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Constitutional Law - Segregation - Separate but Equal Doctrine Modified

Daniel J. Chapman

NOTES

CONSTITUTIONAL LAW — SEGREGATION — "SEPARATE BUT EQUAL" DOCTRINE MODIFIED. A perceptible modification of the United States Supreme Court's attitude toward the doctrine of separate but equal facilities in the segregation of races raises some doubt as to the present effect of the decision in *Plessy v. Ferguson.*[1] Since 1896, when the Supreme Court therein decided that segregation of races was constitutional so long as the treatment was equal within the meaning of the Fourteenth Amendment, the courts have given unanimous adherence to the doctrine.[2]

The Supreme Court's wavering patronage of the *Plessy v. Ferguson* doctrine was first evidenced in the 1938 decision of *Missouri* ex rel. *Gaines v. Canada,*[3] where Chief Justice Hughes, while expressly reaffirming the constitutionality of segregation, declared that a negro had been deprived of equal protection of the laws when in seeking a legal education he was forced to submit to a plan whereby the state of Missouri could, at its option, pay his tuition in an out-of-state school. As an alternative, the Board of Curators of the negro state college in Missouri could establish a negro law school and it was contended that the exercise of this alternative was contemplated. Rejecting the resort to out-of-state facilities as no more than a mitigation of the discrimination, the court held that merely an intention to establish a law school within the state was not equal protection and the petitioner was ordered admitted to the state university.

Having thus forecast a more stringent attitude towards the degree of equality necessary to comply with the equal protection clause of the Fourteenth Amendment, the Supreme Court 10 years later in *Sipuel v. Board of Regents*[4] decided that a negro had not been afforded equal protection by an Oklahoma plan only slightly dissimilar to that found in Missouri. The lone distinguishing feature of the Oklahoma plan was that the state was under an obligation, if the negro so chose, to set up a separate school for negroes within the state. The court found that it would not be necessary for the negro to insist on a separate school for negroes before he applied for admission to the law school at the state university. Petitioner was ordered admitted to the university pending the establishment of a separate law school for negroes in the state. Later, in *Fischer v. Hurst,*[5] it was held that the law school subsequently set up for negroes was in compliance with the court's directive in the *Sipuel* case.

In *Sweatt v. Painter*[6] and *McLaurin v. Oklahoma State Regents,*[7] both decided in 1950, the Supreme Court evidenced what must be

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[1] 163 U.S. 537 (1896).

[2] Sweatt v. Painter, 339 U.S. 629 (1950); Mitchell v. United States, 313 U.S. 80 (1941); Boyer v. Garrett, 183 F.2d 582 (4th Cir. 1950), *cert. denied on other grounds,* 340 U.S. 912 (1950) No cases have been found which directly dispute the finding in Plessy v. Ferguson that segregation is constitutional.

[3] 305 U.S. 337 (1938).

[4] 332 U.S. 631 (1948).

[5] 333 U.S. 147 (1948).

[6] 339 U.S. 629 (1950).

[7] 339 U.S. 637 (1950).

[8] *See* Carr v. Corning, 182 F.2d 14, 22 (D.C.Cir. 1950) (dissenting opinion).

considered a practical repudiation of the *Plessy v. Ferguson* doctrine as applied, at least, to education in professional schools. Both cases, it would seem, could be distinguished from instances of segregation in liberal arts colleges, high schools and elementary schools. But the *Sweatt* and *McLaurin* cases would be strong persuasive authority in such cases and support already can be found in the lower courts for an extension of the principles to these cases.[8]

The petitioner in the *Sweatt* case complained that the facilities afforded negro law students in Texas were not in fact equal to those available at the state university. In affirming this contention, the court cited as deficient at the negro school: (1) reputation of the faculty; (2) experience of the administration; (3) position and influence of the alumni; (4) standing of the school in the community; and (5) opportunity for interplay of ideas with other students.

The negro petitioner in the *McLaurin* case had been previously refused entrance to the graduate school at Oklahoma University, although no other state school offered the course which he sought. Following an adverse decision in the courts, the Oklahoma law requiring segregation was amended to allow the petitioner to enter the graduate school on a segregated basis. He was required to sit apart in classrooms,[9] in the cafeteria and in the library.

