannot read Justice Harlan's argument without realizing how appropriate it would have been for the Court to meet the larger question presented by the appeal.

In December, 1908, *Bailey vs. Alabama*\(^{141}\) was before the Court on a writ of error to reverse a judgment of the Supreme Court of Alabama affirming a lower court which denied a discharge of plaintiff in error on habeas corpus. He was held for trial under a statute claimed to be repugnant to the 13th and 14th Amendments.

\(^{138}\) At p. 39 of 209 U. S. 36.
\(^{139}\) (1908) 211 U. S. 45, 29 S. Ct. 33, 53 L. Ed. 81.
\(^{140}\) In Buchanan v. Warley, (1917) 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149, discussed at p. 269, *infra*, the Court, by Justice Day, says of the Berea College case that the state court was affirmed "solely" upon the reserved power of the legislature of Kentucky to alter, amend, or repeal charters of its own corporations. This is certainly not clear on the fact of the decision, and Justice Harlan seems not to have taken that view in his dissenting opinion. Four members of the Court, when the later case was decided, of whom Justice Day was one, had sat in the earlier case. See citation of the Berea College case in Pierce v. Society of Sisters of Holy Names, (1925) 268 U. S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070.
\(^{141}\) (1908) 211 U. S. 452, 29 S. Ct. 141, 53 L. Ed. 278.
The Alabama Court was sustained on a procedural ground. Justices Harlan and Day dissented, holding that the constitutional question should be considered. The case came back in 1911 and is presented later in this review.

*Thomas vs. Texas*\(^4\) was another case where a motion to quash the indictment on the ground of discrimination in selection of grand jurors was denied in the trial court,—this time after receiving evidence. The Court held that this determination of the question of fact, affirmed by the Texas Court of Criminal Appeals, was conclusive, in the absence of such abuse of discretion as amounted to an infraction of the Federal Constitution (i. e., due process) "which cannot be presumed and which there is no reason to hold on the record before us."\(^1\)

In *Marbles vs. Creecy*,\(^4\) an extradition case, the unanimous Court, by Justice Harlan, held that: "The executive of the surrendering state need not be controlled in the discharge of his duty by considerations of race or color, or, in the absence of proof, by suggestions that the accused will not be fairly dealt with by the demanding state," and that "On habeas corpus the Court can assume that a requisition by an executive of a State is solely for the purpose of enforcing its laws, and that the person surrendered will be legally tried and adequately protected from mob violence."

"Jim Crow" took a step forward in *Chiles vs. C. & O. Ry. Co.*\(^4\) The plaintiff in error, a Negro, had a first-class ticket from Washington, D. C., to Lexington, Kentucky. He changed cars at Ashland, Kentucky, and there went into a car reserved for white passengers exclusively. Pursuant to a regulation of the railway company he was required to remove into a compartment in another car set apart for colored passengers. This he did under protest, only when a policeman had been summoned to eject him. He sued for damages, basing his claims on his rights as an interstate passenger. On the authority of *Hall vs. DeCuir* and *Louisville, N. O. & T. R. C. vs. Mississippi*,\(^4\) it was held, Justice McKenna writing the opinion, that in the absence of Congressional legislation the carrier could make reasonable regulations for the conduct of its business. As to what was "reasonable" it was said that this "cannot depend upon a passenger being state or interstate." The standard adopted

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\(^1^4\)See also *Franklin v. South Carolina*, (1910) 218 U. S. 161, 30 S. Ct. 640, 54 L. Ed. 980.

\(^4^4\)See *Hall vs. DeCuir*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 L. Ed. 92. The quotations are from Headnotes 3 and 4 of the official syllabus.


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\(^4^6\)See pp. 235 and 243, *supra*. 
in *Plessy vs. Ferguson* was adopted for regulations by the carrier as well as state legislation, and it was added: "Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable. See also *Chesapeake & O. R. Co. vs. Kentucky.*" Reference to that decision discloses that it in no way involves the question of reasonableness, which appears to be vital in the instant case.\(^{147}\)

The Court's opinion concludes as follows: "The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulation of carriers has been discussed so much that we are relieved from further enlargement upon it. We may refer to Mr. Justice Clifford's concurring opinion in *Hall vs. De Cuir* for a review of the cases. They are also cited in *Plessy vs. Ferguson* at page 550." The concurring opinion in *Hall vs. De Cuir* enlarges at length on the argument of the Chief Justice, with some citations directly supporting segregation on the basis of race, which, however, are all from state courts. All the cases involving this point which are cited in *Plessy vs. Ferguson* have been included in this review. The decision thus avoided the embarrassing question of segregation in interstate commerce by state law; and the matter was left in control of carriers so long as Congress should fail to legislate on the subject.\(^{148}\) Justice Harlan dissented without opinion.

V

**Chief Justice White**

The second appearance of *Bailey vs. Alabama*,\(^{149}\) brought squarely before the Court the question of the so-called "peonage" laws of certain Southern states in the more extreme form exist-

\(^{147}\)See p. 257, *supra*.

\(^{148}\)It seems to have been discovered later than Congress had legislated on the subject; see Mitchell Case, p. 286, *infra*. In Chiles, however, no point seems to have been made of inequality of accommodations. The Kentucky court considered them "substantially equal." How nearly equal they were can be judged by comparing the following description with those of the ordinary first-class railway coach: "A passenger coach divided by board partitions into three compartments; one of these compartments located in the end of the car, is set apart for colored passengers; the middle compartment is for the use of colored passengers who smoke; and the end compartment is for the accommodation of white people who smoke." It was, however, "clean and ample for his accommodation, and equipped with the same conveniences as the other passenger coach on the train from which he was ejected."

ing in Alabama. As we have just seen, the Court had declined to consider this question in 1908. Section 4730 of the Alabama Code, as amended in 1903 and 1907, provided that any person who, with intent to injure or defraud his employer, entered into a written contract for services, and thereby obtained money or other personal property, and with like intent and without just cause, and without refunding the money or paying for the property, refused to perform the service, should be punished as if he had stolen it. Amendments made the failure to perform the service contracted for, or refund the money or pay for the property so received, \textit{prima facie} evidence of the criminal intent to defraud. A rule of evidence enforced by the courts of Alabama as though included in the laws of the state disqualified the accused person from testifying "as to his uncommunicated motives, purpose or intention." Bailey, the plaintiff in error, had been convicted under this statute. He was a Negro, and while the Court took pains to disclaim all consideration of that fact, it was notorious that laws of this sort had as their objective protection of white employers against alleged delinquencies of black agricultural laborers. The case was considered one of much importance and was exhaustively argued. It was held, (Justice Hughes writing the opinion) that by reason of the provision making refusal to perform the labor contracted \textit{prima facie} evidence of criminal intent to defraud (especially since the accused could not testify as to his intention) the Alabama statute offended against the 13th Amendment,—being in the direction of compulsion to "involuntary servitude." Lawyers will be interested in the criticism of this decision by Justice Holmes, dissenting, in which Justice Lurton concurred.\textsuperscript{150}

Thirty years after \textit{The Civil Rights Cases},\textsuperscript{151} the question of the validity of the Civil Rights Act of March 1, 1875, in cases arising where the United States had undoubted and plenary jurisdiction, expressly reserved in the earlier decision, came before the Court in \textit{Butts vs. Merchants and Miners Transportation Co.}\textsuperscript{152}  

\textsuperscript{150}Cresswell v. Grande Lodge, Knights of Pythias, (1912) 225 U. S. 246, 32 S. Ct. 822, 56 L. Ed. 1074, was a suit by a white fraternal order against a Negro order to enjoin the use of certain names and symbols. The nature of the controversy does not bring the case within the scope of this study. This is also true of Ancient, etc. Order of the Mystic Shrine v. Michaux, (1929) 279 U. S. 737, 49 S. Ct. 485, 73 L. Ed. 939. Jones v. Jones, (1914) 234 U. S. 615, 34 S. Ct. 937, 58 L. Ed. 1520, has not been overlooked, and is omitted from the text for a like reason. It involved a Tennessee statute of descent which, as construed by the Tennessee courts, was held not in conflict with the 14th Amendment.

\textsuperscript{151}See p. 241, \textit{supra}.

