COMMENTS

State Segregation Laws and Judicial Courage

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So much criticism which I deem unsound has been written about the United States Supreme Court's recent decisions holding that segregation of colored children in public schools violates our Constitution, that it would seem to be timely for some lawyer of the white race to make a realistic report on the historic facts leading up to those decisions. As Al Smith used to say, "Let's look at the record":

The case of *Dred Scott vs. Sandford*[1] was decided by the United States Supreme Court on March 6, 1857. That decision, historians tell us, had much to do with bringing on the Civil War. In substance, it held that the Constitution of the United States did not protect a person of the Negro race, even in a state whose laws made him a free man, and that a Negro and his children were not citizens and did not have the constitutional rights of citizens.

Then our nation fought the Civil War with the result that slavery in the United States was abolished.

Thereupon, to the end of implementing the Emancipation Proclamation and also undoing the legal effect of the *Dred Scott* decision, the Fourteenth Amendment to the Constitution of the United States was adopted. Section 1 of that Amendment reads:

> 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. 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 wthin its jurisdiction the equal protection of the laws.

Then on May 18, 1896, in the case of *Plessy vs. Ferguson*[2] the Supreme Court of the United States first sanctioned the so-called "separate but equal" doctrine relative to segregation of the races. That case involved transportation, but did not involve schools, and the Court held that a law of the State of Louisiana, compelling the segregation of

* See Contributors' Section, p. 117, for biographical data.

[1] 60 U.S. (19 Howard) 691 (1857).

[2] 163 U.S. 537 (1896).

Negroes from white persons in trains, was not unconstitutional. The case arose only approximately thirty years after the close of the Civil War, when many white people, including some judges, were perhaps not as yet reconciled to the proposition that Negroes are citizens with the civil rights of citizens. The only mention of schools was a statement in the majority opinion of the Court, by way of argumentative dicta, that certain state courts had upheld segregation of Negoes and whites in their schools, and that such segregation had been practiced in the schools of the District of Columbia without the constitutionality thereof seeming to have been questioned. It must be borne in mind that at that time public education had not been advanced very far, there was little compulsory education, and it was not very long after the time when, as expressed in *Brown v. Board of Education, infra,* "any education of Negroes was forbidden by law in some states."

A dissenting opinion in the *Plessy vs. Ferguson* case was rendered by Associate Justice John M. Harlan. In the course of his dissent he used the following deathless language:

> 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.
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> In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.

This "separate but equal" doctrine, though actually decided only with regard to transportation, was thereafter for many years assumed by the courts to uphold laws providing for the segregation of the races in the public schools; but such long acquiescence could not permanently crush the truth expressed in the above language from the Harlan dissent.

Then came the case of *Brown vs. Board of Education*[3] decided on May 17, 1954. The Supreme Court, while not specifically mentioning Justice Harlan's dissent, clearly vindicated its prophetic language. The Court decided that the segregation of children in public schools, solely on the basis of race, even though the physical facilities and other tangible factors may be equal, brands the children of the minority group with the stigma of inferiority and deprives them of equal educational opportunities. The Court concluded that in the field of public education the doctrine of "separate but equal" has no place, and that segregation in the

[3] 347 U.S. 483 (1954).

public schools deprives the Negro children of that equal protection of the laws guaranteed them by the Fourteenth Amendment.

Chief Justice Warren wrote the opinion. Some commentators have spoken sneeringly of this decision as made by the "Warren court", as though that were some sort of a vile epithet; but it must be borne in mind that the opinion was the unanimous decision of all members of the Supreme Court. As a senior member of the bar, I salute the members of our Supreme Court for having the courage to uphold the Constitution despite the prospect of bitter criticism from some sources.

The indisputable facts of history show that the decision carries out honestly and fearlessly the very purpose and soul of the Fourteenth Amendment to our Constitution. When a Negro man is heavily taxed to support a school, at peril of having his home sold if he does not pay the tax, then if his child is excluded from attending that school, solely because of his race, who could claim with mental honesty that he and his child are not denied the equal protection of the laws? When critics complain that this decision violates states' *rights*, the answer is that it only rectifies states' *wrongs*.

I make no claim that the Supreme Court's recent decisions have completely solved the Negro problem. That problem will have to be further solved in the hearts and minds of the white people, and the good sense and reasonable patience of the colored people. If some whites feel that the problem is extremely difficult to deal with, perhaps a disinterested person living on another continent might feel that some measure of just retribution is at work, because whites were the ones who brought the Negoes to this continent under the lash and in chains. At any rate, we must now find ways and means to abide by our Constitution.

Any white parents who have trouble in reconciling themselves to the thought of Negro children and white children being taught in the same public schools, must face the fact that the only alternative would be to change the Fourteenth Amendment of our Constitution. I seriously doubt that any considerable number of conscientious white persons would want to change that amendment so as to state that: "No state . . . shall deny to any person within its jurisdiction, *except a Negro*, the equal protection of the laws."

Please let us not lapse into unwarranted criticism of a Supreme Court that has had the courage to apply the Fourteenth Amendment in accordance with its true meaning and intent. Some other minorities may well need the protection of like judicial courage as time marches on.