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THE SCHOOL SEGREGATION CASES: A COMMENT

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Segregation in the public schools on the basis of race or color pursuant to law has been declared unconstitutional by the Supreme Court of the United States.[1] Such segregation, the Court says, violates the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment of the Constitution of the United States. The unanimous opinions of the Court delivered by Chief Justice Warren, declare this to be so regardless of the "equality" of the "tangible factors" in such educational facilities. This action, of paramount significance during the term just ended, will have a sequel of virtually equal moment next term, since the framing of decrees in the cases has been set down for further argument then. Coupled with the Court's failure to decide these cases during the 1952 term,[2] there will thus have been afforded an outstanding example of judicial deliberateness in dealing with an emotionally charged problem. That this decision of our highest court will have a tremendous impact upon the laws and legal institutions of Tennessee is obvious.[3] The understanding of it will be aided, it is believed, by some consideration of the broader legal developments which have brought us to this result.

A reading of Section One of the Fourteenth Amendment with little more historical knowledge than the dates of its proposal and effectiveness would lead inevitably to the conclusion that its primary purpose must have been to accord constitutional protection against the states to the recently-freed slaves. All persons were declared to be citizens of their state as well as of the United States. The privileges and immunities of citizenship were not to be abridged by the state. The regular procedures of the law (due process) were to be followed when persons were deprived of life, liberty or property by the state. A state could not deny to any person within its jurisdiction the equal availability and protection of its laws and legal institutions. Study of the historical materials reenforces what the text suggests—a basic purpose to secure equality of treatment before the law for members of the Negro race.[4]

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1. Brown v. Board of Education of Topeka, Briggs v. Elliott, Davis v. County School Board of Prince Edward County, Gebhart v. Belton, 347 U.S. 483, 74 Sup. Ct. 686 (1954); Bolling v. Sharpe, 347 U.S. 497, 74 Sup. Ct. 693 (1954).

2. 345 U.S. 972, 73 Sup. Ct. 1114, 97 L. Ed. 1388 (1953).

3. Segregation of the white and colored races is required by the Tennessee Constitution and statutes. TENN. CONST. Art XI, § 12, TENN. CODE ANN. §§ 11395-11397 (Williams 1934).

4. See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STANFORD L. REV. 5, 138-39 (1949); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COL. L. REV. 131, 166-69

Within five years from its effective date the Privileges and Immunities Clause of the Amendment was rendered largely meaningless in the first decision of the United States Supreme Court interpreting this Section.[5] That decision, nevertheless, stated repeatedly and in emphatic terms the relationship of the Amendment to the rights of Negroes:

> "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 freemen and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the 15th amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth."[6]
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> " . . . in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it."[7]
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> "In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this [Equal Protection] clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.
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> "If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."[8]

Justice Miller proved to be a poor prophet. A case count will show only a relative handful of cases considering the application of the provision to discrimination by states on the basis of race or color as

(1950); Graham, *The Early Antislavery Background of the Fourteenth* Amendment, 1950 WIS. L. REV. 479, 610; Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555-73 (1951).

5. Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394 (U.S. 1873).

6. *Id.* at 71-72.

7. *Id.* at 72.

8. *Id.* at 81.

against the large number concerned with matters such as state taxes and regulations of business.[9]

However, even after this opening up of the protection of the Amendment to situations not involving Negroes, the Court has continued to make it clear that discriminations under state law on the basis of race or color are unconstitutional.[10]

Equal protection, the Court has said, on many occasions, means the protection of equal laws.[11] This does not mean that all state laws involving discrimination are invalid. The question of constitutionality of such laws is framed in terms of whether a rational basis exists for the classification which underlies the differing treatment provided by law.[12] The Court has always held that race or color alone could never supply such a rational basis.[13] Further the Court has made clear that actual administration under law—not merely the wording of a state statute (or constitution) or of a city ordinance—is determinative of constitutional right.[14] At the same time the Court has insisted that it is only "state action" (including any level of government within the state) that is protected against under the Fourteenth Amendment.[15] Merely private discrimination on the basis of race or color is said not to be a violation of the Equal Protection Clause.[16] Congress has no power by reason of Section Five of the Fourteenth Amendment to reach and punish refusals to serve or discriminations in service on the basis of race or color by carriers, hotel keepers or theater owners.[17]