\textsuperscript{152}(1913) 230 U. S. 126, 33 S. Ct. 964, 57 L. Ed. 1422.
A Negro woman, holding a first-class ticket on a coastwise vessel from Boston to Norfolk and return, sued under Sections 1 and 2 of the Act for damages, alleging deprivation, on account of color, of the privileges accorded to other first-class passengers who were white. The unanimous court (Justice Van Dervanter writing the opinion and Justice Harlan being no longer there) recognized The Civil Rights Cases as authoritatively declaring the applicable law, on the ground that the terms of the Act in question, it being a criminal statute, were not separable. U. S. vs. Reese, was cited as in point.153

"Peonage" in Alabama came up again in 1914.154 Justice Day delivered the opinion of the Court, Justice Holmes concurring with evident reluctance. Justice McReynolds took no part. The provisions of the statute in question appear sufficiently in the official syllabus: "A condition of peonage forbidden by the U. S. Constitution, 13th Amendment, and U. S. Comp. Stats., 1901, pp. 1366, 3175, results from the operation of the provisions of the Alabama Code, Sec. 6846, under which a person fined upon conviction for a misdemeanor may confess judgment with a surety in the amount of the fine and costs, and may agree with the surety in consideration of the latter's payment of the confessed judgment, to reimburse him by working for him upon terms, approved by the court, which may in fact be more onerous than if the convict had been sentenced to imprisonment at hard labor, the performance of his agreed service being enforced by the constant fear of re-arrest, a new prosecution, and a new fine for his breach of contract, which new penalty he may undertake to liquidate by a similar contract, attended by similar circumstances and penalties."

The facts involved throw such light on social and industrial conditions a generation ago, in certain portions of the United States, as to warrant recital in some detail.

153See p. 230, supra. In accepting as conclusive the declaration of the earlier case that the Act showed on its face that it was not based upon constitutional right of Congress to regulate interstate commerce, and that the case should therefore be decided under the 14th Amendment, the Court cited the preamble: "Whereas it is essential to just government that we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color or persuasion, religious or political; and it being the appropriate object of legislation to enact great principles into law: Therefore—Be it enacted, etc."

154U. S. v. Reynolds, (1914) 235 U. S. 133, 35 S. Ct. 86, 59 L. Ed. 163 and the companion case of U. S. v. Broughton. In neither case does it expressly appear in the report in the Supreme Court or in the court below that the person alleged to be held in peonage was a negro. It seems probable that such was the fact, in view of the well-known purpose for which such laws in some of the southern states were devised and employed.
In the Reynolds Case one Rivers, on conviction of petit larceny, was fined $15 and costs, $43.75. Reynolds appeared as his surety and judgment by confession was entered against him for the fine and costs. This Reynolds paid. Rivers thereupon entered into a written contract with Reynolds to work for him as a farm-hand for nine months and twenty-four days at $6 per month, in payment of the fine and costs. He entered into Reynolds' employment, and under threats of arrest and imprisonment if he should quit, worked from May 4 to June 6, when he refused to go on. Thereupon he was arrested at the instance of Reynolds for violation of the contract for service. He was again convicted, fined one cent for the violation of the contract and additional costs in the sum of $87.05, for which he again confessed judgment and entered into a similar contract with another surety to work at the same rate for fourteen months and fifteen days. The facts in the Broughton case were similar. The original offense was selling mortgaged property. The fine was $50 and $67.50 costs; the first agreed term of service nineteen months and twenty-nine days; the actual term of service from July 8 to September 14, with a new arrest at Broughton's instance upon quitting. And on this showing a U. S. District Judge of the Southern District of Alabama had held that the conduct of Reynolds and Broughton was justified by the Alabama statute and was not an offense against Federal law. The judgment below was reversed.

In McCabe vs. A. T. & S. F. R. Co.155 a majority of the Court, speaking by Justice Hughes, declared that since Plessy vs. Ferguson,156 "The question could no longer be considered an open one, that it was not an infraction of the 14th Amendment for a state to require separate, but equal, accommodations for the two races;" but that for a state law to permit common carriers to provide sleeping, dining and chair cars for whites, without similar accommodations for Negroes, was such an infraction. Under the circumstances of the case, however, injunctive relief was denied, and the four Justices (White, C. J., Holmes, Lamar and McReynolds) who did not join in the opinion concurred in the result.

An ingenious—however transparent—trick resorted to for circumventing the 15th Amendment, was the "grandfather clause." This came into the Supreme Court in Guinn vs. U. S.157 and Myers vs. Anderson,158 from Oklahoma and Maryland, decided June 21,

155(1914) 235 U. S. 151, 35 S. Ct. 69, 59 L. Ed. 169.
156See p. 246, supra.
158(1915) 238 U. S. 368, 35 S. Ct. 932, 59 L. Ed. 1349.
1915. An amendment to the Oklahoma constitution exempted from a literacy test for voters every person "who was, on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government," or was a "lineal descendant of such person." In the Myers case it appeared that a Maryland statute fixing the qualifications of voters at municipal elections in the city of Annapolis described one of the enumerated group as follows: "All citizens who prior to January 1, 1868, were entitled to vote in this state or any state of the United States at a state election, and the lawful male descendants of any person who prior to January 1, 1868, was" similarly entitled to vote. In each case the Court (by Chief Justice White) brushed aside the device as contrary to the 15th Amendment. There was no dissent. Justice McReynolds took no part in the cases.

The important question of statutory housing restrictions against Negroes did not get to Washington until early in 1916, and was not decided until November, 1917. It was then answered in the negative by the unanimous court in Buchanan vs. Warley,\(^{159}\) which was an action for the specific performance of a contract for the sale of land to a Negro for residence purposes, in Louisville, Kentucky. The contract provided that the purchaser should not be required to accept a deed unless he had the legal right to occupy the property as a residence. The city prohibited this by a discriminatory ordinance. The ordinance was held invalid in a unanimous decision, of which the 3rd headnote is as follows: "A colored person has the right to acquire property without state legislation discriminating against him solely on account of color, under U. S. Constitution, 14th Amendment, providing that no state shall deprive any person of liberty or property without due process of law, nor deny to any person the equal protection of the laws, and the Act of Congress of April 9, 1866 (... Comp. Stat. 1916, Sec. 3931), providing that all 'citizens of the United States' shall have the same right in every state and territory as is enjoyed by the white citizen thereof to 'purchase' real and personal property." Said the Court, by Justice Day: "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted, but its solution cannot be promoted by depriving citizens of their constitutional rights and privileges... It is the purpose of such enactments (as the Louisville ordinance), and it is frankly avowed it will be their ultimate

\(^{159}\)(1917) 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149.
effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races. . . The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person. It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is . . . this aim cannot be accomplished by law or ordinances which deny rights created or protected by the Federal Constitution. It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors, or put to disagreeable though lawful uses with like results.16

VI

TAFT, C. J.

"The corrective process" afforded by state courts, found sufficient in Frank vs. Mangum161 (not a Negro case but an extreme instance of mob domination, in which Justice Holmes wrote one of his famous dissents, Justice Hughes concurring) was found insufficient in Moore vs. Dempsey.162 The case came up from Arkansas on appeal from an order of a U. S. District Judge, dismissing upon demurrer a petition for habeas corpus in behalf of a group of Negroes under sentence of death in the state courts. The report of the case is as interesting as a good story in a "thriller" magazine, but we will give space only to a paragraph in the syllabus which states the facts in a summary style not often found in the reports of this tribunal: "A trial for murder in a state court in which the accused are hurried to conviction under mob domination without regard to their rights is without due process of law and absolutely void." This assumes, of course, the correctness of the recital of facts in the petition; and it was ordered, Justice Holmes writing

160 At pp. 80-83 of 245 U. S. Cf. Hansberry v. Lee, (1940) 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22. There was challenged herein an agreement of owners of residence property in Chicago not to sell lots to, or permit them to be occupied by, negroes, without the consent of owners of 95 per cent of the lot frontage in the area. The suit was successful, but the grounds of decision (opinion by Justice Stone) were such that the case establishes no point appropriate to be considered in this review.

161 (1915) 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969.

162 (1923) 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543.
the opinion, that the petition should be heard in the District Court,—
the position he and Justice Hughes had taken in the Frank case
without avail. Justices McReynolds and Sutherland presented a
vigorous dissent, based on the view that on the whole record the
petition ought not, even upon demurrer, to have sufficient credit
to warrant a hearing.

In Corrigan vs. Buckley, the Court held unanimously (opinion
by Sanford, J.) that an agreement among white holders of real
estate in the District of Columbia not to convey their property to
Negroes was so plainly not obnoxious to any constitutional pro-
vision that no substantial constitutional question was involved in
the appeal. Therefore, not having jurisdiction under the Judicial
Code, the Court could not determine the points relied on by de-
fendants that the restrictive agreement was void as against public
policy, and of such a discriminatory character that a court of equity
ought not to lend its aid to enforce specific performance.

