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Constitutional Law - The Fourteenth Amendment and Segregated Education

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States Attorney General has stated, however, that no repayment of revenues collected from these oil deposits prior to the decision in the present case will be demanded from the states.

Any change in the status accorded the marginal sea by this decision is now in the hands of Congress; further manifestations of federal dominion, and consequent limitation of state regulatory power, or a grant of these lands to the respective maritime states must await congressional action.⁴² A number of bills proposing a quitclaim of this area to the states have been introduced at the present session of Congress.

JOHN PAUL WOODLEY

CONSTITUTIONAL LAW—THE FOURTEENTH AMENDMENT AND SEGREGATED EDUCATION—The passage of the Thirteenth, Fourteenth, and Fifteenth Amendments theoretically placed the negro in a position of civil and political equality; but, practically, the manner in which the rights bestowed by these amendments are enjoyed is a problem of today. That the negro is entitled to education cannot be seriously denied,¹ but the question of whether or not he may validly complain because in some states such education is separate and segregated from that of white men raises new and complex political and social considerations. *Sipuel v. Board of Regents of University of Oklahoma*, 16 U. S. L. Week 4090, 8 C. C. H. Bull. 339, 68 S. Ct. 299 (1948).

The United States Supreme Court long ago declared that the policy of segregation is a social problem and not within the inhibitions of the Fourteenth Amendment.² The leading case of *Plessy v. Ferguson* upheld the constitutionality of this policy and remains today the backbone of judicial precedent on this point.

“The object of the Fourteenth amendment was undoubtedly intended to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have

42. The recent history of congressional action in regard to the marginal sea is significant. Both houses of Congress passed a joint resolution quitclaiming the area to the States, H. J. Res. 225, 79th Congress, 2d sess. (1946); 92 Cong. Rec. 9642, 10316 (1946), which was, however, vetoed by the President (92nd Cong. Rec. 10660 (1946), and his veto was sustained, 92nd Cong. Rec. 10745 (1946). Congressional disposition of this area would be upheld under the power of the Congress to dispose of property belonging to the United States. U. S. Const. Art. IV, § 3.

1. *Sipuel v. Board of Regents of University of Oklahoma*, 16 U. S. L. Week 4090, 8 C.C.H. U.S.S.C. Bull. 339, 68 S. Ct. 299 (1948).

2. *Hall v. DeCuir*, 95 U. S. 485, 24 L. Ed. 547 (1877).

been intended to abolish distinctions based on color, or to enforce *social*, as distinguished from *political* equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."³ (Italics supplied.)

The basis for this position is the feeling that

"The attempt to enforce social intimacy and intercourse between the races, by legal enactments, would probably tend only to embitter the prejudices, . . . and produce an evil instead of a good result."⁴

Even though the education may be furnished separately, it must be equal to that furnished other races, for it is only upon this basis that separation of the races is rendered constitutional.⁵ The very requisite of equality poses the question as to whether the equality must be factual or substantial. To determine in each instance whether there was equality in fact would be extremely difficult, if not impossible, and would place a burden of minute examination of evidence on the Supreme Court. Adoption of the latter rule would allow the Supreme Court to rely largely upon the discretion

3. *Plessy v. Ferguson*, Richmond County, 163 U. S. 537, 544, 16 S. Ct. 1138, 1140, 41 L. Ed. 256, 258 (1896). See also *Cummings v. Board of Education*, 175 U. S. 528, 20 S. Ct. 197, 44 L. Ed. 262 (1899); *Berea College v. Commonwealth of Kentucky*, 211 U. S. 45, 29 S. Ct. 33, 53 L. Ed. 81 (1908); *McCabe v. Atchison Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, 35 S. Ct. 69, 59 L. Ed. 169 (1914); *Gong Lum v. Rice*, 275 U. S. 78, 48 S. Ct. 91, 72 L. Ed. 172 (1927); *Missouri ex rel. Gaines v. Canada*, Registrar of the Univ. of Missouri, 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938).

4. *People ex rel. King v. Gallagher*, 93 N. Y. 438, 448, 45 Am. Rep. 232, 238 (1883).

