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NOTES

Education and the "Separate But Equal" Doctrine

WITH THE question of racial segregation in the public schools presently before the United States Supreme Court,¹ it becomes important to consider the question of what limitations have been imposed upon state action in the area of racial segregation in education. The Fourteenth Amendment of the United States Constitution has been used extensively, especially in the past decade, to attack the practice of segregation in schools² upon the theory that racial segregation and unequal educational facilities imposed by the state are an unconstitutional denial of "the equal protection of the laws."³

¹ *Davis v. County School Board*, 103 F. Supp. 337 (E.D. Va. 1952); *Brown v. Board of Education*, 98 F. Supp. 797 (Kan. 1951); *Briggs v. Elliott*, 98 F. Supp. 529 (E.D. S.C. 1951). These cases have been consolidated on appeal in case #273, 20 U.S.L. WEEK 3051 (1951). Subsequent to such consolidation, but before the arguments were heard, the United States Supreme Court granted certiorari to two other cases to permit them to be heard at the same time. *Bolling v. Sharpe*, F.2d (D.C. 1952), *cert. granted* (in advance of judgment) in case #413, 21 U.S.L. WEEK 3119 (1952); *Gebhart v. Belton*, 91 A.2d 137 (Del. Sup. Ct. 1952), *cert. granted* in case #448, 21 U.S.L. WEEK 3139 (1952).

² *Sweatt v. Painter*, 339 U.S. 629, 70 Sup. Ct. 848 (1950); *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951); *Gonzales v. Sheely*, 96 F. Supp. 1004 (D.C. Ariz. 1951); *Mendez v. Westminster School Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946); *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936).

³ "nor shall any state deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1.

That the operation of the schools has been traditionally a function of the state cannot be denied.⁴ However, education is not entirely a state matter. The courts have held that a violation by a state through its school system of a personal right or privilege protected by the Fourteenth Amendment of the United States Constitution justifies federal intervention.⁵

The decisions which have considered the problem of racial segregation in many different areas of living have sprung from the landmark case of *Plessy v. Ferguson*.⁶ In this case, the Supreme Court was called upon to decide whether a state statute prescribing compulsory segregation between whites and Negroes on trains engaged in intrastate commerce was a denial of the equal protection assured by the Fourteenth Amendment. The Supreme Court held that as long as "equal facilities" were provided for Negroes, a state could exclude Negroes from railroad coaches used by whites without violating the provisions of the Equal Protection clause.⁷ Thus was born the "separate but equal" doctrine which has since been applied indiscriminately to problems of segregation in interstate transportation,⁸ real estate transactions,⁹ marriage¹⁰ and public recreation.¹¹

The doctrine stated in the *Plessy* decision has also been applied to cases involving segregation in schools,¹² but the random manner in which this has been done seems astounding in retrospect. Apparently without con-

⁴ *Gong Lum v. Rice*, 275 U.S. 78, 48 Sup. Ct. 91 (1927); *People ex rel. King v. Gallagher*, 93 N.Y. 438 (1883); *State ex rel. Garnes v. McCann*, 21 Ohio St. 198 (1871).

⁵ *Mendez v. Westminster School Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946). This is based on the "state action" rule under which the acts complained of must have been perpetrated by the state, not by an individual lacking official color of authority. In *West Virginia State Bd. of Education v. Barnette*, the Court said: "The Fourteenth Amendment, as now applied to the states, protects the citizen against the State itself and all of its creatures boards of education not excepted." 319 U.S. 624, 637, 63 Sup. Ct. 1178, 1185 (1943). For an extensive discussion of the university as an instrumentality capable of state action, see *Parker v. U. of Delaware*, 75 A.2d 225, 228 (Del. Ch. 1950).

⁶ 163 U.S. 537, 16 Sup. Ct. 1138 (1896).

⁷ The fact that this result was based entirely upon a decision by Justice Shaw in *Roberts v. City of Boston*, 5 Cush. 198 (Mass. 1849), which was adjudicated years before the Civil War, at a time when the Fourteenth Amendment had not yet been conceived, has been neglected by almost all the courts and textwriters who have considered the validity of the *Plessy* decision. Waring, J., dissenting in *Briggs v. Elliott*, 98 F. Supp. 529, 542 (E.D. S.C. 1951) mentioned the point in passing.

⁸ *Chiles v. C. & C. R.R.*, 218 U.S. 71, 30 Sup. Ct. 667 (1910).

⁹ *Buchanan v. Warley*, 245 U.S. 60, 38 Sup. Ct. 16 (1917).

