

THE SUPREME COURT UNDER FIRE

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I

"NOT SINCE THE Nine Old Men shot down Franklin Roosevelt's Blue Eagle in 1935 has the Supreme Court been the center of such general commotion. . . ."¹ The reasons are plain. In the closing weeks of the October term, 1956, the Court handed down a spate of opinions boldly reasserting its authority to review and overturn federal and state action—judicial, legislative and executive—of the highest sensitivity: the Court upset Smith Act convictions;² curbed federal³ and state⁴ legislative investigations of "un-American" or "subversive" activity; limited state authority to refuse admission to the bar on the basis of alleged past Communist belief;⁵ vindicated the exercise of the privilege against self-incrimination by one charged with conspiring to defraud the government of taxes;⁶ protected the right of a fugitive Communist and his abettors to be free from unlawful search and seizure;⁷ required that a defendant charged with filing a false non-Communist affidavit be furnished access to government witnesses' reports to the FBI;⁸ cast grave doubt on federal authority to court-martial civilian dependents of American military personnel stationed abroad;⁹ and gave renewed evidence that the principles declared in the *School Segregation Cases*¹⁰ would not be compromised.¹¹

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¹ 70 Time, No. 1, at 11 (July 1, 1957).

² *Yates v. United States*, 354 U.S. 298 (1957).

³ *Watkins v. United States*, 354 U.S. 178 (1957).

⁴ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

⁵ *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

⁶ *Grunewald v. United States*, 353 U.S. 391 (1957).

⁷ *Kremen v. United States*, 353 U.S. 346 (1957); cf. *Steinberg v. United States*, 76 S.Ct. 822 (1956).

⁸ *Jencks v. United States*, 353 U.S. 657 (1957).

⁹ *Reid v. Covert*, 354 U.S. 1 (1957). Cf. *Wilson v. Girard*, 354 U.S. 524 (1957), upholding the government's authority to surrender an American soldier stationed abroad to the authorities of the host nation to face criminal prosecution.

¹⁰ *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954); and *Brown v. Board of Education*, 349 U.S. 294 (1955).

¹¹ See *Pennsylvania v. Board of Directors (Girard College Case)*, 353 U.S. 230 (1957); cf. *Clark, Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard*,

Strong courts provoke controversy, and the emergence, under Chief Justice Warren, of a "new" Court ready to exercise full judicial power has proved no exception to the rule. But more than mere controversy and "commotion" have been aroused. Today, regrettably, the Supreme Court is the object of a "wave of sometimes hysterical attack."¹² The attack comes from many quarters, but is garbed in a rhetoric of tedious redundancy:

(1) Senator Byrd, for example, has found it appropriate to assail "the modern Thaddeus Stevens, now cloaked in the robes of the Chief Justice of the United States Supreme Court,"¹³ who "has done and is doing more to destroy the form of government we have in this country than has any Chief Justice in the history of the United States";¹⁴ whether the civil rights legislation over which the Senate battled this past summer reflected "any conspiracy between Chief Justice Warren and the NAACP," Senator Byrd "could not say."¹⁵

(2) Senator Jenner has proposed to restrict the Court's appellate jurisdiction over cases relating to "subversion" or contempt of legislative bodies because the Court "is undermining efforts of the people's representatives at both the state and national levels to meet and master the Communist plot."¹⁶

(3) Federal District Judge Timmerman has recently taken the justices to task for "reading meanings into the Constitution and out of it that discriminate against white citizens, especially those of the so-called Deep South," and for "construing the Constitution so as to make it a protective shield for the criminally disposed and disloyal elements in our population."¹⁷ (Of course, to be fair to the jurist, Judge Timmerman was speaking "as a private citizen."¹⁸)

(4) New Hampshire's Attorney General Louis C. Wyman, speaking as head of the National Association of Attorneys General, has charged that some of the Court's recent decisions constituted an attempt "by fiat of five appointed justices" to substitute what he called a philosophy of government patently contrary to that contemplated by the Constitution's makers."¹⁹

66 Yale L.J. 979 (1957). And consult Miller, Racial Discrimination and Private Education (1957), for a discerning discussion of the possible radiations of the School Segregation Cases beyond strictly "public" schools. The impact of the decision on Catholic parochial schools, for example, is of enormous significance: "Nor does the Vatican attach any importance to argument that segregation does not necessarily constitute discrimination. The Vatican thinks it does, and believes in any case that the matter was settled by the Supreme Court of the United States." N. Y. Times, p. 16, col. 4 (Aug. 10, 1957).

¹² Speech of President David F. Maxwell to the American Bar Association, N. Y. Times, p. 14, col. 3 (July 16, 1957).

¹³ 103 Cong. Rec. 10,672 (July 16, 1957).

¹⁴ *Ibid.*, at 10,675.

¹⁵ *Ibid.*

¹⁶ N. Y. Times, p. 35, col. 4 (July 27, 1957).

¹⁷ N. Y. Times, p. 6, col. 7 (July 26, 1957).

¹⁸ *Ibid.*

¹⁹ Mr. Wyman was addressing the annual meeting of the National Association of Attorneys General. N. Y. Times, p. 1, col. 7, p. 18, col. 3 (June 25, 1957). Wyman's further remarks disclose his particular concern with the Sweezy case (354 U.S. 234 [1957]) which he

(5) The General Assembly of Georgia, by formal resolution of February 22, 1957, called for the impeachment and removal of the Chief Justice and Justices Black, Reed,²⁰ Frankfurter, Douglas and Clark, because they "are guilty of attempting to subvert the Constitution of the United States, and of high crimes and misdemeanors in office, and of giving aid or comfort to the enemies of the United States after taking an oath to support the Constitution. . . ."²¹

Calumny of so gross a nature impels response. Thus it was hardly surprising to find the American Bar Association, at its recent sittings in New York, confronted with a resolution calling on lawyers to refrain from abusing the Court, lest "our judicial system is . . . destroyed by contemptuous disregard of the court's decisions with which we do not agree."²² The resolution created a serious quandary for the assembled men of law: rejection of the resolution might sound like a slap at the Court; but adoption would not only have regrettable overtones of endorsement of the Court, it would run counter to deeply felt notions that in a democracy lawyers—like people—have a right to deplore the teachings of even the highest tribunal. A cunning stratagem devised by the ABA's resolutions committee resolved the dilemma: boldly, their togas wrapped nattily about them, the assembled delegates voted to take no action on the proposal. And the stratagem worked; for the good, grey *New York Times* understood what had transpired and duly submitted the facts to a candid world.²³

had just lost, the Court having set aside a contempt conviction against Professor Paul Sweezy, who had refused to answer certain questions propounded by Wyman, investigating "subversion" on behalf of the New Hampshire Legislature. "Without being disrespectful," said Wyman to his fellow attorneys general, "I believe it is a fair comment to characterize the language of the majority in the Sweezy decision as pure sophistry." *N. Y. Times*, p. 18, col. 3 (June 25, 1957).

