# Table of Contents

SEGREGATION IN THE FIELD OF PUBLIC AND PRIVATE LAW - CONSTITUTIONAL PROHIBITIONS RELATING TO PUBLIC AND PRIVATE BODIES - STATUS OF THE TULANE UNIVERSITY OF LOUISIANA

I. To What Areas Does Desegregation Apply? ........................................... 4

<table>
<thead>
<tr>
<th>Area</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jury Cases</td>
<td>1</td>
</tr>
<tr>
<td>Housing</td>
<td>3</td>
</tr>
<tr>
<td>The Right to Vote</td>
<td>4</td>
</tr>
<tr>
<td>Restrictive Covenants</td>
<td>6</td>
</tr>
<tr>
<td>Labor Unions</td>
<td>8</td>
</tr>
<tr>
<td>Miscegenation</td>
<td>9</td>
</tr>
<tr>
<td>Teachers' Salaries</td>
<td>10</td>
</tr>
<tr>
<td>Public Schools and the School Segregation Cases</td>
<td>10</td>
</tr>
<tr>
<td>&quot;Public&quot; Accomodations and Amusements</td>
<td>20</td>
</tr>
<tr>
<td>Transportation</td>
<td>26</td>
</tr>
<tr>
<td>Evasion of Desegregation</td>
<td>33</td>
</tr>
</tbody>
</table>

II. The Fourteenth Amendment and Private Institutions. 35

<table>
<thead>
<tr>
<th>Subject</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fourteenth Amendment and Civil Rights: General</td>
<td>35</td>
</tr>
<tr>
<td>Nature of Private Institutions</td>
<td>37</td>
</tr>
<tr>
<td>Examples of Private Institutions</td>
<td>39</td>
</tr>
</tbody>
</table>
III. Is Tulane University A Private or Public Corporation

- Characteristics of Private and Public Corporations
- Private Eleemosynary Corporation
- Private Civil Corporation
- State Laws Pertaining to Tulane University
- State Cases Concerning Tulane University
- The Effect of Pupil Assignment Through the Reserve Officers' Training Corps
- Conclusion
TO: Joseph M. Jones
FROM: David Campbell
Re: SEGREGATION IN THE FIELD OF PUBLIC AND PRIVATE LAW - CONSTITUTIONAL PROHIBITIONS RELATING TO PUBLIC AND PRIVATE BODIES - STATUS OF THE TULANE UNIVERSITY OF LOUISIANA.

I. TO WHAT AREAS DOES SEGREGATION APPLY?

The relevant clause of the Fourteenth Amendment to the Federal Constitution states:

"...nor shall any state... deny to any person within its jurisdiction the equal protection of the laws."

I shall attempt in this memorandum to set out in full the judicial definition of "State" as developed by the Courts of this country since the passage of that Amendment. Further, all areas to which this constitutional prohibition applies are discussed separately in this memorandum because of the diversified standards for application of the constitutional prohibition and because some areas come very near the field of private law, which supposedly is excluded from the constitutional prohibition of the Fourteenth Amendment.

JURY CASES

The application of the Fourteenth Amendment to this area of law has developed to such an extent that today a criminal conviction will be overturned if the Court finds that there exists in the jurisdiction a custom of systematic exclusion from service as jury commissioners, grand jurors and petit jurors.

Not long after the Civil War, there were some states which excluded negroes from jury duty by legislative act. Such state laws were held unconstitutional. Strader v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1879).

In Patton v. State of Mississippi, 332 U.S. 463, 92 L. Ed. 164 (1947), a leading case in this area, a criminal conviction was overturned because the State purposely excluded negroes from jury duty for a period of thirty years or more. The Court stated:
"When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long continued exclusion of any representatives at all from a large group of negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand."

In Pierre v. Louisiana, 306 U.S. 354, 83 L. Ed. 757 (1939), an indictment was quashed because of a systematic exclusion of negroes from Grand Juries, the Court holding:

"Such an exclusion is a denial of equal protection of the laws...."

In Louisiana, Article 172 of the Code of Criminal Procedure prohibits distinction as to race in selecting jurors. However, the probable ineffectiveness of Article 172 was illustrated in the case of Rabunes v. Louisiana, 356 U.S. 584, 2 L. Ed. 2d 991 (1958). Although one third of the population was colored and many were shown to be qualified for jury duty, only one had been selected to serve on the Grand Jury since 1936. The United States Supreme Court reversed the Louisiana Supreme Court and held that discrimination was shown despite testimony of state judges who selected jurors that they did not take race into account.

See also annotation of "Jury Selection - Group Discrimination" at 2 L. Ed. 2d 2040.

The case of Hernandez v. State of Texas, 347 U.S. 475, 98 L. Ed. 866 (1953) sets out the general rule. In this case the defendant, of Mexican descent, sought a reversal of his murder conviction on the ground that he was denied equal protection of the laws in that persons of similar ancestry had been systematically excluded from service as jury commissioners, grand and petit jurors, in the county in which he was convicted. The state court affirmed the conviction (ruling that the equal protection clause of the Fourteenth Amendment contemplated only two classes - negro and white). The United States Supreme Court reversed the conviction, holding first, that the state court had erred in limiting the protective scope of the equal protection clause to white and negro classes; second, that the defendant had established that persons of Mexican descent were a distinct class in the county in which he was convicted; and, third, that evidence that persons of such descent had never been selected for jury service, not withstanding the presence of a substantial number of those
persons in the county, many of whom were qualified, was sufficient to show a violation of the equal protection clause of the Fourteenth Amendment.

HOUSING

In this area of law the Courts have been as stringent as in the jury cases. In fact, the "separate but equal" doctrine seems never to have been an important factor in the area of housing.

In Buchanan v. Warley, 245 U.S. 60, 62 L. Ed. 149 (1917) the Court considered a city ordinance which forbade the occupation by a negro of a residence in a block where the greater number of residents were occupied by white persons. Finding that this interdiction was based "wholly upon color; simply that and nothing more," the Court held that the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident cannot be inhibited by the State or one of its municipalities solely because of the color of the proposed occupant of the premises. The Court stated:

"What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the Fourteenth Amendment was primarily designed, that no discrimination shall be made against them by law because of their color?"

In Van v. Toledo Metropolitan Housing Authority, 113 F. Supp. 210 (D. C. Ohio 1953), the Court held that a municipality charged with the management of public housing projects erected with public funds could not exclude persons of the colored race from a housing project in view of the Fourteenth Amendment.

And in Detroit Housing Commission v. Lewis, 226 F. 2d 160 (6th Cir. 1955), a class action was brought by negroes against a city housing commission to have certain segregation practices declared to be violative of the Federal Constitution and other laws and seeking an injunction. An injunction was granted because public housing projects were limited to whites only and others to negroes only and separate lists of eligible negro and white applicants for public housing were being maintained. According to this Court the SEGREGATION CASES (Brown v. Board of Education) apply to all cases of "integration in the case of public facilities."
In Housing Authority v. Banks, 120 Cal. App. 2d 1, 260 P. 2d 668, the state court required a municipal housing authority to admit negroes on an equal basis with whites to any units in its permanent public low-rent housing development. The United States Supreme Court denied Certiorari, 347 U.S. 974 (1954).

**THE RIGHT TO VOTE**

This right is specifically provided for by the Fifteenth Amendment to the United States Constitution: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Because of this Constitutional Amendment, the United States Supreme Court has gone further in this area than any other to apply the constitutional prohibition to "state action".

A certain indecision was displayed by the United States Supreme Court when it first considered the exclusion of negroes from participation in primary elections. Before becoming convinced that primary contests were in fact elections, the Court had relied upon the equal protection clause to strike down a Texas white primary law (Nixon v. Herndon, 273 U.S. 536 (1927)) and a subsequent Texas statute which contributed to a like exclusion by limiting voting in primaries to members of State political parties as determined by the central committees thereof (Nixon v. Condon, 286 U.S. 73, 89 (1932)). When exclusion of negroes was thereafter perpetuated by political parties acting not in obedience to any statutory command, this discrimination was for a time viewed as not constituting state action and therefore not prohibited by either the Fourteenth or Fifteenth Amendments. (Groves v. Townsend, 295 U.S. 45, 55 (1935)). But this holding was reversed nine years later when the Court, in Smith v. Allwright, 321 U.S. 649 (1944), declared that where the selection of candidates for public office is entrusted by statute to political parties, a political party in making it selection at a primary election is a state agency, and hence may not under this Amendment exclude negroes from such elections. Not withstanding that the South Carolina Legislature, after the decision in Smith v. Allwright, repealed all statutory provisions regulating primary elections and
political organisations conducting them, a political party thus freed all
control is not to be regarded as a private club and for that reason exempt
from the constitutional prohibitions against racial discrimination contained
denied, 333 U.S. 673 (1948). See also \textit{Brown v. Board of Educa}tion, 76 F. Supp. 933, 940
(1948) which held violative of the Fifteenth Amendment a requirement of a
South Carolina political party, which excluded negroes for membership, that
white as well as negro qualified voters, as a prerequisite for voting in its
primary, take an oath that they will support separation of the races.

At a very early date the Court held that literacy tests which are
drafted so as to apply alike to all applicants for the voting franchise would
deemed to be fair on their face, and in the absence of proof of discriminato-
ry enforcement could not be viewed as denying the equal protection of the
laws guaranteed by the Fourteenth Amendment. \textit{Williams v. Mississippi}, 170 U.S.
213 (1898). However, the Boswell Amendment to the Constitution of Alabama,
which provided that only persons who understood and could explain the Consti-
tution of the United States to the reasonable satisfaction of boards of regis-
trants was found to be contrary to the Fifteenth Amendment. The legislative
history of the adoption of the Alabama provision disclosed that "the ambiguity
inherent in the phrase 'understand and explain'...was purposeful...and was
intended as a grant of arbitrary power in an attempt to obviate the consequences
of" \textit{Smith v. Allwright}. \textit{Davis v. Schwell}, 61 F. Supp. 872, 876, 880 (1940);
affirmed, 336 U.S. 933 (1949).

\textit{Terry v. Adams}, 345 U.S. 461 (1953) is a well known and much dis-
cussed case since the United States Supreme Court went further here to find
"state action" than it previously had. In this case there was a "three-step
process" in Texas to voting: First, the voluntary, private organization of
individuals called the Jaybirds - This private group would gather before a
primary and decide who they would like to vote for. As a practical matter,
the decision of the Jaybird Association usually determined the results of the
voting in the primary and in the general election. The second step was the
primary itself. The third step was the general election. The Court prohibited
the Jaybird Association from discriminating on basis of race on the ground that the pre-primary election of candidates was no more than a perfunctory ratifier of white voters' election choices.

RESTRICTIVE COVENANTS

The United States Supreme Court decisions in this area of law have created much discussion and some adverse feeling. This area, other than the voting cases also comes closer to the field of private law than other areas.

A typical case showing the earlier position of restrictive covenants in *Queensborough Land Co. v. Cazaux*, 136 La. 724, 67 So. 681 (1915). The Louisiana Supreme Court upheld a covenant running with the land against a sale to a negro, stating that agreements restricting real property from ownership or occupancy by persons of a certain race are not contrary to public policy.

In the Federal Courts the position was the same. Thus in *Mayes v. Burgess*, 147 F. 2d 869, 162 A.L.R. 163 (1945), cert. denied 325 U.S. 669, reh. denied 325 U.S. 896, the Court held that a covenant against negro ownership or occupancy is valid and enforceable in equity by way of injunction.

Two cases which were decided at the same time broke with its previously traditional position. One case was *Henderson v. Hodge*, 334 U.S. 24, 92 L. Ed. 857 (1948), where judicial enforcement of anti-racial restrictive covenants by Courts of the District of Columbia was held prohibited by the Federal Civil Rights Acts provision (Rev. Stat. Sec. 1978, 8 U.S.C.A. Sec. 42) that "all citizens have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

In addition the Court in this case indicated that "even in the absence of the Civil Rights Statute, judicial enforcement of anti-racial restrictive covenants in the District of Columbia would be contrary to the public policy of the United States and as such should be corrected by the Supreme Court in the exercise of its supervisory powers of the Courts of the District of Columbia."

The Court stated:
"It is not consistent with the public policy of the United States to permit Federal Courts in the nation's capital to exercise general equitable powers to compel action denied the State Courts where such state action has been held to be violative of the guarantee of the equal protection of the laws."

The second case decided by the United States Supreme Court is Shelley v. Kraemer, 334 U.S. 1, 92 L. Ed. 845 (1948). The use of judicial power to enforce private agreements of a discriminatory character was held unconstitutional. Holding that restrictive covenants prohibiting the sale of homes to negroes could not be enforced in the Courts, Chief Justice Vinson said:

"These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing."