¹⁰ *Stevens v. United States*, 146 F.2d 120 (10th Cir. 1944).

¹¹ *Rice v. Arnold*, 340 U.S. 848, 71 Sup. Ct. 77 (1950); *Boyer v. Garrett*, 88 F. Supp. 353 (Md. 1949), *aff'd*, 183 F.2d 582 (4th Cir. 1950).

¹² *Gong Lum v. Rice*, 275 U.S. 78, 48 Sup. Ct. 91 (1927); *Berea College v. Kentucky*, 211 U.S. 45, 29 Sup. Ct. 33 (1908). *Cf. Cumming v. County Bd. of Education*, 175 U.S. 528, 20 Sup. Ct. 197 (1899).

sidering the validity of extending the doctrine which has originated in transportation cases to problems in education, the Supreme Court in *Berea College v. Kentucky* said:

Were this a new question it would call for very full argument and consideration, but we think it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts.¹³

Without further discussion, the Court found the *Plessy* doctrine applicable to the problem of segregation in the schools—a problem which had never been considered previously by the Court.

After it had been established that states which provided equal educational facilities for Negroes could maintain separate schools for whites and Negroes without violating the Fourteenth Amendment, the question presented to the courts in an ever increasing number of cases was what constitutes "equal facilities" in education. Early in the development of the "separate but equal" doctrine, it was seen that segregation made identical treatment of the separated groups impossible.¹⁴ For example, the court in *Corbin v. County School Board* said:

Absolute equality is impractical and somewhat Utopian, yet substantial equality is required by the Fourteenth Amendment.¹⁵

The test in recent cases, therefore, has been "substantial equality" rather than absolute equality or identical treatment. Some of the results obtained by application of this test are worthy of note. In *Carr v. Corning*,¹⁶ a lower federal court found "substantially equal facilities" in spite of the fact that overcrowded conditions in the school set apart for Negroes made it necessary for the teachers to conduct their classes in "shifts," thereby allowing two hours less instruction per day for the Negro students than was received by the white students. In *Gong Lum v. Rice*,¹⁷ the evidence disclosed that the school attended by white students was larger and better equipped than the one used by Negroes. The Supreme Court held that this distinction was not vital, but merely incidental to the acquiring of an education, hence the facilities were substantially equal. Other cases in applying the "substantial equality" test have reached similarly strange, and sometimes conflicting results.¹⁸

¹³ 211 U.S. 45, 46, 29 Sup. Ct. 33, 34 (1908).

¹⁴ *Cumming v. County Bd. of Education*, 175 U.S. 528, 20 Sup. Ct. 197 (1899); *Gong Lum v. Rice*, 275 U.S. 78, 48 Sup. Ct. 91 (1927).

¹⁵ 177 F.2d 924, 928 (4th Cir. 1949).

¹⁶ 182 F.2d 14 (D.C. Cir. 1950).

¹⁷ 275 U.S. 78, 48 Sup. Ct. 91 (1927).

¹⁸ Compare *Dameron v. Bayless*, 14 Ariz. 180, 126 Pac. 273 (1912) (traveling distance to a Negro school is not a factor in determining substantially equivalent

Of particular importance to the concept of equal protection is another line of cases which, in attempting to apply a standard to the problem of what constitutes "substantial equality," has defined sharply the nature of the right flowing from the Fourteenth Amendment to be a personal one. In *Missouri ex rel. Games v. Canada*, the Supreme Court said:

The essence of the constitutional right [of equal protection under the laws] is that it is a personal one—it is the individual who is entitled to equal protection of the laws, and if he is denied a facility which under substantially the same circumstances, is furnished to another, he may properly complain that his constitutional privilege has been invaded.¹⁹

This doctrine²⁰ is more than a mere philosophical distinction; the results of its application are very practical. It would appear that courts can no longer find "substantial equality" where none exists by averaging the facilities provided for separated classes of pupils throughout the school district and comparing one group's facilities with those of the other,²¹ nor can states provide "substantial equality" in the schools merely by legislation allocating

facilities), *with* *Corbin v. County School Board*, 177 F.2d 924 (4th Cir. 1949) (differences in distance and transportation are valid inequalities, not incidental to the educational process). *Cf.* *State ex rel. Weaver v. Ohio State University*, 126 Ohio St. 290, 185 N.E. 196 (1933) (denial of dormitory facilities to Negro non-resident student is not a factor in determining substantially equal facilities); *Wilson v. Bd. of Supervisors*, 92 F. Supp. 986 (E.D. La. 1950); *State ex rel. Michael v. Witham*, 179 Tenn. 250, 165 S.W.2d 378 (1942). For a study of factors which go into the analysis of the problem, see Note, 56 *YALE L.J.* 1059 (1947).