It is interesting to note that the presidential Civil Rights Committee in their Report to the President, *To Secure These Rights* (1947), took the contrary view on this point, claiming that intermingling would greatly lessen friction and prejudice.

5. *Gong Lum v. Rice*, 275 U. S. 78, 48 S. Ct. 91, 72 L. Ed. 172 (1927); *Missouri ex rel. Gaines v. Canada*, Registrar of the Univ. of Missouri, 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938).

of the trial court. Such a course would also be consistent with the prior holdings of the Court on the question.⁶

Prior to 1938, by decisions declaring that the negro was entitled to educational facilities substantially equal to those provided for other citizens, but sanctioning segregated schools, the Supreme Court appeared to have crystallized the negroes' rights. Subsequent developments, however, have strikingly shown that this is not the case.

Few problems have presented themselves with respect to primary and secondary education, for the additional economic burden of establishing separate grammar and high schools has always been assumed and provided for by the states. But the situation has been quite different with respect to graduate training and education on the professional levels.

In an attempt to maintain a policy of segregated education, and yet avoid the perhaps impossible economic burden of duplicating facilities in all phases of higher education, the laws of some states provided for the establishment of equal higher educational facilities for the negro by the responsible agency "whenever necessary and practicable in their opinion." Until such agency deemed the move "necessary and practicable" the state provided for an out-of-state scholarship fund for negroes desiring this higher education. Apparently no large scale demands were made upon any state for the establishment of graduate and professional schools for negroes; therefore whenever a single application was made, the state agency in charge would offer the applicant the benefit of the out-of-state scholarship plan. This practice had never been disapproved where the scholarships were adequately financed.⁷ In 1938, however, the

6. "Substantial equality of rights is the law of the State and of the United States; but equality does not mean identity, as in the nature of things identity in accommodations afforded to passengers white or colored, is impossible."

Hall v. DeCuir, 95 U. S. 485, 503, 24 L. Ed. 547, 553 (1877). The case dealt with segregation in transportation, but the principal involved is clearly applicable. Also, Bertonneau v. Board of Directors, 3 Fed. Cases No. 1361, p. 294, 296 (C. C. La. 1878). "Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the United States Constitution. Equality of rights does not necessarily imply identity of rights."

Contra: Fisher v. Hurst, 8 C.C.H. U.S.S.C. Bull. 615, 620, 16 U.S.L. Week 4167, 4168 (1948), Rutledge, J., dissenting: "And in my comprehension the equality required was equality in fact, not in legal fiction." The majority of the court was of the opinion that the applicant, if she desired to contest the state's action further, had to file suit in the state district court.

7. Pearson v. Murray, 169 Md. 478, 182 Atl. 590, 103 A. L. R. 706 (1936).

Supreme Court condemned the out-of-state scholarship plan, holding that:

"The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups *within the State*."⁸ (Italics supplied.)

The same court also condemned the discretionary nature of the statute involved, holding that the exercise of a person's constitutional rights was not subject to discretion, and hence, in the absence of a *mandatory* duty to provide equal facilities for the negro, the statute did not satisfy the requirements of the Fourteenth Amendment.⁹

Following the *Gaines* decision, the lower federal courts and the state courts were besieged with similar cases. In each the court was faced with the difficulty of applying the state laws and following the state's public policy without violating the rule of the *Gaines* case. The result of these cases was that where the state law placed a *mandatory* duty upon the proper officials to provide *substantially equal facilities* for education *within the state*, the agency responsible for the administration of the legislation was entitled to "reasonable advance notice of the intention of a negro student to require such facilities."¹⁰ The courts reasoned that:

"It does not appear that a clear and unmistakable disregard of rights secured by the supreme law of the land¹² would result from a failure on the part of these curators to keep and maintain in idleness and non-use facilities at Lincoln University which no one had requested or indicated a desire to use."¹³

8. *Missouri ex rel. Gaines v. Canada*, Registrar of the Univ. of Missouri, 305 U. S. 337, 349, 59 S. Ct. 232, 236, 83 L. Ed. 208, 213 (1938).