The annotation in 3 A.L.R. 2d 471 points out that Hurd v. Hodge and Shelley v. Kraemer have been consistently followed. After these cases for several years the question remained whether the covenants were also void in Court not when suit was brought to enforce the covenants, but in a suit against the covenant-breaker for damages. This question was answered by the Supreme Court in 1953 in Barrows v. Jackson, 346 U.S. 249, 97 L. Ed. 1586.

The Court held that even a State Court's award of damages in an action for breach of covenant restricting use and occupancy of real property to persons of the Caucasian race is state action under the Fourteenth Amendment. So a restrictive covenant cannot be enforced at law by a suit for damages against a co-covenantor who broke the covenant.

"The action of a State Court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity as in Shelley v. Kraemer....." Barrows v. Jackson, supra.

Two years later a very interesting case arose from Charlotte Park and Recreation Committee v. Barringer, 242 N.C. 311, 86 S.E. 2d 114, Cert.
denied, Leoparp v. Charlotte Park and Recreation Committee, 350 U.S. 983, 100 L. Ed. 851 (1955). The Court held that use by negroes of public golf course would cause reverter of fee to the donor when the land was conveyed for park purposes on condition that it was "to be used and enjoyed by persons of the white race only," and the deed provided that the land should revert to the donor or his heirs if any condition was broken, the conveyance being a fee determinable upon limitation resulting in automatic reverter without judicial action upon the occurrence of the event by which it was limited.

Thus, within the purview of this case, if Paul Tulane had made his donation subject to a resolatory condition that the land revert to the donor or his heirs if used by negroes, this would probably be valid because the resolatory condition would be automatic, just as the automatic reverter in a fee determinable at common law is also automatic. However, this assumes that suit would not have to be brought to dissolve the donation. If the resolution of the donation depends in any way on Court enforcement, then we again enter into the area of state action. Thus the inquiry in Louisiana is: Can a donation be made subject to an automatic resolatory condition. (The Civil Code states that a resolatory condition has to be sued for. See Louisiana Civil Code of 1870, Articles 2045 - 2047).

Secondly, where would this leave us but with the land going back to the heirs of Paul Tulane?

A case which tried to use the Barringer case, supra to get around Shelley v. Kraemer was Capital Federal Savings and Loan Association v. Smith, 316 P. 2d 252 (Colorado). The Court held that even though an antiracial covenant provided for automatic reversion to others on a conveyance to negroes, enforcement of such covenant would be contrary to the Fourteenth Amendment.

LABOR UNIONS

Although I did not cover this area extensively, some problems are set out in the memorandum. The following quotation comes from American Law Reports:

"In cases arising under the Railway Labor Act the Supreme Court has held that a labor union which, by virtue of the
Act, is the exclusive bargaining agent of a craft or class of employees, has the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination on the ground of race. Steele v. Louisville and N. R. Co., 323 U.S. 192, 69 L. Ed. 272 (1944); Graham v. Bhd. of Locomotive Firemen & Eng., 338 U.S. 232, 95 L. Ed. 22 (1949); Bhd. of R. Trainmen v. Howard, 343 U.S. 768, 96 L. Ed. 1039 (1952).

This principle also applies to a labor union which is the exclusive bargaining representative of employees by virtue of the National Labor Relations Act. Sykes v. Oil Workers International Union, 350 U.S. 892, 100 L. Ed. 785 (1955), cert. denied 350 U.S. 943.

In spite of the above quotation, however, the Sixth Circuit Court of Appeals seemed to use very different language in the case of Oliphant v. Bhd. of Locomotive Firemen and Engineers, 252 F. 2d 399 (6th Cir. 1958), cert. denied 359 U.S. 935, 3 L. Ed. 2d 636 (1959). This was an action by negro firemen to compel a railroad union to admit plaintiffs to membership. The union had been certified in accordance with the Railway Labor Act as the exclusive bargaining representative; the constitution of the union forbade the admission of negroes to membership. The plaintiffs asserted that Congress violated the Fifth Amendment due process clause when it passed the Railway Labor Act without including therein a provision requiring a labor union when duly elected as collective bargaining representative of a craft—to extend membership privileges to all members of the craft regardless of race. Rejecting this contention, the Court stated:

"Recent decisions of the Supreme Court in the field of administration of public schooling are not analogous to the instant case. Brown v. Board of Education and Balling v. Sharp, supra, were predicated on the fact that affirmative legislation of the states and the District of Columbia, respectively, denied negroes access to schools supported by public tax funds. These decisions are not applicable here.

The Brotherhood is a private association, whose membership policies are its own affair, and this is not an appropriate case for interposition of judicial control."

DISCRIMINATION

Stevens v. United States, 146 F. 2d 120 (4th Cir. 1944), held that Oklahom St. Ann. Sections 12, 13 forbidding marriage of a person of African descent to a person of another race or descent and prescribing the same punish-
ment for each party to such a marriage do not discriminate against the
colored race within the purview of the Fourteenth Amendment.

The above case is apparently an example of the jurisprudence
today. Miscegenation statutes have not been declared unconstitutional by
the United States Supreme Court although it recently had before it a case
involving such a point. Haim v. Haim, 350 U.S. 791, 100 L. Ed. 784 (1955)
(Court remanded case to Virginia Supreme Court of Appeals to complete the
record), subsequent appeal dismissed 350 U.S. 985, 100 L. Ed. 852 (1956)
(Upon Virginia Court's finding that no state procedure was available to
remand case to lower Court to complete record, the Supreme Court dismissed
the appeal without reaching the merits because no federal question presented.)

See Three Race Relations Reporter, 579 where it is stated:

"A survey of Murray, States' Laws on Race and Color (1951)
and Supplement (1955), indicates that as of 1955, twenty-
seven states had statutes prohibiting marriages between
persons of the Caucasian or white race and various other
racial groups...Eight states apparently have statutes
specifically prohibiting cohabitation between members of
various racial groups."

TEACHERS' SALARIES

The authorities, although limited in number, are in agree-
ment that under the Fourteenth Amendment to the Federal
Constitution a state or any agency thereof cannot lawfully
fix the salary of public school teachers belonging to one
race at a lower figure than the salary of public school
teachers belonging to another race, where the difference
in salary is based solely upon the teachers' race or color
and not upon a material difference in the training, qual-
ifications, experience, abilities, or duties of the indi-
vidual teachers." 130 A.L.R. 1512 (1944)(See cases cited
therein).

PUBLIC SCHOOLS AND THE SCHOOL SEGREGATION CASES

This discussion will be divided into three divisions. The first
division concerns cases decided before the School Segregation Cases (Brown v.
Board of Education). The second division concerns the School Segregation Cases.
The third division is a survey of cases since the School Segregation Cases.

This area is of course the most important to the problems concerned
in this memorandum. This is because the "separate but equal" doctrine which
was first applied in transportation (see Plessy v. Ferguson, infra), had pecu-
liar social and economic application to the field of education. When the separate
But equal doctrine was overruled in the School Segregation Cases, the question of course was whether this doctrine was overruled as to all areas of law, and not only in the field of education. Without going deeper into this question at this point, it can be safely said that the separate but equal doctrine has little or no place in any area of law. But because this has not been specifically answered by The United States Supreme Court, the cases relating to the separate but equal doctrine have been included in this Memorandum. Because the cases on separate but equal in education arose often, these cases frequently affected other fields and the standards set out in the education cases overlapped with standards applicable in other areas of law.

Although the following cases form a step by step process to the apex of the School Segregation Cases, it should be noted that before the School Segregation Cases, the Supreme Court left the education of children wholly to the states. Thus, in the case of Gong Lum v. Rice, 275 U.S. 78 (1927), the Court held that a Chinese citizen may be classified as colored, and made to attend a colored school. The Court pointed out that the state can regulate the method of providing for education at public expense.

The first major excursion into the "separate but equal" doctrine was in 1938, in the case of Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938), the Court held that the curators of a state university in refusing admission to an applicant on account of race is regarded as state action. Here, the state violated the 14th Amendment by excluding negroes from state-maintained law school and providing by statute for the payment of tuition at the university of any adjacent state for any negro resident of the state of Missouri. Since Missouri operated a law school for whites, negroes were entitled to the same opportunity.

Requirements were strict in many state courts, also. Thus, in 1936 the Supreme Court of Maryland held in University of
Maryland v. Murray, 182 Atl.590, 103 A.L.R706, that statutory provisions for scholarships for colored students to study law in other schools outside the state, where such courses were provided for them, was not equivalent to admission to study law in the state university, where the number of scholarships available was insufficient to provide for all colored students who might wish to study law; that such scholarships, even if obtained, were such that the colored students who obtained them would be subjected to expenses in studying law outside of the state, to which they would not be subjected in pursuing such study within the state; and study of law outside the state did not furnish to such colored students, the advantages of primarily studying the law of, and attending upon the courts of their home state, wherein they intended to practice.

The U. S. Supreme Court reiterated its position in Sipuel v. Board of Regents of U. of Okla. 332 U.S. 631, 92 L.Ed. 247 (1948), where it held that a negro applicant to the University of Oklahoma Law School was denied equal protection of the law, when refused admission and when the University of Oklahoma was the only law school in the state.

The case of Sweatt v. Painter, 339 U.S. 629, 92 L. Ed. 1115 (1950), caused states to realize that the separate but equal doctrine would be close to impossible to apply. In this case, a negro was refused admission to the University of Texas Law School, on the grounds that substantially equivalent facilities were offered by a Texas Law School open only to negroes. Refusing either to affirm or disaffirm the doctrine of Plessy v. Ferguson that separate but equal facilities for negroes satisfy the requirements of the Thirteenth and Fourteenth Amendments, the Supreme Court unanimously, in an opinion by Chief Justice Vinson, held that the equal protection clause required that the negro be admitted to the University of Texas Law School, since the school for negroes did not afford equal facilities. The court indicated that apart from any differences there might be
in the physical plants of the University of Texas Law School and the law school open to negroes, there were intangible considerations requiring the decision to this case. Such "intangible" considerations would henceforth render the doctrine of separate but equal most difficult for states to apply.

The Supreme Court decided another case at the same time as Sweatt v. Painter, which illustrated the lengths to which the court would go in insisting with the complete compliance of the court’s interpretation of the Fourteenth Amendment. Thus, in McLaurin v. Oklahoma, 339 U.S. 637, 94 L. Ed. 1149 (1950), the petitioner had been admitted to the graduate school, but claimed that he was being discriminated against in the classrooms. The Court held that the plaintiff had a right to be accorded the same treatment as all other students. This decision, then, forbids segregation in the classrooms and other facilities of the school once the negro has been admitted.

Needless to say, Louisiana did not escape the force of this law. Wilson v. Board of Supervisors of Louisiana State University, and Agriculture and Mechanical College, 92 F. Supp. 986 (E. D. La. 1950), aff’d per curiam 340 U.S. 909, reh. denied 95 L. Ed. 1362, held that the Board of Supervisors denied negroes equal protection of law, by denying admission to the school of law.

An interesting decision is found in the case of Carr v. Corning 182 F 2d 14 (D. C. 1950) where the Court refused to disrupt the “separate but equal” doctrine, although the lengthy dissent is a better argument for desegregation than is Chief Justice Warren’s decision in the school segregation cases. However, the majority held that statutes providing for segregation of races in schools of the District of Columbia did not violate the due process clause of the Fifth Amendment, and that evidence
did not establish that treatment accorded negro students was so discriminatory or unequal as to constitute a violation of the due process clause. (See Bolling v. Sharpe, infra.).

Following Sweatt v. Painter, supra, the Fourth Circuit Court of Appeals, in McKissick v. Carmichael, 187 F. 2d, 949 (4th Cir. 1951), Cert. denied, 341 U.S. 951, found that the law school of the University of North Carolina was inferior to the law school for negroes, and for this reason the University of North Carolina could not exclude negroes.

Right before the Brown case, the district court for the Western District of Louisiana held that plaintiff negroes were denied equal protection of the law when they were refused admission to Southwestern Louisiana Institute, because the nearest colored institutions were 89 and 126 miles away, and "the inconvenience and the loss of time and money imposed upon negro students and their parents, is real, genuine and severe." Constantine v. 314, 120 F. Supp. 417 (W.D. La. 1954).

