THE PRESENT CONTROVERSY CONCERNING THE UNITED STATES SUPREME COURT.*

My talk this evening is presented with an acute consciousness of the fact that Professor Riesenfeld[1] has spoken to you within recent weeks, that Dean Griswold of the Harvard Law School has delivered a lecture to this student body, that Associate Justice Harlan of the United States Supreme Court is in your community and that many of you have heard him. I trust that anything I may say, therefore, will not be too repetitious. I am tempted, on the basis that it will be, to speak on another topic, but since the subject has been announced, I feel obligated to devote my remarks to it. Before doing so I wish to inform you that I am indeed happy to be here. I have spent two days in your community and during this time I have had an opportunity to view your campus, to inspect your library, and to become acquainted with the members of your faculty. On the basis of the impressions thus formed, I think that you are indeed fortunate to be students in this law school. I am tremendously impressed.

The topic I have selected, "The Present Controversy concerning the Supreme Court", suggests that there *is* a controversy raging in the United States involving that institution. This is certainly the case, and while some of the criticism of the Court comes from irresponsible sources, it is by no means confined to those segments of society. For example, in August of 1958 the Chief Justices of the State Supreme Courts meeting in Los Angeles adopted a resolution, with only eight Chief Justices dissenting, asking the United States Supreme Court to apply greater self-restraint in the exercise of its judicial function. It is evident, therefore, that the criticism to which I refer is significant and worthy of discussion. Because of this, I shall endeavour to examine and place in focus some of the factors which have contributed to the controversy.

As a preliminary observation it should be noted that this is by no means the first occasion on which the Court is the object of attack. In fact its entire history is checkered with controversy. One need only point out a few occasions to demonstrate this fact. One such period was in the 1830's during the presidency of Andrew Jackson; another was in 1857 when the Court handed down the *Dred Scott*[2] decision

* An address given to the Law School of the University of Western Australia on 16th July, 1959.

1 See pp. 421-441, *supra*.

2 Dred Scott v. Sandford, (1857) 19 How. 393, 15 L. Ed. 691.

holding that a slave was property and thus if taken by his owner into free territory he did not automatically become a free man; a third period of controversy followed the Civil War when the Court was deciding reconstruction legislation; and again in the 1930's the Supreme Court was bitterly assailed because of its decisions in respect of laws enacted during the early part of President Franklin D. Roosevelt's administration.

The question arises, why is it that the Court so frequently becomes the centre of political storms? In my opinion, the reason is to be found in the nature of the United States' judicial structure. Having heard a partial play-back of Professor Riesenfeld's talk,[3] I realized that you have had the benefit of his description of our Court system. Because of this, I shall make but brief reference to it. You already know that the United States has two sets of courts, the State courts and the federal courts. For the most part, civil controversies between citizens of one State and criminal offences within a given State are matters handled by the State judiciary. The federal judiciary concerns itself with matters arising under the federal constitution, with controversies between citizens of two different States or between a citizen of one State and another State, and with questions arising out of Congressional legislation. These questions are, with few exceptions,[4] handled initially by one of the 93 federal district courts, and from its determination an appeal may be taken to the appropriate Court of Appeals.[5] As a general proposition, once the parties have exhausted their right of appeal in the Circuit Court, their litigation terminates. In some instances, however, the Justices of the United States Supreme Court may be prevailed upon to hear certain controversies. Whether or not they will do so is a matter within their discretion, and they will exercise such discretion in favour of hearing an appeal only if they think that the issues presented are of sufficient importance to warrant the attention of a busy court. The fact that the Court will only hear matters of significance and is not a court of errors and appeal in the accepted sense means that many of its decisions arouse intense interest. Such interest is often the prelude to controversy.

It must further be noted that many of these decisions necessitate construction of general phrases of the Constitution. These phrases do not lend themselves to neat, clear-cut opinions. In construing them, the Court must wade through conflicting interpretations and com-

[3] See note 1, *supra*.

[4] Attention is called to the United States Constitution, Article III, sec. 2.

[5] There are eleven Federal Judicial Circuits, each having a Court of Appeals.

peting meanings. To put it another way, the Court must decide on many occasions an issue which involves a large body of public opinion on one side and a significant segment of public opinion on the other.

