

### **Getting to *Brown v. Board of Education* Through Judicial Restraint**

The following hypothetical opinion is an abridged melding of the factual statements recited by Chief Justice Warren in *Brown v. Board of Education* (1954), 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R.2d 1180, with the legal reasoning expressed by Mr. Justice Harlan in his dissent in *Plessy v. Ferguson* (1896), 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256. The hypothetical opinion shows that – as laudable as the result was in *Brown* – the Warren court’s disregard in that case for longstanding principles of judicial restraint was not necessary in order to reach that result.

**Judge Eugene A. Lucci**

**BROWN, et al.**

**v.**

**BOARD OF EDUCATION OF TOPEKA, KANSAS, et al.**

Decided May 17, 1954

Mr. Justice HARLAN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called “separate but equal” doctrine announced by this Court in *Plessy v. Ferguson*. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not “equal” and cannot be made “equal,” and that hence they are deprived of the equal protection of the laws. Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among “all persons born or naturalized in the United States.” Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect.

Chief Justice Warren believes that, “This discussion and our own investigation [should] convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . . [And] what others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty. . . . An additional reason for the inconclusive nature of the Amendment’s history, with respect to segregated schools, is the status of public education at that time.” However, under basic

principles of judicial restraint, it is the responsibility of this Court to discern the origin and purpose of the law as a necessary predicate for evaluating whether that law is constitutional. This Court chooses not to abandon that responsibility, but rather chooses to fulfill it to the best of its ability. If the task proves difficult, that is no reason to abandon the attempt.

In the South, when the Civil War Amendments were passed, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this court until 1896 in the case of *Plessy v. Ferguson*, involving not education but transportation.<sup>1</sup> American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

Chief Justice Warren argues that principles of judicial restraint are inadequate to resolving the dispute before this court. He states, "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." However, the Court believes that the longstanding principles of judicial restraint need not be jettisoned in order to resolve this dispute.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may

---

<sup>1</sup> The doctrine [of separate but equal] apparently originated in *Roberts v. City of Boston*, 1850, 5 Cush. 198, 59 Mass. 198, 206, upholding school segregation against attack as being violative of a state constitutional guarantee of equality.

be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

We have before us several state enactments that compel the separation of the two races in public schools. Thus, these states are regulating the use of their respective public schools by citizens of the United States solely upon the basis of race. However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the constitution of the United States.

It is beyond dispute that the operation of schools by the government is a public work, established by a public authority, intended for the public use and benefit, the use of which is secured to the whole community.

In respect of civil rights, common to all citizens, the constitution of the United States does not permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But, that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," and that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship.

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through many generations has been held in slavery, all the civil rights that the superior race enjoy." They declared, in legal effect, "that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." We also said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right, most valuable to the colored race – the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy; and discriminations which are steps towards reducing them to the condition of a subject race."

It was, consequently, adjudged that a state law that excluded citizens of the colored race from juries, because of their race, however well qualified in other respects to discharge the duties of jurymen, was repugnant to the Fourteenth Amendment. Referring to the previous adjudications, this court declared that "underlying all of those decisions is 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 the states against any citizen because of his race. All citizens are equal before the law.” The decisions referred to show the scope of the recent amendments of the constitution.

It is argued that the laws requiring separate but equal public schools do not discriminate against either race, but prescribe a rule applicable alike to white and black citizens. But this argument does not meet the difficulty. Everyone knows that the laws in question had their origin in the purpose, not so much to exclude white persons from public schools attended primarily by blacks, as to exclude blacks from public schools attended primarily by or assigned to white persons. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while attending public schools. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to these laws, is that they interfere with the personal freedom of citizens. “Personal liberty,” it has been well said, “consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law.” 1 Blackstone's Commentary 134. If a white family and a black family choose to reside in the same public school district and to send their children to the same public school, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for public schools to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to teach. It is quite another thing for government to forbid citizens of the white and black races from attending the same public school. If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not attend the same public school, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court room, and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if these state laws are consistent with the personal liberty of citizens, why may not the state require the separation in public schools of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given to these questions is that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But courts do not have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable. The rule is that, “the legislative intention being clearly ascertained, the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment.” Sedg. St. & Const. Law, 324. There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are co-ordinate and separate. Each must keep within the limits defined by the constitution. And the courts best

discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly, sometimes literally, in order to carry out the legislative will. But, however construed, the intent of the legislature is to be respected if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

In the *Dred Scott* case, it was adjudged that the descendants of Africans who were imported into this country, and sold as slaves, were not included nor intended to be included under the word "citizens" in the constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that, at time of the adoption of the constitution, they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." The Civil War Amendments to the constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the states, people who view themselves as a dominant race – a superior class of citizens – which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race.

The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public schoolrooms occupied by white citizens?

The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the Civil War, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.

The arbitrary separation of citizens, on the basis of race, while they are in a public school system, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds. If evils will result from the commingling of the two races in public schools established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race.

The doctrine of "separate but equal" is inconsistent with the personal liberty of citizens, white and black, and hostile to both the spirit and letter of the constitution of the United States. Slavery, as an institution tolerated by law, has disappeared from our country; but under the "separate but equal" doctrine there remains a power in the states, by sinister legislation, to

interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the "People of the United States," for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guaranty given by the constitution to each state of a republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.

In *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 850, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "\* \* \* his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system."

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

For the foregoing reasons, we conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate public educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

**IT IS SO ORDERED.**