Chicago-Kent Law Review

Volume 49 | Issue 1 Article 10

April 1972

Constitutional Law - Fourteenth Amendment Rights - Equal Protection of the Law against Racial Discrimination

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DISCUSSION OF RECENT DECISIONS

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT RIGHTS—EQUAL PROTECTION OF THE LAW AGAINST RACIAL DISCRIMINATION. In the recent case of *DeFunis v. Odegaard*,[1] Judge Shorett, of the Superior Court of King County, Washington ruled that the admissions preference accorded minority group students by the University of Washington School of Law violated the equal protection provision of the fourteenth amendment to the United States Constitution.

Mr. Marco DeFunis, Jr., made application for admission in the fall, 1971, at the University of Washington School of Law. He was white; had earned a 3.71 grade point average for his junior and senior years; held an undergraduate degree from the University of Washington; had an average law school aptitude test score of 582; and an average writing ability score of 61.3. The law school received over 1,600 applications, out of which over 200 letters of acceptance were sent. Mr. DeFunis, despite his good credentials, was not one of those accepted, but was placed on a waiting list and later sent a letter denying admission.

On the basis of validity studies conducted by the Educational Testing Service, a formula based on the University of Washington Law School's prior experience was developed for predicting a student's first year average. Mr. DeFunis' predicted first year average was 76.23. On the basis of an evaluation of all the applicants' credentials, the admissions committee granted letters of admission to seventy-four persons, including thirty-six minority group applicants, who had predicted first-year averages below that of Mr. DeFunis.

Mr. DeFunis brought suit in a Washington state court against the University of Washington and its law school alleging that the school's action in denying him admission was discriminatory, arbitrary, capricious and unreasonable. His action was successful.

Defendant Odegaard and the University of Washington have appealed this decision to the Supreme Court of the State of Washington. Due to the nature of the subject matter in this case several organizations, including the American Bar Association, the American Association of Law Schools and the Law School Admission Council have joined in filing an *amicus curiae* brief. Numerous other groups have indicated an interest in filing *amicus curiae* briefs.

Judge Shorett handed down an oral decision, and significant support for his ruling exists. A historical perspective may be gained from the following cases. The equal protection clause of the fourteenth amendment as it relates to the civil rights movement and specifically to the field of education must be viewed initially from the landmark decision made at the end of the nineteenth century, *Plessy v.*

[1] No. 741727, Superior Court of King County, Washington, oral decision September 22, 1971, findings of fact and conclusions of law October 18, 1971, Judge Shorett.

Ferguson.[2] Mr. Justice Brown in pronouncing the opinion of the court held that states could compel racial segregation in the use of public facilities, provided equal facilities were available to all races. Thus the separate but equal doctrine came into being and was sanctioned by the Supreme Court of the United States. In short, the Court had ruled that state-imposed segregation was not state discrimination.

All but one of the Justices subscribed to the opinion in *Plessy*. That one dissenter, Justice John Marshall Harlan, spoke most forcefully in denouncing the decision announced by his colleagues. And it was this dissenting opinion of Justice Harlan that stated what was to be adopted by the Court some four decades hence.

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[3]

For over forty years following *Plessy*, the Supreme Court of the United States heard no case which seriously challenged the validity of the separate but equal doctrine as applied to education. Then in 1954 the monumental decision, *Brown v. Board of Education of Topeka*,[4] was handed down. It left no doubt as to the status of *Plessy*.

> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.[5]

Brown was of course directed towards education at elementary and secondary levels. But even prior to this decision in *Brown* the cases with respect to institutions of higher learning had for all practical purposes eroded the separate but equal doctrine.