The School Segregation Cases were decided by the Supreme Court in 1954. The first case is Brown v. Board of Education of Topeka, 347 U.S. 483, 98 L. Ed. 873, 38 A.L.R. 2d. 1180; 349 U.S. 294, 99 L. Ed. 1083. The U. S. Supreme Court re-examined the "Separate but equal" doctrine as applied in the field of public education, and concluded that it had no place in this field, since separate education facilities are inherently unequal. The Court held that the segregation of students in public schools, on the basis of race, even though the physical facilities and other tangible factors are equal, deprives students of the minority group equal educational opportunities, and constitutes a denial of equal protection of laws.

The companion case to the Brown decision, Bolling v. Sharpe, 347 U.S. 497 (1954), held that the federal government was
prevented from maintaining segregation in the District of Columbia schools, by virtue of the due process clause of the Fifth Amendment.

The effect of the School Segregation Cases is set out in cases following:

In Board of Supervisors v. Tureaud, 347 U.S. 971 (1954) a judgment of the district court entered by a single judge and requiring defendants to admit negroes to a combined six-year Arts and Sciences and Law Course, at L.S.U., was reversed by the Fifth Circuit Court of Appeals, on the grounds that a three-judge court was required to pass on the action. The U.S. Supreme Court vacated the judgment, and remanded the cause for consideration in the light of the Brown case and "conditions that now prevail". It was not made clear what effect, if any, the Brown case has upon the jurisdictional question concerning the composition of the trial court.

I have not included the many cases following the School Segregation Cases of negro children trying to enter white schools and the many cases illustrating certain administrative and social problems involved in the process of desegregation. As a whole, these suits generally seek injunctions against state officials. Needless to say, in nearly all cases, the Brown decision has been adhered to. Certain pupil assignment laws have been held constitutional and seem to be the trend in many southern states, compromising on "token integration". See Gibson v. Board of Public Instruction of Dade County, Florida, 170 F. Supp. 454 (S.D. Fla. 1958).

To illustrate some of the problems involved, however, I have included the Little Rock cases and a series of cases relating to desegregation in a Texas community.

The Little Rock cases culminated in the Supreme Court Decision of September 29, 1958, opinion at 358 U.S. 1, 3 L.Ed. 5. The school board and the superintendent of schools at Little Rock filed a petition in the U.S. District Court for the Eastern District of Arkansas, seeking a postponement of a plan for desegregation of public schools, which had been adopted by the board, and approved
by the appropriate Federal Courts. The petition was rested on the ground that because of extreme public hostility, "engendered largely by the official attitudes and actions of the governor and the legislature" of the state, "the maintenance of a sound educational program at the high school, with negro students in attendance, would be impossible". The District Court granted the relief requested by the board (163 F. Supp. 13). Upon appeal, the United States Court of Appeals for the Eighth Circuit reversed the District Court, (257 F. 2d 33).

On certiorari, the U. S. Supreme Court affirmed the judgment of the Court of Appeals. The Court refused to suspend the integration plan "until state laws and efforts to upset and nullify the court's holding in the Brown case had been further challenged and tested in the courts." It was pointed out that the constitutional right not to be discriminated against in schools maintained by or with the aid of a state cannot be nullified openly and directly by state legislators or state executive or judicial officers, nor indirectly by them through evasive means for segregation, whether attempted ingeniously or ingenuously; and that the ruling of the Brown case was the supreme law of the land and of binding effect on all state legislators and officials.

Governor Faubus shut down the schools after this, but the plan to transfer the public school property to an individual corporation was thwarted by an injunction. See 261 F 2d, 97 (8th Cir. 1958) and 169 F. Supp. 325 (E. D. Ark. 1959). The Court, in issuing an injunction against the school board leasing school property to a private corporation stated: "The briefs of appellants and of the government as amicus curiae have set out and discussed the line of cases in which lessees of public property have in the circumstances of the particular situation involved, on the theory of state instrumentality, been held to be subject to the obligation of the state against racial discrimination." (See cases cited therein).
by the appropriate Federal Courts. The petition was rested on the
ground that because of extreme public hostility, "engendered largely
by the official attitudes and actions of the governor and the
legislature" of the state, "the maintenance of a sound educational
program at the high school, with negro students in attendance,
would be impossible". The District Court granted the relief requested
by the board (163 F. Supp. 13). Upon appeal, the United States
Court of Appeals for the Eighth Circuit reversed the District Court,
(257 F. 2d 33).

On certiorari, the U. S. Supreme Court affirmed the judg­
ment of the Court of Appeals. The Court refused to suspend the
integration plan "until state laws and efforts to upset and nullify
the court's holding in the Brown case had been further challenged
and tested in the courts." It was pointed out that the constitutional
right not to be discriminated against in schools maintained by or
with the aid of a state cannot be nullified openly and directly by
state legislators or state executive or judicial officers, nor in­
directly by them through evasive means for segregation, whether
attempted ingeniously or ingenuously; and that the ruling of the
Brown case was the supreme law of the land and of binding effect
on all state legislators and officials.

Governor Faubus shut down the schools after this, but the
plan to transfer the public school property to an individual corpora­
tion was thwarted by an injunction. See 261 F. 2d. 97 (8th Cir. 1958)
and 169 F. Supp. 325 (E. D. Ark. 1959). The Court, in issuing an
injunction against the school board leasing school property to a
private corporation stated: "The briefs of appellants and of the
government as amicus curiae have set out and discussed the line of
cases in which lessees of public property have in the circumstances
of the particular situation involved, on the theory of state instru­
mentality, been held to be subject to the obligation of the state
against racial discrimination." (See cases cited therein).
"The effect of all these cases, in their relation to the present situation has been epitomized by the Supreme Court in Cooper v. Aaron, 78 S. Ct. 1401, 1409, as follows: 'In short, the constitutional rights of children not to be discriminated against on grounds of race or color declared by this court in the Brown case can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them by evasive schemes for segregation whether attempted ingeniously or ingenuously'.

A series of cases concerning desegregation in a Texas community show the many difficulties inherent in the administrative process and the problems involved when regional mores or, at least, custom, conflict with judicial interpretations espoused by the U. S. Supreme Court.

Thus, in Bell v. Rippy, 133 F. Supp. 811 (N. D. Tex. 1955), the plaintiffs sought an injunction against the defendants who were principals and officers of Dallas Public Schools for refusing to permit negroes to several different public schools. The district judge dismissed the case without prejudice to re-file it "at some later date", stating: "all of the law as declared by the various courts appellate and trial, in the United States, are agreed upon the proposition that when similar and convenient free schools are furnished to both white and colored that there then exists no reasonable ground for requiring desegregation".

(It is obvious that the district judge's interpretation of the Brown case is erroneous, in that the Brown case held that separation was inherently unequal.)

On appeal, the Fifth Circuit reversed the district judge and remanded the case back to him. (See 233 F. 2d 796). But, on remand, the district judge adhered to his first view and dismissed the case without prejudice. (146 F. Supp. 495 1956). Some of the judge's practical language is included:

Speaking of the Brown case, the judge stated:
"I believe that it will be seen that the Court based its decision on no law, but rather on what the Court regarded as more authoritative, modern psychological knowledge that existed at the time that the now discarded doctrine of equal facilities was initiated. It will be recalled that in 1952, Mr. Justice Frankfurter said it was not competent to take judicial notice of 'claims of social scientists....'\".

"It seems to me, in view of the facts, that the white schools are hardly sufficient to hold the present number of white students; that it would be unthinkably and unbearably wrong to require the whites to get out so that the colored students could come in. That would be the result of integration here."

But, on appeal for the second time, the Fifth Circuit again reversed with directions and stated:

"Overcrowding in public schoolrooms cannot be lawfully prevented or relieved by excluding pupils on the basis of their race or color....

"...so long as they are excluded from any public school of their choice solely because of their race or color the plaintiffs are being denied their constitutional rights." Borders v. Rippy, 247 F. 2d 268 (5th Cir. 1957).

The case was not over yet, however, as the district court then ordered desegregation for the coming term. The 5th Circuit again heard the case, 250 F. 2d 690 (1957), and decided that the district judge had not followed the 5th Circuit's mandate by setting a date, but should have left it to the school board "to make the necessary arrangements referred to in the judgment to be entered by the district court as directed by our mandate."

A more concise statement of the history of this litigation is reported in 3 Race Rel. Law Rep. 17.

Louisiana was apparently slow on the move in regards to the separate but equal doctrine. Thus, it was not until after the School Segregation Cases that the legislature passed Act 194 of 1954, which repealed La. R. S. 4:3 and 4, which made places of entertainment or public resort open to all without discrimination as to race. The 1954 amendment to the Louisiana constitution provided the maintenance of separate schools for white and colored to
be in the exercise of the police power of the state.

The Fifth Circuit Court of Appeals, however, later held that the Louisiana Constitutional provision seeking to maintain racially segregated schools under its police power and other statutes enacted to implement such constitutional provisions, were invalid under the equal protection clause of the Fourteenth Amendment. Orleans Parish School Board v. Bush, 242 F. 2d. 156 (5th Cir. 1957), Cert. denied, 354 U.S. 921.

Frazier v. Board of Trustees of the University of North Carolina, 134 F. Supp. 589 (M.D.N.C. 1955), affirmed per curiam 350 U.S. 979 (1956), concerned an action by negroes to be admitted to the University of North Carolina. The defense counsel argued that the Brown decision pertained only to lower public schools. Rejecting this argument, the court stated:

"...the only defense on the merits... offered by the defendants in this suit is that the Supreme Court in Brown v. Board of Education... decided that segregation of the races was prohibited by the Fourteenth Amendment only in respect to the lower public schools and did not decide that the separation of the races in schools in the college and university level is unlawful. We think that the contention is without merit. That the decision of the Supreme Court was limited to the facts before it is true, but the reasoning on which the decision was based is applicable to schools for higher education as to schools on the lower level."

As for admission of negroes to institutions of higher learning, the courts do not hesitate to demand admission without delay. Thus, the Supreme Court in State of Florida ex rel Hawkins v. Board of Control et al., 350 U.S. 413, 76 Sup. Ct. 464 (1956), stated:

"As this case involves the admission of a negro to a graduate professional school, there is no reason for delay. He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates."

In Louisiana, Board of Supervisors of Louisiana State University and Agriculture and Mechanical College v. Ludley, 252 F. 2d 372 (5th Cir. 1958), Cert. denied 358 U.S. 819, 3 L. Ed. 61, declared Act No. 15 of 1956, L. S. A.-R.S. 17:2231 et seq.
unconstitutional. This statute required a student to obtain a certificate of eligibility and good moral character addressed to a particular institution and signed by the superintendent of education of the parish or municipality wherein the applicant graduated from high school, and by the principal of the high school (this was an attempt to assign colored applicants to colored colleges).

I have included the following two subjects (public accommodations-Amusements and Transportation) after the discussion on public schools and the school Segregation Cases because the separate but equal doctrine in school cases was very influential in the public accommodations-amusement and transportation fields. Thus, after the School Segregation Cases in 1954, these last two fields of law were substantially affected.

"PUBLIC" ACCOMMODATIONS AND AMUSEMENTS

The "separate but equal" doctrine was having trouble in this area as well as in education. Thus, in Draper v. City of St. Louis, 92 F. Supp. 546 (E.D. Mo. 1950), the court held that plaintiffs were denied equal protection of the laws when they (negroes) were refused admission to the use of the city's open air swimming pools built and operated by public funds.

In Rice v. Arnold, 340 U.S. 848, 95 L. Ed. 621 (1950) the Supreme Court reversed a decision of the Supreme Court of Florida, holding that a public golf course open to negroes for one day each week satisfied the "separate but equal" doctrine. The case was remanded for reconsideration in light of Sweatt v. Painter and McLaurin v. Okla. State Regents, Supra.

Deal v. Halcombe, 193 F. 2d 334 (5th Cir. 1951) - here, the court required a municipality to admit negroes to municipal facilities for playing golf in a public park. The city had furnished segregated parks, but none of the parks available to negroes contained golfing facilities. The decision was based on the fact that the municipal ordinance was in violation of the Fourteenth Amendment.
No weight was given to the question whether the parks furnished to whites and negroes were substantially equal in their over-all facilities, as the court below had found. The U. S. Supreme Court denied certiorari, 347 U. S. 974, 98 L. Ed. 1114.

It is clear that the "separate but equal" doctrine was becoming as difficult to administer in the public accommodations and amusement area as in the field of education. Thus, when the School Segregation Cases were decided in 1954 the question first arose was whether those cases obliterated the "separate but equal" doctrine from all fields and not just education.