To illustrate the Court's precarious task, I need only refer to certain phrases in the Bill of Rights. The First Amendment states that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof"; nor shall Congress make any law "abridging freedom of speech, or of the press; or the right of the people peaceably to assemble." It is evident that any case that comes before the Court concerned with any one of these phrases allows for a wide difference of opinion and furthermore involves areas in which there are strong feelings both *pro* and *con*. The Fifth Amendment demonstrates this same point, for it provides in part that no person shall be "deprived of life, liberty, or property, without due process of law." Again the phrase "without due process of law" is one which does not lend itself, nor can it lend itself, to fine, neat, precise legal description. The Fourteenth Amendment contains a similar phrase and in addition it adds that no State shall deny to any person "the equal protection of the laws." Here again is a phrase which has stimulated disagreement, for what does the term, "no person shall be denied the equal protection of the laws", mean? It obviously may be subjected to a wide variety of plausible interpretations.

In view, therefore, of the function of the Supreme Court and the type of cases which it is called upon to decide, it is not surprising that it has frequently been involved in controversy. In fact the surprising thing is not that it has been subject to controversy but rather that it has been able, despite its delicate task, to maintain its strength and prestige.

As far as the current situation is concerned, the primary criticism stems from two classes of cases which the Court has been called upon to decide. The first category consists of cases concerned with segregation. The second type includes decisions relating to civil liberties, issues posed by the problems of communist-control and internal security. Since I understand that the civil liberty cases have been described to you, I shall confine my remarks to the segregation cases and then, if in the question period you have questions pertaining to civil rights litigation, I shall be happy to discuss them in so far as I am able.

It is appropriate to point out in opening a discussion of the segregation cases that no matter which way they were decided, they would have caused controversy. Decided as they were, they created

dissension because they threatened to upset a way of life. To appreciate this fact, it must be recognized that southern society in the United States has developed distinct economic, social, political, cultural, and racial characteristics. It was thought by many people that these unique features would be altered considerably by the Civil War and its aftermath. In fact, northern legislators in charge of Congress during the reconstruction period, the period following the Civil War, intended that this way of life should be modified. For this reason they saw to it that there were enacted the Thirteenth, the Fourteenth, and the Fifteenth Amendments; the Thirteenth abolishing slavery, the Fourteenth providing in part that no State shall deprive any person of "life, liberty, or property, without due process of law" nor deny to any person "the equal protection of the laws", and the Fifteenth stating that the right to vote should not be denied to any person "on account of race, color, or previous condition of servitude." In addition to these Amendments, the northern reconstructionists promoted the enactment of four Civil Rights Acts. The most important of these was the Act of 1875, section 2 of which sought to outlaw private discrimination, sought to prohibit in other words discrimination in hotels, restaurants, theatres, and other establishments.[6]

The programme outlined above began to break down soon after its enactment. Strangely enough it broke down largely because of the decisions of the United States Supreme Court, the very institution which is now subjected to vehement attacks by the people of the South. For example, in 1873 the United States Supreme Court decided the famous *Slaughter-House Cases*.[7] In these cases, the Court was called upon to decide the meaning of the "privileges and immunities" clause of the Fourteenth Amendment. This clause provides that "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." It was argued by some that this provision was broad enough to prohibit any type of discrimination. However, the United States Supreme Court, taking the phrase very literally, maintained that it referred only to those privileges which people enjoy as citizens of the United States and not as citizens of a particular State. Since the rights of a citizen of the United States as such only include the right to travel freely to Washington, the right to demand protection on the high seas, and a few comparable privileges, this decision had the result of making the phrase "privileges and immunities" comparatively ineffectual.

[6] See 18 U.S. Stat. 336, sec. 2 (1875).

[7] Slaughter-House Cases, (1873) 16 Wall. 36, 21 L. Ed. 394.

Again, in 1883 the United States Supreme Court was asked to decide the *Civil Rights Cases*.[8] In these cases, the Court held that the Fourteenth Amendment did not refer to private discrimination, did not refer to discrimination by Smith, a white, against Jones, a negro, for example, but only referred to discrimination by a State. As a consequence the Civil Rights Acts, and particularly section 2 of the Civil Rights Act of 1875, were held to be unconstitutional in so far as they sought to prohibit acts of discrimination in restaurants, hotels, dining rooms, theatres, etc. because such acts were private.

