Michigan Law Review

Volume 46 | Issue 5

1948

CONSTITUTIONAL LAW-FOURTEENTH AMENDMENT-EQUAL PROTECTION OF THE LAWS-RACIAL SEGREGATION IN PUBLIC EDUCATIONAL INSTITUTIONS

Neal Seegert S.Ed.
University of Michigan Law School

COMMENTS

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—EQUAL PROTECTION OF THE LAWS—RACIAL SEGREGATION IN PUBLIC EDUCATIONAL INSTITUTIONS—Segregation of races, particularly separation of white and colored races, has long been condoned by American courts as permissible under the Fourteenth Amendment to the Constitution of the United States. Underlying the traditional view is the idea that the equal protection clause is not violated by segregation so

long as equal facilities are provided for both races.[1] On this basic premise a large number of jurisdictions, particularly the southern states, have predicated constitutional provisions and statutory enactments compelling racial segregation,[2] while a number of other states where segregation has not been forbidden by express constitutional or statutory provision have achieved the same practical result.[3] The possibility that the Supreme Court of the United States may have occasion to pass on the validity of the basic assumption[4] makes it desirable to review in some detail the attitude of the courts toward this problem.

I

The first consideration is the basis of the assumed premise that segregation is constitutional where equal facilities are provided. Perhaps the earliest enunciation of the doctrine occurred in the dictum of the United States Supreme Court in the case of *Hall v. De Cuir*.[5] The case involved a public carrier, but the court stated obiter that segregation in public schools did not violate the Fourteenth Amendment if equal facilities were provided. A federal court in an early case actually involving segregation in public schools followed the cue suggested by the dictum of the *Hall* case.[6] In 1889 the United States Supreme Court was presented with a case arising under the Fourteenth Amendment and dealing with compulsory segregation of white and negro children in public schools, but it refused to consider the question because it was not properly before the court.[7] Again by way of dictum in *Plessy v. Ferguson*[8] the United States Supreme Court reiterated the "equal facilities" doctrine. Meanwhile, many state courts as well as lower federal courts followed the lead and proclaimed the legality of segregation in public schools.[9] Finally, in 1927, the Supreme Court

[1] See United States Const., Fourteenth Amendment.

[2] Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Missisippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia, all practice compulsory segregation, twelve of them by virtue of constitutional provision. The Alabama Constitution, Art. XIV, § 256, and the Alabama statute, Ala. Code (1940) tit. 52, § 93 are representative. For a survey and discussion see STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 170 et seq. (1910).

[3] See Payne, "Negroes in the Public Elementary School of the North," 140 ANNALS 224 at 227 (1928).

[4] See Part 2 of this comment for a discussion of current cases.

[5] 95 U.S. 485 (1877).

[6] United States v. Buntin, (C.C. Ohio 1882) 10 F. 730.

[7] Cumming v. Richmond County Board of Education, 175 U.S. 528, 20 S.Ct. 197 (1899).

[8] 163 U.S. 537, 16 S.Ct. 1138 (1896).

[9] State v. McCann, 21 Ohio St. 198 at 209 (1871); Ward v. Flood, 48 Cal. 36 at 49 (1874); Cory v. Carter, 48 Ind. 327 at 344 (1874); Lehew v. Brummell,

was confronted with the question in the case of *Gong Lum v. Rice*.[10] It was argued there that to compel a full-blooded Chinese school child to attend a school for colored children violated the Fourteenth Amendment. The Court tacitly asumed the basic premise and held that the equal protection clause was not violated; it refused to consider the issue of the constitutionality of segregation per se in view of the *Cummings* and *Plessy* cases. Later, in the case of *Missouri ex rel. Gaines v. Canada*,[11] the Court held that a state does not discharge its obligation to provide equal educational facilities by offering to pay the tuition of a colored student in an out-of-state law school. Thus, up to now the Supreme Court has not squarely considered the basic question of the validity of racial segregation in public education institutions in the light of the Fourteenth Amendment.

2

There are, however, a number of very recent cases involving the question of racial segregation in public schools that may well force a reconsideration of the whole problem. A radical departure from the tacit assumption of the legality of racial segregation was expressed by the federal district court for the southern district of California in *Mendez v. Westminster School District*.[12] Judge McCormick there said: "The equal protection of the laws pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, text books, and courses of instruction. . . . A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage."[13] The circuit court of appeals affirmed[14] but preferred to avoid the basic constitutional question, and based its decision entirely on the violation of a California statute restricting segregation.[15]

103 Mo. 546, 15 S.W. 765 (1891); Bluford v. Canada, (D.C. Mo. 1940) 32 F. Supp. 707; State ex rel. Michael v. Witham, 179 Tenn. 250, 165 S.W. (2d) 378 (1942). See also United States Const., Fourteenth Amendment. On the subject generally see comments in 82 UNIV. PA. L. REV. 157 (1933) and 30 MINN. L. REV. 219 at 254, 271, 282 (1946).