¹⁹ 305 U.S. 337, 351, 59 Sup. Ct. 232, 237 (1938).

²⁰ In *Perez v. Lippold*, the court said: "The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to rights of individuals." 32 Cal.2d 711, 713, 198 P.2d 17, 18 (1948). The doctrine has been invoked successfully in other cases. *Sipuel v. Bd. of Regents*, 332 U.S. 631, 68 Sup. Ct. 299 (1948); *Brown v. Bd. of Trustees*, 187 F.2d 20 (5th Cir. 1951); *Carter v. School Board*, 182 F.2d 531 (4th Cir. 1950); *Corbin v. County School Board*, 177 F.2d 924 (4th Cir. 1949); *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936). *Cf.* *Shelley v. Kraemer*, 334 U.S. 1, 68 Sup. Ct. 836 (1948).

But the doctrine is a two-edged sword; it has a limiting aspect as well.

"The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race. It is the fact of injury to the complainant—not to others—which justifies judicial intervention." *McCabe v. Atchison, T. & S.F. R.R.*, 235 U.S. 151, 161, 35 Sup. Ct. 69, 71 (1914).

²¹ *Sipuel v. Bd. of Regents*, 332 U.S. 631, 68 Sup. Ct. 299 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 Sup. Ct. 232 (1938); *Carter v. School Board*, 182 F.2d 531 (4th Cir. 1950); *Corbin v. County School Board*, 177 F.2d 924 (4th Cir. 1949). These courts took cognizance of the fact that wherever group averages are used as a test of substantial equality, the individual rights at the extremes of the normal curve of each group are not considered. Thus, if a court attempted to apply group averages to a situation in which a Negro is denied admittance to a special school (vocational or professional), it might find "substantial equality" for the *individual petitioner* by utilizing the argument that a *substantial number* of Negroes, who do not want, need or have the capacity to attend the special

equal funds for each of the separated school systems without considering also the actual nature of the facilities offered.²² The fact that the number of students who have been affected by the denial of equal facilities is small has been held not to be relevant to the consideration of whether substantially equivalent facilities have been provided for the several racial groups.²³

With the application of the "individual rights" concept to the recent cases on educational discrimination, the results obtained under the "separate but equal" doctrine have been considerably more realistic than were the earlier cases²⁴ which did not employ the "individual rights" concept. In *Sweatt v. Painter*,²⁵ the Supreme Court, while expressly refusing to overrule the *Plessy* case and the "separate but equal" doctrine, held that as a practical matter it was impossible to provide equal facilities to separated groups of law school students — that the segregation in this case was per se inequality and, therefore, a violation of the Equal Protection clause.²⁶ The Court noted that there were certain intangible factors inherent in education at the professional level which made segregation in such schools, of necessity, unequal. Justice Vinson, speaking for the Court, said:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students, and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The [Negro] law school excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom the petitioner will inevitably be dealing when he becomes a member of the Texas bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the [law school for white students].²⁷

school, have educational facilities equivalent to those offered to most white students, instead of applying the true test of substantially equal facilities for each individual.

²² *Sipuel v. Board of Regents*, 332 U.S. 631, 68 Sup. Ct. 299 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 Sup. Ct. 232 (1938); *Brown v. Bd. of Trustees*, 187 F.2d 20 (5th Cir. 1951); *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936).

²³ *Sipuel v. Bd. of Regents*, 332 U.S. 631, 68 Sup. Ct. 299 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 Sup. Ct. 232 (1938). In *Pearson v. Murray*, the court said: "The number of colored students affected by the discrimination seems excluded as a factor in the problem the essence of the constitutional right is that it is a personal one." 169 Md. 478, 482, 182 Atl. 590, 592 (1936)

²⁴ *E.g.*, *Gong Lum v. Rice*, 275 U.S. 78, 48 Sup. Ct. 91 (1927); *Cumming v. County Bd. of Education*, 175 U.S. 528, 20 Sup. Ct. 197 (1899).

²⁵ 339 U.S. 629, 70 Sup. Ct. 848 (1950)

²⁶ Note that the Court did not say that all segregation was a violation of the Equal Protection clause. This is not a trifling distinction, as will be developed by the discussion, *infra* p. 141.