In refusing to recognize this as equal protection of the laws, the court said, "But they (the restrictions imposed on petitioner) signify that the state in administering the facilities it affords for professional and graduate study, sets McLaurin apart from other students. The result is that the appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and in general, to learn his profession . . . We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been admitted to a state supported school, must receive the same treatment at the hands of the state as the students of the other races."[10]

It should be made clear that the "separate but equal" doctrine threads through each of these decisions and in fact, in the *Sweatt* case, the court refused to consider the constitutionality of segregation but contented itself with determining if the facilities of the two races were equal. But the true impact of the two cases is to impose unattainable conditions precedent upon the luxury of segregation, at least insofar as it applies to professional schools. It would seem to need no argument, for example, that generous expenditures and fabulous facilities would be insufficient to equal the reputation of the University of Texas faculty, the position and influence of the school's alumni and the experience of its administration, all of which were only part of the inequalities set out by the court in the *Sweatt* case.

Segregation, however, takes on many forms and the tendency is to oversimplify the field. *Plessy v. Ferguson,* for example, a case of intrastate commerce, was a valid exercise of the state's police power and included an express finding that no inferiority was implied toward the negro race. Yet subsequent cases, many distinguishable

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[9] An unfortunate incident occurred in this respect when the school authorities erected a wooden railing around petitioner's seat in the classroom and posted a sign "reserved for colored".

[10] 339 U.S. 637, 641 (1950).

on all the above counts from *Plessy v. Ferguson*, were decided by courts who felt themselves bound by the court in the *Plessy* case. The dissenting opinion in *Carr v. Corning*[11] suggests the probability that two schools are less likely to be "equal" facilities, than two railroad cars which are exactly alike.[12] Similarly, public recreational accomodations and private businesses are other categories which seem to require separate treatment.

If it is to be assumed that *Plessy v. Ferguson* settled the constitutionality of segregation, federal courts have no jurisdiction in many matters of segregation. Thus where state law requires segregation in affairs wholly within the state and affords equal treatment to both races, the state, by its police power, has sole jurisdiction.[13] Where the state has undertaken to supply certain accommodations to its citizens, the federal courts have jurisdiction to review the adequacy of the facilities provided for negroes and determine if negroes have been given equal protection of the laws within the Fourteenth Amendment.[14] In view of the decisions in *Shelley v. Kraemer*[15] and similar cases,[16] the definition of state action has been broadly extended and the jurisdiction of the federal courts increased. Federal courts have also steadfastly refused to yield to the states the right to regulate interstate commerce.[17]

Some Difficulties of Equal Protection

As has previously been indicated, it is little consolation to the states to know that segregation is constitutional if for some purposes equal facilities are more a myth than a possibility.[18] The largest single factor in reaching this anomalous result has been the concept that the right to be protected by the equal protection clause of the Fourteenth Amendment is a personal right.[19] Hence proportional or even superior accommodations for negroes as a group are insufficient if in any respect an individual member of the negro race is being deprived of something available to the other race.[20]

In *Henderson v. United States*,[21] which was decided upon a provision of the Interstate Commerce act,[22] it was held that a negro

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[11] 182 F.2d 14, 31 (D.C.Cir. 1950).
[12] *Id* at 31.
[13] Plessy v. Ferguson, 163 U.S. 537 (1896).
[14] Rice v. Arnold, 45 S.2d 195 (Fla. 1950), *rev'd without opinion*, 340 U.S. 848 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Draper v. City of St. Louis, 92 F.Supp. 546 (E.D. Mo. 1950).
[15] Shelley v. Kraemer, 334 U.S. 1 (1948).
[16] Hurd v. Hodge, 334 U.S. 24 (1948); Barrows v. Jackson, 19 U.S.L. Week 2467 (Cal. Mar. 26, 1951).
[17] Morgan v. Virginia, 328 U.S. 373 (1946); Hall v. DeCuir, 95 U.S. 485 (1877). *But cf.* Bob-lo Excursion Co. v. Michigan, 333 U.S. 28 (1948) (insulated segment of foreign commerce).
[18] Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Wilson v. Board of Supervisors, 92 F.Supp. 986 (E.D. La. 1950), *aff'd mem*, 340 U.S. 909 (1951); Draper v. City of St. Louis, 92 F.Supp. 546 (E.D. Mo. 1950) (contemplated swimming pool for negroes would not be equal protection to negroes living closer to white swimming pool)
[19] Missouri *ex rel* Gaines v. Canada, 305 U.S. 337 (1938); *see* McCabe v. Atchison, Topeka and Santa Fe Railway, 235 U.S. 151 (1914).
[20] Henderson v. United States, 339 U.S. 816 (1950); Law v. Mayor and City Council of Baltimore, 78 F.Supp. 346 (D. Md. 1948).
[21] 339 U.S. 816 (1950).
[22] 54 Stat. 902, 49 U.S.C. §3 (1) (1946).

