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# The Hughes Court and the Beginning of the End of the Separate but Equal Doctrine

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# The William B. Lockhart Lecture*

# The Hughes Court and the Beginning of the End of the "Separate But Equal" Doctrine

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A century ago, the distinguished abolitionist, statesman and former slave, Frederick Douglass, pondered whether blacks would ever be full and equal participants in the American dream. He asked:

> [Can] American justice, American liberty, American civilization, American law, and American Christianity . . . be made to include and protect alike and forever *all* American citizens in the rights which have been guaranteed to them by the organic and fundamental laws of the land?[1]

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1. RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO 9-10 (1965) (emphasis in original) (quoting Frederick Douglass).

Five years later, in *Plessy v. Ferguson*,[2] the Supreme Court dashed any lingering hope that American blacks would soon realize the constitutional promise of equal rights under the law. The *Plessy* Court upheld a state's right to require separate railway coaches for blacks and whites.[3] In so doing, the Court created a precedent which was extended to support state-imposed racial segregation in schools and other public facilities.

In his eloquent and prophetic dissent, Justice John M. Harlan stated:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law .... It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.[4]

Harlan concluded: "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."[5]

In the following decades, the seeds of race hate planted by the *Plessy* Court yielded a bitter harvest of divisiveness, racial degradation, and judicial disrespect for the constitutional guarantee of equal treatment under the law.[6]

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2. 163 U.S. 537 (1896).

3. *Id.* at 550-51.

4. *Id.* at 559 (Harlan, J., dissenting).

5. *Id.* at 560.

6. For background on issues of racism and the law, see generally DERRICK A. BELL, JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW (2d ed. 1980) [hereinafter BELL, RACE LAW]; MARY F. BERRY, BLACK RESISTANCE, WHITE LAW (1971); MARY F. BERRY & JOHN W. BLASSINGAME, LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA (1982); A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (Gerald D. Jaynes & Robin W. Williams, Jr., eds., 1989); JOHN H. FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (6th ed. 1988); JACK GREENBERG, CASES AND MATERIALS ON JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION 1-237 (1977); JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW (1959); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR (1978); RICHARD KLUGER, SIMPLE JUSTICE (1975); GENNA R. MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983); LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO (1966); GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (20th anniversary ed. 1962); CARTER G. WOODSON & CHARLES H. WELSEY, THE NE-

On February 13, 1930, when Charles Evans Hughes became chief justice of the Supreme Court of the United States, any impartial observer would have been compelled to ask the same question that haunted Douglass in 1891. Because of the Court's failure to vindicate their legal rights, black Americans were barred from southern voting booths, relegated to inferior public schools and facilities, excluded from many state colleges and universities, and subjected to a hostile criminal justice system.

Americans rightly view the Warren Court's 1954 decision in *Brown v. Board of Education*[7] as the most critical turning point in the legal battle against racial segregation. However, *Brown* was not a revolutionary decision, but an evolutionary event. It was the culmination of decades of litigation that chipped away at the legal foundation of the "separate but equal" jurisprudence of *Plessy* and its progeny.

This Article examines the civil rights record of the Supreme Court under Charles Evans Hughes, who served as Chief Justice from 1930 to 1941. The Hughes Court is perhaps best remembered for its decisions in the early 1930s that overturned many of the key statutes of President Roosevelt's New Deal. Students of the Supreme Court often ignore the fact that it was during the Hughes era that courageous civil rights lawyers, working in isolation or under the auspices of organizations such as the NAACP, confronted the Supreme Court with cases challenging racism in the courts and the electoral process, as well as challenging racial segregation in public schools, facilities, and transportation. The Court's decisions in these cases present a mixed record of progress. In a number of critical cases, the Court stopped far short of guaranteeing blacks the full enjoyment of "rights which have been guaranteed to them by the organic and fundamental laws of the land." However, the seminal civil rights decisions of this era redressed some of the most egregious instances of state-sponsored racism. In so doing, the Court took its first tentative steps away from *Plessy* and toward *Brown*.

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GRO IN OUR HISTORY (12th ed. 1972); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed. 1974); Evelyn Brooks Higginbotham, *Beyond the Sound of Silence: Afro-American Women's History*, 1 GENDER & HIST. 50 (1989); Evelyn Brooks Higginbotham, *In Politics to Stay: Black Women Leaders and Party Politics in the 1920's*, *in* L. TILLEY & P. GURIN, WOMEN, CHANGE AND POLITICS (1989); Evelyn Brooks Higginbotham, *African-American Women's History and the Metalanguage of Race*, SIGNS, Winter 1992.

7. 347 U.S. 483 (1954).

## I. CIVIL RIGHTS FOR BLACKS IN THE 1930s: THE CONSTITUTIONAL DREAM OF EQUALITY AND THE DAILY REALITY OF DEGRADATION

Two examples suffice to demonstrate the wide gap that existed during the Hughes Court era between the constitutional promise of equal treatment under the law and the daily reality of racial discrimination faced by even the most influential and powerful blacks.

### A. SEGREGATION AND THE CONGRESSMAN: "IT DIDN'T MAKE A DAMN BIT OF DIFFERENCE WHO I WAS."

The first incident involved the highest ranking black public official in the United States—Arthur W. Mitchell of Chicago, the sole black member of the United States House of Representatives. On April 20, 1937, Congressman Mitchell boarded a Pullman car in Chicago with a first class ticket to Hot Springs, Arkansas. When the train left Memphis, the conductor told him that he could no longer ride in the first class section. Later, Mitchell testified, "I thought it might do some good for me to tell him who I was. I said, 'I am Mr. Mitchell, serving in the Congress of the United States.' He said it didn't make a damn bit of difference who I was, that as long as I was a nigger I couldn't ride in that car."[8] The conductor then warned Mitchell that he had "better get out of that car, and had better be gone when he came back."[9]

The conductor's unmuted order forced Mitchell to decide whether he should retreat to the decrepit black coach, which had no running water or working toilet, or whether he should challenge the conductor's policy by refusing to move.

Mitchell testified:

> [F]or a moment I decided that I wouldn't go, that I would let them put me in jail down there and see how the thing would finally come out.
>
> But I happened to think that I was in Arkansas, and sometimes they don't keep them in jail for trial down there, but they take them out and lynch them after they put them in jail; so I thought maybe I had better not; being the only negro in Congress, that I had better not

8. Record from the United States Supreme Court at 79, Mitchell v. United States Interstate Commerce Comm'n, 313 U.S. 80 (1941) (No. 577) (reprinting the testimony of Arthur W. Mitchell before the Interstate Commerce Comm'n, Mitchell v. Chicago, R.I. & Pac. Ry., 229 I.C.C. 703 (1938) (No. 27844)).

9. *Id.*

be lynched on that trip.[10]

The conductor's behavior was in clear violation of a 1914 Supreme Court ruling that the denial of first class accommodations on trains to blacks violated the Fourteenth Amendment.[11] In 1937, however, Mitchell knew that even a black Congressman ran the risk of being lynched in Arkansas for demanding his well-established legal rights.

In 1941, the Supreme Court declared that the railroad's treatment of Mitchell violated his rights under the Interstate Commerce Act.[12] Because of further litigation after the Supreme Court's remand, however, Mitchell did not settle with the railroad until late 1945.[13] Despite the humiliation he had endured, and the time and expense of litigating his case before an administrative agency and the state and federal courts, Mitchell received in settlement the sum of $1,250, which he split with his attorney.[14]

## B. RACE DISCRIMINATION AT THE CITADEL OF JUSTICE

The second example of racial discrimination in the 1930s occurred at the citadel of justice in this country, the United States Supreme Court. Although it is difficult to document the Court's discriminatory practices, the senior author has heard

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10. *Id.*

11. McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151, 161-62 (1914) (stating that "if he [the black traveller] is denied by a common carrier . . . a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded").

12. Mitchell v. United States Interstate Commerce Comm'n, 313 U.S. 80, 97 (1941). The *Mitchell* Court concluded that "the discrimination shown was palpably unjust and forbidden by the Act." *Id.*

Since its adoption in 1887, the Interstate Commerce Act has prohibited unreasonable discrimination by common carriers. Act of Feb. 4, 1887, ch. 104, § 3, 42 Stat. 379, 380 (current version codified at 49 U.S.C. § 10731(b) (1988)). As originally enacted, the Act made it unlawful for interstate carriers "to subject any . . . person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." *Id.* Long before *Mitchell*, the Interstate Commerce Commission recognized that this language prohibited discrimination between white and black passengers. *See, e.g.*, Edwards v. Nashville, C. & St. L. Ry., 12 I.C.C. 247, 249 (1907) (holding that the failure to provide black first-class ticket passengers with equal facilities violated § 3); Heard v. Georgia R.R., 1 I.C.C. 428, 435 (1888) (same); Councill v. Western & Atl. R.R., 1 I.C.C. 339, 347 (1887) (holding that the forcible removal of a black passenger from a first-class compartment violated § 3 since the passenger had paid first-class fare).

13. *See* Stipulation for Dismissal and Order, Mitchell v. Lowden, No. 37-C-5529 (Cook County Cir. Ct. Nov. 5, 1945).