Without being disrespectful, it would seem fair comment to round out Wyman's views of the Supreme Court with a passage from a brief filed by him in the Supreme Court of New Hampshire on December 21, 1956, in *Wyman v. De Gregory*, 100 N.H. 163, 132 A.2d 133 (1957), a contempt proceeding against one who refused to answer Wyman's questions despite a grant of immunity. Urging the appellate court to sustain the trial court's denial of bail pending appeal, Wyman observed: "The decision of the Superior Court that De Gregory should stand committed until he replies is not only a sound decision but sorely needed judicial firmness in a field in which mistaken notions of so-called sympathy for the underdog have affected higher judicial authority than exists in this state, to the undoubted prejudice of national security." Reply to Motion for Reconsideration, *Wyman v. De Gregory*, supra.

²⁰ Justice Reed is of course no longer on the Court. And assuredly his retirement, announced some time before, but effective a few days after, the Georgia Resolution, cannot be ascribed to that document's *in terrorem* effect. Indeed, in theory, Justice Reed is presumably still amenable to impeachment; as a retired justice he draws pay, 65 Stat. 724 (1951), 28 U.S.C. § 371 (1952), and may, with his assent, be recalled to "judicial duties in any circuit," 62 Stat. 901 (1948), 28 U.S.C. § 294(a) (1952). In fact Justice Reed on July 8, 1957, was assigned by the Chief Justice "to perform judicial duties in the United States Court of Claims pursuant to 28 U.S.C. § 294," 26 U.S.L. Week 3008 (July 9, 1957). It seems questionable whether the cited statute authorizes assignment to the Court of Claims, which, whether or not an Article III court (compare 62 Stat. 898 [1948], 28 U.S.C. § 171 [1952] with *Williams v. United States*, 289 U.S. 553 [1933]), doesn't appear to perform "judicial duties in any circuit" except in a geographic sense. (For a time the validity of the assignment appeared mooted by Justice Reed's appointment as Chairman of the new Civil Rights Commission, *N. Y. Times*, p. 1, col. 1 [Nov. 8, 1957], but Justice Reed shortly resigned from the Commission. *N. Y. Times*, p. 1, col. 4 [Dec. 4, 1957]. Meanwhile Justice Minton was called upon to serve on the Court of Claims during December, 1957. 78 S.Ct. xiii [1957].)

²¹ A Resolution Requesting Impeachment of Six Members of the United States Supreme Court, *Ga. L.* (1957) 553, 556.

²² *N. Y. Times*, p. 17, col. 3 (July 17, 1957).

²³ *Ibid.*, at p. 1, col. 8.

By whatever circuitous route, the ABA of course reached the right result. Scurrilous attacks on the Court are as old as the nation.²⁴ And, as Mr. Justice Brewer observed more than a half a century ago, "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. . . . True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all."²⁵

II

It is evident that the current attacks on the Court focus primarily on two areas of adjudication: (1) cases in which the Court has intervened to strike down penalties or disabilities imposed on persons of alleged or conceded left-wing persuasion; and (2) cases vindicating Negro rights.

The cases in the first category embrace an enormous range of legal problems: the permissible scope and the required precision of federal and state legislative inquiry into political belief, discussion and affiliation;²⁶ the meaning and validity of the Smith Act and kindred federal legislation;²⁷ the extent to which either specific federal statutes²⁸ or the special responsibilities of the federal government for national survival²⁹ foreclose state restraints on "subversive" activity; the degree to which federal and state agencies may deny public employment or quasi-public professional status

²⁴ Compare, for example, the views of the General Advertiser, a Philadelphia newspaper, on the Court's decision in *McCulloch v. Maryland*, 4 Wheat. (U.S.) 316 (1819): "Never was a bad cause worse supported by constellated talents, learning, and wisdom of a Bench of Supreme Judges. It seems as if nature had revolted from the debasing task assigned them; and that their reason and their judgment had forsaken them, upon an instinctive horror and disgust for the destructive purposes they were pledged to fulfill, in defiance of all human rights, human joys and divine commandments." 1 Warren, *The Supreme Court in United States History* 524-25 (1922).

²⁵ From his address entitled *Government by Injunction*, delivered on Lincoln Day, 1898, reprinted in 15 Nat. Corp. Rep. 849 (1898), and quoted in Frankfurter, Mr. Justice Holmes and the Supreme Court 94 n. 20 (1938).

²⁶ See *Watkins v. United States*, 354 U.S. 178 (1957), and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); cf. *United States v. Rumely*, 345 U.S. 41 (1953); *Barsky v. United States*, 167 F.2d 241 (App. D.C., 1948); *United States v. Josephson*, 165 F.2d 82 (C.A. 2d, 1947).

²⁷ Compare *Yates v. United States*, 354 U.S. 298 (1957), with *Dennis v. United States*, 341 U.S. 494 (1951); cf. *Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

²⁸ *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), illustrates the pre-emptive effect of the Smith Act, which was found to cover the ground of and hence displace Pennsylvania's anti-sedition legislation. For a far less discriminating application of pre-emption doctrines, compare the decision in *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957) (and the companion cases of *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U.S. 20 [1957], and *San Diego Building Trades Council v. Garmon*, 353 U.S. 26 [1957]), finding in the National Labor Relations Act an intent to oust state boards and courts from regulating small-scale interstate labor relations problems which the NLRB has consistently chosen to stay out of rather than dilute the efforts it must expend on major matters.

