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The Supreme Court and States Rights

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I. Introduction: The Current Furor Over States' Rights

Last May at the University of Kentucky Commencement Exercises President Harris of Tulane, speaking on the subject "Conservation of Educational Resources," warned of the Soviets' national commitment to education and research in the solid conviction that these alone will provide the means to survive the future, to overcome America and lead the world. He suggested that "our national survival and well-being depend as much upon the strength of our *national* educational system as upon the strength of our military system. . . . Our people soon will have to think about a minimum required *national curriculum* for grade and high schools."

In contrast let us look for a moment at another view on education expressed in House Concurrent Resolution No. 10 of the 1956 session of the Louisiana legislature. "Interposing the sovereignty of the State of Louisiana against encroachment upon the police powers reserved to this State by the United States Constitution. . . . Be It Resolved by the Legislature of Louisiana . . . that by its decision on May 17, 1954, in the school cases, the then occupants of the offices of Justices of the Supreme Court of the United States attempted to amend the Constitution by declaring that regardless of the meaning or intention of the Fourteenth Amendment when adopted by the States (which was explicitly shown to be contrary to the decision in these cases) it would be construed, in view of changing conditions, to deprive the several States of authority over their respective public school systems never surrendered by them. . . ."[1] The legislature asserts its power over the public school system lest "submissive acquiescence to palpable, deliberate and dangerous usurpation of such power

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[1] Reported in 1 Race Rel. L. Rep. 753 (1956).

would, in the end, lead to the surrender of all powers, and inevitably to the obliteration of the sovereignty of the States, contrary to the sacred compact by which this Union of States was created. . . ."[2]

Is education a national problem (and lack of it a national danger) or is it a matter of states' rights and the preservation of the sovereignty of the state? This is no mere matter of policy or politics. As de Tocqueville remarked long ago on a peculiar American trait:

> Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obligated to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings.[3]

The London Economist put it in more stirring words in a comment in 1952 on the Steel Seizure case:

> At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start. Last week, the old bugle-note rang out, clear and thrilling, calling Americans to a fresh debate on the Constitution. . . .[4]

So today America is racked with a great debate on states' rights—a debate which began—began all over again—five years ago last month when the Supreme Court handed down the decision in the Segregation cases. Did the Supreme Court in holding that "separate but equal" education denied equal protection of the law to Negro school children usurp states' rights and encroach upon state sovereignty? This is how we carry on this great argument over policy framed in the language of the law.

The debate spreads. Last summer the Conference of Chief Justices (of the state supreme courts), meeting in Pasadena, California, adopted a resolution stating

> That this Conference believes that our system of federalism, under which control of matters primarily of national

[2] *Ibid.*
[3] De Tocqueville, Democracy in America (1835).
[4] 163 London Economist 370 (1952).

> concern is committed to our national government and control of matters primarily of local concern is reserved to the several states, is sound *and should be more diligently preserved.*[5] [Emphasis added.]

The Conference also approved the Report of its "Committee on Federal-State Relationships as Affected by Judicial Decisions." This report, after a sally into constitutional history, reviewed a number of recent Supreme Court decisions and concluded:

> We are now concerned specifically with the effect of judicial decisions upon the relations between the federal government and the state governments. Here we think that the overall tendency of decisions of the Supreme Court over the last 25 years or more has been to press the extension of federal power and to press it rapidly. . . .
>
> We believe that in the fields with which we are concerned, and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of state action by the Supreme Court by virtue of the Fourteenth Amendment. . . .[6]

This February the House of Delegates of the American Bar Association adopted a resolution calling for further national legislation in the field of internal security. Perhaps you think there is no connection between a call for more federal legislation strengthening internal security and states' rights. With the resolution the American Bar Association simultaneously published a report of its Special Committee on Communist Tactics, Strategy and Objectives criticizing the Supreme Court. It found that many cases "have been decided in such a manner as to encourage Communist activity in the United States," and there is a "paralysis of our internal security" growing out of "construction and interpretation centering around technicalities emanating from our judicial process." I suspect there is more connection between the report and states' rights than appears in the passing reference to the *Nelson* case,[7] which invalidated state subversion laws in conflict with the federal Smith Act.

[5] Reported in Harvard Law Record, October 23, 1958, p. 1.
[6] *Id.* at 4.
[7] Pennsylvania v. Nelson, 350 U.S. 497 (1956).

The argument over states' rights in our constitutional system has two aspects. The first and most obvious one exists under any federal governmental system—what is the distribution of governmental powers over the individual citizen? Whose is the sword? What are the respective areas of Congressional power to legislate as opposed to the area assigned to state legislation? What are the appropriate areas of federal administrative authority as opposed to state administrative authority? What are the cases which the citizen must litigate in federal court and what are the cases which he must take to the state court? The problems here under our system are most difficult—what are the areas and who shall decide? The states or the nation? The legislature or the courts?

The second aspect is more peculiar to our system, because it involves the concept of individual liberty from government.

When one government oppresses the individual, what official of which government will interpose to protect the individual? Whose is the shield? May the Louisiana legislature interpose against the federal courts? May the Arkansas governor interpose against the President? May the President interpose between Faubus and the people? Under our system of judicial review of administrative, legislative and even judicial action of inferior courts, we have the special complication of the federal courts sitting in judgment upon the actions of the state legislature, administration and judiciary any time any lawyer for any individual citizen can frame a law suit to question an infringement of personal rights.