²⁷ 339 U.S. 629, 633, 70 Sup. Ct. 848, 850 (1950).

In *McLaurin v. Oklahoma State Regents*,²⁸ the Supreme Court went even further in finding unequal treatment. The Court held that a Negro student who was attending the same professional school, listening to the same lectures, taking the same examinations and eating in the same cafeteria with white students was nevertheless denied equal facilities because a state statute prescribed, and the school authorities effected, segregation within the school.²⁹

That the *Sweatt* and *McLaurin* cases have gone far to make the test of the "separate but equal" doctrine one of *full* equality, rather than *substantial* equality, cannot be questioned. It should be noted, however, that neither of these cases expressly overruled the "separate but equal" doctrine itself, although in both cases the Court was called upon to do so. The failure to overrule the *Plessy* case and declare segregation in education to be a violation of the Equal Protection clause per se may be explained by the Supreme Court's historic reluctance to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."³⁰

Since the *Sweatt* and *McLaurin* decisions, has the "separate but equal" doctrine retained its former vigor? It is interesting to note that the recent decisions involving segregation at the professional school level³¹ have tended to follow the *Sweatt* and *McLaurin* cases, but the doctrine of full equality has not yet been applied to the other educational levels.³² The court in *Briggs v. Elliott* said:

The problem of segregation as applied to graduate and professional education is essentially different from that involved in segregation in edu-

²⁸ 339 U.S. 637, 70 Sup. Ct. 851 (1950).

²⁹ The petitioner was forced to sit at a designated desk in an anteroom adjoining the classroom; he was assigned to a designated desk in the library and a separate table in the school cafeteria. The Court held that this treatment hampered him in obtaining his professional education and was, therefore, inequality repugnant to the Equal Protection clause. The Court said: "It may be argued that [petitioner] will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving [petitioner] of the opportunity to secure acceptance by his fellow students on his own merits." 339 U.S. 637, 641, 70 Sup. Ct. 851, 853 (1950).

³⁰ See concurring opinion of Justice Brandeis in *Ashwander v. TVA*, 297 U.S. 288, 341, 56 Sup. Ct. 466, 480 (1936).

³¹ *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951); *Battle v. Wichita Falls Jr. College Dist.*, 101 F. Supp. (N.D. Tex. 1951); *Gray v. Bd. of Trustees*, 100 F. Supp. 113 (E.D. Tenn. 1951); *Wilson v. Bd. of Supervisors*, 92 F. Supp. 986 (E.D. La. 1950); *State ex rel. Brewton v. Bd. of Education*, 361 Mo. 88, 233 S.W.2d 697 (1950).

³² *Davis v. County School Board*, 103 F. Supp. 337 (E.D. Va. 1952) (elementary

cation at the lower levels. In the graduate and professional schools the problem is one of affording equal educational facilities to persons of mature personality. The problem of segregation at the common school level is a very different one. At this level, as good education can be afforded in Negro schools as in white schools and the thought of establishing professional contacts does not enter the picture.³³

Whether there is any validity to this distinction seems questionable. Judge Waring took violent issue with this distinction between the professional and elementary educational levels.³⁴

It seems clear that the battle to extend the concept of equal protection in education will have to be fought in the Supreme Court.³⁵ Lower federal courts and state courts to date have been reluctant to apply the full equality principle enunciated in the *Sweatt* and *McLaurin* cases except in cases involving almost identical facts and have refused entirely to reconsider the validity of the "separate but equal" doctrine.³⁶

In any reconsideration of the "separate but equal" doctrine of the *Plessy* case, three questions should be asked:

1. Is there any logical basis for the doctrine?
2. What is the present value of the *Plessy* case as a legal precedent?
3. What would be the practical results of a continued application of doctrine?

Underlying the concept that segregation of citizens of a state according to the color of their skins is a valid exercise of state police power is the theory that there are fundamental differences between the races which must be controlled by the state in order to promote the public peace.³⁷ This assumption is basic though implicit in many of the cases upholding segrega-

schools); *Brown v. Bd. of Education*, 98 F. Supp. 797 (Kan. 1951) (elementary schools); *Briggs v. Elliott*, 98 F. Supp. 529 (E.D. S.C. 1951) (elementary schools); *Belton v. Gebhart*, 87 A.2d 862 (Del. Ch. 1952) (secondary schools)

³³ 98 F. Supp. 529, 535 (E.D. S.C. 1951).

