THE SUPREME COURT ON TRIAL. By *Charles S. Hyneman.* New York: Atherton Press. 1963. Pp. ix, 308. $6.50.

The Supreme Court on Trial is a purported examination of the Court as a repository of political power. More particularly, it seeks to determine whether the power of judicial review is fundamentally compatible with principles of representative government,[1] whether the Court acquired the power of judicial review by grant or by usurpation,[2] and whether that power has been exercised with wisdom and restraint. While the author avoids a direct expression of his own opinions, the materials he has selected leave the clear impression that the Court is guilty of capricious conduct and undemocratic self-aggrandizement.

These charges have been made before, of course, and it is unclear precisely why their reiteration was warranted in a new book. In view of the voluminous literature already available, moreover, it is somewhat disconcerting that the author fails to supply appropriate footnotes duly acknowledging familiar authority for many of his observations. Instead, he rests a number of propositions on vague references to "most thoughtful persons," "many informed and thoughtful observers," "some persons," "many thoughtful persons," "many people," and "thoughtful men" without specification. This deficiency is not fully offset by the lightweight bibliography provided at the end of the volume. Nevertheless, Professor Hyneman's treatment of the origin, legitimacy, and uses of judicial review is generally well composed, tightly organized, and fairly convincing. If these subjects comprised the whole of the author's work, the book could be fairly appraised as a useful addition to the literature on judicial review.

The problem is, however, that the book turns out to be less significant for what it restates on these matters than for what it asserts regarding the Supreme Court's treatment of race relations. In many respects it is *Brown v. Board of Educ.*[3] which dominates the discussion; judicial review tends largely to sketch the general

1. For a recent and provocative treatment of this theme, not cited in the present work, see HOOK, THE PARADOXES OF FREEDOM (1962).

2. For a recent discussion, not cited in the present work, see MASON, THE SUPREME COURT; PALLADIUM OF FREEDOM (1962).

3. 349 U.S. 294 (1954).

setting for a specific and highly critical treatment of *Brown*. In fact, the durability of *The Supreme Court on Trial* is more likely to depend upon its assessment of the desegregation cases as a particular exercise of judicial review than upon the more general treatment of judicial review itself. And because of the unfortunate assessment of those cases, it may be that the book will not endure.

Starting from the premise that the Constitution sanctioned governmentally-compelled segregation until 1954,[4] Professor Hyneman broadly implies that the Supreme Court decided *Brown* incorrectly as a matter of law, that the Court was performing a legislative function beyond its legitimate powers, and that the Court thereby raised itself to a peak of power without precedent in the nation's history. It appears, however, that the author has indulged in a partisan presentation which overlooks a vast amount of competent authority on this highly charged subject.

Following an introductory comparison of *Brown* and *Plessy*, for instance, the author lays out the criticisms of the Supreme Court by the 1958 Conference of State Chief Justices. The Committee Report preceding the Conference Resolutions is described and quoted for its "remarkably restrained language."[5] The positioning of the Report in the book implies that the state chief justices were reacting to the Court's work in race relations. The author does not mention, however, "that there is not one iota of criticism in the Conference's Resolution or Report which is directed to the *School Segregation Cases*,"[6] "neither a mention nor an allusion to [those] decisions in the Report."[7] Nor does the text offer a single rejoinder to the Report. Instead, a single line in bibliographic notes at the end of the volume refers to Dean Rostow's reply to the chief justices.[8] But since Dean Rostow is elsewhere identified in the book as an activist sympathizer of the Court,[9] the reader is discouraged from examining the Rostow article or from taking it very seriously. The fact is, however, that the Conference Report has been exhaustively canvassed in books and articles never acknowledged in this work.[10] The consensus is that

4. P. 10: "It will be clear from what has been said that, up to the 1954 decision of *Brown v. Board of Education*, the constitutional law of the country permitted discriminatory treatment on the basis of race or color as long as a decent showing was made that the treatment accorded one race was equal to that accorded the other."