While the Court was thus emasculating much of the anti-discrimination legislation which had been enacted shortly after the Civil War, it took another action which pointed the way towards further segregation. It did this in the case of *Plessy v. Ferguson*[9] decided in the year 1896. This case arose because Mr. Plessy, an octoroon, sought to ride on a railroad car which under sanction of Louisiana law was reserved for white citizens. The officials in charge of the train objected; Mr. Plessy persisted. Mr. Plessy was arrested for disturbing the peace. He fought the arrest on constitutional grounds, maintaining that the State of Louisiana, by insisting that he ride in a car reserved for negroes and prohibiting him from riding in a car reserved for whites, was denying him the equal protection of its laws. The United States Supreme Court decided to the contrary. It held that as long as there were facilities for negroes as well as for whites and provided these facilities were of equal calibre, the State of Louisiana was not denying negroes the equal protection of its laws. (Incidentally, Associate Justice Harlan's grandfather was a member of the Court at that time. He filed a dissenting opinion, making the observation that in time the decision of *Plessy v. Ferguson* would be as pernicious as the *Dred Scott* decision.)

Having thus been given a legal formula, a formula which became known as the "separate but equal doctrine", the South felt secure in its reconstruction as a segregated society. Separate restaurants, hotels, parks, schools, and separation on streetcars, buses, and other public conveniences, were accepted features of this way of life; accepted at least in the legal sense until the Court was called upon to decide the segregation cases in 1954.

Before commenting on this decision, it may be pointed out that

8 Civil Rights Cases, (1883) 109 U.S. 3, 27 L. Ed. 835. For a prior case affecting the Court's position during the reconstruction period, see United States v. Cruikshank, (1875) 92 U.S. 542, 23 L. Ed. 588.

9 (1896) 163 U.S. 537, 41 L. Ed. 256.

students of constitutional law should have been able to predict that the Court would decide these controversies as it did. Why is this? The answer is to be found in certain cases decided during the two decades prior to 1954. The first such case arose in the State of Maryland in 1936.[10] At that time a negro sought to enter the University of Maryland Law School. He was denied admission. He appealed to the Maryland Court of Appeals, and that court said that in view of the fact that Maryland had no negro law school, the State had no alternative but to admit the petitioner to the University of Maryland.

In 1938 a very comparable case reached the United States Supreme Court. This controversy also involved a negro, Mr. Gaines, seeking admission to a law school, in this case the University of Missouri Law School.[11] The United States Supreme Court, taking a leaf from the Maryland Court, said that since Missouri did not have a separate negro law school, the State of Missouri had to admit Mr. Gaines to the University Law School. The Court further commented, and this is significant, that the offer of the State to send Gaines to a law school of another State and to pay his tuition at that school did not change the picture. The test was whether the State within its boundaries provided separate but equal facilities for its negro citizens.

1948 saw another case involving this question before the Supreme Court.[12] This case, concerned with a negro seeking admission to the University of Oklahoma Law School, gave the Justices an opportunity of reaffirming the stand they had taken in 1938. In 1950, a more difficult problem was presented. This involved a denial of admission to a negro by the University of Texas Law School.[13] This case was more difficult for the reason that the State of Texas had a negro law school. The question which thus confronted the Supreme Court was whether or not in a State where there was a negro law school it should nevertheless order the "all-white" university to admit a negro. The Court's answer was that the negro, Mr. Sweatt, was entitled to admission. In reaching this conclusion, the Justices gave efficacy to the meaning of the term "equal." They stated that in ascertaining whether or not the negro law school was "equal" to the Law School of the University of Texas it was necessary to examine such tangible factors as the size of the faculty, its calibre, the size of the student body, the