Corpus juris secundum states:

"The guaranty of the equal protection of the laws operates as a protection against any state action, whether by statute or otherwise, which denies to any person because of race or color, equal accommodations in public conveyances, or equal accommodations, facilities, rights and privileges in publicly owned parks, playgrounds, golf courses, fishing, swimming, artistic, cultural or entertainment facilities, or in housing projects, financed in whole or in part with public funds, or in public schools, or which appropriates the whole of the tax raised from the property of white persons to white schools, and vice-versa, or which taxes colored persons for schools for the exclusive use of white persons." (see cases cited therein).

* * * *

"After racial segregation in the public schools was outlawed as inherently unequal, the courts soon recognized the inequality of segregation in these other fields, and the 'separate but equal' doctrine was held to be no longer applicable in cases involving public parks, playgrounds, golf courses, and the like." 16 A. C.J.S. Sec. 542.

A survey of the cases since the School Segregation Cases shows that this quotation is substantially correct. However, the Supreme Court has not given a decision which expressly overrules the "separate but equal" doctrine as to fields other than education.

The court in Holley v. City of Portsmouth, 150 F. Supp. 6 (D.C. Va.) was quite emphatic in holding that the separate but equal doctrine has ceased to exist with respect to governmental facilities including golf courses, swimming pools, bathing beaches, and parks.
The Sixth Circuit Court of Appeals in Murr v. Louisville Park Theatrical Assn., 202 F.2d. 275 (1953) held that a privately owned enterprise which leased from a city an amphitheater in a public park was guilty of no unlawful discrimination in refusing admission to negroes where the city did not participate either directly or indirectly in the operation of the private enterprise. But the United States Supreme Court vacated that decision and remanded the cause for consideration in the light of the Brown case and "conditions that now prevail". 347 U.S. 971, 98 L. Ed. 1112.

In Ward v. City of Miami, Florida, 151 F. Supp. 593 (S.D. Fla. 1957), affirmed per curiam 252 F. 2d 787 (5th Cir. 1958) the court held: "The policy...of the City of Miami in restricting its negro residents to the use of the city's golfing facilities to one day each week and at no other times, is unconstitutional...".

Burton v. Wilmington Parking Authority, 150 A. 2d 197 (Del. 1959) was an action for declaratory judgment in form of injunctive relief against the operator of a restaurant in a public building, to require the operator to refrain from refusing to serve plaintiff, solely because he was a negro. The court held:

"...when a negro seeks rights in property owned by a state agency or by a state political subdivision, the devise of a lease of such property to a concessionaire will not serve to insulate the public authority from the force and effect of the Fourteenth Amendment..., and there would seem to be no valid basis for distinction when the leasing of space by a public authority is not a patent attempt at subterfuge but a good-faith method of furnishing service to the public through a tenancy. Derrington v. Plummer... (a restaurant in a county courthouse) and Nash v. Air Terminal Service, Inc.,...(a restaurant in a federally owned airport and so subject to the Fifth Amendment)

A suit which attracted wide public attention concerned an attack upon a Louisiana statute which prohibited athletic contests
negroes and white. This suit was in the form of a declaratory judgment and an injunction to restrain the Louisiana State Athletic Commission from enforcing a regulation and the statute prohibiting athletic contests between negroes and whites. (See Rule 26 of the Rules and Regulations of the Commission and Act 579 of 1956, L.S.A.-R.S. 4: 451 et seq.). The court held that these regulations and statutes were unconstitutional, stating that the state cannot justify its action through its exercise of the police power.

The following case is a Federal District Court decision rendered in 1955. Although not at the apex of the judicial hierarchy, I have quoted from this decision at length, because I believe it sets out the current status of the "separate but equal" doctrine in the field of public recreation.

"Even before this order of May 24, 1954, and before the School Segregation Cases were decided, the Supreme Court, in Rice v. Arnold, where the City of Miami operated a public golf course, permitting negroes to play one day a week, and the whites to play on the other days, entered an order vacating the judgment and remanded the case to the Supreme Court of Florida for reconsideration in the light of Sweatt v. Painter and McLaurin v. Okla. State Regents.

"What, then, is the current status of Plessy v. Ferguson in the light of the School Segregation cases and in the light of the Supreme Court action upon certiorari in Haur v. Louisville and its action upon certiorari in Rice v. Arnold in a case involving the use of public recreational facilities? It is true that the School Segregation Cases expressly overruled Plessy v. Ferguson only insofar as it applied to the field of public education, but it seems clear to me that its action upon certiorari in the Haur case, and in Rice v. Arnold, are strong indications that Plessy v. Ferguson will not, and should not, be held to be controlling in the public recreational field. If the provisions for equal, tangible facilities in the field of public education do not eliminate intangible or psychological discrimination in the field of public education, how can it reasonably be said that equality in tangibles, in the field of public recreation, eliminate psychological factors so clearly involved in segregation based upon the color of a man's skin?

"It can, of course, be argued that the intangibles are less effective in the public recreational field than in the field of public education, but that is to say that a little discrimination is to be condemned but a great deal should be condemned. If the reasoning in the School Segregation Cases concerning psychological factors is sound as it relates to public education,
then it must necessarily apply to the field of public recreation.

"A case which is most persuasive upon me, and which convinces me Flessey v. Ferguson is no longer the law in either the field of public education or public recreation, is that of Dawson v. Mayor and City Council of Baltimore City (Lonesome v. Maxwell) a per curiam opinion of the U.S. Court of Appeals, Fourth Circuit decided March 14, 1955."


The decision of the Federal District Court for the Eastern District of Texas is fortified by its citation of Dawson v. Mayor and City Council of Baltimore City, supra. Since the decision of Fayson v. Beard, the Supreme Court affirmed the decision of the Fourth Circuit in the Dawson case. See 350 U.S. 877, 76 Sup. Ct. 133. In the Dawson case, the court gave an injunction against the enforcement of racial segregation in the use of public beaches and bath houses maintained by the public authorities of the state of Maryland and the City of Baltimore. The District Court had relied on two state decisions which were based on Flessey v. Ferguson. But the Fourth Circuit Court of Appeals stated that "the subsequent decisions of the Supreme Court" swept away "the authority of these cases." The Fourth Circuit stated: "It is now obvious, however, that segregation cannot be justified as a means to preserve the public peace merely because the tangible facilities furnished to one race are equal to those furnished to the other.... With this in mind, it is obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the state...."

The Supreme Court affirmed, without decision, the decision of the Fourth Circuit Court of Appeals.

Another case which seems to be frequently cited today is Holmes v. City of Atlanta, 350 U.S. 879, 76 Sup. Ct. 141(1955). The District Court had held that the "separate but equal" doctrine is not in conflict with the Fourteenth Amendment and was unaffected
by the Brown decision "as in that case the doctrine of 'separate
but equal' was rejected only as it applied to public education."
But the court held: "Where, as here, the City of Atlanta owns and
operates seven golf courses and sets same aside for the exclusive
use of white people, and plaintiff negroes were refused the use of
said golf courses by agent employees of the City. The plaintiffs
were denied equal protection of the laws to which they were entitled
under the constitution." The Court of Appeals affirmed (apparently
on the ground that the "separate but equal" doctrine was valid but
that equal facilities were not furnished here).

However, on certiorari, the Supreme Court vacated the
case and "remanded to the District Court with directions to enter a
decree for petitioners in conformity with Dawson v. Mayor and City
Council of Baltimore City...." This leaves little doubt that the
intention of the Supreme Court is that the School Segregation
Cases, overruling the separate but equal doctrine should apply
in public recreational fields.

The Court opened up the New Orleans City Park to negroes
in New Orleans City Park Improvement Assn. v. Detiege, 252 F. 2d.
122 (5th Cir. 1958) affirmed per curiam 358 U.S. 54, 3 L. Ed. 46,
Petition for Reh. den. 358 U.S. 913, 3 L. Ed.234 (1959). The Court
stated:

"The Courts have decided that the refusal of city and
state officials to make publicly supported facilities available
on a non-segregated basis to negro citizens deprives them of equal
protection under the laws in too many cases for us to take seriously
a contention that such decisions are erroneous and should be reversed."

The following two cases ask the question whether a state
or state agency, if it cannot constitutionally operate public
recreational facilities on a segregated basis, may lease these
facilities to private bodies, which exclude negroes.
In City of Greensboro v. Stimpson, 246 F. 2d 425 (4th Cir. 1957), the city leased its golf course to a private body. The private body excluded negroes. The Court, striking down this arrangement, stated:

"...the right of citizens to use public property without discrimination on the grounds of race, may not be abridged by the mere leasing of the property. The city may, however, under the terms of the order, part with ownership of the property by bona fide sale; and the Court, under the power reserved will doubtless approve other dispositions if they will not result in unlawful discriminations against citizens on the ground of race or color."

In Dept. of Conservation & Development, Div. of Parks of Virginia v. Tate, 231 P. 2d 615, cert. denied, 352 U.S. 838, 1 L. Ed. 2d 56 (1956), the Court held:

"It is perfectly clear under recent decisions that citizens have the right to the use of public parks of the state without discrimination on the ground of race....and we think it equally clear that this right may not be abridged by the leasing of the parks with ownership retained in the state."

TRANSPORTATION

The following quotation appears in an annotation in Lawyers Edition, which was written before the School Segregation Cases. The author to that annotation states:

"Race discrimination by rail and motor carriers has, since Civil War times, been the subject of repeated consideration by the Supreme Court. Discrimination by carriers appears in the form of segregation of the races - the maintenance of separate facilities for white and negro passengers, as a result of state statutes (commonly referred to as 'separate coach laws') or regulations of the carrier itself. As against the assertion that passenger segregation is unconstitutional, a long line of Supreme Court decisions have supported the rule that such segregation is not, per se, invalid as conflicting with the Thirteenth or Fourteenth Amendments to the Federal Constitution. Nor is segregation of passengers by carriers violative of the Commerce Clause of the Constitution, where such segregation, whether by virtue of state statute or carrier regulation, does not affect passengers in Interstate Commerce, or where its effect is merely incidental and does not subject Interstate Commerce to unreasonable demands. The contrary is, of course, true where the regulation or statute, in fact, constitutes an interference with commerce...
"Carrier segregation of passengers in any case, by statute or regulation of the carrier itself, depends for its constitutional validity upon the quality of accommodations afforded to both white and negro races...."

The question now presents itself whether the School Segregation Cases permeate both the message of the above annotation and of the "separate but equal" doctrine itself in the field of transportation. There are two subjects of attack in this field, and two methods of attack. First, either a state statute or a carrier's regulation may be the subject of attack. Secondly, the attack may be on the grounds of unlawful interference with inter-state commerce or violation of the Fourteenth Amendment of the Federal Constitution. The various rules of law can be drawn from the cases following.

Although Plessy v. Ferguson is given credit for the "separate but equal" doctrine, the following case shows that the theory itself was present before the Plessy decision.

"Common carriers are required by law not to make any unjust discrimination, and must treat all passengers paying the same price alike. Equal accommodations do not mean identical accommodations. Races and nationalities, under some circumstances......may be reasonably separated; but in all cases the carrier must furnish substantially the same accommodations to all, by providing equal comforts, privileges, and pleasures to every class. Colored people and white people may be so separated, if carriers proceed according to this rule." Logwood v. Memphis R. Co., 23 Fed. 318 (1885).

A bit of the usual set of facts was reversed in the case of Hall v. DeCuir, 95 U.S. 485 (1877). The Louisiana Supreme Court had held that the act under consideration (prohibiting racial discrimination on public carriers) applied to interstate carriers, and required them, when they came within the limits of the state, to receive colored passengers into cabins set apart for whites. Accepting that construction as conclusive, the U. S. Supreme Court held that the act was a regulation of interstate commerce, and therefore beyond the power of the state.
In early cases, if such a statute as the one above was construed as affecting intrastate commerce only, then such a statute was not a regulation of interstate commerce and did not violate the commerce clause of the Constitution. See Louisville, New Orleans and T. R. Co. v. Mississippi, 133 U.S. 587, 33 L. Ed. 784.

Plessy v. Ferguson, decided in 1896, held that a state statute which provided for equal but separate railway coaches or compartments for white and colored races, and the assignment of passengers to such coaches or compartments according to their race by conductors, is not in conflict with the Fourteenth Amendment. 163 U.S. 537. It has been said that Harlan's *separate but equal* in Plessy ("our constitution is color blind, and neither knows nor tolerates classes among citizens") has been vindicated by the School Segregation Cases.