5. P. 23.

6 KURLAND, *The Supreme Court and Its Judicial Critics*, 6 UTAH L. REV. 457 (1959).

7. Weissman, *Report of the Committee of the Conference of the State Chief Justices on Federal-State Relationships as Affected by Judicial Decisions*, 19 LAW. GUILD REV. 6, 8 (1959).

8. P. 283. The reference is to Rostow, *The Court and Its Critics*, 4 So. TEX. L.J. 160 (1959).

9. Pp. 218, 222-23, 264-66, 272.

10. In addition to articles cited *supra*, see, *e.g.*, FREUND, THE SUPREME COURT OF THE UNITED STATES 177, 188 (1916): "The thrust of the criticism by the state chief

the criticisms of the state chief justices were substantially without foundation, reflecting far more discredit on their promulgators than on the Supreme Court. And the point here is that the failure to mention these articles in this book is, unfortunately, an example of the oversights which significantly detract from the work as a whole.

The character of the desegregation discussion is even more evident in the author's concentration on criticisms of *Brown* to the exclusion of arguments in its favor elsewhere examined among more than three hundred articles and books occasioned by that case. Thus, scarcely a mention is accorded the many materials elaborating and defending the following arguments in favor of the correctness of the decision:

First, the Court of 1954 correctly interpreted the equal protection clause of the fourteenth amendment and merely rectified previous judicial errors of the Reconstruction Court which had emasculated the Civil War Amendments and legislation during the thirty years following the Civil War.[11] *Plessy* itself was inconsistent with a case then twenty-three years old, which had understood the War Congress to mean that physically equal but separate transportation facilities did not satisfy the federal standard.[12] Indeed, *Plessy* contained statements regarding the proper means of reconciling whites and Negroes which were rendered impossible of accomplishment because of the very type of law given sanction by the decision itself. Thus, Mr. Justice Brown wrote:

> "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences . . . ."[13]

justices seems to me, in short, to have been misdirected. There has been no real invasion of state authority; on the contrary, there has been growing acceptance of state legislation in matters that really count for the states."; Lewis, *The Supreme Court and Its Critics*, 45 MINN. L. REV. 305 (1961); Lockhart, *A Response to the Conference of State Chief Justices*, 107 U. PA. L. REV. 802 (1959); McKay, *The Supreme Court and Its Lawyer Critics*, 28 FORDHAM L. REV. 615, 626-36 (1960); Monroe, *The Supreme Court on Trial: A Perspective*, 11 HASTINGS L.J. 369 (1960).

11. See, *e.g.*, Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952). The eviscerating cases were these: Hodges v. United States, 203 U.S. 1 (1906); James v. Bowman, 190 U.S. 127 (1903); Baldwin v. Franks, 120 U.S. 678 (1887); *In re* Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882); United States v. Cruikshank, 92 U.S. 542 (1875); *In re* Slaughter-House Cases, 83 U.S. 36 (1873). The first of these, the *Slaughter-House Cases*, reduced the content of privileges and immunities of United States citizenship to such a low state that one can scarcely imagine such content was all the proponents had in mind in framing a *constitutional* amendment. See also HARRIS, THE QUEST FOR EQUALITY (1960); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950).

12. Railroad Co. v. Brown, 84 U.S. (17 Wall.) 445 (1873).

13. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

But the decision, it will be recalled, did not provide merely that individual white persons could voluntary dissociate themselves from racial contacts they might personally and individually find offensive. Rather, it provided that state governments could *compel* segregation of the races by law, regardless of any willingness of many individuals to share a railroad car without regard to the color of other occupants, and without regard to the desires of the management of the railroad. Under the system of law-coerced segregation which emerged after *Plessy*, the opportunities for integration through voluntary consent, mutual appreciation, and natural affinities, of which Mr. Justice Brown wrote so glowingly, were cut off. The opinion by Mr. Justice Brown, quoted at length by Professor Hyneman, should most certainly be tested against the historic dissents of Mr. Justice Harlan, who is never mentioned.[14] Moreover, the extension of *Plessy* (a transportation case) to sanction coerced segregation in public education would have required a degree of judicial inventiveness, in view of the fact that the issue of segregation in public schools could scarcely have occupied the attention of the country at the time the fourteenth amendment was adopted.[15]