14. *See* CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT 215 n.26 (1983).

from reputable black lawyers who practiced in the 1930s that blacks were occasionally discriminated against in the Supreme Court's cafeteria.

Recently, Judge Lois Forer, a respected Philadelphia jurist, stated that, as a young lawyer in Washington in the late 1930s, she often used the Supreme Court library for her research.[15] On one occasion, while standing in line at the Supreme Court's cafeteria, she stood next to a black lawyer who had an argument scheduled before the Court. A manager came over to the lawyer and told him he could not be served. An observer, who Judge Forer believes was a law clerk, rushed out of the cafeteria and returned with Justice Louis Brandeis. The Justice approached the manager and said, "If this man is not served, I will leave the Supreme Court." After this unexpected intervention, the cafeteria manager seated the black lawyer at a table in the corner, and placed a screen around him.[16]

In July of 1990, the senior author discussed the history of segregation at the Court cafeteria with Justice Thurgood Marshall. Justice Marshall reported that he had been told that in the late 1930s, when Thomas E. Waggaman was marshal of the Court, a number of incidents demonstrated that Waggaman had only contempt for blacks.[17] According to what Justice Marshall had been told, Waggaman was so concerned that blacks were using the Supreme Court cafeteria that he complained to Chief Justice Hughes. Hughes instructed Waggaman to go outside the building and look at the portals of the Supreme Court, which are emblazoned with the words, "Equal Justice Under Law." The Chief Justice added that if after reading these words, Waggaman did not understand what the policy of the Supreme Court should be, he would be replaced. From that date onward, there reportedly were no further attempts made to exclude blacks from the Court's cafeteria.[18]

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15. Interview with the Honorable Lois G. Forer, Retired Judge of the Court of Common Pleas, in Philadelphia, Pa. (July 23, 1991).

16. *Id.*

17. Telephone conversation with Justice Thurgood Marshall, United States Supreme Court (July 13, 1990).

18. There continued to be incidents in the 1930s and 1940s that showed that the Supreme Court justices were susceptible to the prejudices of their times. Hugo Black's biographer noted that before the Court's historic 1954 decision in *Brown*, the issue of racial segregation

> had been cropping up in the court's own institutional life in one way or another over the past decade and a half. In 1939, because of segregated seating arrangements, what was to have been a private recital of Marian Anderson in Constitution Hall became a public concert at the

The *Mitchell* case and the segregation at the Supreme Court exemplify two realities facing blacks in 1930s America: first, the grudging recognition by the courts that blacks were entitled to the most basic rights of citizenship; and, second, the wearying legal battles that blacks were forced to fight to secure those fundamental rights.

## II. "THE PREJUDICES WHICH JUDGES SHARE WITH THEIR FELLOW MEN": POLITICS, RACE, AND THE HUGHES COURT'S VIEWS ON CIVIL RIGHTS

The Supreme Court proclaims to be a non-political institution, and most justices strive to be objective, dispassionate and "neutral" in their decision making. However, Justice Holmes's oft-quoted observation about the "unconscious" prejudices of judges applies with particular force to the Supreme Court's civil rights jurisprudence.

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, *even the prejudices which judges share with their fellow-men*, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[19]

Indisputably, political and sociological developments in this country and throughout the world profoundly influenced the Hughes Court's civil rights decisions. In the first third of this century, several factors combined to undermine the post-Reconstruction philosophy of white supremacy underlying the *Plessy* doctrine. Millions of blacks had fled the stifling poverty and racial oppression of the Deep South to seek better lives in northern and midwestern cities. As they gained economic and political power, these urban pioneers became increasingly strident in their opposition to discrimination and state-imposed racial segregation. Blacks and some whites were struck by the

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> Lincoln Memorial wherein invitations to the Supreme Court produced *one* acceptance. In 1947, a household controversy—whether the black Supreme Court messengers should attend the law clerks' and secretaries' Christmas party—took almost an hour's debate at the weekly judicial conference before being settled by an affirmative 6-2 vote.

GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 304 (1976) (emphasis added). It is interesting to note that no Supreme Court justice had ever selected a black person as a law clerk until the 1948 Term, when William T. Coleman, Jr. clerked for Felix Frankfurter. *Id.* at 287.

19. OLIVER W. HOLMES, THE COMMON LAW 1 (1881) (emphasis added).

hypocrisy of America's self-proclaimed international mission in World War I to "make the world safe for democracy" while American blacks were denied the most basic rights of citizenship at home. Finally, after decades of experience with the "separate but equal" doctrine, no reasonable American could any longer deny that the disproportionate allocation of resources in the separate schools, separate public accommodations, and separate public transport for blacks was vastly and unmistakably *unequal*.[20]

The "prejudices which judges share with their fellow men" affected how the members of the Hughes Court viewed these developments and shaped their vision of the Court's role in redressing human rights abuses of blacks. The wide divergence of racial views among the justices is perhaps best illustrated by comparing the judicial careers of two jurists. One man emerged as one of the Court's fairly consistent supporters of racial justice. The other remained trapped by the bigotry and petty pretenses of his upbringing and became an increasingly lonely and bitter dissenter as the Court turned away from *Plessy* to emphasize equality of treatment as a higher value than racial segregation.

### A. THE GULF BETWEEN TWO JUSTICES

#### 1. Charles Evans Hughes

In an era when most judges shared, or at least implicitly accepted, the white supremacist principles at the foundation of Jim Crow legislation, Chief Justice Hughes held relatively progressive racial views. After Hughes' death, John Lord O'Brian recalled:

> Racial problems were always a matter of serious private concern to

20. Professor Bell described the gross disparity of public education in the South before *Brown*:

> In 1915, South Carolina was spending an average of $23.76 on the education of each white child and $2.91 on that of each black child. As late as 1931, six Southern states (Alabama, Arkansas, Florida, Georgia, and North and South Carolina) spent less than one third as much for black children as for whites, and ten years later this figure had risen to only 44 percent. At the time of the 1954 decision in Brown v. Board of Education, the South as a whole was spending on the average $165 a year for a white pupil, and $115 for a black.

DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW 452 (1973) (citations omitted).

For a penetrating analysis of the inequality of segregated public education in one of the supposedly enlightened border states before *Brown*, see Parker v. University of Delaware, 75 A.2d 225, 230 (Del. Ch. 1950).

> him and remained so even in the final years following his retirement from public life .... As early as 1908, he declared that "with respect to white and black, conditions which promote the *wholesome feeling of personal honor* and *individual worth* are alone the conditions which will secure lasting benefits for our society and the solution of the grave problems which confront it."[21]

The son of an abolitionist minister, Hughes served two terms as a progressive, reform-minded governor of New York before his appointment to the Supreme Court in 1910. He resigned from the Court in 1916 to mount an unsuccessful presidential campaign against Woodrow Wilson. From 1920 to 1925, Hughes served as secretary of state under President Harding. In 1930, President Hoover appointed Hughes as chief justice of the Supreme Court, where he served until his retirement in 1941.

In two opinions, written in his first years on the Court, Hughes demonstrated his practice of redressing specific civil rights violations, without emphasizing the pervasive racism that gave rise to the abuses. In *Bailey v. Alabama*,[22] Hughes's majority opinion reversed, on Thirteenth Amendment grounds, the conviction of a black laborer found guilty of breaking a one-year employment contract.[23] Despite clear evidence that the Alabama statute at issue was designed to keep indigent, primarily black, farm-workers permanently indebted to white farm-owners,[24] Hughes began his decision by "dismiss[ing] from consideration the fact that plaintiff in error is a black man."[25] He continued: "No question of a sectional character is presented,

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21. Remarks of John Lord O'Brian, *in* PROCEEDINGS OF THE BAR AND OFFICERS OF THE SUPREME COURT OF THE UNITED STATES, IN MEMORY OF CHARLES EVANS HUGHES 48 (1950) (quoting Justice Hughes) (emphasis in original).

In a September 1, 1948 condolence letter after Hughes's death, Walter White, the Secretary of the NAACP, wrote: "Thirty years ago [Hughes's] voice was raised at Carnegie Hall against lynching and other denials of basic human and constitutional rights to American Negroes and other minorities. Today's concerns with civil liberties is due to the vision and courage of others like him. We are grateful for his leadership." *Id.* at 104.

22. 219 U.S. 219 (1911). For a discussion of *Bailey* and the other peonage cases, see Benno Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era: The Peonage Cases*, 82 COLUM. L. REV. 646 (1982).

23. 219 U.S. at 245.

24. The United States, as amicus curiae, noted that "[t]he statute hits especially, as was intended, negro laborers on farms and plantations. Every reported case under the statute is that of a farm laborer. The maximum penalty fixed by the statute, $300, also makes it peculiarly applicable to this class of laborers." *Id.* at 222-23; *see also* Schmidt, *supra* note 22, at 680-81.