It is a noteworthy—perhaps significant—fact that the direct
issue of a state’s right to require separation of the white and Negro
races in the public schools has never been squarely decided by the
Supreme Court, although language used in Plessy vs. Ferguson,
pointed strongly to an affirmative answer. Gong Lum vs. Rice
skirted more closely along the edge of this issue than any case
previously considered by the Court. A native child of pure Chinese
blood was excluded from a white public school under a provision
of the Mississippi Constitution providing that “Separate schools
shall be maintained for children of the white and colored races.”
The exclusion was upheld in an opinion by Chief Justice Taft, from
which there was no dissent. The decision was in effect that a child
of Chinese blood, born in and a citizen of the United States, was
not denied the equal protection of the laws by being classed by the
state among the colored races who are assigned to public schools
separate from those provided for the whites, when equal facilities
for education are afforded to both classes. As the case was presented

163 (1926) 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969.
163a A similar question arose in 1945. In Mays vs. Burgess, 147 Fed. 2nd, 869, the United States Court of Appeals, District of Columbia, held in a 2 to 1
decision that a deed made in violation of such an agreement was invalid, Certiorari was denied, 325 U. S. 868. Justices Murphy and Rutledge were
of a contrary opinion, and Justices Reed and Jackson took no part. It has
been suggested that perhaps one reason why the writ was withheld was that
the restrictive covenant, made September 1, 1921, for 21 years, had only fifteen
months to run and conditions were such that by the time it expired the con-
troversy would probably settle itself.
164 See p. 246, supra.
165 (1927) 275 U. S. 78, 48 S. Ct. 91, 72 L. Ed. 172.
by the petitioner the constitutionality of separation of whites from Negroes was not attacked, the question being merely whether a Chinese child should be classed as "colored." In view of the importance of the basic question the summary character of the opinion seems unfortunate. Beyond a recital of facts and certain provisions of the constitution and statutes of Mississippi it is as follows: "The case then reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry, born in this country, and a citizen of the United States, the equal protection of the laws by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races. The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. In Cumming vs. Richmond County Board of Education, 175 U. S. 528, persons of color sued the board of education to enjoin it from maintaining a high school for white children without providing a similar school for colored children which had existed and—had been discontinued." Here follows a quotation from Justice Harlan's opinion. It is not noted, however, that in declaring the principle of the state's control of education, that opinion expressly reserves a case of "clear and unmistakable disregard of the rights secured by the supreme law of the land,"—i. e., the Fourteenth Amendment. And Justice Harlan took pains to add that under the facts before the Court "we have no such case to be determined."

"The question here," continues the opinion in the Gong Lum case, "is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question, it would call for very full argument and consideration, but we think it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution."166 The opinion then quotes language used in Plessy vs. Ferguson,167 in regard to separation of the races in the public schools (a question not before the Court in that case) and concludes: "Most of the cases cited arose, it is true, over the establishment of separate
schools as between white and black pupils, but we cannot think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools and does not conflict with the 14th Amendment.”

Another device to defeat negro suffrage which was new in the Supreme Court appeared in *Nixon vs. Herndon*. A negro attempted to vote at a Democratic primary held in Texas for nomination of candidates for Senator and Representative in Congress. His ballot was refused under a Texas statute which declared that “in no event shall a Negro be eligible to participate in a Democratic primary election held in the State of Texas.” Justice Holmes, speaking for a unanimous Court, said: “It seems to us hard to imagine a more direct and obvious infringement of the 14th Amendment,” citing with approval some of the broad language of *Strouder vs. West Virginia*.* The judgment below was reversed, but Nixon was not yet to get his vote.

VII

**Chief Justice Hughes**

The first case, pertinent to this inquiry, that arose after the accession of Chief Justice Hughes was *Aldridge vs. U. S.* The case came up on certiorari to the Court of Appeals of the District of Columbia. It was held to be reversible error for the trial court to refuse to permit interrogatories as to racial prejudice on the *voir dire* of jurors, in a case in which a Negro was on trial for the murder of a white man. Chief Justice Hughes spoke for the Court, and Justice McReynolds dissented.

The Texas legislature promptly repealed the offending section involved in *Nixon vs. Herndon*, and substituted another which provided that: “Every political party in the state through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party.” Acting under this statute the Democratic State Executive Committee adopted a resolution “that all white Democrats who are qualified under the constitution and laws of Texas and who

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168 (1927) 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759.  
169 See p. 237, supra.  
170 (1931) 283 U. S. 308, 51 S. Ct. 470, 75 L. Ed. 1054.
subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate" in certain forthcoming primaries. Again Nixon, who was a qualified voter unless disqualified by the foregoing resolution, went to the polls and requested a ballot. This was refused by the judges of election, on the ground that he was a Negro and by force of the resolution only white Democrats could vote at the primary. His action for damages was dismissed in the U. S. District Court,\(^{171}\) and this was affirmed in the Circuit Court of Appeals, 5th Circuit.\(^{172}\) In the Supreme Court Justice Cardozo, speaking for the majority, cut through the argument that the party committee did not represent the state in the following terms: "Whether in given circumstances parties or their committees are agencies of government within the 14th and 15th Amendments is a question which this Court will determine for itself. It is not concluded upon such inquiry by decisions rendered elsewhere. The test is not whether the members of the Executive Committee are the representatives of the state in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action. Delegates of the state's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black... The 14th Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the Court to level by its judgment these barriers of color."\(^{173}\) There was the "five-to-four" division of the Court which later became quite familiar. The decision was supported by Hughes, C. J., and by Brandeis, Stone and Roberts, JJ. Justice McReynolds presented a strong dissenting opinion, in which Justices Van Devanter, Sutherland and Butler joined.\(^{174}\) 

\(^{171}\)(1929) 34 F. (2d) 464.  
\(^{172}\)(1931) 49 F. (2d) 1012.  
\(^{174}\)It seems desirable to take note of the personnel of the Court more carefully than we have done heretofore. When Nixon v. Condon was decided its membership was as follows:  
Chief Justice Hughes, appointed from New York by President Hoover.  
Justice Van Devanter, appointed from Wyoming by President Taft.  
Justice McReynolds, appointed from Tennessee by President Wilson.  
Justice Brandeis, appointed from Massachusetts by President Wilson.  
Justice Sutherland, appointed from Utah by President Harding.  
Justice Butler, appointed from Minnesota by President Harding.  
Justice Stone, appointed from New York by President Coolidge.  
Justice Roberts, appointed from Pennsylvania by President Hoover.  
Justice Cardozo, appointed from New York by President Hoover.
Powell vs. Alabama,\textsuperscript{175} much publicized as "the Scottsboro Case," was heard in 1932. The Court's opinion, by Justice Sutherland, contained a long and careful discussion of due process with reference to the timely appointment of counsel in a capital case, and reached the conclusion that under all the facts "the failure of the trial court to give them (the defendants below) reasonable time and opportunity to secure counsel was a clear denial of due process." All defendants were Negroes, indicted, tried and convicted for the rape of white women. The case is noteworthy as showing the length to which the Court as then constituted was willing to go in order to insure justice to a group of friendless blacks under sentence of death for an atrocious crime. Justices Butler and McReynolds thought the majority went too far in their interpretation of the evidence.

One of the men involved in the preceding case was again in the Supreme Court after retrial, conviction and sentence to death in Norris vs. Alabama.\textsuperscript{176} In the trial court there were motions to quash the indictment and the trial venire on the ground of the exclusion of Negroes from the grand and petit jury lists solely because of race and color. The Court, by Hughes, C. J., Justice McReynolds taking no part, went even further than in Neal vs. Delaware\textsuperscript{177} in inquiring into all the relevant facts in determining the issue. The opinion declared that "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights."\textsuperscript{178} Thus examining the evidence the Court said: "We are of the opinion that the evidence required a different result from that reached in the state court. We think that the evidence that for a generation or longer no Negro had been called for service on any jury in Jackson County, that there were Negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of Negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications

\textsuperscript{175}(1932) 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158. Two other companion cases were Patterson v. Alabama and Weems v. Alabama.

\textsuperscript{176}(1935) 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074.

\textsuperscript{177}See p. 239, \textit{supra}.

\textsuperscript{178}At p. 590 of 294 U. S.
of Negroes, established the discrimination which the Constitution forbids.\textsuperscript{779}

Not deterred by the two \textit{Nixon} cases the Democrats of Texas tried again to exclude negroes from the party primaries,—this time with better luck. On May 24, 1932, the State Democratic convention adopted the following resolution: "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." The case came up for review of the judgment of the highest court of Texas having jurisdiction, sustaining a demurrer to the complaint. According to the facts admitted by the demurrer, one Grovey, a negro, was refused an absentee ballot by the county clerk, a state official, by virtue of the resolution above quoted. Candidates for Senator and Representative in Congress were to be elected at the forthcoming election, and nomination by the Democratic party was equivalent to election. Grovey brought suit for damages. The Court, by Justice Roberts, held unanimously that the facts complained of did not constitute state action in violation of the 14th and 15th Amendments.\textsuperscript{80}

\textit{Brown vs. Mississippi},\textsuperscript{81} is worthy of considerable space, as an example (let us hope extreme) of the kind of "justice" Negroes received in Mississippi less than a dozen years ago. The unanimous opinion of the Court, consisting mainly of a recital of the facts, was delivered by the Chief Justice. Two Negroes were indicted for a murder which occurred March 30, 1934. At the trial confessions of the defendants were presented, which they claimed had been extorted by violence. "Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury." The Supreme Court of Mississippi affirmed the conviction on two grounds: That immunity from self-incrimination is not essential to due process of law; and that the failure of the trial court to exclude the confessions after the introduction of evidence

\textsuperscript{779}At p. 596 of 294 \textit{U. S.} With the Norris case the Court had before it and decided the same day that of still another member of the 1932 group. The same result was reached. In holding, against a claim to the contrary not made in the Norris case, that it had full jurisdiction, the court took a noticeably liberal attitude. Patterson \textit{v. Alabama}, (1935) 294 \textit{U. S.} 600, 55 \textit{S. Ct.} 575, 79 \textit{L. Ed.} 656. The Neal and Norris cases were followed in Hollins \textit{v. Oklahoma}, (1935) 295 \textit{U. S.} 394, 55 \textit{S. Ct.} 784, 79 \textit{L. Ed.} 1500, a \textit{per curiam} decision.