II. STATES' RIGHTS V. NATIONALISM—WHAT DID THE FOUNDING FATHERS INTEND?

Faced then with this great debate over schools and security —cast in terms of a constitutional law argument over the preservation of states' rights against all-consuming nationalism—let us turn first to our origins.

The Constitutional Convention met in Philadelphia in 1787 to find a remedy for the evils which had arisen under the Confederation Government—particularly the want of power in the central government to tax and legislate and the increasing conflicts between the central government and the states and among

the states themselves. The Convention framed a constitution establishing a central government of three branches with enumerated powers and adopted a supremacy clause stating "This Constitution shall be the Supreme Law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."[8]

Of course, the Constitution would not have been adopted if its proponents had not promised a Bill of Rights, and the ten amendments constituting it were soon added. The tenth amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[9]

What kind of government did the founding fathers contemplate? According to generally accepted constitutional theory, there were in the Convention widely divergent views in the matter which are sometimes identified with the viewpoints of Hamilton and Madison. Hamilton, the nationalist, favored a strong central government of general powers, truly sovereign. Madison, on the other hand, is credited with the view that the Constitution merely established a compact among existing states which retained "residuary and inviolable sovereignty."[10] The Constitution itself was a compromise encompassing the hopes of both factions without explicitly adopting the views of either. It was only because John Marshall, a Federalist, became Chief Justice by fortuitous circumstance and was able in a series of landmark decisions to establish a firm nationalist interpretation of the Constitution that we became a nation, rather than a confederacy. He accomplished this first by asserting in the Supreme Court the power of ultimate judicial review of the acts of Congress[11] and of the state legislatures[12] and decisions of the state courts.[13] Second, by asserting that although the central government was a government of enumerated powers, it also had implied powers and could choose means "necessary and proper" to carry out its express powers.[14]

[8] U.S. Const., Art. VI.
[9] U.S. Const., Amend. X.
[10] See Corwin, The Twilight of the Supreme Court 47-48 (1934).
[11] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[12] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
[13] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
[14] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

In recent years challenges have been made to this neat story of constitutional "cowboy and Indians." Crosskey has already devoted two volumes to his thesis that everyone understood at the time the Constitution was framed and adopted that it established a strong central government, giving Congress broad general power to legislate for the common defense and the general welfare.[15] The so-called enumeration of the powers of Congress was to limit the presidential prerogative, Crosskey says. There was no problem of states' rights in Crosskey's view of Congressional power[16] because the states had none left worth discussing. The tenth amendment was added to the Bill of Rights to preserve liberty to the people not power to the states.[17] Thereafter, for reasons of politics, the national government established by the Constitution was destroyed by the Jeffersonians. John Marshall fought a valiant, but losing, rear guard action.

Schmidhauser's recent book, "The Supreme Court as Final Arbiter in Federal-State Relations 1789-1957," also attacks the conventional history, but he is concerned with establishing the legitimacy of the Supreme Court's power to arbitrate federal-state disputes. He demonstrates that the Court's role rests on no usurpation by John Marshall, but that it is precisely that envisioned by the framers and the members of the ratifying convention.[18]

The Convention was aware of the problem of conflicts between the nation and the states and the need of an arbiter. Hamilton proposed that "all laws of the particular States contrary to the Constitution or laws of the United States . . . be utterly void; and the better to prevent such laws being passed, the Governour or president of each state shall be appointed by the General Government and shall have a negative upon the laws about to be passed in the state of which he is Governour or President."[19] Another proposal was that of Edmund Randolph providing that *Congress* be empowered to negative all laws of the states contravening, in the opinion of Congress, the articles of

[15] See 1 and 2 Crosskey, Politics and The Constitution, chs. 14-16, 27 (1953).
[16] See 1 *id.* at 675; 2 *id.* at 1164.
[17] See 1 *id.*, ch. 22.
[18] See Schmidhauser, The Supreme Court as Final Arbiter in Federal-State Relations 1789-1957, at 11 (1958).
[19] *Ibid.*

union. This proposal, constantly put forward, was finally defeated due to the objections of the smaller states.

The solution finally adopted was the supremacy clause, which made the Constitution *judicially* enforceable law. The members of the convention understood that the federal judges were to be umpires between states and between the states and the United States, although the more nationalistic members of the Convention preferred a congressional negative on the laws of the states to the bitter end. They argued that the firmness of judges was not sufficient; that it would be better to prevent the passage of a state law than to declare it void after it was passed; that a state which would violate the Constitution would not be very ready to obey a judicial decree in favor of the Union.

Thus Schmidhauser concludes:

> The Philadelphia Convention record indicates unmistakably that the new Supreme Court had been clearly designated the final judicial arbiter in federal-state relations and that it was primarily the states' righters in the Convention who brought this to pass. The nationalists had not opposed the creation of the judicial arbiter but had felt strongly that a national judiciary would not, by itself, be strong enough to cope with state encroachments on national authority.[20]

What did the founding fathers intend?

