CHAPTER II

THE LEGAL BASIS OF FREE PUBLIC LIBRARY SERVICE TO NEGROES IN THE SOUTH

THE history of the Negro in American life is very largely involved in his different status from others under the law. From the beginning of his presence here there have been laws of general application, and there have also been laws of special application to the Negro. For example:

> Masters and slaves cannot be governed by the same common system of laws: so different are their positions, rights, and duties.[1]
>
> The African race are strangers to our Constitution, and are the subject of special and exceptional legislation.[2]

These laws of special application have always resulted, either by their explicit direction or by administrative methods which they did not forbid, in denials to the Negro of important civic benefits which the laws of general application have insured to others. The story of the American Negro is largely the story of efforts to reduce the number of these denials and to vouchsafe to the Negro an ever increasing number of these benefits.

It is the purpose of this chapter (1) to give a panoramic view of the method by which there has been fastened upon the Negro a different status under the law; (2) to attempt to discover how the free public library fits into this general legal pattern; and (3) to attempt to predict to what extent the courts would frown upon denials to the Negro of the benefits of free public library service, which are insured to others by library laws of general application.

[1] *George* (a slave) v. *State*, 37 Miss. 316, 320 (1859).

[2] *African M.E. Church* v. *New Orleans*, 15 La. Ann. 441, 443 (1860).

THE NEGRO'S STATUS UNDER THE LAW

The statement in the Declaration of Independence that "we hold these truths to be self-evident, that all men are created equal" would seem to be broad enough to mean "all men," but that it did not mean this legally is now well known. The matter was formally settled against the Negro by the Supreme Court of the United States in *Dred Scott* v. *Sandford*, in which case Chief Justice Taney said:

> In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves nor their descendants, *whether they had become free or not*, were then acknowledged as a part of the people, nor intended to be included in the *general words* of that memorable instrument.[3]

"General words" of law, therefore, where they conferred benefits, did not apply to the Negro during the days of slavery. Curiously enough, however, where "general words" of law imposed burdens, the Negro was not so easily left out of the picture. Thus Chief Justice Taney found no difficulty in bringing the Negro within the meaning of "general words" in order to make the Negro accountable for crimes. Here is his reasoning in the case of *U.S.* v. *Amy:*

> It is true that a slave is the property of the master, and his right of property is recognized and secured by the Constitution and laws of the United States; and it is equally true that he is not a citizen and would not be embraced in a law operating only upon that class of persons. Yet he is a person, and . . . . the slave, as a person, may commit offenses which society has a right to punish for its own safety.[4]

[3] 60 U.S. 393,407 (1856). (Italics are author's.)

[4] Fed. Cases 792, 809 (1859).

Thus, during the days of slavery, where laws of general application conferred benefits, rights, and privileges, in the slave states, they did not usually apply to the Negro. Laws of special application were established for him, and these laws were continually made more burdensome and restrictive. *Corpus juris* states the general situation as follows:

> With the exception of his right to protection from personal injury, and the liability of a carrier for injury to slaves, and the relation of a slave to the criminal law, a slave in all relations and in all matters, was regarded by the law as property. He had no civil, social, or political rights or capacity whatever, except such as were bestowed on him by statute, and every attempt to extend to a slave positive rights was held to be an attempt to reconcile inherent contradictions; for, in the very nature of things, he was held subject to despotism.[5]

Under these conditions, the results were usually the following:

Under the laws of general application others could own, possess, and dispose of property, but the Negro could not take title to property either by deed[6] or by gift or devise or bequest.[7]

Under the laws of general application others were free to make contracts, but a contract made by a Negro "neither imposed obligations nor conferred rights on either party."[8]

Under the laws of general application others were free to give evidence as witnesses, but "there were many restrictions on the competency of Negroes or persons of part Negro blood as witnesses, at least in actions to which white persons were parties."[9]

Under the laws of general application others were free to educate themselves and to improve their minds as they

[5] *Corpus juris*, LVIII, 757.

[6] *State* v. *Van Lear*, 5 Md. 91 (1853).

[7] *Cunningham* v. *Cunningham*, 1 N.C. 519 (1801).

[8] *Corpus juris*, LVIII, 758.

[9] *Cyclopedia of Law and Procedure*, XL, 2200.

saw fit, but this right was denied to the Negro. The laws of special application regarding the education of the Negro are summed up by Carter G. Woodson in *The Education of the Negro Prior to 1861*, as follows:

> The aim of the subsequent reactionary legislation of the South was to complete the work of preventing the dissemination of information among Negroes and their reading of abolition literature. This they endeavored to do by prohibiting the communication of the slaves with one another, with the better informed free persons of color, and with the liberal white people; and by closing all the schools theretofore opened to Negroes. The States passed laws providing for a more stringent regulation of passes, defining unlawful assemblies, and fixing penalties for the same. Other statutes prohibited religious worship, or brought it under direct supervision of the owners of the slaves concerned, and proscribed the private teaching of slaves in any manner whatever.[10]
>
> After these laws had been passed, American slavery extended not as that of the ancients, only to the body, but also to the mind.[11]

Likewise, under laws of general application others were eligible for jury service and to exercise the ballot, but these benefits did not extend to slaves.

The limitations and proscriptions of these laws of special application became continually more exacting until stopped by physical force in the Civil War. Against such a legal background the Thirteenth, Fourteenth, and Fifteenth amendments to the Constitution of the United States were projected. With the omission of the provisions which gave to Congress the power to enforce them by appropriate legislation, these amendments read as follows:

> *Thirteenth.*—Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or in any place subject to their jurisdiction.
>
> *Fourteenth.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States

[10] (New York and London: G. P. Putnam's Sons, 1915), p. 164.

[11] *Ibid.*, p. 170.

and of the State wherein they reside. 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.

Fifteenth.—The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

It would seem at face value that these "general words" were broad enough to strike down all laws of special application to the Negro and to guarantee to him all the benefits of laws of general application. That this was the intention of those who framed and adopted these amendments seems also clear. Justice Miller, speaking for the Supreme Court of the United States in the famous *Slaughter House Cases*, expressed the purpose of the Thirteenth, Fourteenth, and Fifteenth amendments as follows:

> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all, and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, *the security and firm establishment of that freedom*, and *the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.*[12]

That the realization has fallen far short of Justice Miller's picture of this broad intention is a matter of common knowledge. How has this difference between the anticipation and the realization been legally effectuated? First, by judicial decisions to the effect that the "general words" of the Thirteenth, Fourteenth, and Fifteenth amendments mean less than ostensibly they seem to say; and, second, by laws of special application in regard to the Negro which

[12] 83 U.S. 36, 71 (1873). (Italics are author's.)

have been upheld by judicial decisions. As Justice Curtis said in his dissenting opinion in the Dred Scott case: "The assertion is, though the Constitution says *all*, it does not mean all—though it says *all*, without qualification, it means all except such as allow or prohibit slavery."[13]

Let us examine briefly some of the examples of this process which has caused the Thirteenth, Fourteenth, and Fifteenth amendments in practice to mean less than their broad "general words" would seem to indicate. The first substantial setback came from the Supreme Court of the United States in the *Civil Rights Cases*.[14] In these cases the Congress of the United States had undertaken, by appropriate legislation carrying heavy criminal penalties for violation, to protect the Negro from discrimination in the great field of private enterprises intimately associated "with a public interest," like public conveyances, theaters, and other places of public amusement, hotels, inns, and other such places for the accommodation of the general public. In a private economy like that in vogue under our form of government these public places were naturally operated by private initiative and enterprise, but the Supreme Court of the United States also had held[15] that, when such enterprises had been committed to a public use, that use was subject to public regulation for the protection of the public.