[10] 275 U.S. 78, 48 S.Ct. 91 (1927).

[11] 305 U.S. 337, 59 S.Ct. 232 (1938). For the final outcome of the case see 344 Mo. 1238, 131 S.W. (2d) 217 (1939), noted in 13 So. CAL. L. REV. 68 (1939). A similar result was reached in Pearson v. Murray, (Md. 1936) 182 A. 590; 20 MINN. L. REV. 673 (1936); 45 YALE L. J. 1296 (1936).

[12] (D.C. Cal. 1946) 64 F. Supp. 544, 47 COL. L. REV. 325 (1947).

[13] (D.C. Cal. 1946) 64 F. Supp. 544 at 549.

[14] (C.C.A. 9th, 1947) 161 F. (2d) 774; 56 YALE L. J. 1059 (1947); 30 MINN. L. REV. 646 (1946).

[15] According to a letter from National Association for Advancement of Colored People, Dec. 8, 1947, the case has not been appealed.

The question has similarly been raised in South Carolina by the case of *Wrighten v. Board of Trustees*,[16] where the issue was presented by a negro student desiring to enter the law school of the University of South Carolina. The state provided no facilities for legal education of colored students, but the court was willing to allow the state time to establish a law school and conditioned its decree on that event. The other alternatives given the state by the decree were to discontinue all legal education, or to accept Wrighten in the existing white law school.[17] The court squarely held that segregation according to race was not an unreasonable classification under the equal protection clause of the Fourteenth Amendment, and was therefore permissible.

Two cases have arisen in Louisiana raising the segregation issue: *Johnson v. Louisiana State University*, and *Hatfield v. Louisiana State University*, the former concerned with the medical school and the latter with the law school. These cases have not yet been tried.[18] Likewise in Texas the case of *Heman Marion Sweatt v. Members of the Board of Regents of the University of Texas* has raised the issue.[19]

Finally, in the case of *Sipuel v. Board of Regents of the University of Oklahoma*[20] the Supreme Court of Oklahoma upheld segregation, claiming that the Fourteenth Amendment is not violated by denial of entry to a colored student to the law school where no separate facilities for legal education of colored students are provided unless and until the student has made his wants and desires known to the proper authorities. It thus attempted to qualify the *Gaines* case.[21] On writ of certiorari the Supreme Court of the United States reversed this decision in an opinion handed down January 12, 1948.[22] The court in a brief per curiam opinion, however, ignored the fundamental question of the validity of segregation and based its decision solely on the *Gaines* case,[23] adding as the only qualification that equal facilities must be provided as promptly for the petitioner as they are for applicants of any other group. Thus again the Supreme Court has left the funda-

[16] (D.C. S.C. 1947) 72 F. Supp. 948.

[17] No appeal has been taken from this order. South Carolina has set up a law school of sorts, according to a letter from N.A.A.C.P., Dec. 8, 1947.

[18] Letter, N.A.A.C.P., Dec. 8, 1947.

[19] There have been two appeals, the first of which was decided March 26, 1947, by the Court of Civil Appeals for the Third Judicial District of Texas and was remanded to the District Court of Travis County for trial on the issue of the illegality of segregation. The trial was held in May, 1947, and the case is now on appeal again to the same Court of Civil Appeals.—Letter from N.A.A.C.P., Dec. 8, 1947.

[20] (Okla. 1947) 180 P. (2d) 135.

[21] 305 U.S. 337, 59 S.Ct. 232 (1938).

[22] (U.S. 1948) 68 S.Ct. 299.

[23] 305 U.S. 337, 59 S.Ct. 232 (1938).

mental question unanswered. If this attitude is to be continued, it is apparent that it will be very difficult to present a case which will decide the issue, since the states which compel segregation are the very states least likely to provide facilities which will meet the equality test. Thus the Supreme Court will always be able to avoid the fundamental question by finding that the facilities provided colored students are not in fact adequate or equal.[24]

3

As previously pointed out, the question of the validity of segregation by race in public educational institutions is still unanswered insofar as a direct decision by the Supreme Court of the United States is concerned. As new cases arise in that court, it will be faced with three possible alternatives. First, it can avoid this constitutional issue if possible. This alternative, of course, accords with the often repeated but frequently violated rule of declining to decide particular constitutional issues unless necessary to the decision of the case.[25] Secondly, it can resolve the question by deciding that racial segregation is permissible under the Fourteenth Amendment if equal facilities are provided. Or thirdly, it may decide that racial segregation per se violates the equal protection clause of the Fourteenth Amendment. Insofar as the latter two alternatives are concerned, the only possible arguments for the separate but equal facilities view are, first, adherence to dicta or assumption of previous cases as a matter of precedent, especially since many lower federal courts, as well as state courts, have adhered

