

An End to Racial Discrimination in the United States?

The School-segregation Decisions

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The decisions handed down in the school-segregation cases by the United States Supreme Court on May 17th, 1954,¹ mark the completion of a cycle in policy attitudes that began with the adoption of the Reconstruction Amendments—the 13th, 14th and 15th Amendments to the Constitution—in the aftermath of the Civil War, was highlighted by the Supreme Court decision in *Plessy v. Ferguson* in 1896² and now has made the full turn. Before entering into a full canvass of the doctrinal arguments contained in the current decisions, it is worthwhile to make a few preliminary remarks on some rather unusual and interesting aspects of the decisions.

First, it is worth noting that we are in fact dealing with two separate decisions, handed down on the same day and covering in all five different cases arising in the states of Kansas, South Carolina, Virginia and Delaware and in the District of Columbia, respectively. The Supreme Court on October 8th, 1952,³ formally joined the Kansas and South Carolina cases which were then pending on appeal before it; the court then went on to note the similarity, in basic principles involved, of the Virginia case, in which the court now indicated probable jurisdiction, and of the District of Columbia case, in respect of which the court announced that it would hear a petition for certiorari. On November 10th, 1952, it formally granted certiorari in the District of Columbia case,⁴ and two weeks later it granted certiorari in the Delaware

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¹ *Brown et al. v. Board of Education of Topeka, Shawnee County, Kan.*, et al. (1954), 74 Supreme Court Reporter 686; *Bolling et al. v. Sharpe et al.* (1954), 74 Supreme Court Reporter 693.

² (1896), 163 U.S. 537.

³ 344 U.S. 1 (*per curiam*, Douglas J. dissenting).

⁴ 344 U.S. 873.

case.⁵ On June 8th, 1953, the court simultaneously ordered all five cases restored to the docket and assigned for re-argument before it in the fall of 1953, at the same time posing a series of five questions on each case. The two decisions handed down on May 17th, 1954, involve the separation, for purely doctrinal reasons, of the four state cases (Kansas, South Carolina, Virginia and Delaware) from the District of Columbia case, though the four state cases were disposed of by the one opinion. But it seems clear, as we shall see a little later, that now that the general principles of law have been laid down by the court, each of the five cases will be considered separately when it comes to a detailed application and enforcement of the court's holding.

As a second point, and the chronology serves to make this clear, it is worth commenting on the length of time the cases were before the Supreme Court. The first three cases, the Kansas, South Carolina and Virginia cases, arose well before the presidential elections of 1952 and it seems not unreasonable to suggest that, if the state of the court's docket was the only concern, those cases could have been disposed of at that time. The Douglas dissent to the *per curiam* decision of October 8th, 1952, postponing argument and decision in the three cases until the court had had a chance to grant certiorari in the District of Columbia case surely points up this fact. Even if it were desirable to wait for the District of Columbia and the Delaware cases, the fact still remains that between the time all five cases were formally together on the court's docket and the final decisions a further eighteen months elapsed. Partly, it may be, the explanation for this delay is to be found in the political events of 1952 and 1953. Each of the two major political parties had included a civil-rights plank in its presidential campaign platform of 1952, which committed the party, if successful in the elections, to the application in varying degrees of federal constitutional powers in race relations;⁶ and, even after the elections, there is

⁵ 344 U.S. 891

⁶ 1952 Republican Platform, pp 13-14, Civil Rights.

"... We believe that it is the primary responsibility of each State to order and control its own domestic institutions, and this power, reserved to the States, is essential to the maintenance of our Federal Republic. However, we believe that the Federal Government should take supplemental action within its constitutional jurisdiction to oppose discrimination against race, religion or national origin

"We will prove our good faith by:

... Appropriate action to end segregation in the District of Columbia.

The Democratic Platform, 1952, pp 43-44, Civil Rights.

"... Our country is founded on the proposition that all men are created equal. This means that all citizens are equal before the law and should

something to be said for waiting to see how far and to what extent the cloudy generalities of campaign promises are to be translated into concrete action. All this presupposes, no doubt, a notion that courts do, in part anyway, follow election returns.⁷ But since it was clear from the outset of the school-segregation cases that the question of how far and to what extent any ruling ending segregation could be enforced would be crucial to the court's final decision, it is difficult to see how the court could rationally avoid giving some attention to the question of what the federal executive, as the chief law-enforcement agency in the United States federal system, would be likely to do. And in fact the court's order of June 8th, 1953, directing restoration of the five cases to the docket and assigning them for re-argument in the fall of 1953, concluded with an invitation to the Attorney-General of the United States to take part in the oral argument and file an additional brief if he wished. A simpler explanation for the length of time the cases were before the court is to be found in the inherent complexity of the social problem involved, quite apart from anything the federal government might or might not do, and in the obvious need of the court to

enjoy equal political rights. They should have equal opportunities for education, for economic advancement, and for decent living conditions. . . .

"We know this task requires action, not just in one section of the Nation, but in all sections. It requires the co-operative efforts of individual citizens and action by State and local governments. It also requires Federal action. The Federal Government must live up to the ideals of the Declaration of Independence and must exercise the powers vested in it by the Constitution. . . .

"The Department of Justice has taken an important part in successfully arguing in the courts for the elimination of many illegal discriminations, including those involving rights to own and use real property, to engage in gainful occupations and to enroll in publicly supported higher educational institutions. We are determined that the Federal Government shall continue such policies. . . ."

