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CONSTITUTIONAL LAW-FOURTEENTH AMENDMENT EQUAL PROTECTION SEGREGATION IN RECREATIONAL FACILITIES FURNISHED BY A MUNICIPALITY

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CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT EQUAL PROTECTION—SEGREGATION IN RECREATIONAL FACILITIES FURNISHED BY A MUNICIPALITY—The plaintiff, a Negro, was denied admission to a municipal golf course under an ordinance setting aside certain public parks for the exclusive use of Negroes, and providing that all other public parks were for the exclusive use of white people.[1] Only the public parks provided for the "whites" had golf courses, though in all other respects the park facilities offered were substantially equal. The plaintiff brought an action in a federal district court for a declaratory judgment as to his civil rights and for an injunction protecting such rights. The injunction was denied on the grounds that the facilities offered to Negroes were "substantially equal" to those reserved to the "whites." On appeal, *held,* reversed. Statutory denial of the right to use the municipal golf course, solely because of race, is a denial of equal protection of the laws when equal facilities are not provided for members of the excluded race. *Beal v. Holcombe,* (5th Cir. 1951) 193 F. (2d) 384.

[1] Houston (Texas) City Code §1434 (1942).

The "separate but equal" doctrine[2] is based on the theory that equal protection of the laws can be provided under a system of segregation, so long as the facilities offered to one group are "equal" or "substantially equivalent"[3] to those reserved to the other. It has existed as an anomalous legal fiction since the adoption of the Fourteenth Amendment.[4] In recent cases the Supreme Court has expressly refused to reconsider this basic postulate, but rather has particularized the inherent lack of equality in the situation with which it was faced.[5] Considering these decisions together, however, it is clear that the Court is formulating a new approach to the problem of segregation, and will hereafter insist upon a real, rather than merely nominal, equality.[6] Emphasis has been placed upon the fact that the essence of the individual's right under the Constitution is personal and immediate,[7] and that equal protection is not provided by dealing with groups of persons as groups and according equal treatment to the members on some sort of a general average basis.[8] If in any respect an individual member of the group is being deprived of something available to a member of the other group, equal protection has not been afforded.[9] It would seem that the logical extension of this reasoning would, in itself, be a

[2] The doctrine was first expressed by the Supreme Court in Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138 (1896), a case involving segregation on interstate carriers.

[3] Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232 (1938); Toliver v. Board of Education, 360 Mo. 671, 230 S.W. (2d) 724 (1950); Law v. Baltimore, (D.C. Md. 1948) 78 F. Supp. 346. Cf. Sweatt v. Painter, 339 U.S. 629, 70 S.Ct. 848 (1950).

[4] For an excellent discussion of the merits of the doctrine see Ransmeier, "The Fourteenth Amendment and the 'Separate but Equal' Doctrine," 50 MICH. L. REV. 203 (1951). See also the Brief of Amici Curiae in Support of the Petitioner filed on behalf of the Committee of Law Teachers Against Segregation in Sweatt v. Painter, supra note 3. The brief is reprinted in full in 34 MINN. L. REV. 289 (1950).

[5] E.g., Sweatt v. Painter, supra note 3; McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S.Ct. 851 (1951); Henderson v. United States, 339 U.S. 816, 70 S.Ct. 843 (1950); Mitchell v. United States, 313 U.S. 80, 61 S.Ct. 873 (1941). By adhering to traditional judicial restraint in considering constitutional questions the court in each case refused to reconsider Plessy v. Ferguson, supra note 2. It is doubtful whether or not the question could be squarely presented to the court in such a way as to *require* a reexamination of the doctrine.

[6] Sweatt v. Painter, supra note 3, and McLaurin v. Regents, supra note 5, have made segregation in state supported graduate education a practical impossibility. See note in 3 FLA. L. REV. 358 (1950). The rationale of these cases would seem to carry over to primary and secondary education. 36 VA. L. REV. 797 (1951). But cf. Briggs v. Elliott, (D.C. S.C. 1951) 98 F. Supp. 529 (segregation upheld in secondary schools), judgment vacated and case remanded for further facts, 342 U.S. 350, 72 S.Ct. 327 (1952) (Justices Black and Douglas dissenting).

[7] Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836 (1948). See also Sweatt v. Painter, supra note 3, Missouri ex rel. Gaines v. Canada, supra note 3.