The old version is that John Marshall discovered the need for an arbiter of federal-state relations and with statesmanship accepted that role as a proper function of the Supreme Court. The Crosskey version is that the founding fathers intended Congress to occupy that role and it was taken from it by states' rights politicians in the next hundred years. The Schmidhauser version is that the founders clearly saw the need for an arbiter of federal-state relations and consciously compromised on a judicial arbiter, the Supreme Court, rather than the legislative arbiter, Congress, preferred by the nationalist members of the convention.

III. AN EARLY STATES' RIGHT CRISIS

Be that as it may, the Supreme Court has been the arbiter between the state and the nation for a century and a half and has decided many questions of most important policy, framed in

[20] *Id.* at 13.

terms of constitutional authority—national power, individual liberty, and states' rights. There is no longer any real question of the function of the court—rather the question is: "How well has the Court used the power?" Has it used it to hobble seriously all branches of the national government as Crosskey contends, or has it used it to destroy the states?

The disputes began early. Could the states be sued in federal court? Financial disaster threatened the states if suit could be maintained on state bonds or to recover confiscated property.[21] They claimed sovereign immunity. The Court allowed the action in the *Chisholm Case,*[22] but the eleventh amendment reversed the result. The question of the federal alien and sedition laws led to the next crisis. Their constitutionality never came before the Court, but John Breckinridge proposed Jefferson's resolutions in the Kentucky legislature, asserting the invalidity of the acts and the right of the Commonwealth to veto a law of Congress as unconstitutional.[23] It should be noted, however, that the Kentucky resolutions merely proposed another check on Congress; they did not directly question the powers of the judicial arbiter.

Twenty five years later, however, states' rights was the banner under which Kentuckians fought the Supreme Court. During the years from 1819 to 1824 Kentucky officials, politicians, and newspapers were attacking the Supreme Court almost constantly. The basis was no abstract matter of state pride. Kentuckians had four very real economic grievances:[24]

(1) The federal courts had extended admiralty jurisdiction to Kentucky's inland waters.
(2) They had sustained the rights of the obnoxious Bank of the United States.
(3) They had invalidated Kentucky laws for the protection of debtors.
(4) They had invalidated Kentucky's land patent legislation.

First, the Kentucky legislation recognized the rights of those squatters who were called felicitously "the occupying claimants." When the Supreme Court, only three of the seven judges sitting, handed down *Green v. Biddle*[25] in 1823 invalidating Kentucky's

21 1 Warren, The Supreme Court in United States History 99 (rev. ed. 1928).
22 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
23 1 Warren, *op. cit. supra* note 21, at 259.
24 *Id.* at 633-34.
25 21 U.S. (8 Wheat.) 1 (1823).

Occupying Claimant Law the Kentucky legislature protested; the Governor said that the decision degraded the sovereignty of the State; and the Kentucky Court of Appeals refused to recognize it on the ground that a decision by only three judges of the Supreme Court was not binding.[26]

Virginia, which for years had protested strenuously against the Supreme Court's assertions of jurisdiction, was strangely unmoved by the rights of Kentucky occupying claimants against the interests of non-occupants (Virginians usually).[27] Henry Clay wrote that the decision ". . . cripples the sovereign power of the state of Kentucky more than any other measure ever affected the independence of any State in the Union; and not a Virginian voice is heard against the decision."[28]

The states' rights fury of Kentuckians over the land cases was as nothing compared with their anger at the decision of the Court invalidating the debt moratorium (stay-laws) and other debtors' relief legislation of 1821. The legislature adopted resolutions urging that the state statutes should be enforced regardless of the opinion of the Court. When the Court of Appeals followed the Supreme Court decisions, the legislature abolished it and established the "New Court" to which the Governor appointed men known to be supporters of the debtor-relief laws. Perhaps the climax of the revolt was a resolution of the Kentucky legislature asking ". . . whether, in the opinion of the Executive, it may be advisable to call forth the *physical power* of the State to resist the execution of the decisions of the Court . . ."[29] (Emphasis added.)

A great lesson we can learn from this early excitement in Kentucky over states' rights and the Supreme Court. The main reason for the excitement was that Kentuckians owed everybody on the Atlantic seaboard and the Supreme Court said we should pay. In Virginia, on the other hand, interest in states' rights went out the door when it was a matter of recovering property or collecting money from Kentuckians.

Much of our national history could be described in terms of

[26] Bodley v. Gaither, 19 Ky. (3 T.B.Mon.) 57 (1825). See 1 Warren, *op cit. supra* note 21, at 641.
[27] 1 Warren, *op. cit, supra* note 21, at 642.
[28] *Ibid.*
[29] *Id.* at 650.

"states' rights."[30] The Federalist legislatures of New England denounced the Kentucky and Virginia resolutions in 1798, and then in 1814 at the Hartford convention adopted resolutions of similar import. Virginia espoused states' rights for decades, but failed to support Kentucky's cry of states' rights to protect its debtors in 1825. When South Carolina in 1832 adopted a nullification ordinance, Kentucky in turn adopted resolutions denying that South Carolina or any other state could defeat the will of the majority as expressed in a law of Congress.