It had been conceded that, if the denial of the benefits of these public places to the Negro or discrimination against him in the enjoyment of the advantages of such public places had been practiced because of his race and color and condition of servitude—in legal parlance, if such denials

[13] *Dred Scott* v. *Sandford*, 60 U.S. 393, 615 (1856).

[14] 109 U.S. 3 (1883).

[15] *Munn* v. *Illinois*, 94 U.S. 113 (1876).

and discriminations were "badges and incidents" of slavery —then Congress had the power to protect the Negro in the enjoyment of these benefits and advantages under the Thirteenth Amendment. But when Justice Bradley came to write the opinion of the Supreme Court, using reasoning fundamentally the same as that employed by Chief Justice Taney in the Dred Scott case, this is what he said:

> Mere discriminations on account of race or color were not regarded as badges of slavery.
>
> There were thousands of free colored people in this country before the abolition of slavery, enjoying all the *essential* rights of life, liberty and property, the same as white citizens; yet no one, at that time, thought it was any invasion of his personal status as a freeman because he was not admitted to *all the privileges* enjoyed by white citizens. . . . .[16]

Justice Harlan, himself a southerner well acquainted with the facts involved, refuted this argument in his dissenting opinion in these words:

> The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial. I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. "It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul." Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law.[17]

Justice Bradley said for the majority:

> It is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.[18]

[16] *Civil Rights Cases*, 109 U.S. 3, 25 (1883). (Italics are author's.)

[17] *Ibid.*, p. 26.

Justice Harlan in his dissent proceeded to express an opinion, well known by the Negro through a thousand bitter experiences to be a fact, in these words:

> I am of the opinion that such discrimination practiced by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment.[19]

But the law was settled to the contrary and the Thirteenth Amendment approached its doom through the same deadly precision employed in the Dred Scott case.

After the Thirteenth Amendment was stripped to the point of meaning bare physical freedom and little more, the Fourteenth was set upon, and the foundation was laid for the emasculation of both the Fourteenth and the Fifteenth amendments, which subsequent decisions of the Supreme Court have all but completed. In construing the Fourteenth Amendment Justice Bradley held that the Negro could not complain and that Congress was without power to give him ground for complaint unless, he stated, "the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration."[20] The clear implication was that "those who had formerly exercised unlimited dominion over" the Negro could get together at their will, in some alleged private way and perpetrate any of "the oppressions" mentioned in the *Slaughter House Cases*, the very things which the three amendments intended to prevent. Nor have "those who formerly exercised unlimited dominion over" the Negro been inept in taking their cue from Justice Bradley's sug-

[18] *Ibid.*, p. 20.

[19] *Ibid.*, p. 43.

[20] *Ibid.*, p. 18.

gestion. Two examples—one involving the Fifteenth Amendment and one involving the Fourteenth Amendment—elucidate this point clearly. They show how effective was the blow delivered to all the amendments by the *Civil Rights Cases*.

In the interpretation of the Fifteenth Amendment it is admitted that the right of the Negro to vote cannot be "denied or abridged" by "State law or State authority." But, under Justice Bradley's ruling in the *Civil Rights Cases*, "those who had formerly exercised unlimited dominion over" the Negro had an instrument through which they might deny or abridge his right to vote as they pleased.

From this point on, the technique was easy. The states in the southern area passed laws setting up the statutory primary elections of the South. These elections were made in every respect, even to minute details, exactly like the general elections, so that the white South could be perfectly satisfied that all the differences within their group could be fought out in a preliminary election which had all the safeguards of a general election. The next step was to get together in an alleged private convention, called the "Democratic Party," and to pass a resolution that Negroes could not vote in these statutory primary elections. Then the formula which Justice Bradley announced in the *Civil Rights Cases* was able to serve as a shield and complete protection. Thus, when the matter came before the Supreme Court of the United States in *Grovey* v. *Townsend*,[21] Justice Roberts ruled that the Fifteenth Amendment had not been violated because the denials of the Negro's right to vote had not been perpetrated by the state or by its authority.

It is well settled that a state statute or municipal ordi-

[21] 295 U.S. 45 (1935).

nance which makes it illegal for a Negro to buy property in a given section of the Negro's home town would be a violation of the Fourteenth Amendment,[22] so "those who had formerly exercised unlimited dominion over" the Negro decided to bring into play Justice Bradley's formula. They entered into a contract that it should be illegal for the Negro to buy property in a certain section; and the Supreme Court of the United States did the rest by holding that a state decision[23] enforcing such an alleged private deprivation of the Negro's right was not prohibited by the Fourteenth Amendment.[24]

That sound reasons might have been found to support a different view would seem to appear from the reasoning used by a federal district judge in *Gandolfo* v. *Hartman*, where it was said:

> It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the State may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear.[25]

Unfortunately for the Negro, the Supreme Court of the United States thought that this reasoning was not at all clear, and to that extent, the "full enjoyment" of his free-

[22] *Buchanan* v. *Warley*, 245 U.S. 60 (1917).

[23] This came up from the District of Columbia, but the decisions of the highest court of the District may be treated like those of a state court.

[24] *Corrigan* v. *Buckley*, 271 U.S. 323 (1926).

[25] 549 Fed. 181, 182 (1892).

dom, which Justice Brown said[26] was "the primary object" of the Fourteenth Amendment has not been realized.

THE DOCTRINE OF SEPARATION OF THE RACES

Another guise under which the "full enjoyment" of the Negro's freedom has been attacked with great success is the doctrine of the separation of the races by law in the enjoyment of the privileges and advantages provided for by the states. The classic illustrations, which may serve as examples of all the rest, are the laws for separate schools and the laws requiring the separation of the races in public conveyances.