⁷ Compare this criticism of the Supreme Court handling of the grade-school segregation cases advanced in 1952:

"In any ordinary case that appeal [*i.e.*, in the South Carolina case] would have been accepted by the Supreme Court and would have been argued in the fall of 1951. The great issue would thus have been decided some time last spring. The Supreme Court took the remarkable step of holding the case without any action at all for six months and then sent it back to the lower court to consider the progress report which had been required. [Footnote omitted.] In a case raising similar issues brought up from Kansas, the Supreme Court has taken no action at all.

"Undoubtedly every other case which was appealed at the same time as these cases has long since been disposed of. Are these cases being given such gingerly treatment because of the election in November? . . . If one assumes, and this is only a guess, that the Supreme Court has avoided facing the grade school issue for political reasons, should it be criticised for a desire to postpone the explosive question from the heat of 1952 to the comparative calm of 1953?"

Frank, *Can the Courts Erase the Color Line?* (1952), 2 Buffalo L. Rev. 28, at p. 38.

direct a major part of its energies to the working machinery available for application of any decision ending segregation: in fact it may be suggested that in the present cases, to an unprecedented extent, the more usual court function of formulating general constitutional propositions of a high level of abstraction (here, the question of whether segregation in itself is unconstitutional) was made to wait on the attainment of some agreement by the court on the range and flexibility of the remedies available for enforcement of any such general propositions, the general propositions to this extent being conditioned and shaped by the remedies.

A third point of interest in this era, since the Court Revolution of 1937, when the proliferation of opinion-writing on the court—the multiplication of special concurrences and dissents—has been the subject of considerable criticism,⁸ is the fact that each of the two decisions handed down on May 17th, 1954, is unanimous; and, even more remarkable, that there is only an opinion of the court filed in each case, with no separate opinions (specially concurring or dissenting). The present writer believes that the relative freedom exercised by the members of the United States Supreme Court in the filing of individual opinions is one of the key explanations of the forthright, direct way in which great and controversial issues of public policy are faced in the United States; but it is worth observing that the comparative novelty of the unanimity in the present cases has not been without its value in educating the country at large to accept the decisions,⁹ more especially as that unanimity is obviously genuine and not the frequently artificial, constrained agreement contained in the single, *per curiam*, opinions of tribunals like the Privy Council, which arrive at their unanimity by majority vote. I will, however, make a slight reservation now by suggesting that, once the problem of devising

⁸ See, for example, Ballantine, *The Supreme Court: Principles and Personalities* (1945), 31 A.B.A.J. 113; Palmer, *Supreme Court of the United States: Analysis of Alleged and Real Causes of Dissents* (1948), 34 A.B.A.J. 677; Moorhead, *Concurring and Dissenting Opinions* (1952), 38 A.B.A.J. 821.

And cf. McWhinney, *Judicial Concurrences and Dissents: A Comparative View of Opinion-writing in Final Appellate Tribunals* (1953), 31 Can. Bar Rev. 595, at pp. 609-619.

⁹ In connection with the policy aspects of the Supreme Court's decisions, some comments might be offered here on the background and affiliations of the nine justices participating in the decisions. With the exception of Chief Justice Warren (appointed by President Eisenhower), all the justices were appointed by Democratic Presidents (Presidents Roosevelt and Truman). All nine were appointed since the Court Revolution of 1937, and all except Chief Justice Warren and Justice Burton are Democrats. Two of the justices come from Southern States—Justice Black (Alabama) and Justice Clark (Texas)—while Justice Reed (as also did the late Chief Justice Vinson) comes from the border state of Kentucky.

special machinery for the enforcement of any decision ending segregation had been solved,¹⁰ the problem of reaching agreement on the general principle of ending segregation was perhaps not insuperable. The conflicts and differences, to that extent, will go to application of the general principle and have, to that extent also, merely been postponed.

A fourth comment must be made, this time on the rôle of Chief Justice Warren in the two decisions handed down on May 17th, 1954. His position is unusual to the extent that he was still governor of California when the school-segregation cases first arose in the Supreme Court in 1952, and also in June 1953, when the Supreme Court restored the cases to the docket and handed down the five questions for argument at the fall term. Chief Justice Vinson died suddenly in September 1953, having actively participated in the school-segregation cases until his death, and Mr. Warren did not become Chief Justice (the only Eisenhower appointment to the court so far) until October 5th, 1953. Shortly after his appointment, Chief Justice Warren did hear the re-argument in the school-segregation cases, and he then proceeded to exercise his undoubted right as a chief justice who is a member of a majority vote (in this case, apparently, a unanimous vote) in the court's conference of writing the opinion of the court. Chief Justice Warren has been widely credited in the press with the novel unanimity on the Supreme Court and there is little doubt that he possesses, perhaps to an even greater degree than his immediate predecessor, those qualities of common-sense, patience and goodwill, allied with a capacity for personal leadership, that are so important in a chief justice of the United States Supreme Court. It is perhaps unfair to the late Chief Justice Vinson to give all credit to his successor for the present decision; for the pattern of cases on race relations decided by the Vinson Court pointed inevitably towards a decision in principle, some time in the not too distant future, of the nature now handed down; and the five questions directed to counsel in June 1953, which helped to solve the "remedy" dilemma, bear all the imprints of Chief Justice Vinson's border-state experience and wisdom. But full credit must be given to Chief Justice Warren for the clarity, brevity and directness of his two opinions in the present cases, unencumbered as they are by an excess of conventional, legalistic argument. The only detail in the opinions, which in any case is removed to the footnotes, is to be found in