Although the Supreme Court of the United States has, in general, refused to validate legal distinctions in the states based, expressly or

9. See CONSTITUTION OF UNITED STATES OF AMERICA, REVISED AND ANNOTATED, 1141-70 (1952).

10. Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1880) and Patton v. Mississippi, 332 U.S. 463, 63 Sup. Ct. 184, 92 L. Ed. 76 (1947) (jury selection); Buchanan v. Warley, 245 U.S. 60, 38 Sup. Ct. 16, 62 L. Ed. 149 (1917) (residential segregation ordinance); Shelley v. Kraemer, 334 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161 (1948) (enforcement of restrictive covenant); Smith v. Allwright, 321 U.S. 649, 64 Sup. Ct. 757, 88 L. Ed. 987 (1944).

11. See Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 Sup. Ct. 1064, 30 L. Ed. 220 (1886).

12. Truax v. Raich, 239 U.S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131 (1917).

13. Shelley v. Kraemer, 334 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161 (1948); see Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349-50, 59 Sup. Ct. 232, 83 L. Ed. 208 (1938), which shows that race segregation laws have never been valid except on the assumption that "substantial equality" prevailed under them.

14. Yick Wo v. Hopkins, 118 U.S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220 (1886).

15. See CONSTITUTION OF THE UNITED STATES, REVISED AND ANNOTATED 1141 (1952).

16. Civil Rights Cases, 109 U.S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835 (1883). *But cf.* Muir v. Louisville Park Theatrical Association, 74 Sup. Ct. 783 (1954); Shelley v. Kraemer, 334 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161 (1948), and Rice v. Elmore, 165 F.2d 387 (4th Cir.), *cert. denied*, 333 U.S. 875 (1947).

17. Civil Rights Cases, 109 U.S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835 (1883); *but cf.* Henderson v. United States, 339 U.S. 816, 70 Sup. Ct. 843, 94 L. Ed. 1302 (1950); Steele v. L.&N.R.R., 323 U.S. 192, 65 Sup. Ct. 226, 89 L. Ed. 173 (1944); Brotherhood of Railway Trainmen v. Howard, 343 U.S. 768, 72 Sup. Ct. 1022, 96 L. Ed. 1283 (1952).

in administration, upon race or color, it did not have to deal under the Equal Protection Clause[18] with the question of laws requiring or permitting segregation on such bases until 1896. In *Plessy v. Ferguson*,[19] decided in that year, the Court held that a state law requiring separation of Negroes and non-Negroes in railroad cars did not violate the Equal Protection Clause so long as the facilities were substantially equal. The acceptance of this doctrine as applied to public education came in *Cumming v. Board of Education*[20] and particularly in *Gong Lum v. Rice*,[21] decided in 1927, although in neither of these cases was it directly challenged.

The erosion of the "separate but equal" concept as a basis for permissible racial distinctions in public education began in 1938 with the decision in *Missouri* ex rel. *Gaines v. Canada*.[22] With Chief Justice Hughes writing the opinion, the Supreme Court held that Missouri violated the Equal Protection Clause if it accorded a qualified white person a legal education at a state institution within its borders while requiring a Negro applicant, similarly situated, to go elsewhere. The tone of the opinion with its insistence upon "equality in fact" had a quality that sets it apart from preceding cases relating to education:

> "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. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State

18. *But cf.* Washington, Alexandria & Georgetown R.R. v. Brown, 17 Wall. 445, 84 L. Ed. 675 (U.S. 1873).

19. 163 U.S. 537, 6 Sup. Ct. 1138, 41 L. Ed. 256 (1896). The majority opinion contains language repudiated in *Brown v. Board of Education:* "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." 163 U.S. 537, 551. The dissent of Mr. Justice Harlan contains classic phrases: " . . . in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens. . . . [T]he 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.*" 163 U.S. 537, 559. See Watt and Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13 (1949).

