

Discussion 11: Desegregation

Summary points from last class on substantive due process

Due process was originally intended to deal with the procedural protections you are afforded under federal law. Then came the idea of substantive due process.

Lochner Era: The time between *Lochner v. New York* (1904) and *West Coast Hotel v. Parrish* (1937) in which the Supreme Court repeatedly struck down economic and social legislation regulating liberty of contract. The Court interpreted freedom of contract to be a protection afforded by the 14th Amendment under the term "liberty." After frustrations with the Court striking down New Deal legislation, Roosevelt threatened to pack the court with sympathetic justices, eventually tilting the Court in his favor with the *West Coast Hotel* decision upholding a minimum wage law in the state of Washington (there is some debate now as to whether *West Coast Hotel* was the pivotal moment and whether the "switch in time that saved nine" exaggerates the suddenness of the shift away from *Lochner*).

The *Carolene Products* decision (in Footnote 4) announces the future approach of the Supreme Court on substantive due process issues. It says the court will take a more proactive approach in reviewing issues that appear to target a specific minority. Thenceforth social/economic regulations must only satisfy a rational basis test to be valid, unless they appear to target a suspect class of "discrete and insular" minorities (among other categories). In such cases, there must be something more than a rational basis, perhaps a compelling interest (as the subsequent cases hold). The rational basis test appears to have taken effect in the *West Coast Hotel* case of 1937.

The economic/social realm is one aspect of what's known as substantive due process. There are now other areas of law involving substantive due process that are still being debated actively.

Historical background of segregation

In a book titled *The Strange Career of Jim Crow* by CV Woodward of Yale, segregation was shown to be a reaction to the breakdown of racial hierarchy in the South rather than the immediate result of abolishing slavery or an extension of antebellum social and legal patterns. The fact that *Plessy* was not decided until 1896 is indicative of this historical observation.

In *Bolling vs. Sharpe*, the Court says that the 5th Amendment Due Process clause reflects the same equal protection values of the 14th Amendment which therefore also applies to the Federal Government as well. This case means that the Federal government must afford all the protections provided by the 14th amendment to its territories, and that equal protection applies to federal statutes.

Discussion of *Plessy vs. Ferguson*, 1896

Background:

Plessy was a Louisiana citizen who was 1/8 African-American by blood. Louisiana statute mandated that Blacks and Whites may not travel in the same train cars. *Plessy* was denied the right to travel in a white train car. The state of Louisiana practiced the "one drop" rule, whereby even one drop of African-American blood made you African-American in the eyes of the law.

If Plessy's race was not identifiable, it suggests that this case was staged for the purpose of challenging the law. The unique circumstances of Plessy's racial classification highlight several important questions that improved his position to challenge the law:

- Why does it matter what racial classification an individual belongs to if the Constitution provides that blacks and whites are equal in the eyes of the law?
- Does the state have the power to classify citizens however it wants and enforce segregation upon them; is this consistent with equal protection?

Provisions of the Louisiana statute:

- Whites and non-whites must have separate and equal cars. The company must assign each passenger to the car appropriate to his/her race and passengers must comply
- If you are a nurse attending children of another race, you are an exception. Functionally, black nurses could stay with white families in the white car
 - If the segregation rationale here is one of "anti-contamination", the exception completely undermines the statute
 - If the statute is intended to promote a caste system, then the exception seems to undermine the objective, but does not entirely conflict with it

An exception to a law challenged on equal protection grounds is an opportunity for the Supreme Court to look very closely at the exception to determine if it is consistent with the rationale supporting the statute. That opportunity was not taken in Plessy.

Decision:

The objection based on the 13th Amendment was swiftly denied:

"A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude. Indeed, we do not understand that the thirteenth amendment is strenuously relied upon by the plaintiff in error in this connection." (Plessy v. Ferguson, 1896, Findlaw.com)

Plessy's more "reasonable" claim (from the perspective of the majority), based on the 14th Amendment, was also rejected on the grounds that social equality is distinct from political equality and that laws that uphold social inequalities or differences do not inherently mandate political inequality under the law:

"The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." (Plessy v. Ferguson, 1896, Findlaw.com)

- The Supreme Court rejects the inter-state commerce objection of Plessy, saying that his challenge did not involve an issue of inter-state commerce and therefore the state legislature has jurisdiction.
- The Court also says that the ability to sit wherever you want is not a positive right. Therefore, enforcing social inequalities is allowable.