had been deprived of equal protection of the laws in a railroad train dining car, where he had been denied service because the two tables conditionally set aside for negroes were filled but space was available at tables set aside for whites. In rejecting the contention that sometimes whites had to wait while the negro tables were empty, the court said, "Discriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader than if only one were affected."[23] Similar wording can be found in *Mitchell v. United States*[24] and *McKissick v. Charmichael*.[25]

Another obstacle in the quest for equal facilities is the requirement that there must be no implication of inferiority towards the negro race.[26] Although this principle has been sparingly employed,[27] it was the basis for Justice Harlan's dissenting opinion in *Plessy v. Ferguson*.[28] In the words of Justice Harlan, "The thing to accomplish was, under the guise of giving equal accommodation for the whites and blacks, to compel the latter to keep to themselves while travelling in railroad coaches. No one would be so wanting in candor as to assert the contrary."[29]

Assuming that *Plessy v. Ferguson* was correctly decided and that no inferiority was in fact implied in that case, it is probable that many cases since litigated and which have cited *Plessy v. Ferguson* could have been distinguished on this point. It is significant in this respect that no cases have been found where white persons have complained of segregation.

Segregation and Interstate Commerce

Courts have been quick to strike down any movement of the state legislatures in the field of interstate commerce and acts requiring or prohibiting segregation in interstate commerce have been invalidated alike.[30] On the other hand, the carriers themselves would seem to have a free hand to impose reasonable rules of segregation,[31] although even this principle was successfully challenged in a 1949 Circuit Court of Appeals decision.[32]

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[23] 339 U.S. 816, 825 (1950).

[24] 313 U.S. 80 (1941) at 97, "We take the chief reason for the Commission's action was the 'comparatively little colored traffic'. But the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by provisions in the Interstate Commerce Act."

[25] 187 F.2d 949 (4th Cir. 1951) "The duty of the federal courts is clear. We must give first place to the rights of the individual citizen, and when and where he seeks only equality of treatment before the law, he must prevail. It is for him to decide in which direction his advantage lies."

[26] Plessy v. Ferguson, 163 U.S. 537 (1896).

[27] *See* Carr v. Corning, 182 F.2d 14, 22 (D.C. Cir. 1950) (dissenting opinion).

[28] 163 U.S. 537, 557 (1896).

[29] *Ibid. i.e.* Boyer v. Garrett, 183 F.2d 582 (4th Cir. 1950), involved city recreational facilities and court decided it was bound by Plessy v. Ferguson and refused to distinguish between the two cases. Subsequently the United States Supreme Court refused certiorari because of untimely application.

[30] Hall v. DeCuir, 95 U.S. 485 (1877) (prohibiting segregation); Morgan v. Virginia, 328 U.S. 373 (1946) (requiring segregation).

[31] Day v. Atlantic Greyhound Corp., 171 F.2d 59 (4th Cir. 1948); Simmons v. Atlantic Greyhound Corp., 75 F. Supp. 166 (W.D. Va. 1947).

[32] Whiteside v. Southern Bus Lines, Inc., 177 F.2d 949 (6th Cir. 1949) (carrier's segregation was crystallization of unwritten state law based on custom and was indistinguishable from segregation statute).

As was pointed out in *Morgan v. Virginia*,[33] the court does not assume to pass upon the validity of segregation in declaring such statutes to be unconstitutional. Rather, the court is finding that because of the varying conditions in the many states, the problem requires uniform legislation by the Congress. Any attempt by the states to legislate in this field must be regarded then as violative of the federal government's exclusive right to regulate interstate commerce. Where, however, the interstate or foreign commerce is local in nature, an exception is made.[34]

The courts appear to make no distinction between the modes of transportation. Thus, *Hall v. DeCuir*,[35] the earliest Supreme Court decision in this field, was a steamboat case; *Chiles v. Chesapeake and Ohio Railway Co.*[36] was a railroad case; and *Morgan v. Virginia*[37] was a bus case. Air transportation has left little litigation in this field. *Nash v. Air Terminal Services*,[38] a federal district court decision, was a case of exclusion of a negro from a federal airport restaurant but did not involve a regulation of interstate commerce.