A case which illustrates the situation where the carrier adopts a regulation which segregates the races is Chiles v. C. & O. Ry. Co., 218 U.S. 71 (1910), 54 L. Ed. 936. The issue was whether "a private person, to wit, the railroad company" could by its regulations require separation of races on its trains. The Court denied judgment for plaintiff stating:

"...the interstate commerce clause of the Constitution does not constrain the action of carriers, but, on the contrary, leads them to adopt rules and regulations for the government of their business, free from any interference except by Congress. Such rules and regulations, of course, must be reasonable, but whether they be such cannot depend upon a passenger being state or interstate."

It might be questioned what happened in the case of a public carrier which followed a state statute requiring separation of the races, when the carrier was actually engaged in interstate commerce. This is shown, and answered, by South Covington & Street R. Co. v. Kentucky, 252 U.S. 399, 64 L. Ed. 631 (1920). The railway company had violated a Kentucky statute which required the furnishing of separate coaches, or the division of individual coaches into
separate compartments for white and negro races and provided that there should be no difference or discrimination in the quality of the cars or coaches. The railway company was engaged in the inter-city carriage of passengers between Cincinnati, Ohio, and cities in Kentucky across the Ohio River. The Court held that, although the business was interstate "...there are other considerations. There was a distinct operation in Kentucky... and it is that operation the act in question regulates, and does no more, and therefore it is not the regulation of interstate commerce....the regulation of the act affects interstate business incidentally and does not subject it to unreasonable demands"...

In Washington B & A Elec. R. Co. v. Waller, 289 Fed.598, 30 A.L.R. 50 (1923), there was a state statute which required segregation of white and colored passengers. The plaintiff was an interstate passenger; the court held that the state statute requiring segregation was not applicable to an interstate passenger, however, the court noted that "in the absence of any federal statute regulating the carrying of interstate passengers, it seems the appellant has by law authority to regulate such traffic in a reasonable manner." (it was shown however that the carrier did not in fact have any regulation concerning segregation of races).

Section 3 (1) of the Interstate Commerce Act (#9 U.S.C. 3(1)) states:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give or cause any undue or unreasonable preference or advantage to any particular person, company, firm", etc.

It should be noted, however, that the "separate but equal" doctrine could apply in the face of this section of the Interstate Commerce Act. I will attempt to answer whether this is true today.

Mitchell v. U.S., 313 U.S. 80, 85 L. Ed. 1201 (1941), held that the railroad violated the interstate commerce act by requiring a colored passenger who had bought a first-class ticket to sit in the colored section which was not equivalent to the first-class of the white section. The implication is, of course, that
if the railroad had provided for equal facilities for the first-class passengers of both white and colored races, there would have been no violation of the interstate commerce act. ("...persons who buy first-class tickets must be furnished with accommodations equal in comfort and conveniences to those afforded to first-class white passengers." Mitchell v. United States, supra at 95, 85 L. Ed. 1211.)

The rule of Morgan v. Virginia, 328 U.S. 373, 90 L. Ed. 1317 (1946), is clear: A state statute requiring segregated seats for negro passengers on interstate busses is an unconstitutional burden of interstate commerce, in violation of Article I, Section 8, Clause 3 of the Constitution. (But the Court pointed out that it was dealing with a State Statute and not with a regulation of the carrier).

Henderson v. United States, 339 U.S. 816, 94 L. Ed. 1302 (1950), held that interstate railroad regulations and practices assigning a separate table in a dining car to negroes contravened the interstate commerce act, 49 U.S.C. Sec. 1, et seq. "Since Section 3(1) of the I.C.A. invalidates the rules and practices before us, we do not reach the constitutional or other issues suggested."

Thus, the two above cases give us two clear rules for a foundation: First, a state statute will violate the constitution if it requires segregation of races on carriers which are engaged in interstate commerce. Secondly, an interstate carrier regulation which segregates races will violate the interstate commerce act. These two rules leave open the question whether the "separate but equal" doctrine is still valid in intrastate commerce, whether provided for by state statute or carrier regulation.

The question whether the public carrier may segregate the races in interstate or intrastate commerce without violating the constitution (since the Fourteenth Amendment applies to "State Action") also remains open.

Relating to the second question which remains open, the case of Carolina Coach Co. v. Williams, 207 F. 2d 408 (4th Cir. 1953)
a carrier regulation may be valid but the carrier will be responsible legally if that regulation is carried out by one of its agents in an unreasonable manner. In the Williams case, a negro passenger in an interstate bus was removed from the bus and criminally prosecuted for refusing to change his seat when ordered to do so by the bus driver. The negro sued the bus company for damages. The defendant relied upon regulations of the bus company requiring the separate seating of white and negro passengers. The Court held for the plaintiff "because the regulations relied on were applied by the bus driver in an unreasonable manner in requiring the passenger to change his seat in an interstate journey after he had been properly seated in accordance with the regulations."

In the District Court, 111 F. Supp. 329, 332, the Court stated:

"It is foreclosed by binding decisions of the Supreme Court which hold that an interstate carrier has a right to establish rules and regulations which require white and colored passengers to occupy separate accommodations, provided there is no discrimination in this arrangement."

The first indication of the extent to which the School Segregation Cases would be applied was manifested in Flemming v. So. Carolina Elec. & Gas Co., 224 F. 2d 752 (4th Cir. 1955) appeal dismissed 351 U.S. 901. The Court held that segregation of races on busses under South Carolina law was unconstitutional. The lower court had held that it was bound by Plessy v. Ferguson but the Fourth Circuit Court of Appeals stated:

"We do not think that the separate but equal doctrine of Plessy v. Ferguson, supra, can any longer be regarded as a correct statement of the law. That case recognizes segregation of the races by common carriers as being governed by the same principles as segregation in the public schools; and the recent decisions in Brown v. Board of Education of Topeka and Holling v. Sharpe..... which relate to public schools, leave no doubt that the separate but equal doctrine approved in Plessy v. Ferguson has been repudiated. That the principle applied in the school cases should be applied in cases involving transportation, appears quite clearly from the recent case of Henderson v. United States....., where segregation in dining cars was held violative of a section of the interstate commerce
act, providing against discrimination. The argument that such segregation can be upheld as a proper exercise of the state police power was answered in the case of Dawson v. Mayor and City Council of Baltimore City 

In Gayle v. Browder, 352 U.S. 903, affirming 142 F. Supp. 707 (M.D. Ala. 1956), petitioners, negroes, sought to have declared unconstitutional statutes of state and ordinances of city which require segregation of races on city motor busses. The Supreme Court, in a one-sentence opinion, held that the statutes and ordinances violated due process and equal protection clauses of the Fourteenth Amendment.

The District Court stated: "We cannot, in good conscience, perform our duty as judges by blindly following Plessy v. Ferguson, supra, when our study leaves us in complete agreement with the Fourth Circuit's opinion in Flemming v. So. Carolina Elec. & Gas Co., 

that the separate but equal doctrine can no longer be safely followed as a correct statement of the law. In fact, we think that Plessy v. Ferguson has been impliedly, though not explicitly, overruled, and that, under the later decisions, there is now no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation...the application of that doctrine cannot be justified as a proper execution of the state police power."

See the dissent by Judge Lynne, for an excellent view of why Plessy v. Ferguson has not been overruled in public transportation cases, e.g., "My study of Brown has convinced me that it left unimpaired the 'separate but equal' doctrine in a local transportation case, and I perceive no pronounced new doctrinal trend therein."

In Garmon v. Miami Transit Co., Inc. 151 F. Supp. 953 (F.D.Fla. 1957), the Court followed Gayle v. Browder and held that Miami ordinances requiring segregation of races on public busses were unconstitutional. But, the Court dismissed the transit company because: "The decisions of the Supreme Court in Civil Rights cases
of all types and kinds are directed to state (or city) officials acting in their official capacity and those decisions have not been directed to either private individuals or private business firms and indeed there is no constitutional prohibition affecting the freedom of private businesses within the law, nor is there any constitutional authority to impose upon them the burden to either enforce or not to enforce segregation in their private affairs.

In conclusion, as to the transportation cases, I believe that the following four rules of law can be stated:

One, state action in interstate or intrastate, violates the Fourteenth Amendment of the Constitution if that action requires segregation of the races.

Two, the furnishing of equal facilities to both negro and white races is not enough to satisfy the Fourteenth Amendment; that is, the separate but equal doctrine has been repudiated as to state action in transportation.

Three, carrier regulations requiring separation of the races in interstate commerce violate the interstate commerce act.

Four, this leaves open only one question - and the most important to us - whether carrier regulations may still constitutionally separate the races in intrastate commerce. This has not yet been answered.

EVASION OF DESEGREGATION

States have tried to get around desegregation by several methods; one has been mentioned previously (that of leasing state property to private bodies - that method is ineffective). A few more methods for evading desegregation are set out below.

The first method is discussed by A. E. Papale, Dean and Professor of Law, Loyola University, in "judicial enforcement of desegregation; its problems and limitations", 52 N.W. Univ. Law Review, 301, 315-16:
"Will interposition and nullification in a new dress be effective? There are those who honestly feel that the Eleventh Amendment and the principle that a state cannot be sued without its consent can be utilized to circumvent the principle by withdrawing the consent to sue and be sued from all administrative officials. Louisiana has such a statute which has already been declared unconstitutional by the Federal District Court for the Eastern District of Louisiana. The Fifth Circuit Court of Appeals affirming. (Citing Orleans Parish School Board v. Bush, 242 F. 2d 156). Some argue that this statute was vulnerable only because it withdrew its consent to be sued, while a statute making it mandatory for all integration suits to be filed against the state itself would be invulnerable to an attack of unconstitutionality.

"It is submitted that in the light of Ex parte Young, such a statute could not resist the attack. It could also be argued that any inconsistency between the Eleventh and the Fourteenth Amendments must be resolved in favor of the latter because it is the latest expression of the people."

This argument was raised before the United States District Court for the Eastern District of Louisiana in Dorsey v. State Athletic Commission 168 F. Supp. 149 (1958), where the commission contended that the plaintiff's suit was in effect a suit against the State of Louisiana, and the Eleventh Amendment protects a state against being sued without its consent. The commission argued that the plaintiff would have to sue members of the commission individually. The Court considered this argument and stated:

"The short answer to the commission's contention is that Dorsey's suit is not against the State of Louisiana, in name or in effect. It does not attempt to compel state action, but to prevent illegal action of the commission. As Judge Tuttle stated in the Bush case: 'If in fact the laws under which the board here purports to act are invalid, then the board is acting without authority from the state and the state is no wise involved'. A state can act only through agents. Whether the agent is an individual official or a commission, the agent ceases to represent the state when state power is used in violation of the United States Constitution.

Since it has already been noted that a state cannot lease its property to private bodies which practice racial discrimination, it would seem that the only legal method for a state to evade desegregation would be a bona fide sale of the property to private bodies."
II. THE FOURTEENTH AMENDMENT AND PRIVATE INSTITUTIONS

FOURTEENTH AMENDMENT AND CIVIL RIGHTS: GENERAL

The following quotation is found in the annotated edition of the "Constitution of the United States of America," (1952), Page 1141:

"The inhibition against denial of equal protection of the laws has exclusive reference to state action. It means that no agency of the state, legislative, executive or judicial, no instrumentality of the state, and no person, officer or agent exerting the power of the state shall deny equal protection to any person within the jurisdiction of the state. The clause prohibits 'discriminating and partial legislation....in favor of particular persons as against others in like conditions.'"

The various Federal Civil Rights Acts also apply only to private persons; for ready reference, I have included the citations to the Civil Rights Acts below:


To illustrate the fact that both the Fourteenth Amendment and the Civil Rights Act apply to state actions and not action of private persons, Whittington v. Johnston, 102 F. Supp. 352, (D.C.Ala. 1952), held that where the plaintiff alleged that the defendants as private citizens acting under cover of state law, caused her to be declared insane and to be incarcerated, the right of plaintiff allegedly violated was not protected by Civil Rights Act or the Fourteenth Amendment.

The traditional interpretation of the Fourteenth Amendment is given by the Civil Rights Cases, 109 U.S. 3 (1883). "It is state action of a particular character that is prohibited. Individual invasion of individual right is not the subject matter of the Amendment...it does not invest Congress with power to legislate upon subjects which are within the domain of state
legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to."

In Valle v. Stengel, 176 F. 2d 697 (3rd Cir. 1949), the Plaintiffs were refused admission to a privately owned amusement park open to the public on payment of a fee. The plaintiffs were refused admission to the swimming pool and then ejected from the park by the park management aided and abetted by the chief of police, because there were negroes in the party. The court held that the plaintiffs were denied equal protection of the law, and that the police chief was acting under color of state law. Thus, even though the property might be privately owned, and thus the owner may discriminate racially as much as he pleases, if aid is called upon from the state then any action of state agents will invalidate the effectiveness of the private discrimination. Going one step farther, it is to be noted that an individual exercising state powers comes within the meaning of "state action" in the Fourteenth Amendment even when exercised in a manner which is not authorized by state law. Ex parte Virginia, 100 U.S. 339 (1879) (in this case, a state judge was performing state judicial functions). Similarly, Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913), held that it is "state action" within the meaning of the Fourteenth Amendment, even if an official of the state acts contrary to state law.

