Fifty Years of Negro Citizenship as Qualified by the United States Supreme Court

The Historic Background

The citizenship of the Negro in this country is a fiction. The Constitution of the United States guarantees to him every right vouchsafed to any individual by the most liberal democracy on the face of the earth, but despite the unusual powers of the Federal Government this agent of the body politic has studiously evaded the duty of safeguarding the rights of the Negro. The Constitution confers upon Congress the power to declare war and make peace, to lay and collect taxes, duties, imposts, and excises; to coin money, to regulate commerce, and the like; and further empowers Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." After the unsuccessful effort of Virginia and Kentucky, through their famous resolutions of 1798 drawn up by Jefferson and Madison to interpose State authority in preventing Congress from exercising its powers, the United States Government with Chief Justice John Marshall as the expounder of that document,

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Fortified thus, the Constitution became the rock upon which nationalism was built and by 1833 there were few persons who questioned the supremacy of the Federal Government, as did South Carolina with its threats of nullification. Because of the beginning of the intense slavery agitation not long thereafter, however, and the division of the Democratic party into a national and a proslavery group, the latter advocating State's rights to secure the perpetuation of slavery, there followed a reaction after the death of John Marshall in 1835, when the court abandoned to some extent the advanced position of nationalism of this great jurist and drifted toward the localism long since advocated by Judge Roane of Virginia.

In making the national government the patron of slavery, a new sort of nationalism as a defence of that

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In the decision of *Prigg* v. *Pennsylvania*, when the effort was to carry out the fugitive slave law, [5] the court, speaking through Justice Storey in 1842, believed that the clause of the Constitution conferring a right should not be so construed as to make it shadowy or unsubstantial or leave the citizen without the power adequate for its protection when another construction equally accordant with the words and the sense in which they were used would enforce and protect the right granted. The court believed that Congress is not restricted to legislation for the execution of its expressly granted powers; but for the protection of rights guaranteed by the Constitution, may employ such means not prohibited, as are necessary and proper, or such as are appropriate to attain the ends proposed. The court held, moreover, in *Prigg* v. *Pennsylvania*, that "the fundamental principle applicable to all cases of this sort, would seem to be, that when the end is required the means are given; and when the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted."

It required very little argument to expose the fallacy in supposing that the national government had ever meant to rely for the due fulfillment of its duties and the rights which it established, upon State legislation rather than upon that of the United States, and with greater reason, when one bears in mind that the execution of power which was to be the same throughout the nation could not be confided to any State which could not rightfully act beyond its own territorial limits. All of this power exercised in executing the Fugitive Slave Law of 1793 was implied, rather than such direct power as that later conferred upon Congress by the Thirteenth Amendment, which provided that Congress should have power to pass appropriate legislation to enforce it.

As the Supreme Court decided in the case of *Prigg* v. *Pennsylvania* that the officers of the State were not legally obligated to assist in the enforcement of the Fugitive Slave Law of 1793, Congress passed another and a more drastic measure in 1850 which, although unusually rigid in its terms, was enthusiastically supported by the Supreme Court in upholding the slavery regime. The Fugitive Slave Law of 1850 deprived the Negro suspect of the right of a trial by jury to determine the question of his freedom in a competent court of the State. The affidavit of the person claiming the Negro was sufficient evidence of ownership. This law made it the duty of marshals and of the United States courts to obey and execute all warrants and precepts issued under the provisions of this act. It imposed a penalty of a fine and imprisonment upon any person knowingly hindering the arrest of a fugitive or attempting to rescue one from custody or harboring one or aiding one to escape. The writ of habeas corpus was denied to the reclaimed Negro and the act was *ex post facto*. In short, the Fugitive Slave Law of 1850 committed the whole country to the task of the protection of slave property and made slavery a national matter with which every citizen in the

In the decision of *Ableman* v. *Booth*[7] the court in construing the provision for the return of slaves according to the Fugitive Slave Law of 1850 further recognized the master's right of property in his bondman, the right of assisting and recovering him regardless of any State law or regulation or local custom to the contrary whatsoever. This tribunal then believed that the right of the master to have his fugitive slave delivered up on the claim, being guaranteed by the Constitution, the implication was that the national government was clothed with proper authority and functions to enforce it. These were reversed during the Civil War by the nation rising in arms against the institution of slavery which it had economically outgrown and the court in the support of the Federal Government exercising its unusual powers in effecting the political and social upheaval resulting in the emancipation of the slaves, again became decidedly national in its decisions.

Out of Rebellion the Negro emerged a free man endowed by the State and Federal Government with all the privileges and immunities of a citizen in accordance with the will of the majority of the American people, as expressed in the Civil Rights Bill and in the ratification of the Thirteenth, Fourteenth and Fifteenth Amendments. A decidedly militant minority, however, willing to grant the Negro freedom

of body but unwilling to grant him political or civil rights, bore it grievously that the race had been so suddenly elevated and soon thereafter organized a party of reaction to reduce the freedmen to the position of the free people of color, who before the Civil War had no rights but that of exemption from involuntary servitude. During the Reconstruction period when the Negroes figured conspicuously in the rebuilding of the Southern States they temporarily

enjoyed the rights guaranteed them by the Constitution. As there set in a reaction against the support of the reconstructed governments as administered by corrupt southerners and interlopers, the support which the United States Government had given this first effort in America toward actual democracy was withdrawn and the undoing of the Negro as a citizen was easily effected throughout the South by general intimidation and organized mobs known as the Ku-Klux Klan.

One of the first rights denied the Negro by these successful reactionaries was the unrestricted use of common carriers. Standing upon its former record, however, the court had sufficient precedents to continue as the impartial interpreter of the laws guaranteeing all persons civil and political equality. In *New Jersey Steam Navigation Company* v. *Merchants Bank*[8] the court speaking through Justice Nelson took high ground in the defence of the free and unrestricted use of common carriers, a right frequently denied the Negroes after the Civil War. The court said that a common carrier is "in the exercise of a sort of public office and has public duties to perform from which he should not be permitted to exonerate himself without assent of the parties concerned." This doctrine was upheld in *Munn* v. *Illinois*, [9] and in *Olcott* v. *Supervisors*, [10] when it was decided that railroads are public highways established under the authority of the State for the public use; and that they are none the less public highways, because controlled and owned

that of the State;[1112]

In the *Slaughter House Cases*[13] and *Strauder* v. *West Virginia*[14] the United States Supreme Court held that since slavery was the moving or principal cause of the adoption of the Thirteenth Amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against all discrimination against them, because of their race in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its present express power to enforce that amendment by appropriate legislation, might enact laws to protect that people against deprivation, *because of their race*, of any

civil rights granted to other freemen in the same States; and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the State.

The State was conceded the power to regulate rates, fares of passengers and freight, and upon these grounds it might regulate the entire management of railroads in matters affecting the convenience and safety of the public, such as regulating speed, compelling stops of prescribed length at stations and prohibiting discriminations and favoritisms. The position taken here is that these corporations are actual agents of the State and what the State permits them to do is an act of the State. The Thirteenth and Fourteenth Amendments made the Negro race a part of the public and entitled to share in the control and use of public utilities. Any restriction in the use of these utilities would deprive the race of its liberty; for "personal liberty consists," says Blackstone, "in the power of locomotion of changing situation, of removing one's person to whatever places one's own inclination may direct, without restraint, unless by due course of law."

In several decisions the court had held that the purpose of the Thirteenth and Fourteenth Amendments was to raise the Negro 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 United States. In *Strauder* v. *West Virginia*, [15] and *Neal* v. *Delaware*, [16] the court had taken the position that exemption from race discrimination is a right of a citizen of the United States. Negroes charged that members of their race had been excluded from a jury because of their color. The court was then of the opinion that such action contravened the Constitution and, as was held in

PriggPennsylvania

In *Ex Parte Virginia* the position was the same. In this case one Cole, a county judge, was charged by the laws of Virginia with the duty of selecting grand and petit jurors. The laws of that State did not permit him in the performance of that duty to make any distinction as to race. He was indicted in a Federal court under the act of 1875, for making such discriminations. The attorney-general of Virginia contended that the State had done its duty, and had not authorized or directed that county judge to do what he was charged with having done; that the State had not denied to the Negro race the equal protection of the laws; and that consequently the act of Cole must be deemed his individual act, in contravention of the will of the State. Plausible as this argument was, it failed to convince the court; and after emphasizing the fact that the Fourteenth Amendment had reference to the acts of the political body denominated a State, "by whatever instruments or in whatever modes that action may be taken" and that a State acts by its legislative, executive and judicial authorities, and can act in no other way, it said:

"The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. 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 inhibitions; and, as he acts under the name and for the State, and is clothed with the State power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it. But the constitutional amendment

was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated as State but upon the persons who are the agents of the State, in the denial of the rights which were intended to be secured." [17]

The Supreme Court of the United States soon fell under reactionary influence and gave its judicial sanction to all repression necessary to establish permanently the reactionaries in the South and to deprive the Negroes of their political and civil rights. It will be interesting, therefore, to show exactly how far the United States Supreme Court, supposed to be an impartial tribunal and generally held in such high esteem and treated with such reverential fear, has been guilty of inconsistency and sophistry in its effort to support this autocracy in defiance of the well established principles of interpretation for construing the constitutions and laws of States and in utter disregard of the supremacy of Congress in the exercise of the powers granted the government by the Constitution of the United States.

