Notre Dame Law Review

Volume 57 | Issue 4 Article 1

1-1-1982

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As social changes with regard to race relations have occurred in the United States, legal changes have preceded or followed, each to some extent influencing the other. But, of course, more than law has affected how race relations have developed, just as more than race relations has had to be taken into account in formulating legal doctrines. Nevertheless, it is of some interest to isolate some of the principal lines of the legal development of civil rights and observe their relationship, or non-relationship, to underlying social reality. To perform the task comprehensively would require an encyclopedic inquiry into American history and law. But even a survey into a few areas provides interesting insights.

I shall, therefore, examine four constitutional or legal lines of growth, two of them historical and two contemporary. They are the evolution of the law of state action from post-Reconstruction to the late 1960's when in demonstration cases it reached a plateau, the development from *Plessy v. Ferguson*'s[1] separate-but-equal doctrine to *Brown v. Board of Education*,[2] the present day, unfinished mixed statutory-constitutional struggle over discriminatory effect versus discriminatory intent and the debate over affirmative action.

## I. The Development of the "State Action" Doctrine

The original civil rights law of the United States was the Thirteenth Amendment which outlaws slavery, the Fourteenth Amendment, which so far as relevant to this discussion prohibits states from denying due process and equal protection of the laws, and the Fifteenth Amendment which prohibits racial discrimination in voting. The early civil rights statutes attempted to secure equality in civil, commercial, and property relationships, in the criminal justice sys-

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1 163 U.S. 537 (1896).

2 347 U.S. 483 (1954).

tem and against certain categories of violence.[3]

This complex of statutes and amendments gave rise to the "state action" issue, which was posed by language in the Fourteenth Amendment stating that:

> No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[4]

State action received its first significant treatment by the Supreme Court of the United States in the *Civil Rights Cases*[5] involving the Civil Rights Act of 1875 which attempted to assure access to various public accommodations without regard to race.[6] The seven consolidated cases involved blacks who were denied admission to a hotel, theaters, an opera house and a railroad. The Supreme Court ruled the legislation unconstitutional because it prohibited discrimination by private persons and was not limited to state action. The Court ruled that Congress was without power to enforce against private discrimination an amendment which spoke in terms of "no state shall." The Court also rejected the contention that segregation was a vestige of slavery and that, therefore, the legislation was authorized by the Thirteenth Amendment, which operates against private conduct.

Justice Bradley's opinion also distinguished between the exercise of power under the Fourteenth Amendment and congressional authority under the Commerce Clause which, said Bradley, gives Congress direct power of legislation over commerce. The Court made no effort to consider whether the 1875 Civil Rights Act might be sustained on that basis. In any event, the state of Commerce Clause jurisprudence in 1883 was such that this claim may not have prevailed, except with regard to rail travel, with which one of the cases dealt.

Just as the state action concept invalidated the 1875 public accommodations act, it also debilitated other civil rights legislation of the same period. Some of the Reconstruction statutes themselves required proof of state action. Section 242 of Title 18 of the United States Code makes it a crime to deprive a person of rights "under

3 For a survey of the early interpretation of reconstruction civil rights legislation, *see* M. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS (1947).

4 U. S. CONST. amend. XIV, § 1 (emphasis added).

5 109 U.S. 3 (1883).

6 *See id.* at 9.

color of any. . . statute . . . ."[7] Legislation forbidding inequality in the right to own property and make contracts remained largely unenforced against private discrimination until 1968 when it was held, in *Jones v. Mayer Co.*,[8] to be applicable against private persons as a valid enforcement of the Thirteenth Amendment. Until then, it was widely thought that Congress could forbid only discriminatory state action, not private conduct. Efforts to enforce voting rights also were hobbled by the state action limitation. *Grovey v. Townsend*[9] held that the exclusion of blacks from the Democratic party of Texas was no violation of the Fourteenth and Fifteenth Amendments because the party acted privately and not pursuant to state law.