Second, even assuming the correctness of *Plessy*, in some sense and at the time, the years between 1896 and 1954 witnessed developments which required its overruling unless the Court were to recommit itself to a foolish and hopeless surface consistency:

(a) In 1896, legislatively coerced segregation was a new device of undetermined significance. Only during the ensuing twenty years did it develop into a rigid and pervasive regime effectively forcing the separation of the races in nearly every walk of life.[16] The *Plessy* Court may not have anticipated the effect of its decision in cementing the re-establishment of white supremacy in the South, nor of the decision's systematic extension to extinguish the prospect of a voluntary coming together by the races. Had the Court been able

14. See, *e.g.*, *id.* at 559: "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case.*"

15. Freund, *Storm Over the American Supreme Court*, 21 MODERN L. REV. 345, 350 (1958): "In 1868 state-supported schools were rare in the South, and Negro education of any sort virtually non-existent there. It would be pointless to seek in the minds of the statesmen of 1868 a definite answer to the question of the meaning of 'equal protection' in the 1950's when public schools have become the rule and Negroes have proved that in capacity for learning and teaching, differences are individual rather than racial."

16. See WOODWARD, THE STRANGE CAREER OF JIM CROW (1955); Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421-22 (1960): "The question of the 'intent' of the men of 1866 on segregation *as we know it* calls for a far chancier guess than is commonly supposed, for they were unacquainted with the institution as it prevails in the American South today. To guess their verdict upon the institution as it functions in the midtwentieth century supposes an imaginary hypothesis which grows more preposterous as it is sought to be made more vivid."

to anticipate the practical consequences, it might not have decided as it did.

(b) Early in the twentieth century, twelve years after *Plessy*, the Brandeis brief was legitimated. The practice of deciding issues of fact by sterile reference to "legal" facts began to be eroded.[17] Whether women might be harmed by being required to work more than ten hours a day, for instance, was tested by a meticulous examination of all relevant data.[18] It was scarcely to be expected that the Court would be less scrupulous forty-six years later in reviewing the political, sociological, and psychological presuppositions of *Plessy* than it was in examining the legislative facts in *Muller v. Oregon*.

(c) In 1896, the disciplines of sociology, cultural anthropology, and psychology were embryonic. By 1954, it had become apparent from research in these developing disciplines that nineteenth-century presuppositions regarding the character of inherent racial differences and the effects of segregation on Negroes were extremely doubtful. Even assuming that the normative standard of equal protection is to be treated as a historical constant, therefore, superior technique and information in measuring whether that standard was in fact satisfied under conditions of coerced segregation necessarily would alter particular findings of fact.[19]

(d) Years after *Plessy*, but years before *Brown*, the NAACP established itself as a law-oriented organization. It was vastly better equipped than earlier litigants or amici to prepare cases and to take full advantage of developments respecting the Brandeis brief and new information provided by the emerging sociological disciplines.[20] As the lopsided character of earlier litigation—which frequently was adversary in name only—was gradually redressed, so too the lopsidedness of judicial results was bound to be corrected.