¹⁰ See *infra* the five questions handed down by the court on June 8th, 1953, in directing re-argument.

what are, from the strictest viewpoint, extra-legal, "sociological" materials. It is worth saying that if Chief Justice Warren's judicial style falls short of the lyrical purity of Mr. Justice Holmes' greatest opinions, he comes as close as anyone here to matching the Magnificent Yankee in a scorn for narrow legalisms and an insistence on hewing to fundamental philosophic principles—the ultimate policies that the Constitution should serve to-day.¹¹

The Historical Background to the School-segregation Decisions

To find the ultimate legal source of the present decisions, we must go back to the period immediately after the Civil War when Radical Republican majorities in both houses of Congress pushed through a series of proposals designed to translate into action President Lincoln's proclamation of January 1st, 1863, declaring all persons held as slaves in the rebel states to be free. These proposals were all, within a space of a few years, successfully ratified as amendments to the Constitution, becoming known, popularly, as the Reconstruction Amendments. The first of the proposals, which was ratified in 1865 as the 13th Amendment, gave formal freedom to the slaves by declaring that

neither slavery nor involuntary servitude, except as punishment for crime . . . , shall exist within the United States, or any place subject to their jurisdiction

A second set of proposals was originally sponsored by Congressman Bingham on behalf of the Joint Committee of Congress on Reconstruction, following authoritatively expressed doubts whether the fairly terse, precise language of the 13th Amendment afforded legal basis for the exertion of congressional legislative power in the area of reconstruction, especially the sweeping federal Civil Rights Act of 1866, which was only enacted by Congress over President Andrew Johnson's stern veto. After considerable debate in Congress, involving a number of modifications and additions, these proposals were sent on by Congress to the state legislatures for ratification and were eventually adopted in 1868 as the 14th Amendment.

The first paragraph of the 14th Amendment is the key constitutional provision for the present discussion:

All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

¹¹ See, especially, Warren C.J.'s opinion of the court in the District of Columbia case, *Bolling et al v. Sharpe et al.*, *infra*.

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.

The 15th Amendment to the Constitution, which was ratified in 1870, was limited to the question of voting rights:

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, colour, or previous condition of servitude.

The 13th, 14th and 15th Amendments each include a provision authorising Congress to enforce its provisions "by appropriate legislation".

It is necessary to understand the temper of the times when the 13th, 14th and 15th Amendments were adopted. These Reconstruction Amendments were imposed on the defeated South by the dominant Republican majorities in Congress immediately after the Civil War, and ratification was made a condition prerequisite to the re-admission of the defeated southern states to the union. When the United States Supreme Court in 1873 had to rule, in interpreting a statute, on the device of segregating white and coloured passengers into separate but identical railroad cars on the same train, it had little difficulty, against the background of the dominant public policies of the time, in finding that the statute amounted to a denial of equality in violation of the 14th Amendment.¹² This Supreme Court decision clearly represents the high-water mark of Radical Republican sentiment immediately after the Civil War.

The resiling that then occurs seems partly to have been a response to the hitherto unsuspected difficulties in integrating the newly-freed slaves into full community life in the United States. Partly, also, it seems to have been a reaction by more enlightened Northern opinion against the indignities inflicted upon the defeated rebel states in the first flush of victory, and to a disposition to let the Southern States solve their own problems without further intervention. Mr. Justice Miller of the Supreme Court, a very great northern liberal himself, seemed to foreshadow this change of heart in his opinion of the court in the Slaughter-House Cases¹³ given the same year as *Railroad Company v. Brown*, already mentioned. Though the Slaughter-House Cases had nothing to do with race relations, being concerned with a grant of an economic monopoly by the "carpet-bag" legislature of Louisiana, Mr.

¹² *Railroad Company v. Brown* (1873), 17 Wall. 445.

¹³ (1873), 16 Wall. 36.

Justice Miller, in ruling on whether the grant of a monopoly to one company at the expense of others violated the "privileges and immunities of citizens of the United States" under the 14th Amendment, had little difficulty in holding that it did not do so, and went on to postulate anew something of a state-rights approach to the Constitution:

... We do not see in those Amendments [the 13th, 14th and 15th Amendments] any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the states with powers for domestic and local government, including the regulation of civil rights, the rights of person and of property, was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states, and to confer additional power on that of the nation.¹¹

In 1883, in the Civil Rights Cases,¹⁵ the Supreme Court had to pass on the constitutionality of indictments launched under the federal Civil Rights Act of 1875 for denial of certain facilities to negroes on account of race and colour. The facilities concerned were accommodation in inns or hotels, admission to the dress circle of a theatre in San Francisco, admission to the Grand Opera House in New York and the use of the ladies car in a train. Mr. Justice Bradley, for the court, held that though Congress could, by affirmative legislation like the federal Civil Rights Act of 1875, enforce the 14th Amendment against state laws or acts done under state authority, that is, though Congress had legislative power under the 14th Amendment to "correct" state action—it had no "general" legislative power over civil rights sufficient to enable it to reach purely private (as distinct from state) action. Mr. Justice Bradley also ruled out any possibility of support from the terms of the 13th Amendment for federal legislative power to reach action by private parties. In setting up the distinction between "corrective" action (permitted the federal government under the 14th Amendment) and "general" action (denied to it), and making the successful application of federal legislative power turn on the question whether the denial of rights involved was state action or not, Mr. Justice Bradley set up a new constitutional dichotomy, public as opposed to private, involving the proposition that only public and not private action denying rights on account of race could be reached by federal legislation; and thus erecting a major legal barrier, which persists to this day, against any very comprehensive federal civil-rights programme.