20. 175 U.S. 528, 20 Sup. Ct. 197, 44 L. Ed. 262 (1899).

21. 275 U.S. 78, 48 Sup. Ct. 91, 72 L. Ed. 172 (1927). The opinion of Chief Justice Taft considered the question of enforced segregation in railroad cars, involved in *Plessy v. Ferguson*, to be "a more difficult question" than segregation in schools on the basis of color (made applicable here under Mississippi law to a Chinese child.) He relied heavily upon the Massachusetts decision in Roberts v. Boston, 5 Cush. 198 (1849), as having established the doctrine that equality may be accorded in separate schools, and cites many other state court decisions throughout the country to the same effect. See also Berea College v. Kentucky, 211 U.S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81 (1908).

22. 305 U.S. 337, 59 Sup. Ct. 232, 83 L. Ed. 208 (1938).

> upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race."[23]

After World War II further clarification of the constitutional status of racially-segregated educational facilities came in *Sipuel v. Board of Regents*,[24] *Sweatt v. Painter*[25] and *McLaurin v. Oklahoma State Regents*.[26] The United States Supreme Court found lack of factual equality in the segregated facilities in each instance but carefully avoided the question of whether necessarily and intrinsically educational facilities separated on the basis of race constituted a violation of the Equal Protection Clause. These cases, and lower court decisions following them, had by the end of 1950 substantially established that in the field of specialized higher education separate facilities did not meet constitutional requirements because of lack of equality in the tangible and intangible factors applicable to such specialty.[27] This same period, 1945-1950, saw much ferment in terms of ending racial discrimination in many fields. The reports of the President's Committee on Civil Rights[28] and of the Commission on Higher Education[29] called for the end of racial discrimination and segregation in education. It was a period when all distinctions on the basis of race were getting a pretty thorough going-over from such diverse sources as international organizations, church groups, civic groups, business concerns and labor unions, as well as federal, state and local lawmaking bodies. Constitutionally, such distinctions were suspect in a way that had not been true previously as measured by tangible results.[30]

What would have happened if substantially equal facilities at all levels of education had in fact been provided for Negroes consistently and as a normal pattern in those states requiring or permitting segregation we shall never know. This part of the constitutional doctrine of "separate but equal" was never implemented as a general pattern although some states took their responsibilities in this regard more

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23. 305 U.S. 337, 349.
24. 332 U.S. 631, 68 Sup. Ct. 299, 92 L. Ed. 247 (1948).
25. 339 U.S. 629, 70 Sup. Ct. 848, 94 L. Ed. 1114 (1950).
26. 339 U.S. 637, 70 Sup. Ct. 851, 94 L. Ed. 1149 (1950).
27. See Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 560-61 (1951); Sanders, *Constitutional Law—1953 Tennessee Survey*, 6 VAND. L. REV. 1159, 1173-76 (1953).
28. TO SECURE THESE RIGHTS—THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, 79-87, 166 (1947).
29. PRESIDENT'S COMMISSION ON HIGHER EDUCATION, HIGHER EDUCATION FOR AMERICAN DEMOCRACY, Vol. II, c. III, pp. 25-39, 43-44 (1947).
30. Cassell v. Texas, 339 U.S. 282, 70 Sup. Ct. 269, 94 L. Ed. 839 (1950); Hurd v. Hodge, 334 U.S. 24, 68 Sup. Ct. 847, 92 L. Ed. 1187 (1948); Shelley v. Kraemer, 334 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161 (1948); Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 Sup. Ct. 1138, 92 L. Ed. 1478 (1948); Oyama v. California, 332 U.S. 633, 68 Sup. Ct. 269, 92 L. Ed. 249 (1948); see Morgan v. Virginia, 328 U.S. 373, 66 Sup. Ct. 1050, 90 L. Ed. 1317 (1946); cf. Rice v. Elmore, 165 F.2d 387 (4th Cir.) *cert. denied*, 333 U.S. 875 (1947).