\textsuperscript{81}(1936) 297 \textit{U. S.} 278, 56 \textit{S. Ct.} 461, 80 \textit{L. Ed.} 682.
showing their inadmissibility, in the absence of a request for such exclusion, did not deprive the defendants of life and liberty without due process of law. The facts disclosed by the evidence referred to appear in the recital (quoted in full by Chief Justice Hughes) in the dissenting opinion of two members of the Mississippi Supreme Court:

"The crime with which these defendants, all ignorant negroes, are charged, was discovered about one o'clock p. m. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that state, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

"The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailor, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they
changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment.

"Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

"All this having been accomplished, on the next day, that is, on Monday, April 2, when the defendants had been given time to recuperate somewhat from the tortures to which they had been subjected, the two sheriffs, one of the county where the crime was committed, and the other of the county of the jail in which the prisoners were confined, came to the jail, accompanied by eight other persons, some of them deputies, there to hear the free and voluntary confession of these miserable and abject defendants. The sheriff of the county of the crime admitted that he had heard of the whipping, but averred that he had no personal knowledge of it. He admitted that one of the defendants, when brought before him to confess, was limping and did not sit down, and that this particular defendant then and there stated that he had been strapped so severely that he could not sit down, and as already stated, the signs of the rope on the neck of another of the defendants were plainly visible to all. Nevertheless the solemn farce of hearing the free and voluntary confessions was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the so-called confessions, which were received by the court and admitted in evidence over the objections of the defendants duly entered as of record as each of the said three witnesses delivered their alleged testimony. There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment, under every rule of procedure that has heretofore been prescribed, and hence it was not necessary subsequently to renew the objections by motion or otherwise.
"The spurious confessions having been obtained—and the farce last mentioned having been gone through with on Monday, April 2d—the court, then in session, on the following day, Tuesday, April 3, 1934, ordered the grand jury to reassemble on the succeeding day, April 4, 1934, at nine o'clock, and on the morning of the day last mentioned the grand jury returned an indictment against the defendants for murder. Late that afternoon the defendants were brought from the jail in the adjoining county and arraigned, when one or more of them offered to plead guilty, which the court declined to accept, and, upon inquiry whether they had or desired counsel, they stated that they had none, and did not suppose that counsel could be of any assistance to them. The court thereupon appointed counsel, and set the case for trial for the following morning at nine o'clock, and the defendants were returned to the jail in the adjoining county about thirty miles away.

"The defendants were brought to the courthouse of the county on the following morning, April 5th, and the so-called trial was opened, and was concluded on the next day, April 6, 1934, and resulted in a pretended conviction with death sentences. The evidence upon which the conviction was obtained was the so-called confessions. Without this evidence a peremptory instruction to find for the defendants would have been inescapable. The defendants were put on the stand, and by their testimony the facts and the details thereof as to the manner by which the confessions were extorted from them were fully developed, and it is further disclosed by the record that the same deputy, Dial, under whose guiding hand and active participation the tortures to coerce the confessions were administered, was actively in the performance of the supposed duties of a court deputy in the courthouse and in the presence of the prisoners during what is denominated, in complimentary terms, the trial of these defendants. This deputy was put on the stand by the state in rebuttal, and admitted the whippings. It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a negro; not as much as I would have done if it were left to me.' Two others who had participated in these whippings were introduced and admitted it—not a single witness was introduced who denied it. The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the
trial, including the state's prosecuting attorney and the trial judge presiding.\textsuperscript{182}

The Court held that the use of confessions thus obtained was a clear denial of due process. The procedural point was swept aside, and the true attitude of the Mississippi courts exposed, in the following terms: "The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the Court is clearly satisfied that such violations exist it will refuse to sanction such violations and will apply the corrective. In the instant case the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner ... It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. The court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established and especially set up and claimed.\textsuperscript{183}

The first attack upon the poll tax in the Supreme Court was made by a white man in \textit{Breedlove vs. Suttles}.\textsuperscript{184} The decision, which was unanimous and presented by Justice Butler,\textsuperscript{185} disposed of the claim that the tax was repugnant to the 14th Amendment, as follows: "To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the state, and save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of

\textsuperscript{182}See the case below in (1934) 173 Miss. 563, 161 So. 465. The dissenting opinion from which this excerpt is taken will be found at pp. 572 ff. of 173 Miss. and pp. 470, 471 of 161 So.

\textsuperscript{183}I am not including in this study Herndon v. Georgia, (1935) 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1550, and Herndon v. Lowry, (1937) 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066. The merits of the case were not involved in the former, and the latter covered constitutional rights to freedom of speech and assembly, without reference to the race or color of the defendant-appellant. He was a negro communist agitator, indicted and convicted upon a charge of attempting to incite insurrection, especially among negroes of the Black Belt. Herndon v. Lowry was a "5 to 4" case, Justice Roberts writing the majority and more liberal opinion.

\textsuperscript{184}(1937) 302 U. S. 277, 58 S. Ct. 205, 82 L. Ed. 252.

\textsuperscript{185}Justice Van Devanter had retired and Justice Black from Alabama had been added to the Court.
the Federal Constitution, the state may condition suffrage as it 
deems appropriate . . . The privileges and immunities protected 
are only those that arise from the Constitution and laws of the 
United States and not those that spring from other sources.8

Discrimination against Negroes in employment first came to 
the attention of the Court in March 1938, in *New Negro Alliance 
vs. Sanitary Grocery Company.*107 The matter in controversy was 
whether the case made by the pleadings involved or grew out of a 
labor dispute within the meaning of Section 13 of the Norris-
LaGuardia Act of March 23, 1932. The facts were thus summarized 
by the Court: "The petitioners requested the respondent to adopt 
a policy of employing Negro clerks in certain of its stores in the 
course of personnel changes; the respondent ignored the request 
and the petitioners caused one person to patrol in front of one 
of the respondent's stores on one day carrying a placard which 
said—'Do Your Part! Buy Where You Can Work! No Negroes 
Employed Here!' and caused or threatened a similar patrol of two 
other stores of respondent. The information borne by the placard 
was true. The patrolling did not coerce or intimidate respondent's 
customers; did not physically harass persons desiring to enter the 
store; the picket acted in an orderly manner, and his conduct did 
not cause crowds to gather in front of the store." The lower courts 
had granted an injunction against the picketing. In reversing this 
the Court said, by Justice Roberts,—Justices McReynolds and 
Butler joining in a brief but caustic dissent:108 "The desire for fair 
and equitable conditions of employment on the part of persons of 
any race, color or persuasion, and the removal of discriminations 
against them by reason of their race or religious beliefs is quite as 
important to those concerned as fairness and equity in terms and 
conditions of employment can be to trade or craft unions or any 
form of labor organization or association. Race discrimination by 
an employer may reasonably be deemed more unfair and less excusable 
than discrimination against workers on the ground of union 
affiliation. There is no justification in the apparent purposes or 
the express terms of the act for limiting its definition of labor 
disputes and cases arising therefrom by excluding those which 
arise with respect to discrimination in terms and conditions of 
employment based upon differences of race or color."

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106At p. 283 of 302 U. S.
107(1938) 303 U. S. 552, 58 S. Ct. 703, 82 L. Ed. 1012. The case came 
upon certiorari to the United States Court of Appeals for the District of 
Columbia.
108Justice Reed from Kentucky had succeeded Justice Sutherland.
A *per curiam* decision in April 1938 is worthy of note because of the facts and the technical and conspicuously unfair attitude of the Kentucky courts. In 1936 a Negro was indicted for murder in McCracken County. He moved to set aside the indictment on the ground that the jury commissioners had excluded from the list from which the grand jury was drawn all persons of African descent because of their race and color. Among the facts shown by supporting affidavits were the following: that the population of the county was approximately 48,000, of which 8,000 were Negroes; that the county assessor's books showed approximately 6,000 white persons and 700 Negroes qualified for jury service in accordance with the state laws; that the jury commissioners filled the wheel for jury service in 1936 with between 500 and 600 names exclusively of white citizens; that the failure to draw any Negro was not due to any statutory disqualification. There was an offer to show "systematic and arbitrary" exclusion of Negroes from jury service in the county, on account of race and color, for a period of fifty years. Counsel for the state stipulated that the witnesses named by defendant would testify as specified, and offered no evidence to the contrary. Defendant was convicted and sentenced to death, and the judgment was affirmed in the Kentucky Court of Appeals. It appeared from an affidavit of the clerk of the trial court that by inadvertence a copy of the motion to set aside the indictment was omitted from the record before the Court of Appeals. That court said that on the record the case was one "where the proof might be regarded as sufficient to sustain the ground upon which the motion was evidently made, but there is wanting in the record a sufficient statement of those grounds to permit the introduction of proof." A petition for rehearing was denied by the Court of Appeals, after being advised of the error in transmitting the record. In the Supreme Court the judgment was reversed under *Neal vs. Delaware*, *Carter vs. Texas* and *Norris vs. Alabama*, heretofore discussed.