9. *Ibid.*

10. *Wrighten v. Board of Trustees of Univ. of S. C.*, 72 F. Supp. 948 (E.D. S. C. 1947); *State ex rel. Bluford v. Canada*, Registrar of University of Mo., 348 Mo. 298, 153 S. W. (2d) 12 (1941); *Sipuel v. Board of Regents of University of Okla.*, 180 P. (2d) 135 (Okla. 1947); *State ex rel. Michael v. Witham*, 179 Tenn. 250, 165 S. W. (2d) 378 (1942).

11. *Bluford v. Canada*, 32 F. Supp. 707 (W. D. Mo. 1940); *State ex rel. Michael v. Witham*, 179 Tenn. 250, 165 S. W. (2d) 378. (1942).

12. The court was referring to *Cumming v. Richmond County Board of Education*, 175 U. S. 528, 545, 20 S. Ct. 197, 201, 44 L. Ed. 262, 266 (1908) where the court said, "and any interference on the part of the Federal Authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

13. *Bluford v. Canada*, 32 F. Supp. 707, 711 (W. D. Mo. 1940); *State ex rel. Bluford v. Canada*, 348 Mo. 298, 308, 153 S. W. (2d) 12, 17 (1941);

The Supreme Court, however, during its present term, refused to adopt this reasoning, declaring that:

"The state must provide it for her in conformity with the equal protection clause of the Fourteenth amendment *and provide it as soon as it does for applicants of any other group.*"¹⁴ (Italics supplied.)

The case was then remanded to the Oklahoma Supreme Court "for proceedings not inconsistent with this opinion." The Oklahoma court directed the Board of Regents of the university, in accordance with the Oklahoma Constitution and the Fourteenth Amendment, "to afford plaintiff and all others similarly situated an opportunity to commence the study of law at a state institution as soon as citizens of other groups are offered such opportunity," and remanded the case to the state district court with instructions to follow the mandate of the Supreme Court of the United States.¹⁵

On January 22, 1948, the trial court entered its order that unless and until a separate school of law with advantages substantially equal to the advantages furnished white students was established and ready to operate by the time at which the next semester at the Oklahoma University Law School began, upon proper application, the Board of Regents of the University of Oklahoma could either enroll the applicant in the white law school or admit no one at all to the first year class. On January 26, 1948, the State of Oklahoma jerry-built a three-professor law school for negroes.¹⁶

The plaintiff then moved for leave to file a petition for a writ of mandamus in the Supreme Court alleging evasion of that court's mandate, and on February 16, 1948, the Supreme Court refused this motion.¹⁷ In so refusing, the court made a point of the fact that segregation was not at issue in the proceedings.¹⁸

From the foregoing it is safe to conclude that today a state may follow a policy of segregated education as long as its laws insure

State ex rel. Michael v. Witham, 179 Tenn. 250, 257, 165 S. W. (2d) 378, 381 (1942); Sipuel v. Board of Regents, 180 P. (2d) 135, 138 (Okla. 1947).

14. Sipuel v. Board of Regents of the Univ. of Okla., 16 U.S.L. Week 4090, 8 C.C.H. U.S.S.C. Bull. 339, 68 S. Ct. 299 (1948).

15. Sipuel v. Board of Regents, 180 P. (2d) 135 (Okla. 1947).

16. United Press News Despatch, February 16, 1948.

17. Fisher v. Hurst, 8 C.C.H. U.S.S.C. Bull. 615, 16 U.S.L. Week 4167 (1948). Plaintiff is the former Ada Lois Sipuel.

18. The factual accuracy of this statement is at least doubtful, for an examination of respondents' brief (P. 19) shows plainly that the issue was presented.

substantially equal educational facilities for all groups and provide them as soon for one group as for another. It is not the state of the law, however, that is most important; rather it is the trend of the law.