²⁹ See U. S. Const. Preamble; U. S. Const. Art. I, § 8, cls. 1, 11, 12, 13, 14, 15, 16, and § 10, cl. 3; U. S. Const. Art. II, § 2, cls. 1, 2; U. S. Const. Art. III, § 3; U. S. Const. Art. IV, § 4; U. S. Const. Amendments, 2, 3, 5, and 14, §§ 3, 4; but cf. U. S. Const. Art. IV, § 2, cl. 2. See *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

on suspicion of unpopular beliefs or associations;³⁰ and the minimal procedural demands of criminal and quasi-criminal proceedings.³¹

From "academic freedom" and "federal-state relations" to "search-and-seizure" and "vagueness," these cases march across the pages of the digests under a hundred legal banners. But a pragmatic annotator like Judge Timmerman collects all these cases under the single headnote: "a protective shield for the criminally disposed and disloyal elements in our population,"³² and thereby manages with a gaudy phrase to miseducate his countrymen. And people are ripe for this sort of miseducation, for it is much easier to revere concepts like free speech and due process of law when they glow abstractly in the nation's rhetoric than when they insulate a particular Red or rapist against retribution. The difficulty is, of course, that the law-abiding and God-fearing have no real reason to believe the anachronism on which our entire jurisprudence rests: "Although the defendant may be the worst of men . . . the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."³³ And the judge who intervenes on behalf of the vile and abhorrent can, therefore, expect to reap his crop of calumny.

Therefore, criticisms of the Court for decisions favoring political pariahs ordinarily come as no surprise and furnish little ground for serious concern.³⁴ The vindication of constitutional liberties presupposes that courts will oppose majorities bent on committing acts of oppression.³⁵ It is not to be expected that more than a minority of the community will ever genuinely understand the democratic imperative of protecting "the expression of

³⁰ Compare *Wieman v. Updegraff*, 344 U.S. 183 (1952), *Garner v. Board of Public Works*, 341 U.S. 716 (1951), and *Peters v. Hobby*, 349 U.S. 331 (1955); compare *Konigsberg v. State Bar*, 353 U.S. 252 (1957), and *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957), with *In re Summers*, 325 U.S. 561 (1945), and *Barsky v. Board of Regents*, 347 U.S. 442 (1954).

³¹ E.g., *Kremen v. United States*, 353 U.S. 346 (1957); *Jencks v. United States*, 353 U.S. 657 (1957); *Quinn v. United States*, 349 U.S. 155 (1955); and *Emspak v. United States*, 349 U.S. 190 (1955); compare Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), with *Bailey v. Richardson*, 341 U.S. 918 (1951), and *Peters v. Hobby*, 349 U.S. 331 (1955); and see cases cited notes 26 and 30 *supra*. See also *Shaughnessy v. Mezei*, 345 U.S. 206 (1953); *Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Carlson v. Landon*, 342 U.S. 524 (1952); and *Hariades v. Shaughnessy*, 342 U.S. 580 (1952).

³² See text at note 17 *supra*.

³³ *People v. Gitlow*, 234 N.Y. 132, 158, 136 N.E. 317, 327 (1922) (dissenting opinion of Judge Cuthbert Pound). For an excellent contemporary attempt to persuade the nonlegal community of the primacy of procedural safeguards see Satter, *Murder and the Due Process of Law*, *The Hartford Courant Magazine* (April 14, 1957).

³⁴ E.g., the exchange between Senators Thurmond and Byrd regarding the Jencks, Yates and Watkins cases (cited at notes 8, 2 and 3 *supra*). 103 Cong. Rec. 10,676 (July 16, 1957).

MR. THURMOND. Is it not true that the Court handed down a decision in the Jencks case which would open up the FBI files and enable the Communists to obtain confidential information which would be very detrimental to the defense of this country?

MR. BYRD. Yes.

MR. THURMOND. Is it not true that in the Yates case the Court turned loose 5 Communists and granted a new trial to 9 others? They were people who admitted and confessed to being Communists, and yet the Supreme Court acted in such a manner.

Is it not further true that in the Watkins case the Court has practically destroyed the investigative power of Congress, which has been so influential and so important in uncovering crimes and in uncovering Communists and sending them to the penitentiary?

MR. BYRD. The Senator is correct.

³⁵ "Those who won our independence . . . [r]ecognizing the occasional tyrannies of gov-

opinions that we loathe and believe to be fraught with death,"³⁶ or of insisting that "the nation steadfastly . . . follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men. . . ."³⁷

The courage the Court is today demonstrating in defending the rights of political minorities has been manifest for more than three years in defense of racial minorities. It was in May of 1954, a few months after the accession of the new Chief Justice, that the Court, in the *School Segregation Cases*, erased the fateful interlineation "separate but equal" from the Constitution.³⁸ And a review of the brief but turbulent history of the Warren Court³⁹ makes it plain that "the current wave of abuse was . . . precipitated by the school segregation decisions, though it has by no means been limited to them."⁴⁰

Fundamental misunderstanding and distrust of the Court's role in the *School Segregation Cases* raise problems of quite different dimension from the shock and anger commonly engendered by the various political cases. The Court's functions in protecting political and racial minorities of course complement each other. But the basic support of the American people, which the Court cannot look for when it upholds the rights of Communists, it must have in full measure if the promise of the *School Segregation Cases* is to be fulfilled.

This is so because, as Professor Clark has put it, the Court in the *School Segregation Cases* was "speaking the conscience of a majority of the nation."⁴¹ The Court made more than a judicial finding—it made on behalf of the American people a confession of error and an admission of guilt—when it declared that separating Negroes "from others . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever

erning majorities, amended the Constitution. . . ." *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (concurring opinion of Justice Brandeis).

³⁶ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion of Justice Holmes).