In 1935 Lloyd Gaines, a Negro, was refused admission to the Law School of the University of Missouri on the ground that it was "contrary to the constitution, laws and public policy to admit a Negro as a student at the University of Missouri." On his application for relief the Missouri courts denied a writ of mandamus to require his admission as applied for. He was a graduate of Lincoln University, an institution maintained by the state for the higher education of Negroes, and it was admitted that his work

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and credits there would qualify him for the Law School of the University of Missouri, if otherwise eligible. It was not questioned that the action of exclusion was the action of the state. Lincoln University did not have a law school, but there had been what the Supreme Court of Missouri styled "a legislative purpose to establish" one "whenever necessary and practicable." Section 9622, R. S. Mo., 1929, was as follows: "Pending the full development of the Lincoln University, the board of curators shall have 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." Petitioner was advised to apply for aid under this statute, which apparently, he did not do. In Gaines vs. Canada, Registrar, Etc., 190 the Court, speaking by Chief Justice Hughes, said that the state had recognized its obligation "to provide Negroes with advantages for higher education substantially equal to the advantages furnished to white students," and had "sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions." He cited Plessy vs. Ferguson, McCabe vs. A. T. & S. F. Ry. Co., Gong Lum vs. Rice, and Cumming vs. Board of Education, cases heretofore discussed in this study. It was held, however, that the facilities offered were not equal. "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.'" The judgment of the Supreme Court of Missouri was reversed and the case remanded for "further proceedings not inconsistent with this opinion." Justices McReynolds and Butler dissented, citing the Cumming and Gong Lum cases.

The writer ventures the suggestion that this case leaves still without direct and specific determination the right of a state to require separation of the white and negro races in the publicly supported institutions of learning. On analysis all the cases cited head up in Plessy vs. Ferguson, and there the forms of discrimination before the Court did not include public education. The practice

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existing, and locally approved in certain states, of separation in public schools, was referred to *arguendo* as supporting the view of the majority; but the precise point was not and never had been presented to the Court. Is there no ground for contending that discriminations which are (as decided) permissible in such contacts between the races as were before the Court in *Plessy vs. Ferguson*, are otherwise in tax-supported educational institutions?

*Pierre vs. Louisiana*,191 decided in February 1939, went even further than *Norris vs. Alabama*,192 in looking behind the findings of the state courts to determine whether there had been actual discrimination in the drawing of the grand jury returning an indictment against a Negro for murder. The alleged facts were extreme and undisputed, and the trial court had quashed the petit jury panel for unlawful discrimination. Both grand and petit juries had been drawn from the same general venire, but the judge held that discrimination in selecting the former did not affect the constitutional rights of the defendant. A new petit jury panel was drawn and defendant was tried and convicted. On appeal the State Supreme Court considered the evidence submitted on the motion to quash and decided that it was insufficient, and that the trial court had erred in requiring a new petit jury panel. Justice Black, speaking for the Court, said: “In our consideration of the facts the conclusions reached by the Supreme Court of Louisiana are entitled to great respect. Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country’s laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts.”193 A reversal was ordered and there was no dissent.194

After *Guinn vs. United States*,195 the resourceful Oklahoma legislature tried again. In February, 1916, it passed a law (Section 5654 Oklahoma Stats. 1931) the nature of which is thus stated in the syllabus of *Lane vs. Wilson*:196 “Oklahoma statutes made registration prerequisite to voting, and provided generally that all citizens

192See p. 275, *supra*.
194Justice Cardozo, deceased, had been succeeded by Justice Frankfurter from Massachusetts.
195See p. 268, *supra*.
qualified to vote in 1916 who failed to register between April 30 and May 11, 1916, should be perpetually disfranchised, excepting those who voted in 1914. The effect was that white people who were on the lists in 1914 in virtue of the provision of the Oklahoma Constitution, called the 'Grandfather Clause,' which this Court in 1915 adjudged unconstitutional . . . were entitled to vote; whereas colored people kept from registering and voting by that clause would remain forever disfranchised unless they applied for registration during the limited period of not more than 12 days." Lane, a Negro citizen of Oklahoma, was qualified for voting in 1916 but was not then registered and had not applied for registration within the 12-day period. He sued, under U. S. R. S. Section 1979, three election officials for declining to register him in 1934. His action for damages was brought in the United States District Court, which directed a verdict for defendants. This action was affirmed by the United States Circuit Court of Appeals. The Supreme Court, speaking by Justice Frankfurter, reversed. Justices McReynolds and Butler dissented without opinion; Justice Douglas\textsuperscript{197} took no part. The Court, for reasons incident to Oklahoma statutes and procedure, recognized plaintiff's right to come into a Federal Court before exhausting his remedies in the state courts. Said Justice Frankfurter: "The Amendment (i. e., the 15th) nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race . . . The practical effect of the 1916 legislation was to accord to the members of the Negro race who had been discriminated against in the outlawed registration system of 1914, not more than 12 days within which to reassert constitutional rights which this Court found in the Guinn case to have been improperly taken from them. We believe that the opportunity thus given Negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and confined. The restrictions imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiation and enterprise."\textsuperscript{198}

\textsuperscript{197}Appointed from Connecticut, just before the argument of the case, to succeed Justice Brandeis.

\textsuperscript{198}At pp. 275, 276, of 307 U. S.
Chambers et al. v. Florida, was closely parallel to Brown v. Mississippi, although the means by which confessions were secured were not shown to have included physical violence. Justice Black, speaking for the Court (Justice Murphy did not sit in the case) said: "The record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows, without conflict, the dragnet methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young tenant farmers by state officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisors or counselors, and under circumstances calculated to break the strongest nerves and the stoutest resistance." The right of the Court to go behind the verdict of the jury in the state court, which had found the confessions to be voluntary, was specifically challenged by the State of Florida, and on this point the Court declared: "Since petitioners have reasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by a review of the facts upon which that issue necessarily turns." The case went beyond Brown v. Mississippi in that, although Chambers' conviction was supported not only by his own confession but the testimony of three other "confessors" who pleaded guilty, the judgment below was reversed.

"Jim Crow" again came before the Court, and this time under different auspices but quite conspicuously, in Mitchell v. United States. Appellant, a Negro member of Congress from Illinois, took passage at Chicago for Hot Springs, Arkansas, over the lines of the Illinois Central and Rock Island Railways, holding a first-class round-trip ticket. He was furnished Pullman car accommodations until shortly after the train entered Arkansas, when he was required by the conductor, over his protest and under threat of arrest, to move into the car provided for colored passengers, in purported compliance with an Arkansas statute requiring segregation of colored from white persons by the use of cars or partitioned sections providing "equal but separate and sufficient accommoda-

199 (1940) 309 U. S. 227, 60 S. Ct. 472, 82 L. Ed. 716.
200 See p. 276, supra.
201 At p. 228 of 309 U. S.
202 At p. 228 of 309 U. S.
tion" for both races. He made a complaint to the Interstate Commerce Commission, pursuant to provisions of the Interstate Commerce Act which made it unlawful for a common carrier subject to the Act "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The Commission made findings of fact and dismissed the complaint, five Commissioners dissenting. Mitchell then brought suit to set aside the Commission's order. Three judges sitting in the United States District Court for the Northern District of Illinois found the facts as stated in the Commission's findings, and that they supported its findings. The court held, however, that it was without jurisdiction and dismissed the complaint on that ground. The case then came to the Supreme Court on direct appeal. It was hotly contested. The United States Attorney General filed a memorandum against the judgment below, and in addition to counsel for appellees the Attorneys-General of ten Southern states filed briefs. The Court, speaking by Chief Justice Hughes, set aside the order of the Commission, basing this conclusion on the violation of the Act, and declining to consider the briefs of the Attorneys-General of the several states, which discussed the general question of segregation under the 14th Amendment. Said the Chief Justice: "The undisputed facts showed conclusively that, having paid a first-class fare for the entire journey from Chicago to Hot Springs, and having offered to pay the proper charge for a seat which was available in the Pullman car for the trip from Memphis to Hot Springs, he was compelled, in accordance with custom, to leave that car and to ride in a second-class car and was thus denied the standard conveniences and privileges afforded to first-class passengers. This was manifestly a discrimination against him in the course of his interstate journey, and admittedly that discrimination was based solely on the fact that he was a Negro. The question whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation but one of equality of treatment. The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment (citing McCabe vs. Ry. Co. and Gaines vs. Canada,204) and in view of the nature of the right and of our constitutional policy it cannot be maintained that the discrimination as it was alleged was not essentially unjust. In that aspect it could not be deemed to lie outside the purview of the sweeping pro-