25. 219 U.S. at 231.

and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho."[26]

Hughes may be fairly criticized for downplaying the racial aspects of this case. However, in so doing, he undoubtedly held together a majority of a court that was decidedly unsympathetic to legal claims by blacks.[27] Hughes also articulated the important point that the Reconstruction Amendments' guarantees protected *all* Americans, and thus that civil rights was not a peculiarly black issue. "Opportunities for coercion and oppression, in varying circumstances, exist in all parts of the Union," Hughes wrote, "and the citizens of all the States are interested in the maintenance of the constitutional guarantees, the consideration of which is here involved."[28]

In *McCabe v. Atchison Topeka & Sante Fe Ry.*,[29] five black Oklahomans sued to enjoin the state from enforcing a state law that permitted railroad companies to deny blacks access to first-class railcars. In his opinion for the Court, Hughes reaffirmed *Plessy*'s holding that the Fourteenth Amendment allowed Oklahoma "to require separate, but equal, accommodations for the two races."[30] However, he then destroyed the state's argument that the denial of first-class services to black passengers was justified by the Legislature's finding that " 'there was no substantial demand for Pullman car and dining car service for persons of the African race.' "[31] Hughes wrote:

> This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether

26. *Id.*

27. *See* Schmidt, *supra* note 22, at 681-82 (discussing Justice Harlan's decision to appoint Justice Hughes to write the majority opinion in *Bailey*).

28. 219 U.S. at 231.

29. 235 U.S. 151 (1914). For an analysis of the Supreme Court's decision in *McCabe*, see Benno Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 485-94 (1982). Professor Schmidt notes that Justices White, Holmes, Lamar, and McReynolds "concurred only in the affirmance, thereby disassociating themselves from Hughes's opinion." *Id.* at 488. Professor Schmidt cites a fascinating memorandum from Hughes to Justice Holmes, which indicates that Holmes believed that the Oklahoma law should have been construed to permit "separate but equal," not partitioned, luxury cars for blacks and whites. *Id.* Hughes concluded his message to his colleague by stating: "I don't see that it is a case calling for 'logical exactness' in enforcing equal rights, but rather as it seems to me it is a bald, wholly unjustified, discrimination against a passenger wholly on account of race." *Id.* at 490.

30. 235 U.S. at 160.

31. *Id.* at 161 (quoting the brief of counsel for the railway company).

> or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused.[32]

Ironically, this ringing endorsement of the Fourteenth Amendment's guarantee of equal treatment had no effect on the appellants in *McCabe*. Hughes concluded his opinion by holding that the appellants were not entitled to injunctive relief, as they had not demonstrated that they had been actually injured by the statute.[33]

### 2. James C. McReynolds

In contrast, the Supreme Court tenure of James C. McReynolds, perhaps the most bigoted justice to sit on the Supreme Court in this century,[34] is an example of the disastrous consequences of a president's ill-considered Supreme Court appointment. Born in 1862 in Elkton, Kentucky, McReynolds rose to prominence as a conservative and puritanical antitrust attorney during the Theodore Roosevelt and Taft administrations. In 1913, Woodrow Wilson named McReynolds as his attorney general, where McReynolds' bad temper and poor judgment in the handling of several politically sensitive matters made his tenure "brief and disastrous."[35] In 1914, Wilson rid himself of this cantankerous and controversial cabinet member by appointing him to the Supreme Court.

McReynolds did not reform himself during his judicial career. It was with just a touch of hyperbole that Harold Laski remarked that "McReynolds and the theory of a beneficent deity are quite incompatible."[36] The Justice was intolerably rude to his colleagues, acidly sarcastic to the attorneys who appeared before him, and generally reactionary in his conduct and judicial opinions. Hughes' predecessor as chief justice, William Howard Taft, observed that McReynolds was "selfish to the last degree" and "fuller of prejudice than any man I have ever

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32. *Id.*

33. *Id.* at 162-64.

34. *See* Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1641 (1986). As Professor Kennedy observes, McReynolds's white supremacist allegiances became more pronounced as the Hughes Court began showing more concern for the legal rights of blacks. *Id.*

35. David Burner, *James C. McReynolds*, *in* THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2023, 2026 (Leon Friedman & Fred L. Israel eds., 1969).

36. *Id.* at 2024 (quoting Laski).

known."[37] Anecdotes about his racist, anti-Semitic, and sexist conduct are legion. In 1938, Charles Hamilton Houston, a brilliant black lawyer with the NAACP and a former member of the *Harvard Law Review* argued a landmark desegregation case before the Supreme Court. During Houston's oral argument, McReynolds turned his back on the attorney and stared at the back wall of the courtroom.[38] He once referred to Howard University, a historically black institution in Washington, D.C., as a "nigger university."[39] He repeatedly snubbed Justices Brandeis and Cardozo because of their Jewish faith.[40]

A stalwart opponent of New Deal economic reforms, McReynolds also vociferously resisted the Court's growing liberalism in civil rights cases. His bitter dissents, often joined by his reactionary colleague from Minnesota, Justice Pierce But-

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37. ALPHEUS T. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 215 (1964) (quoting Taft).

38. Videotaped interview with the Honorable Robert Carter, District Judge, U.S. District Court for the Southern District of New York (Aug. 1987) (discussing Judge Carter's observation of the oral argument in Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938)); *see also infra* notes 112-18 and accompanying text (discussing *Gaines*).

39. In his autobiography, Justice William O. Douglas described how McReynolds received a rare, but well deserved, comeuppance when he made this disparaging comment about Howard University.

> One day McReynolds went to the barbershop in the Court. Gates, the black barber, put the sheet around his neck and over his lap, and as he was pinning it behind him McReynolds said, "Gates, tell me, where is this nigger university in Washington, D.C.?" Gates removed the white cloth from McReynolds, walked around and faced him, and said in a very calm and dignified manner, "Mr. Justice, I am shocked that any Justice would call a Negro a nigger. There is a Negro college in Washington, D.C. Its name is Howard University and we are very proud of it." McReynolds muttered some kind of an apology and Gates resumed his work in silence.

WILLIAM O. DOUGLAS, THE COURT YEARS: 1939-1975, at 14-15 (1980). McReynolds, who died in 1946, never saw the most famous graduate of Howard University's law school, Thurgood Marshall, argue the *Brown* case in 1953 and 1954, and become the first black Supreme Court justice in 1967.

40. *See* Burner, *supra* note 35, at 2023. In 1922, McReynolds turned down an invitation by Chief Justice Taft to accompany him and other justices to a ceremonial visit to Philadelphia. He explained to the Chief Justice: "As you know, I am not always to be found when there is a Hebrew abroad. Therefore, my 'inability' to attend must not surprise you." MASON, *supra* note 37, at 216-17. In 1924, McReynolds refused to take his place next to Brandeis for the official Court photograph, forcing the cancellation of the photographic session. *Id.* at 217.

McReynolds remained hostile to these two Jewish justices throughout their tenure on the court. He refused to attend Cardozo's funeral services in 1938 or to sign the Court's letter of regret about the resignation of Brandeis in 1939. LEONARD BAKER, BRANDEIS AND FRANKFURTER 357, 370 (1984).

ler, railed against the Court's decisions remedying racial discrimination in jury selection,[41] criminal trials,[42] the electoral process,[43] and schools.[44]

## B. THE CRIMINAL JUSTICE PROCESS

A series of criminal cases in the 1930s gave the Supreme Court a stark education about the injustices that blacks faced in the American criminal justice system. The justices were not yet prepared to question the legal basis of racial segregation, but these cases forced them to address the openly racist and unfair treatment of black defendants in southern courts. In so do-

41. Aldridge v. United States, 283 U.S. 308, 315 (1931) (McReynolds, J., dissenting). For additional discussion of this case, see *infra* text accompanying notes 50-52. In a seething dissent, typical of his writings on racial matters, Justice McReynolds ignored the daily reality of race relations in the District of Columbia, observing that "[n]othing is revealed by the record which tends to show that any juror entertained prejudice which might have impaired his ability fairly to pass upon the issues." 283 U.S. at 317. He concluded by scolding his colleagues for increasing the difficulty of law enforcement "by excessive theorizing of or by magnifying what in practice is not really important." *Id.* at 318.

42. Powell v. Alabama, 287 U.S. 45, 73 (1932) (Butler, J., dissenting). For additional discussion of this case, see *infra* text accompanying notes 53-59. McReynolds joined Butler's dissent, which ignored the overwhelming evidence of injustice, blandly concluding "[t]he record wholly fails to reveal that petitioners have been deprived of any right guaranteed by the Federal Constitution." 287 U.S. at 77.

43. Nixon v. Condon, 286 U.S. 73, 89 (1932) (McReynolds, J., dissenting). For additional discussion of this case, see *infra* text accompanying notes 121-25. The majority decision overturned a Texas law which permitted the state Democratic party to prohibit blacks from voting in its primary elections. 286 U.S. at 89. McReynolds did not dispute the petitioner's contention that Texas was "overwhelmingly Democratic and nomination by the primaries of that party is equivalent to an election." *Id.* at 91. However, he saw no constitutional difficulties in the exclusion of blacks from the Democratic primary, noting that "[p]olitical parties are fruits of voluntary action. Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise." *Id.* at 104.

44. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 353 (1938) (McReynolds, J., dissenting). For additional discussion of this case, see *infra* notes 112-18 and accompanying text. The *Gaines* Court held that Missouri's refusal to admit a qualified black applicant to the state's only public law school violated the Fourteenth Amendment. 305 U.S. at 337. In his vitriolic dissent, McReynolds castigated his colleagues for their failure to defer to Missouri's longstanding view "that the best interest of her people demands separation of whites and negroes in schools." *Id.* at 353. McReynolds believed that under the majority decision, Missouri could either "abandon her law school and thereby disadvantage her white citizens without improving petitioner's opportunities for legal instruction or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, *damnify both races*." *Id.* (emphasis added).

ing, the Supreme Court accelerated a trend it had begun with decisions in *Frank v. Mangum*[45] and *Moore v. Dempsey*,[46] cases applying the Fourteenth Amendment's Due Process Clause to require the states to conduct fair criminal proceedings.[47]

The Hughes Court's landmark criminal justice cases were dramatic proof that in the criminal justice field the "separate but equal" concept of *Plessy* was not working in accordance with the rationale of equality that the Court had articulated in 1896. In *Plessy*, counsel had argued that separation of facilities on an intrastate train "stamp[ed] the colored race with a badge of inferiority."[48] The Supreme Court responded, "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[49] In contrast, the Hughes Court's criminal justice cases demonstrated that courts treated black criminal defendants far more harshly than their white counterparts, and that this harsher treatment was not a figment of blacks' imaginations. These cases demonstrated that in many areas of the country the treatment of blacks was both separate and *un*equal. In ob-

45. 237 U.S. 309 (1915). Although denying relief to the petitioner, the Court held that if a state "supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." *Id.* at 335.

46. 261 U.S. 86 (1923). The petitioners in *Moore* were sentenced to death by an Arkansas court for killing a white man during a race riot sparked by an attack on a group of blacks assembled in a church. *Id.* at 87. The defendants were saved from lynching only through the presence of federal troops. *Id.* at 88. Black witnesses were tortured and whipped to provide incriminating testimony, and blacks were systematically excluded from the grand and petit juries in the case. *Id.* at 89. The court-appointed defense counsel did not consult with their clients before trial; did not request a continuance, change of venue, or separate trials; failed to challenge any prospective jurors; called no witnesses; and did not put the defendants on the stand. *Id.* After a 45-minute trial and five minutes of jury deliberation, the defendants were sentenced to death. *Id.*

Faced with this massive, undeniable evidence of a gross miscarriage of justice, the Supreme Court held that if a state criminal proceeding is

> a mask—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.

*Id.* at 91.

47. *See* RICHARD C. CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI: THE SUPREME COURT AND BROWN V. MISSISSIPPI 116-20 (1986).

48. Plessy v. Ferguson, 163 U.S. 537, 551 (1986).

49. *Id.*

serving the extraordinarily disparate treatment black criminal defendants received in the courts, the justices undoubtedly must have recognized that a political system that permitted such gross racial discrimination even within its halls of justice would probably have similar inequities in its segregated schools, universities, and public facilities, and in other aspects of its public and private culture.

The Supreme Court's new direction in criminal justice matters became apparent shortly after Hughes became chief justice in 1930. The Court reversed the conviction of a black defendant sentenced to death for the murder of a white policeman.[50] The District of Columbia trial judge had refused to permit the defense to question prospective jurors about their racial prejudices.[51] In his opinion, Hughes remarked that "[n]o surer way could be devised to bring the processes of justice into disrepute" than to "permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors."[52]

In the famous Scottsboro cases, the Court reviewed the trials of several black youths, ages thirteen to nineteen, who were charged with raping two white girls in a freight car in Alabama.[53] The defendants were indicted, tried, convicted, and sentenced to death within two and a half weeks of the incident.[54] The trial judge did not name a lawyer for the defendants until the morning of trial.[55] Each defendant's trial lasted no more than a single day.[56] All were conducted after white protesters swarmed into the small town of Scottsboro, Alabama.[57] Hundreds of militia were stationed around the courthouse.[58] The Supreme Court called the trials' setting a "community . . . of great hostility."[59] The scene could more appropriately be characterized as a hysterical lynch mob environment.

In *Powell v. Alabama*,[60] the first of three opinions involv-

50. Aldridge v. United States, 283 U.S. 308, 315 (1931).
51. *Id.* at 310.
52. *Id.* at 315.
53. For a description of the facts and conditions surrounding the trials, see Powell v. Alabama, 287 U.S. 45, 49-53 (1932).
54. *Id.*
55. *Id.* at 56.
56. *Id.* at 50.
57. *Id.* at 51.
58. *Id.*
59. *Id.*
60. 287 U.S. 45 (1932).

ing the Scottsboro defendants,[61] the Court reversed the condemned black youths' convictions.[62] To build consensus in this highly politicized case, Chief Justice Hughes assigned the majority opinion to the conservative Justice George Sutherland of Utah.[63] Sutherland's carefully crafted opinion documented the "atmosphere of tense, hostile and excited public sentiment"[64] that surrounded the Scottsboro trial and the trial court's rush to convict the unrepresented, poorly educated and frightened young defendants.

In its landmark ruling, the Court held that due process requires state trial courts to appoint attorneys for indigent defendants in death penalty cases.[65] In a marked departure from the dry, abstract language that characterized most of the Court's previous civil rights decisions, Sutherland's opinion was clearly animated by the evidence of oppressively racist conditions that almost leapt from the trial record. Sutherland stated:

> [I]n the light of the facts outlined in the opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.[66]

Although the principles of fundamental fairness underlying the Due Process Clause mandated this holding, the stark racial injustice of the Scottsboro trial moved a majority of the Court to reach this result long before they might have otherwise have done so.

In *Norris v. Alabama*,[67] the second Scottsboro decision, Chief Justice Hughes held, for a unanimous Court,[68] that the systematic exclusion of all black citizens of Jackson County, Alabama from the jury rolls violated the Equal Protection Clause.[69] This case is remarkable not for its holding, which es-

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61. The other two opinions were Norris v. Alabama, 294 U.S. 587 (1935), discussed *infra* text accompanying notes 67-72, and Patterson v. Alabama, 294 U.S. 600 (1935), discussed *infra* note 72.

62. 287 U.S. at 73.

63. *See* 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 724 (1951).

64. 287 U.S. at 51.

65. *Id.* at 71.

66. *Id.*

67. 294 U.S. 587 (1935).

68. Justice McReynolds did not participate in this decision. *Id.* at 599.

69. *Id.*

sentially reinforced a longstanding constitutional doctrine,[70] but because of the Court's readiness to examine the discriminatory application of a facially neutral jury selection system. In words that would later haunt those who attempted to hide racist motives behind the veil of "objective" factfinding, Hughes stated that the Supreme Court must determine not only whether a federal right has been denied "in express terms," but also whether it has been denied "in substance and effect."[71] He added: "If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights."[72]

Unfortunately, as federal courts have continued to combat the most blatant forms of racial discrimination in jury selection, legislatures, prosecutors, and jury commissioners have developed an imaginative array of devices to bar blacks and other minorities from the jury box. Sadly, recent cases show that the American criminal justice system is still some distance from its constitutional objective of color-blind jury selection.[73]

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70. *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (invalidating a West Virginia statute which restricted jury service to "white male persons").

71. 294 U.S. at 590.

72. *Id.*

In Patterson v. Alabama, 294 U.S. 600 (1935), the third and final Scottsboro decision, another Scottsboro defendant challenged the systematic exclusion of blacks from jury duty in Jackson County, Alabama. The Alabama Supreme Court refused to consider the substance of his appeal because of the untimely filing of his bill of exceptions. *Id.* at 602. Noting that the Alabama Supreme Court decided *Norris* and *Patterson* on the same day, Chief Justice Hughes remanded the case to the state court to allow it to reconsider what would ordinarily be deemed a non-federal and non-reviewable question of state procedure. *Id.* at 606-07. Because of the "exceptional features of the present case," *id.* at 605, involving a challenge to the now discredited jury selection scheme of Jackson County, Chief Justice Hughes concluded that "the state court should have an opportunity to examine its powers in the light of the situation which has now developed," *id.* at 607.

One of Hughes's biographers later observed: "[T]he basic motivating consideration in [the *Patterson*] opinion was the awful contemplation that for a technical defect in procedure a human being might be sent to his death. With a little ingenuity in reasoning, the technical requirements of the law were subordinated to the ends of justice." SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 161 (1951).

After *Norris*, the Hughes Court re-emphasized on two occasions the constitutional rule against racial discrimination in jury selection. *See* Pierre v. Louisiana, 306 U.S. 354 (1939); Hale v. Kentucky, 303 U.S. 613 (1938) (per curiam).