Thus, as a matter of constitutional and statutory interpretation, the state action doctrine largely impeded federal enforcement of civil rights. With slight exception, the national government could not compel individuals to cease discriminating except when they somehow acted for the state. Despite what could be done against the widespread discrimination which constituted state action (and enforcement against this was usually lacking), privately inflicted discrimination was sufficient to make the lives of most black citizens irremediably second class. While in theory the states could act against discrimination, in fact they acted hardly at all.[10]

The state action doctrine developed not in terms of dispensing with the requirement that it be present, but rather by finding state action to exist in circumstances where, earlier, it had been deemed to be nonexistent. Two important milestones on the way to modern state action doctrine were *Marsh v. Alabama*[11] and *Shelley v. Kraemer*.[12] *Marsh* held that a privately owned company town could not, under the First Amendment, prosecute Jehovah's Witnesses for trespass for having entered into the town contrary to its prohibition. The "private" property was in a constitutional sense governmental. *Shelley* held that courts were forbidden by the Fourteenth Amendment to enforce restrictive covenants which prohibited a property owner from selling to blacks. Judicial enforcement of state-created private rights

7 18 U.S.C. § 242 (1976).

8 392 U.S. 409 (1968).

9 295 U.S. 45 (1935). The voting cases developed their own characterizations of state action. The cases which perhaps definitively set forth the doctrine in this area were Smith v. Allwright, 321 U.S. 649 (1944) and Terry v. Adams, 345 U.S. 461 (1953).

10 For early cases on state power to prohibit private discrimination, *see* Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945) and Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948).

11 326 U.S. 501 (1946).

12 334 U.S. 1 (1948).

was forbidden state action. These decisions suggested that, while the Fourteenth Amendment, in terms, is limited to action of the state, it could also be applied to certain private conduct which involved the state.

Other cases gently pushed the perimeter of the concept slightly outward.[13] But the state action concept entered its period of greatest challenge in the 1960's, the period of the sit-in demonstrations and freedom rides. Those who argued that the Fourteenth Amendment prohibited convicting blacks of trespass for sitting in at lunch counters from which they had been excluded because of race claimed that it was unconstitutional for the state to enforce an owner's racial preference. The ultimate assertion of these plaintiffs was that property does not consist of things or land but, rather, of relationships among persons with regard to things enforceable by the state. As a consequence, state enforcement of a private property owner's racial choice constituted state action. The real issue was whether that aspect of property which constituted exclusion of blacks was to be so highly valued that it deserved protection against blacks' claims to be free of discrimination. While virtually all the trespass convictions were reversed, this particular argument never prevailed. It was picked up in a few concurring opinions, but was resisted vigorously by those who favored convicting the demonstrators as well as by many who supported them.

In 1961, the first of the sit-in cases, *Garner v. Louisiana*[14] and companion cases, were reversed on the ground that there was no evidence that defendants had disturbed the peace. The state action question, that is, whether the arrest and conviction to enforce racial discrimination violated the equal protection clause, was not decided.[15] In 1963, the Court reversed a series of trespass convictions on the ground that in the communities where the cases arose city ordinances required racial segregation in public accommodations.[16] In two of those cases, one arising from New Orleans[17] and another from Dur-

13 *See* Cooper v. Aaron, 358 U.S. 1 (1958); Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957); Barrows v. Jackson, 346 U.S. 249 (1953); Terry v. Adams, 345 U.S. 461 (1953); American Communications Ass'n v. Doubs, 339 U.S. 382 (1950). All of these cases suggested or held that deeds which in some sense were private, in a constitutional sense, were or could be state action because of a close nexus between private and state conduct.

14 368 U.S. 157 (1961).

15 *See* 368 U.S. at 176 (Douglas, J., concurring).

16 Peterson v. City of Greenville, 373 U.S. 244 (1963); Gober v. City of Birmingham, 373 U.S. 374 (1963).

17 Lombard v. Louisiana, 373 U.S. 267 (1963).

ham, North Carolina,[18] there was no evidence in the record of such city ordinances. Nevertheless, in the former, the Court held that a pro-segregationist threat of the police chief amounted to the same thing. And in the latter, counsel had asserted that such an ordinance existed although there was no evidence of it in the record. The Court vacated for reconsideration in the light of cases where there had been such a showing.