[24] On January 17, 1948, the Supreme Court of Oklahoma issued an order directing the trial court to take such proceedings as might be necessary to carry out the mandate of the Supreme Court of the United States. The trial court entered an order directing the Oklahoma State Regents for Higher Education to (1) enroll plaintiff in the first year class at the School of Law of the University of Oklahoma, or (2) admit no students to that first year class until a separate and substantially equal school of law for negroes should be established, but if such separate school should be established then not to enroll plaintiff in the University of Oklahoma. The regents claimed to have set up a separate school as required. Plaintiff did not attend but rather petitioned the Supreme Court of the United States for a writ of mandamus to compel compliance with the mandate of January 12, 1948. The petition was denied on February 16, 1948, Fisher v. Hurst, (U.S. 1948) Adv. Op. The court held that the original petition for certiorari did not present the question whether a state could satisfy the due process clause of the Fourteenth Amendment by establishing a separate law school for negroes, and remanded the petition to the trial court for a determination of any proceedings arising under its order. Justice Murphy thought that evidence should have been heard as to whether the Oklahoma court's decision constituted an evasion of the mandate. Justice Rutledge dissented, asserting that the action of the Oklahoma courts was inconsistent with the mandate on its face.

[25] Burton v. United States, 196 U.S. 283 at 295, 25 S.Ct. 243 (1905).

to the separate but equal facilities doctrine; and, secondly, the possible social effects which repudiation of the doctrine may have in areas now practicing segregation. The very weakness of these arguments is doubtless a compelling reason for avoidance of a decision on the issue at all, since in the absence of a repudiation of the separate but equal facilities doctrine, the status quo may be retained even though the plight of the race discriminated against may still be alleviated by stricter insistence on truly equal facilities. Indeed, the trend of the cases has been to tighten the requirements of an equal facility.[26] This course inevitably will involve the Supreme Court in a determination of what constitutes an equal facility,[27] a problem which will undoubtedly arise more and more frequently in the future. On the other hand, a decision that the equal protection clause is not satisfied by equal but separate facilities will bring this field of the law more in accord with the pronounced attitude of the Court in finding racial discrimination unconstitutional in other situations, for example, segregation in interstate transportation,[28] exclusion of negroes from jury service,[29] differentials in salaries of white and negro public school teachers,[30] residential segregation prescribed by state legislation or municipal ordinance.[31]

Finally, it can hardly be denied that the facilities afforded the minority race are seldom in fact equal and almost always result in discrimination. Gunnar Myrdal sums up the problem in these words:

> " . . . Negroes to get equal accommodations, but separate from the whites. It is evident, however, and rarely denied, that there is practically no single instance of segregation in the South which has not been utilized for a significant discrimination. The great difference in quality of service for the two groups in the segregated set-ups for transportation and education is merely the most obvious example of how segregation is an excuse for discrimination." [32]

[26] For example see Jones v. Newlon, 81 Colo. 25, 253 P. 386 (1927); Patterson v. Board of Education, 11 N.J. Misc. 179, 164 A. 892 (1933), affd., 112 N.J.L. 99, 169 A. 690 (1934); Jones v. Board of Education, 90 Okla. 233, 217 P. 400 (1923). See also the note in 103 A.L.R. 713 (1936).

[27] It is not the purpose of the writer to go into this question here. An excellent annotation may be found on this point in 103 A.L.R. 713 (1936).

[28] Morgan v. Virginia, 328 U.S. 373, 66 S.Ct. 1050 (1946).

[29] Carter v. Texas, 177 U.S. 442, 20 S.Ct. 687 (1900); Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164 (1940); Hill v. Texas, 316 U.S. 400, 62 S.Ct. 1159 (1942).

[30] Alston v. School Board, (C.C.A. 4th, 1940) 112 F. (2d) 992, cert. den., 311 U.S. 693, 61 S.Ct. 75 (1940).

[31] Harmon v. Tyler, 273 U.S. 668, 47 S.Ct. 471 (1927); Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16 (1917); Richmond v. Deans, (C.C.A. 4th, 1930) 37 F. (2d) 712, affd., 281 U.S. 704, 50 S.Ct. 407 (1930).

[32] 7 GUNNAR MYRDAL, AN AMERICAN DILEMMA 581 (1944).

Various statistical studies would appear to bear out these assertions.[38] Thus in making a decision on this point the Supreme Court can hardly allow itself to ignore the fact that the separate but equal facilities doctrine does not in practice prevent racial discrimination.

Neal Seegert, S.Ed.

---

[38] See BLOSE and CAILVER, STATISTICS OF THE EDUCATION OF NEGROES 6, Table 8 (1944). For further material, see 56 YALE L. J. 1059 at 1062 (1947), and 14 J. OF NEGRO EDUCATION 509 et seq. (1945); 15 id. 263 et seq. (1946); 16 id.