73. Recent cases reveal an imaginative array of methods used to limit black participation in juries. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 83 (1986) (blacks excluded through peremptory challenges); Swain v. Alabama, 380 U.S. 202, 209-22 (1965) (blacks excluded through peremptory challenges);

Anyone searching for a particularly egregious civil rights violation in American history is well advised to begin reviewing the reported Mississippi cases.[74] *Brown v. Mississippi*[75] is one

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Avery v. Georgia, 345 U.S. 559, 560-61 (1953) (jurors selected by means of racially coded tickets); Hill v. Texas, 316 U.S. 400, 402 (1942) (jury commissioners selected jurors from among their personal acquaintances); Labat v. Bennett, 365 F.2d 698, 713 (5th Cir. 1966) (exclusion of hourly wage earners), *cert. denied*, 386 U.S. 991 (1967); Rabinowitz v. United States, 366 F.2d 34, 40 (5th Cir. 1966) (blacks excluded through a system of panel selection in which "respectable" citizens were asked to recommend others for jury duty); United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 77-78 (5th Cir.) (jury lists drawn from voter registration lists, from which blacks were excluded), *cert. denied*, 361 U.S. 838 (1959); *see also* LAWRENCE D. RICE, THE NEGRO IN TEXAS: 1874-1900, at 255-57 (1971) (blacks excluded through subjective eligibility criteria for jury duty, jury commissioner discretion, literacy qualifications). *See generally* JACK BASS, UNLIKELY HEROES 278-85 (1981) (discussing race discrimination in jury selection in the Fifth Circuit during the 1950s and 1960s); BELL, RACE LAW, *supra* note 6, at 235-77 (discussing judicial background of racism in jury selection).

As Justice Marshall noted in his *Batson* concurrence, an instruction handbook used by the Dallas, Texas prosecutor's office in the 1970s "explicitly advised prosecutors that they conduct jury selection so as to eliminate 'any member of a minority group.'" 476 U.S. at 104 (citation omitted). An earlier jury-selection guide used by those same prosecutors phrased this advice more bluntly: "Do not take Jews, Negroes, Dagos, Mexicans, or a member of any minority race on a jury, no matter how rich or well educated." *Id.* at 104 n.3 (citation omitted).

In Clark v. City of Bridgeport, 645 F. Supp. 890 (D. Conn. 1986), the city attorney candidly admitted that he struck eight of eight black venirepersons on purely racial grounds. When asked to justify his peremptory challenges, he stated:

> [I]f I had a choice between a white juror and a black juror under the facts of these cases, I'm going to take a white juror. That's what I'm saying. . . . [W]hy should I put my city and my defendants at the mercy of the people in my opinion who make the most civil rights claims, at least in my experience.

*Id.* at 894.

Last year, in Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991), the Supreme Court ruled that the Constitution forbade the use of peremptory challenges to exclude blacks in *civil* cases. Writing for the Court, Justice Kennedy pointed out that "[b]y enforcing a discriminatory peremptory challenge, [a] court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the alleged discrimination.'" *Id.* at 2085 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)).

The Supreme Court last year also emphasized that racially motivated peremptory challenges are not a peculiarly black concern, holding in Powers v. Ohio, 111 S. Ct. 1364 (1991), that a white criminal defendant may challenge the discriminatory exclusion of black citizens from a jury. *Id.* at 1374.

74. Theodore G. Bilbo, who was elected as Mississippi's governor in 1915 and 1927, and who served as its U.S. senator from 1935 to 1947, exemplified the starkly racist nature of Mississippi politics during the Hughes era. Bilbo strenuously opposed federal anti-lynching legislation in the late 1930s, stating:

example. In 1934, three impoverished and "ignorant" Negroes in Kempner County, Mississippi were suspected of murdering a white man. A deputy sheriff and several of his white cronies brutalized the defendants with some of the most extreme torture ever revealed in a reported American case. One defendant, Yank Ellington, so enraged a mob of twenty white men with his professions of innocence that they whipped him and twice hung him from a tree before finally releasing him to return home in agony.[76] Two days later, the deputy again seized Ellington and took him to jail by a circuitous route that led into the State of Alabama.[77] While in Alabama, the deputy again severely whipped the defendant until he "agreed to confess to such a statement as the deputy would dictate, . . . after which he was delivered to jail."[78]

The same deputy then arrested two other black men, Ed Brown and Henry Shields. One night, the deputy, the jailer, and several other white men made the defendants strip. The two men were then "laid over chairs and their backs were cut to pieces with a leather strap with buckles on it."[79] They were

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> [T]he underlying motive of the Ethiopian who has inspired this proposed legislation . . . and desires its enactment into law with a zeal and a frenzy equal if not paramount to the lust and lasciviousness of the rape fiend in his diabolical effort to despoil the womanhood of the Caucasian race, is to realize the consummation of his dream . . . to become socially and politically equal to the white man.

CORTNER, *supra* note 47, at 48 (citation omitted).

Bilbo followed the racist tradition of his predecessor, Governor James K. Vardaman, who joined the chorus of outrage by Southern politicians when President Theodore Roosevelt had lunch with the moderate black leader Booker T. Washington. Vardamen wrote:

> It is said that men follow the bent of their geniuses, and that prenatal influences are often potent in shaping thoughts and ideas in after life. Probably old lady Roosevelt, during the period of gestation, was frightened by a dog, and that fact may account for the qualities of the male pup that are so prominent in Teddy. I would not do either an injustice, but am disposed to apologize to the dog for mentioning it.

MILLER, *supra* note 6, at 206-07 (citation omitted). As a Senator, Vardamen continued to use Booker T. Washington as a foil for his racist rhetoric, stating: "I am just as much opposed to Booker Washington as a voter, with all his Anglo-Saxon reenforcements, as I am to the cocoanut-headed, chocolate-covered, typical little coon, Andy Dotson, who blacks my shoes every morning. Neither is fit to perform the supreme function of citizenship." 1 HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE 8 (1978) (citation omitted).

75. 297 U.S. 278 (1936).
76. *Id.* at 281.
77. *Id.* at 281-82.
78. *Id.* at 282.
79. *Id.*

repeatedly whipped and told that the whipping would continue until they admitted "in every matter of detail" a confession "in the exact form and contents as desired by the mob."[80] During a two-day trial, the rope burns on Ellington's neck were clearly visible,[81] and the deputy sheriff and others freely admitted to the beating of all three defendants.[82] The deputy testified that Ellington's whipping by the mob was "[n]ot too much for a negro; not as much as I would have done if it was left to me."[83] Despite the clear evidence that the defendants' pretrial statements were coerced, the trial court denied the defendants' motion to suppress the "confessions."[84] The three men were convicted and sentenced to death.[85] The aggressive young attorney prosecuting the case was John Stennis, and he did not deny the severe police brutality. This case was one of the first steps in a political career that would later lead Stennis into becoming an "esteemed" member of the United States Senate.[86]

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80. *Id.*

81. *Id.* at 281.

82. *Id.* at 284-85. T.H. Nicholson, the marshal of Scooba, Mississippi, testified that defendants Ed Brown and Henry Shields "had been whipped some" at the time of their initial confessions. Record from the United States Supreme Court at 102, Brown v. Mississippi, 297 U.S. 278 (1936) (No. 301) (reprinting the record of the trial court).

E.L. Gilbert, another witness for the State, also stated that Shields and Brown were whipped during their interrogations. Gilbert admitted participating in the beating of Brown, stating: "We told him any time he wanted to talk, we would let him up, and he got up." *Id.* at 106.

Kemper County Deputy Sheriff Cliff Dial acknowledged that he was present when a mob of 20 men whipped and tried to hang Ellington, *id.* at 111-12, but that he interceded to save Ellington because he "didn't want any of the negroes beat up," *id.* at 108. However, Dial's concern for the defendant's well-being was mercurial. He admitted that after Shields and Brown had professed their innocence, three days later, he and his companions "kind of warmed them a little," until they finally confessed. *Id.* at 113. Dial also testified that he "strapped Yank [Ellington] a little bit" during the trip into Alabama, and that Ellington also confessed after this treatment. *Id.* at 114.

83. Record at 112, *Brown* (No. 301).

84. 297 U.S. at 279.

85. *Id.*

86. In 1985, a flattering profile of Stennis in the New York Times characterized the senior senator from Mississippi as "the undisputed patriarch of the Senate, a teacher to younger members and a conscience for the entire institution." Steven V. Roberts, *Wisdom in Judgment, 38 Years in the Making*, N.Y. TIMES, Nov. 4, 1985, at B10. However, the same article mentions that Stennis established his reputation in his first year in the Senate by being selected to lead a floor debate against a civil rights bill, "an unusual honor for a junior legislator." *Id.* It was not until 1982 that Stennis " 'reluctantly' cast his first vote for a civil rights bill, one extending the Voting Rights Act." Marjorie Hunter, *Profile: John C. Stennis; Plowing a Straight Line to the End of the Row*, N.Y. TIMES, Nov. 6, 1987, at A18.