The first real break in the separate but equal doctrine occurred in 1938 as the result of efforts by a young Negro to enter law school at the University of Missouri. The state provided no law school at the state-operated university for Negroes but agreed to pay tuition at an out-of-state law school until a Negro law school could be established. This arrangement requiring Negroes, but not whites, to leave the state for a legal education was held by the Court to be a denial of equal protection. The really significant fact of the case, however, is

2 163 U.S. 537 (1896).
3 *Id.* at 559.
4 347 U.S. 483 (1954).
5 *Id.* at 495.

that it ordered the desegregation of the law school at the University of Missouri, in view of the failure of the state to provide a law school for Negroes.[6]

Further developments were slowed by the years of World War II but in 1948 the battle in the Supreme Court was renewed, this time against the University of Oklahoma Law School, and the results of the 1938 Missouri case were repeated. In *Sipuel v. Board of Regents*,[7] the Court held that a Negro, qualified to receive professional legal education offered by a state, cannot be denied such education because of her color.

> The State must provide [such education] 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.[8]

The Missouri and Oklahoma cases did not decide whether Negroes would have to return to all-Negro schools once they were established, but that question was pretty well put to rest by a decision in 1950 against the University of Texas.[9] In this case petitioner was denied admission to the state-supported University of Texas Law School, solely because he was a Negro and because state law prohibited the admission of Negroes to that law school. He was offered, but he refused, enrollment in a separate law school newly established by the state for Negroes. The University of Texas Law School had sixteen full-time and three part-time professors, 850 students, a library of 65,000 volumes, a law review, moot court facilities, scholarship funds, an Order of the Coif affiliation, many distinguished alumni, and much tradition and prestige. The separate law school for Negroes had five full-time professors, 23 students, a library of 16,500 volumes, a practice court, a legal aid association and one alumnus admitted to the Texas Bar. Obviously the facilities at this school were poor and its prestige small. Stressing intangible factors "which are incapable of objective measurement but which make for greatness in a law school,"[9a] the Court found the white and Negro schools unequal in educational quality and held that the Negro applicant had a personal constitutional right to be considered for admission to the University of Texas Law School *without regard to race.* The legal education offered the petitioner was not substantially equal to that which he would receive if admitted to the University of Texas Law School and thus the equal protection clause of the fourteenth amendment required that he be admitted to the University of Texas Law School.

A companion case to *Sweatt*, announced the same day, concerned the rights of a Negro graduate student enrolled in the theretofore all white University of Oklahoma.[10] The Court noted that restrictions imposed upon the appellant im-

[6] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
[7] 332 U.S. 631 (1948).
[8] *Id.* at 663.
[9] Sweatt v. Painter, 339 U.S. 629 (1950).
[9a] *Id.* at 634.
[10] McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950).

paired and inhibited his ability to study, to engage in discussions and exchange views with other students, and in general to learn his profession.

The *Sweatt* and *McLaurin* cases, with their heavy reliance on intangible aspects of the education process, all but completely ruled out the separate but equal doctrine for the graduate and professional levels of public education. True, the Court had not formally held separate but equal to be inapplicable to graduate and professional levels, but the Court's reliance on such things as the right to associate and to discuss ideas together suggested that segregated schools, however equal they may have been in other respects, could never provide equality between the races by separating them in the education process.

The significance of the above discussed cases is that the separate but equal doctrine expounded in *Plessy* was laid to rest. Furthermore, the dissent of Justice Harlan was now adopted by the full court in the *Brown* decision. No longer could the state differentiate between the color of one's skin no matter how equal the separate facilities might be! In Justice Harlan's words, the Constitution is color-blind and "in respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights."[11]

In a companion case to *Brown*,[12] the Supreme Court clarified the role race or color could play in a state's contacts with its citizens.

> Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.[13]

Continuing, the Court cited *Gibson v. Mississippi*:[14]

> As long ago as 1896, this Court declared the principle 'that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the States, against any citizen because of his race.'[15]

Mr. DeFunis attacked the law school's decision respecting his admission denial on several grounds, including (1) the failure of the admissions committee to give preference to Washington residents; (2) the averaging of three L.S.A.T. scores instead of taking the final and highest score with some discount for the learning factor; (3) the failure of the admissions committee to take into account the grades earned in graduate work; (4) the acceptance of any applicants with lower predicted first-year averages than his; and (5) the preferential consideration accorded to minority group applicants.