Public conveyances.—In the *Civil Rights Cases* it was held that, as far as the federal Constitution was concerned, the private owners of enterprises affected with a public interest could admit or exclude the Negro as they might see fit. Lest some might admit the Negro to the same accommodations open to white people state legislatures in the South have passed statutes requiring that separate accommodations be provided for the two races in connection with various of these enterprises. All the southern states have passed such laws with reference to public conveyances like railroads, steamboats, and streetcars. For the benefit of the Fourteenth Amendment the provision has been usually added that these separate accommodations for the two races shall be "equal" in all points of comfort and convenience. The Supreme Court of the United States has given its approval to such laws in its decision in the case of *Plessy* v. *Ferguson*.[27] It was held that "a statute which implies merely a legal distinction between the white and colored races—a distinction which is found in the color of

[26] *Holden* v. *Hardy*, 169 U.S. 366, 382 (1898).

[27] 163 U.S. 537 (1896).

the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races."[28]

As if sensing the kind of "separate but equal" accommodations which would be provided for the Negro under this kind of mandate, Justice Harlan again dissented, saying: "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."[29] In answer to the "social equality" argument he said in substance that this was only a straw man and that there was no more social equality in two races riding in the same coach than there was in the two races walking down the same side of the street.[30]

As a matter of practical economics Justice Harlan knew that it would be economically impossible for a railroad to provide two separate sets of accommodations which would, at the same time, be "equal" in all points of comfort and convenience. Those who are familiar with the hardships which the Negro has to endure in the matter of public conveyances, despite the payment of a first-class fare, know how truly Justice Harlan prophesied. For his first-class fare the Negro usually gets inferior accommodations by comparison with the accommodations which white people get for their first-class fares. It is true that the effect of the word "equal" must yet be dealt with—more will be said of this later—but the inevitable result of the course of the decisions of the Supreme Court of the United States, starting with the *Civil Rights Cases*, has been that for all practical purposes the accommodations for the Negro could hardly be other than unequal.

Public schools.—We come now to the illustration of the

[28] *Ibid.*, p. 543. [29] *Ibid.*, p. 559. [30] *Ibid.*, p. 561.

separate school. The difference between this and the case of the common carrier is that the privilege or advantage or benefit in the case of public schools is provided for by the state out of public taxes. All the thirteen southern states under consideration have such laws, and in practically all of them it is a requirement of the state constitution that schools shall be separate for the two races. In only four of these states, however—North Carolina, Kentucky, Florida, and Texas—do the provisions requiring separate schools specifically require "impartial" or nondiscriminatory treatment of the Negro schools. State laws requiring separate schools for the Negro have been held to be constitutional by the Supreme Court of the United States,[31] the condition of constitutionality being that the separate schools should be equal. In a recent decision on this point, Chief Justice Hughes stated that "the admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State."[32]

The Gaines case was the much-discussed attempt of a Negro to gain admission to the law school of the University of Missouri, no separate law school for Negroes having been provided by the state within its borders. The Supreme Court of the United States held that the test of equality had not been met and that "the State was bound to furnish him within its borders *facilities* for legal education *substantially equal* to those which the State there afforded to persons of the white race."[33] Thus the provision of scholar-

[31] *Gong Lum* v. *Rice*, 275 U.S. 78 (1927).

[32] *Missouri* ex rel. *Gaines* v. *Canada*, 305 U.S. 337, 349 (1938).

[33] *Ibid.*, p. 351. (Italics are author's.)

ships to Negroes for legal education outside the state were held to be unequal.

At face value this would seem to be a sweeping victory, but, when an attempt is made to interpret the true import of the words "facilities" and "substantially equal," the meaning immediately becomes elusive. When an attempt is made to analyze them in the light of Chief Justice Hughes's further holding that the right violated was a "personal" and "individual" right of Gaines,[34] many difficulties arise for the Negro as a race; for it was "to secure the colored race, then recently emancipated, the full enjoyment of their freedom,"[35] that the Thirteenth, Fourteenth, and Fifteenth amendments were enacted. What is actually meant by "*facilities* for legal education"? When does a thing become "substantially equal" to the real article for which it substitutes? Would only a law school patterned after the law school of the University of Missouri be a "facility substantially equal," or would some other kind of contrivance within the state be held to be acceptable? If the University of Missouri law school is housed in a building erected especially for the purpose, would rented rooms be "substantially equal" to such a building? If the old lecture method of instruction were adopted instead of the case method or the more modern plan of individual research and honors courses, would this meet the test of "substantial equality"? How many and what kind of law books must be available to the Negro student, and how convenient must they be to him, as compared with their availability and accessibility at the University of Missouri law school? What of the training, experience, and prestige of the faculty? All these questions are pertinent because Gaines has not yet been admitted to the University of

[34] *Ibid.*

[35] *Holden* v. *Hardy*, 169 U.S. 366, 382 (1898).

Missouri law school, and a law school of undetermined quality has been established at Lincoln University, the Negro state school, for him and other Negroes.

Even more formidable is the proposition that the right to educational "facilities," which are "substantially equal," is "personal" and "individual." Imagine the millions of Negro boys and girls, men and women, trying by an individual lawsuit to enforce this personal right throughout the South. The simple fact is that this is beyond the realm of any practical possibility of achieving results.

Another formidable difficulty is the discretion which is given to local administrators over these matters. A quotation from a North Carolina decision will indicate this. In *Lowery* v. *Board of Graded School Trustees*, this court said:

> Much must be left to the good faith, integrity, and judgment of local boards in working out the difficult problem of providing equal facilities for each race in the education of all the children of the State. Local conditions, relative number, and other well-recognized factors enter into the problem, and must be dealt with in a spirit of justice to all concerned, and to promote the honor and welfare of the State.[36]

The highest court of Kentucky has also said in *Davies County Board of Education* v. *Johnson:*

> Under our Bill of Rights and the Fourteenth Amendment to the Federal Constitution, it is not necessary that the rights or privileges of the two races shall be *identical* but only that they shall be *equal.*[37]

The latitude is obviously wide, and just how much "good faith" and "integrity" has been shown in the administration of separate school laws by local administration is indicated in an editorial analysis in the *Journal of Negro Education* for April, 1935.[38] Analyzing a booklet entitled *School Money in Black and White*, published by the Julius Rosenwald Fund, editor Charles H. Thompson finds:

> *First*, since 1900, taken by decades, the proportionate disparity between the "U.S." as a whole and the "White South" has been either decreasing or remaining relatively constant. (Note that the "White South" expended *only* 21 per cent per capita as much as the "U.S." in 1900, but in 1930 it expended 45 per cent as much.) *Second*, the disparity between the per capita expenditure of the "White South" and "Negro" has steadily widened. (Note that the per capita expenditure on Negroes in 1900 was approximately 62.5 per cent that of the "White South," while in 1930 the per capita expenditure on Negroes was *only* 28 per cent as much as the "White South." Again, from 1900 to 1930, the per capita expenditure for the "White South" increased 1,108 per cent, while the per capita expenditure for Negroes increased *only* 503 per cent—less than half that of the "White South.")

Finding the existence of these discrepancies is one thing; but the question of what the Negro can do about it in view of the legal status which has been fastened upon him since the Civil War is quite another matter.