Over a strident dissent from two judges,[87] the Mississippi Supreme Court disregarded the defense attorney's protest that the defendants' coerced confessions were invalid and inherently unreliable.[88]

In an appeal argued by former Mississippi Governor Earl Brewer and partially financed by the NAACP,[89] the United States Supreme Court set aside the convictions and death sentences as a violation of due process. Writing for a unanimous court, Chief Justice Hughes stated that although a state could adopt criminal procedures "in accordance with its own conceptions of policy," it could not institute a "trial by ordeal."[90] In language that bristled with outrage, Hughes continued:

> The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and

87. A dissent by Mississippi Supreme Court Justice Virgil Alexis Griffith, joined by Justice William D. Anderson, described the torture of the three *Brown* defendants in gruesome detail. Justice Griffith concluded his dissenting opinion with an unusually explicit invitation to the U.S. Supreme Court to reverse his colleagues' majority opinion, stating:

> If this judgment be affirmed by the federal Supreme Court, it will be the first in the history of that court wherein there was allowed to stand a conviction based solely upon testimony coerced by the barbarities of executive officers of the state, known to the prosecuting officers of the state as having been so coerced, when the testimony was introduced, and fully shown in all its nakedness to the trial judge before he closed the case and submitted it to the jury, and when all this is not only undisputed, but is expressly and openly admitted.

Brown v. State, 161 So. 465, 472 (Miss. 1935) (Griffith, J., dissenting).

The strength and eloquence of Griffith's dissent was of incalculable value in publicizing the *Brown* case and in persuading the United States Supreme Court to review the Mississippi decision. CORTNER, *supra* note 47, at 81-86. Chief Justice Hughes quoted Griffith's dissent at length in his factual summary, agreeing with his state court colleague that the trial transcript "reads more like pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government." 297 U.S. at 282 (quoting 161 So. at 470 (Griffith, J., dissenting)).

88. 161 So. at 465. Ironically, on the same day that the Mississippi Supreme Court announced its decision in *Brown*, the United States Senate was consumed by a bitter and ultimately successful filibuster to defeat an anti-lynching bill. *Filibuster Balks Efforts to Speed Roosevelt Bills*, N.Y. TIMES, Apr. 30, 1935, at A1.

89. *See* CORTNER, *supra* note 47, at 89-106.

90. 297 U.S. at 285.

sentence was a clear denial of due process.[91]

In 1940, the Court reaffirmed the principle, announced in *Brown v. Mississippi*, that involuntary confessions are inadmissible. In *Chambers v. Florida*,[92] several "ignorant young colored tenant farmers"[93] were imprisoned, held incommunicado, beaten, threatened and questioned almost continuously by the police until they finally "confessed."[94]

In a unanimous opinion by Justice Hugo Black, the Court reversed the convictions, finding that the police coercion rendered the defendants' confessions invalid. "We are not impressed," Justice Black wrote, "by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end."[95] The opinion by Justice Black was of great significance because it was one of his first decisions on the Court. Critics attacked Black's nomination because of his previous membership in the Ku Klux Klan, but he made his judicial philosophy clear in *Chambers*, where he wrote that "courts stand . . . as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or . . . are non-conforming victims of prejudice and public excitement."[96]

Until quite recently, the Court firmly adhered to the prin-

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91. *Id.* at 285-86.

92. 309 U.S. 227 (1940).

A contemporary account gives some sense of the atmosphere surrounding the issuance of the *Chambers* decision.

> The court's unanimous and extended opinion was based on the constitutional "due process" clause in the Fourteenth Amendment, passed after the Civil War to protect the newly granted rights of Negroes from arbitrary State judicial action.
>
> It was handed down on the anniversary of the birth of Abraham Lincoln, who was chiefly responsible in obtaining the basis of these rights for the liberated and enfranchised Negro race, and it was voiced eloquently by Justice Black, who admitted, after his nomination to the high bench, that he had once been a member of the Ku Klux Klan.
>
> The drama of the occasion, due to the date of the opinion, the background of the justice rendering it, the defense of constitutional principles and the broad overtones of the court's denunciation of the exercise of dictatorial power by any government, was not lost upon the audience which crowded the great marble court chamber.

Frederick R. Barkley, *High Court Saves 4 Doomed Negroes*, N.Y. TIMES, Feb. 13, 1940, at A1.

93. 309 U.S. at 238.

94. *Id.* at 238-40.

95. *Id.* at 240-41.

96. *Id.* at 241.

ciple enunciated in *Brown* and *Chambers* that coerced confessions have absolutely no place in criminal trials.[97]

A little known in forma pauperis case also shows the Hughes Court's growing sensitivity to the plight of blacks in southern courts. In *White v. Texas*,[98] a black defendant sought review of his state conviction for raping a white woman. The Supreme Court originally denied White's poorly written certiorari petition.[99] However, Chief Justice Hughes was persuaded by White's rehearing petition that the Court might have acted too hastily. He sent for the state court record, which revealed that the Texas Rangers had coerced White's confession by third degree methods. The Court summarily reversed the conviction[100] and denied the state's rehearing petition in a scathing opinion by Justice Black.[101]

In the midst of the retrial, White was shot and killed by the husband of the alleged victim. White's murderer was acquitted after the district attorney told the jury that the suppression of the coerced confession had forced the husband to take the law into his own hands.[102] According to Hughes's biographer, "[s]uch lawlessness in the name of law was sufficient to keep Hughes vigilant in examining the in forma [pauperis] cases."[103] At the present time, when the Supreme Court is restricting its review of in forma pauperis matters,[104] the Court's

97. In Arizona v. Fulminante, 111 S. Ct. 1246, 1263-65 (1991), a divided Court held that the admission of an involuntary confession was subject to the harmless error rule of Chapman v. California, 386 U.S. 18 (1967). Justice Byron White, writing for the four dissenters, stated that "permitting a coerced confession to be part of the evidence on which a jury is free to base its verdict of guilty is inconsistent with the thesis that ours is not an inquisitorial system of criminal justice." 111 S. Ct. at 1256 (White, J., dissenting) (citing Chambers v. Florida, 309 U.S. 227, 235-38 (1940)).

For an excellent analysis of the *Fulminante* decision, see Charles J. Ogletree, Jr., Arizona v. Fulminante: *The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991).

98. 309 U.S. 631 (1940) (per curiam).

99. White v. Texas, 308 U.S. 608 (1939).

100. 309 U.S. at 631.

101. White v. Texas, 310 U.S. 530 (1940) (denying the State's petition for rehearing).

102. Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 25-26 (1949).

103. PUSEY, *supra* note 63, at 727.

104. *See In re* Demos, 111 S. Ct. 1569 (1991) (denying certiorari petition by prolific pro se litigant and denying leave to proceed in forma pauperis in all *future* petitions of extraordinary relief); *In re* Sindram, 111 S. Ct. 596 (1991) (denying motion by pro se litigant to proceed in forma pauperis on current or future petitions for extraordinary relief); *In re* McDonald, 489 U.S. 180 (1989) (same); *see also In re* Amendment to Rule 39, 111 S. Ct. 1572, 1572 (1991)

experience in *White v. Texas* bears remembering.

The Hughes Court's criminal cases mark the feeble beginnings of a criminal justice jurisprudence that ultimately would curb the most severe abuses against blacks and other citizens by police, jailers, district attorneys and judges.

### C. EDUCATION

During Chief Justice Hughes's tenure, lawsuits challenging the exclusion of blacks from public graduate schools spelled the beginning of the end of school segregation. NAACP attorneys such as Charles Hamilton Houston,[105] Houston's cousin William Henry Hastie[106] and Houston's student Thurgood Marshall[107] orchestrated the legal attack.

In 1935, Lloyd L. Gaines, a twenty-five-year-old Missouri citizen, graduated from Lincoln University, the state's segregated black university. Gaines applied for admission to the University of Missouri Law School, the only state-supported law school in Missouri. Although a qualified applicant, he was denied admission solely because he was black. The registrar acknowledged that the University of Missouri admitted white students from other states, Asian-American students, foreign students—in fact, everyone except "students of African

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(amending Rule 39 of the Supreme Court Rules to allow denial of leave to proceed with "frivolous" or "malicious" in forma pauperis proceedings).

In his dissent in *Demos*, Justice Marshall, joined by Justices Blackmun and Stevens, wrote:

> In closing its doors today to another indigent litigant, the Court moves ever closer to the day when it leaves an indigent litigant with a meritorious claim out in the cold. And with each barrier that it places in the way of indigent litigants, and with each instance in which it castigates such litigants for having "abused the system," the Court can only reinforce in the hearts and minds of our society's less fortunate members the unsettling message that their pleas are not welcome here.

111 S. Ct. at 1571-72 (Marshall, J., dissenting) (citation omitted).

105. *See* MCNEIL, *supra* note 6, at 13, 52-53, 132-36.

106. *See* G. WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE 29, 85-86, 95-96 (1984).

107. *See* A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas From a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1012-15 (1992); A. Leon Higginbotham, Jr., *Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 55 (1991).