That the struggle over slavery led the southern states to espouse states' rights even to the extent of secession is well-known. But the anti-slavery forces also resorted to states' rights dialectic. As Schlesinger reminds us:

> In Wisconsin the state Supreme Court held the [Fugitive Slave] Law to be "unconstitutional and void"; and when the federal Supreme Court reversed the decision, the state legislature resolved in 1859, on the verge of the war to preserve the Union, that the several states which had formed the federal compact, being "sovereign and independent" had "the unquestionable right to judge of its infractions" and to resort to "positive defiance" of all unauthorized acts of the general government."[31]

Says Schlesinger,

> The victory of the federal government in the Civil War forever settled the theory of states rights so far as nullification and secession were concerned. . . . Since the Civil War the federal government has progressed with unprecedented rapidity toward a consolidation of authority. . . . Protests against this centralizing tendency have been expressed again and again; but in these latter years the remonstrances have not usually been uttered by the *states* in their organic capacities, nor have the protests been designed to accomplish anything more than a revulsion of public sentiment from the current drift of events. In this sense, stripped of its disunionist tendencies, the states rights doctrine will doubtless always be with us.[32] (Emphasis added.)

But that was written 25 years ago!

[30] Schlesinger, New Viewpoints in American History 220 (1922).
[31] *Id.* at 231.
[32] *Id.* at 233-34.

IV. THE ORIGIN OF THE PRESENT FUROR: THE SEGREGATION CASES

Having in mind the well established function of the Supreme Court as final arbiter of the distribution of powers in our federal system, and with the perspective that history gives to the states' right position, let us turn abruptly to the present day.

The opening gun in the present day campaign to save states' rights was the "Declaration of Constitutional Principles" put out in March, 1956, by nineteen southern senators and seventy-seven southern representatives in the Congress of the United States.[33] This so-called "Southern Manifesto"[34] attacked the Supreme Court for its decision on the Segregation cases as "a clear abuse of judicial power." It charged the Supreme Court with undertaking "to legislate" and "to encroach upon the reserved rights of the States," and the justices with substituting "their personal political and social ideas for the established law of the land."

That was a relatively moderate attack. The Georgia legislature has requested Georgia's representatives in Congress to introduce a bill to *impeach* the justices, charging that the Court had disregarded precedents, arbitrarily repudiated the legislative history of the fourteenth amendment and had based its decision upon psychological conclusions rather than upon legal authority.[35] Louisiana's claim of exclusive police power over the public schools we noticed at the outset. These are only samples.

Is this criticism valid? How does it happen that the Supreme Court decrees that provision of "separate but equal" schools for Negroes is forbidden to the states? Here we are faced with a claim of individual liberty as against states' rights and a recognition of that liberty by the Supreme Court of the nation. What is the authority for this kind of exercise of power by the Supreme Court?

We begin with the Bill of Rights of the federal constitution. Except for the first amendment, it is written in general terms which could literally be applied against the states. The fifth amendment, for instance, says: "No person . . . shall be . . . deprived of life, liberty or property without due process of law. . . ."

It was arguable that the fifth amendment prohibited any *state*

[33] 102 Cong. Rec. 3948, 4004 (1956).
[34] Reported in 1 Race Rel. L. Rep. 435 (1956).
[35] 2 Race Rel. L. Rep. 485 (1957).

or federal official from taking liberty without due process, but in *Barron v Mayor of Baltimore*[36] the Supreme Court decided that the Bill of Rights was intended to protect the citizen against *Congress* and the *federal* government only. As far as the Constitution of the United States was concerned, a *state* had the right to take all the property it chose, and to deprive its citizens of life or liberty as it pleased, except as the state constitutions forbade.

Following the War Between the States, however, the fourteenth amendment was adopted (1868) stating 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, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law. [Emphasis added.]

What was this amendment intended to do? Did it constitute the Court "a perpetual censor upon all legislation of the states . . . with authority to nullify such as it did not approve as consistent with (civil) rights?"[37] In the *Slaughter House Cases* five judges said that since such a construction would "fetter and degrade the state governments" and "radically change[s] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people . . .", it could not be followed "in the absence of languagge which expresses such a purpose too clearly to admit of doubt."[38]

The four dissenting judges were clear in *their* minds. Said Mr. Justice Bradley:

> The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.[39]

Judge Swayne added:

> These amendments are all consequences of the late civil war. The prejudices and apprehension as to the central

[36] 32 U.S. (7 Pet.) 243 (1833).
[37] The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 78 (1873).
[38] *Id.* at 78.
[39] *Id.* at 123.

> government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members. . . . The language employed is unqualified in its scope. . . . This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. . . .
>
> It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted. . . . The construction adopted by the majority of my brethren is, in my judgment, much too narrow. It defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted. To the extent of that limitation it turns, as it were, what was meant for bread into a stone. By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment. Against the former this court has been called upon more than once to interpose. Authority of the same amplitude was intended to be conferred as to the latter.[40]

That the Supreme Court should have power to safeguard individual liberty against the states was clear to Swayne. He said further:

> The power is beneficent in its nature, and cannot be abused. It is such as should exist in every well-ordered system of polity. Where could it be more appropriately lodged than in the hands to which it is confided? It is necessary to enable the government of the nation to secure to everyone within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reasons and justice and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority any government claiming to be national is glaringly defective.[41]

But the decision, you will remember, was 5-4 against this construction of the privilege and immunities clause.

That was merely the beginning. What the Supreme Court refused to do in the name of national privileges and immunities, it soon began to do in the name of liberty and property, and from

[40] *Id.* at 128.
[41] *Id.* at 129.