¹⁴ *Ibid.*, p. 82

¹⁵ (1883), 109 U S 3.

When eventually the Supreme Court was asked to rule, in 1896 in *Plessy v. Ferguson*,¹⁶ on a Louisiana statute passed in 1890 providing for separate railway carriages for the white and coloured races, the temper of the American people towards race relations had changed greatly from the community attitude reflected in the 1873 decision in *Railroad Company v. Brown*.¹⁷ As Mr. Justice Brown declared in his opinion of the court in *Plessy v. Ferguson*:

The object of the [14th] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognised as within the competence of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.¹⁸

Mr. Justice Brown concluded his opinion by referring to the difficulties confronting any official attempt to counteract social prejudices:

The argument [of the plaintiff] assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . .¹⁹

The *Plessy v. Ferguson* decision, in upholding the Louisiana railway segregation statute of 1890 against attack under the 14th Amendment, introduced the principle of "separate but equal" into American constitutional law; and as a general constitutional formula for reconciling relations between white and negro in the United States, "separate but equal" prevailed until the current decisions of the Supreme Court. If *Plessy v. Ferguson* represents

¹⁶ (1896), 163 U.S. 537.

¹⁷ Frank, *op. cit.*, *supra* footnote 7, at p. 29: "What is important about each of these decisions is that each reflects the dominant social, moral, and political spirit of its times. In 1873 the Court sensed that the dominant element of the country wanted real equality. By 1896 the Court very accurately recognised that this was no longer so."

¹⁸ (1896), 163 U.S. 537, at p. 544

¹⁹ *Ibid.*, p. 551.

the antithesis of the dominant post-Civil War attitudes on race relations, we can nevertheless observe the unfolding of the dialectic in the years since 1896. Especially in the last generation, the court has been increasingly active to secure full political, social and economic rights for negroes and the "separate but equal" formula itself has come under close judicial scrutiny. It will suffice for present purposes to outline some of the landmarks in this trend.

In the area of political rights, the court as early as 1915 had outlawed the so-called "grandfather" clause, a voting-qualification device used in the Southern States and colourably designed to restrict negro suffrage by establishing literacy requirements for electors, coupled with an exemption clause excepting from the literacy test all persons entitled to vote in 1866 or their descendants.²⁰ In 1927, the court ruled that a Texas statute declaring negroes ineligible to participate in primary elections of the Democratic Party was a denial to negroes of their equal protection under the 14th Amendment, the court not considering the question of the application of the 15th Amendment.²¹ Voting in primary elections, in many of the Southern States, is of course the key feature of the whole political process,²² in view of the one-party system that in practice prevails so widely in the South. When, therefore, following the decision in *Nixon v. Herndon*, already mentioned, the Democratic Party of Texas, claiming to act in its capacity as a voluntary (private) association beyond the reach of the 14th Amendment (and necessarily of the 15th Amendment also), proceeded of its own accord to exclude negroes from primary elections, the United States Supreme Court, after some early difficulties,²³ finally ruled that this was state action which as such violated the 15th Amendment to the Constitution.²⁴

In the area of social and economic rights, the court made significant advances in the last decade. In *Morgan v. Virginia*²⁵ it invoked the national commerce power to hold provisions of the Virginia code requiring the separation of white and coloured passengers on interstate buses to be an unconstitutional burden on commerce. In 1950, in a decision given on statutory interpretation grounds

²⁰ *Gunn v. United States* (1915), 238 U.S. 347.

²¹ *Nixon v. Herndon* (1927), 273 U.S. 536.

²² Cf. *United States v. Classic* (1941), 313 U.S. 299.

²³ *Grovey v. Townsend* (1935), 295 U.S. 45. And cf. *Nixon v. Condon* (1952), 286 U.S. 73.

²⁴ *Smith v. Allwright* (1944), 321 U.S. 649, over-ruling *Grovey v. Townsend*, *supra*.