In subsequent cases, the Supreme Court continued to finesse the issue of whether arrest and conviction to sustain a proprietor's racial segregation constituted state action. *Griffin v. Maryland*[19] held that although an amusement park was private, sufficient state action existed because the private guard who ordered Negroes to leave the premises was also a deputy sheriff. Thus, the order to leave came from a "state" not a private source. *Barr v. City of Columbia*[20] was decided on no evidence grounds. *Bouie v. City of Columbia*[21] held that a South Carolina trespass statute had been applied contrary to the Fourteenth Amendment because, under prior state decisions, trespass constituted only initial entry on premises after notice to stay off, not refusal to leave after having entered with permission. There was, therefore, an unconstitutionally retroactive interpretation of the law, which did not give fair warning. *Robinson v. Florida*[22] reversed another conviction because Florida Board of Health regulations requiring segregated toilets had the same effect as the segregation ordinances in the 1963 cases.[23]

Many other cases were vacated for reconsideration in the light of the preceding decisions. Throughout all of this, the Court steadfastly declined to face the bedrock Fourteenth Amendment state action issue. Finally, after all the demonstration convictions which could be decided on other grounds or on conventional state action grounds had been reversed, the only ones left were those which posed the basic question. *Bell v. Maryland*[24] was a sit-in case in which there was no insufficiency of evidence; the statute was not vague; there was no segregation ordinance or similar Board of Health regulation; and there were no unexpected departures in judicial interpretation. At the last moment, however, a *deus ex machina* appeared. The state of

18 Advent v. North Carolina, 373 U.S. 375 (1963).
19 378 U.S. 130 (1964).
20 *Id.* at 146.
21 *Id.* at 347.
22 *Id.* at 153.
23 *See* notes 16 to 18 *supra*.
24 378 U.S. 226 (1964).

Maryland, while the case was pending, adopted legislation prohibiting segregation in public accommodations. The Supreme Court, in an opinion by Justice Brennan, referred to the doctrine of abatement, which none of the parties had argued, briefed, or even suggested. That doctrine provides that if a criminal statute is repealed while the conviction is pending on appeal, the conviction should be vacated. Brennan asked whether the passage of antidiscrimination legislation in Maryland was not the equivalent of repeal of the trepass statute and sent the case back to the Maryland courts to consider that question.

In the meantime, the Civil Rights Act of 1964[25] was enacted by the Congress and signed by the President. It prohibited exclusion from public accommodations on the basis of race. In *Hamm v. City of Rock Hill*,[26] the Court held that the federal statute had the effect of abating the state convictions, because if the federal statute had been in effect at the time defendants went upon the property, they would have been committing no crime. With the passage of the Civil Rights Act, consideration of the hardcore state action issue came to an end. While state action questions continue to arise, none probe so deeply the question of the relation between state and the individual.

The state action doctrine addressed the extent to which the national government could control individual discrimination by attributing to it state-like qualities. A classical view held that without overt formal state involvement, such conduct is private and immune from constitutional prohibition. As time went on, conduct which once would have been held private was in some cases characterized as that of the state. But the courts declined to give constitutional significance to the ultimate, underlying state support for all assertions of rights which exist in any society other than an anarchy. And Congress, joining in evasion of the issue of how far its authority to prohibit private discrimination extended under the Fourteenth Amendment, rested the public accommodation portion of the Civil Rights Act of 1964 at least in part on the Commerce Clause.[27]

Several factors which may have affected the evolution of this doctrine are worth noting. First, despite the North's triumph in the Civil War and assertion of national paramountcy over state's rights with regard to race, the momentum of racial prejudice and discrimi-

25 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a-2000n (1976)).

26 379 U.S. 306 (1964).

27 *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249-62 (1964).

nation remained strong. Although overt state involvement in discrimination could not be tolerated under the explicit language of the Fourteenth Amendment, the country obviously was not yet ready to legally disapprove the underlying, less conspicuous state complicity. The national government was tolerant of state involvement at all but the surface level and, in this toleration, allowed individuals to discriminate without governmental interference. In this tolerance, a classical liberalism coincided with an early view of federalism, both leading to the same result.[28] Bentham and James and John Stuart Mill had asserted that the highest degree of liberty would be achieved in states where there was the least amount of governmental interference with private choice. Similarly, early state action doctrine permitted private discrimination without governmental interference. But as society became more complex, John Mill himself and later T.H. Green recognized that in some situations, government inaction was a form of action itself. Private activity could stifle the freedom of the weak and state interference was necessary to assure greater personal freedom. This latter perception may be seen in developed state action doctrine, which provided a means of controlling discriminatory conduct.