1890-1936 the Supreme Court invalidated a multitude of state tax and regulatory statutes which it regarded as attempts to take individual liberty or property (especially property) without due process of law. Among the statutes which fell were state statutes setting minimum wages and hours of labor for women, and other state regulations of business for health and welfare purposes. Indeed, that the business community up to 1936 at least regarded the Supreme Court as a principal bulwark against "socialist" legislation and gloried in the role of the Supreme Court as perpetual censor of us all.

When it came to liberty of the person, the Supreme Court was for a long time more reluctant to interfere with state actions. It held that due process in state courts did not require indictment by grand jury[42] nor did it forbid self-incrimination[43] or even a certain amount of double jeopardy.[44] But it gradually made a few excursions into the task of supervising state criminal procedures and invalidated a conviction dominated by a mob,[45] convictions in capital cases without counsel (the famous Scottsboro case),[46] and today its exercise of this jurisdiction has become commonplace.

Now to return to our main theme. What of state legislation and executive practices discriminating against Negroes? In 1880 the first case on equal protection—under a West Virginia statute limiting jury service to white male persons—reached the Court. The statute was held invalid.[47] However, in the *Civil Rights Cases*[48] three years later the Court distinguished between "state action" and "private action" and left the door open for much discrimination to be enforced by "private action" of quasi-public corporations such as railroads, etc.

But private discrimination has loopholes and in 1890 the Louisiana legislature passed a statute *requiring* railroads to furnish "equal but separate accommodations for the white and colored races." One Plessy refused to sit in the colored coach because he was 7/8 Caucasian and 1/8 African and the mixture of

[42] Hurtado v. California, 110 U.S. 516 (1884).
[43] Twining v. New Jersey, 211 U.S. 78 (1908).
[44] Palko v. Connecticut, 302 U.S. 319 (1937).
[45] Moore v. Dempsey, 261 U.S. 86 (1923).
[46] Powell v. Alabama, 287 U.S. 45 (1932).
[47] Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1879).
[48] 109 U.S. 3 (1883).

colored blood was not discernible in him and he claimed he was entitled to every right, privilege and immunity secured to citizens of the United States of the white race. (Mind you his primary contention was that he was a white man, not that colored persons could not be segregated or discriminated against.) Arrested and jailed, he sought a writ of prohibition against the judge of the criminal district court on the ground that the act was unconstitutional.

Denying his claim the Supreme Court 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 . . . In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their *comfort,* and the preservation of the public *peace* and *good order.*[49] [Emphasis added.]

Then some 19th century psychology:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[50]

Then to some 19th century sociology:

> Legislation is powerless to eradicate racial instincts or abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . .[51]

The lone dissenter on the Court was old John Harlan of Kentucky. The fourteenth amendment, he proclaimed,

> removed the race line from our governmental systems. . . . There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law

[49] Plessy v. Ferguson, 163 U.S. 537, 550 (1896).
[50] *Id.* at 551.
[51] *Ibid.*

> regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of of the land are involved.[52]

What of the majority's psychology? Said Harlan,

> It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty . . . The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor to assert the contrary. . . . The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, or atone for the wrong this day done.[53]

What of the majority's sociology? Said Harlan,

> 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. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.[54]

Thus, in a law suit brought by an octoroon who really wanted to be declared legally white, did the "separate but equal" formula come to American constitutional law, over the ringing protest of John Harlan.

Until 1950 only six cases involving the separate but equal formula in the field of education had wound their way up to the Supreme Court. In none of them was the separate but equal doctrine directly challenged. For instance, in *Gong Lum v. Rice*,[55] the plaintiff, a Louisiana Chinese, was asserting he was

[52] *Id.* at 555, 559.
[53] *Id.* at 556, 562.
[54] *Id.* at 560.
[55] 275 U.S. 78 (1927).

not colored. In the *Gaines* case,[56] a Missouri Negro was asserting that tuition payments to an out-of-state school would not provide him with equal facilities.

It was not until the close of World War II that a concerted attempt was made to obtain a ruling from the Supreme Court on the constitutionality of segregation itself. It was asserted that the "separate but equal" doctrine should be abolished first, because the Court should face the historical truth that tangible separate facilities had been and inevitably would be unequal in fact, or, second, that segregation was a denial of equal protection in *principle, i.e.,* that there was no reasonable basis for classifying people into black and white for purposes of education. Three cases involving college students went to the Supreme Court in the late 40s. In each case, the Court found that the separate school afforded Negroes was not equal in fact—and ordered their admission to the so-called "white" schools. Since petitioners were entitled to relief even under the segregation doctrine, it was unnecessary for it to reach the question of the validity of the separate but equal formula.

In the last of these cases, *Sweatt v. Painter,*[57] the Court held that the hastily organized and separate law school of the Texas State University for Negroes was not equal to the University of Texas Law School. After comparing the tangible facilities, such as faculty, courses, and library, Chief Justice Vinson went on to say,

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education

[56] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
[57] 339 U.S. 629 (1950).

> offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.[58]

This bold, honest observation by Fred Vinson of Louisa, Kentucky, has in it the seeds of the *Brown* opinion four years later. For its candor it deserves to be set alongside the dissenting opinion of John Harlan in *Plessy v. Ferguson.*

The Supreme Court was finally brought to bay in *Brown v. Board of Education.*[59] Unlike all previous cases, there was no question of inequality of facilities. The opinion of the three-judge District Court of Kansas stated that the primary contention was that "segregation in and of itself without more violates . . . the Fourteenth Amendment."[60] The District Court found that segregation in and of itself created a sense of inferiority in Negro children, affected their motivation to learn and had a tendency to retard their educational and mental development. It held that it was bound by the dicta in *Plessy* and *Lum,* although it conceded that *McLaurin* and *Sweatt* seemed contrary on principle:

> If the denial of the right to commingle with the majority group in higher institutions of learning as in the Sweatt case and gain the educational advantages resulting therefrom, is lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades.[61]

When the *Brown* decision was appealed to the Supreme Court it proceeded most gingerly. It consolidated the case with three others and set arguments for October 13, 1952, and then postponed them. Then on December 9-10, 1952, it heard arguments for ten hours. (In most cases argument is limited to one hour on a side.) Then on June 8, 1953, the Court propounded five issues to the parties and set the case for reargument on Oct. 12, 1953. The issues concerned the intent of the framers, Congress, and people in regard to the fourteenth amendment. Was it intended to abolish school segregation, or to authorize Congress or the Court to outlaw it in the future? Second, if a decree were granted, should it call for prompt or gradual desegregation?

[58] *Id.* at 634.
[59] 347 U.S. 483 (1954).
[60] 98 F. Supp. 797, 798 (D. Kan. 1951).
[61] *Id.* at 800.

The Court heard eleven hours of reargument on December 8-9, 1953, and finally on May 17, 1954, handed down its decision. The opinion was both brief and unanimous—quite remarkable as Supreme Court opinions go. What does it say?

(1) Looking first for the "legislative intent" of 80 years ago as to segregation, the Court found that the amendment's history was inconclusive because there were all sorts of views as to what was being done and because the state of public education was so primitive at that time no issue was made of it.

(2) Second, turning to the precedents, the Court pointed out that there were really no controlling Supreme Court cases since *Plessy* involved transportation and the six school cases that followed had assumed but not decided the constitutional issue now raised.

(3) Third, the Court indicated that, in any event, in construing the amendment, it could not be bound by the vision of 1878 or even of 1896, but must consider segregation in public education in the light of its full development and present place in American life as the most important function of state and local government.

(4) Then the Court gets to the heart of the case:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities. *We believe that it does.*[62] [Emphasis added.]

Having decided the case, the Court then alluded to the effect of segregation on the educational development of children as found by the district court in Kansas, and remarked, "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,* this finding is amply supported by modern authority," and cited, in footnote 11, a half-dozen social science books and articles, including Myrdal.

Is the decision then based on a "foreign sociology" or modern social psychology rather than law? I think I would rather agree with Edmund Cahn that, at most, footnote 11 was a sop thrown to the social scientists to indicate that the Court had not failed

[62] 347 U.S. at 493.

to read their labored efforts to prove the obvious. As he remarked in the 1954 Annual Survey of American Law,

> One speaks in terms of the most familiar and universally accepted standards of right and wrong when one remarks (1) that racial segregation under government auspices inevitably inflicts humiliation, and (2) that official humiliation of innocent, law-abiding citizens is psychologically injurious and morally evil. Mr. Justice Harlan and many other Americans with responsive consciences recognized these simple, elementary propositions before, during, and after the rise of "separate but equal." For at least twenty years, hardly any cultivated person has questioned that segregation is cruel to Negro school children. The cruelty is obvious and evident. Fortunately, it is so very obvious that the Justices of the Supreme Court could see it and act on it even after reading the labored attempts by plaintiffs' experts to demonstrate it "scientifically".[63]

Without endorsing all of Mr. Cahn's strictures on morality and sensitivity, I am sure he is right when he suggests that "modern social psychology" and the "international relations aspect" played no real part in the Court's decision of the *Brown* case.

There can be many miles and many years between the making of the decision and its enforcement. The Court was not insensible to this, and in handing down its opinion, it called for further argument on timing and again heard arguments on April 11-14, 1955, on this point. On May 31, 1955, it remanded the cases to the district courts for enforcement "with all deliberate speed"—a lovely phrase which has been since traced back to Francis Thompson's "Hound of Heaven":

> Still with unhurrying chase,
> And unperturbed pace,
> Deliberate speed, majestic instancy,
> Came on the following Feet,
> And a Voice above their beat—
> "Naught shelters thee, who wilt not shelter Me."

Unsegregated education may still be a century away in some school districts in the South. Faubus is still at large, and some states may decide to abolish public schools for a time. But, as John Frank put it so nicely in the "Marble Palace,"

[63] Cahn, "Jurisprudence", 1954 Ann. Surv. Am. L. 809, 818 (1955).

> Those persons, if such there be, who hope the problem may be solved by the simple expedient of persuading the Constitution either to lie down or to go away are doomed to disappointment.[64]

In the Segregation cases, the doctrine of judicial review thrust a constitutional issue, unsought, upon the Court. Using the conventional tools of constitutional interpretation (intent of the framers, precedents and application of the words of the Constitution to a present factual situation developed with every technique at our command), the Court reached a legitimate and well-nigh inevitable conclusion. Some may disagree with the result; more may regret it. But the decision is no startling departure from precedent, no abandonment of law for social psychology, no evidence of Communist control of the Court, and no revolutionary overthrow of states' rights.