Segregation in labor bargaining units of interstate carriers has been given the go-ahead, it would seem, in *Steele v. L. & N. Ry.*[39] In that case, a railroad brotherhood, from which negroes were excluded, was enjoined from acting contrary to the interests of negro employees, where the brotherhood has been given exclusive bargaining rights. The court indicated[40] that the brotherhood could determine its own membership.

State Legislation in Field of Segregation

Since segregation survived its first Supreme Court test in *Plessy v. Ferguson*, over half of the states have deemed themselves authorized to pass statutes on the subject.[41] States which require segregation encounter the problem of separate but equal facilities for each race; and states which prohibit segregation must define the extent of the applicability of the statute.

Although, of course, the problem in the latter category varies with the wording of each statute, state courts have held that school segregation is unlawful;[42] that segregation on a golf course only nominally private was illegal;[43] that a negro girl was entitled to social privileges of white students in a non-segregated high school;[44] that a refusal to sell beer to negroes was unlawful;[45] that negroes could not be excluded from a race track;[46] that a theater is a public accommodation within a state civil rights law;[47] that a swimming pool

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[33] 328 U.S. 373 (1946).
[34] Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948).
[35] 95 U.S. 485 (1877).
[36] 218 U.S. 71 (1910).
[37] 328 U.S. 373 (1946).
[38] 85 F. Supp. 545 (E.D. Va. 1949).
[39] 323 U.S. 192 (1944).
[40] *Id* at 206.
[41] See Morgan v. Virginia, 328 U.S. 373, 382 (1946) (statutes collected).
[42] Webb v. School Dist. No. 90, 167 Kan. 395, 206 P.2d 1066 (1949) (gerrymandering of school districts); Hedgepeth v. Bd. of Educ. of Trenton, 131 N.J.L. 153, 35 A.2d 622 (1944).
[43] Gillespie v. Lake Shore Golf Club, 91 N.E.2d 290 (Ohio 1950).
[44] Jones v. Newlon, 81 Colo. 25, 253 Pac. 386 (1927).
[45] McCrary v. Jones, 39 N.E.2d 167 (Ohio 1941).
[46] Suttles v. Hollywood Turf Club, 45 Cal. App. 2d 283, 114 P.2d 27 (1941).
[47] Bailey v. Washington Theater Co., 218 Ind. 513, 34 N.E.2d 17 (1941).

is included within public accommodations from which a negro could not be excluded;[48] that an ice cream parlor is not a "place of entertainment or amusement";[49] and that a dentist's office is not a public accommodation.[50]

Instances where courts have been called upon to pass on statutes or ordinances requiring segregation include holdings that a negro had to be admitted to law school where there was no provision for a negro law school in the state;[51] that restricting a golf course six days to whites and one day to negroes was not equal protection of the laws;[52] that a negro girl could not be excluded from the state's only school for nursing;[53] that a state could regulate intrastate commerce;[54] that a city could maintain a segregated recreational program;[55] that a state could exclude a Chinese girl from a white high school under segregation laws;[56] that negroes are not deprived of equal protection of the laws until their request for separate facilities has been denied[57] or until such facilities prove inadequate.[58]

Who is a Negro?

It is readily understandable, in view of the many distinctions based upon color of skin,[59] that much importance lies in determining who is a negro. Plessy, the negro complainant in *Plessy v. Ferguson*, was himself only one-eighth negro and the Virginia statutes classify a person as a negro who has any quantum of negro blood.[60] And in *State v. Treadway*[61] a colored person was said to be one with "negro blood pure or mixed . . . no matter what may be the proportion . . . so long as the negro blood is traceable."[62] The definition of a colored person has been broadened to include a Chinese girl[63] and a California school district tried to exclude children of Mexican descent from the white school.[64]