Further emphasis is put to the point that the Fourteenth Amendment applies only to private action by the following quotation from Garmon v. Miami Transit Co., Inc., 151 F. Supp. 953 (S.D.Fla. 1957), which quotation has previously been used in connection with the transportation cases:

"The decisions of the Supreme Court in Civil Rights Cases of all types and kinds are directed to state (or city) officials acting in their official capacity and those decisions have not been directed to either private individuals or private business firms and indeed there is no constitutional prohibition affecting the freedom of private businesses within the law, nor is there any constitutional authority to impose upon them the burden to either enforce or not to enforce segregation in their private affairs."
More specifically, Hayward v. Public Housing Adm., 238 F.2d 689 (5th Cir. 1956), stated:

"Neither the Fifth nor the Fourteenth Amendment
operates positively to command integration of
the races but only negatively to forbid govern-
mentally enforced segregation."

NATURE OF PRIVATE INSTITUTIONS
The question must be asked when is a Constitution
"Public" and when it is "Private"?

(Please note that the characteristics of private and
public corporations are discussed under part one of Roman
Numeral Three, infra).

In determining whether a college or university is
public or private in character and control, Corpus Juris Secundum
states:

"The public or private character and the control of
a college or university are determined from its
articles of incorporation and the statute authorizing
its formation....a college or university is usually
described to be a public institution or incorporation
and subject, as such, to the plenary control of the
state, when.......instituted by the state and main-
tained out of state funds....

"Where a college or university is a public corporation,
its charter may be altered, amended, or repealed at
the pleasure of the legislature, even though the state
has created a body corporate to control its property
and affairs. In the case of private institutions,
however, if neither the statute under which the
college is incorporated, nor its charter, reserve
to the state the right to change or modify its
charter, no such right exists...."

One factor, which denotes a public corporation, is the
election of its trustees by the people or the legislature, as in
Spalding v. People, 172 Ill. 40, 49 N.E.993 (1898); Head v.
University of Missouri, 47 Mo. 220 (1871), affirmed in 19 Wall
(U.S.) 526, 22 L. Ed. 160 (1874).

Another factor which denotes a public corporation is
that a public educational corporation can exercise the power of
public domain, see Russell v. Purdue University, 168 N.E. 529,
65 A.L.R. 1384 (1929). A private educational corporation, of
course, has no such power. Connecticut College v. Calvert.
A third factor to consider in determining public from private corporations is stated in 65 A.L.R.1397: "The most important result arising from a determination that an educational institution is a private or a public corporation is that shown by the Dartmouth College case (1819)...wherein it was held that the charter of a private corporation was a contract and that any alteration of such charter by the legislature without its consent was in violation that clause of the Constitution of the United States (Article 1, Section 10) which declares that no state shall make any law impairing the obligation of contracts. But alteration of the charter of a public corporation, without the consent of the members or trustees composing such a body, is not in violation of the above-mentioned constitutional provision. State ex rel. Attorney General v. Knolles (1878), 16 Fla. 577...."

Louisiana gives its definition of a public institution as follows:

"Generally speaking a state educational institution is one, title to whose property is vested in the state, whose physical plant and facilities are controlled and managed by the state through one of its state-wide boards and whose funds for its operation are derived from appropriations made by the state legislature.


Once an institution is found to be private, the following case illustrates the result. Reed v. Hollywood Professional School, 338 P. 2d 633 (Sup. Ct. Los Angeles County, Calif, 1959) was an action for damages for refusal of a private school to enroll the plaintiff minor negro. The Court affirmed the judgment for the defendant and stated, concerning a possible violation of the state civil right act:

"In the court's opinion a private school is not a place of public accommodation or amusement, nor is it a public place of amusement or accommodation, within the meaning of Civil Code Sections 51 or 52. It is true that racial discrimination in public education is unconstitutional."
...the Civil Rights Statute have not been applied in the case of private or semi-private uses.... It was early decided that a negro was not denied any constitutional right by refusal of a private educational institution to admit him, apparently on the ground that the constitutional guarantees apply to state action rather than to private action."

(See cases cited therein).

"...In our opinion private schools should be entitled to contract or refuse to contract with students of their choice for whatever reason if such contract or refusal does not fall within the constitutional or statutory proscription against discrimination on the basis of race or color. We do not find any authority that such refusal does so...."
These corporations, civil and eleemosynary, which differ from each other so especially in their nature and constitution, may very well differ in matters which concern their rights and privileges, and their existence and subjection to public control. The one is the mere creature of public institution, created exclusively for the public advantage, without other endowments than such as the king or government may bestow upon it, and having no other founder or visitor than the king or government...But the case of a private corporation is entirely different. That is the creature of private benefaction for a charity or private purpose. It is endowed and founded by private persons, and subject to their control, laws, and visitations, and not to the general control of the government; and all these powers, rights and privileges, flow from the property of the founder in the funds assigned for the support of the charity."

In Board of Trustees of Vincennes University v. State of Indiana, 14 How. 268, 14 L. Ed. 416, the Supreme Court held that a grant of public land by an Act of Congress to the Board of Trustees of the University, did not make the board a public corporation.

"...The corporators were vested with all the necessary powers to carry out the trust. And for the purposes of the trust the title became vested in them, as soon as they acquired a capacity to receive it. This corporation had no political powers, and could, in no legal sense be considered as officers of the state. They were not appointed by the state. Their perpetuity depended upon the exercise of their own functions; and they were no more responsible for the performance of their duties than other corporations established by the state to execute private trust."

It might be questioned what effect, if any, a state tax exemption has upon the nature of a body which is essentially private in character. That is, does a state tax exemption give to a private body certain quasi-public characteristics? The two cases below answer this question negatively.

In Carmichael v. Southern Coal Company, 301 U.S. 495, 509 (1937), the Supreme Court declared that a state is free to select the subject of taxation and exemption and that neither due process nor equal protection imposes a rigid rule of equality. A taxpayer is not denied equal protection because someone else has
received an exemption, provided the basis of differentiation is reasonable. The problem of tax exemptions by the state in favor of private bodies corporate which practice racial discrimination and similar problems arising through eminent domain are discussed in 61 Harvard Law Review 344, 350-52 (1948).

The question posed above was more definitely answered in Dorsey v. Stuyvesant Town Corp., 74 N.Y.S. 2d 220 (Supreme Court of New York 1947), Cert. denied 339 U.S. 951. The Stuyvesant Town was a privately owned housing development covering several blocks in New York City. Under a contract with the city, the city condemned the land and granted Stuyvesant a twenty-five year partial tax exemption. The plaintiffs, negroes, brought suit to enjoin Stuyvesant from refusing to rent to negroes, contending that the action of Stuyvesant was the action of the state. The New York Supreme Court rejected the plaintiff's contention that a private corporation may, under some circumstances, be subject to the Fourteenth Amendment. The Court stated:

"Tax exemption and power of eminent domain are freely given to many organizations which necessarily limit their benefits to a restricted group. It has not yet been held that the recipients are subject to the restraint of the Fourteenth Amendment.

"The aid which the state has afforded to respondents and the control to which they are subject are not sufficient to transmute their conduct into state action under the constitutional provisions here in question."

Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212, cert. denied, 326 U.S. 721 (1945), has been cited as a case which is factually similar to the position of Tulane University; although this is true, it should be noted that the case of Eaton v. Board of Managers of James Walker Memorial Hospital discussed below, is even more closely analogous to Tulane's position.

In the Kerr case, suit was brought by a negroess on the ground that she was refused admission to a Library Training Class which was conducted by the defendant library. The plaintiff
charged that the library was performing a government function and that she was rejected in conformity with the uniform policy of the library to exclude all persons of the negro race from the training school and that by this action the state of Maryland deprived her of the equal protection of the laws.

The library was established through the philanthropy of a private citizen. Some conditions were imposed, the corporation was formed and the conveyances by gift were made to and accepted by the city, which assumed the required obligations. The steps by which these objects were given legal effect, included an act of the state legislature and several ordinances of the City of Baltimore. Citizens of the city constituted the Board of Trustees. The real and personal property vested in the city by virtue of the state act, as well as future acquisitions, were exempted from state and city taxes.

At one time the legislature authorized the city to issue bonds from the acquisition of additional property. Library salaries were paid by the city. All of the income of the library was received from and disbursed by the city, with the exception of special gifts, which constituted about one percent of the city's outlay.

The court found that the powers and obligations of the city and the trustees were not conferred by the philanthropists but by the state, at the inception of the enterprise; that the city completely supported the library and "in this way the city exercises a control over the activities of the institution.

"It is our view that although Pratt furnished the inspiration and the funds initially, the authority of the state was invoked to create the institution and to vest the power of ownership in one instrumentality and the power of management in another, with the injunction upon the former to see to it that the latter faithfully performed its trust. We know of no reason why the state cannot create separate agencies to carry on its work in
this manner, and when it does so, they become subject to the constitutional restraint imposed upon the state itself.

"The board of trustees must be deemed the representative of the state."

The Court also spoke of "so great a degree of control over the activities and existence of the library on the part of the state that it would be unrealistic to speak of it as a corporation entirely devoid of governmental character."

In Norris v. Mayor of Baltimore, 78 F. Supp. 451 (1948), a negro sued for declaratory judgment and injunction to enjoin the Maryland Institute for the Promotion of the Mechanic Arts from excluding him from instruction solely because of race or color.

The institute was incorporated as a private corporation but the State of Maryland and the City of Baltimore appropriated public money and public property to the institute. The city maintained a contract relationship with the institute for the education of pupils in the institute. The only inter-relations with the state were (1) the state by act of the legislature, incorporated the institute as a private corporation; (2) the annual contributions made by the state. In giving judgment for the defendant the Court stated:

"In this case, the discrimination was made by the Maryland Institute, a Maryland corporation. The ultimate question, therefore, is whether its action constituted private or public conduct. If the Institute is a private corporation, then its conduct is also private. The legal test between a private and a public corporation is whether the corporation is subject to control by public authority, State or municipal. To make a corporation public, its managers, trustees, or directors must be not only appointed by public authority but subject to its control."

The Court distinguished the Kerr case on the ground that the library in the Kerr case was "completely owned and supported from its inception by the state, ", whereas the Maryland Institute in the Norris case was "essentially a private corporation."

The distinction which the Court made is important to any distinctions which should be made between Tulane University and public institutions. The existence of the contract was not considered to affect the legal status of the institution as a purely private corporation, not subject to public control. That is, the contract did not make the Maryland Institute a part of the Maryland Public School System.

A case with possible dangerous potentialities is Marsh v. Alabama, 326 U.S. 501, 90 L. Ed. 265. Plaintiff distributed religious literature in a privately-owned "company town" without getting permission, as required by the town-owner. The plaintiff was arrested and convicted in state court with violation of the Alabama Code Section which makes it a crime to enter or remain on the premises of another after having been warned not to do so. The issue was whether the First and Fourteenth Amendments protected plaintiff of freedom of press and religion in the situation. (Or, as the court put it: "Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?")

The court held for the plaintiff and stated:

"...the circumstance that the property rights to the premises where the deprivation of liberty...took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute."

One of the most talked about cases in 1957 was Pennsylvania v. Board of Directors of City Trusts of City of Philadelphia (Girard College Case), 353 U.S. 230, 1 L. Ed. 792 (1957). The Court held that even though a testator, in leaving a fund in trust for the erection and operation of a school limited admission to qualified persons of the white race, it is discrimination, forbidden by the Fourteenth Amendment, for the board operating the school to
refuse to admit negroes meeting all other qualifications, where
the will named as trustee a city and the board operating the school
was established by an act of the state legislature; the board being
an agency of the state its action is state action, notwithstanding
its acting as a trustee.

After this decision the board was removed as trustee
and the college was turned over to private trustees under an order
of the Orphan's Court of Philadelphia and the restriction of the
college to white students was continued. On appeal to the Supreme
Court of Pennsylvania that Court held that the removal of the
old and the substitution of the new trustees by the court did not
constitute state action within the scope of the Fourteenth
Amendment, and this procedure was not inconsistent with the mandate
of the Supreme Court of the United States. In re Girard College
Trusteeship , 391 Pa. 434, 138 A. 2d 844. The case was then
appealed to the Supreme Court of the United States, which granted
a motion to dismiss the appeal and also, treating the case as a
petition for writ of certiorari, denied the writ. On October
13, 1958, reconsideration of this decision was denied. 79 Supreme
Court 14.