The Right of Locomotion

In 1875 Congress passed a measure commonly known as the Civil Rights Bill, which was supplementary of other measures of the same sort, the first being enacted April 9, 1866, [18] and reenacted with some modifications in sections 16, 17, and 18 of the Enforcement Act passed August 31, 1870. [19] The intention of the statesmen advocating these measures was to secure to the freedmen the enjoyment of every right guaranteed all other citizens. The important sections of the Civil Rights Bill of 1875 follow:

- *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 or water, theatres, 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.

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

Although the Negroes by this measure were guaranteed the rights which were granted by the Constitution to every citizen of the United States, the members of the Supreme Court of the United States instead of upholding the laws of the nation in accordance with their oaths undertook to hedge around and to explain away the articles of the Constitution in such a way as to legislate rather than interpret the laws according to the intent of the framers of the Constitution. Subjected to all sorts of discriminations at the polls, in the courts, in inns, in hotels, on street cars, and on railroads, Negroes had sued for redress of their grievances and the persons thus called upon to respond in the courts attacked

the constitutionality of the Civil Rights Bill, and the War Amendments, contending that they encroached upon the police power of the States.

The first of these *Civil Rights Cases* were: *United States* v. *Stanley, United States* v. *Ryan, United States* v. *Nichols, United States* v. *Singleton*, and *Robinson and wife* v. *Memphis and Charleston R. R. Co*. Two of these cases, those against Stanley and Nichols, were indictments for denying to persons of color the accommodations of an inn or hotel; two of them, those against Ryan and Singleton, were, one on information, the other on indictments, for denying to

individuals the privileges and accommodations of a theatre. The information against Ryan was for refusing a colored person a seat in the dress circle of McGuire's Theatre in San Francisco; and the indictment against Singleton was for denying to another person, whose color was not stated, the full enjoyment of the accommodation of the theatre known as the Grand Opera House in New York.

The argument to show the culpability of the State was that in becoming a business man or a corporation established by sanction of and protected by the State, such a person or persons discriminating against a citizen of color no longer acted in a private but in a public capacity and in so doing affected an interest in violation of the State by controlling, as in the case of slavery, an individual's power of locomotion. The Civil Rights Bill was appropriate legislation as defined by the Constitution to forbid any action by private persons which "in the light of our history may reasonably be apprehended to tend, on account of its being incidental to quasi public occupations, to create an institution." The act of 1875 in prohibiting persons from violating the rights of other persons to the full and equal enjoyment of the accommodations of inns and public conveyances, for any reason turning merely upon the race or color of the latter, partook of the specific character of certain contemporaneous, solemn and effective action by the United States to which it was a sequel and is constitutional.

Giving the opinion of the court in Civil Rights Cases, [20] Mr. Justice Bradley said that the Fourteenth Amendment on which this act of 1875 rested for its authority, if it had any authority at all, does not invest Congress to legislate within the domain of State legislation or in State action of the kind referred to in the Civil Rights Act. He believed that the Fourteenth Amendment does not authorize Congress to create a code of municipal law for the regulation of private rights. He conceded that positive rights and privileges are secured by the Fourteenth Amendment but only by prohibition against State laws and State proceedings affecting those rights. [21] "Until some State law has passed," he said, "or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against State laws and acts under State authority." Otherwise Congress would take the place of State legislatures and supersede them and regulate all private rights between man and man. Civil rights such as are guaranteed by the Constitution against State aggression, thought Justice Bradley, cannot be impaired by the wrongful acts of individuals unsupported by State authority in the shape of laws, customs, or executive proceedings, for those are private wrongs.

Justice Bradley believed, moreover, that the Civil Rights Act could not be supported by the Thirteenth Amendment in that, unlike the Fourteenth Amendment, the Thirteenth Amendment is primary and direct in abolishing slavery. "When a man has emerged from slavery," said he, "and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state there must be some

Wright Case

Although conceding that the Thirteenth Amendment was direct and primary legislation, the court held that it had nothing to do with the guarantee against that race discrimination commonly referred to in the bills of complaint as the badges and incidents of slavery. The court found the Fourteenth Amendment negative rather than direct and primary because of one of its clauses providing that "no State shall make or enforce any law which shall abridge the

privileges and immunities of citizens of the United States nor shall any State deprive any person of life, liberty and property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The court was too evasive or too stupid to observe that the

first clause of this amendment was an affirmation to the effect that all persons born and naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. In other words, the court held that if there is one negative clause in a paragraph, the whole paragraph is a negation. Such sophistry deserves the condemnation of all fairminded people, when one must conclude that any person even without formal education, if he has heard the English language spoken and is of sound mind, would know better than to interpret a law so unreasonably.

In declaring this act unconstitutional the Supreme Court of the United States violated one of its own important principles of interpretation to the effect that this duty is such a delicate one, that the court in declaring a statute of Congress invalid must do so with caution, reluctance and hesitation and never until the duty becomes manifestly imperative. In the decision of *Fletcher* v. *Peck*, [22] the court said that whether the legislative department of the government has transcended the limits of its constitutional power is at all times a question of much delicacy, which seldom, if ever, is to be decided in the affirmative, in a doubtful case. The position between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. In the *Sinking Fund Cases*[23] the court said: "When required in the regular course of judicial proceedings to declare an act of Congress void if not within the legislative power of the United States, this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." And

this is exactly what happened. The judiciary here assumed the function of the legislative department. Not even a casual reader on examining these laws and the Constitution can feel that the court in this case felt such a clear and strong conviction as to the invalidity of this constitutional legislation when that tribunal, as its records show, had under different circumstances before the Civil War held a doctrine decidedly to the contrary.

Mr. Justice Harlan, therefore, dissented. He considered the opinion of the court narrow, as the substance and spirit were sacrificed by a subtle and ingenious verbal criticism. Justice Harlan believed, "that it is not the words of the law but the internal sense of it that makes the law; the letter of the law is the body, the sense and reason of the law the soul." "Constitutional provisions adopted in the interest of liberty," said Justice Harlan, "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 end the people desire to accomplish, which they attempted to accomplish, and which they supposed they had accomplished, by changes in their fundamental law."

The court, according to Justice Harlan, although he did not mean to say that the determination in this case should have been materially controlled by considerations of mere expediency or policy, had departed from the familiar rule requiring that the purpose of the law or Constitution and the objects to be accomplished by any grant are often the most important in reaching real intent just as the debates in the convention of 1787 and the discussions in the

Federalist and in the ratifying conventions of the States have often been referred to as throwing important light on clauses in the Constitution seeming to show ambiguity. The debates on the war amendment, when they were proposed and ratified, were thoroughly expounded before the court in bringing before that tribunal the intention of the members of Congress, by which the court, according to a

well established principle of interpretation, should have been influenced in construing the statute in question.

The court held that legislation for the enforcement of the Thirteenth Amendment is direct and primary "but to what specific ends may it be directed?" inquired Justice Harlan. The court "had uniformly held that national government has the power, whether expressly given or not, to secure and protect rights conferred or guaranteed by the Constitution." [24] Justice Harlan believed then that the doctrines should not be abandoned when the inquiry was not as to an implied power to protect the master's rights, but what Congress might, under powers expressly granted, do for the protection of freedom and the rights necessarily inhering in a state of freedom.