[8] Corbin v. County School Board, (4th Cir. 1949) 177 F. (2d) 924; Carr v. Corning, (D.C. Cir. 1950) 182 F. (2d) 14. See note 15 infra. But this is not to take from the states the power reasonably to classify according to criteria relevant to a legitimate legislative purpose.

[9] Law v. Baltimore, supra note 3; Mitchell v. United States, supra note 5; Henderson v. United States, supra note 5. An attempt to conceal discrimination by denying "whites" access to Negro facilities is of no avail for equal protection of the laws is not provided by the "indiscriminate imposition of inequalities." Shelley v. Kraemer, supra note 7 at page 22.

repudiation of the "separate but equal" doctrine, for it can be argued that when Negroes are denied the enjoyment of "white" facilities, the individual members of the Negro race are denied something available to the members of the "white" races. Nevertheless, the broad principle of segregation has been retained, the Court using the argument that the protected constitutional rights are individual rights merely to insure real equality of facilities.

The decision of the court in the principal case is clearly correct insofar as it requires the city to provide equal golf facilities for Negroes.[10] However, the decree entered permitting the city a reasonable time within which to provide for regulations for the use of the course "which, while preserving segregation, will be in full and fair accord with its principle,"[11] is of dubious merit.[12] When a facility is offered exclusively for the use of different groups at different hours of the day, or on different days of the week, there is clearly physical equality. But it is equally clear that temporal segregation does not afford individual equality, especially when the time intervals are substantial.[13] In considering the availability of accommodations, time is certainly a factor, and if the discrepancy is great, Negroes simply do not have equal facilities. If the city is intent upon maintaining segregated recreational facilities, they could perhaps do so by providing separate facilities substantially equal to those provided for the "whites,"[14] although the cost of such an enterprise would undoubtedly be prohibitive.[15] While it can be argued that the personal nature of constitutional rights makes segregation per se a denial of equal protection, the continued recognition by the Court of the "separate but equal doctrine" indicates that it is not ready to carry this reasoning to its logical

[10] The trial court held that the facilities offered to the Negroes were substantially equal to those offered to the "whites" even though there were no golfing facilities provided for Negroes.

[11] Principal case at 388.

[12] A method of temporal segregation on golf courses was first suggested in Law v. Baltimore, supra note 3. This has been upheld as meeting the "equality" requirement of the "separate but equal" doctrine. Rice v. Arnold, (Fla. 1950) 45 S. (2d) 195, judgment vacated by the Supreme Court, 340 U.S. 848, 71 S.Ct. 77 (1950), and the Supreme Court of Florida directed to reconsider in light of Sweatt v. Painter, supra note 3 and McLaurin v. Oklahoma, supra note 5. The Florida court distinguished those cases, and re-entered judgment denying mandamus. (Fla. 1951) 54 S. (2d) 114.

[13] As the time intervals become less substantial the discrimination approaches de minimis, e.g., tennis courts available to the two races on alternate hours. See Hyman, "Segregation and the Fourteenth Amendment," 4 VAND. L. REV. 555 (1951).

[14] Where there is an objective physical equality of facilities, and commingling of the races affords no particular subjective value to the individual, the court is not likely to strike down the segregation. In this respect the graduate education cases may be distinguished, for there the free interchange of ideas is essential to the intellectual development of the individual. Cf. 35 MINN. L. REV. 399 (1950).

[15] In Law v. Baltimore, supra note 3, it was pointed out that where there were three golf courses for white citizens and only one for Negroes, the facilities were not equal, for the white golfers had a greater variety of terrain over which to play. It would seem then that in providing separate facilities for Negroes the city would have to have the same number of courses for a relatively small segment of the golfing population as they have for the large number of white golfers. Each of these would have to be substantially equal in quality to the white courses.

conclusion. The Court is in a position where it may extend the broad principles of the recent cases to such situations and at such time as it sees fit to do so, in the meantime requiring an almost prohibitive standard of equality where it feels that the racial friction caused by commingling of the races will be the greatest.[16] If it is a correct proposition that segregation is in a large measure a device for effecting discrimination,[17] strong pressure by the Court to secure practical equality should have a basic corrective result, even though in law the segregation rests upon untenable grounds.

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[16] Compare, for example, the relative intensity of the discriminatory feeling with respect to the right of the Negro to vote, and his right to marry a white person of his choice. See Berger, "The Supreme Court and Group Discrimination Since 1937," 49 COL. L. REV. 201 (1949).

[17] See MYRDAL, AN AMERICAN DILEMMA, c. 26 (1944).