I consider the following case the closest factually to
the history and existence of Tulane University of Louisiana. Eaton
v. Board of Managers of James Walker Memorial Hospital, 261 F. 2d
521 (4th Cir. 1958)(This is the same court that decided Kerr v.
Enoch Pratt Free Library). Certiorari was denied with three dissents
by the United States Supreme Court on May 4, 1959, 359 U.S. 984.

In this case, suit was brought by three negro physicians
for a declaratory judgment that the Board of Managers of the James
Walker Memorial Hospital could not exclude them from courtesy staff
privileges because of their race or color, and that the hospital
was an agency of the State of North Carolina.

The hospital was first founded as a city-county hospital,
but a charitable citizen nineteen years later furnished funds to build a new hospital on the site of the city hospital. The citizens (Mr. Walker) will provided for such monies as were necessary for the completion of the building, to be turned over to the city for use. As a result of this benefaction the Board of Managers of the James Walker Memorial Hospital was chartered under the private laws of North Carolina. The Board of Managers was made a self-perpetuating body. The city and county conveyed the tract of land upon which the new hospital stood to the new Board of Managers to hold in trust for the use of the hospital so long as it should be maintained as such for the benefit of the city and county, with reverter to the city and county in case of its disuse or abandonment.

The city and county contributed to the hospital annually.

Subsequent acts of the general assembly authorized various appropriations to be made to the hospital by the city and county but all of these provisions were declared to be unconstitutional by the North Carolina Supreme Court on the ground that support of the hospital was an unnecessary governmental expense and had not been approved by a majority of the qualified voters.

The Court held that when the city and county conveyed the land to the Board of Managers the hospital then ceased to be a public agency.

The Court distinguished the Kerr case from this case:

"The similarity between them is confined to the one circumstance: That in each instance a self-perpetuating governing body had been placed in charge by an act of legislature in compliance with the wishes of the donor. The distinguishing features, on the other hand, are decisive. The library was completely owned and largely supported from the beginning by the city and at the time the suit was brought it was occupying a modern building erected by the city on land owned by the city and, more importantly, substantially all the revenues of the institution were derived from the city in the form of budgetary appropriations. In short, it was shown that the library was so completely subsidized by the city that in practical effect its operations were subject to the city's control. In the pending case, as we have shown, the hospital is neither owned nor controlled by the municipality, and the revenues derived from them on a contract basis amount to less than four and one-half percent of its total income."
III. IS TULANE UNIVERSITY A PRIVATE OR PUBLIC CORPORATION?

CHARACTERISTICS OF PRIVATE AND PUBLIC CORPORATIONS

A close reading of the following materials shows that Tulane University should be classed as a private, eleemosynary corporation.

1. **Private, eleemosynary corporation** - "An eleemosynary corporation is a private charity, constituted for the perpetual distribution of the alms and bounty of the founder. In this class are ranked hospitals for the relief of poor, sick, and impotent persons, and colleges and academies established for the promotion of learning and piety, and endowed with property, with public and private donations."

2. Kent Comm. 274.

Fletcher, in his *Cyclopedia of Corporations* states:

"An incorporated academy, or other corporation for educational purposes, which declares no dividends, and pays no money to its members, but is conducted solely for educational and charitable purposes, is not a corporation for pecuniary profit, although it may charge fees for tuition."

For example, *In re Estate of Bailey*, 19 Cal. App. 2d 135, 65 P. 2d 102, held that the fact that a school or college charges tuition does not deprive it of its character as a charitable institution if such income is used solely for the benefit of the school and not for private profit.

Thus, the English Chartered Society for the Propagation of the Gospel was a "private, eleemosynary corporation" though created for the administration of a public charity. *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*, 8 Wheat (U.S.) 464, 5 L. Ed. 662.

Referring again to the Dartmouth College case, it was held there that it was "an eleemosynary, and so far as respects its funds, a private corporation." *Dartmouth College v. Woodward*, 4 Wheat (U.S.) 518, 6 L. Ed. 629.
Even if an institution is incorporated by special act of the legislature, if it has no capital stock and is not organized for the benefit of its members, it is still a "charitable" corporation. 

Heams v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L.R.A. 224. (That an educational corporation may have stock and still be a charitable institution, see Lightfoot v. Poindexter, 199 S.W. 1152 (Texas Civil App.).)

The test is the object and purpose of the corporation. A college or university founded for the purposes of the gratuitous distribution of knowledge, erected at the expense of individuals, must be regarded as an eleemosynary corporation. Thus, Dartmouth College was held to be private in respect to its funds, although its object was public charity. See also Board of Education v. Bakewell, 122 Ill. 339, 10 N.E. 378. Also, Trustees of a school created under provisions of a will, and confirmed by an act of incorporation, constitutes an eleemosynary corporation for the purpose of education. Nelson v. Cushing, 52 Mass. 519.

2. Private, Civil Corporation

"A private corporation involves the idea of consent of the individuals who compose it, and after incorporation cannot be changed or dissolved without their consent, unless the power to do so is reversed at the time of creation, or unless it has forfeited the right to do business or exist by virtue of the abuse or non-user of its powers. On the other hand, a public corporation, being an instrument or means of government, is subject to creation or dissolution at the will of the legislative body or law-making power, and in total disregard of the wishes of the members who compose it. In the same manner, its charter is subject to change or amendment.

While all corporations are public in the sense that they affect and are dependent upon the public to a greater or lesser extent, strictly speaking a public corporation is one that is created for political purposes with political powers to be exercised for purposes connected with the public good in the administration of the civil government. It is an instrument of the government, subject to the control of the legislature, and its members are officers of the government appointed for the discharge of public duties..." 1 Fletcher, Cyclopedis of Corporations, Page 195.
In Regents of the University of Maryland v. Williams, 9 Gill and J. (M.D.) 365, 31 Am. Dec. 72, the Court stated:

"Public corporations are to be governed according to the laws of the land, and the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises. That is of the essence of a public corporation."

It has often been stated that a corporation is not public merely because its object is of a public character and will result in benefit to the public. See Tinsman v. Belvidere D. R. Co. 26 N.J.L. 148, 69 Am. Dec. 565.

Fletcher states that when the control of the corporation by the state appears in the charter itself, as if the trustees or directors consist of public officials, or the corporation is created to carry out some functions of government, "this may itself indicate conclusively its public character" 1 Fletcher, Cyclopedia of Corporations, Page 199.

Thus, in the Dartmouth College Case, supra, the corporation was created by a charter in which the trustees were mentioned by the name of "the trustees of Dartmouth College" granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body, and it was held to be a private corporation.

Elaborating on the character of public corporations, the Court in Mobile School Comm'n v. Putnam, 44 Ala 506, stated:

"...if the property possessed by a corporation is altogether the property of the state; if the corporators have paid nothing amounting to a valuable consideration for the act of incorporation; in fine, if there is no contract upon valuable consideration between the state and the corporators, it is a public corporation."

It should also be noted that property of a private corporation is usually taxable, while that of a public corporation is not usually taxable. Tulane University enjoys state exemption from taxation. Does this mean that Tulane takes on public characteristics? The short answer to this question is no, for
it has been held that the mere fact that property of a corporation is exempt from taxation does not necessarily determine that the corporation is either public or quasi-public in character. People v. Forest Home Cemetery Company, 258 Ill. 36, 101 N.E. 219. For a more exhaustive treatment of the effect of tax exemption see the discussion of the case Administrators of the Tulane Education Fund v. The Board of Assessors, et al., infra.

Fletcher states: "Educational institutions, such as academies, universities, and schools, are public if they are exclusively owned and controlled by the state... The fact that a corporation is established for education or charitable purposes does not of itself make it a public corporation." 1 Fletcher, Cyclopedia of Corporations, Pages 212-13.

The following cases are examples of institutions which have been classed as private or public.

Cornell University is not an organ of the state, although the state contributes to it and supervises some of its activities. Green v. State, 107 Miss. 557, 176 N.Y. Supp. 681.

Howard University, in the District of Columbia, is also a private corporation. See Maatico Construction Co., Inc. v. United States to use of Phelps, 79 F. 2d 418, cert. denied, 296 U.S. 649, 80 L. Ed. 462.

Levin v. Sinai Hospital of Baltimore City, Inc., 186 Md. 174, 46 A. 2d 298, stated that a public corporation is an instrumentality of the state founded and owned by the state and public interests, supported by public funds, and governed by managers deriving their authority from the state.

Louisiana State University is a public corporation. National Bank of Commerce v. Board of Supervisors of Louisiana State University and Agriculture and Mechanical College, 206 La. 264, 20 So. 2d 264 (1944). "The constitution authorizes the state to organize and maintain a system of public education, and the purpose of creating the Louisiana State University was to educate and train the youth of the state - a governmental function."
Certainly it is not a private corporation. "The distinction between private and public corporations has reference to their powers and the purposes of their creation. They are public when created for public purposes only, connected with the administration of the government, and where the whole interest and franchises are the exclusive property of the government itself" (citing 7 R.C.L., Section 14, Page 40).

A corporation is deemed private, although created for the administration of a public charity, where the endowments thereof have been received from individuals. Miller v. Davis, 136 Tex. 299, 150 S.W. 2d 973.

The University of Maryland is a public corporation and "a branch or agency of the state government" because the government has "the sole right, as trustees of the public interests, to regulate, control and direct the corporation, and its funds and its franchises, at its own good will and pleasure." The University of Maryland v. Murray, 169 Md. 478, 182 Atl. 590, 103 A.L.R. 706.

STATE LAWS PERTAINING TO TULANE UNIVERSITY

Before taking up a discussion of cases concerning Tulane, some of the laws pertaining to the university are set out below. Louisiana Constitution of 1921, Article 12, Section 24, states: "The Tulane University of Louisiana, located in New Orleans, is hereby recognized as created and to be developed in accordance with provisions of the Legislative Act No. 43, approved July 5, 1884."

The relevant portions of the title of Act No. 43 of 1884 read:

"An Act to foster, maintain, and develop the University of Louisiana, to that end to make the Board of Administrators of the Tulane Education Fund, as presently constituted, with the addition of the governor, superintendent of public education, and mayor of the City of New Orleans, as ex officio members thereof, the administrators of the University of Louisiana, which shall hereafter be known as the 'Tulane University of Louisiana', to invest said Tulane Board with all the powers, privileges,
franchises, and immunities now vested in the Board of Administrators of the University of Louisiana; and with such other powers as may be necessary or pertinent to develop, control, foster and maintain it as a great university in the City of New Orleans. To give to the Administrators of the Tulane Education Fund the control, management and use of all the property of the University of Louisiana, in the City of New Orleans, for the purposes aforesaid; to exempt, in consequence of the terms of this act, and the dedication of its revenues to the purposes stated in this act, all the property, real and personal, present and future, of the said Board of Administrators of the Tulane Education Fund, from all taxation, whether state, parochial or municipal; to make a contract, irrevocable and conclusive, between the state and the administrators of the Tulane Education Fund...to give said board of administrators of the Tulane Education Fund, upon the adoption of said constitutional amendment, not only the full powers of administration over the University of Louisiana conferred by this fact, but also the power to create, develop and maintain a great university in the City of New Orleans, which university so to be created shall perpetually be under their full and complete control....

Section Four of the Act changes the name of the university to "Tulane University of Louisiana" and reiterates the purpose of the act, being to invest the Board of Administrators with all the rights which were vested in the University of Louisiana, and full power "to create and develop a great university in the City of New Orleans, to be named as aforesaid."

Section Five exempts all the property of the Tulane Educational Fund from taxation in consideration of its obligation to devote all its revenues to develop and maintain the University of Louisiana.

Section Six obligates the Tulane Board, in consideration of the exemption of its property, present and future, from all taxation, and of the investing in it the administration of the University of Louisiana, to devote all its revenues to the development, fostering, and maintaining the Tulane University.

Section Seven declares the Act in all its provisions to be a contract between the state and the administrators of the Tulane Education Fund.

It is here submitted, after reading the provisions of the charter, that the charter contemplates two institutions; first, the state was interested in perpetuating the University of Louisiana. Thus, by conveying all property of the University of Louisiana to
the Tulane Board, the state required the continuation of the state university. Secondly, the state realized that the Tulane Board would thereafter have complete control and sole custody to "develop a great university in the City of New Orleans". It seems as though the state contemplated the building of a new and separate university, under the complete control of the Tulane board, separate and apart from the University of Louisiana, the latter of which was to be changed in name to the "Tulane University of Louisiana". If the state had intended that the university to be created by the Tulane board out of the Tulane Educational Fund was to be the University of Louisiana, or at least a state institution, surely the state would have used the words "University of Louisiana" or "a state institution" in lieu of the words "a great university in the City of New Orleans."