The Thirteenth Amendment, the court conceded, did more than prohibit slavery as an *institution*, resting upon distinctions of race, and upheld by positive law. The court admitted that it "established and decreed universal civil freedom throughout the United States." "But did the freedom thus established," inquired Justice Harlan, "involve more than exemption from actual slavery? Was nothing more intended than to forbid one man from owning another as property? Was it the purpose of the nation simply to destroy the institution and then remit the race, theretofore held in bondage, to the several States for such protection, in their civil rights, necessarily growing out of their freedom, as those States in their discretion might choose to provide? Were the States against whose protest the institution was destroyed to be left free, so far as national interference was concerned, to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights which by universal concession, inhere in a state of freedom?" Justice Harlan considered it indisputable that Congress in having power to abolish slavery could destroy the burdens and disabilities remaining

as its badges and incidents which constitute its substance in visible form.

The court in its defense had taken as an illustration that the negative clause of the Fourteenth Amendment was not direct and primary, that although the States are prohibited from passing laws to impair the obligations of contracts this did not mean that Congress could legislate for the general enforcement of contracts throughout the States. Discomfitting his brethren on their own ground Harlan said: "A prohibition upon a State is not a *power* in *Congress or in the national government*. It is simply a *denial* of *power* to the State. The much talked of illustration of impairing the obligation of contracts, therefore, is not an example of power expressly conferred in contradistinction to that of this case and is not convincing for this would be a court matter, not a matter of Congress. The Fourteenth Amendment is the first case of conferring upon Congress affirmative power by *legislation to enforce* an express prohibition on the States. Judicial power was not specified but the power of Congress. The judicial power could have acted without such a clause. The Fourteenth Amendment is not merely a prohibition on State action. It made Negroes citizens of the United States and of the States. This is decidedly affirmative. This citizenship may be protected not only by the judicial branch of the government but by Congressional legislation of a primary or direct character. It is in the power of Congress to enforce the affirmative as well as the prohibitive provisions of this article.

The acceptance of any doctrine to the contrary," continued Justice Harlan, "would lead to this anomalous result: that whereas prior to the amendments, Congress with the sanction of this court passed the most stringent laws -operating directly and primarily upon States and their officers and agents, as well as upon individuals -in vindication of slavery and the right of the master, it may not now, by legislation of a like primary and direct character, guard, protect, and secure the

freedom established, and the most essential right of the citizenship granted, by the constitutional amendments."

It did not seem to Justice Harlan that the fact that, by the second clause of the first section of the Fourteenth Amendment, the States are expressly prohibited from making or enforcing laws abridging the rights and immunities of citizens of the United States, furnished any sufficient reason for upholding or maintaining that the amendment was intended to deny Congress the power, by general, primary, and direct legislation, of protecting citizens of the several States, being also citizens of the United States, against all discrimination, in respect of their rights as citizens, which is founded on "race, color, or previous condition of servitude." "Such an interpretation," thought he, "is plainly repugnant to its fifth section, conferring upon Congress power, by appropriate legislation, to enforce not merely the provisions containing prohibitions upon the States, but all of the provisions of the amendment, including the provisions, express and implied, in the first clause of the first section of the article granting citizenship." The prohibition of the State laws could have been negatived by judicial interpretation without the Fourteenth Amendment on the ground that they would have conflicted with the Constitution.

The court said the Fourteenth Amendment was not intended to enact a municipal code for the States. No one will gainsay this. This Amendment, moreover, is not altogether for the benefit of the Negro. It simply interferes with the local laws when they operate so as to discriminate against persons or permit agents of the States to discriminate against persons of any race on account of color or previous condition of servitude. Of what benefit was it if it did not do this? The constitutions of the several States had already secured all persons against deprivation of life, liberty or property otherwise than by due process of law, and in some form recognized the right of all persons to the equal protection of the laws. If this be the correct interpretation

even, it does not follow that privileges which have been granted by the nation, may not be protected by primary legislation upon the part of Congress. Justice Harlan pointed out that it is for Congress not the judiciary, to say that legislation is appropriate, for that would be sheer usurpation of the functions of a coordinate department. Why should these rules of interpretation be abandoned in the case of maintaining the rights of the Negro guaranteed by the Constitution?

The Civil Rights Act of 1875 could have been maintained on the ground that it regulated interstate passenger traffic, as one of the cases, *Robinson and Wife* v. *Memphis and Charleston Railroad Company*, showed that Robinson a citizen of Mississippi had purchased a ticket entitling him to be carried from Grand Junction, Tennessee, to Lynchburg, Virginia. This case substantially presented the question of interstate commerce but the court reserved the question whether Congress in the exercise of its power to regulate commerce among the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another. The court undertook to hide behind the fact that this specific act did not recite therein that it was enacted in pursuance of the power of Congress to regulate commerce. Justice Harlan, therefore, inquired: "Has it ever been held that the judiciary should overturn a

statute, because the legislative department did not accurately recite therein the particular provision of the constitution authorizing its enactment?" On the whole, the contrary is the rule. It is sufficient to know that there is authority in the Constitution.

In this decision, too, there was the influence of the much paraded bugbear of social equality forced upon the whites. To use the inns, hotels, and parks, established by authority of the government and the places of amusement authorized as the necessary stimulus to progress, to buy a railroad ticket at the same window, ride in the same comfortable car on a limited train rather than incur the loss of time and

suffer the inconvenience of inferior accommodations on a slow local train; to sleep and eat in a Pullman car so as to be refreshed for business on arriving at the end of a long journey, all of this was and is today dubbed by the reactionary courts social equality. Justice Harlan exposed this fallacy in saying: "The right, for instance, of a colored citizen to use the accommodations of a public highway, upon the same terms as are permitted to white citizens, is no more a social right than his right, under the law, to use the public streets of a city or a town, or a turnpike road, or a public market, or a post office, or his right to sit in a public building with others, of whatever race, for the purpose of hearing the political questions of the day discussed."

What did the Negro become when he was freed? What was he when, according to section 2 of Article IV of the Constitution, he became by virtue of the Fourteenth Amendment entitled to all privileges and immunities of citizens in the several States? [25] From what did the race become free? If Justice Bradley had been inconveniently segregated by common carriers, driven out of inns and hotels with the sanction of local law, and deprived by a mob of the opportunity to make a living, would he have considered himself a free citizen of this or any other country? "A colored citizen of Ohio or Indiana while in the jurisdiction of Tennessee," contended Justice Harlan, "is entitled to enjoy any privilege or immunity, fundamental in citizenship, which is given to citizens of the white race in the latter State. Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State." In *United States* v. *Cruikshank*[26] it was held that rights of life and personal liberty are natural rights of man, and that "equality of the rights of citizens is a principle of republicanism."

Inconsistency of the Court

In the case of *Hall* v. *DeCuir*[27] the court reached an important decision when an Act of Louisiana passed in 1869 to give passengers without regard to race or color equality of right in the accommodations of railroad or street cars, steamboats or other water crafts, stage coaches, omnibusses or other vehicles, was declared unconstitutional so far as it related to commerce between States. [28]

Here a person of color had been discriminated against by a Mississippi River navigation company which was called to answer before a United States court for violating this act.

Giving the opinion of the court, Chief Justice Waite said: "We think it may be safely said that State legislation which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom does encroach upon the exclusive power of Congress. The statute now under consideration in our opinion occupies that position." "Inaction by Congress," the court held, "is equivalent to a declaration that interstate commerce shall remain

free and untrammelled." This meant that the carrier was "at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him best for the interest of all concerned. The statute under which this suit is brought, as construed by the State court, seeks to take away from him that power so long as he is within Louisiana, and while recognizing to the fullest extent the principle which sustains a statute unless its unconstitutionality is clearly established, we think this statute to the extent that it requires those engaged in the transportation of passengers among the several States to carry colored persons 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."

Justice Waite here expressed his fear as to the delicate ground on which he was treading in saying: "The line which separates the powers of the States from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not infrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved." Thus the way was left clear to vary the principle of interpretation according to the color of the citizens whose rights might be involved.