(e) *Brown* itself did not spring full-blown from the Supreme Court in 1954. Commencing no later than 1917 and reacting to developments noted above, the Court gradually moved away from the tenor of the reconstruction cases.[21] Four years prior to *Brown*, the

17. See Doro, *The Brandeis Brief*, 11 VAND. L. REV. 783 (1958).

18. Muller v. Oregon, 208 U.S. 412 (1908).

19. See, *e.g.*, Lewis, *supra* note 10, at 331: "An earlier Court, applying the sociology of its day, had found that racial segregation did not deny Negroes the equal protection of the laws because there was nothing invidious about the arrangement unless they chose 'to put that construction upon it.' But could any rational person doubt in 1954 that racial segregation was a calculated device to exalt one group and debase another, whether practiced in Mississippi, the Union of South Africa or Hitler's Germany? A Court would have to be obtuse indeed to find nothing invidious in a rule requiring Negro children—or Jewish children, say, or Mexican children—to attend separate schools."

20. See VOSE, CAUCASIANS ONLY (1959).

21. Unmentioned by Professor Hyneman is the fact that the Court rejected the rationale of separate but equal in 1917, in invalidating a racial zoning ordinance. Buchanan v. Warley, 245 U.S. 60 (1917). Beginning with Guinn v. United States, 238

Court had made it clear that physically separate facilities for certain educational disciplines could never be equal. By 1954, the separate-but-equal doctrine had become scarcely more than a shell of state laws devoted to the systematic degradation of Negroes.

The conviction that the desegregation cases have been unjustly treated in this book is fortified by several other coincidences. Shortly following a résumé of these cases, for instance, there is a summary of criticisms of other particular exercises of judicial review by the Court. These criticisms in turn serve as a prologue for a reconsideration of *Marbury v. Madison*, "in order to see whether men may reasonably doubt, and to inspect the grounds for doubting, that the power of judges to nullify statutes was vested in them by the Constitution."[22] There follows a thirty-one page examination of *Marbury* and a restatement of familiar objections to that case. This critique of *Marbury*, in turn, is made to appear relevant to the Warren Court's treatment of the desegregation cases. This appearance of relevance proceeds from the fact that the author fails to distinguish the criticisms legitimately made of judicial review by the Supreme Court of *acts of Congress* from judicial review of state laws, like those principally involved in the desegregation cases. Thus, in introducing the discussion of *Marbury*, the author writes of "the power of judges to nullify statutes," and not merely of the power to nullify *federal* statutes. It should have been made explicit, however, that the alleged infirmities of *Marbury* by no means necessarily bear upon the separate question of the Court's final authority to review state laws. The most caustic of the *Marbury* critics, Professor Crosskey, carefully distinguished the two levels of judicial review:

U.S. 347 (1915), the Court gradually extended the availability of the franchise which had been withdrawn from the Negro near the turn of the century. See, *e.g.*, Nixon v. Condon, 286 U.S. 73 (1932); United States v. Classic, 313 U.S. 299 (1941); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953). The shift in housing, commencing with *Buchanan, supra*, was stepped up in Shelly v. Kraemer, 334 U.S. 1 (1948) and Hurd v. Hodge, 334 U.S. 24 (1948), the latter case serving six years later to provide the fifth amendment implied equal protection basis for Bolling v. Sharpe, 347 U.S. 497 (1954). The "doctrine" of *Shelley*, of course, is potentially of enormously greater significance than that of *Brown v. Board of Educ.* The decision in *Brown* was signalled by Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938), Sipuel v. Regents of Univ. of Oklahoma, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950), and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), as noted but not elaborated upon by Professor Hyneman at 11. See, FREUND, *op. cit. supra* note 10, at 173: "A final obvious fact is that the decisions were not an abrupt departure in constitutional law or a novel interpretation of the guarantee of equal protection of the laws. The old doctrine of separate-but-equal, announced in 1896, had been steadily eroded for at least a generation before the school cases, in the way that precedents are whittled down until they finally collapse." John Frank correctly described *Sweatt* when he wrote: "The Supreme Court, through Chief Justice Vinson, took the position, in essence, that legal education could never be both separate and equal, and that the inequality was inherent in the very act of separation itself." FRANK, MARBLE PALACE 212 (1958).