As national hegemony over the states grew after the 1930's, the federalism concern abated. As a national policy concerning race began to turn against discrimination, tolerance of the individual's right to discriminate weighed less in the equation. But the factor of individual autonomy against the state continued to, and still does, weigh heavily. It may be that if state action doctrine only affected race, private action by now might all but be equated with state action. But the law requires a certain degree of consistency. If the underlying state involvement in protection of property were sufficient state action to invoke the Fourteenth Amendment's equal protection clause, other, perhaps undesirable, outcomes might be suggested for non-racial situations. For example, must an employer give a due process hearing to an employee before discharging him or her? Need a parent treat all children equally or be required to justify unequal treatment? May a householder invite to a barbeque all his neighbors except some who might be excluded arbitrarily, or perhaps because of race or religion? Answers to these questions have been suggested by Louis Henkin and Charles L. Black, Jr.[29] Basically, they have

28 On early liberalism *see*, J. GREENBERG, RACE RELATIONS AND AMERICAN LAW 48-49 (1959).

29 *See* Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81

proposed that the grave unacceptablity of racial discrimination and personal privacy be the delimiting factors. A householder or family member dealing with others in his family might invoke the countervailing consideration of privacy, but the owner of a public restaurant might not. But this would require breaking new ground, with perhaps unforeseen consequences, which did not have to be plowed. It was perhaps possible for demonstrators to win their cases on limited grounds.

As discrimination slowly eroded, the role of privacy never had to be put to the test because the reason for so doing disappeared. Between 1964 and 1968, a hundred years after adoption of Reconstruction legislation, public accommodations, employment, and housing all became covered by the civil rights legislation of the mid '60's, which prohibited private racial discrimination. Because the legislation was bottomed on the Commerce Clause as well as the Fourteenth Amendment, the state action issue did not have to be and was not addressed. Moreover, the Reconstruction Civil Rights Acts interpreted in *Jones v. Mayer Co.*[30] were for the first time held to cover private property and contractual relations. That legislation implemented the Thirteenth Amendment, which has no state action requirement. Therefore, while the state action issue continues to be litigated in cases of lesser consequence, no fundamental jurisprudential debate of the magnitude of that of the '60's continues.

## II. From "Separate But Equal" to "Integration"

Not long ago after the adoption of the Fourteenth Amendment, the Supreme Court in *Strauder v. West Virginia*,[31] using language which sounds quite modern, struck down a statute excluding blacks from juries on the ground that it imposed a brand of inferiority upon them. But the definitive 19th Century pronouncement on segregation was *Plessy v. Ferguson*[32] which became the bedrock of racial segregation until 1954. *Plessy* loomed so large that until *Brown v. Board of Education*[33] was decided, civil rights efforts were directed almost entirely to destroying *Plessy* or finding ways around it. Today *Plessy* is no more than a footnote in constitutional law textbooks. It is perhaps a curiosity that the only bright spot in *Plessy*, Justice Harlan's

HARV. L. REV. 69, 94-95 (1967); Henkin, Shelley v. Kraemer; *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

30 392 U.S. 409 (1968).

31 100 U.S. 303 (1880).

32 163 U.S. 537 (1896).

33 347 U.S. 483 (1954).

dissent stating that "our constitution is color blind,"[34] is today often cited by those who are opposed to affirmative action for blacks.

On the pages of the Supreme Court reports, the long road up from *Plessy* to *Brown* is one of legalistic formalism. It is written in terms of *stare decisis*, the technicalities of pleading, constitutional history, syllogistic jousting, *reductio ad absurdum* and other forensic techniques. But underneath it all, there was the substantive issue of race relations. Because *Plessy* is not read much anymore it is worth recalling the debate between the majority and dissenting opinions. The majority rejected the notion that segregation is a vestige of slavery and therefore prohibited by the Thirteenth Amendment. That proposition, it was said, runs the slavery argument into the ground. Justice Harlan, in dissent, retorted that the Thirteenth Amendment did not permit the withholding or deprivation of any right inhering in freedom and that the amendment struck down badges of slavery or servitude.

The majority took a look at the precedents and rejected the principle of *Strauder v. West Virginia*,[35] on the ground that it dealt with the political right to serve on juries, and not with the social right to ride in a non-segregated railroad coach. Justice Harlan, on the other hand, looked at the language of *Strauder* which condemned exclusion of blacks from juries as "practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to . . . race prejudice"[36] and viewed it as controlling.