In view of the subsequent decisions in separate car cases, moreover, the following portion of Justice Waite's opinion as to a clause in the law involved in the case of *Hall* v. *DeCuir* is unusually interesting. "It does not act," said he, "upon the business through the local instruments to be employed after coming within the State, from without or goes out from within. While it purports only to control the

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With the rapid expansion of commerce in the United States and the consequent necessity for regulation both by the State and the United States, no power of Congress was more frequently questioned than that to regulate commerce and no litigant concerned in such constitutional questions easily escaped the consequences of the varying interpretation given this clause by the United States Supreme Court. The court, of course, accepted as a general principle that there are three spheres for the regulation of commerce, namely: that which a State cannot invade, that which the State may invade, when Congress has not interfered, and that which is reserved to the State in conformity with its police power. But as late as 1886 the nationalistic school found some encouragement in the decision of the *Wabash, St. Louis and Pacific Railway Company* v. *Illinois*[30] given by Justice Miller. He said: "Notwithstanding what is there said, that is, in the decisions of *Munn* v. *Illinois; C. B. and Q. R. R. Company* v. *Iowa*, and *Peik* v. *Chicago and N. W. R. R. Co.*, [31] this court held and asserted that it had never consciously held otherwise, that a statute of a State intended to regulate or to tax, or to impose any other restriction upon the transmission of persons or property or telegraphic messages, from one State to another, is not within the class of legislation which the States may enact in the absence of legislation by Congress; and that such statutes are void even as to the part of such transmission which may be within the State." Chief Justice Waite, and Justice

Bradley and Justice Gray, however, dissented for various reasons.

In the *Louisville Railway Company* v. *Mississippi*, [32] however, in 1899, the court, evidently yielding to southern public opinion, reversed itself by the decision that an interstate carrier could not run a train through Mississippi without attaching thereto a separate car for Negroes and had the audacity to argue that this is not an interference with interstate commerce. [33]

To show how inconsistent this interpretation was one should bear in mind that in *Hall* v. *DeCuir* the court had held that this was exactly what a State could not do in that the statute acted not upon business through local instruments to be employed after coming into the State, but directly upon business as it comes into the State from without or goes out from within, although it purported only to control the carrier when engaged within the State. It necessarily influenced the conduct of the carrier to some extent in the management of his business

HallDeCuir

Giving the opinion in the Mississippi case, however, Justice Brewer said: "It has been often held by this court that there is a commerce wholly within the State which is not subject to the constitutional provision and the distinctions between commerce among the States and the other class of commerce between citizens of a single State and conducted within its limits exclusively is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other." [34] He might have added some other comment to the effect that this court will not definitely draw the line of distinction between such classes of commerce since it desires to leave adequate room for evasion, because it had been unusually easy to find such a line in cases in which the rights of Negroes were concerned and such definite interpretation might interfere with the rights of white men. Justices Harlan and Bradley dissented on the grounds that the law imposed a burden upon an interstate carrier in that he would be fined if he did not attach an additional car for race discrimination, and that the opinion was repugnant to the principles set forth in that of *Hall* v. *DeCuir*.

The United States Supreme Court finally reached the position of following the decision of *Ex Parte Plessy* which justified the discrimination in railway cars on the grounds

that it is not a badge of slavery contrary to the Thirteenth Amendment. This decision, in short, is: So long, at least, as the facilities or accommodations provided are substantially equal, statutes providing separate cars for the races do not abridge any privilege or immunity of citizens or otherwise contravene the Fourteenth Amendment of the United States Constitution. In such matters equality and not identity or community of accommodations is the extreme test of conformity to the requirements of the amendment. The regulation of domestic commerce is as exclusively a State function as the regulation of interstate commerce is a Federal function. The separate car law is an exercise of police power in the interest of public order, peace and comfort. It is a matter of legislative power and discretion with which Federal courts cannot interfere.

In *Hennington* v. *Georgia*, [35] it was later emphasized that it had been held that legislative enactments of the States, passed under the admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which by their necessary operation, affect, to some extent, or for a limited time, the conduct of commerce among the

States, are yet not invalid by force alone of the grant of power of Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of power granted to it by the Constitution. Of course, there was no other provision to which such laws could be contrary after the Supreme Court had whittled away the war amendments.

In the case of *Plessy* v. *Ferguson*[36] the most inexcusable inconsistency of the court was shown when the persons of color aggrieved attacked the separate car law of Louisiana on the ground that it conflicted with the Fourteenth Amendment.

Giving the opinion of the court, Justice Brown said: "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 the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances 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 State legislatures."

Justice Harlan dissented, saying that he was of the opinion that the Statute of Louisiana is inconsistent with personal liberty of white and black in that State and hostile to both in the letter and spirit of the Constitution of the United States. Justice Harlan rightly contended that laws can have no regard to race according to the Constitution. If they do, they conflict with the rights of State and national citizenship and with personal liberty. The Thirteenth and Fourteenth Amendments removed race from our governmental system. But what has the court to do with the policy or expediency of legislation? "A statute may be valid, and yet upon grounds of public policy, may well be characterized as unreasonable." Accordingly Mr. Sedgwick, a distinguished authority, says: "The Courts have no other duty to perform than to execute the legislative will, without regard to their views as to the wisdom or justice of the particular enactment." "Statutes," said Justice Harlan, "must always have a reasonable construction. Sometimes they are to be construed strictly; sometimes, liberally,

in order to carry out the legislative will. But, however construed, the intent of the legislature is to be respected."

The decisions in the cases of *M. K. and T. Railway* v. *Haber*[37] and *Crutcher* v. *Kentucky*, [38] are of some importance. In these cases the court reiterated the doctrine that the regulation of the enjoyment of the relative rights and the performance of the duties, of all persons within the jurisdiction of a State belong primarily to such a State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes. [39]

The court by this time, however, had all but held that the Constitution secured to the Negro no civil or political rights except that of exemption from involuntary servitude, and that law for the Negro is the will of the white man.

Further development of the doctrine as to the right of the State to deprive a Negro of citizenship is brought out in the *Lauder Case*. [40] The case was this: Lauder's wife purchased a first class ticket from Hopkinsville to Mayfield, both places within the State of Kentucky. She took her place in what was called the "ladies' coach" and was ejected therefrom by the conductor and assigned a seat in a smoking car, which was alleged to be small, badly ventilated, unclean and fitted with greatly inferior accommodations. This road ran from Evansville, Indiana, to Hopkinsville,

Louisville, New Orleans and RailwayMississippi[41]*PlessyFerguson*[42]

In the case of *Chesapeake and Ohio Railway Company* v. *Kentucky*, [43] this doctrine was carried to its logical conclusion. The question was whether a proper construction of the separate car law confines its operation to passengers whose journeys commence and end within the boundaries of the State or whether a reasonable interpretation of the act requires Negro passengers to be assigned to separate coaches when traveling from or to points in other States. In other such cases the Supreme Court of the United States had interpreted the local law as applying only to interstate commerce. The language of the first section of the Kentucky statute made it very clear that it applied to all carriers. The first section of the Kentucky law follows:

"Any railroad company or corporation, person or persons, running or otherwise operation of railroad cars or coaches by steam or otherwise, in any railroad line or track within this State, and all railroad companies, persons or persons, doing business in this State, whether upon lines or railroads owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may herefter be built under existing charters, or charters that may hereafter be granted in this State; and all foreign corporations, companies, person or persons, organized under charters granted, or that may be hereafter granted by any other State, who may be now, or may hereafter be engaged in running or operating any of the railroads of this State, whether in part or whole, are hereby required to furnish separate coaches or cars for travel or transportation of the white and colored passengers on their respective lines of railroad."

Any sane man can see that this law undertook to regulate interstate commerce. Justice Brown, however, tried to square the opinion with that of the Kentucky Supreme Court, upholding the law on the grounds that it was constitutional in as much as it applied only to intrastate passenger traffic, although the law plainly applies also to interstate traffic.

Speaking further for the court, Justice Brown said: "Indeed 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. It is scarcely courteous to impute to a legislature the enactment of a law which it knew to be unconstitutional and if it were well settled that a separate coach law was unconstitutional, as applied to interstate commerce, the law applying on its face to *all* passengers should be limited to such as the legislature were competent to deal with. 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."

"While we do not deny the force of the railroad's argument in this connection, we cannot say that the General Assembly would not have enacted this law if it had supposed it applied only to domestic commerce; and if it were in doubt on that point, we should unhesitatingly defer to the opinion of the Court of Appeals, which held that it would give it that construction if the case called for it. In view of the language above quoted it would be unbecoming for us to say that the Court of Appeals would not construe the law as applicable to domestic commerce alone, and if it did, the case would fall directly within the *Mississippi Case*. [44] We, therefore, feel compelled to give it that construction ourselves and so construe it that there can be no doubt as to its constitutionality." Here we have a plain case of the United States Supreme Court declaring an act severable because thereby it could apparently justify as constitutional a measure depriving the Negroes of civil and political rights, whereas in some other cases it has held other acts not severable to reach the same end.