22. P. 93.

> "[J]udicial review was intended to be provided as to the acts of the states, but *not* as to the acts of Congress. . . .[23]
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> "And its meaning, as before suggested, can surely not be doubted: judicial review was meant to be provided as to all the legislative enactments of the states, but *not* as to those of Congress."[24]

Another distinguished critic of *Marbury,* Professor Corwin, has noted:

> "Most of the criticism of judicial review is directed, it should be noted, against review of acts of Congress, although it is today rarely exercised adversely to such acts. That there must be a central review of state action by the Supreme Court is generally conceded."[25]

Similarly, Professor Powell takes account of the familiar distinction between *Marbury,* involving horizontal judicial review, and *Martin v. Hunter's Lessee* and *Cohens v. Virginia,* on vertical supremacy:

> "Neither Hamilton nor Marshall falls into the error of invoking the judicial power to condemn state conduct in conflict with the existence or with the exercise of national powers and contending that this implies a corresponding Supreme Court power over acts of Congress. The former judicial authority finds clear warrant in the so-called supremacy clause of the Constitution. . . .[26]
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> "The Supreme Court's power over state legislation was plainly if not explicitly indicated in the supremacy clause of the Constitution."[27]

And nearly every student of constitutional law will recall Holmes' observation:

> "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[28]

It is true, of course, that even the doctrine of vertical judicial supremacy remains open to the argument that in reviewing state laws, the Court should be guided by congressional interpretations of the Constitution rather than by its own interpretation. This is

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23. 2 CROSSKEY, POLITICS AND THE CONSTITUTION 987 (1953).
24. *Id.* at 990.
25. CORWIN & PELTASON, UNDERSTANDING THE CONSTITUTION 37 (1958).
26. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 16 (1956).
27. *Id.* at 22.
28. HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920).

an argument, however, which is not resolved by a consideration of *Marbury v. Madison.*

The author's treatment of the Hughes Court, which invalidated federal statutes during the early Roosevelt Administration, is used to criticize again the desegregation cases. The author suggests that a discussion of the depression cases will "prepare the reader for critical evaluation of my appraisal of the Segregation cases."[29] Yet it never becomes clear just how the two subjects are connected. That some Justices of the Hughes Court were wedded to Spencerian economics and ought, perhaps, to have used their veto over Congress more sparingly at that time and in those circumstances are observations which contribute little to an analysis of the reasonableness of the Warren Court's response to the crisis in race relations in 1954, or of its right to review state laws.

The feeling that the desegregation cases are the real subject of this book, and that the nominal topic—distribution of political power in a democracy—emerges as a secondary subject, goes deeper still. The lead paragraph of the jacket lays initial stress on the author's assertions concerning the desegregation cases rather than on the larger theme of political power. It adverts to the author's new observation about these cases, accurately reflecting the author's twice-presented view,[30] in the following words:

> "Professor Hyneman shows convincingly that the Supreme Court raised itself to a new peak of power in its orders outlawing segregation. In other and older constitutional crises, the Court thwarted the reform efforts of elected lawmakers. By holding those efforts invalid, it restored the previous and familiar state of law. In its new role, the Supreme Court is the initiator of reform."

The reference to "other and older constitutional crises," in which "the Court thwarted the reform efforts of elected lawmakers," is doubtless to *Dred Scott, Pollack,* and the depression cases. These are the familiar instances of judicial braking, *i.e.,* occasions when the Court has employed the power of judicial review of federal laws to heave sand into the congressional cogwheels. But these cases do not begin to exhaust the occasions of judicial review, least of all with respect to the invalidation of state laws. And *Brown* is by no means the *first* instance where judicial review of state laws was employed to initiate social reform rather than to retard it. In the field of commerce, the Marshall Court applied the Constitution far in advance of congressional action and in the teeth of widespread state statutes to extend protection of private economic