The majority found support for railroad segregation in a school segregation case, *Roberts v. City of Boston*,[37] decided by the Supreme Judicial Court of Massachusetts before the adoption of the Fourteenth Amendment. Justice Harlan pointed out that *Roberts* was a school, not a railroad case, and had been decided before adoption of the amendment. It therefore was not significant in a Fourteenth Amendment case involving travel.

Majority and dissent debated the implication of a decision upholding segregation: for example, whether persons of different hair color or religions could be segregated, or whether houses on opposite sides of the street could be required to be painted different colors. Justice Harlan had argued that those consequences would flow from upholding segregation; the majority said such regulations would be

34 163 U.S. at 559 (Harlan, J., dissenting).

35 100 U.S. 303 (1980).

36 *Id.* at 308.

37 59 Mass. (5 Cush.) 198 (1849).

unreasonable while racial segregation in railroad coaches was reasonable. Finally, the majority held that if segregation made blacks feel inferior, that was a function of their own minds; whites in similar circumstances, it was asserted, would not feel the same way. The Court urged that law could not affect prejudice.

Between 1899 and 1927, civil rights lawyers tried to overturn *Plessy* in a number of cases. *Cumming v. Board of Education*[38] involved an effort to enjoin collecting taxes for a white high school in Augusta, Georgia because the black school had been closed. The Court held that the relief sought by plaintiffs was inappropriate because a court should not close a school, and that the attack on segregation should have been made in the pleadings. In *Berea College v. Kentucky*,[39] the conviction of the University of Kentucky for having admitted black students in violation of the state segregation law was upheld on the ground that a state may regulate corporations.

In *Gong Lum v. Rice*,[40] the Court faced the issue of whether a child of Chinese descent properly could complain about being segregated into a black school. She objected to being segregated with blacks because she wanted to be segregated with whites. Three Justices widely viewed as enlightened liberals, Stone, Holmes and Brandeis, joined the unanimous opinion holding racial segregation in education as beyond question, citing as authority *Plessy* and *Roberts*. By the beginning of the 1930's, the validity of racial segregation, in virtually all aspects of American law, seemed to be settled.

There was, however, a substantial strain of authority holding that in some circumstances segregation was prohibited. *Strauder v. West Virginia*[41] remained good law, at least as to jury service. In 1917, *Buchanan v. Warley*[42] held that a city ordinance dividing a community into black and white sections denied property without due process of law. The case involved a white property owner who had been prevented from selling to blacks. Most important, in 1886 the Court had decided a case which has had enormous influence, *Yick Wo v. Hopkins*.[43] It held that a San Francisco ordinance prohibiting the operation of laundries in wooden buildings denied equal protection of the laws because almost all the laundries in wooden buildings were operated by Chinese. Moreover, white laundry operators had ob-

38 175 U.S. 528 (1899).
39 211 U.S. 45 (1908).
40 275 U.S. 78 (1927).
41 100 U.S. 303 (1880).
42 245 U.S. 60 (1917).
43 118 U.S. 356 (1886).

tained some exemptions from the law while Chinese had not. The seminal language of *Yick Wo* was:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[44]

In the early 1930's, a small group of lawyers including William H. Hastie and Charles H. Houston undertook to reconcile the two competing strains of authority with the aim of destroying the legal basis of racial segregation. After toying with the idea of bringing a number of separate-but-equal suits for the purpose of making segregation too expensive to maintain, they rejected that notion because it would affect only a few places which undoubtedly would soon slip back into inequality. In a brilliant paper prepared for the group, Nathan Margold argued that the only proper goal would be to strike at the heart of the evil itself, racial segregation. He proposed bringing cases based on the theory of *Yick Wo*, arguing to the courts that racial segregation always has been accompanied by inequality and that segregated education inevitably was administered with an uneven hand and an evil eye.[45]

The effort began with a series of cases which today are no more than footnotes in constitutional law case books, but which engaged the passions of civil rights lawyers for fifteen years. *Missouri ex. rel. Gaines v. Canada*[46] for the first time held that a state may not have a law school only for whites and require blacks to leave the state to seek legal education. *Sipuel v. Board of Regents of the University of Oklahoma*[47] held that a black applicant for law school, excluded from the white school, was not furnished equal protection of the laws by a promise to build an equal law school for her. *Sweatt v. Painter*[48] held that in measuring black and white law schools against one another, intangible factors such as the opportunity to associate with classmates of another race had to be considered. *McLaurin v. Oklahoma State Re-*

44 *Id.* at 373-74.