seriously than others.[31] The series of cases which resulted in the Supreme Court's decision in the instant case were instituted in 1950 in a context of great effort at improvement in separate facilities for Negroes.[32] Nevertheless lack of equality in facilities provided was found at least in the beginning of the litigation in three of the four cases arising under the Fourteenth Amendment. Plans for correction of these inequalities were urged as a defense in each of these instances. In at least two instances the facilities were found to be equal before final action was taken by the lower court. In *Brown v. Board of Education*[32a] the segregated elementary schools established by the Topeka Board of Education pursuant to the permission granted by Kansas law were found substantially equal with respect to buildings, transportation, curricula and educational qualifications of teachers by the three-judge Federal District Court. This court considered that the arrangement had a detrimental effect upon Negro children. Nevertheless, it considered that its finding of substantial equality precluded a holding of invalidity under the controlling precedent of *Plessy v. Ferguson*.[33]

In the case of *Briggs v. Elliott*,[34] arising from South Carolina, the three-judge Federal District Court had found the Negro schools (elementary and high school) to be inferior to those provided in Clarendon County for white pupils. Admission to white schools was denied by the court pending a report as to progress made in equalizing the facilities provided for Negro children which the court ordered. After a remand from the Supreme Court of the United States the district court found substantial equality in facilities or immediate plans to provide such. It therefore dismissed the action.[35] In the case from Virginia,[36] the three-judge court found inequality, ordered the provision of substantially equal curricula and transportation, and diligence in removing physical plant inequality. Admission to white schools pending the carrying out of the equalization program was denied.[37] In the Delaware case,[38] after a finding of inequality, the immediate

31. See ASHMORE, THE NEGRO AND THE SCHOOLS, Tables 8-15, pp. 153-60 (1954), for graphic illustration of disparities normally prevailing between white and Negro schools in the South, together with the great strides made in recent years to close the gap.

32. See ASHMORE, THE NEGRO AND THE SCHOOLS, 108-26 (1954). The regional compact among certain states in the South covering professional education has been a part of this effort. See Comment, *Constitutionality of the Proposed Regional Plan for Professional Education of the Southern Negro*, 1 VAND. L. REV. 403-24 (1948).

32a. *Supra* note 1. For lower court decision see 98 F. Supp. 797 (D. Kans. 1951).

33. *Supra* note 19.

34. *Supra* note 1.

35. 103 F. Supp. 920 (E.D.S.C. 1952).

36. Davis v. County School Board, *supra* note 1.

37. 103 F. Supp. 337 (E.D. Va. 1952).

38. Gebhart v. Belton, *supra* note 1.

admission of Negro children to white schools was ordered by the chancellor and affirmed by the Supreme Court of Delaware.[39]

After hearing arguments on these cases in the 1952 Term the United States Supreme Court set them down for reargument and requested the Attorney General of the United States as well as others to address themselves to a series of detailed questions.[40] On the merits of the Equal Protection issue, the Court asked for answers to the following:

> "1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
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> "2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
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> "(*a*) That future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or
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> "(*b*) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?
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> "3. On the assumption that the answers to questions 2(*a*) and (*b*) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?"[41]

After reargument in December, 1953, the Court announced its unanimous decision on May 17, 1954, overruling the doctrine of "separate but equal" as applied in public education at all levels. In spite of aspects of inequality in three out of the four cases, the Court did not seek to avoid this issue. The opinion states that the constitutional problem does not turn on a comparison of tangible factors. The answer to the questions set forth above are not dealt with in detail.[42] Chief Justice Warren's opinion indicates that original intentions or expectations are not too illuminating or necessarily controlling:

> "Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best,

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39. 91 A.2d 137, *affirming* 87 A.2d 862 (Del. Ch. 1952).
40. 345 U.S. 972, 73 Sup. Ct. 1114, 97 L. Ed. 1388 (1953); see Sanders, *Constitutional Law—1953 Tennessee Survey*, 6 VAND. L. REV. 1159, 1173 (1953).
41. 345 U.S. 972.
42. This in spite of the fact that on the oral argument the Justices seemed to be much concerned with these questions. See 22 U.S.L. WEEK 3157-64 (U.S. Dec. 15, 1953).