³⁷ *In re Yamashita*, 327 U.S. 1, 43-44 (1946) (dissenting opinion of Justice Rutledge). There must of course be some minimal minority support for even this aspect of the judicial function. The brave futility of a judge seeking singlehanded to override lawless executive authority was made pathetically plain by Chief Justice Taney in *Ex parte Merryman*, 17 Fed. Cas. 144, No. 9,487 (C.C. Md., 1861), which has been described as the "lowest point in the history of the federal judiciary." Jackson, *The Struggle for Judicial Supremacy* 324 (1941).

³⁸ *Brown v. Board of Education*, 347 U.S. 483 (1954), of course only dealt in terms with *education*, it has since been followed in the fields of *recreation*: *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Holmes v. Atlanta*, 350 U.S. 879 (1955); and *transportation*: *Gayle v. Browder*, 352 U.S. 903 (1956). The Court has thus far felt no enthusiasm for determining the validity of anti-miscegenation laws. Cf. *Naim v. Naim*, 350 U.S. 891 (1955).

³⁹ Time feels that what it luminously calls "the new look for the law" originated shortly after Warren became Chief Justice. 70 *Time*, No. 1 at 12 (July 1, 1957).

⁴⁰ *Recent Attacks Upon the Supreme Court of the United States. A Statement by Members of the Bar*, 1 *Race Rel. L. Rep.* 1024, 1025 (1956). The Attorney General has noted that "the Court . . . has been the subject of a torrent of criticism because of its decisions in the Segregation Cases." Brownell, *The United States Supreme Court: Symbol of Orderly, Stable and Just Government*, 43 *A.B.A.J.* 595, 598 (1957).

⁴¹ Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 *Yale L. J.* 979, 981 (1957).

to be undone."⁴² If this judicial articulation of the American conscience was, as over ninety Southern Congressmen have alleged, a "clear abuse of judicial power"⁴³—if the national conscience has no constitutional relevance—then the fabric of American democracy is torn shoddy which can no longer warm anybody no matter what his complexion.

If, however, the Court was the authorized spokesman of the popular will, the *School Segregation Cases* have more than symbolic validity. They then can and ultimately will be implemented. In this practical sense, too, the *School Segregation Cases* differ from the political cases. Decisions setting aside convictions or other disabilities in political cases are generally of a negative character which require little popular support to be enforced. But the decrees in the *School Segregation Cases* mean years of affirmative co-ordinated action by judges, lawyers, administrators, legislators, teachers, parents, and children. The contempt power cannot get the job done "with all deliberate speed."⁴⁴ Plainly enough, the contempt power, unaided, cannot get the job done at all. Integration of public schools in the Southern and border states will come about because the "conscience of a majority of the nation" insists and the Court has said evasion of this mandate is unlawful.⁴⁵

III

By scaling down the know-nothingsisms of commentators like Judge Timmerman to the less stimulating but rather more tractable vocabulary of ordinary discussion, it is possible to come to grips with attacks on the *School Segregation Cases*. Stripped of inessentials, the criticism is dual: (1) that educational policy is entirely outside the federal domain, and (2) that the Fourteenth Amendment, as a Court familiar with the Amendment declared in *Plessy v. Ferguson*,⁴⁶ was not intended to affect segregated public education, at least so long as the separate facilities afforded were "equal."

The first contention, that state policy in the field of public education is beyond federal constitutional restraint of any kind, argues from the reservation enshrined in the Tenth Amendment and from the indubitable fact "that the word 'education' is not even to be found in the United States Constitution," to an easy Q.E.D.⁴⁷ Far too easy. The argument proves vastly too much: it makes a total dead letter of the equal protection clause, which requires adherence by "the laws" of every state to a constitutional standard of equal treatment without any differentiation based upon the

⁴² *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

⁴³ Consult Brownell, *op. cit. supra* note 40, at 598.

⁴⁴ *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).

⁴⁵ For a comprehensive view of the dimensions of the job of implementing the *School Segregation Cases*, see McKay, "With All Deliberate Speed" A Study of School Desegregation, 31 N.Y.U. L. Rev. 991 (1956). Cf. the wide implications of the *School Segregation Cases* adverted to note 11 *supra*.

⁴⁶ 163 U.S. 537 (1896).

⁴⁷ E.g., colloquy between Senators Thurmond and Byrd. 103 Cong. Rec. 10, 676 (July 16, 1957).

content of "the laws."⁴⁸ Moreover the argument wholly undercuts the loudly-insisted-upon merits of *Plessy's* "separate but equal" rationale, whether applied to education, transportation, or any other "reserved" field.

The second contention—that the Fourteenth Amendment was not intended to curtail segregation in public schools—is of course subsumed in the first contention that no part of the Constitution has any impact on local educational practices under any circumstances. But the contention also has separate force, drawn from the undeniable fact that the Court in 1896, in *Plessy*, sustained against Fourteenth Amendment attack a Louisiana law assigning Negro and white railway passengers to separate cars, relying principally on decisions upholding compulsory racial separation in public schools as a "valid exercise of the legislative power."⁴⁹ The "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority," and hence accords the races inherently unequal treatment, was rejected by the *Plessy* Court as a "fallacy": the alleged inequality was said to arise "solely because the colored race chooses to put that construction upon it."⁵⁰

Not content to use the lawyer's trick of simply distinguishing *Plessy*,⁵¹ the Court acknowledged the relevant language in *Plessy* and stamped that language "rejected."⁵²

"In reaching its conclusion the Supreme Court," according to the Georgia Legislature, "has disregarded its former pronouncements and attempted to justify such action by the expedient of imputing ignorance of psychology to men whose knowledge of the law and understanding of the constitution could not be impugned. . . ." Moreover, "in reaching its conclusion the court, professing itself to be unable to ascertain the intent of those who adopted the fourteenth amendment to the constitution, arbitrarily chose to repudiate the solemn declaration of its meaning rendered under the sanctity of their oaths of office by the Justices of the Supreme Court of the United States at a time when all of its members were contemporaries of

MR. THURMOND. I should like to ask the distinguished Senator a question or two. Is it not true, speaking of the segregation decision, that in the first 10 amendments to the Constitution, known as the Bill of Rights, which were drafted by a great citizen of the Senator's State, George Mason, the 10th amendment to the Constitution provides that all powers not specifically delegated to the Federal Government are reserved to the States?