²⁵ (1946), 328 U.S. 373.

without actually ruling on any constitutional issue, the court banned segregation in interstate dining cars.²⁶

As regards housing, the Supreme Court in 1917, in *Buchanan v. Warley*,²⁷ had declared unconstitutional the provisions of a city ordinance which denied to coloured persons the right to occupy houses in blocks where the greater number of houses were occupied by white persons, the court noting that the 14th Amendment operated to entitle a coloured man to acquire property without state legislation discriminating against him solely because of colour. This was complemented by the decision in *Shelley v. Kraemer*,²⁸ in which Chief Justice Vinson, for the court, considered the application of the 14th Amendment to restrictive covenants as to race entered into by private landowners among themselves; noting that restrictive covenants as to race and colour, even though they arose initially from private agreements, depended for their efficacy upon enforcement by the courts, Chief Justice Vinson concluded that the "full coercive power" of the state was involved and that the restrictive covenants involved, therefore, a denial of equal protection by the state as outlawed by the equal protection clause of the 14th Amendment.²⁹

But it is in the education cases that the most significant achievements of the Supreme Court took place. In 1938, in *Missouri ex rel. Gaines v. Canada*,³⁰ the court, through Chief Justice Hughes, ruled that the state of Missouri could not discharge its obligation to provide legal education to a negro by offering to pay his tuition at qualified law schools in neighbouring states.³¹ In *Sipuel v. Board of Regents*, in 1948,³² the court held that there was a denial of equal protection of the laws where the only state-supported university in Oklahoma offering professional training in law ex-

²⁶ *Henderson v. United States* (1950), 339 U.S. 816; similiter *Mitchell v. United States* (1941), 313 U.S. 80

²⁷ (1917), 245 U.S. 60

²⁸ (1948), 334 U.S. 1.

²⁹ Compare *Dorsey v. Stuyvesant Town Corporation* (1949), 299 N.Y. 512, when the Court of Appeals of New York refused to regard as state action violative of the 14th Amendment the exclusion by a corporation, organized under state re-development companies laws, of negroes from consideration as tenants in a housing project in New York City. Certiorari was refused subsequently by the U.S. Supreme Court (1950), 339 U.S. 981 (Black and Douglas JJ. dissenting).

³⁰ (1938), 305 U.S. 337.

³¹ *Ibid.*, per Hughes C.J., at p. 350: "The equal protection of the laws is 'a pledge of the protection of equal laws'. . . . Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained."

³² (1948), 332 U.S. 631

cluded concededly qualified negroes from admission solely because of colour. The two succeeding cases in this field involved the direct application by the court to education of the "separate but equal" formula. In *Sweatt v. Painter*,³¹ the court was called on to consider whether the state of Texas could, compatibly with the equal protection clause, refuse a negro applicant admission to the University of Texas Law School on the score that there was available to him an alternative avenue for legal education at a newly-opened Texas State University for Negroes. For purposes of his decision for the court, Chief Justice Vinson found it unnecessary to canvass *Plessy v. Ferguson* and to re-examine its devising of the "separate but equal" formula. Instead, accepting "separate but equal" as the applicable constitutional formula, he entered into an extensive examination of "those qualities which are incapable of objective measurement but which make for greatness in a law school";³⁴ and, after comparing the facilities of the new negro law school with those of the existing University of Texas Law School, he had no difficulty in concluding that, on the facts, the education offered by the state of Texas to the negro applicant was not "substantially equal" to that offered to white law students. Chief Justice Vinson followed this holding by his opinion of the court in *McLaurin v. Oklahoma*³⁵ in the same term. Here the issue was whether the state of Oklahoma might, after admission of a negro student to graduate instruction in the University of Oklahoma, accord him different treatment from other students by requiring him to be separated from them in the class-room, library and cafeteria—in effect, instruction, within the university, on a segregated basis. Chief Justice Vinson found that these restrictions on the negro graduate student "impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession".³⁶ and that these differences in treatment by the state, based upon race, constituted a clear denial of equal protection of the laws.

It will be noted that each of the decisions by Chief Justice Vinson was rested on the facts of the case before him. Accepting as his premise that "separate but equal" was the governing constitutional principle, he proceeded to find, on the facts, that the separate facilities actually provided were unequal. He did not choose to re-examine *Plessy v. Ferguson* and, given his factual approach to decision-making in these cases, such a fundamental inquiry was strictly unnecessary.

³¹ (1950), 339 U.S. 629.

³⁵ (1950), 339 U.S. 637

³⁴ *Ibid.*, p. 634.

³⁶ *Ibid.*, p. 641.

Something of a tactical problem was thus presented to counsel handling the grade-school segregation cases for negro parties. If they went to the Supreme Court with a well-documented, factual record, it might seem to be an invitation to the court to give a decision on the narrow, factual issue of whether the separate facilities provided actually were equal, and thus to by-pass the major issue, from the viewpoint of the negro parties, of whether separation, with or without equality of facilities, was in itself unconstitutional. On the other hand, for counsel to go to the court without a detailed, factual record would be to hazard the fate of their negro clients on the chance that the court was ready then and there to announce a major policy ruling ending segregation.³⁷

The Current Cases: The Five Questions of June 8th, 1953

The questions posed by the court on June 8th, 1953, when it restored the school-segregation cases to the docket and assigned them for re-argument,³⁸ are interesting pointers to the alternative approaches available to the court in exercising judicial review. The first three questions go to the meaning of the Constitution. Question No. 1 approaches its meaning in the light of history and the intention of the Founding Fathers, or more accurately the "contemplation" of the "Amenders" of the Constitution in 1868 as to what the 14th Amendment would actually do—in this case the expectation of those persons (comprising the two-thirds majorities in each house of Congress who initiated the proposal for amendment and also the majorities in the legislatures of three-fourths of the states who ratified it) who actually operated the amending machinery under article V of the Constitution by means of which the 14th Amendment was finally adopted in 1868. Question No. 2 also looks to history and the "understanding" of the "framers" of the 14th Amendment:³⁹ even if it was not envisaged that the 14th Amendment would require the immediate abolition of segregation in public schools, did the "framers" nevertheless envisage, in effect, a progressive or generic interpretation of the Constitution

³⁷ Cf. Frank, *op. cit.*, *supra*, footnote 7, at p. 42.