The court continued its reactionary course. In *Chiles* v. *Chesapeake and Ohio R. R. Company*[45] the court reiterated that "Congressional inaction is equivalent to a declaration that a carrier may, by its regulations, separate white and Negro interstate passengers. In *McCabe* v. *Atchinson, Topeka and Santa Fe Railway Company*, [46] Justice Hughes giving the opinion of the court, followed the *Plessy* v. *Ferguson* decision. He did not believe, moreover, "that the contention that an act though fair on its face may be so unequally and oppressively administered by the public authorities as to amount to an unconstitutional discrimination by the State itself, is applicable where it is the administration of the provisions of a separate coach law by carriers, which is claimed to produce the discrimination. The separate coach provisions of Oklahoma [47] apply to transportation wholly intrastate in absence of a different construction by State courts and do not contravene the commerce clause of the Federal court. The court held, however, that so much of the Oklahoma separate coach law as permits carriers to provide sleeping cars, dining cars, and chair cars for white persons, and to provide no similar accommodations for Negroes, denies the latter the equal protection of the laws guaranteed by the Constitution.

The most recent case, that of the *South Covington and Cincinnati Street Railway, Plaintiff in error* v. *Commonwealth of Kentucky* shows another step in the direction of complete surrender to caste. This company was a Kentucky corporation, each of the termini of the railroad of which was in Kentucky. The complainant hoped to prevent the segregation of passengers carried from Ohio into Kentucky. The decision was that a Kentucky street railway may be required by statute of that State to furnish either separate cars or separate compartments in the same car for white and Negro passengers although its principal business is the carriage of passengers in interstate commerce between Cincinnati, Ohio, and Kentucky across the Ohio River. Such a requirement affects interstate commerce only incidentally, and does not subject it to unreasonable demands. In other words, this inconvenience to the carrier is not very much and the humiliation and burden which it entails upon persons of color thus segregated should not concern the court, although they are supposed to be citizens of the United States.

Justice Day dissented and Justices Van DeVanter and Putney concurred on the ground that the attachment of a different car upon the Kentucky side on so short a journey would burden interstate commerce as to cost and in the practical operation of the traffic. The provision for a separate compartment for the use of only interstate Negro passengers would lead to confusion and discrimination. The same interstate transportation would be subject to conflicting regulation in the two States in which it is conducted. They believed that it imposed an unreasonable burden and according to the dissentients was, therefore, void.

Justice in the Courts.

One of the most important constitutional rights denied the Negroes is that of justice in the courts. In as much as their former masters felt enraged against the freedmen because of their sudden release from bondage, they too often perpetrated upon the freedmen crimes for which the Negro had no redress in courts, for white persons constituted the accusers, the prosecutors, the judges, and the juries. Immediately following the Civil War, before the amendments of the Constitution enacted in the special

StrauderWest Virginia[48]*VirginiaRives*[49]*NealDelaware*[50]*GibbonsKentucky*[51]

In the case of *Bush* v. *The Commonwealth of Kentucky*[52] the Negro faced an additional difficulty in that the court held that wherein there was no specific law excluding persons from service upon juries because of their race or color, that the petitioner would have to show evidence to that effect. In the case of *Smith* v. *The State of Mississippi*[53] it was held that the omission or refusal of officers to include Negro citizens in the list from which jurors might be drawn is not, as to a Negro subsequently brought to trial, a denial of equal protection of laws. In the case of *Murray* v. *The State of Louisiana*[54] the decision was that the fact

that a law confers on the jury commissioners judicial power in the selection of citizens for jury service, does not involve a conflict with the Fourteenth Amendment of the Constitution of the United States, although in the exercise of such power they might not select Negroes for jury service.

The case of *Williams* v. *Mississippi* was more interesting. The law of that State prescribed the qualifications of voters and of grand and petit juries and invested the administrative officers with a large discretion in determining what citizens have the necessary qualifications. As it appeared that in the use of their discretion they would exclude Negroes from such juries it was contended that the act of Mississippi was a violation of the Fourteenth Amendment. The court held, however, that the Mississippi law could not be held repugnant to the Fourteenth Amendment merely on a showing that the law might operate as a discrimination against the Negro race, in absence of proof of an actual discrimination in the case under consideration. This ground has often proved convenient for the Supreme Court of the United States in dodging the question whether or not the Negroes must be protected in the rights guaranteed them by the Constitution.

This case was decided in 1897 and two years later Mr. Justice Gray, giving the opinion of the court in the case of *Carter* v. *Texas*, [55] said that the exclusion of all persons of African race from a grand jury which finds an indictment against a Negro in a State court, when they are excluded solely because of their race or color denies him the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States, whether such

exclusion is done through the action of the legislature, through the courts, or through the executive or administrative officers of the State. This was substantially the position taken in the case of *Strauder* v. *West Virginia* twenty years earlier.

The Negroes received some encouragement, too, from the decision of *Rogers* v. *Alabama*. [56] It was held that there had been a denial of the equal protection of the laws by a ruling of a State court upon the motion to quash an indictment on account of the exclusion of Negroes from the grand jury list, which motion, though because of its being in two printed octavos, was struck from the files under the color of local practice for prolixity, contained an allegation that certain provisions of the newly adopted State constitution, claimed to have the effect of disfranchising Negroes because of their race, when such action worked as a consideration in the minds of the jury commissioners in reaching their decision. The court held in *Martin* v. *The State of Texas*, however, [57] that a discrimination against Negroes because of their race in the selection of grand or petit jurors as forbidden by the Fourteenth Amendment is not shown by written motion to quash, respectively, the indictment of the panel of petit jurors, charging such discrimination where no evidence was introduced to establish the facts stated in the omissions. It is not sufficient merely to prove that no persons of color were on the jury.

As certain States wished to make the government further secure in the elimination of Negroes from juries, after making the qualifications for voters unusually rigid so as to exclude persons of African descent, they easily established the same qualifications for jurors, to relieve persons of color also from that service. In the case of *Franklin* v. *South Carolina*[58] the court held that there was no discrimination against Negroes because of their race in the selection of the grand jury made by the laws of South Carolina, [59] giving the jury commissioner the right to select electors of good moral character such as they may deem qualified to serve as jurors, being persons of sound mind and free from all legal exceptions. A motion, therefore, to quash an indictment

against a Negro for disqualification of the grand jurors who must be electors, because of a change in the State constitution of South Carolina respecting the qualifications of electors, did not violate the Act of Congress, June 25, 1868, and, therefore, did not present to the Supreme Court of the United States a question of a denial of Federal right where there is nothing in the record to show that the grand jury as actually impaneled contained any person who was not qualified as an elector under the earlier State constitution, which was, according to the allegation, so made up as to exclude Negroes on account of their color. The Supreme Court of the United States then took no account of the intent or the spirit of the law maker as this tribunal had been accustomed to do in cases of constitutional import and left upon the Negro the burden of performing the difficult task of showing that he had been discriminated against on account of his color when the discrimination could be easily effected without the possibility of his actually producing any evidence that on the face of itself could convince the court.

Suffrage

As already mentioned above the Negroes during this period were struggling to retain the right of suffrage and, of course, were attacking in the courts those restrictions primarily directed toward the elimination of the Negroes from the electorate. The Supreme Court of the United States generally shrank from these cases by disclaiming jurisdiction. In *Ex Parte Siebold*, [60] *Ex*

Parte Yarborough, [61] and *In re Coy*, [62] however, the general jurisdiction of Federal courts over matters involved in the election of national officers was affirmed. The court held that it had jurisdiction in the election case in *Wiley* v. *Sinkler*, [63] when

SwaffordTempleton[64]

From the Supreme Court of the United States, however, the Negroes received little encouragement, in as much as the right of suffrage, with its requirements of property ownership and the literacy test, could be withheld from the Negro without specifically discriminating against any one on account of race or color. In *Southy* v. *Virginia*, 181 U. S., Revised Statutes, of the United States, Cont. St. 1901, pages 37-42, providing that every person who prevents, hinders, controls or intimidates another from exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment of the Constitution of the United States, by means of bribery, etc., shall be punished, was held invalid as it was considered to be beyond the constitutional power of Congress to act in such a case except in that of race discrimination. If the discrimination is in a State or municipal election, however, Congress may intervene, if the discrimination is shown, but not until then.