MR. BYRD. The Senator is correct.

MR. THURMOND. Is it not further true that the word "education" is not even to be found in the United States Constitution?

MR. BYRD: That is correct.

MR. THURMOND. Is it not further true that since the field of education was not delegated to the Federal Government, therefore it was reserved to the States and should remain reserved to the States and to the people thereof?

MR. BYRD. The Senator is correct.

⁴⁸ Cf. Brownell, op. cit. supra note 40, at 599.

⁴⁹ *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

⁵⁰ *Ibid.*, at 551.

⁵¹ "This case involved *transportation*." DeLacy, *The Segregation Cases: A Judicial Problem Judicially Solved*, 43 A.B.A.J. 519 (1957).

⁵² *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

those who proposed, discussed, debated, submitted and adopted the amendment."⁵³

Life, America's most widely read law review, has put the case against the *School Segregation Cases* on narrower grounds: "Even lawyers who applauded the decision felt its reasoning was based not on law but on sociological considerations."⁵⁴

Parsed, the indictment against the *School Segregation Cases* has three counts: abandonment of "law"; contempt for precedent; and disregard of the intended meaning of the Fourteenth Amendment.

A. "Sociology" Instead of "Law"

Can it be fairly said that the Court, spurred on by testimony as to the psychological effects of segregation, ventured out of the realm of "law" and into the greener pastures of "science" to find that segregated Negroes receive inferior schooling? It is of course true, as already observed, that the Court did say that segregation of Negro children "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁵⁵ Building upon this observation, the Court quoted approvingly a trial court "finding" that state-imposed segregation deprives Negro children of educational benefits; noted that, "whatever may have been the extent of psychological knowledge" in 1896, when *Plessy* was decided, "modern authority"—referring to published psychological scholarship,⁵⁶ *not* to the scientific testimony on record in some but not all of the cases—supported the "finding"; and declared that *Plessy* language conflicting with the "finding" was "rejected."⁵⁷

Plainly enough, "the decisions did not rest upon the testimony of the social scientists."⁵⁸ Moreover, the cited "modern authority" was only corroborative of what was really decisive—the justices' human awareness that segregation is "invidious."⁵⁹ "For at least twenty years," as Professor Cahn has observed, "hardly any cultivated person has questioned that segregation

⁵³ Ga. L. (1957) 553, 559.

⁵⁴ 43 *Life*, No. 1, at 33 (July 1, 1957).

⁵⁵ *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). See text at note 32 supra.

⁵⁶ The "modern authority" was collected in the now famous (some say infamous) footnote 11. *Ibid.*, at 494. The extent to which a court should notice, judicially or otherwise, technical learning in other disciplines is a matter of great subtlety and considerable moment: much depends, for example, on whether the proffered authority is designed to support or repudiate the reasonableness of challenged legislative or executive action. For some trenchant consideration by Professor Freund and by Professor Cahn, see Cahn, *Jurisprudence*, 30 *N.Y.U. L. Rev.* 150, 153-54, 167-68 (1955).

Intimations by the Georgia Legislature that the material cited by the Court in footnote 11 was largely produced by persons "affiliated with organizations declared by the Attorney General of the United States to be subversive," Ga. L. (1957) 553, 559, hardly deserve the dignity of thoughtful consideration: it may be at least as relevant that the Fourteenth Amendment was itself the consequence of events initiated by subversive activity of an antecedent Georgia Legislature and associated co-conspirators.

⁵⁷ *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

⁵⁸ Greenberg, *Social Scientists Take the Stand: A Review and Appraisal of Their Testimony in Litigation*, 54 *Mich. L. Rev.* 953, 969 (1956).

⁵⁹ The term was used by Justice Minton, discussing the cases after he retired from the bench. 12 *Ebony*, No. 2, at 99 (Dec., 1956).

is cruel to Negro school children. The cruelty is obvious and evident. Fortunately, it is so very obvious that the Justices of the Supreme Court could see it and act on it even after reading the labored attempts by plaintiffs' experts to demonstrate it 'scientifically.'⁶⁰

By characterizing the judicial recognition of injury as a "finding," the Court did render itself vulnerable to doubts which have, regrettably but understandably, distracted many commentators from the merits of the decision. Calling something a "finding" gives it factual solidity in the particular situation which is being litigated, but raises the specter of a contrary "finding"—and hence a contrary result—on other facts. (Actually, the *School Segregation Cases* were five consolidated cases, and the endorsed Kansas "finding" was echoed at trial in only one of the others; but all five were decided the same way on appeal.⁶¹) Furthermore, the Court's observation that the "finding" is "supported" by "modern authority"⁶² can be read as leaving the door ajar for future repudiation in the light of new scientific learning.⁶³ It might have been better for the Court to have placed racial equality and the harm engendered by racial segregation among the things which do not require demonstration—which are less tangible and more enduring than facts: there is, after all, precedent for the proposition that "all men are created equal."⁶⁴

Too much attention has been devoted to the way in which the Court reached the conclusion that segregation is injurious. In order to repudiate

⁶⁰ Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150, 159 (1955). In a few haunting sentences Professor Cahn has made plain the nature of the injury involved in segregation:

"There are people who argue, sometimes quite sincerely, that racial segregation is not intended to humiliate or stigmatize. On first impression, the argument seems to have some slight mitigative value, for surely a deliberate insult is liable to cut deeper than one inflicted out of mere crudeness or insensibility. But the mitigation comes too late. An excuse that one did not intend to injure does not stand much chance of reception when the offender, having been informed of the damage he has done, continues and persists in the same old callous insults. As is observed in the ancient Babylonian Talmud, to shame and degrade a fellow-creature is to commit a kind of psychic mayhem upon him. Like an assailant's knife, humiliation slashes his self-respect and human dignity. He grows pale, the blood rushes from his face just as though it had been shed. That is why we are accustomed to say he feels 'wounded.'