³⁸ (1953), 345 U.S. 972

³⁹ Are the "framers" of the 14th Amendment synonymous with the (no doubt) thousands of persons referred to in Question 1 who, as members of the two-thirds majorities in Congress and of the majorities in the legislatures of three-fourths of the states, actually operated the amending machinery in article V of the Constitution? It may be that the use of the poetic word "framers" enables a narrowing of the range of judicial inquiry by confining attention to the leaders of the movement for drafting of the 14th Amendment, presumably, above all, Congressman Bingham and the members of the Joint Committee of Congress on Reconstruction.

by which future congresses, or else the court in the light of future conditions, might abolish segregation in public schools under the 14th Amendment. Question No. 3 seems to go to the interpretation of the Constitution in the "dictionary" sense—the meaning of the words actually used in it —

. . . Is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

Questions 4 and 5 concern the remedies, and represent not merely the most novel feature of the current cases but, in so far as they point to a disposition on the part of the court to shape procedural machinery to suit policy ends, perhaps the most radical innovation in American constitutional law since the successful introduction of the Brandeis Brief over forty years ago. Thus Question 4:

Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

Question 5 follows up the inquiry in Question 4(b), on the possibility of a gradual, staged application of any general ruling by the court ending segregation, by directing attention to the various procedural devices available to such an end:

. . . assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in this case;

(b) if so what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in this case and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

The court ended these interrogations, as I have noted, by inviting the Attorney-General of the United States to take part in the oral argument and to file a brief.

The Warren Opinions of May 17th, 1954: The Four State Cases

It is proposed to discuss first of all the Warren opinion in regard to the four state cases,⁴⁰ and then his opinion in the District of

Columbia case. Chief Justice Warren opened his examination of the four state cases by referring to history—the circumstances surrounding the adoption of the 14th Amendment—which had been extensively canvassed in the re-argument in the fall of 1953 following the court's five questions of June 18th, 1953. But, as the Chief Justice observed:

... Although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, 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.⁴¹

As an additional reason for the inconclusiveness of history as a guide to the interpretation of the 14th Amendment, hereferred (in a paragraph heavily supported in footnotes by historical source materials) to the status of public education at the time of the adoption of the amendment:

In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public education had already advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.⁴²

The Chief Justice then turned to the cases on the 14th Amendment, starting his review with the transportation case of 1896, *Plessy v. Ferguson*, in which the "separate but equal" formula originated, and ending with the most recent education cases. In none

⁴⁰ *Brown et al. v. Board of Education of Topeka, Shawnee County, Kan., et al.*; *Briggs et al. v. Elliott et al.*; *Davis et al. v. County Board of Prince Edward County, Va., et al.*; *Gebhart et al. v. Belton et al.* (1954), 74 Supreme Court Reporter 686.

⁴¹ *Ibid.*, pp 688-9.

⁴² *Ibid.*, p. 689.

of these cases, he observed, was it necessary for the court to re-examine the "separate but equal" formula in order to grant relief to negro plaintiffs and, in fact, in *Sweatt v. Painter* the court had expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

But in the present cases, according to the Chief Justice, that question was directly presented, with the result that the court could not give a decision on the facts alone so as to by-pass the central issue of whether segregation in itself, with or without equality of facilities, violated the 14th Amendment:

Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors.⁴⁷ Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.⁴⁸

In approaching this problem, he went on:

. . . 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 . . .

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . . To separate them 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. . . . Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.⁴⁹ Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.⁵⁰

The Chief Justice concluded his opinion by noting that on re-argument the consideration of appropriate relief had been subordinated to the primary question of the constitutionality of segre-

⁴⁷ Footnote by Chief Justice Warren omitted here.

⁴⁸ (1954), 74 Supreme Court Reporter 686, at pp. 690-691.

⁴⁹ Chief Justice Warren here listed, in a footnote to his opinion, authoritative texts on psychology in support of his finding.

⁵⁰ (1954), 74 Supreme Court Reporter 686, at pp. 691-2

gation in public education. Since the present cases were class actions, and because of the wide applicability of the court's decision and the great variety of local conditions, the formulation of decrees in the present cases presented problems of considerable complexity. The court therefore had decided to restore the cases to the docket for further argument on the question of appropriate decrees, particularly under Questions 4 and 5 previously propounded to the parties. For this purpose, the Attorney-General of the United States was again invited to participate, and the court indicated that the Attorneys-General of states requiring or permitting segregation in public education would also be permitted to appear if they desired.⁴⁷

The District of Columbia Case

The opinion in the District of Columbia case⁴⁸ was released by Chief Justice Warren on the same day as the four state cases. It was separated by him from the four state cases, in the announcement of the court's ruling on segregation in public schools, for reasons of legal doctrine alone. The equal protection clause of the 14th Amendment is a mandate to the states alone⁴⁹ — it does not apply to the national government or its instrumentalities (here the District of Columbia). A ruling by the court ending segregation in public schools would therefore, so far as the District of Columbia is concerned, have to be subsumed under some head of the Constitution other than the 14th Amendment. The Chief Justice had to fall back, *faute de mieux*, on that old judicial stand-by, the due process clause, in this case the due process clause of the 5th Amendment, which is applicable to the national government.⁵⁰ In the four state cases, the Chief Justice formally noted that he found it unnecessary, in view of the specificity and immediate relevance of the equal protection clause to the issue, to canvass the question whether segregation by the states violated also the prohibitions of the due process clause of the 14th Amendment, which is applicable to the states.⁵¹

The very absence of an explicit constitutional provision im-

⁴⁷ *Ibid*, pp. 692-3.