45 For a fuller description of the genesis of the modern effort to secure a ruling that segregation is unconstitutional, *see* Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 REC. OF THE ASSOC. OF THE BAR OF THE CITY OF N.Y. 320 (1974).

46 305 U.S. 337 (1938).

47 332 U.S. 631 (1948).

48 339 U.S. 629 (1950).

*gents*[49] held that to segregate black students within the classroom, the cafeteria and library at the University of Oklahoma Graduate School of Education denied equal protection because it interfered with the ability to learn. Finally, in 1954, the Supreme Court in *Brown v. Board of Education*[50] repudiated *Plessy* and held unconstitutional racial segregation in education, ultimately bringing about the invalidation of all state supported segregation as unconstitutional. The *Brown* opinion reviewed the arguments of the *Plessy* majority and rejected them in light of contemporary experience. *Brown*'s most controversial passages referred to social scientific evidence of the mental harm inflicted by segregation.[51] *Plessy*, in dealing with this issue, had rested on the preconceptions of the Justices. Modern social science cited in *Brown* pointed the other way.

During the fifteen year period of *Gaines* through *Brown*, the Court preceeded tentatively, even gingerly. When a writ of mandamus was sought against the University of Oklahoma in *Fisher v. Hurst*[52] because the school's first response to *Sipuel* was to provide equality by closing the law school for whites, the Court denied the application on the ground that there was no record upon which to base a decision. In *Brown*, the Court followed its 1954 decision outlawing segregation with the 1955 "all deliberate speed" opinion[53] which moderated the urgency of the 1954 opinion.

Perhaps one can better understand the uneven course of the development of equal protection up to this period by considering what was going on in the country during this period. In 1947, President Truman's Committee on Civil Rights set forth a blueprint of what needed to be done to achieve racial equality in America.[54] That document, which then appeared to be utopian, called for the abolition of segregation in public accommodations, education and housing, adoption of a fair employment practices act and a sweeping catalog of similar reforms. One must remember that Washington, D.C. was at that time more racially segregated than Johannesburg, South Africa is today. But the Truman Committee document was a reflection of enormous changes which had taken place in the United States since *Plessy* and even *Gong Lum*. World War II, a war against Nazi racism,

49 339 U.S. 637 (1950).
50 347 U.S. 483 (1954).
51 *Id.* at 494 n. 11.
52 333 U.S. 147 (1948).
53 Brown v. Board of Education, 349 U.S. 294 (1955).
54 PRESIDENT'S COMMISSION ON CIVIL RIGHTS, TO SECURE THESE RIGHTS, 153-73 (1947).

helped bring a new prosperity to the United States, facilitated migration of large numbers of Southern blacks to other parts of the country, exposed both blacks and whites who had led insular lives to other possibilities by travel in the United States and abroad, and created an additional claim for justice on the part of black citizens who had fought and died for America. But all President Truman could achieve was a report. Nevertheless, his Solicitor General supported the claims of black citizens in the Supreme Court.[55] But the courts proceeded haltingly. There was no legislation. Southern racism and Southern domination of congressional committees made that impossible.

While the Supreme Court had the vision to declare an end to segregation as governmental policy, it did not have the ability to change the country's thinking or to compel the country to act differently. The *Brown* decision was a legal assertion with moral consequences that began the process of revising America's feeling and conduct about the race. But even apart from "all deliberate speed," it was inevitable that the dynamics of American life and law would slow down and stretch out social change which would result from *Brown*. From such outrageous resistance as the riots of Clay and Sturgis, Kentucky, Milford, Delaware, and Clinton, Tennessee, to the insurrection of Little Rock and the violence of New Orleans, deep and uncontrollable patterns of behavior retarded progress. Smoother resistance appeared in the form of pupil placement laws, stairstep integration plans, minority-to-majority transfer plans, freedom of choice and other tactics which made the realization of school integration slow and sparse.[56]