"Moreover, if affronts are repeated often enough, they may ultimately injure the victim's backbone. We hear there are American Negroes who protest they do not feel insulted by racially segregated public schools. If there are any such Negroes, then they are the ones who have been injured most grievously of all, because segregation has shattered their spines and deprived them of self-respect." *Ibid.*, at 158-59.

Compare the Vatican's succinct concurrence in the view that segregation is per se wrong, reported in the passage from the New York Times, quoted note 11 supra.

⁶¹ *Brown v. Board of Education*, 347 U.S. 483, 495-96 (1954).

⁶² *Ibid.*

⁶³ Consult Cahn, *op. cit.* supra note 60, at 167-68. Indeed, arguably, repudiation could follow if only a *reasonable minority* of scientific opinion "supported" legislative or executive action in conflict with the "finding" of the *School Segregation Cases*. Consult in this regard note 56 supra.

⁶⁴ Declaration of Independence. Charles P. Curtis, recalling that Chief Justice Taney, in the *Dred Scott Case* (*Scott v. Sandford*, 19 How. [U.S.] 393, 410, 426 [1857]), denied that the Declaration embraced Negroes, but that Lincoln disagreed, has observed: "The difference between them is not only that Taney was wrong and Lincoln right. It is that Taney was ascribing to the words what he thought their authors intended, and Lincoln was giving the authors credit for what their words meant." Curtis, *The Role of the Constitutional Text*, in *Supreme Court and Supreme Law* 64, 66 (Cahn ed., 1954). Curtis finds little but historical interest in what was "intended" by the "authors" of declarations and constitutions. Consult note 91 infra.

Plessy, finding injury and according that injury constitutional weight should not really have been a difficult problem. After all, “the cruelty is obvious and evident,”⁶⁵ and judges may not close their minds to what “all others can see and understand. . . .”⁶⁶ The real obstacle presented by *Plessy* was the bland assertion that the “badge of inferiority” segregation imposes on Negroes is not the consequence of state action—that it is unconnected with the state’s exercise of compulsion, but arises “solely because the colored race chooses to put that construction upon it.”⁶⁷ But that piece of legal disingenuousness had, prior to the *School Segregation Cases*, been quietly interred by the Court in *McLaurin v. Oklahoma State Regents*, which, albeit on a graduate level, not only sensed the harm in separation but acknowledged that the state’s role aggravated the harm:

These restrictions . . . signify that the State . . . sets McLaurin apart from the other students.

. . . .

It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. *Shelley v. Kraemer*, 334 U. S. 1, 13-14 (1948). The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.⁶⁸

In short, the opinion in the *School Segregation Cases* might have been helped by a crisper statement that (1) “Our Constitution is color-blind,”⁶⁹ and scientific validation of its mandates is welcome but legally superfluous; and (2) *Plessy*’s disavowal of injury and of state responsibility for such injury are both “rejected.”

B. A Decent Respect for Precedent

The conventional arguments for continuity of decision are worthy ones—but they have strikingly little force in relation to the *School Segregation Cases*. The only interest created or expanded “in reliance” upon *Plessy* and its progeny was the South’s grotesque investment in a dual school system. Balanced against this budgetary folly was the daily sacrifice of each Negro

⁶⁵ Cahn, *op. cit.* supra note 60, at 159 (emphasis added).

⁶⁶ *Child Labor Tax Case*, 259 U.S. 20, 37 (1922).

⁶⁷ *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), quoted in the text, at note 50 supra.

⁶⁸ *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641-42 (1950).

⁶⁹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion of Justice Harlan).

pupil's "personal and present right to the equal protection of the laws."⁷⁰

Beyond this, because the issues were constitutional ones—and fateful ones at that, bearing on the nation's self-respect and its capacity for world leadership⁷¹—ordinary canons of *stare decisis* were doubly unpersuasive.⁷² Judges have acknowledged "the greater fluidity of decision which the process of constitutional adjudication concededly affords"⁷³ ever since Chief Justice Taney declared his willingness "that it be regarded hereafter as the law of this court, that its opinion upon the construction of the constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."⁷⁴

C. The Meaning of the Equal Protection Clause

Through the industry and generosity of the litigants, texts and testimony on the effects of segregated schooling poured in on the Court as it pondered the *School Segregation Cases*. But it was the Court on its own motion which, by propounding the famous questions as to the genesis of the Fourteenth Amendment,⁷⁵ solicited further information in *Brown v. Board of Education* and the companion state cases: What, if anything, had the framers and ratifiers of the Amendment intended with respect to the immediate or ultimate abolition of segregated public schools?

The months of research by scores of eager partisans produced voluminous scholarship—"book-size and shelf-length"⁷⁶—but few real answers. The most objective response—that of the United States—was that there was "no conclusive evidence of a specific understanding as to the effect of the Fourteenth Amendment on school segregation. . . ."⁷⁷ And this conclusion the Court echoed: "[A.]lthough these sources cast some light, it is not enough to

⁷⁰ *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 642 (1950); see *Sweatt v. Painter*, 339 U.S. 629, 635 (1950).

⁷¹ Factors underlined by the participation of the United States in support of the plaintiffs.

⁷² Quite apart from the contention (see note 51 *supra*) that the Court had never "held" the *Plessy* doctrine applicable to education.

⁷³ *National Mutual Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 617 (1949) (concurring opinion of Justice Rutledge).

⁷⁴ *Passenger Cases*, 7 How. (U.S.) 283, 470 (1848) (dissenting opinion). Consult Jackson, *The Struggle for Judicial Supremacy* 294-98 (1941); Frank, *Courts on Trial* 313 (1949). It was, of course, Taney's tragedy to be remembered as the author of the one decision—the *Dred Scott* case (*Scott v. Sandford*, 19 How. [U.S.] 393 [1857])—which required not only amendments but a war to overrule. Cf. note 37 *supra*.

⁷⁵ "1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?"

"2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment.

(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?" 345 U.S. 972 (1953).

⁷⁶ Bickel, *The Original Understanding and the Segregation Decision*, 69 *Harv. L. Rev.* 1, 6 (1955).