[11] Plessy v. Ferguson, 163 U.S. 537, 554 (1896).
[12] Bolling v. Sharpe, 347 U.S. 497 (1954).
[13] *Id.* at 499.
[14] 162 U.S. 591 (1954).
[15] 347 U.S. at 499.

Judge Shorett dismissed all of Mr. DeFunis' claims except his contention of the preferential consideration accorded to minority group applicants. The Judge noted "that the law school here wished to achieve greater minority representation and in accomplishing this gave preference to the members of some races."[16] The Judge concluded by stating that Mr. DeFunis and others in a like situation had not been accorded the equal protection of the law guaranteed by the fourteenth amendment to the United States Constitution, and in his findings of fact and conclusions of law Judge Shorett states:

> That in denying the plaintiff Marco DeFunis, Jr. admission to the University of Washington School of Law, the University of Washington has discriminated against said plaintiff and has not accorded to him equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution.[17]

The position that Judge Shorett took in this case appears to be that the state may not take into consideration a person's race or color, be it either Negro or Caucasian; in effect the state must remain color blind insofar as race alone is considered.

Mr. Chief Justice Warren speaking for the Court in *Brown* commented on the role of state and local governments in providing education:

> Such an opportunity [of an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[18]

In his oral decision, Judge Shorett commented on *Brown* as follows:

> In 1954, the United States Supreme Court in *Brown v. The Board of Education*, decided that public education must be equally available to all regardless of race. After that decision, the 14th Amendment could no longer be strecthed [*sic*] to accommodate the needs of any race. Policies of discrimination will inevitably lead to reprisals. In my opinion, the safe rule is treat all races alike and I feel that this is what is required of an equal protection clause.[19]

The issue presented by the case is perhaps best brought into focus by Charles E. Odegaard, President of the University of Washington.

> It is clear that the main issue in this case turns on the interpretation of the Fourteenth Amendment . . . as it is applicable to the admission of persons from educationally disadvantaged backgrounds to higher education. . . . The fundamental purpose of the university's affirmative action program in admissions is to fulfill the obligation called for by

[16] 57 A.B.A.J. 1234.

[17] DeFunis v. Odegaard, No. 741727, Superior Court of King County, Washington, findings of fact and conclusions of law, October 18, 1971, p. 9.

[18] 347 U.S. at 493.

[19] *Commentary on the DeFunis Case*, 1 Balsa Reports Newsletter No. 2, February 1972, p. 13.

the Fourteenth Amendment by providing equal educational access to all, including those who have been educationally disadvantaged.[20]

But achieving "equal educational access for all" is to wield a double-edged sword. For to carve out a preferred place for one person on the primary basis of his minority race is simultaneously denying another person the same opportunity as a result of his "majority" race!

In conclusion, two points or limitations must be kept in mind respecting the decision in *DeFunis*. First, this case deals not with primary or secondary, nor even undergraduate education, but rather with the higher institutions of learning, on the graduate and professional level. As the cases cited have illustrated, the courts, and in particular the United States Supreme Court, have a history of finding such institutions as requiring special treatment in contradistinction to standards relating to elementary education.

Secondly, Judge Shorett in this case specifically dealt with only one issue. If a law school admissions committee decide to establish new criteria for admission, excluding such traditional criteria as L.S.A.T. scores, undergraduate grade point averages, predicted first-year law school averages, and the like, a wholly different situation may exist. The fourteenth amendment equal protection clause may not dictate the outcome indicated in the present case. Judge Shorett appears to have left this "door" open in that he did expressly dismiss all of the complainant's allegations except for preferential consideration accorded to minority group applicants.

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[20] 57 A.B.A.J. 1234.