In the case of *Giles* v. *Harris*[65] there was brought to the Supreme Court a bill in equity, complaining that Negroes qualified to vote for members of Congress had been refused on account of their color by virtue of the Alabama constitution, whereas white men were registered to vote at such an election. Relief was asked for on the basis of the Revised Statutes, Sec. 1979, praying that the Supreme Court should order that the petitioner be registered and declare null and void the special clause of the Alabama constitution. The court answered this petition with certain observations

disclaiming jurisdiction largely for "want of merit in the averments which were made in the complaint as to the violation of Federal rights."

The court held that if the registrars acting at this election in Alabama had no authority under the new constitution, which the petitioner prayed that the court might declare null and void, they could not legally register the plaintiff. If they had authority, they were within their right to use their discretion. If this clause in the constitution should be struck down according to the prayer of the plaintiff, there would be no board to which the mandamus could be issued. The Supreme Court, therefore, held that no damage had been suffered because no refusal to register by a board constituted in defiance of the Federal Constitution could disqualify a legal voter otherwise entitled to exercising the electorate franchise, since this amounts to a decision upon an independent non-Federal ground sufficient to sustain the judgment without reference to the Federal question presented. It observed, moreover, that the bill imported that the great mass of the white population intended to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff named to be inscribed upon the lists of 1902 would be needed.

Giving his dissenting opinion in this case, Justice Brewer showed that "although the statute and these decisions thus expressly limit the range of inquiry to the question of jurisdiction, it was held that there is a constitutional question shown in the pleadings. The certificate, therefore, might be ignored and the entire case presented to the court for consideration. . . . Hence every case coming up on a certificate of jurisdiction may be held to present a constitutional question and be open for full inquiry in respect to all matters involved." Brewer

would not assent to the proposition that the case presented was not a strictly legal one and entitling a party to a judicial hearing and decision. "He is a citizen of Alabama entitled to vote. He wanted

to vote at an election for a Representative in Congress. Without registration he could not, and registration was wrongfully denied him. That many others were thus treated does not deprive him of his right or deprive him of relief." Justice Harlan dissented also giving practically the same argument as that of Justice Brewer. He observed: "The court in effect says that although it may know that the record fails to show a case within the original cognizance of the Circuit Court, it may close its eyes to that fact, and review the case on its merit." In view of the adjudged cases, he could not agree that the failure of parties to raise a question of jurisdiction relieved this court of its duty to raise it upon its own motion.

There was thereafter presented a petition for modification of judgment and for a rehearing June 1, 1903. The court ordered the decree of affirmance changed adding these words: "So far as such decree orders that the petition be dismissed, but without prejudice to such further proceedings as the petitioner may be advised to make."

The case of *Giles* v. *Teasley*[66] was, to some extent, of the same sort. A Negro of Alabama who had previously been a voter and who had complied with the reasonable requirements of the board of registration, was refused the right to vote, for, as he alleged, no reason other than his race and color, the members of the board having been appointed and having acted under the provision of the State constitution of 1901. He sued the members of the board for damages and for such refusal in an action, and applied for a writ of mandamus to compel them to register him, alleging in both proceedings the denial of his rights under the Federal Constitution and that the provisions of the State Constitution were repugnant to the Fifteenth Amendment. The complaint had been dismissed on demurrer and the writ refused, the highest court of the State holding that if the provisions of the constitution were repugnant to the Fifteenth Amendment, they were void and that the board

of registers appointed thereunder had no existence and no power to act and would not be liable for a refusal to register him, and could not be compelled by writ of mandamus to do so; that if the provisions were constitutional, the registrars had acted properly thereunder and their action was not reviewable by the courts.

"The right of the Supreme Court to review the decisions of the highest court of a State," said the national tribunal, "is even in cases involving the violations by the provisions of a State constitution of the Fifteenth Amendment, circumscribed by rules established by law, and in every case coming to the court on writ of error or appeal the question of jurisdiction must be answered whether propounded by the counsel or not. Where the State court decided the case for reasons independent of the Federal right claimed its action is not reviewable on writ of error by the United States Supreme Court." It was held that the writs of error to this court should be dismissed, as such decisions do not involve the adjudication against the plaintiff in error of a right claimed under the Federal Constitution but deny the relief demanded on grounds wholly independent thereof." In *Wiley* v. *Sinkler*, and *Swafford* v. *Templeton*, the registrars were legally averred to be qualified. [67]

In the Maryland case of *Pope* v. *Williams*[68] the court

further explained its position. While the State cannot restrict suffrage on account of color, the privilege is not given by the Federal Constitution, nor does it spring from citizenship of the United States. While the right to vote for members of Congress is derived exclusively from the law of the State in which they are chosen but has its foundation in the laws and Constitution of the United States, the elector must be one entitled to vote under its statute. A law, therefore, requiring a declaration of intention to become citizens before registering as voters of all persons coming from without Maryland is not a violation of the Constitution.

In the case of *Guinn* v. *United States*[69] the court held that the literacy test was legal and not subject to revision but in this clause of the constitution that part of a section providing for literacy was closely connected with the so-called grandfather clause that the United States Supreme Court declared both unconstitutional as it did in the case also of *Myers* v. *Anderson*, [70] coming from Annapolis, Maryland, and in the case of *The United States* v. *Mosely*, from Oklahoma. [71] The clause referred to follows:

"No person shall be registered as an elector of this State or be allowed to vote in any election herein, unless he be able to read and write any section of the Constitution of the State of Oklahoma; but no person who was on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to read and write sections of such constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct officer when electors apply for ballots to vote."

The court held that this was a standard of voting which on its face was in substance but a revitalization of conditions which when they prevailed in the past had been destroyed by the self-operative force of the Thirteenth Amendment.

Educational Privileges

These suffrage laws left the Negroes in an untoward situation for the reason that there was little hope that, with the educational facilities afforded them, that they would soon be able to meet the same requirement of literacy as that which might not embarrass the whites offering themselves as jurors and electors. The States upheld in their action by the United States Supreme Court, had shifted from their shoulders the burden of the uplift of the Negro by the ingenious doctrine that equal accommodations did not mean identical accommodations and that the spirit and the letter of the law would be complied with by providing separate accommodations for Negroes. In the end, however, separate accommodations turned out to be in some cases no accommodations at all.

This was the situation as it was brought out in the case of *Cumming* v. *The Board of Education of Richmond County*. [72] It appeared that a tax for schools had been levied in this district. The Negroes objected to paying that portion of the tax which provided for the maintenance of a high school, the benefits of which they were denied, when there was no high school provided for them. The board of education of Richmond County had maintained a high school for Negroes but abolished it. The petitioner prayed, therefore, that an injunction be granted against the collection of such portion of the school tax as was used for the maintenance of said

high school. The defendant set up the plea that it had not established a white high school, but had merely appropriated some money to assist a denominational high school for white children, saying "that it had to choose between maintaining the lower schools for

a large number of Negroes and providing a high school for about sixty." The board of education, declared, moreover, that the establishment of a Negro high school was merely postponed.

The opinion of the court was that a decision by a State court, denying an injunction against the maintenance by a board of education of a high school for white children, while failing to maintain one for Negro children also, for the reason that the funds were not sufficient to maintain it in addition to needed primary schools for Negro children, does not constitute a denial to persons of color of the equal protection of the law or equal privileges of citizens of the United States. The court held that under the circumstances disclosed it could not say that this action of the State court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs and to those associated with them of the equal protection of the laws, or of any privileges belonging to them as citizens of the United States. While the court admitted that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, it held that 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 case of a clear unmistakable disregard of rights secured by the supreme law of the land.

This is downright sophistry. To any sane man it could not but be evident that this was an "unmistakable disregard of rights secured by the Supreme law of the land." The school authorities had separated white and Negro children for purposes of education on account of race and had, moreover, refused to grant the Negro children the facilities equal to those of the white. The State, in the first place, in establishing separate schools on the basis of race, violated a right guaranteed the Negro race by the Constitution of the United States, and the board of education of Richmond

County violated still another in failing to provide for the Negroes the same facilities for high school education as those furnished the whites while taxing all citizens without regard to race. It is true that the Federal Government cannot generally interfere in matters of police regulation of persons and property in the States but when the matter of race is introduced the national authority is thoroughly competent within the Constitution to restrain such local government or any group of persons so authorized by such government. It would have been unwise for the court to enjoin the collection of such a tax but it could have on the constitutional points raised in this case declared invalid laws separating the races for purposes of education.