10 Pearson v. Murray, (1936) 169 Md. 478, 182 Atl. 590.

11 Missouri *ex rel.* Gaines v. Canada, (1938) 305 U.S. 337, 83 L. Ed. 208.

12 Sipuel v. Board of Regents of the University of Oklahoma, (1948) 332 U.S. 631, 92 L. Ed. 247.

13 Sweatt v. Painter, (1950) 339 U.S. 629, 94 L. Ed. 1114.

size of the library, and the availability of a law review. They also said that intangible factors, such as the experience of the administrators, the influence of the alumni, the reputation of the faculty, and the reputation of the law school in the community were important. Given such criteria, it would appear that no two institutions could be equal. Thus the Court in reality in 1950, not 1954, abolished the separate but equal test, even though they paid it lip service.[14] This fact should have been more widely recognized, and the decision of 1954 should not have been the shock that it was.

The decision of 1954 was the result of the desire of a Mr. Brown, living in Topeka, Kansas, to send his eight-year-old negro daughter to a certain "white" public school. The administrators of that school denied her admission, as they were compelled to do under Kansas law. Mr. Brown decided to fight this refusal, and in time his case found its way to the United States Supreme Court. When presented to that tribunal, four other cases based on comparable facts were ready for argument. These originated in South Carolina, Virginia, Delaware, and the District of Columbia. The Court combined these cases and because Mr. Brown's name headed the alphabetical list of litigants, the controversy became known by the name *Brown v. The Board of Education of Topeka, Kansas.*[15] Arguments were heard by the Court on 9th, 10th and 12th December, 1952. One year later, on 8th and 9th December, further arguments were heard. This fact should be stressed, for those of you who heard the discussion yesterday morning[16] will recognize that it is unusual for any case to be argued for five days before the United States Supreme Court. The normal time allotted is two hours, an hour to a side. On occasion, if the Court feels the issue warrants, oral argument may continue for approximately four hours, or perhaps five or six, but five days of argument is very rare. It is further appropriate to note in view of the fact that it has been said that the Court acted in haste that the Justices took approximately a year and a half, after the first argument, to decide the cases, for the decision was not announced until 17th May, 1954. That decision was unanimous. That decision held that "separate but equal" educational facilities are a misnomer, that such separate facilities are

14 For another case decided the same day as Sweatt v. Painter, *supra,* which reflected the Court's awareness of the "equal" concept, see McLaurin v. University of Oklahoma, (1950) 339 U.S. 637, 94 L. Ed. 1149.

15 (1954) 347 U.S. 483, 98 L. Ed. 873.

16 A reference to the discussion which followed the presentation of Associate Justice John M. Harlan's paper on "Some Aspects of the Judicial Process in the Supreme Court of the United States" to the Eleventh Convention of the Australian Law Council on 15th July, 1959, at Perth.

inherently unequal. As a consequence the States were put on notice to integrate their public school system "with all deliberate speed."[17]

As anticipated, the reaction was immediate, sharp, and bitter. The early attacks concentrated on the obvious. It was asserted that the Court ignored precedent, that it had reversed itself since *Plessy v. Ferguson*. This criticism has some validity, for it is true that *Brown v. The Board of Education* is hard to reconcile with the *Plessy* case. However, as illustrated above, it was not a sudden or abrupt reversal. The Court for years had been chipping away at the "separate but equal" doctrine, had been narrowing its significance in many decisions prior to 1954. It should further be noted, as Dr. Goodhart pointed out this afternoon,[18] that historically the United States Supreme Court in the field of constitutional affairs has not been hesitant to reverse itself. In fact, one of our earliest and greatest Chief Justices, John Marshall, said in *McCulloch v. Maryland*,[19] "We must never forget that it is a constitution we are expounding, a constitution intended to endure for ages to come and consequently to be adapted to the various crises of human affairs." Acting on that premise, the Court has not felt bound as tightly to the rule of precedent[20] as have, for example, the English courts under the pronouncements of the House of Lords.