Perhaps worst of all, was the outright refusal by school boards to comply with *Brown*, a condition which could not be remedied without litigation, at a time when there were little or no resources to bring lawsuits. The NAACP Legal Defense Fund had a small number of lawyers. The Black bar in some Southern states, consisted of only one lawyer and in others, of a few part-time lawyers. The United States government not only had no statutory authority but also no desire to bring school integration cases.[57] President Eisen-

55 *See, e.g.*, Briefs of the Solicitor General of the United States in Sweatt v. Painter, 339 U.S. 629 (1950), and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

56 For a fuller description of some of these developments *see Resistance Grows; 36 Areas to Integrate*, 2 SOUTHERN SCHOOL NEWS (1956): *Klansmen Gather to Plan Integration Fight*, 7 SOUTHERN SCHOOL NEWS 13 (1960).

57 *See* Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520 (1968).

hower disapproved of the *Brown* decision and Congress was so opposed that the Senate came within one vote of adopting legislation which would have stripped the Supreme Court of large parts of its jurisdiction.[58]

All of that began to change in 1960 when John F. Kennedy became President. He stated publicly that he approved of the decision in *Brown*. The situation began to change further when the demonstrations of the early 1960's commenced, leading the country to adopt the civil rights legislation of 1964, 1965 and 1968.[59] That legislation marked the alignment of the Congress, the President, and the Supreme Court on the issue of racial discrimination. With such national unity, the country seriously began to address the problem of race discrimination which until then had been dealt with in a fragmentary way and principally by the courts. During all of the period under discussion, law and society developed from and reenforced each other.

## III. Intent Versus Effect and Affirmative Action: Issues for the Eighties

Among the vigorously debated civil rights issues of the 1980's, two are particularly prominent. The first is the question of whether and when it is necessary to demonstrate discriminatory intent rather than a discriminatory result. The other is the issue of affirmative action. In some ways, aspects of one involve aspects of the other. Intention versus effect first rose to prominence in *Palmer v. Thompson*[60] in which the Supreme Court held that when the city of Jackson, Mississippi closed five segregated swimming pools rather than desegregating them, it did not violate the Fourteenth Amendment equal protection clause. The Court reasoned that no matter how discriminatory the city's intention, the effect was to treat blacks and whites equally. Therefore, *Washington v. Davis*[61] was perceived as inconsistent with *Palmer* when it held that the Fifth Amendment was not violated by tests given for hiring District of Columbia police officers which had an adverse impact upon hiring blacks. Mr. Justice White wrote "Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially dis-

58 *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973).

59 *See* Civil Rights Act of 1964, *supra* note 25, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971 & 1973 (1976)); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601-3619 (1976)).

60 403 U.S. 217 (1971).

61 426 U.S. 229 (1976).

criminatory purpose, is unconstitutional soley because it has a racially disproportionate impact."[62] This decision was followed by a number of cases asserting the same standard. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[63] held that the village did not deny equal protection by refusing to rezone a tract of land from single family to multiple family classification to make it possible to build racially integrated housing there. The decision held that plaintiffs had not demonstrated a discriminatory intent. Among other recent cases reiterating the same standard, the most prominent is *Mobile v. Bolden*[64] which held that an at-large election system which diluted the voting strength of Negroes did not violate the Fourteenth or Fifteenth Amendments or the Voting Rights Act because the outcome was not a consequence of discriminatory intent.

The requirement that intent be demonstrated has been moderated by at least three different doctrines. The first is that Congress, by legislation, may adopt a test making proof of discriminatory effect sufficient. For example, in the very same Arlington Heights case, on remand following the Supreme Court decision, the lower courts held that Title VIII of the Civil Rights Act could be invoked upon demonstration of discriminatory effect.[65] And in *Griggs v. Duke Power Company*,[66] Title VII was held to have been violated upon showing that a test like the one involved in *Washington v. Davis*[67] had a racially disparate impact. Conversely, a statute might require demonstration of discriminatory intent, as with regard to the discriminatory operation of lines of seniority. Section 703h of Title VII immunizes discrimination effected by seniority from the condemnation of Title VII, absent proof of discrimatory intent.[68]

Second, the intent test may be more or less stringent depending upon what constitutes satisfactory proof of intent. For example, intent might be found in various objective circumstances as in a tort or criminal cases.[69] On the other hand, direct proof of subjective mental processes might be demanded. Without seeking to adumbrate the rule of the cases, suffice it to say at this point that the battle

62 *Id.* at 239.