204See pp. 268, 282, supra.
hibitions of the Interstate Commerce Act." The decision was unanimous.205

VIII

CHIEF JUSTICE STONE

"Peonage" came up again in 1942, in Taylor vs. Georgia.206 The case was closely parallel to Bailey vs. Alabama,207 which was followed without dissent, Justice Byrnes writing the opinion. The personnel of the Court had changed completely since the Bailey case.208 It does not specifically appear that Taylor was a Negro, but that is probable. This is also true of the person alleged to have been wronged in United States vs. Gaskin.209 Here the appellee had been indicted under Section 269 of the Criminal Code in the United States District Court for the Northern District of Florida for arresting one Johnson "to a condition of peonage." A demurrer to the indictment was sustained and the United States appealed. It was held, Justice Roberts writing the opinion, that Section 269 should be construed so as to cover an arrest with intent to hold a person in peonage. Justice Murphy dissented, on the ground that this construction was too broad for application to a criminal statute.210

Smith vs. Allwright211 is a case of such importance as to call for rather full presentation. The question involved was the same which was before the Court in Grovey vs. Townsend.212 Smith, a Negro, had brought suit for damages under a Federal statute, on account of denial of his right to vote at a Democratic primary in Texas, and relief had been denied by the lower Federal Courts. The Court, speaking by Justice Reed, said: "The statutes of Texas relating to primaries and the resolution of the Democratic party of Texas extending the privilege of membership to white citizens only are the same in substance and effect today as they were when Grovey vs. Townsend was decided by a unanimous court. The question as to whether the exclusionary action of the party was

205 Justice Murphy, appointed from Michigan, had succeeded Justice Butler, deceased.
207 See p. 263, supra.
208 Chief Justice Hughes and Justice McReynolds had retired in 1941, and Justice Byrnes and Justice Jackson were appointed from South Carolina and New York respectively.
209 (1944) 320 U. S. 527, 64 S. Ct. 31, 88 L. Ed. 287.
210 Justice Byrnes had resigned and Justice Rutledge had been appointed from Iowa.
212 See p. 276, supra.
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 vs. 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 of 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 nomination of the Democratic party in Texas.

. . . Despite Texas' decision that the exclusion is produced by private or party action. . . . 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.' 213 After examination of the Texas electoral system the Court concludes: "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 laws an agency of the state in so far as it determines the participants in a primary election . . . This is state action within the meaning of the Fifteenth Amendment . . . 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 re-examine the basis of its constitutional decisions . . . 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 thereof . . . *Grovey vs. Townsend* is overruled. Judgment reversed." 214 Justice Frankfurter concurred in the result, and Justice Roberts dissented. 215 In his dissenting

213 At pp. 661, 662, of 321 U. S.
214 At pp. 663, 664, of 321 U. S.
215 The groundwork for this decision had been laid in 1941 in United States v. Classic, (1941) 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368, an election fraud case from Louisiana, not involving negroes. Stone, J., presented an elaborate opinion, and Douglas, Black and Murphy, JJ., dissented.
opinion Justice Roberts made rather heated comments on the reversal of Grovey vs. Townsend, a decision reached by a unanimous Court (the opinion being written by himself) of which he and the Chief Justice were the only members sitting in the instant case. "In Mannich vs. Southern Steamship Co., 321 U. S. 96, 105," he said "I have expressed my views with respect to the present policy of the Court freely to disregard and to overrule considered decisions and the rules of law announced in them. This tendency, it seems to me, indicates an intolerance for what those who have composed this Court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors... The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by Justices who deem they have new light on the subject... It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this Court, which has been looked upon as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions."216

The latest appearance of peonage in the Supreme Court was the very interesting case of Pollock vs. Williams,217 decided in April, 1944. The lawyer's humanitarian inclinations will be gratified by the solicitude for human rights shown in the majority opinion of Justice Jackson, and from his professional viewpoint he cannot read without admiration the keen criticism of Justice Reed's dissent, in which the Chief Justice joined; while the layman who can follow the technical points in the two opinions cannot fail to observe the intellectual integrity with which equally acute and learned judges may reach opposite conclusions on complicated legal questions. Pollock, a Negro, was charged under a Florida statute substantially identical with those which were considered in the Bailey and Taylor cases218 with fraudulently obtaining $5 under a con-

216At pp. 666, 669, and 670, of 321 U. S.
217(1944) 322 U. S. 4, 64 S. Ct. 792, 88 L. Ed. 1095.
218See pp. 263 and 288, supra.
tract for labor. On the day of his arrest he was taken before a county judge and upon his plea of guilty was sentenced to pay a fine of $100 or be imprisoned for 60 days in the county jail,—$20 for each dollar of his debt with the alternative of serving time at the rate of about 9 cents per day. In his uncontradicted petition for a writ of habeas corpus he says he was without funds and unable to employ counsel, did not know he had a right to have counsel appointed, and understood that if he owed money to his former employer and quit without paying it he was guilty of the charge. On appeal the state circuit court held the statute in question to be unconstitutional, but the State Supreme Court reversed. Justice Jackson analyzed the peonage cases mentioned in this study and reviewed at considerable length the general subject of peonage in the United States.219 As in the Bailey and Taylor cases the state statute was treated as a whole, and with the presumption feature was held to be violative of the 13th Amendment. In the Florida Supreme Court the case turned upon the appellant's plea of guilty in the trial court. On this point Justice Jackson said: "We cannot doubt that the presumption provision had a coercive effect in producing the plea of guilty... No one questions that we clearly have held that such a presumption is prohibited by the Constitution and the Federal statute. The Florida legislature has enacted and twice re-enacted it since we so held. We cannot assume it was doing an idle thing. Since the presumption was known to be unconstitutional and of no use in a contested case, the only explanation we can find for its persistent appearance in the statute is its extralegal coercive effect in suppressing defenses. It confronted this defendant. There was every probability that a law so recently (1943) and repeatedly enacted would be followed by the trial court, whose judge was not required to be a lawyer. The possibility of obtaining relief by appeal was not bright, as the event proved, for Pollock had to come all the way to this Court, and was required, and quite regularly, to post a supersedeas bond of $500, a hundred times the amount of the debt. He was an illiterate Negro laborer in the toils of the law for the want of $5. Such considerations bear importantly on the decision of a prisoner, even if aided by counsel, as Pollock was not, whether to plead guilty and hope for

219Northerners should not be too smug in their criticism of the South in this regard. The lumber interests of Maine and Minnesota seem to have sought protection in like manner. In Minnesota obtaining transportation with intent to defraud is a misdemeanor, and since 1901 the statute has declared that failure to do the work contracted for shall be prima facie evidence of fraudulent intent (Minn. St. 1941, Chap. 620.64).
leniency, or to fight. It is plain that, had his plight after conviction not aroused outside help, Pollock himself would never have been heard of in any appellate court. . . . We think that a state which maintains such a law in the face of the court decisions we have recited may not be heard to say that a plea of guilty under the circumstances is not due to pressure of its statutory threat to convict him on this presumption.”

Lyons vs. Oklahoma, decided in June, 1944, involved the admission of an alleged involuntary confession in a trial for murder. The petitioner (defendant below) was a Negro. Although that does not appear in the report it doubtless had much to do with the fact that the case received much publicity. It is included here rather for that reason than because it is of importance in this review. Lyons made two confessions the same day, the first admittedly involuntary. Justice Reed, who delivered the opinion of the Court sustaining the conviction, said the issue was “the voluntary character of the second confession under the circumstances which existed at the time and place of its signature and, particularly, because of the alleged continued influence of the unlawful inducements which vitiated the prior confession.” The question presented was one of fact, and it was held that the evidence warranted the conclusion that the effects of the coercion which procured the earlier confession had been dissipated prior to the second one, and that the latter was voluntary. The conviction, therefore, could not be set aside as contrary to “that fundamental fairness essential to the very concept of justice,” the absence of which amounts to a denial of “due process.” Justice Murphy recorded a vigorous protest in which Justice Black concurred. Justice Rutledge dissented without opinion, and Justice Douglas concurred in the result.