Other attacks on *Brown v. The Board of Education* sought to discredit the decision on the basis that the Court made use of "non-legal" materials. It is true that in its opinion the Court made the observation that regardless of the extent of psychological knowledge in 1896, when *Plessy v. Ferguson* was decided, such knowledge in 1954 informed the Court that separate but equal facilities were irreconcilable, that separate facilities had by virtue of their very existence an unfortunate, and thus unequal, impact upon negro children. In defence of such utilization of so-called "non-legal" material, it seems fair to state there is probably no court, including Australian courts, which does not utilize, consciously or unconsciously, admittedly or otherwise, such information, and certainly the United States Supreme Court would be the last to maintain that in deciding constitutional matters it has

17 This formula for relief was announced by the Court on 31st May, 1955, after hearing special arguments on the question: See Brown v. The Board of Education, (1955) 349 U.S. 294, 99 L. Ed. 1083.

18 A reference to remarks made by Dr. A. L. Goodhart to the student body on 16th July, 1959.

19 (1819) 4 Wheat. 316, 4 L. Ed. 579.

20 For an interesting discussion of the role of precedent in constitutional cases, see *Supreme Court Reversals on Constitutional Issues* by Charlotte C. Bernhart, (1948) 34 CORNELL L.Q. 55.

never, prior to *Brown v. The Board of Education,* made use of non-legal materials. In fact, since the introduction of the so-called "Brandeis Brief" in 1908,[21] the Court has openly accepted economic and sociological data in the belief that information as to the impact of its decisions in the world in which such determinations must be made will enable it better to decide the issues at hand.

More basic than the aforementioned attacks is the allegation that by its decision in *Brown v. The Board of Education of Topeka, Kansas,* the Supreme Court stepped into an area which should have been reserved for determination by the States. In other words, these critics assert that the Court by its determination intruded into the area of educational policy. This, these critics contend, is a matter for the States, not for the federal government. This, as indicated, is the most significant argument that has been hurled against the decision of *Brown v. The Board of Education of Topeka, Kansas.* Its plausibility was sufficient to revive an early and historic doctrine, the "Doctrine of Interposition." This concept rests on the theory, to state it in over-simplified terms, that the national government only has such power as the States have given it. If, therefore, the Federal Government attempts to exercise power which the States have not surrendered to it, State governments are at liberty to interpose their sovereignty between such assertion of authority and their citizens; have power to say that such assertion, whether it comes from Congress or, as in this instance, whether it is an edict of the Court, is a nullity. Most of us thought that the validity of this doctrine had been tested by the Civil War; most of us thought that that conflict had decided that the powers of the Federal Government were the powers given to it by the people and not by the States as separate sovereignties. Most of us thought that the fact that this doctrine could lead to nothing but anarchy was so evident as to produce its own collapse. It had, nonetheless, sufficient plausibility and historical precedent to cause it to become a rallying cry for the South. While few assert its legal validity, it has provided the theme of justification for over 150 measures enacted by various State legislatures which are designed to curb, delay, and defeat, if possible, the processes of integration.

In appraising these criticisms it must be recalled once again that white Southern society viewed the segregation cases as a threat to the

21 This brief was introduced by Mr. Brandeis (later Mr. Justice Brandeis) when he appeared as counsel in the case of Muller v. Oregon, (1908) 208 U.S. 412, 52 L. Ed. 551, to argue on behalf of the constitutionality of a statute enacted by the Oregon legislature limiting the hours of employment of women.

very foundations of their social structure; a structure which the elements of history had built; a structure which was interwoven with the economic, cultural, political threads of a segregated society. In short, *Brown v. The Board of Education* and the associated cases were viewed by these people as placing a way of life in jeopardy. By the same token, negro society viewed these decisions as the opening wedge to new dignity, to a new way of life, to a way of life which they had never known.

It is not surprising in view of these factors that the Court became the centre of violent discussion and criticism. This controversy, as previously noted, was magnified as the Justices were called upon to decide many cases involving issues related to subversive activities. These decisions naturally produced strong reactions, for in the clash of individual versus the state, permissible actions are not sharply distinguishable from those which should be prohibited in the interests of security. The net impact of the two groups of decisions accounts for the present crisis in the history of the United States Supreme Court.

It is my opinion that, as in prior crises involving the Court, this too will pass away; that no significant curbing of judicial power will result. In time, however, other controversies will again surround that institution, for issues involving matters as significant as those which the Court must resolve by standards which cannot be precise cannot but produce the seeds of criticism. In appraising such reactions, it is important that the people of your country and my country appreciate this fact.

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