[36] 140 N.C. 25, 47 (1905).

[37] 179 Ky. 34 (1918). (Italics are author's.)

[38] IV, 150.

SUMMARY OF THE NEGRO'S LEGAL STATUS

Much as we like to talk about the full and equal rights of the Negro under the Constitution of the United States, an impartial consideration of the situation leads inevitably to the fact that no such thing exists as the law now stands. While under the Dred Scott case the Negro had "*no* rights which the white man was *bound* to respect," the most that can now be said in the present state of the law is that the Negro has *some* rights which the white man is bound to respect.

It may be said that physical freedom has been guaranteed, but as for the full civil freedom, which it was the manifest intention of the Thirteenth, Fourteenth, and Fifteenth amendments to guarantee, it seems clear that

this has been only partially secured. Indeed, in most particulars the Supreme Court of the United States, for all practical purposes, has given the states a free hand in dealing with the rights of the Negro. It is true, however, that when flagrant abuses persist, such as "long-continued, unvarying, and wholesale exclusion of Negroes from jury, service,"[39] or total failure to provide any legal education for Negroes within their borders, when this is provided for whites,[40] the Supreme Court will remind the states that they are going too far. But, generally speaking, the decisions of the Supreme Court have not been any great obstacle to the states in carrying out their own particular philosophy concerning what civic rights and benefits should be accorded to the Negro. The *Civil Rights Cases* paved the way; subsequent decisions[41] carried forward the point of view there expounded.

Had the minority view of Justice Harlan prevailed in the *Civil Rights Cases*, at a time when the national policy growing out of the Civil War and the war amendments was still being formulated, and had that minority view been followed in the succeeding cases like the important case of *Pleasy* v. *Ferguson*,[42] the position of the Negro under the law would undoubtedly now be much more favorable. But nearly three-quarters of a century of the point of view of Justice Bradley in the *Civil Rights Cases* is a long time, during which, with Supreme Court approval, the practice of assigning to the Negro a lesser status under the law has

[39] *Norris* v. *Alabama*, 294 U.S. 587, 597 (1935).

[40] *Gaines* v. *Canada*, 305 U.S. 337 (1938).

[41] *Plessy* v. *Ferguson*, 163 U.S. 537 (1896) and *Grovey* v. *Townsend*, 295 U.S. 45 (1935).

[42] 163 U.S. 537 (1896).

crystallized; attitudes consistent with such a legal point of view have become ingrained in the white people;[43] and the Negro himself has subjectively felt in a very definite way the impact of this process which has been driven home to him through so many years. The result is an accomplished fact which even a decision of the Supreme Court of the United States would have difficulty in eradicating. The exclusion of the Negro from, or his being "jim-crowed" in the use of, public places, the unquestionably unequal opportunities for public education of the Negro, the disfranchisement of the Negro, have all now become just as much a part of the social system of the United States as was slavery at the time of the Civil War—all with the approval of the Supreme Court of the United States.

There is, however, one important difference. During slavery, and especially after the Dred Scott decision, the absence of physical freedom made hope very dim, but now the presence of physical freedom and the progress the Negro has made and is continuing to make, keep alive the hope that the full civil freedom, which the Thirteenth, Fourteenth, and Fifteenth amendments attempted without success to bring, may yet be realized. That process for the moment seems to be one of self-help, and a continuous, wise, and effective attempt to foster tolerance and liberality on the part of the white South toward the Negro. In this view the Supreme Court of the United States through continually more liberal decisions will serve as a strong appeal to the conscience of a prejudiced America. It is difficult to see any other role that such decisions can now play in the face of the great political and civic discriminations which are perpetrated against the Negro.

[43] See also chap. i.

THE FREE PUBLIC LIBRARY FOR NEGROES IN THIS LEGAL PATTERN

How does the free public library for Negroes fit into this general legal pattern? First, what is a public library? The following definition seems to be the one which is generally accepted: "The only really essential requirement in the definition of a public library is that its use should be free to all residents of the community on equal terms."[44] Measured alone by democratic principles of "equal rights to all, special privileges to none," this definition would seem to settle any questions of distinctions on account of race or other such differences in persons. But we have seen that in American law "all" does not always include the American Negro. Specifically, with two or three exceptions, the public libraries open to white people in the thirteen southern states under consideration have not been opened to the Negro.

On the basis of the facts, therefore, the general terms which guarantee public library facilities to others "on equal terms" have not thus far included the Negro. Here, as in other places, he has been made the subject of special consideration. It thus becomes necessary to inquire what legal rights the Negro has (1) under the Constitution and laws of the United States; (2) at the level of state law; and (3) at the point of local library control. Before entering upon this inquiry, however, it is necessary to define and delimit the issue further.

First, the legal basis and status of libraries as public institutions have been fully explained and covered by Dr. Carleton Bruns Joeckel in *The Government of the American Public Library*. The pertinent query here, therefore, is,

[44] C. B. Joeckel, *The Government of the American Public Library* (Chicago: University of Chicago Press, 1935), Introd., p. x.

given the types of institutions there disclosed as constituting the American public library, what legal rights does the Negro have to enjoy their privileges and benefits?

Second, in so far as proprietary and subscription libraries remain as institutions which receive no support from public funds, it is clear that those who own these libraries may admit or exclude whom they will, subject to the following explanations. Under the doctrine of the *Civil Rights Cases* the Thirteenth and Fourteenth amendments do not apply so long as there is no state regulation in the public interest. Under *Munn* v. *Illinois*,[45] where such libraries have been committed to general public use, the states may probably regulate and control them as being affected with a public interest. If a state should rule such a library to be affected with a public interest and thus subject to state control, it may, under the rule of *Plessy* v. *Ferguson*,[46] require the library authorities to provide separate accommodations for white and colored people, and, in that event, under the theory of *McCabe* v. *A.T. & S.F. Ry.*,[47] it would seem that the separate accommodations provided for Negroes pursuant to such a mandate of the state must be "substantially equal" to those provided for white people.

Third, where such privately controlled libraries receive support from public funds, there would arise a basis for the contention that, by the acceptance of these public funds, these libraries would forfeit any right which they might have had to discriminate between citizens in the use of their privileges. In *Lowery* v. *Board of Graded School Trustees*[48] it was said of the public school system: "This system includes all public schools or schools receiving for

[45] 194 U.S. 113 (1876).
[46] 163 U.S. 537 (1896).
[47] 235 U.S. 151 (1914).
[48] 140 N.C. 25, 47 (1905).

their support public taxes, either general or local." It is a well-settled principle that public taxes may not constitutionally be used for a private purpose.[49]

Fourth, "the libraries of the corporation and association group are still numerous but have passed the zenith of their importance as a class."[50] The legal rights of the Negro in connection with this class of libraries will, therefore, be left with the above observations.