⁴⁸ *Bolling et al v. Sharpe et al* (1954), 74 Supreme Court Reporter 693

⁴⁹ "... nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

⁵⁰ "... nor shall [any person] be deprived of life, liberty, or property, without due process of law."

⁵¹ "... nor shall any State deprive any person of life, liberty, or property, without due process of law."

posing an obligation of equal protection of the laws on the national government as on the state governments imposed some problems on the Chief Justice in the District of Columbia case, which he attempted to overcome by making a rough equation of due process of law (applicable to both the nation and the states) with equal protection of the laws (applicable to the states alone). To do this, he had necessarily to eschew strict and literal interpretation in favour of a search for the fundamental postulates on which the American Constitution and system of government as a whole are based:

. . . The concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law', and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognised, discrimination may be so unjustifiable as to be violative of due process. [Footnote omitted]

Classifications based solely upon race must be scrutinised with particular care, since they are contrary to our traditions and hence constitutionally suspect. . . .

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.⁵²

The Chief Justice ended with a purely policy argument:

In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.⁵³

The District of Columbia case, like the four state cases, was then ordered restored to the docket for re-argument on the question of appropriate decrees.

The Aftermath of the Grade-school Cases

On May 24th, 1954, one week after the release of the grade-school segregation cases, the Supreme Court handed down six memorandum decisions which, when read with the sweeping language used in Chief Justice Warren's opinions in the grade-school cases,

⁵² (1954), 74 Supreme Court Reporter 693, at pp. 694-5.

⁵³ *Ibid.*, p. 695.

suggest that, over and beyond the ending of racial segregation in education, the Supreme Court may be reaching the point of ruling that racial discrimination, whenever and wherever it is practised, is outlawed by the Constitution. The memorandum decisions of May 24th, incidentally, finally cleared the court's docket, for the term just completed, of appeals involving racial discrimination.

Of the six memorandum decisions, three once again concerned education. *State of Florida ex rel. Hawkins v. Board of Control of Florida*⁵⁴ involved attempted segregation by the state of Florida in graduate-school education, first of all through the offer to negro applicants for admission to the graduate school of the University of Florida at Gainesville of out-of-state scholarships equal to those available at tax-supported graduate schools within Florida, and then through the offer of the provision of equal facilities at a Florida College for Negroes. The Supreme Court vacated a Florida Supreme Court judgment against the negro applicants, and remanded the case "for consideration in the light of the Segregation Cases decided May 17th, 1954, *Brown v. Board of Education*, etc., . . . and conditions that now prevail". In *Tureau v. Board of Supervisors of Louisiana State University*⁵⁵ the Supreme Court vacated a ruling of the federal Court of Appeals for the Fifth Circuit against a negro applicant for admission to a combined course in Arts, Science and Law at Louisiana State University, and again remanded the case for future consideration in the light of the grade-school decisions of May 17th. In *Wichita Falls Junior College District v. Battle*⁵⁶ the Supreme Court denied certiorari and so refused to review a ruling by the federal Court of Appeals for the Fifth Circuit that the denial of admission of negro students to a junior college in Texas, after they had been refused matriculation on the score that negro schools with equal facilities were available, violated the equal protection clause of the 14th Amendment.

The remaining three memorandum decisions of May 24th, however, broke new ground in their subject matter. *Mur v. Louisville Park Theatrical Association*⁵⁷ involved the refusal to admit a negro to a theatrical performance in a park amphitheatre in Louisville, Kentucky, the refusal being based on the ground that the park was reserved, under the town park system, for whites only. The Supreme Court vacated a federal District Court ruling that, since the theatrical association giving the performances in the

⁵⁴ (1954), 74 Supreme Court Reporter 783.

⁵⁵ (1954), 74 Supreme Court Reporter 784.

⁵⁶ (1954), 74 Supreme Court Reporter 783

⁵⁷ *Ibid.*

amphitheatre was a private corporation, it was not subject to regulation under the 14th Amendment; this case also was remanded for consideration in the light of the grade-school decisions of May 17th.

In two other cases, *Holcombe v. Beal*⁵⁸ and *Housing Authority of the City & County of San Francisco v. Banks*,⁵⁹ the Supreme Court denied certiorari in lower court decisions (of the federal Court of Appeals for the Fifth Circuit and a California court, respectively) in favour of negro parties, and so preserved those rulings. The first case concerned a refusal of permission to a negro to play golf on a municipal golf course in Houston, Texas, reserved for white players; the second involved the barring of a negro by a public housing authority, under a "neighbourhood pattern policy", from admission to a housing project built for families of Italian extraction.⁶⁰

Now, as to the three cases that did not concern education, it must be stressed that only one, on admission to theatrical performances in an amphitheatre, involved a direct ruling by the Supreme Court on the general issue of racial discrimination; the golf-course and the housing-project cases concerned only the denial of certiorari by the Supreme Court, and this, as the Supreme Court is frequently at pains to stress, involves no formal ruling on the merits. Nevertheless, if the grade-school decisions of May 17th, in departing from the "separate but equal" formula, can be said to correct at long last the settlement of 1896 in *Plessy v. Ferguson*, there seem some grounds for suggesting also that the way may be open now for the court to move to eliminate that major legal barrier to an affirmative and comprehensive federal civil-rights programme presented by the holding in the Civil Rights Cases in 1883 that only public (state) action, and not private action, could be reached by legislation passed by Congress under the 14th Amendment.