It has been suggested[65] that tests which imply that being a negro is an indication of inferiority are unconstitutional as not in compliance with the equal protection clause of the Fourteenth Amendment. Aside from the constitutional considerations, which have

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[48] Draper v. City of St. Louis, 92 F. Supp. 546 (E.D. Mo. 1950); State v. Rosecliff Realty Co., 1 N.J.S. 94, 62 A.2d 488 (1948).
[49] Brown v. Meyer Sanitary Milk Co., 150 Kan. 931, 96 P.2d 651 (1939).
[50] Rice v. Rinaldo, 95 N.E.2d 30 (Ohio 1950).
[51] Pearson v. Murray, 169 Md. 478, 182 Atl. 590 (1936).
[52] Rice v. Arnold, 45 So.2d 195 (Fla. 1950), *rev'd without opinion*, 340 U.S. 848 (1950).
[53] McCready v. Byrd, 73 A.2d 8 (Md. 1950), *cert. denied*, 340 U.S. 827 (1950).
[54] New v. Atlantic Greyhound Corp., 186 Va. 726, 43 S.E.2d 872 (1947).
[55] Boyer v. Garrett, 183 F.2d 582 (4th Cir. 1950), *cert. denied on other grounds*, 340 U.S. 912 (1950).
[56] Gong Lum v. Rice, 275 U.S. 78 (1927).
[57] Sweeney v. City of Louisville, 309 Ky. 465, 218 S.W.2d 30 (1949).
[58] Hawkins v. Bd. of Comm. of Florida, 47 So.2d 608 (Fla. 1950).
[59] Cohen, *An Appraisal of the Legal Tests Used to Determine Who Is a Negro*, 34 Corn. L.Q. 246 (1948).
[60] Va. Code §67 (Michie, 1942).
[61] 126 La. 300, 52 So. 500 (1910) (case contains lengthy discussion of definitions of negroes and colored persons).
[62] *Id* at 502.
[63] Gong Lum v. Rice, 275 U.S. 78 (1927).
[64] Westminster School Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1947).
[65] Cohen, *An Appraisal of the Legal Tests Used to Determine Who Is a Negro*, 34 Corn. L.Q. 246 (1948).

some merit in light of the express wording of the *Plessy v. Ferguson* case, strong support can be found for the argument that blood is not affected in any way by negro commingling.[66]

CONCLUSION

In summary, it should be said, as was pointed out in *Boyer v. Garrett*,[67] that *Plessy v. Ferguson* continues unrepudiated by the Supreme Court. However, certain substantial revisions have been made in its effect[68] and further changes can be expected.[69] Thus segregation in professional schools has apparently been abandoned but all other forms of segregation, which do not unduly restrain interstate commerce, continue to be sanctioned so long as the facilities afforded the several races are equal within the purview of the Fourteenth Amendment.

It is submitted that the cautious tack of the United States Supreme Court into the raging tempest of segregation merits commendation.[70] Without compromise of legal principles and without attempting to revolutionize mores which have been deeply inbred in some sections of the United States, the court has bettered the position of the negro and held out realistic hope of continued advancement in his struggle for acceptance in our society. In *Sweatt v. Painter*[71] and *McLaurin v. Oklahoma State Regents for Higher Education*,[72] the court has, in effect, opened the door to schools of professional training to the negro. And axiomatically the negro who will enter these schools is one who will have worked hard to attain a position where he can insist on admittance to a school heretofore forbidden to persons of his race and can be expected to be a credit to his race. At the same time, the Court has retained the broad doctrine of segregation and would seem to be in a position to extend the principle of the *Sweatt* and *McLaurin* cases at a time of its own choosing.

Daniel J. Chapman.

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[66] See quotations set out in 34 Corn. L.Q. 246, 253 (1948).

[67] Boyer v. Garrett, 183 F.2d 582 (4th Cir. 1950), *cert. denied on other grounds*, 340 U.S. 912 (1950).

[68] Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[69] *See* Carr v. Corning, 182 F.2d 14, 22 (D.C. Cir. 1950) (dissenting opinion).

[70] See Draper v. City of St. Louis, 92 F. Supp. 546 (E.D. Mo. 1950) (where swimming pool was opened to negroes and race riots had resulted, yet court ordered pool reopened, if at all, on non-segregated basis).

[71] 339 U.S. 629 (1950).

[72] 339 U.S. 637 (1950).