Most libraries today are creatures of government—school district, municipal, county, groups of counties—and the future of the library as an institution seems to lie in this direction.[51] The discussion of the legal rights of the Negro will thus be limited to that type of library institution which is a creature of government.

Under the Constitution and laws of the United States.—"There is no direct manner in which the federal government may affect the actual form of library organizations and administration."[52] "The library must look to the state, and not to the nation, as the ultimate source from which it draws its powers and as the authority which prescribes its forms."[53] Further, "the Constitution of the United States has nothing whatever to say . . . . about libraries. Nor are there any federal statutes regarding the organization or administration of libraries."[54]

There are, however, "possibilities of federal aid to libraries."[55] A bill having this as one of its purposes (which bill is still pending) was introduced in the Seventy-sixth

[49] See *Eyers Woolen Co.* v. *Town of Gilsum*, 146 A. 511 (1929) and cases cited.

[50] Joeckel, *op. cit.*, p. 342.

[51] *Ibid.*, p. 341.

[52] *Ibid.*, p. 33.

[53] *Ibid.*

[54] *Ibid.*

[55] *Ibid.*, p. 34.

Congress.[56] Section 301 of the bill states the purpose of the proposed appropriation as follows: "to facilitate adequate provision for library service primarily for rural inhabitants throughout the various States." The bill sets up certain conditions which must be met by the states in order to qualify for the funds, one being that in states where separate library services are maintained for separate races that an equitable apportionment must be made of such funds for library services for minority races.[57] The bill sets up the following test of "equitable apportionment":

> A just and equitable apportionment or distribution of the several funds, provided under this Act, for the benefit of a minority racial group in a State which maintains by law separate educational facilities for such minority racial group, means any plan of apportionment or distribution which results in the expenditure, for the benefit of such minority racial group, of a proportion of said funds not less than the proportion that each such minority racial group in such State bears to the total population of that State.[58]

While this test may be sufficient to make it possible for a state to get the federal grant-in-aid, it by no means follows that the Fourteenth Amendment would be satisfied by library service to Negroes set up pursuant to a governmental policy of spending on that service no more than the proportion of total available library funds which the Negro population of the state bears to the total population. This problem will be discussed at greater length later in this chapter.

Anticipating the possibility of enactment of the above-mentioned federal bill, the Tennessee legislature has already passed an enabling act, in which the federal requirement for library service to Negroes is taken into considera-

[56] S. 1305.

[57] Sec. 302(*b*).

[58] Sec. 601(*a*).

tion.[59] The commission of education, among other things, is given the following "powers, functions and duties": "to make equitable apportionment of any funds so received so as to provide library facilities to both the white and colored races."

Although the Constitution of the United States does not mention libraries, yet it does put some limitations upon the extent to which the Negro may be denied the benefits of privileges created and supported by governmental units within a state. The legal rights of the Negro, in this instance, arise under the clause of the Fourteenth Amendment which prohibits the states from denying to citizens the "equal protection of the laws," and this prohibition runs not only against state legislatures but also against every other governmental agency within the state.[60] The difficult question, however, underlying the whole situation springs from the definition of "equality." This question will be considered again in connection with the discussions of the legal rights of the Negro at the level of state law and at the point of local library control. It should be stated here, however, that it is believed that the standard of equality set up in the pending federal bill mentioned above does not meet the requirements of the equal protection clause of the Fourteenth Amendment.[61]

At the level of state law.—Whether the public library is

[59] *Tennessee Laws of 1939*, chap. 172, sec. 3.

[60] "Whoever by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition" (*ex parte Virginia*, 100 U.S. 339, 347 [1879]).

[61] See *Lowery* v. *Board of Graded School Trustees* (140 N.C. 25, 44 [1905]), where the distribution of school funds on a basis of ratio of population was held to violate a provision of the Constitution of North Carolina guaranteeing equality of the Negro schools with the white.

legally a matter of state-wide concern or only of local interest in some political subdivision of the state still remains a question which is "confused and uncertain."[62] As far as the legal rights of the Negro are concerned, it is significant in so far as the free public library may be held to be a part of the public school systems of the South, within the meaning of the constitutional provisions which practically all these states have requiring that there shall be separate schools for Negroes and white people. If these mandatory constitutional provisions apply, then every community which has or expects to have a library must look forward to having two libraries, which under the Fourteenth Amendment are required to be "equal." If, on the other hand, it should be held that, even though the library may be an educational function, yet the term "schools" does not necessarily include every educational function, the public library pattern for the Negro may be decidedly different.[63] Many communities may be unwilling even to attempt the impossible task of building two "equal" libraries. Two of the thirteen southern states under consideration have in recent years passed statutes making the public library a part of the state-wide system of public education, although no mention is made of the Negro in these laws.[64] As suggested, however, public education might reasonably be construed to be broader than public schools. In West Virginia, for example, in the case

[62] Joeckel, *op. cit.*, p. 47.

[63] For discussions of the public library as an educational function see *ibid.*, p. 44, where the case of *Carpenter* v. *St. Louis* (318 Mo. 870 [1928]) is cited. This case is particularly important because the state of Missouri has a constitutional provision which makes separate schools mandatory, but the city of St. Louis makes no effort to separate the races in its public library (see sec. 3, Art. XI of Missouri Constitution).

[64] *Tennessee Laws of 1937*, chap. 240; *Virginia Laws of 1936*, p. 107.

of *Brown* v. *Board of Education*,[65] it was specifically held that, even though the Charleston Public Library was under the control and supervision of the board of education, this library was not a part of the public school system of the state within the meaning of a constitutional provision in that state which requires separate schools for the white and colored races.

The position of the state in the library picture is also significant in so far as the states under consideration have, by state-wide statutes, made the policy of the separation of the races mandatory as a matter of state policy; and it has been shown that the Supreme Court of the United States has upheld this policy in the enjoyment of governmental privileges, which would include the public library, provided that the privileges accorded to the separated groups are substantially equal. Here it would be well to look into the state library laws themselves to see if they further promulgate this policy. Only five of the states under consideration have specifically mentioned the Negro in their library laws.[66] Reference has already been made to the Tennessee statute, which does not state the doctrine of the separation of the races in connection with library service as a positive state policy but only by way of attempting to meet the conditions of a possible federal bill for grants-in-aid to the states for library service. The statutes in the other four states read as follows:

North Carolina.—The state librarian is directed to fit up and maintain a separate place for the use of the colored people who may come to the library for the purpose of reading books or periodicals.

Texas.—Any white person of such county may use the county free library under the rules and regulations prescribed by the Commissioners' Court and may be entitled to all privileges thereof. Said Court shall make proper provision for the Negroes of said county to be served through a separate branch or branches of the county free library, which should be administered by a custodian of the Negro race under the supervision of the county librarian.