V. THE PASADENA RESOLUTION

But enough of the Segregation cases! I have sketched for you the reception given the decision three years ago in the "Southern Manifesto," and in the resolutions of southern legislatures. There have been countless speeches, pamphlets and books since.

I am far more concerned with the recent spread of the attack on the Court. The Report and Resolution of the State Chief Justices at Pasadena last August, for example, charged that the Supreme Court has pressed the rapid extension of federal powers. It urged the Court to test the division of powers *solely* by the Constitution. It charged that the Court had tended to adopt the role of policy-maker without proper judicial restraint and had assumed powers not contemplated by the framers of the Constitution nor by the draftsmen of the fourteenth amendment. And finally it said: "It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast.[65]

When we turn from the sweeping charges of the summary to the specifications, we find a curious hodge-podge. The Segregation cases are conspicuous by their absence. The indictment is

[64] Frank, Marble Palace 284 (1958).
[65] Report; *supra* note 5, at 4.

based partly on applications of the doctrine of pre-emption and partly on the use of the fourteenth amendment to reverse the state action.

The preemption cases need not detain us. There Congress acted and the Court read its legislation as invalidating inconsistent state laws—chiefly in the field of labor relations and national security! It is Congress, not the Court, which passed the legislation, and if Congress wishes to preserve the state legislation it may quickly say so.[66]

The invalidation of state legislation or state administrative action and the reversal of convictions in the state criminal courts because of infringements on individual liberties are more lasting, although even here state legislation may quickly correct the problem. But let us look at a sample case.

Since some of the civil liberties cases criticized in the Report will undoubtedly be discussed by other members of the seminar, I will choose the *Griffin* case,[67] a criminal procedure case upon which the Report lavishes more space than upon any other. Griffin, an indigent convicted of armed robbery in an Illinois court, moved that he be furnished a transcript without cost on which to obtain an appellate review. The motion having been denied, he sought reversal of his conviction on the ground that he was denied an effective appeal because, being an indigent, he could not afford the expensive transcript required. The state contended in effect that an indigent did not have to be given an appeal as effective as that of one who could afford to pay. The Supreme Court held simply that failure of the state to afford an indigent convict the appeal available to the solvent convict denied equal protection of the laws.

To the Kentucky lawyer this hardly seems an unreasonable requirement. We have for some years had a statute, Ky. Rev. Stat. Sec. 28.460(2) (a), which says:

> If the taking or the transcript [in criminal cases] is requested upon the motion of the defendant, he shall pay for same, if in the opinion of the court, he is able to do so. If it appears that the defendant is not able to pay for the tak-

[66] *Cf.* Lockhart, "A Response to the Conference of State Chief Justices," 107 U. Pa. L. Rev. 802 (1959).

[67] Griffin v. Illinois, 351 U.S. 12 (1955).

> ing or for the transcript, the court shall direct the same to be paid by the county.

The Report of the Chief Justices admits that "[p]robably no one would dispute the proposition that the poor man should not be deprived of the opportunity for a meritorious appeal simply because of his poverty."[68] But it is concerned about the "practical problems"—it will mean a vast increase in criminal appeals. It would be possible, of course, to provide for a screening system to eliminate non-meritorious appeals. But, says the Conference, "It seems very doubtful that the legislatures generally would be willing to curtail the *absolute right of appeal* in criminal cases which now exists in many jurisdictions."[69] Exists, that is, for those who are able to afford the cost of the transcript.

I cannot leave the *Griffin* case without reference to one curious fact. In preparation for the Report, the Chief Justices commissioned five University of Chicago law professors to make an extensive survey of recent decisions of the Supreme Court dealing with federal-state relations. The Report purports to be based on their research. Professor Francis A. Allen did the work on the state criminal cases. Dealing with a number of recent improvements in criminal procedure in Illinois, including the requirement that a transcript be furnished indigents, Professor Allen says: "It is perfectly clear that all these measures were the direct or indirect product of judicial supervision of Illinois criminal procedures by the United States Supreme Court. It may also be asserted that these alterations in the existing law were *necessary* and *desirable.*"[70] Has the Court destroyed the states in the process? Says Allen, "There appears . . . little basis for the view, sometimes expressed, that the court has proceeded in the criminal cases oblivious to the claim of state power and state policy. The contrary is more nearly accurate . . . the essentials of federalism in the criminal area remain intact."[71] One wonders if the Chief Justices read the reports of their own researchers.

All the Court was doing in the *Griffin* case was to insist that the State of Illinois adopt criminal procedures that do not "shock

[68] Report, *supra* note 5, at 4, col. 1.
[69] *Id.* at 4, col. 2.
[70] 8 U. Chi. L. Rec. 3, 19 (1958).
[71] *Id.* at 17, 19.

the conscience"[72] or "violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[73] I, for one, cannot regret this exercise of jurisdiction.

