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Constitutional Law - Equal Protection - Segregation in Recreational Facilities Furnished by the State

James H. O'Keefe

by the state.[25] But upon compliance with the foregoing, neither the accordance of finality to the board's interpretation of the evidence [26] nor to determinations of certain questions of law [27] is violative of due process.

Here, the fact that appellant in refusing to produce the subpoenaed papers was acting on advice of competent legal counsel, and that the crime of which applicant was convicted involved no moral turpitude [28] is of no material consequence. Apellant's contention that the Board of Regents relied on immaterial and prejudicial evidence of the alleged subversive activities of the Refugee Committee in determining the extent of disciplinary action taken is likewise unavailing in that the mere fact of appellant's conviction of a crime was sufficient to sustain the Board's determination.[29] Therefore, if the board has not exceeded its jurisdictional limits and if substantial evidence supports its findings, a final determination of the constitutional validity of the empowering statute precludes judicial review of the considerations upon which the board based its decision.[30]

The instant case, in supporting the extension of discretionary powers of administrative boards, is in accord with the vast majority of holdings. It is submitted that the policy thus set forth is desirable as tending not only to facilitate the accurate and expeditious fulfilment of administrative functions, but also to prevent an even greater crowding of court dockets, the inescapable consequence of a contrary view.

H. M. PIPPIN

CONSTITUTIONAL LAW — EQUAL PROTECTION — SEGREGATION IN RECREATIONAL FACILITIES FURNISHED BY THE STATE. — Suit was brought against the City of Baltimore and the State of Maryland by plaintiffs, adult and minor Negroes, to enjoin segregation of the races at public swimming pools, beaches and bathhouses. Plaintiffs claim that such segregation interferes with rights guaranteed them by the equal protection clause of the Fourteenth Amendment. It was stipulated at a pre-trial conference that the separate facilities afforded the Negroes were "physically equal." The court *held,* that segregation of the races with respect to recreational facilities controlled by the State did not deprive the plaintiffs of their constitutional rights as long as the facilities provided were of a substantially equal nature. *Lonesome* v. *Maxwell,* 123 F. Supp. 193 (D.Md. 1954).

Under the "separate but equal" doctrine, public facilities for Negroes and Whites may be separate if substantially equal.[1] It is not required that the facilities provided the different races be identical but is is sufficient if they

25. Smith v. State Board, 140 Iowa 66, 117 N.W. 1116 (1908); *See* Golsmith v. United States Board of Tax Appeals, 270 U.S. 117, 123 (1925).

26. *cf.* Jones v. Buffalo Creek Coal Co., 245 U.S. 328 (1917); Central Land Co. v. Laidley, 159 U.S. 103 (1895); U.S. v. Gallagher, 183 F.2d 342 (3d Cir. 1949).

27. Reetz v. Michigan, *supra* note 11.

28. Sinclair v. United States, 279 U.S. 263 (1929).

29. Sinclair v. United States, *supra note 28;* Armour Packing Co. v. United States, 209 U.S. 56 (1908).

30. Gibson v. Medical Examining Board, 141 Conn. 218, 104 A.2d 890 (1954); State *ex rel.* Kassabian v. State Board, *supra* note 14; Schnure v. Board of Regents, 130 N.Y.S. 2d 783 (N.Y. 1954); Davis v. Board of Regents, 283 App. Div. 591, 128 N.Y.S.2d 51 (1954); *cf.* Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943); Ray v. Powell, 314 U.S. 402 (1941); Bates and Guild Co. v. Payne, 194 U.S. 106 (1904).

1. Plessy v. Ferguson, 163 U.S. 537 (1896).

are equivalent.[2] This doctrine has been controlling in the field of recereation.[3] In recreation the courts have always demanded strict adherence to standards of physical equality, not hesitating to strike down any segregation laws which have only the appearance of providing equality.[4] Thus the doctrine has not become a pure legal fiction. With typical judicial restraint the whole of the doctrine has never been closely re-examined, the Supreme Court being content to point out inequalities as particular cases arise. Without specifically re-examining the doctrine, the Court has ruled that segregation in professional and graduate schools is a denial of equal facilities.[5] Aside from the more obvious inequalities present in segregated education, such factors as restricted class of associates, less renowned faculty, and absence of school tradition in the Negro school were cited. While comparing the relative merits of the Negro and White law schools the Court said, ". . . the University of Texas Law School [i.e. the one for Whites] possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school." [6] It was made clear that while segregation was still possible in higher education, the standards demanded were to be increasingly exacting. Expressly avoiding a frontal attack on the "separate but equal" doctrine, the Court did indicate the doctrine was capable of being reconsidered in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment.[7] Shortly thereafter, a case involving segregation in recreation was remanded by the Supreme Court to be reviewed in light of these decisions on graduate and professional schools.[8] It is apparent that the Supreme Court sees some relationship between cases involving segregation in recreation and those involving segregation in higher education.