Manifestly the Supreme Court is not prepared to declare segregation unconstitutional. It is equally certain, however, that the economic obstacles which the Supreme Court has placed in the path of segregated education will make it increasingly difficult for a state to maintain this policy in all levels of the educational system.¹⁹ The present position of the courts was well stated in *Wrighten v. Board of Trustees*²⁰ thus:

“Segregation in education may be considered as a necessity or a luxury, according to the geographical situs. *Each community will have to determine whether it can or desires to sustain the financial burden of segregation, and this therefore must be treated as a political rather than a judicial problem.*”²¹
(Italics supplied.)

In the ultimate analysis, the negro must, if democracy is a way of life and not a form of government, cease to be *distinguished* because of his color, for

“When a man has emerged from slavery, . . . there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.”²²

But when is this stage to be reached? Prior decisions indicate that the Supreme Court, believing the problem to be more social than judicial, will allow the people to set their own pace in reaching

19. Delaware recently announced that it would admit negro students to the University of Delaware to any course not offered by the Delaware State College for negroes.

Also it has heretofore been the studied practice of many states of paying colored school teachers on a lower scale than is paid to white teachers. Today it is well settled that such practice is invalid. *Alston v. School Board of City of Norfolk*, 112 F. (2d) 992 (C. C. A. 4th, 1940); *Morris (Hibbler, Intervener) v. Williams*, 149 F. (2d) 708 (C. C. A. 8th, 1945); *Mills v. Board of Education*, 90 F. Supp. 245 (N. D. Md. 1939); *McDaniel v. Board of Public Instruction*, 39 F. Supp. 638 (N. D. Fla. 1941); *Thomas v. Hibbits*, 46 F. Supp. 368 (N. D. Tenn. 1942); *Davis v. Cook*, 55 F. Supp. 1004 (N. D. Ga. 1944).

20. 72 F. Supp. 948 (E.D. S. C. 1947).

21. *Id.* at 950.

22. “The Civil Rights Cases,” 109 U. S. 3, 25, 27 L. Ed. 835, 844, 3 S. Ct. 18, 31, 45 Am. Rep. 232, 259 (1883).

the mental attitude necessary to the recognition of this tenet. There have, however, been many expressions to the effect that the answer lies in quick, decisive judicial action. The desirability of one approach over the other is a question susceptible of too many sociological and political implications to be the subject of a legal treatise. It is believed that the Supreme Court will in the future adhere to its established policy and allow the states and the individual members of both races to iron out their difficulties in the spirit of cooperation and realization of mutual benefit.

ROBERT E. LEAKE, JR.

CRIMINAL PROCEDURE—DISTINCT OFFENSES ENUMERATED IN THE SAME LAW—WHEN AND HOW CHARGEABLE IN THE SAME COUNT—Defendant was prosecuted and convicted of the crime of reckless driving under an ordinance¹ defining reckless driving as embracing, inter alia, driving a vehicle “while under the influence of intoxicating liquor or narcotic drugs.” The affidavit charged that the defendant “did operate said vehicle while under the influence of intoxicating liquor or drugs.” *Held*, remanded to allow the affidavit to be amended. The defendant is entitled to know whether the charge is driving while under the influence of intoxicating liquor or under the influence of drugs or both. Where the offenses or methods of committing the offense are charged disjunctively and alternatively, the precise accusation against the defendant is left uncertain. *City of Shreveport v. Bryson*, 33 So. (2d) 60 (La. 1947).

The right of an accused in a criminal prosecution to be informed of the nature and cause of the accusation is one of the corner stones of Anglo-American justice.² Thus, in the instant case, it was held that this right may be denied by the use of the word “or” in place of the word “and.”

Article 222 of the Louisiana Code of Criminal Procedure states a long-recognized rule:

“Several distinct offenses, or the intent necessary to constitute such offenses, disjunctively enumerated in the same law or in the same section of a criminal statute, may be cumulated in the same count, when it appears that they are connected with

1. Ordinance 207 of 1923 of the City of Shreveport, § 35.

2. This right is guaranteed both by the Constitution of the United States (Amendment VI) and by the Constitution of Louisiana (La. Const. of 1921, Art. 1, § 10).