This amount of property which was transferred from the state to the administrators was again recognized and acted upon by Acts 1890, No. 94, as amended by Acts 1942, No. 76, which authorized the Board of Administrators to "lease, sell or dispose of, the immovable property, transferred to them by the state, under Act No. 43, approved July 5, 1884."

Thus, again the Legislature recognized that if it had any control over Tulane University and its property, that control pertained only to that land which was transferred by the state to the Board. This is why it was, of course, unnecessary for the state to give permission to Tulane to lease, sell or dispose of the immovable property which came to the Board from the Tulane Educational Fund for from other private endowments. The state has an interest only in that part of the original conveyance made by the state to the Tulane Board in 1884. This is again illustrated in City of New Orleans v. Administrators of Tulane Educational Fund, 193 La. 297, 190 So. 560 (1939) where the property in question (the City of New Orleans desiring to purchase it) was part of the inventory of the property of the University of Louisiana taken by Charles
Andry, notary public, in 1884.

STATE CASES CONCERNING
TULANE UNIVERSITY

State v. Board of Administrators of Tulane Education Fund, 125 La. 432, 51 So. 483 (1910) was a suit by the state to annul a lease made by the Board. "In other words, the state is suing as the guardian of the Tulane University to annul a lease made by its representatives...." The Court found that the state has only the right, under the Act of 1884 to sue to recover the property for herself, on the ground of breach of the contract by the defendant board, and that the lease was valid anyway. Although the Court did not state that Tulane University is a private institution, it stated:

"In the argument of the case the Attorney General admitted that the 'Administrators of the Tulane Education Fund' is not a state institution. It cannot be otherwise under the facts of the case and the provisions of said statute. The General Assembly recognized the Board as a private corporation capable of making a perpetual and irrevocable contract with the State of Louisiana. The Act of 1884 expressly repealed Section 1560 of the Revised Statutes of 1870, giving the Legislature power of supervision and control over the University of Louisiana. It goes without saying that the Legislature cannot make such a contract with a state institution or renounce its powers of supervision and control over a state agency."

Chief Justice Breaux, dissenting, stated:

"In my opinion the 'University of Louisiana' was not entirely superseded by 'Tulane University'.

"In the consolidation of the two institutions, in accordance with Act 43 of 1844, enough remained of the University of Louisiana to save it from destruction; nor did Tulane University, under the conditions of this consolidation, become a private institution.

"It possesses all the powers of the University of Louisiana, a state institution. These are substantially the words of the statute."

In Succession of Hutchinson, 112 La. 656, 36 So. 639 (1904), the Court stated:

"Despite the above explicit and unequivocal language that 'the purpose of the act' was 'to invest said board with all the rights now vested in the University of Louisiana' and 'to give to said Board, moreover, complete control of said university in all of its
departments and in every respect,' and that said board should 'possess all the powers, privileges, immunities, and franchises now vested in said University of Louisiana, as well as such powers as may flow from this Act, or may be vested in said Board under the terms of this Act'; despite, we say, this explicit and unequivocal language—the learned counsel for plaintiff insists that the Tulane University merely stepped into the shoes of the University of Louisiana, with no greater or enlarged powers, and with the same disabilities. This appears to us to be going squarely against the plainly expressed intention of the statute."

In Administrators of the Tulane Education Fund v. The Board of Assessors, et al., 38 La. Ann. 292 (1886), the Court exempted property given by Paul Tulane from taxation on the ground that the dedication by the Administrators of all their revenues to the support and maintenance of the University of Louisiana was a sufficient dedication to a public use as to exempt the property from taxation within Article 207 of the Constitution of 1879. The Court stated that the University of Louisiana, a public institution, was continued in existence through Tulane University, and the entire revenues of the administrators dedicated to its support. The exemption was based on the proposition that "property, dedicated to a public use, the revenues of which serve a public purpose, is public property although the title be not in the public."

I have included extensive quotations from this case, as it is my belief that certain language used by the Court could have the greatest damaging influence if taken out of context and used by a court eager to foster desegregation. That is, looking at the language on its face, it is readily conceivable that Tulane University could easily be classed as a public corporation.

"The legislative purpose to preserve the University of Louisiana is unequivocally and constantly manifested in every part of the Act of 1884. The title mentions it, the preamble gives prominence to it, and the enacting clauses confirm it. The University is delivered to the Tulane administrators with all its
franchises, immunities and property to be governed and developed by them. Its existence is continued, and if it is not perpetuated, the constitutional amendment alone will confer the power to replace it by another.

***

"The first exemption from taxation by the Constitution is 'all public property.' Article 207. The University of Louisiana is not only a public institution but the constitution has taken it under its protective care. The entire revenues of the Tulane administrators are dedicated to its support. The state has contracted with them to deliver this public institution into their hands on the condition that the revenues should be wholly applied to its maintenance and development, and they have accepted the contract and thereby made the university the usufructuary of all their property. Whatever taxes are payable upon this property must necessarily be payable out of these revenues that have thus been dedicated to a public use, that is to say, must be paid by the university...

"The usufructuary is bound to pay all the taxes on the property that is subject to the usufruct... and as the University of Louisiana is the usufructuary of the Tulane property, it follows necessarily that whatever taxes are paid will be paid by the university.... Now the university cannot be taxed. The Constitution created it. Its property is public property within the intendment of the Constitution.

"But the property of the Tulane Board is not the property of the University, and it is the property of the Tulane Board of which taxes are demanded....

"...Private property which is subject to taxation becomes exempt by the change that is made in its use. The character of taxability is not ineffaceably stamped on property, and it may be removed by the act of its owner. Whenever he dedicates it to public use it passes under the dominion of the exemption that is
accorded to public property. And that is what we meant when in the earlier part of this opinion we said that the question was whether the consecration of the plaintiff's revenues to a public use did not proprio vigore, operate an exemption. The Legislature cannot exempt from taxation property that is constitutionally liable to it, but an owner of property may translate it into the domain of constitutional exemption by dedicating it to a public use.

"And primarily the Legislature determines what is a public use, and when it has declared what may be so regarded, the Courts will not interfere except in clear cases of usurpation or abuse of authority.... The Act of 1884 declares that the plaintiff's revenues are devoted to public use, and as a legal consequence the property that produces them is exempt from taxation...."

To prevent a conclusion that Tulane University is a public institution, with reference to the above cited quotations, two important factors should be pressed to the fore: (1) The issue of the case above was whether Tulane would have to pay taxes or whether it would enjoy tax exemption. The Court, eager to allow tax exemption (taxes for the years 1885 and 1886 exceeded state annual appropriations, the latter which, by the way, the administrators refused to accept) found that not only could the property of the University of Louisiana not be taxed, since it was public and was "perpetuated" by the Act of 1884, but the property of the administrators of the Tulane Education Fund could not be taxed because this property was sufficiently "dedicated to a public use." Thus, it is most important that the Court have before it a tax case and was not deciding whether the property of the administrators of the Tulane Education Fund was state property so as to make that body an agency of the state. (2) The second factor arises out of this background: The case under discussion has frankly been cited for the proposition that the "University of Louisiana is a public educational institution."
See Fletcher, Cyclopedia of the Law of Private Corporations, Page 213, n. 49. By adding two and two, the assumed "eager court" could say that (1) since the university of Louisiana was perpetuated by Act No. 43 of 1884, and (2) since the University of Louisiana is a public educational institution, then...the University of Louisiana as it is now known as the Tulane University of Louisiana, is a public educational institution. To prevent this simple addition, another factor must be remembered: If the University of Louisiana was perpetuated through Act No. 43 of 1884, then only the property of the University of Louisiana which existed at the time of the conveyance to the administrators was "perpetuated" which is but a small portion of the property now held by the Board of Administrators. Even the Court in the noted case recognized this, as it spoke of two properties involved—that of the University of Louisiana and that of the administrators of the Fund. The property of the administrators, even though dedicated to public use for tax purposes, is clearly separate from the property of the University of Louisiana.

THE EFFECT OF PUPIL ASSIGNMENT THROUGH THE RESERVE OFFICERS TRAINING CORPS

At the present time, there is no provision in the United States Code for the assignment of pupils (colored and white) to particular colleges and universities. Thus, the problem, if it arises, is not yet in existence. See 10 U.S.C.A. 4381, et seq. (Act August 10, 1956 c. 1041, 70 A Stat. 1)

The case of Dorsey v. Stuyvesant Town Corporation, 74 N.Y.S. 2d 220 (Supreme Court of New York 1947), cert. denied, 339 U.S. 981, suggested a problem which applies to the situation of the Federal Government establishing and supporting military training schools in colleges and universities:

"The increasing and fruitful participation of government, both state and federal, in the industrial and economic life of the nation - by subsidy and control analogous to that
found in this case - suggests the grave and delicate problem in defining the scope of the constitutional inhibitions which would be posed if we were to characterize the rental policy of respondents as governmental action. To cite only a few examples: The Merchant Marine, Air Carriers and Farmers, all receive substantial economic aid from our Federal Government and are subject to varying degrees of control in the public interests. Yet, it has never been suggested that those and similar groups are subject to restraints upon governmental action embodied in the Fifth Amendment similar to the restrictions of the Fourteenth Amendment upon the states."

CONCLUSION

Rather than drawing this memorandum to an end with a personal conclusion, I have quoted from a recent book which illustrates in more literary form my own beliefs, or, my apprehensions. However, I would add that at present Tulane University should be classed as a private institution. Logically, and even historically, I believe this to be a correct statement. My apprehension lies not in the logical conclusion, however, but rather in the awareness of the present judicial trend in the field of equal protection of the laws as expressed by the United States Supreme Court. As has been shown, it is believed that the Supreme Court might go beyond traditional boundaries in order to fulfill that court's interpretation of the guarantee of liberties prescribed by the Fourteenth Amendment of the Federal Constitution. Thus, relying on apprehension more than logic, I quote from Blaustein and Ferguson, "desegregation of the law - the meaning and effect of the School Segregation Cases". (Rutgers University Press, 1957, 333 p.)

"It is probable that the Supreme Court will go even further in extending the application of the present meaning of state action...."

"The rule of law that state-imposed racial discrimination is unconstitutional may well result in decisions of future Supreme Courts declaring the invalidity of the racial discrimination now practiced legally by privately operated schools, privately operated business and privately operated clubs. This can be done in one
of two ways: Either by applying the existing law to new factual situations, or by changing the present legal meaning of state action.

"The Warren-Black-Douglas position on Shelley v. Kramer, strengthened by the decision in the Exeter College case, represents the first of these approaches. They would declare unconstitutional any racial discrimination where its existence could possibly be connected with the state. Racial discrimination might be outlawed in the operation of a private school on the theory that its educational standards are prescribed by the state; racial classifications might be struck down in the employment policies of a private corporation on the theory that the existence of the corporation depended upon a state charter; racial classifications might be invalidated in the membership requirements of a fraternal order on the theory that it had received a state-authorized tax exemption.

"The second way in which the Fourteenth Amendment can be extended to preclude all racial discrimination is by changing the actual meaning of state action. This can be accomplished by developing the thinking of the Supreme Court decision in the Jay Bird decision." (See Terry v. Adams, supra).

"In that case, the discrimination practiced by a private group in election primaries was invalidated on the theory that voting was a state function and that any agency performing a state function would have to meet the requirements of the Fourteenth Amendment. Following this line of reasoning, any task which historically has been a function of the state (like voting and jury service) will always be judicially considered a function of the state. Accordingly, such function would have to be performed on a racially non-discriminatory basis, regardless of the absence of specific state action.

"A change in the meaning of state action can also be accomplished by re-introducing into this area of constitutional thinking some basic common law principles. Some future Supreme Court might well hold that any activity that affects large numbers of the general public automatically becomes a matter of governmental concern, and thus falls within the state action concept. Under such an analysis the services of hotels, restaurants, and theaters would have to be made available to the general public without regard to race. This was the old English common law rule governing inns and common carriers. Since those facilities are inherently public in character, and while housing was not public concern at public law, present-day, large-scale housing developments could be declared a matter of governmental interest within the context of the Fourteenth Amendment. This approach would preclude racial discrimination in these private activities, regardless of any specific action on the part of the state and regardless of whether the state had ever undertaken such activities in the past."