> they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty."[43]

The relative lack of development in public education is given as an additional reason for lack of light as to the intentions of the framers with respect to this particular problem. This whole aspect is considered of secondary importance:

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."[44]

The opinion then proceeds to its conclusion by declaring that education is today perhaps the most important function of state and local governments, that it is the foundation of good citizenship and a principal instrument in awakening cultural values, in preparing for advanced training and helping in normal adjustment to environment. "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[45] The opinion then declares that segregation in the public schools "solely on the basis of race" necessarily deprives the children of the minority group of equal educational opportunities. "Separate facilities are inherently unequal."[46] The intangible considerations stressed in the *McLaurin Case*[47] are considered to apply with added force to the child in grade and high school. "To separate them [by law] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[48] The Court specifically rejects the language of *Plessy v. Ferguson*[49] that segregation involves no stamp of inferiority, accepting the findings of psychologists and social scientists as "modern authority" in this regard.

43. 74 Sup. Ct. 686, 688-89.
44. *Id.* at 691.
45. *Ibid.*
46. *Id.* at 692.
47. *Supra* note 26.
48. 74 Sup. Ct. 686, 691.
49. See note 19 *supra.*

The Court found it unnecessary to reach the question of violation of the Due Process Clause of the Fourteenth Amendment but the companion case of *Bolling v. Sharpe*[50] held that the segregated schools of the District of Columbia, pursuant to Congressional enactment, violated the Due Process Clause of the Fifth Amendment (which contains no mention of "equal protection"). The Court's definition of "liberty" can be expected to have implications far beyond the facts of this case:

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."[51]

It would be "unthinkable" the opinion concludes, that the Constitution would impose a lesser duty on the Federal Government, at the capital of the nation, than it does on the states.

The cases, taken together, seem clear and unfaltering in their pronouncement by the organ of government empowered to decide (and to make effective the Supremacy Clause of the Federal Constitution).[52] That pronouncement sets forth the principle that existing constitutional provisions invalidate the requiring or permitting of enforced segregation in public education by any level of government.

For the application of this principle, even in the cases in which it was announced, we must wait until the next term of the Court. Some of its implications may be gleaned from action taken by the Court on May 24, 1954 in other cases pending before it. Three of these cases involved public education. In *Florida* ex rel. *Hawkins v. Board of Control*,[53] an applicant for admission to the College of Law, University of Florida, who had made no effort to show the inequality of a segregated law school, had been refused a peremptory writ to compel his admission by the supreme court of that state. In *Tureaud v. Board of Supervisors*[54] a petition for an injunction against the governing board of Louisiana State University to prevent the enforcement by that body of the provisions of Louisiana law requiring segregation was granted by the Federal District Judge. The Court of Appeals for the Fifth

50. *Supra* note 1.
51. 74 Sup. Ct. 693, 694-95.
52. U.S. CONST., Art. VI, cl. 2.
53. 74 Sup. Ct. 783. For facts and lower court opinion, see 60 So.2d 162.
54. 74 Sup. Ct. 784. For facts and lower court decisions, see 116 F. Supp. 248, 207 F.2d 807.

Circuit reversed, not on the merits, but because a three-judge court was thought to be required. In each of these cases the applicant's petition for certiorari to the United States Supreme Court was granted, the judgment vacated and the case remanded for consideration in light of the decision in the principal case "and conditions that now prevail." In *Wichita Falls Junior College District v. Battle*,[55] both the federal district court (single judge) and the Court of Appeals for the Fifth Circuit had approved an injunction to prevent the controlling body of a state junior college from excluding qualified Negro applicants residing in the district. The junior college district had taken the position that it was compelled to exclude the applicants under the constitution and statutes of Texas. Its petition for writ of certiorari was denied on May 24, 1954.