The sophistry of the Supreme Court in seeking to justify its refusal to maintain the rights of the Negro to education is still more evident from its opinion in the case of *Berea College* v. *The Commonwealth of Kentucky*, decided in 1908. Berea College was established in 1856 by a group of antislavery Kentucky mountaineers, led by John G. Fee, desiring to bring up their children in the love of free institutions. There were no Negro students prior to the Civil War but a few Negro soldiers were admitted on returning home from the front in their uniforms and members of the race were thereafter welcomed at Berea. In the course of time, however, this coeducation of the races became very distasteful to the State of Kentucky with its decided

increase in race prejudice necessitating in their economy a thorough proscription of the Negro race. In 1904, therefore, the State of Kentucky enacted a law against persons and corporations maintaining schools for both white persons and Negroes.

Feeling that its charter was violated by this law and also that it infringed upon the rights guaranteed the Negro in the Constitution of the United States, Berea College attacked the validity of this measure in the inferior courts and finally in the Supreme Court of the United States. The plaintiff unanswerably contended that this Kentucky

law abridged one's privileges and immunities, in violation of the Fourteenth Amendment of the Constitution of the United States, which was a limitation on the police power of the State when it brings in the matter of race. It further contended that the Constitution makes no distinction between races and that the Fourteenth Amendment is not only to protect Negroes but to protect white persons in the enjoyment of their rights. The plaintiff admitted that social equality could not be enforced by legislation but contended that voluntary social equality of persons cannot be constitutionally prohibited, unless it is shown that such is immoral, disorderly, or for some other reason so palpably injurious to the public welfare as to justify direct interference with the personal liberty of the citizens.

Evidently wishing to find some ground upon which it could base its opinion upholding the Supreme Court of Kentucky which had sustained this statute, the Supreme Court of the United States fell back upon various principles of interpretation. The court said it would not disturb the judgment of the State court resting on Federal or non-Federal grounds, if the latter was sufficient to sustain the decision in as much as the State court determines the extent of the limitations of powers conferred by the State on its corporations. It directed attention to the fact that a corporation is not entitled to all the immunities to which individuals are entitled and a State may withhold from its corporations privileges and powers of which it cannot constitutionally deprive individuals. A State statute limiting the powers of corporations and individuals may be constitutional as to the former, although unconstitutional as to the latter; and if separable it will not be held unconstitutional in the instance of a corporation unless it clearly appears that the legislature would not have enacted it as to corporations separately. "The same rule," continues the court, "which permits separable sections of a statute to be declared unconstitutional without rendering the entire statute void applies to separable provisions of a section of

a statute. In coming to the assistance of the Supreme Court of Kentucky the national tribunal said the prohibition of Kentucky against persons and corporations maintaining schools for both white persons and Negroes is separable and, even if an unconstitutional restraint as to individuals, is not unconstitutional as to corporations, it being within the power of the State to determine the powers conferred upon its corporations.

The court conceded that the reserve power to alter, or amend charters is subject to reasonable limitations but insisted that the Kentucky law includes no alteration or amendment which defeats or substantially impairs the object of the grant of vested rights. The court then went almost out of its way to say that "a general statute which in effect alters or amends a charter is to be construed as an amendment for all even if not in terms so designated. The court conceded that a statute which permits the education of both whites and Negroes at the same time in different localities, although prohibiting their attendance in the same place, does not defeat the

object of a grant to maintain the college for all persons and is not violative of the contract clause of the Federal Constitution, the State law having reserved the right to repeal, alter and amend charters.

Justice Harlan dissented. He referred to the fact that the court held also, in *Huntington* v. *Werthen*, [73] that if one provision of a statute be invalid the whole act will fall, where "it is evident the legislature would not have enacted one of them without the other." Harlan meant to say here that to construe this law as applying only to corporations and not to individuals would give it an interpretation that the legislature never had in mind. The intention of the State legislature was to prevent all coeducation of Negroes and whites whether it should be done by persons or corporations. The whole law, therefore, should fall. Justice Harlan conceded that a State reserved the right to repeal

the charter but it was not repealed by this act. The statute did not purport even to amend the charter of any particular corporation but assumed to establish a certain rule applicable alike to all individuals, associations, or corporations that teach the white and black races together in the same institution. This decision of the United States Supreme Court was then nothing more than "fine sophistry" to sanction an arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment.

Justice Harlan contended that if the giving of instruction is not a property right, it is one's liberty. Exposing the sophistry of the court he remarked that if the schools must be subjected to such segregation, why not also the Sabbath Schools and Churches? "If States can prohibit the coeducation of the whites and blacks it may prohibit the association of the Anglo-Saxons and Latins; of the Christians and the Jews. Have we become so inoculated with prejudice of race," continued Justice Harlan, "that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races? Further if the lower court be right, then a State may make it a crime for white and colored persons to frequent the same market places, at the same time, or appear in an assembly of citizens convened to consider questions of a public or political nature in which all citizens without regard to race, are equally interested."

The Right to Labor

Although the Negro by these various decisions of the Supreme Court of the United States had been deprived of rights essential to freedom and citizenship in matters of voting, service upon juries, education, and the use of common carriers, there remained even another right which was to be infringed upon without the hope of any redress from

the United States Supreme Court. This was the right to contract, to labor. Every honest man should live by his own labor and it is a well established principle of democratic government, that in the exercise of this right the individual should be free not only from interference on the part of the government but should enjoy protection from individuals subject to the government. Because of the development of race prejudice into a flame of bitter antagonism among the laboring men during the period of commercial expansion in the United States since the Reconstruction period, the country has been all but thoroughly organized through trades unions, so as to restrict the Negro to menial service by written constitutions in keeping with the caste which has so long figured conspicuously in American institutions.

Negroes sought redress in the courts and finally in the United States Supreme Court, the best case in evidence being that of *Hodges* v. *United States*. [74] In this case came a complaint from certain Negroes in Arkansas laboring in the service of an employer according to a contract. Because of their color certain criminals in that community conspired to injure, oppress, threaten and intimidate them, resulting in the severance of their connection with this employer and the consequent economic loss resulting therefrom. The Negroes thus complaining brought this case to the United States Supreme Court contending that a remedy for this evil was to be found in the revised statutes of the United States Senate, Sections 1977, 1979, 5508, and 5510. These sections follow in the order of their importance:

Section 5508. If two or more persons conspire to injure, oppress, threaten or intimidate 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, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to hinder his free exercise or enjoyment of any right or privilege so secured,

they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit or trust created by the Constitution or laws of the United States.

Other statutes referred to but not so vital were:

- *Section 1977*. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue the parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
- *Section 1978*. All citizens of the United States shall have the same right in every State and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
- *Section 1979*. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
- *Section 5510*. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any right, privilege, 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 inhabitants being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars or by imprisonment not more than one year, or by both.

The decision in this case was in substance that Congress cannot make it an offense against the United States for individuals to combine or conspire to prevent even by force, citizens of African descent, solely because of their race, from earning a living, although the right to earn one's living

Ex Parte Yarborough[75]*LoganUnited States*[76]*Ex Parte YarboroughUnited StatesReese*[77]

"The whole scope and effect of this series of decisions," continued the court, "was 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 abridgement by the United States, or by the States, as the case may be, and cannot, therefore, be affirmatively enforced by Congress against unlawful causes 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 adopted to attain the object." This doctrine was sustained also by the decision in the case of *United States* v. *Waddell*, [78] and *Motes* v. *United States*. [79] Here it was emphatically stated that Congress might pass any law necessary

or proper for carrying out any power conferred upon it by the Constitution.

The court here, however, evaded the real question as before, dodging behind the doctrine that while a State or the United States could not abridge the privileges and immunities of citizens, individuals or groups of individuals may do so and Congress has no power to interfere in such matters since these come within the police power of the State. In other words, the government cannot discriminate against the Negro itself, but it can establish agencies with power to do it. It is not surprising that Justice Harlan dissented, feeling as he had on former occasions that this decision permitted the States and groups of individuals supposedly subject to the government of those States to fasten upon the Negro badges or incidents of slavery in violation of the civil rights guaranteed him by the Thirteenth and Fourteenth Amendments. He believed that Congress had the right to pass any law to protect citizens in the enjoyment of any right granted him by Congress. The duty of the Federal government as Justice Harlan saw it was very clear in that the State had caused the race question to be injected therein and in such a case Congress always has power to act.