Bester Steele had worked his way up to be a locomotive fireman for the Louisville and Nashville Railroad. By “established practice” only white firemen could be promoted to be engineers, and he had a black skin. But he had won a place in a “passenger pool,”—a highly desirable position, and had valuable seniority rights. Under the Railway Labor Act the Brotherhood of Locomotive Firemen and Enginemen was the exclusive representative of the craft for pur-

220At pp. 115, 116, of 322 U. S.
221(1944) 322 U. S. 596, 64 S. Ct. 1208, 88 L. Ed. 1481.
222In Ashcraft v. Tennessee, (1944) 322 U. S. 145, 64 S. Ct. 921, 88 L. Ed. 1192, decided a few weeks before the Lyons case, the propriety of the Court’s interference with convictions obtained in state courts on enforced confessions was argued quite fully in the majority opinion by Justice Black and in the minority opinion by Justice Jackson. One of the defendants was a negro, but no discrimination on that ground was suggested.
poses of bargaining. The majority of the firemen in the employ of the railroad company were white; but there was a substantial minority of Negroes, all of whom were excluded from membership in the Brotherhood, and they could have no bargaining representative other than that organization. Without giving the Negroes notice or allowing them an opportunity to be heard the Brotherhood entered into new agreements with the company, providing that vacancies as they occurred should be filled by white men, and restricting the seniority rights of Negro firemen, with the avowed purpose of ultimately excluding all Negroes from the service. As these agreements were worked out Steele lost a substantial amount of time, was assigned to harder and less remunerative work and later put on a switch engine. He brought suit on behalf of himself and other Negro employees in like situation, as provided in the Railway Labor Act, 4 Stat. 1185, 45 U. S. C. Sec. 151 et seq., for injunctive and other appropriate relief. A circuit court in Alabama sustained a demurrer to the complaint, and the State Supreme Court affirmed. The case excited much interest and the Government appealed, briefs being also filed by the National Association for the Advancement of Colored People and the American Civil Liberties Union as amici curiae. The decision in Supreme Court was rendered in December, 1944.223

The Court, speaking by the Chief Justice, stated the question to be whether the Railway Labor Act "imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and if so, whether the Courts have jurisdiction to protect the minority of this craft or class from the violation of such obligation." In discussing this question the Court said: "If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward the members, constitutional questions arise . . . If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading." The constitutional questions were not considered,

for it was held that the agreements were violative of the terms of the Act, and the judgment of the Alabama court was reversed. In a concurring opinion Justice Murphy went somewhat further: "The economic discrimination against Negroes practiced by the Brotherhood and the railroad under color of Congressional authority raises a grave constitutional question which should be squarely faced. The utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation. To decide the case and analyze the statute solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees, is to make the judicial function something less than it should be. The constitutional problem inherent in this instance is clear . . . It cannot be assumed that Congress meant to authorize the representative to act so as to ignore the rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect. For that reason I am willing to read the statute as not permitting or allowing any action by the bargaining representative in the exercise of its delegated powers which would in effect violate the constitutional rights of individuals. If the Court's construction of the statute rests upon this basis, I agree. But I am not sure that such is the basis . . . The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation." 224

On January 29, 1943, Claude Screws, a Georgia sheriff, aided by his deputy and a policeman, arrested Robert Hall, a Negro, on a warrant charging theft of a tire. Hall, while handcuffed, was beaten with a two-pound blackjack 15 to 30 minutes until he was unconscious. He was then dragged, feet-foremost, into the jail and died from his injuries within an hour. There was no action in the Georgia courts; but Screws and his associates were prosecuted in the United States District Court for the Middle District of Georgia under Sections 20 and 37 of the Federal Criminal Code, the former making it a criminal offense wilfully to deprive a person, "under color of law," of "rights, privileges or immunities" secured to him

224 At pp. 208, 209, of 323 U. S.
by the Constitution and laws of the United States; the latter covering conspiracy for such violation. The defendants claimed that Hall reached for a gun (though handcuffed!) and used insulting language. They were convicted by a jury on both counts, and fines totalling $1,000, with imprisonment for three years were imposed on each defendant. After affirmance in the Circuit Court of Appeals, the case went to the Supreme Court on a writ of certiorari. Section 20, on which the prosecution was based, is as follows: "Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both." This section is the amended survivor of Sections 1 and 2 of the original Civil Rights Act. The "rights" charged to have been violated were the right not to be deprived of life without due process of law, and the right to be tried upon the charge on which Hall was arrested by due process of law,—rights claimed to be secured to him by the 14th Amendment. The case did not involve any charge of discrimination against Hall because he was a Negro; so far as strictly legal points were involved he might have been a white man. But the case has a proper place in this study, for obviously Screws would have been prosecuted in the State Courts if Hall had been white. The Supreme Court was split four ways, Justice Douglas writing the prevailing opinion, in which the Chief Justice and Justices Black and Reed concurred. They were able to reach an interpretation of the statute under which its constitutionality could be upheld, but at the expense of finding error in the charge, on which ground they reversed although no exception to the charge had been taken in the trial court.

Justice Murphy, in a conspicuously clear and untechnical opinion stood for an unqualified affirmation. Justices Roberts, Frankfurter and Jackson presented a joint opinion arguing vigorously for reversal on the ground of the unconstitutionality of the statute as rightly interpreted. Justice Rutledge indicated at length his agreement with Justice Murphy, but, in order that the case might be

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disposed of, voted with those who took Justice Douglas’ view of the case.

No useful purpose would be served by an attempt to analyze here the different opinions in so far as they deal with the interpretation of the statute and its constitutionality. But the case is interesting for the light it throws upon the personality of the different members of the court, and upon the administration of criminal justice in Georgia. Why were not Screws and his co-defendants prosecuted in the state courts? Justice Murphy remarks: “States are undoubtedly capable of punishing their officers who commit such outrages. But where, as here, the states are unwilling for some reason to prosecute such crimes the federal government must step in unless constitutional guaranties are to become atrophied.” Justices Frankfurter, Roberts and Jackson say: “Instead of leaving this misdeed to vindication by Georgia law, the United States deflected Georgia’s responsibility by instituting a federal prosecution.” “After all, Georgia citizens sitting as a grand jury indicted and other Georgia citizens sitting as a Federal trial jury convicted Screws and his associates; and it was a Georgia judge who charged more strongly against them than this Court thinks he should have.” At the trial the Solicitor General of the Albany Circuit in the State of Georgia, which includes the county where the crime occurred, testified: “There has been no complaint filed with me in connection with the death of Bobby Hall against Sheriff Screws, Jones and Kelley . . . As to whom I depend (on) for investigation of matters that come into my court, I am an attorney. I am not a detective and depend on evidence that is available after I come to court or get into the case . . . I rely on my sheriffs and policemen and peace officers, and private citizens also who prosecute each other, to investigate the charges that are lodged in court.”

What appears to be an authoritative statement of the course followed by the Department of Justice is as follows: “The case was brought to the attention of the Civil Rights Section by a Negro newspaper and the local United States Attorney, and while the usual investigatory machinery of the Department of Justice was at once set in motion there is evidence in the Department’s file of the case that every effort was made to encourage the State of Georgia to prosecute the offenders. The reasons for Georgia’s failure to take any action in such an extreme case are not entirely clear; for one thing the Georgia Solicitor General for that district whose duty it was to start proceedings in such a case is reported to have felt ‘helpless in the matter.’ ‘He has no investigative facilities
and has to rely on the sheriff and policemen of the various counties of his circuit for investigation. Here, such assistance would have had to come from the accused persons themselves! At any rate, the United States Attorney, with the approval of the Justice Department, finally brought the case to the attention of the Federal grand jury and in April an indictment was secured.227 In his concluding comment this writer says, after an illuminating review of the case, "The Screws case shows how the use of the statute can be successfully combined with the general 'conspiracy' statute (18 U. S. C. A. Sec. 88, F. C. A. title 18, Sec. 88) to make possible increased penalties if a conviction is secured, but such penalties are still far out of line with the enormity of such a crime as that committed by the defendants in this case. Sooner or later Congress must provide new legislation if the civil rights program of the Department of Justice is to develop in a normal and desirable way. In the meantime Screws vs. United States clears away constitutional doubts about such a program and makes possible continued use of statutory tools, however imperfect they may be. This is of first importance if one accepts the premise that in the never-ending struggle to make civil liberty in America more secure the positive employment of Federal power toward that end is a weapon that can prove exceedingly useful."

Akins vs. Texas228 is found upon analysis to be more interesting as it discloses the mental processes of the learned and astute men who sit in the highest of our courts than it is important as a precedent. Akins, a Negro, was tried in a Texas court and sentenced to death for murder. The conviction was affirmed in the Texas Court of Criminal Appeals. "Certiorari was allowed because of the importance in the administration of criminal justice of the alleged racial discrimination (in the selection of grand jurors) which was relied upon to support the claim of violation of constitutional rights." Justice Reed wrote the prevailing opinion. Justice Rutledge concurred in the result. Justice Murphy wrote a dissenting opinion. The Chief Justice and Justice Black also dissented, but without opinions.

Under the Texas statutes jury commissioners appointed by the judge of the trial court select a list of 16 grand-jurymen, from which list 12 are chosen as a grand jury for a current term of court.