The recent case in which the Supreme Court declared segregation in public schools violative of the equal protection clause casts a new light upon the whole "separate but equal" doctrine.[9] Segregation in the field of public education is now per se, unequal and thus separate school facilities can never be made legally equal. Is the Court now ready to carry this new pronouncement to its logical end and overrule the doctrine in other fields? The court in the principal case expresses a belief to the contrary, preferring to give the decision a narrowly restricted application. Equality in recreational facilities in the past has been determined only by a comparison of physical plants.[10]

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2. *State ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Law v. Baltimore, 78 F. Supp. 346 (D. Md. 1948).

3. *E.g.*, Beal v. Holcombe, 347 U.S. 974 (1952) (parks); Williams v. Kansas City, 205 F.2d 47 (8th Cir. 1953) (swimming pool); Law v. Mayor and City Council of Baltimore, 78 F. Supp. 346 (D. Md. 1948) (golf); Lopez v. Secombe, 71 F. Supp. 769 (S.D. Cal. 1944) (bathhouse).

4. Hayes v. Crutcher, 108 F. Supp. 582 (M.D. Tenn. 1952); Durkee v. Murphy, 181 Md. 259, 29 A.2d 253 (1942).

5. McLaurin v. Oklahoma Board of Regents, 339 U.S. 637 (1950) (Negro graduate student required to sit at separate table); Sweatt v. Painter, 339 U.S. 629 (1950) (Texas established separate law school for Negroes with separate buildings and faculty. Held, not equal facilities).

6. Sweatt v. Painter, 339 U.S. 629, 634 (1950).

7. *Id.* at 637.

8. Rice v. Arnold, 340 U.S. 848 (1950) (Upon remand, the Supreme Court of Florida found that the *Sweatt* and *McLaurin* cases were not controlling in the field of segregated recreation. United States Supreme Court refused certiorari, 342 U.S. 946).

9. Brown v. Board of Education, 347 U.S. 483 (1954) (It is interesting to note that Justice Harlan in his classic dissent in Plessy v. Ferguson, *supra* note 1, foresaw that the "separate but equal" doctrine would never endure the test of time or close inspection.

10. See 35 Minn. L. Rev. 399 (1950).

Intangible inequalities were factors never before considered. However, the recent decision banning segregation in schools was based primarily on the psychological damage that segregation engenders in school children, resulting in a deprivation of equal educational opportunity.[11] It is submitted that this reasoning could apply to segregation in recreation, although perhaps with diminished force. Certainly the same feeling of inferiority is present in segregated play as in segregated education.

If it could be assumed that separate recreational facilities may be inherently as well as physically equal, it may be further argued that segregation of this kind is not a proper exercise of the state police power since it accomplishes no reasonable governmental objective. However, the use of the police power in requiring recreational segregation presents a different and more complex problem than that involved in segregated education. Prejudice against the Negroes is highest, except for direct sexual relations, in such personal activities as bathing, dancing and swimming.[12] As a result, it would seem a sound governmental objective to avoid racial antipathies which otherwise would result from these interracial contacts. Of course a natural aversion to members of another race furnishes, in itself, no basis for use of the police power to enforce segregation; there must be a present and pressing public necessity for the use of it.[13] It would seem that segregated recreation is a proper exercise of the police power, at least in areas of marked racial antagonisms. Clearly, segregation is more open to attack under the equal protection clause.

The recent education cases by partial rejection of the "separate but equal" doctrine, place the whole structure of segregation in serious constitutional jeopardy. In line with the traditional policy of deciding constitutional questions only when necessary to resolve the issue at hand, the Supreme Court has wisely refrained from declaring segregation, per se, unconstitutional.[14] Such a broad declaration would bring down in ruin the traditional southern social structure. The Court, aware of this non-legal reality, has merely placed itself in such a position that it can further diminish the scope of the doctrine upon an occasion of its own choosing, preferably as socio-political conditions become more favorable toward the Negro. Segregation in recreation, as in education, tends to deprive the Negro of basically the same intangible benefits that all should receive under an equalitarian constitution. Racial integration of public recreational facilities is necessary if the Negro is to advance in his continuing fight for full equality under law.

JAMES H. O'KEEFE

CORPORATIONS — POWER OF CORPORATIONS TO MAKE DONATIONS. — The stockholders of plaintiff corporation objected to a proposed donation by the corporation to Princeton University on the ground that the act was ultra vires. The corporation sought a declaratory judgment to determine the status of its power to make such donations. The court *held* that a corporation was given such power, both by statutory provisions to that effect and also by the

11. Brown v. Board of Education, *supra* note 9 at page 494.
12. Myrdal, An American Dilemma, 60, 61 (1944).
13. *See* Korematsu v. United States, 323 U.S. 214 (1944).
14. Rescue Army v. Municipal Court, 331 U.S. 549 (1947); Ohio Ry. Co. v. Dittney, 232 U.S. 576 (1914); Southwestern Oil and Gas Co. v. Texas, 217 U.S. 114 (1910); Burton v. United States, 196 U.S. 283 (1904).