On the whole, however, the United States Supreme Court has not yet had the moral courage to face the issue in cases involving the constitutional rights of the Negro. Not a decision of that tribunal has yet set forth a straight-forward opinion as to whether the States can enact one code of laws for the Negroes and another for the other elements of our population in spite of the fact that the Constitution of the United States prohibits such iniquitous legislation. In cases in which this question has been frankly put the court has wiggled out of it by some such declaration as that the case was improperly brought, that there were defects in the averments, or that the court lacked jurisdiction.

In the matter of jurisdiction the United States Supreme Court has been decidedly inconsistent. This tribunal at

OsbornUnited States Bank[80]

The fairminded man, the patriot of foresight, observes, therefore, with a feeling of disappointment this prostitution of an important department of the Federal Government to the use of the reactionary forces in the United States endeavoring to whittle away the essentials of the Constitution which guarantees to all persons in this country all the rights enjoyed under the most progressive democracy on earth. Since the Civil War the United States Supreme Court instead of performing the intended function of preserving the Constitution by democratic

interpretation, has by its legislative decisions practically stricken therefrom so many of its liberal provisions and read into the Constitution so much caste and autocracy that discontent and radicalism have developed almost to the point of eruption.

C. G. Woodson

1 *McCulloch* v. *Maryland*, 4 Wheaton, 416.

2 *Ibid.*, 416.

3 *Ibid.*, 416.

4 *Dred Scott* v. *Sanford*, 19 Howard, 399.

5 16 Peters, 539, 612.

6 *Dred Scott* v. *Sanford*, 19 Howard, 399.

7 21 Howard, 506.

8 6 Howard, 344.

9 94 U. S., 113.

10 16 Wall., 678.

11 This was held in *Township of Queensburg* v. *Culver* (19 Wall., 83), in *Township of Pine Grove* v. *Talcott* (19 Wall., 666), and in Massachusetts in *Worcester* v. *Western R. R. Corporation* (4 Met., 564).

12 *Storey on Bailments*, Sec. 475-6, and *Rex* v. *Ivens*, 7 Carrington & Payne, 213; 32, E. C. L., 495.

13 16 Wall., 36.

14 100 U. S., 303.

15 100 U. S., 306.

16 103 U. S., 386.

17 *Ex Parte Virginia*, 100 U. S., 346-7.

18 14 statutes, 27, Chapter 31.

19 16 statutes, 140, Chapter 114.

20 109 U. S., 1.

21 *United States* v. *Cruikshank*, 92 U. S., 542; *Virginia* v. *Rives*, 100 U. S., 318; *Ex Parte Virginia*, 100 U. S., 339.

22 6 Cranch, 128.

23 99 U. S., 418.

24 *United States* v. *Reese*, 92 U. S., 214; *Strauder* v. *West Virginia*, 100 U. S., 303.

25 *Ward* v. *Maryland*, 12 Wall., 418; *Corfield* v. *Coryell*, 4 Washington, D. C., 371; *Paul* v. *Virginia*, 8 Wall., 168; *Slaughter-house cases, Ibid.*, 36.

26 92 U. S., 542.

27 95 U. S., 487.

28 The Louisiana Act was:

- *Section* -. All persons engaged within this State in the business of common carriers of passengers, shall have the right to refuse to admit any person to their railroad cars, street cars, steamboats or other water-crafts, stage coaches, omnibusses, or other vehicles, or to expel any person therefrom after admission, when such persons shall, on demand, refuse or neglect to pay the customary fare, or when such person shall be of infamous character or shall be guilty, after admission to the conveyance of the carrier, of gross, vulgar, or disorderly conduct, or who shall commit any act tending to injure the business of the carrier, prescribed for the management of his business, after such rules and regulations shall have been made known: *Provided*, said rules and regulations make no discrimination on account of race or color, and shall have the right to refuse any person admission to such conveyance where there is not room or suitable accommodation; and, except in cases above enumerated, all persons engaged in the business of common carriers of passengers are forbidden to refuse admission to their conveyance, or to expel therefrom any person whomsoever.
- *Section 4*. For a violation of any provision of the first and second sections of this act, the party injured shall have right of action to recover any damage, exemplary as well as actual, which he may sustain, before any court of competent jurisdiction. Acts of 1869, page 77; Rev. Stat. 1870, page 93.

29 Mr. Justice Clifford concurred in the judgment but went into details to justify the segregation whereas the opinion of the court merely tried to see whether the details conflicted with the power of Congress to regulate commerce.

30 118 W. S., 557.

31 All of these are in 94 U. S.

32 133 U. S., 587.

33 This was the law of Mississippi:

- *Sec. 1.* "Be it enacted, That all railroads carrying passengers in this State (other than street railroads) shall provide equal, but separate accommodation for the white and colored races by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations."
- *Sec. 2*. That the conductors of such passenger trains shall have power and are hereby required to assign each passenger to the car or the compartment of a car (when it is divided by a partition) used for the race to which said passenger belongs; and that, should any passenger refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have the power to refuse to carry such passenger on his train and neither he nor the railroad company shall be liable for any damages in any event in this State.
- *Sec. 3*. That all railroad companies that shall refuse or neglect within sixty days after the approval of this act to comply with the requirements of section one of this act, shall be deemed guilty of a misdemeanor and shall upon conviction in a court of competent jurisdiction, be fined not more than five hundred dollars; and any conductor that shall neglect to, or refuse to carry out the provisions of this act, shall, upon conviction, be fined not less than twenty-five nor more than fifty dollars for each offense.
- *Sec. 4*. That all acts and parts of acts in conflict with this act be, and the same are hereby repealed, and this act to take effect and be in force from and after passage. Acts of 1888, p. 48.

34 133 U. S., 592.

35 163 U. S., 317.

36 *Ibid.*, 537.

37 169 U. S., 613, 645.

38 141 U. S., 61.

39 In *Pa. R. R. Co.* v. *Hughes* (191 U. S., 489), Justice White says:

"In the absence of Congressional legislation upon the subject an act of the Alabama legislature to require locomotive engineers to be examined and licensed by a board to be appointed by the governor for that purpose was sustained in *Smith* v. *Alabama*" (124 U. S., 465).

40 179 U. S., 393.

41 133 U. S., 587.

42 163 U. S., 537.

43 179 U. S., 388, 391.

44 133 U. S., 588.

45 218 U. S., 71.

46 235 U. S., 151.

47 U. S., 18, 1907 Revised Statutes, 1910, Section 860, *et seq.*

48 100 U. S., 303.

49 *Ibid.*, 313.

50 103 U. S., 370.

51 162 U. S., 565.

52 107 U. S., 110.

53 162 U. S., 592.

54 163 U. S., 101.

55 167 U. S., 442.

56 192 U. S., 226.

57 200 U. S., 316.

58 218 U. S., 161.

59 Laws of South Carolina, 1902, page 1066, section 2.

60 100 U. S., 371.

61 110 U. S., 651.

62 127 U. S., 731.

63 179 U. S., 58.

64 185 U. S.

65 189 U. S., 475.

66 193 U. S., 146.

67 The Constitution of Mississippi prescribing the qualifications for electors conferred upon the legislature the power to enact laws to carry those provisions into effect. Ability to read any section of the Constitution or to understand it when read was made a qualification necessary to a legal voter. Another provision made the qualifications for grand or petit jurors that they should be able to read and write. Upon the complaint of Negroes thus disabled the court held that these provisions do not on their face discriminate between white and Negro races and do not amount to a denial of the equal protection of the law secured by the Fourteenth Amendment of the Constitution. It had not been shown that their actual administration was evil, but that only evil was possible under them.
In Washington County, Mississippi, Williams had been indicted for murder by a grand jury composed of white men altogether. He moved that the indictment be quashed because the law by which the grand jury was established was unconstitutional. (*Williams* v. *Mississippi*.)

68 193 U. S., 621.

69 238 U. S., 347.

70 *Ibid.*, 368.

71 *Ibid.*, 763.

72 175 U. S., 528.

73 120 U. S., 102.

74 202 U. S., 1.

75 110 U. S., 651.

76 144 U. S., 236, 286, 293.

77 92 U. S., 214, 217.

78 110 U. S., 651.

79 178 U. S., 458, 462.

80 9 Wheaton, 738.