There is also mention of the school segregation issues:

Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances [163 U.S. 537, 551] is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures. (Plessy v. Ferguson, 1896, Findlaw.com)

Harlan Dissent in Plessy

There are several important passages in Harlan's famous dissent providing insight into the future of separate but equal doctrine and equal protection jurisprudence.

*"It was said in argument that the statute of Louisiana does [163 U.S. 537, 557] not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of commodation for travelers. 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 traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute, is that it interferes 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 Bl. Comm. *134. If a white man and a black man choose to occupy the same public conveyance on a public highway, 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." (Harlan, dissenting in Plessy v. Ferguson, 1896, Findlaw.com)*

Harlan's interpretation of the 14th Amendment is that the law may not create a caste system, and therefore there is no meaningful distinction between political and social equality in legislation that expressly classifies based upon race:

"The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. 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. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the spreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race." (Harlan, dissenting in Plessy v. Ferguson, 1896, Findlaw.com)

Harlan also compares the decision in Plessy to the Dred Scott decision, saying that later historians will condemn the Court's ruling in Plessy. He also points to an argument that will be developed 50 years later in Brown:

"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 coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.” (Harlan, dissenting in Plessy v. Ferguson, 1896, Findlaw.com)

Brown vs. Board of Education, 1954

Background:

Segregation in public schools (law schools, graduate schools, and universities) had been challenged a number of times leading up to the Brown decision, within the framework of the Plessy decision. Brown was the first to challenge the inherent illegitimacy of separate but equal. The named plaintiff in the Brown case had challenged the Topeka, Kansas Board of Education, but the case was argued jointly with a number of other cases brought against other boards of education around the country looking for the Court to resolve the issue.

Decision:

The Court concludes that given the evidence provided by the plaintiffs, separate schools are inherently unequal, even if the facilities, teachers, and curricula are the same and therefore, the equal protection clause of the 14th Amendment is violated.

The majority opinion explains:

To separate them [the African-American student plaintiffs] 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.”

(Brown v. Board of Education, 1954, Findlaw.com)

Herbert Wechsler, a major critic of the Brown decision, says that the case could have been decided on 1st Amendment freedom of association grounds. Wechsler argues that such a rationale would have been truly neutral (state would be depriving black and white students from associating with each other), unlike the “politically biased” decision in Brown which Wechsler saw as a betrayal of the ideal of principled decisionmaking, taking side of the victimized African Americans (see his famous Harvard Law Review article “Toward Neutral Principles in Constitutional Law”).

Oral Arguments presented in class:

Brown:

- Race may not be a distinguishing factor in who can attend a specific school
- Separate facilities will never be equal, making separate schooling inherently unequal
- Quality of education is not as good in any of the states that have separate schools for blacks and whites: teachers are not as well trained

- Biological differences such as gender are determinate, racial differences are not. (e.g., one may have mixed racial composition but not a mixed gender – or can you?)

Board of Education:

- 50 years of precedent lie behind this ruling and there is no rationale for reversing (*Harlan in Plessy v. Ferguson, 1896, Findlaw.com*)

Final thoughts on Brown:

The case was argued three times; the second argument focused on the original understanding of the 14th Amendment and whether it prohibited school segregation; the third argument focused on the remedy the court was supposed to provide. The enforcement of the decision was a famously long and difficult process – “Massive Resistance” is a buzzword of popular opposition to a Supreme Court decision, invoked after the Roe case was decided -- in which the court had to render further decisions as part of its enforcement effort alone. The Brown decision was unanimous, thanks in large part to the political efforts of Chief Justice Warren who wished for the Court’s order to have maximum possible legitimacy.

Footnote 11 of Brown v. Board references the studies regarding the psychological effects of segregation. This opened up a debate about whether the Court should be able to rely upon social science rather than purely legal reasoning when making its decisions (see Richard Posner’s recent critique, as well as a whole stream of literature condemning so-called “junk social science”).

Brown also raises the perennial issue of the legitimacy of judicial review and the counter-majoritarian dilemma (see above all the classic critique by then Yale law professor Alexander Bickel).