228 (1945) 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692.
juries. Where jury commissioners limit those from whom grand jurors are selected to their own personal acquaintance, discrimination can arise from commissioners who know no Negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." And in *Hill vs. Texas*, the Chief Justice uses language of like import. Justice Murphy says in his dissenting opinion: "The equal protection clause of the Fourteenth Amendment entitles every person whose life, liberty or property is in issue, to the benefits of grand and petit juries chosen without regard to race, color or creed." And he concludes as follows: "Clearer proof of intentional and deliberate limitation on the basis of color would be difficult to produce. The commissioners' declaration that they did not intend to discriminate and their other inconsistent statements cited by the Court fade into insignificance beside the admitted and obvious fact that they intended to and did limit the number of Negroes on the jury panel. By limiting the number to one they thereby excluded the possibility that two or more Negroes might be among the persons qualified to serve. All except the one Negro were required to be of white color. At the same time, by insisting upon one Negro they foreclosed the possibility of choosing sixteen white men on the panel. They refused, in brief, to disregard the factor of color in selecting the jury personnel. To that extent they have disregarded petitioner's right to the equal protection of the laws. To that extent they have ignored the ideals of our jury system. Our affirmance of this judgment thus tarnishes the fact that we of this nation are one people undivided in ability or freedom by differences of race, color or creed."

Also in June, 1945, there was decided *Railway Mail Association vs. Corsi*, an appeal from a state declaratory judgment interpreting certain sections of the New York Civil Rights Law. By these sections every labor organization was forbidden to deny to any person membership or equal treatment by reason of his race, color or creed. Appellant was an organization of postal clerks which limited its membership to persons "of the Caucasian race" and native American Indians. It claimed that it was not a labor organization within the meaning of the law; and that, if it should be found to be such, the sections under consideration violated the due process and equal protection clauses of the 14th Amendment, and were in

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234 See p. 284, footnote 193.
235 At p. 409 of 325 U. S.
236 At p. 410 of 325 U. S.
conflict with the federal power over post offices and post roads. All these points were found against the Association in an opinion written by Justice Reed. Concerning "due process" he said: "We, have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment 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. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization functioning under the protection of the state, which holds itself out to represent the general business needs of the employees." Justice Frankfurter in a concurring opinion used broader and more emphatic language: "It is urged that the Due Process Clause of the Fourteenth Amendment precludes the State of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a state may leave abstention from such discriminations to the conscience of individuals. On the other hand, a state may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such state power would stultify the Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of the state to extend the area of non-discrimination beyond that which the Constitution itself exacts." Justice Rutledge concurred in the result.

IX.

Summary

Probably those who have followed this review have not been able to trace any uninterrupted tendency in the decisions; and yet it must be clear that the general trend has been toward an increasingly liberal recognition of the civil and political rights of Afro-American citizens as such. No attempt has been made or will be made here to explore the sources of the main current, or to account for the eddies and counter-currents in its flow. Neither will
the writer undertake the ambitious task of formulating in propositions of law the legal conclusions which are to be drawn from the cases presented. In many instances the questions considered have centered in the three War Amendments. In many the result has depended on the Court's application of other constitutional provisions and of fundamental principles of the unwritten law. In the latter group we have not so much an interpretation of the law as an inquiry whether the circumstances of the case bring it within a well settled rule. Here the fact that the right in question is claimed for a Negro is of importance only for its bearing on the general attitude of the Court, and its relation to the background of local sentiment and conditions out of which the case emerged. Recognizing inevitable differences of viewpoint in a Court of nine members, we find in this field an impartial and painstaking effort to do justice according to law. For Negroes accused of atrocious crimes there has been insistence that they must have all the safeguards in indictment, trial and protection while in custody which the law provides for others. Well established limitations of the Court's jurisdiction should be borne in mind.

Concerning the 13th Amendment Kelly Miller, an acknowledged spokesman for the Negro race, said in 1928: "The 13th Amendment is upheld and respected by the government and the American people." It has been declared by the Court to be self-executing, to furnish redress against the oppressive "peonage" system, and to provide support for civil and political rights more specifically guaranteed by the other Amendments.

Vigorous complaints have been made by Negro leaders against decisions of the Court under the 15th Amendment: "The Negro lost the right to vote conferred on him by the 14th and 15th Amendments because the Supreme Court through hair-splitting sophistry and astute evasion emasculated both Amendments to the point of nullification. . . . More than once he took his case to the Supreme Court of the United States, but the Court pointed out that he had failed to show that the state had abridged or denied his right to vote, or that persons who had prevented him from voting had done so because of his race, color or previous condition of servitude. So, unable to prove that the committee which had met him at the polls with shotguns was actuated by any such base and unconstitutional motives, he found his case thrown out. In the last analysis he lost his right to vote because of the attitude of the Supreme Court."

Whatever color or justification for these bitter words of a cultured and self-respecting Negro may be found in a few cases, notably *Reeves* and *Cruikshank*, it should not be forgotten, even by laymen, that often constitutional principles recognized as sound and just cannot be applied to the particular case before the Court because of defects in the implementing federal statute, the terms in which the question is presented by the record, or the factual foundation on which the decision must be based. At any rate, since *Smith vs. Allwright*, if blame for Negro disfranchisement is to be traced to the national government, it would seem that Congress rather than the Court must bear the burden. A legislative act found defective may be susceptible of remedy, and the 2nd Section of the 14th Amendment furnishes Congress with a weapon which has never been tried. The Court has consistently held that the 15th Amendment does not confer a right of suffrage, but only forbids discrimination by a state or the United States; and that it does not reach "denial" or "abridgement" through the acts of private individuals. However, the conception of what constitutes an act of the state seems to be much enlarged, in line with the position taken by Justice Strong in construing the 14th Amendment.

From the standpoint of the four dissenting Justices the 14th Amendment got off to a bad start in *The Slaughter House Cases*. Though racial discrimination was not directly involved it was the dominating thought on both sides of the closely divided Court. But if anything can be regarded as settled in the field of constitutional law, this case gives a permanent interpretation of the fundamental features of the 14th Amendment. In 1922 Charles Warren commented as follows upon the far-reaching results of this famous decision: "Had the case been decided otherwise, the states would have largely lost their autonomy and become, as political entities, only of historical interest. If every civil right possessed by a citizen of a State was to receive the protection of the National Judiciary, and if every case involving such a right was to be subject to its review, the States would be placed in a hopelessly subordinate position; and the ultimate authority over the citizens of the State would rest with the National Government. The boundary lines between the States and the National Government would be practically abolished, and the rights of the citizens of each State would be irrevocably fixed as of the date of the Fourteenth Amendment, without power in the State to modify them, and with power in the Supreme Court of the Nation to review any State statute asserted to be in violation of
such rights, even if such statute affected solely a matter of State policy."  

As to racial discriminations sought to be covered by the 14th Amendment progress may be observed. Results held not obtainable by direct congressional legislation have been reached through judicial interpretation of "due process," "privileges and immunities" and "equal protection." In respect to segregation, while the Court has seemed to accept as authoritative precedents the patterns set by earlier cases, there has been a general tendency toward a broader view. It has been held that in intrastate transportation separate accommodations must really be "equal"; and there is reason to hope that when the question of separation in interstate commerce comes squarely before the Court, Twentieth Century ideas of civil rights may finally prevail. Where the test of reasonableness is to be applied and the Court may exercise its discretion, is not the universal sense of justice, adopted by Justice Matthews for the unanimous Court in Yick Wo vs. Hopkins, more consistent with present-day standards than the convenience of the carrier, found sufficient in DeCuir vs. Louisiana, or the local "usages, traditions and customs" of Plessy vs. Ferguson?

At the present writing residential segregation by statute or ordinance stands forbidden, but restrictive agreements among owners have the sanction of Corrigan vs. Buckley. The validity of race restrictions in conveyances remains an open question. In the industrial relations of the Negro federal labor legislation has been effectively summoned to his aid.

There remains the important field of public school education. However wise the statutory color-line may be as a matter of local policy, the question of its constitutionality has never been squarely met by our court of last resort.


240As to whether they did prevail in Morgan vs. Virginia, decided June 3, 1946, while this article was in the hands of the printer, opinions will differ. The case arose under a Virginia statute "which requires all passenger motor vehicle carriers, both interstate and intrastate, to separate without discrimination the white and colored passengers in their motor buses so that contiguous seats will not be occupied by persons of different races at the same time." The Court, by Justice Reed, said: "This Court frequently must determine the validity of state statutes that are attacked as unconstitutional interferences with the national power over interstate commerce. This appeal presents that question as to a statute that compels racial segregation of interstate passengers in vehicles moving interstate." It was held that on account of public inconveniences incident to its execution the statute "so burdens interstate commerce or so infringes the requirements of national uniformity as to be invalid." Justice Jackson took no part. Justices Rutledge, Frankfurter and Black concurred in the result,—Justice Black with a sharp protest against "the undue burden on commerce formula." Justice Burton presented a dissenting opinion. 

241(1886) 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.