It has been suggested in the discussion of the grade-school decisions of May 17th that the separation by the court of the general issue from the question of remedies may have been a substantial factor in the court's striking unanimity on the general issue of ending segregation, for that separation allowed postponement of some of the most crucial problems—to what extent, with what degree of uniformity throughout the nation and, even more important,

⁵⁸ *Ibid.*

⁵⁹ (1954), 74 Supreme Court Reporter 784.

⁶⁰ Compare *Dorsey v. Stuyvesant Town Corporation* (1949), 299 N.Y. 512 (Court of Appeals of New York); certiorari denied (1950), 339 U.S. 981 (U.S. Supreme Court, Black and Douglas JJ. dissenting).

how quickly, segregation, as a working institution of community life in the areas concerned, is to be ended. It may well be, of course, that when the question of formulating appropriate decrees to implement the court's decision on the general principle is finally reached in each of the cases currently remanded for detailed consideration, disagreements will arise among the members of the court.

In taking the step of separating the general issue from the question of application, the court has acted in full accord with the tenets of sociological jurisprudence, with the socio-ethical limitations on the effectiveness of legal action. The court recognizes that it faces something of a dilemma—it is resolved to lead public opinion on race relations, and yet if it gets too far in advance of the community at large—of the community “living law”—its directives may break down in action and so delay the ending of segregation as a working institution of society longer than if the court had not intervened in the first place. The questions the court has posed on remedies allow for a continuing court supervision that can take account of significant variations in local conditions and adjust the timing of the application of the decision on the general issue accordingly. It may be reasonable, for example, to expect a fairly immediate and complete application of the decision in the District of Columbia grade-school case, since the national government, ultimately, will be the authority responsible for enforcement and it has already indicated its full acceptance of the court's decision on the principle. Likewise, in the two other education cases remanded on May 24th—the graduate-school case and the undergraduate (combined Arts, Science and Law) case—it can surely be expected, in the light of the various decisions in the field of tertiary education handed down by the court in Chief Justice Vinson's regime, that the court will not have to teeter too long over full application of the general principle. But it may well be, in the remaining grade-school education cases, that final solution in all the four states concerned will demand a number of years of continuing and patient supervision by the court. The interest the court has shown up to the present, and that it has now indicated it will continue to show, in the views of the national and the state governments reflects an intelligent judicial awareness of the crucial importance of the rôle of these bodies in enforcement. Presumably, full and willing co-operation by the individual states will encourage the court to hold back and allow them to work out their own salvation. In any event, the demands on the

court for the exercise of wisdom, tolerance and common-sense will be quite as considerable as in the case of the states directly concerned in the application of the court's decision, and this leads us back, finally, to the judges themselves.

There is, as I have noted, a quality in Chief Justice Warren's opinions that speaks well for his tenure of the office of chief justice, for his opinions in the grade-school cases are notably free from legalistic abstractions and are written in language that the man in the street can understand and appreciate. Noteworthy is the Chief Justice's rejection both of history and the Founding Fathers ("ancestor worship") and of the "dictionary" approach (the concept of a fixed, static Constitution graven on stone tablets) as a guide to the meaning of the Constitution, in favour of a Cardozo-like inquiry into the fundamental postulates of American society and government at the present day. In the same vein, one must commend his refreshing reliance on what are, from the conventional viewpoint, strictly "extra-legal" materials in determining whether segregation in grade schools violated the equal protection clause of the 14th Amendment—see, for example, his adoption of the views of acknowledged experts in psychology and sociology on the effects of segregation in education upon children. The Chief Justice was undoubtedly helped here by the intelligent and sustained workmanship of counsel in preparing the extremely comprehensive briefs filed in the cases;⁶¹ but the fullest utilization of the briefs necessarily required a judge with the breadth of learning and outlook, and also the freedom from stereotyped legal attitudes, to enable him intelligently to employ source materials drawn from social sciences other than law.

What will be needed is the exercise of judicial statesmanship of a continuously high level; but the resourcefulness the court has already shown in its handling of the current cases is a good guarantee for conscious, creative judicial policy-making in the future.

⁶¹ Counsel involved in the case included Thurgood Marshall of New York, special counsel of the National Association for the Advancement of Colored People (for the plaintiffs in the five cases); John W. Davis, the Democratic Party Presidential candidate of 1924 and a leader of the New York Bar (for the state of South Carolina); and J. Lee Rankin, Assistant Attorney-General of the United States (for the United States Justice Department, which intervened in the cases).

The workmanship of lawyers presenting cases before the Supreme Court has not always been the subject of praise. See the strictures of Professor Willard Hurst, in Cahn (ed.), *Supreme Court and Supreme Law* (1954) p. 83.