Oklahoma.—Provided that in such cities that have not less than one thousand (1,000) colored inhabitants the said city council may establish and maintain a separate library and reading room, or either of them, for the use and benefit of the colored inhabitants thereof to be maintained by said city council in like manner as that of the library and reading room.

Kentucky.—Sec. (1). In cities and towns of the classes named herein in which there . . . . has been or hereafter may be erected, and fully paid for by voluntary donations made by citizens and business organizations of said city or town and the vicinity thereof . . . . and into which library building and library, all citizens of said city or town, or all white citizens thereof, or all colored citizens thereof, as the case may be, have and shall continue to have, free and equal rights and privileges to the use of the library . . . . shall be entitled to and shall have all of the aid . . . . of the provisions herein; provided the two-tenth of one mill . . . . as the least popular subscription required, and the one mill . . . . as the maximum limit . . . . be based or levied upon . . . . all property which is subject to taxation . . . . owned by all persons of the race or races, respectively, to whom is given free access to said library building and library. . . . .

Sec. (2). If a library building herein provided for has been . . . . erected for the separate and exclusive use of each of said races . . . . the revenue derived from the one-half of all fines, forfeitures, and costs from the police court . . . . [shall] be credited to the library fund of said separate library organizations, respectively, in the proportion per capita as the total number of citizens of such city or town belonging to each of the respective races bears to the total population. . . . . The revenues from the ad valorum tax against property belonging to the respective races shall be credited to the library for which the levy was made, giving to each the amount collected on property of each race respectively. . . . .

It will thus be seen that there is not that mandatory state-wide statutory requirement for separate libraries, such as was found for schools in the southern states. The North Carolina statute specifically covers only the state

[65] 106 W.Va. 476 (1928).

[66] *North Carolina Code of 1935*, sec. 6585; *Texas Rev. Civ. Stat.* (1935), Art. 1688; *Comp. Okla. Stat.* (1921), sec. 9528; *Tennessee Laws of 1939*, chap. 172; and *Kentucky Laws, 1932*, chap. 94, p. 437.

library, although there is a North Carolina decision in which the supreme court of that state seems to indicate by way of dictum that the policy of separate libraries for Negroes is general in the state.[67] The Texas statute refers only to county libraries, and the Oklahoma statute calls for separation, and this in a permissive way only, in cities with not less than 1,000 Negro inhabitants. In Kentucky there seems to be no state-wide legislative enactment in regard to public libraries, either requiring separation of the races or permitting it, though the wording of the statute quoted from seems to indicate that separation of the races is taken for granted. This statute itself, however, merely provides for certain types of support of separate libraries which have been erected by "voluntary donation made by citizens and business organizations" in certain cities and towns.

Given a policy of separation of the races in the use of library facilities set up by the state itself, such as law libraries for appellate courts, state libraries and their extension services, and the like, what are the legal rights of the Negro in connection with such library facilities? In the Gaines case the Supreme Court of the United States held that, while the state of Missouri was under no obligation

[67] "It has long been the settled policy of this State, promulgated through the legislative branch of the government, to have separation or segregation of the white and Negro races with *equal accommodations*, in the public institutions of the State, and by public service corporations. Separate schools for the white race and Negro race; separate asylums and other institutions for the afflicted Negroes in the State, separate reformatories, etc. In the cities and towns that have them, separate parks, *separate libraries*, etc. By public service corporations, separation and segregation on railroad trains, steamboats, streetcars, separation and segregation in the railroad and steamboat companies' passenger stations" (*Corporation Commission* v. *Interracial Commission*, 198 N.C. 317, 320 [1930]). This evidently means that the supreme court of this state would approve provisions for separation passed by the authorities clothed with authority to legislate for the use of libraries in cities and towns and other geographical library areas, since there are no state statutes which specifically call for such separation.

to provide legal education for any of its citizens, yet, having established a law school, the Negro was entitled to the enjoyment of its privileges on the same conditions as other citizens. The doctrine of the separation of the races was reiterated, the court pointing out that the right of the Negro to attend the law school of the University of Missouri could be defeated by the establishment of substantially equal separate facilities for legal education. But the court held that, until such substantially equal separate facilities were established, the Negro's right to enjoy the facilities established for others remained unimpaired. While the privileges of legal education were involved in the Gaines case, it seems clear that the principles enunciated would apply with equal force to the privileges of free public library service. Applying these principles the following propositions would seem to follow:

First, the Negro has a right in the first instance to use every state public library service on the same conditions as other races.[68]

Second, this right may be defeated by the establishment of separate library service for the Negro which is substantially equal to that provided for others. A mere declaration of intention to make such provision of substantially equal separate library service would not be sufficient to defeat the Negro's right; the right is not defeated until the substantially equal separate service is actually in existence for his use.[69] The Negro would therefore seem always to have the right to challenge the equality of the

[68] "We are of the opinion that the ruling was error, and that the petitioner was entitled to be admitted to the law school of the State University *in the absence of other and proper provision for his legal education within the State*" (*Gaines* v. *Canada*, 305 U.S. 337, 352 [1938]). (Italics are author's.)

[69] "As to the first ground it appears that the policy of establishing a law school at Lincoln University has not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough" (*ibid.*, p. 346).

separate library service provided for him; and, if it should be found that the separate library facilities were not in fact substantially equal, the Negro would then be entitled to use the library facilities provided for other races until such time as those provided separately for him were made substantially equal.

This raises the difficult question of what separate library service would be substantially equal? Take the North Carolina statute, for instance, which requires the state librarian "to fit up and maintain a separate place for the use of the colored people." What kind of "separate place" would be "substantially equal" to the state library? Or, when is a library extension service provided by a state library commission "substantially equal" when separate collections are maintained for the two races? The Negro has a right, under the principles of the Gaines case, to use the white collection if the Negro collection is not substantially equal to it. Who is sufficiently wise and discriminating to say that one collection of books is equal to another collection of books, if the two collections are not the same?

No precise definition of substantial equality has been given by the Supreme Court of the United States or by the highest courts of the states under consideration. In the Gaines case the Supreme Court of Missouri held that scholarships outside the state were "substantially equal" to the privilege of attending the law school of the University of Missouri. The Supreme Court of the United States held that such outside scholarships were not substantially equal. By analogy it would seem that the privilege of using library books off the library premises would not be substantially equal to the privilege of using them in the library reading-rooms.

In arriving at what is substantially equal in the case of

public schools, we have seen that the Supreme Court of North Carolina in the Lowery case[70] mentions "local conditions, relative numbers, and other well-recognized factors," which local boards may consider. The argument of relative numbers was made in the Gaines case, but it was turned down by Chief Justice Hughes in these words: "Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of Negroes as excusing the discrimination in favor of whites."[71] The state courts would thus seem to be tending to consider other matters and circumstances than a comparison of what is provided for the Negro with what is provided for others. The Supreme Court of the United States, however, seems inclined toward a plan of testing which would set up the privilege afforded to white people and then to put along side of it the privilege afforded to the Negro and then to ask the simple question: Can it be fairly said that the latter is equal to the former? Under the former test, "local conditions, relative numbers, and other well-recognized factors" have in practice—as everyone knows—been used as reasons for justifying admitted inequalities. Under the latter test the question is simple: How does the precarious privilege afforded to the Negro compare with the privilege afforded to others, when these two privileges themselves are measured by proper standards of measurement? This raises the further question: "What are proper standards of measurement?