63 429 U.S. 252 (1977).

64 446 U.S. 55 (1980).

65 *See* Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (1977) and 469 F. Supp. 836 (1979).

66 401 U.S. 424 (1971).

67 426 U.S. 229 (1976).

68 *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

69 *See, e.g.*, Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

ranges back and forth between these two standards of proof. Finally, the role of presumptions remains important. When one has demonstrated discriminatory intent with regard to one aspect of a system, it has been presumed that such intent has infected the rest of the system, unless this presumption can be rebutted.[70]

The second great recent battleground of civil rights issues has been that of affirmative action. The Supreme Court has addressed the issue deftly, generally upholding the concept while carefully defining the circumstances in which it is appropriate. In *DeFunis v. Odegaard*[71] the Court avoided the issue because DeFunis would have graduated before his enrollment from law school could have been affected by a decision. In *Regents of the University of California v. Bakke*[72] the Court struck down the particular affirmative action program employed by the University of California because of its rigidity, but in dictum upheld the general concept of affirmative action so long as it is not inflexible and is designed to bring racial diversity to a school for the purpose of enabling students of different backgrounds to learn from one another. In *United Steel Workers v. Weber*[73] the Court upheld a voluntary affirmative action plan for admission to an industrial training program on the ground that it was not rigid nor permanent, admitted whites as well as blacks, and was adopted against the background of prior racial discrimination. In *Fullilove v. Klutznick*[74] the Court upheld a ten percent set aside of government contracting business for minority contractors on the ground that Congress had the power to adopt this compensatory measure as a means of dealing with historic racial discrimination.

The issues of effect versus intent and affirmative action bear interesting relationships to one another. To require proof of intent could hobble efforts to achieve equality when it is necessary to demonstrate the existence of a state of mind amounting to racial hostility. On the other hand, if objective, extrinsic factors are sufficient evidence of intent, the burden may be lighter. There is a resemblance here to the state action issue in which the external standard, state-action, remained constant but its content changed over the years, so that it was much easier to demonstrate the existence of state action in the 1960's than in the 1880's. To the extent that a sympathetic concern for racial equality in the future informs judicial deci-

70 *See* Keyes v. School District No. 1, 413 U.S. 189 (1973).
71 416 U.S. 312 (1974).
72 438 U.S. 265 (1978).
73 443 U.S. 193 (1979).
74 448 U.S. 448 (1980).

sion making, proof of intent should be easier to establish. Conversely, a contrary outlook would lead to opposite results. On the other hand, if all that need be demonstrated is effect, the way to address racial inequality successfully would be much simpler. Of course, as *Arlington Heights* and *Fullilove* demonstrate, Congress can simplify the problem by enacting an effects standard.

Both affirmative action and an effects standard are results oriented. In this, their consequences often may be distributive, and not merely concerned with racial status or stigma. But the distributive aspect of the effects test and affirmative action is precisely why both are the focus of so much controversy. The dominant white racial group, particularly in a time of economic stringency, is reluctant to give up portions of what it owns to those who possess less. This has been most clearly demonstrated in the two Supreme Court cases concerning distributive rights, *San Antonio School District v. Rodriguez*[75] and *Dandridge v. Williams*.[76] *Rodriguez* held that the equal protection clause did not require invalidating a school finance plan which favored wealthy over poor school districts. *Dandridge* held that a welfare plan which awarded less benefits per child for children in large families was not prohibited by the equal protection clause.

These cases seem to indicate that to the extent that an equal protection assertion involves economic distribution, it has an additional burden to bear. But of course federal constitutional litigation is not the only arena for such issues. A number of state supreme courts[77] have come to conclusions different from that of *Rodriguez* under their own constitutions. Congress has adopted some redistributive legislation and at least to some extent, probably will continue to in the future. In so fluid a situation, judicial attitudes with regard to the constitutional aspects of such questions are far from foreclosed.

75 411 U.S. 1 (1973).
76 397 U.S. 471 (1970).
77 *See* Serrano v. Priest, 5 Cal. 3d 584 (1971); Robinson v. Cahill, 70 N.J. 155 (1976).