⁷⁷ Supplemental Brief for the United States on Reargument at 125, *Brown v. Board of Education*, 347 U.S. 483 (1954).

resolve the problem with which we are faced. At best, they are inconclusive."⁷⁸

The government's and the Court's appraisals of the historical materials have been substantially ratified by later scholarship. Professor Bickel, after canvassing the materials with care, views the history of the drafting of Section 1 of the Amendment as "rather clearly demonstrating that it was not expected . . . to apply to segregation."⁷⁹ Professor McKay feels that "had the requirement of equal protection of the laws been embodied in a statutory clause rather than a constitutional context, there would seem little doubt that the judicial construction in the foregoing cases [*Plessy* and those "separate but equal" cases which followed it] was a correct interpretation of the intention of those who framed and adopted it. And there the matter would rest, at least in the absence of amendment or repeal."⁸⁰

Assuming *arguendo* the collective accuracy of all this retrospection,⁸¹ it becomes relevant to inquire how the Court reached the conclusion that the Fourteenth Amendment made segregated public education unconstitutional. Professor McKay⁸² finds the answer in the fact that it is not a statute but, in Chief Justice Marshall's words, "a *constitution* we are expounding."⁸³ Professor Bickel, finding "an awareness on the part of these framers that it was a *constitution* they were writing," concludes that "the Radical leadership succeeded in obtaining a provision whose future effect was left to future determination," and hence that "the record of history, properly understood . . . invited" the Court to emancipate itself from the framers' and drafters' contemporaneous intent.⁸⁴

Professors McKay and Bickel are doubtless right in large measure, perhaps in toto, in their not dissimilar constructions of the Court's opinion in *Brown v. Board of Education*. The difficulty lies with the opinion, which does not explicitly adopt either formula but simply recites, in terms the layman, but unfortunately not the lawyer, can understand, that, "in approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life. . . ."⁸⁵

The lawyer's difficulty in understanding the Court arises from a deeply ingrained sense of professional constraint which enjoins him to remember,

⁷⁸ *Brown v. Board of Education*, 347 U.S. 483, 489 (1954).

⁷⁹ Bickel, *op. cit.* supra note 76, at 64.

⁸⁰ McKay, *op. cit.* supra note 45, at 996.

⁸¹ Before the intensive and extensive research undertaken in response to the Court's questions, some scholars had viewed the then available materials rather differently, finding it to have been the net understanding of "the reconstruction decade" (rather than "any particular year") that the equal protection clause meant "with reservations, for here there is substantial divergence, there should be no segregation in the schools." Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 *Col. L. Rev.* 131, 167-68 (1950); *cf. ibid.*, at 162.

⁸² McKay, *op. cit.* supra note 45, at 996-97.

⁸³ *McCulloch v. Maryland*, 4 Wheat. (U.S.) 316,407 (1819).

⁸⁴ Bickel, *op. cit.* supra note 76, at 63-65.

⁸⁵ 347 U.S. 483, 492-93 (1954).

in the words of *Ex parte Bain*, "that, in the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the man who framed that instrument."⁸⁶ If the framers of a constitutional provision labored and brought forth a sow's ear, that is what it is supposed to remain.

A sow's ear may never become a silk purse. But maybe, by shifting the *Bain* emphasis a bit, it can become a pigskin wallet. This is, after all, "a constitution we are expounding," Marshall's great aphorism—potent enough to validate congressional exercise of a power to incorporate which the framers discussed but did not embody in the Constitution⁸⁷—has surely been one of the most seminal single influences on subsequent construction of the Constitution.⁸⁸ It has permitted the nation to adapt an eighteenth-century instrument to twentieth-century problems, in recognition that "the provisions of the Constitution are not mathematical formulas having their essence in their form. . . . Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."⁸⁹

In construing constitutional provisions the Court still regards it as its function to examine both "their origin" and "the line of their growth." Concern for the original intent of the framers of the Constitution remains high,⁹⁰ notwithstanding the persuasively fashioned contrary views of com-

⁸⁶ 121 U.S. 1, 12 (1887).

⁸⁷ 5 Elliot's Debates 543-44 (1866). This legislative history was known at the time *McCulloch v. Maryland* was decided, for Jefferson had utilized it in his 1791 memorandum to Washington opposing the Bank Bill. 4 *ibid.*, at 610. Cf. the 1798 extract from Jefferson's *Memoirs*, 4 *ibid.*, at 611-12.

⁸⁸ Justice Frankfurter has described "John Marshall's greatest judicial utterance" as the "pole-star for constitutional adjudications," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 596 (1952) (concurring opinion). For its impact see, e.g., the fundamental thinking of Professor Thayer in his essay, *The Origin and Scope of the American Doctrine of Constitutional Law*, in Thayer, *Legal Essays* 1, 13 (1908). Compare Chief Justice Hughes's landmark opinion in *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 443 (1934), and see the discussion in Mason, Harlan Fiske Stone: *Pillar of the Law* 362-65 (1956), of the role played by Justices Cardozo and Stone in formulating the opinion.

The impact of Marshall's phrase—or the impact of Justice Story's amiable paraphrase, "We should never forget that it is an instrument of government we are to construe"—has been little less striking in other English-speaking jurisdictions. See Friedmann, *Statute Law and Its Interpretation in the Modern State*, 26 *Can. Bar Rev.* 1277, 1291-94 (1948).

⁸⁹ *Gompers v. United States*, 233 U.S. 604, 610 (1914).

⁹⁰ For cases prior to the Roosevelt Court, see the extraordinarily comprehensive articles by tenBroek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 *Calif. L. Rev.* 287, 437, 664 (1938), 27 *Calif. L. Rev.* 157, 399 (1939). For recent judicial examples see, e.g., *Everson v. Board of Education*, 330 U.S. 1 (1947); *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Communications Ass'n v. Douds*, 339 U.S. 382 (1950); *Dennis v. United States*, 341 U.S. 494 (1951); *Ullman v. United States*, 350 U.S. 422 (1956); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Costello v. United States*, 350 U.S. 359 (1956); *Watkins v. United States*, 354 U.S. 178 (1957).