29. P. 129.
30. Pp. 78, 199.

interests against state invasion and interference. In a most scholarly article, Professor W. H. Mann has recently recapitulated the innovative actions of the Marshall Court in this field:

> "[L]egal concepts of 'commerce' which had the effect of designating constitutional protections against state invasion and interference have dominated adjudications dealing with the constitutional authority of the commerce clause. Congress' powers to effectuate national policy through regulation remained in the background . . . .
> "The commerce clause has not only been used in constitutional adjudication to curb state powers in order to secure the existence of national powers; it has also served to secure for the Supreme Court the jurisdictional authority to nationalize and enforce private rights . . . ."[31]

More recently, but well before *Brown*, the Court advanced first amendment claims of groups and individuals against the popular will, contradicting the legislative will, and forcing the states to make their property available to those who found no favor with "representative" assemblies.[32] As previously noted, the Court moved to broaden the franchise beyond the demonstrated desires of state legislatures, forcing the abandonment of white primaries and state practices which were at least as "familiar" as segregation laws.[33] In holding the racially restrictive covenants unenforceable, the Court cut the ground from under a settled convention widely employed throughout the country, and it cast into limbo a piece of the common law which was indeed familiar and established: It acted, of course, without the approval or support of state legislation, and contrary to traditional common-law practice. Similarly, protection of the criminally accused has been advanced by the Court over settled state practice and statutes.[34] The examples could

31. Mann, *The Marshall Court: Nationalization of Private Rights and Personal Liberty From the Authority of the Commerce Clause*, 38 IND. L.J. 117-18 (1963).

32. See, *e.g.*, the pre-1954 cases of Saia v. New York, 334 U.S. 558 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. State, 308 U.S. 147 (1939).

33. See note 20 *supra*.

34. See, *e.g.*, the pre-1954 involuntary confession cases: Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Ward v. Texas, 316 U.S. 547 (1942); White v. Texas, 310 U.S. 530 (1940); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936). Pre-1954 right to counsel cases, reforming state laws and practices, include: Gryger v. Burke, 334 U.S. 728 (1948); Bute v. Illinois, 333 U.S. 640 (1948); DeMeerleer v. Michigan, 329 U.S. 663 (1947); Hawk v. Olson, 326 U.S. 271 (1945); White v. Ragen, 324 U.S. 760 (1945); House v. Mayo, 324 U.S. 42 (1945); Tomkins v. Missouri, 323 U.S. 485 (1945); Williams v. Kaiser, 323 U.S. 471 (1945); Smith v. O'Grady, 312 U.S. 329 (1941); Powell v. Alabama, 287 U.S. 45 (1932).

be multiplied. Therefore, whether or not the Court generally *ought* to leave reform to the legislatures, the desegregation cases are by no means the *first* occasion that the Court has refused to do so. Indeed, it is precisely because judicial supremacy has occasionally operated to instigate reform that sociologists are sometimes incorrect in denigrating the law as a mere reflection of established folkways.

These matters aside, this book is not likely to convince the political skeptic that a decent regard for democratic principles requires an interminable waiting upon the doubtful consciences of supine state legislatures. Many of these legislatures are neither well-composed nor disposed to afford protection to the civil rights and liberties of beleaguered minorities, and they have scarcely conducted themselves over the years with any considerable distinction. Indeed, until the franchise is more generally available, and until the implications of *Baker v. Carr* are fulfilled, it is doubtful that state legislation can be regarded even as representative.

We are, of course, entitled to be troubled by the power implicit in the doctrine of judicial supremacy (although less so as it regards the states), and we may not be able fully to reconcile its presence with the theory of representative democracy. Professor Hyneman is quite right in reminding us of the difficulty. At times, and with respect to certain issues, however, the necessity for the exercise of that power has reflected more ruefully on the inertia of our democratic assemblies and ourselves than it has on the Supreme Court. In any case, it is extremely doubtful that history will condemn the doctrine because of its particular involvement in the desegregation cases.

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