If this is what the Conference report means when it attacks the Court's lack of self restraint, and its exercise of essentially legislative powers instead of strictly judicial powers; if it means to say that we must preserve the right of Illinois to deny the fair appeal which Kentucky has long since provided, I am on the side of the Court. Isn't it here, if anywhere, that the Court really has its greatest function? The Illinois *legislature* will not act—the convicts are not their constituents and they have no lobby. If there is any unfairness in Illinois criminal procedure, improvement by *legislative* action is most uncertain. Surely the Court may, in the exercise of its limited policy making role, determine minimum standards of criminal procedure in the United States at the suit of an individual.

Doesn't this attack by the Chief Justices on the Supreme Court for lack of self-restraint and for judicial legislation have a familiar ring? Isn't the statement that the division of powers between state and nation should be tested *solely* by the provisions of the Constitution intended to suggest that the Court has been testing them by something else—like foreign sociology or social psychology?

VI. THE RESOLUTIONS OF THE HOUSE OF DELEGATES

At its February meeting the House of Delegates of the American Bar Association also adopted a set of resolutions, submitted by its special Committee on Communist Tactics, Strategy and Objectives. These resolutions disapproved proposals to limit the jurisdiction of the Supreme Court but proposed legislation to correct defects in the security laws revealed by decisions of the Supreme Court in such cases as *Nelson, Watkins, Yates,* etc. President Ross Malone has since written an article to prove that the resolutions show that "the Bar . . . [is] in the foremost ranks of the supporters of the Supreme Court."[74] Unfortunately, the

[72] Rochin v. California, 342 U.S. 165, 172 (1952).
[73] Palko v. Connecticut, 302 U.S. 319, 328 (1937).
[74] Malone, "The Communist Resolutions: What the House of Delegates Really Did," 45 A.B.A.J. 343, 347 (1959).

lengthy report of the committee was not so discreet in its language. Neither were the comments from the floor. Mr. Loyd Wright is quoted as saying, "Isn't it time that we ask the Court to read the law and interpret the law and quit writing ideological opinions?"[75] When Orson S. Marden moved that action be deferred until the August meeting, General Riter of Utah invoked an article by Arthur Krock stating that it was the duty of the bar to be critical of the judiciary, not excluding the Supreme Court of the United States. "Do you want to vote for this motion [to postpone] in the face of Arthur Krock's statement?" he asked.[76]

States' rights had disappeared as the issue at Chicago. The problem now is the paralysis of our internal security—the Supreme Court is destroying the nation, not the states—and Congress must come to the rescue and save us from construction and interpretation centering around technicalities emanating from our judicial process.

VII. CONCLUSION

Two years ago Senator Jenner introduced a bill to limit the jurisdiction of the Supreme Court in certain cases, by denying it power to review any case involving:

(1) Any congressional committee activity;
(2) Any federal or state security or subversive program;
(3) Any state school board rule concerning subversive activities by teachers;
(4) Any state bar proceedings.

The mills of Congress ground slowly through the process of amendment and substitution to the eventual defeat of a statute directed at the preemption doctrine by a Senate vote of 41-40. A new bill is on its way through the House at the present time, limited to pre-emption. If it is successful, it will set a most unfortunate precedent of Congressional dictation to the Supreme Court. Once they taste blood, will the critics of the Court be so easily satisfied?

What we are facing today is a strange coalition of states' rights segregationists and left-over McCarthyites joined in an all-out attack on the Supreme Court. Once again the banner of states' rights has been lifted against the Court, but now it flys

[75] Proceedings of The House of Delegates, 45 A.B.A.J. 360, 406 (1959).
[76] *Id.* at 407.

alongside the Stars and Stripes. I think there are reasons to be concerned about this development.

Previous attacks on the Court have usually been the result of Supreme Court decisions which resolved questions between competing political and economic groups. The losers attacked the Court as a matter of course, but the winners just as enthusiastically defended it.

In the present battle, the Supreme Court is suffering from want of supporters. It has got itself into its present predicament by recognizing claims of liberty and equal protection from some litigants who are at least powerless, and sometimes disreputable. How many will rush to the support of Negro school children—much less the procedural rights of armed robbers and subversives?

Previous attacks have often been little more than routine grumblings by disappointed litigants. The present attackers seem to want to bring the Court to its knees and to force it into a more passive role—especially where claims of individual freedom are made. The attack moves from criticism of the results in particular decisions to personal attacks on the competence and loyalty of its members to an effort to discredit the very institution itself. In general, it makes the "court-packing" plan of 1937 seem like a subtle and delicate hint.

Before we go overboard in an effort to destroy the Court in the name of states' rights and national security, let us remember three things:

1. The Supreme Court has firm foundations in our national history and has served us well. For years it has exercised its delayed and reflective judgment and our nation has prospered under it. We need this Court where claims are made in the name of right, justice, and wisdom, not political power. Surely the Court is exercising its most important function most properly of all when it gives an ear to a claim of individual liberty.

2. States' rights has been a shabby cloak for a variety of unsupportable causes over the years. It has served local politicans, New England traders, Southern slave-owners, exploiters of child labor, and over-zealous prosecutors and police in turn. It seldom involves dispassionate, disinterested concern for the proper structure of the Union.

3. Courts, and least of all the Supreme Court, are not above criticism—especially, as Judge Hand once said, by those who take the trouble to understand. But this year, I think, the Court needs support more than it needs criticism. If you criticize the Court this year, your words may be turned to aid a position upon which you may not wish to take your stand.