First, when standards of excellence or efficiency are set up by the state library laws themselves, it would seem not open to serious question that, in order to be substantially equal, the library service provided for the Negro would

[70] See p. 44.

[71] *Gaines* v. *Canada*, 305 U.S. 337, 350 (1938).

have to meet the state standards in all respects in which the library service which was provided for others met these standards. One example of such standards is the training and certification of librarians required by some state library laws.[72]

Second, when the state library authorities have set up standards of excellence and efficiency, it would seem that it would not be possible to say that lower standards would be equal in the provision of separate library service for the Negro. In other words, the state library commission or other proper authority having said that certain standards were necessary in order to have first-class library service for white people, it would be inconsistent with the requirement of substantial equality to say that lower standards would produce first-class library service for Negroes.

At the point of local library control.—"The American city, it must be remembered, is the creature of the state. We talk much about our rights and privileges in the management of local affairs, but it is a commonplace in the study of the form of American institutions that there is no 'inherent right of local self-government.' "[73] This means that the state is the ultimate source of the powers exercised by local library authorities attached to political subdivisions of the state. The exercise of these powers is subject to the restraints of the Constitution of the United States.[74]

In view of the attitude, however, expressed by the Supreme Court of North Carolina,[75] it seems probable that local library authorities may provide for separation of the races and that such provisions would be upheld in all the

[72] See *Tennessee Laws of 1937*, chap. 239; *Virginia Code of 1936*, sec. 363; *Kentucky Acts of 1938*, chap. 140.

[73] Joeckel, *op. cit.*, p. 40, quoting J. F. Dillon, *Commentaries on the Law of Municipal Corporations* (5th ed.; Boston, 1911), I, 154.

[74] See *Ex parte Virginia*, 100 U.S. 339 (1879).

[75] See p. 54.

southern states under consideration. Though this policy has not been followed in West Virginia,[76] whose statutory policy of separation of the races seems to be limited to separate schools, it is doubted if this course would be pursued in the thirteen southern states under consideration, where the statutory policy of racial separation is more extensive. Even if the West Virginia decision were followed by the highest courts of any of the thirteen states under consideration, there is little doubt that the state legislatures of such states would forthwith provide the necessary statutory basis for the exercise by local library authorities of power to set up a policy of separation of the races in the use of public library facilities. Since the state, though, is the ultimate source of their authority, by-laws, ordinances, resolutions, or other legislative actions of local library authorities must meet the test of equality between the races;[77] and, library authorities, being public officials, must also administer the library laws without racial discrimination in order to meet the equality provision of the Fourteenth Amendment.[78]

It is thus clear that the equal protection clause of the Fourteenth Amendment gives the same protection to the Negro at the point of local library control as at the level of state law. It is also true, as we have seen, that the only

[76] See pp. 53–54.

[77] Compare *Nixon* v. *Condon* (286 U.S. 73 [1932]), where a resolution of a state Democratic executive committee, which in its ordinary relations was considered a private body, was held subject to the restraint of the equal protection clause of the Fourteenth Amendment, when the source of the power to pass the resolution was a state statute.

[78] "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" (*Yick Wo* v. *Hopkins*, 118 U.S. 356, 373 [1886]).

appellate court decision which has been found states, by way of dictum in a case in which the public library was not involved, that at the point of local library control there shall be "equal accommodations" for the two races.

Therefore, if a city or town or school district or county or other political subdivision of a state establishes a free public library, the Negro has a legal right to enjoy its privileges; and this right may be defeated only by the establishment of a separate free public library for Negroes which is substantially equal to the free public library which has been established for others. Here again the question would arise concerning what kind of separate free public library would meet the test of substantial equality. A fair basis of measurement would seem to be those standards of excellence and efficiency which the controlling library authority has set up and maintained in connection with the free public library which has been established for white people. For instance, suppose the controlling library authority has said that the white library shall remain open ten hours each day. How many hours would the Negro library have to remain open to make the service substantially equal in this particular? In *Lowery* v. *Board of Graded School Trustees*, speaking of the length of school term necessary to satisfy the requirement of equality, the Supreme Court of North Carolina said: "The school term shall be of the same length during the school year."[79] By analogy it would seem that the white and Negro libraries should remain open for service the same number of hours in order to meet the test of substantial equality.

In certain communities in North Carolina and Kentucky the funds for the support of the white library come from a tax exclusively on the property of white citizens,

[79] 140 N.C. 25, 46 (1905).

while the funds for the support of the Negro library come from a like tax exclusively on the property of Negro citizens. In the case of support for separate schools both the Supreme Court of North Carolina[80] and the Court of Appeals of Kentucky[81] have held that such a method of support does not meet the test of equality because the taxes realized from the levy on the property of Negroes are so much less than the taxes realized from the levy on the property of white people that inferior Negro schools result. By analogy it would seem that such a method of library support would also fail to meet the test of substantial equality. It is believed that only that method of financial support of the Negro library would be "substantially equal" which produces in fact a free public library service for Negroes which would meet the standards of excellence and proficiency which have been set for and which are met by the white library.

In order to challenge the substantial equality of the Negro library, it will be necessary, in a proper case, to marshal the facts and, point by point—covering books, building, staff, and all other pertinent matters—to measure the Negro library against the white library. This is from the point of view of legal theory; from the point of view of practical possibilities there probably is not now and never will be enough library funds in the thirteen southern states under consideration to build in every community a first-class library for white people and then to build another substantially equal separate library for Negroes.

The Alexandria case.—Only one court decision has been found in which a challenge has been presented and passed upon by the appellate courts, though two situations arose

[80] *Puitt* v. *Commissioners*, 94 N.C. 709 (1886).

[81] *Dawson* v. *Lee*, 83 Ky. 49 (1885).

in Alexandria, Virginia, where such a challenge could develop. The city of Alexandria had established a municipal free public library and had excluded Negroes from enjoying its privileges and benefits, without providing any kind of separate library facilities for the Negro race. Under the principles of the Gaines case, the Negro clearly had the right to enjoy the privileges and benefits of the Alexandria free public library on the same terms as other races. On August 21, 1939, five Negro young men entered the Alexandria Public Library and were exercising this right, when they were directed to leave by the librarian and by policemen who were summoned. When they remained in spite of these directions, they were arrested and charged with disorderly conduct. Evidence at the hearing on this charge showed that they were not destroying property, were properly attired to be in the library, and that, had they been white people, they would not have been requested to leave.