The three other related cases disposed of on that date go beyond the realm of education. The Court of Appeals for the Fifth Circuit had directed that the Mayor of Houston, Texas, should be enjoined from refusing on the basis of their race to allow Negroes to make use of municipal golf facilities. The court of appeals' judgment had provided for the preservation of segregation in such use. The Supreme Court denied the mayor's petition for writ of certiorari.[56] In *Housing Authority of the City and County of San Francisco v. Banks*,[57] the District Court of Appeal in California had held that classification of tenants on the basis of race in public low-rent housing is a denial of Equal Protection. *Plessy v. Ferguson* had been distinguished by the California court. The housing authority's petition for writ of certiorari was denied by the Supreme Court. While the action of the Supreme Court in each of the two cases was taken without reference to the Segregation Cases, in *Muir v. Louisville Park Theatrical Association*[58] the judgment of the Court of Appeals for the Sixth Circuit was vacated and the case remanded for consideration in the light of the school cases "and the conditions that now prevail." Very significantly, this case involved the lease of an amphitheater in a city-owned park to a privately operated enterprise where the city did not participate either directly or indirectly in the operation of the private enterprise. The private enterprise had refused admission to Negroes to its operatic performance at the amphitheater during the summertime. The lower court had held that this refusal involved no violation of the Fourteenth Amendment although in the same case it had held that Negroes

55. 74 Sup. Ct. 783. For facts and lower court decisions, see 101 F. Supp. 82, 204 F.2d 632.

56. Holcombe v. Beal, 74 Sup. Ct. 783. For facts and lower court decisions, see 103 F. Supp. 218, 193 F.2d 384.

57. 74 Sup. Ct. 784.

58. *Id.* at 783. For facts and lower court opinions, see 102 F. Supp. 525, 202 F.2d 275.

were entitled to use public golf courses and the facilities of a fishing lake in the same park.

It is too early to attempt to gauge the full scope of the Court's holding in the School Segregation Cases. The decision, in its choice of words for the statement of its holding and in the reasons given to support the holding, is limited to public education. It is not reasonable to assume that it will be contained to this sphere overly-long as the *Louisville Park*[59] case indicates. On the other hand, to assume an immediate demise for all laws involving race separation by law would undoubtedly be premature. The facts and holding of these cases do not indicate that the Constitution requires a compulsory intermingling in the sense of complete integration of all educational facilities regardless of individual choice. Rather under the fact patterns the decision is to the effect that race is not a constitutionally valid basis for the exclusion from public schools of an otherwise qualified applicant who desires to use such facilities. Obviously the decision does not invalidate the good-faith setting up of classifications, on such accepted bases as sex, intelligence, and choice of educational program when made applicable without regard to race.

Finally, it must be borne in mind that there can be a vast difference between announcement of constitutional principle and practical application on a generally accepted basis. This is best illustrated perhaps by the history of race discrimination in jury and grand jury selection where the constitutional requirement has been clearly enunciated for seventy-five years or more.[60] This is not meant to suggest, in any way, that evasive devices can be expected to be tolerated by the Supreme Court or that the effect of the law announced is purely a matter of voluntary compliance. Each of these cases involved class actions. The decrees will be fashioned at the next term, and decrees can be enforced, but two of the defendants have apparently already made plans to voluntarily carry out the principle announced, which would seem the better part of wisdom for all who are affected by its announcement. In this area, as in so many others, the ultimate results depend to a large extent upon people and their attitudes, including particularly those in key positions (most of whom take an oath to uphold the Constitution of the United States). There are many others,

59. *Ibid. But cf.* Lonesome v. Maxwell, 23 U.S.L. WEEK 2057 (D. Md. Aug. 3, 1954), decided on July 27, 1954 in which the Federal District Court for Maryland refused to enjoin segregation at Maryland's public bathing beaches and swimming pools. The Court felt that the School Segregation Cases show "the way the wind is blowing" but felt that there was some significance in the remand for consideration in the *Louisville Park* case rather than outright reversal, and that it was bound by Fourth Circuit decisions on segregation in recreational facilities.

60. See Patton v. Mississippi, 332 U.S. 463, 68 Sup. Ct. 184, 92 L. Ed. 76 (1947).

of course, who take seriously the rights established by the Constitution and who are willing to participate in the thought and effort continually required to bridge the gap between the reality of human and governmental relationships and the constitutional ideal.