⁹¹ "One element of the past intrudes quite unnecessarily upon the present. We try to make the most of the consequences of what our forefathers did, but there is no reason why we should feel we have to carry out their plans for us. Were they so wise they didn't need to know the facts? The intention of the framers of the Constitution, even assuming we could discover what it was, when it is not adequately expressed in the Constitution, that is to say, what they meant when they did not say it, surely that has no binding force upon us. If we look behind or beyond what they set down in the document, prying into what else they wrote

mentators like Mr. Curtis.⁹¹ Indeed, *Adamson v. California*,⁹² in which the Court split five to four on whether the framers of the Fourteenth Amendment intended to incorporate in its first section all the guarantees of the Bill of Rights, impressively demonstrates the anxiety of living judges to learn what the drafters of the post-Civil War amendments intended.

The questions propounded in the *School Segregation Cases* are, of course, themselves the best evidence of the Court's strong and persistent interest in original intention.⁹³ Not strong enough, doubtless, to permit the Court to follow Professor Crosskey, even if it were convinced that Crosskey was right and all the constitutional history between the Convention and today founded on misapprehensions. After all, the Court is also concerned with the Constitution's "line of growth" and ultimately even error may become sanctified.⁹⁴

If, however, the original understanding of the equal protection clause did permit, as Professor Bickel has urged, "future determination" of its "future effect,"⁹⁵ the Court in the *School Segregation Cases* should have said so expressly and thereby squared its gearing the clause to present-day realities with its insistence that the Constitution is a written document of confined meaning.

The failure to make the decisional process explicit may have been inadvertent. Very possibly, however, it was the intended price of a unanimous decision. For it may be that Justices Black and Douglas, the surviving dissenters in *Adamson*, would have regarded any explicit evolutionary formulation of the Fourteenth Amendment as endorsement of the open-ended view of the Amendment espoused by Justice Frankfurter⁹⁶—a view they

and what they said, anything we may find is only advisory. They may sit in at our councils. There is no reason why we should eavesdrop on theirs." Curtis, *Lions Under the Throne* 2 (1947).

⁹² 332 U.S. 46 (1947). Consult Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *Stan. L. Rev.* 5 (1949).

For other Fourteenth Amendment problems, consult Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 *Yale L. J.* 371 (1938), 48 *Yale L. J.* 171 (1938). Compare *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (dissenting opinion), and *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576 (1949) (dissenting opinion); *Wheeling Steel Corp. v. Glander*, supra at 574 (separate opinion).

⁹³ Cf. the questions propounded in *Reid v. Covert* and *Kinsella v. Krueger*, 352 U.S. 901 (1956), which led to overruling of the original decision (351 U.S. 487 [1956]), 354 U.S. 391 (1957).

⁹⁴ Cf. note 92 supra. But cf. the unceremonious overturning of *Swift v. Tyson*, 16 Pet. (U.S.) 1 (1842), in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁹⁵ See text, at note 84 supra.

⁹⁶ Justice Frankfurter looks upon *due process*—and also upon other terms like *commerce*—as "purposely left to gather meaning from experience," by contrast with such concrete constitutional limitations as the length of the president's term of office, or the meaning of the word *state*. *National Mutual Ins. Co. v. Tidewater*, 337 U.S. 582, 676 (1949) (dissenting opinion). The unwillingness of Justices Rutledge and Murphy to find *state* a concept of unalterable meaning (*National Mutual Ins. Co. v. Tidewater*, supra, at 623) suggests the appropriateness of Professor Freund's doubt that it is possible to break the Constitution down into concepts which have a fixed meaning and concepts which do not. Consult Cahn, op. cit. supra note 64, at 61. (The judicial conviction that *state* has a fixed meaning is not too remote from the judicial assumption that old states and new ones have affixed—namely an equal—relation to one another. How this assumption was judicially translated into an "equal footing" clause which the framers deliberately omitted from the Constitution is an adventure in original understanding well told by Mr. Curtis. Curtis, op. cit. supra note 91, at 4-6.)

equate with a constitutional monstrosity oddly labelled "natural law."⁹⁷ Justice Black's quest for certainty in constitutional adjudication—a quest underscored by his full quotation in the epochal *Adamson* dissent of the quaint *Bain* insistence on placing "ourselves . . . in the condition of the man who framed that instrument"⁹⁸—is, in short, wholly at odds with the one apparently documentable interpretation of the intended meaning of the equal protection clause under which *Plessy* could not stand.

Moreover, the difficulties a rigorous rationale might have entailed would only have been multiplied when transferred to the District of Columbia case, *Bolling v. Sharpe*.⁹⁹ The Court there equated the Fourteenth Amendment's equal protection clause and the Fifth Amendment's due process clause. Support for the equation was found in dictum of 1896¹⁰⁰—the year *Plessy* was decided—and in the observation that any different result would have been "unthinkable."¹⁰¹ Unthinkable but not inexplicable¹⁰²—for the Fifth Amendment goes back to the slaveholding days of 1791—unless Fifth Amendment "due process" is also an ambulatory concept designed to gather constitutional moss as it rolls along.¹⁰³ A logical explanation satisfactory to all members of the Court is not easy to come by.

Apparent inadequacies in the Court's articulation of the decision in the *School Segregation Cases* are unfortunate to the extent that they furnish a stick to beat the Court with. But the inadequacies are not of major dimension. They do not undercut the merits of the *School Segregation Cases*—they merely becloud the precise rationale. If the Court's silences were the price of unanimity—if a couple of logical steps were dropped in order to pick up a couple of votes—the cost was insignificant. For the unanimous decision will shape the nation's future long after caterwauling about the two opinions has died away.

⁹⁷ See *Adamson v. California*, 332 U.S. 46, 75 (1947).

⁹⁸ *Ibid.*, at 72; see text, at note 86 supra.

⁹⁹ 347 U.S. 497 (1954).

¹⁰⁰ *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896).

¹⁰¹ *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

¹⁰² See Cahn, *op. cit. supra* note 60, at 155.

¹⁰³ Consult note 96 supra.