Court Must Say "No" to Segregation*

GUEST COMMENTARY
By
W. B. Allen
Associate Professor of Government
Harvey Mudd College – Claremont, California

It will come as a complete shock to most Americans to learn that the U. S. Supreme Court has never handed down a simple "NO" to segregation!

Ever since the court's decision in *Brown v. Bd. of Education* in 1954, it has been popularly held that segregation itself was outlawed. But that is a mistake.

And much of the wonder about the court's approaching decision in the case, *The Regents of the University of California v. Allan Bakke,* is based on our failure to recognize or admit that segregation itself was never outlawed.

When one reads through the massive files of the *Bakke* case—beginning with his ultimately successful bid in California courts to be admitted to medical school without regard to race, creed, color, or sex—the most striking fact is that hundreds of learned lawyers and jurists have found thousands of indirect ways to deny or affirm this one, simple principle: segregation is wrong. The consequence is that citizens generally believe the *Bakke* case to be about almost everything but the legality of segregation.

The Supreme Court seems to be aware of the problem: How do we say "NO" once and for all to segregation, without spawning endless social political struggles on the part of people with established power and a vested interest in keeping the power to segregate?

The problem begins with the very first Supreme Court case that made the power to segregate a matter of Constitutional law. The case as *Plessy v. Ferguson*—the very case which wrote the rule, "separate but equal."

Under the notion that where true equality was maintained there was no violation of human rights in the separation of races, the nation's courts set about trying to find true equality. This, of course, required the power of government both to define equality and to enforce separation. Because, in theory, equality was preserved, no rights were thought to be lost.

When the Warren Court struck down school segregation in 1954, it did not strike down the theory. It simply argued that, in practice, equality could not be achieved by separation. But it accepted the notion of the power of government as a tool for creating equality. The American people were left with the same power, under the condition that it could only be used—if used at all—to integrate.

One element of *Plessy v. Ferguson* stands out far more important than the theory of "separate but equal." That is Justice Harlan's dissent, which urged that the government had no power as such to decide how citizens would be equal. Harlan coined the phrase oft-repeated since, "The Constitution is color-blind." He meant that what was important for the citizen was not his status relative to others but the absolute guarantee of his right equally only if no citizens were subject to being singled out by government to live one way or the other.

When one studies these issues he has to be struck by a great peculiarity of American law—perhaps the greatest. It is peculiar that the Harlan dissent, in practice, has become the law of the land without ever being expressly declared so in over 80 years! It is not unusual for a dissenting opinion later to be majority opinion in the court.

Most students of the court remember the miraculous changes of the court during the New Deal. Perhaps the best examples of dissent setting the pace of the future are the dissents of Justice Homes in the freedom of speech cases *Abram v. United States* and *Gitlow v. New York* in 1919 and 1925. These dissents developed the famous "clear and present danger" test for dealing with subversive activity. They became the declared "law of the land," however, within only a few years of those cases.

Harlan's dissent—"the Constitution is color-blind"—has perhaps been the most frequently quoted of any dissenting opinion of the court. To citizens, lawyers, and judges alike it fully expressed the purpose and character of the American constitution. Still, no court has formally made it the "law of the land."

This is the fact which explains the odd situation of the State of California dragging a private citizen to court and demanding the right and power to discriminate against him on the basis of his color. As much as all desire a color-free society, the temptation to use this awesome power is apparently just too great for states to give it up voluntarily and without resistance.

The Supreme Court's decision in the *Bakke* case should be very near now. It is all that lacks in the massive record of this case to allow us to finish our analysis. But even now we can risk a prediction.

Assuming that dissension in the court is not so intense as to force postponement until next fall, the court should succeed in placing the hundred-year history of race litigation permanently behind us. This aberration in legal history—arguing over a governmental power which never should have existed—will proved matter for popular and scholarly speculations for a long time to come. But once and for all we will have said "NO" to segregation.

---

[*] Published in the *West County Times*, Pinole, California, June 14, 1978.