For thoughtful collections of articles on Justice Marshall, see also, Tributes, 101 YALE L.J. 1 (1991); A Tribute to Justice Thurgood Marshall, 6 HARV. BLACKLETTER J. 1 (1989); Tribute to Justice Thurgood Marshall, 40 MD. L. REV. 390 (1981).

descent."[108]

The Missouri Supreme Court unanimously held that the State had satisfied its Fourteenth Amendment obligation to Gaines by offering to subsidize his schooling in the law schools of Illinois, Iowa, Kansas, or Nebraska, none of which excluded blacks.[109] The court downplayed the fact that these schools were as much as 300 to 400 miles from Gaines's St. Louis home, stating that the necessity to travel great distances to attend an out-of-state school was "but an incident to any classification for school purposes and furnishes no substantial ground for complaint."[110]

Charles Hamilton Houston, a brilliant black attorney and former member of the *Harvard Law Review*, argued the *Gaines* appeal on November 9, 1938.[111] In an opinion for the majority in *Missouri ex rel. Gaines v. Canada*,[112] Chief Justice Hughes brushed aside the parties' extensive comparison of the legal training at the University of Missouri and at out-of-state schools, stating the comparison was "beside the point."[113] According to the Court:

> The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. . . . That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.[114]

In response to Missouri's assertion that the "limited demand in Missouri for the legal education of negroes" justified

108. *See* State *ex rel.* Gaines v. Canada, 113 S.W.2d 783, 785 (Mo. 1937), *rev'd*, 305 U.S. 337 (1938).

109. *Id.* at 790.

110. *Id.* at 789. The Missouri Supreme Court reiterated its earlier determination that racial segregation was justified on the basis of "natural race peculiarities" and "practical results":

> "There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social relations, recognized by all well-organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage."

*Id.* at 788 (quoting Lehew v. Brummel, 15 S.W. 765, 766 (Mo. 1890)).

111. *See* MCNEIL, *supra* note 6, at 143-45, 149-50.

112. 305 U.S. 337 (1938).

113. *Id.* at 349.

114. *Id.* at 349-50.

the discrimination in favor of whites, the Court stated that Gaines's right was "a personal one."[115] The Court stated that Lloyd Gaines

> as an individual . . . was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.[116]

*Gaines* was the first Supreme Court decision to invalidate a state's school segregation practices. The Court did not explicitly question the *Plessy v. Ferguson* "separate but equal" doctrine and, in fact, noted that the state could constitutionally furnish equal facilities in separate schools for blacks and whites.[117] However, *Gaines* sounded the death knell of state-sanctioned racial segregation, for it seriously eroded two important legal foundations of *Plessy*'s aberrant reading of the Equal Protection Clause.

First, the *Gaines* opinion showed that the Court would no longer automatically defer to the state's "discretion" to adopt "reasonable" regulations to segregate the races in public schools. For the first time in a segregation case, the United States Supreme Court refused to defer to the states' authority to regulate schools and actually scrutinized the *content* of the state's segregation plan.

Second, the logic, if not the language, of *Gaines* undermined the peculiar notion of "equality" which was at the heart of the "separate but equal" doctrine. Following *Plessy*, the Fourteenth Amendment guarantee of equal protection for all races took on a make-believe quality, as the Court strained to uphold state action with clearly racist motives and undeniably discriminatory effects.[118] *Gaines* was the first sign that the Court would no longer give "equality" such a tortured definition. The Court imposed a duty on the state to provide equal educational opportunities for black students without regard to the number of blacks who were in a position to take advantage of those opportunities, and without regard to the availability of

115. *Id.* at 350-51.
116. *Id.* at 351.
117. *Id.* at 344.
118. Thus, grossly inequitable practices such as the closing of a county's only black high school, Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899), a state's prohibition of integrated *private* schools, Berea College v. Kentucky, 211 U.S. 45 (1908), and the exclusion of all non-whites from white schools in a dual school system, Gong Lum v. Rice, 275 U.S. 78 (1927), were found to satisfy the state's obligation to provide equal protection to its citizens.

those opportunities in other states. Although the Court limited the *Gaines* holding to situations in which blacks were legally excluded from state supported professional schools, *Gaines* could not logically be confined to these facts. Because the Court read the principle of *actual* equality of opportunity into the Constitution, it was inevitable that some day the Court would have to face the reality that *all* forms of *de jure* racial segregation inevitably diminish the quality of services and opportunities available to blacks.

By cutting back on the Court's deferential standard of review and moving toward an equal protection test of *actual* equality, the decision in *Gaines* paved the way for the ultimate victory in *Brown v. Board of Education.*

### D. THE RIGHT TO VOTE

In the decades after the Civil War, the "respectable" leaders of the white power structure in the South did more than the terrorists of the Ku Klux Klan to bar blacks from the voting booth. Describing his state's experience in a speech to its Constitutional Convention of 1890, Judge Chrisman of Lincoln County, Mississippi said: "[I]t is no secret that there has not been a full vote and a fair count in Mississippi since 1875."[119] He stressed that "we have been preserving the ascendancy of the white people by revolutionary methods. In plain words, we have been stuffing ballot boxes, permitting perjury and here and there in the State carrying the elections by fraud and violence until the whole machinery for elections was about to rot down."[120]

In varying degrees of intensity, the discrimination against black voters persisted throughout the South. The Hughes Court had a mixed record in protecting blacks' right to vote under the Fifteenth Amendment. The Court showed a willingness to remedy the most direct state-imposed obstacles to black voting, but stopped far short of redressing indirect, but equally effective methods of disenfranchising blacks.

The most significant barrier was the exclusion of black voters from the Democratic primary elections. In the essentially one party Southern states, the winner of the Democratic primary almost invariably won the later general elections. Thus, states could deny blacks any meaningful role in the electoral

119. BURKE MARSHALL, FEDERALISM AND CIVIL RIGHTS 13-14 (1964) (quoting Judge Chrisman).

120. *Id.*

process by the simple expedient of declaring the all-white primary elections the activities of "private" political parties.

After the Supreme Court's 1927 decision invalidating a Texas law that flatly prohibited blacks from voting in the state's Democratic primary,[121] the Texas Legislature enacted an "emergency" statute that permitted the party's executive committee "to prescribe the qualifications of its own members and . . . in its own way determine who shall be qualified to vote or otherwise participate in such political party."[122] The Democratic Executive Committee promptly restricted participation in the party's primary to "white Democrats."[123] In *Nixon v. Condon*,[124] the Court, in an opinion by Justice Benjamin Cardozo, struck down the State's attempt to circumvent the Court's prior ruling, finding that the State had unconstitutionally empowered the Texas Democratic party to "discriminate invidiously between white citizens and black. The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color."[125]

Despite Cardozo's ringing rhetoric, the Court's enthusiasm for demolishing voting barriers to blacks soon faltered. After *Nixon v. Condon*, the Texas Democratic Party passed a resolution at a party convention restricting membership to qualified "white citizens."[126] The Court unanimously upheld this method of disenfranchising blacks, blithely concluding in *Grovey v. Townsend* that the Fourteenth and Fifteenth Amendments did not prohibit a private political party from barring blacks if the state did not directly authorize or compel this policy.[127] Thus, the Court accepted the hypocritical fiction that so long as blacks were afforded a meaningless right to vote in the general election, they could constitutionally be banned from the critical primary election.[128] As one commentator aptly observed, after *Grovey*, "the southern states remained at liberty

121. Nixon v. Herndon, 273 U.S. 536 (1927).
122. *See* Nixon v. Condon, 286 U.S. 73, 82 (1932).
123. *Id.*
124. 286 U.S. 73 (1932).
125. *Id.* at 89 (citations omitted).
126. Grovey v. Townsend, 295 U.S. 45, 47 (1935), *overruled by* Smith v. Allwright, 321 U.S. 649 (1944).
127. *Id.* at 55.
128. In 1944, the Supreme Court overruled *Grovey* in Smith v. Allwright, 321 U.S. 649 (1944), finally recognizing that the Democratic Party's discrimination against black voters violated the Fifteenth Amendment's guarantee of the right to vote to all races.

to render the fifteenth amendment hollow by allowing the dominant political party to exclude blacks from the only election that mattered."[129]

The Hughes Court had a mixed record in combatting other types of bias against black voters. In *Lane v. Wilson*,[130] the Court struck down Oklahoma's patently discriminatory voter registration statute, which essentially disenfranchised the State's black citizens. However, this victory was muted by the Court's prior decision in *Breedlove v. Suttles*,[131] which upheld a poll tax, a device which disproportionately disenfranchised black voters.[132] It was not until the enactment of the Twenty-fourth Amendment that this decision's effect on federal elections was reversed.

On balance, it must be acknowledged that the Supreme Court under Hughes failed to vindicate blacks' constitutionally guaranteed right to vote. Although the Court was willing to strike down the most blatant forms of voter discrimination, it lacked the will to address the South's increasingly sophisticated means of denying blacks this most precious right of citizenship.

## CONCLUSION

The poets and the writers of the 1920s and 1930s often conveyed the cruelties and the disparities that confronted blacks more accurately and passionately than was possible in the dry, distilled language of Supreme Court decisions. For example, in

129. David P. Currie, *The Constitution in the Supreme Court: Civil Rights and Liberties, 1930-1941*, 1987 DUKE L.J. 800, 808 (footnote omitted).

130. 307 U.S. 268 (1939).

131. 302 U.S. 277 (1937), *overruled by* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

132. In *Breedlove*, the Court upheld a poll tax of one dollar levied against every Georgia inhabitant between the ages of 21 and 60, except blind and female residents who did not register to vote. *Id.* at 279-80. Georgians were not allowed to vote in any elections unless this tax was paid. *Id.* at 280.