Prior to the above occurrence, on May 8, 1939, a Negro brought suit against the librarian of the Alexandria Public Library seeking to compel the librarian to issue to him a library card under the same conditions as such cards are issued to white people. No separate library facilities having been provided for Negroes, the case seems exactly in principle like the Gaines case, where a law school had been established without any separate provision for legal education for Negroes.

As if in recognition of this principle, on September 12, 1939, the City Council of Alexandria referred to its library committee a recommendation of the city manager that a sum between $3,000 and $4,000 be allocated for the erection of a Negro library and that this Negro library, if and when erected, be maintained by the city at a cost approximating $1,400 per year. On January 10, 1940, judgment

was rendered in the Alexandria case which sought to compel the librarian of the Alexandria Public Library to issue a library card to a Negro.[82]

While the case was decided against the Negro petitioner on a procedural ground, there is a most significant dictum in the judge's written decision. This dictum reads: "Inasmuch as the City Council has not provided a separate library for the colored race, upon a proper showing mandamus would lie to require the librarian to issue reading cards and facilities to such members of the colored race as come within the above description." The "above description" refers to the rules for use of the library laid down by the controlling library authority.

This dictum is unequivocal, but the opening sentences of the judgment may, in the judge's mind, have been a limitation upon the above-quoted broad statement of the Negro's rights under the laws of Virginia. Those opening sentences read:

[82] *George Wilson* v. *Katherine H. Scroggin, librarian of the Alexandria Library et al.*, Law No. 2599 in the Corporation Court of the City of Alexandria, Hon. William P. Woolls, judge. The judgment reads as follows: "In this case there has not been introduced any evidence that the Alexandria Library Association has any regulation limiting the Library's use and facilities to the white race. Also, there is no provision or covenant to this effect in the joint agreement to which the City of Alexandria and the Alexandria Library Association are parties. On the contrary, the evidence shows that under the rules and regulations of the Alexandria Library Association those entitled to its benefits are 'persons living in the City of Alexandria, or tax payers in Alexandria, who fill out an application and give a local reference.' Inasmuch as the City Council has not provided a separate library for the colored race, upon a proper showing mandamus would lie to require the librarian to issue reading cards and facilities to such members of the colored race as come within the above description.

"However, the facts as shown do not permit or justify the issuance of the writ in this case. The petitioner or relater, must have a legal right, and in order to have this right he must have complied with the rules as promulgated or adopted. One of these rules is that he must fill out an application and give a local reference before he has the right to a card to withdraw books. This he did not do, and for this reason the petition for mandamus will be dismissed at the cost of the petitioner."

In this case there has not been introduced any evidence that the Alexandria Library Association has any regulation limiting the Library's use and facilities to the white race. Also, there is no provision or covenant to this effect in the joint agreement to which the City of Alexandria and the Alexandria Library Association are parties.

This raises the question of what the legal effect would be if the Alexandria Library Association did have a regulation limiting the use of the library to white people or if the joint agreement between the Association and the city provided that the use of the library should be limited to white people, the city having provided no separate library for the Negro.

It is believed that, for the reasons heretofore advanced in this chapter, Judge Woolls's dictum would still be a correct statement of the law and that such provisions limiting the use of the library to white people would be invalid under the Fourteenth Amendment to the Constitution of the United States, even though they should be held valid under the laws of Virginia. Reading the decision as a whole, however, it does not seem from the unqualified way in which Judge Woolls set forth the rights of the Negro, where no library facilities had been provided for him, that any such limitation of those rights was intended to be inferred.

SUMMARY

Special treatment of the Negro's legal status in connection with the American public library is made necessary by the fact that in the thirteen southern states under consideration the Negro does not have the same legal rights as other citizens. A public library is established under the basic idea that "its use should be free to all residents of the community on equal terms," but the Negro is not included in these broad terms. He has special status here as in so

many other places in American life and under American law. Inquiry must therefore be made to determine in what respects the rights of the Negro are the same and in what respects they differ from those of other citizens.

When such a public library is built in any place in the states being considered, those who build and control it do not expect the Negro to enjoy its privileges and benefits. Where state laws have spoken upon the matter, they too, expect that such a library shall be closed to the Negro and that something separate and special shall be provided for him. Such is the assumption also of the only decision which has been found to discuss the matter from the appellate courts of these states.

The equal protection clause of the Fourteenth Amendment, however, guarantees that the Negro shall have the right to enjoy the privileges and benefits of such a library, unless separate facilities "substantially equal" thereto have been provided for him. Just what is "substantially equal" can be found out by the Negro only through a long, expensive, and painful process of litigation. In legal theory it is believed that, in order to be equal, the Negro library must meet all those standards of excellence and proficiency which have been met by the library for other races.

In practice, however, the states under consideration do not have the library funds to build two such equal library systems; and the Negro runs great risks—of being arrested or worse—in the exercise of his right to use the library provided for other races. Under these circumstances the Negro's position, to say the least, is not easy. The Supreme Court of the United States has said that he may be set apart, if the separate privileges are equal. At the same time, in order to make the privileges afforded to other races approach national standards of excellence and effi-

ciency, there has been left either no money or very little money with which to provide any kind of separate privileges for the Negro. What is more, there is not in sight sufficient money with which to right the wrong.

In the meantime vested interests have grown up; attitudes and public opinion, stronger than the law, have become ingrained. If the Negro seeks to exercise his right to use the library open to others, where none is provided for him, a policeman is called; if he attempts to litigate the matter, he is faced with almost insurmountable obstacles of expense, racial antagonisms, and delay. Faced with such a situation he can only travel the road of making the best use that he can of such library facilities as may be open to him, of making friends of those who have the power to increase these library facilities, and of working for the development of more liberal attitudes and public opinion, based upon more liberal decisions of the Supreme Court of the United States and the highest courts of the states involved. As the law now stands, no shorter road seems to be open.

CHAPTER III

GOVERNMENTAL ORGANIZATION

PUBLIC library service to Negroes in the South is available in some measure on both state and local levels, though it has not been uniformly or universally developed by either state or local agencies. Consistency is evident only in the lack of service for the majority of the group and in the obvious shortcomings of those facilities which are provided. In conformity with the general southern pattern, various forms of segregated service have evolved, although exceptions to this general custom occur on both state and local levels.

SERVICE AT THE STATE LEVEL

At the state level two main types of public library service are maintained. The first is that offered by state libraries themselves to local residents of the city in which the library is located or to residents living in other sections of the state who visit the state library. Occasionally there is also some service by mail. The second type is the statewide public library service provided by state library extension agencies. In some states these two functions are combined in one organization, while in others there are two separate administrative units.

Service from state libraries.—Information was received from eight of the thirteen states considered in regard to the service offered to Negroes in the state library.[1] Alabama,

[1] All facts were obtained through direct correspondence with state librarians in February, 1940.