For a further discussion of the use of the poll tax to disenfranchise minority and lower income citizens, see 2 THOMAS I. EMERSON ET AL., POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1120-34 (student ed. 1967); PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 38-39 (1947); Note, *Disenfranchisement by Means of the Poll Tax*, 53 HARV. L. REV. 645, 645-52 (1940); Note, *Negro Disenfranchisement—A Challenge to the Constitution*, 47 COLUM. L. REV. 76, 92-94 (1947); *see also* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966) (striking down a Virginia poll tax for state elections and noting "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process"); United States v. Dogan, 314 F.2d 767, 768, 774 (5th Cir. 1963) (finding impermissible racial discrimination in a county sheriff's refusal to accept poll taxes offered by black citizens).

his moving introduction to the profound sociological study, *Black Metropolis*,[133] Richard Wright in 1945 gave voice to the anger and frustration felt by many of the victims of racism in America. Wright wrote:

> What has America done to people who could sing out in limpid verse to make them snarl about being "pressed to the wall" and dealing "one death-blow"? Is this the result of a three-hundred-year policy of "knowing niggers and what's good for 'em"? Is this the salvation which Christian missionaries have bought to the "heathen from Africa"? That there is something wrong here only fools would deny.[134]

He concluded:

> White America has reduced Negro life in our great cities to a level of experience of so crude and brutal a quality that one could say of it in the words of Vachel Lindsay's *The Leaden-Eyed* that:
>
> It is not that they starve, but they starve so dreamlessly,
> It is not that they sow, but that they seldom reap,
> It is not that they serve, but they have no gods to serve,
> It is not that they die, but that they die like sheep.[135]

Of course the Supreme Court did not and could not significantly deter much of the despair and cruelty which Richard Wright described. But nevertheless, in halting, tentative steps, the Supreme Court in the 1930s began to turn away from *Plessy* in a series of decisions that implicitly recognized that the separate treatment afforded blacks in the nation's judicial, educational, and political systems was inherently, unmistakably *unequal* and unfair.

During the Hughes Court era, civil rights lawyers began the arduous task of removing some of the most treacherous

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133. Richard Wright, *Introduction* to ST. CLAIRE DRAKE & HORACE R. CAYTON, BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY (1945).

134. *Id.* at xxxiv. Wright took the quoted words from "a new and strange cry from another Negro, Claude McKay, [who] in his sonnet, *If We Must Die*, . . . seems to snarl through a sob." *Id.* at xxxiii. McKay's sonnet goes:

> If we must die—oh, let us nobly die,
> So that our precious blood may not be shed
> In vain; then even the monsters we defy
> Shall be constrained to honor us though dead!
>
> Oh, kinsmen! We must meet the common foe;
> Though far outnumbered, let us still be brave,
> And for their thousand blows deal one death-blow!
> What though before us lies the open grave?
> Like men we'll face the murderous, cowardly pack
> Pressed to the wall, dying, but—fighting back!

*Id.* at xxxiv (quoting portions of McKay's sonnet as published in ANTHOLOGY OF AMERICAN NEGRO LITERATURE 203-04 (V.F. Calverton ed., 1929)).

135. *Id.*

roadblocks on the "road to freedom."[136] In the following decades, other Supreme Court cases brought down still more barriers to equality in the areas of public education and facilities, employment, housing, criminal procedure, and voting rights.

While much has been accomplished, many roadblocks and barriers nevertheless remain. The National Urban League's recent assessment of Black America[137] demonstrates that even today for at least one-third of black Americans, the distance between the goal of equality and the tragic daily reality of discrimination is still devastating, as reflected in the data on poverty, extraordinarily high unemployment rates, excessively deteriorating housing, and disproportionate health deficiencies.[138]

The incredible verdict in the recent trial of the officers accused of beating Rodney King[139] and the resulting explosion of

136. Speaking to the Association of the Bar of the City of New York on April 21, 1965, Martin Luther King said: "[T]he *road to freedom* is now a highway because lawyers throughout the land, yesterday and today, have helped clear the obstructions, have helped eliminate road blocks, by their selfless, courageous espousal of difficult and unpopular causes." Martin Luther King, Jr., *The Civil Rights Struggle in the United States Today*, 20 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK No. 5, at 5, 6 (1965) (emphasis added).

137. NATIONAL URBAN LEAGUE, INC., THE STATE OF BLACK AMERICA: 1992 (Billy J. Tidwell ed., 1992) [hereinafter 1992 STATE OF BLACK AMERICA].

138. Tables and statistics in David H. Swinton, *The Economic Status of African Americans*, *in* 1992 STATE OF BLACK AMERICA, *supra* note 137, at 60, 80, report that 36.9% of blacks live in poverty. In 1990 the number of blacks in poverty reached 9.8 million, up 500,000 over 1989. *Id.* at 89. Swinton also notes the sharp drop in the 1980s of black rates of employment. *Id.* at 97-100. While the overall rate of black unemployment for the past twenty years ranged between 10 and 12%, for black teenagers the unemployment rate has been over 30% since 1980. *Id.* at 102.

Robert D. Bullard, *Urban Infrastructure: Social, Environmental and Health Risks to African Americans*, *in* 1992 STATE OF BLACK AMERICA, *supra* note 137, at 183, 183-88, examines black inner-city residents' exposure to infrastructure decay, environmental degradation, health threats, and impoverishment. The gravity of this situation is enormous since more than 57% of African Americans live within the crumbling inner cities. The combination of loan denial rates, residential segregation and racial discrimination severely restricts the avenue of moving away from the deteriorating neighborhoods for blacks in the inner city. *Id.* at 184-86.

For a detailed examination of the persistent disparities between black and white rates of illness, disability and death, see NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 391-450 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).

139. *See* Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, at A1; Seth Mydans, *23 Dead After 2d Day of Los Angeles Riots; Fires and Looting Persist Despite Curfew*, N.Y. TIMES, May 1, 1992, at A1; Robert Reinhold, *Cleanup Begins in Los Ange-*

racial unrest in Los Angeles demonstrate that many blacks and other non-whites believe that the system of justice is incapable of protecting their basic rights. These tragic events illustrate that the demise of de jure racial segregation was not equivalent to the abolition of the massive racial and economic injustices that still plague this country.

In assessing the current state of Black America, John E. Jacob, president of the National Urban League, stated:

> Even as we celebrated international triumphs, critical issues such as the deepening recession, widespread poverty, mounting racial and ethnic tensions, substandard schools, deteriorating cities and a crumbling infrastructure, restricted access to health care, and many others were largely ignored by public policymakers.[140]

Many of the longstanding problems recounted in the Urban League report cannot be addressed in any significant way by the Supreme Court. But to the extent that some of these conditions are within the ambit of issues that the Supreme Court can adjudicate, one must wonder whether the current Supreme Court will act to narrow the gaps. Two years ago, one of the present authors wrote:

> [W]e cannot become smug and assume that the trend of recent decades toward eradicating racism will continue. It is obvious that the most effective way to weaken the fabric of human and civil rights for minorities would be to change the balance of the Supreme Court so that gradually, in a slow but determined process, the Court would repudiate its historic role in the protection of individual and minority rights. The recent appraisal of the current Supreme Court by one of its own members—Justice Thurgood Marshall said: "It is difficult to characterize last terms' decisions [of the Supreme Court] as the product of anything other than a deliberate retrenchment of the civil rights agenda."[141]

After those comments were written in 1990, both Justices Brennan and Marshall resigned from the Court. One must therefore ask whether the current Supreme Court will act in our era as much as the Hughes Court acted in its time to remove some of the remaining barriers on the "road to freedom"[142] that a moderate Supreme Court could eradicate.

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*les; Troops Enforce Surreal Calm*, N.Y. TIMES, May 3, 1992, at A1; Richard W. Stevenson, *Toll is 38 in Los Angeles Riots But Violence Seems to Abate; Bush Dispatches Force of 5,000*, N.Y. TIMES, May 2, 1992, at A1.

140. John E. Jacob, *Black America, 1991: An Overview*, *in* 1992 STATE OF BLACK AMERICA, *supra* note 137, at 1, 1.

141. A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 587 (1990).

142. Three years ago, Justice Blackmun, speaking about a seemingly consistent majority of five Supreme Court justices on key civil rights and race re-

lations cases, observed: "Sadly, . . . [o]ne wonders whether the majority [of Supreme Court Justices] still believes that . . . race discrimination—or more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was." Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2136 (1989) (Blackmun, J., dissenting) (citation omitted). If there is a retreat in the Supreme Court's traditional role in the protection of human rights, such a demise becomes even more tragic because of other events that are taking place in the United States. As Dr. Bernard C. Watson has so aptly observed:

> Ominous currents are swirling across the nation's landscape, and they presage profound and disturbing questions about the future of these United States. David Duke's recent emergence as a political force in Louisiana represents only the most visible sign of widespread discontent. Recent polls, focus groups, and annual surveys provide evidence of deteriorating racial and ethnic relations in this country.

Bernard C. Watson, *The Demographic Revolution: Diversity in the 21st Century America*, *in* NATIONAL URBAN LEAGUE, INC., THE STATE OF BLACK AMERICA: 1991, at 13, 13 (Billy J. Tidwell ed., 1991).