³⁴ "The evils of segregation and color prejudice come from early training. It is difficult and nearly impossible to change and eradicate these early prejudices, however strong may be the appeal to reason. If segregation is wrong, then the place to stop it is in the first grade and not in graduate colleges." *Briggs v. Elliott*, Waring, J. dissenting, 98 F. Supp. 529, 547 (E.D. S.C. 1951).

³⁵ The problem has been squarely presented to the Supreme Court in *Briggs v. Elliott* and companion cases cited note 1 *supra*. The arguments have been presented but as of this writing no opinion has yet been rendered.

³⁶ *E.g., Belton v. Gebhart*: "Plaintiffs point to a decisional trend from which they would have the court conclude that the "separate but equal" doctrine as applied to education should be rejected. Certainly such a trend is 'in the wind,' but it is for the Supreme Court to say so in view of its older, and as yet unrepudiated, decisions." 87 A.2d 862, 866 (Del. Ch. 1952).

³⁷ It is not denied that it is possible to classify citizens validly by law, but the classification must be founded on some real distinction relevant to the purposes of the particular legislation, or it will be rendered void by operation of the Equal Protection clause. *Takahashi v. Fish and Game Comm.*, 334 U.S. 410, 68 Sup. Ct. 1138

tion according to race as a valid classification of citizens.³⁸ One case has even pointed out expressly that the basis of racial segregation is inherent racial differences.³⁹ Recent scientific studies have consistently indicated that racial differences in blood, intelligence and temperament are, barring environmental fluctuations, negligible.⁴⁰ Therefore, since the underlying assumption in the "separate but equal" doctrine has been refuted by modern scientific knowledge, the doctrine itself should fall for lack of a logical basis upon which to stand.⁴¹

It has been argued⁴² that although the logical basis of the *Plessy* doctrine has been worn away by recent scientific findings, *Plessy v. Ferguson* has become such a strong legal precedent that the question should be considered as conclusively settled.⁴³ One answer to this argument is that in society, as the needs of the social structure change, the law must be flexible

(1948); *Snowden v. Hughes*, 321 U.S. 1, 64 Sup. Ct. 397 (1944); *Skinner v. Oklahoma*, 316 U.S. 535, 62 Sup. Ct. 1110 (1942). For a thorough discussion of the relationship between classification of citizens and the purposes of the classifying legislation, see Ransmeier, *The Fourteenth Amendment and the 'Separate but Equal' Doctrine*, 50 MICH. L. REV. 203, 247 (1951), in which it is contended that segregation according to race is an invalid classification, either for educational objectives or to safeguard the peace and order of the state.

³⁸ Cases cited note 12 *supra*.

³⁹ In *Lebew v. Brummell* the court said: "But it will be said the classification now in question is based on color, and so it is; but the color carries with it natural race peculiarities, which furnish the reason for the classification. There are differences in races not created by human laws, some of which never can be eradicated. These differences create different social relations, recognized by all well-organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage." 103 Mo. 546, 551, 15 S.W. 765, 766 (1891).

⁴⁰ KLINEBERG, RACE DIFFERENCES 343 (1935); Note, 58 YALE L.J. 472 (1949) and authorities therein cited. See also *Perez v. Sharp*, 32 Cal.2d 711, 722, 198 P.2d 17, 20 (1948) (judicial notice taken of the fact that there is no certain correlation between race and intelligence).

⁴¹ It may be argued that the philosophical basis of the "separate but equal" doctrine is not fundamental racial differences. If this be so, the argument that there is no logical reason for the existence of the doctrine becomes even stronger. The only possible basis for the doctrine, then, is a conscious intent on the part of the lawmakers and the judiciary to discriminate against a minority group. This interpretation may seem to be unduly severe, but see 1 MYRDAL, AN AMERICAN DILEMMA 581 (1944) "It is evident 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." See also Note, 49 COL. L. REV. 629, 637 (1949).

⁴² See note 36 *supra*.

⁴³ Considerable precedent has followed in the wake of the *Plessy* case. *Sweatt v. Painter*, 339 U.S. 629, 70 Sup. Ct. 848 (1950); *Sipuel v. Bd. of Regents*, 332 U.S. 631, 68 Sup. Ct. 299 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337,

and change to meet such needs.⁴⁴ But the "separate but equal" doctrine as applied to education can be attacked upon precedent value as well. That the *Plessy* case itself was not based on valid precedent must be admitted.⁴⁵ Furthermore, some authorities have contended that, whether or not the doctrine espoused in *Plessy v. Ferguson*, a transportation case, was valid, it was misapplied to the area of segregation in the schools because of the intrinsic differences in the human relationships involved in transportation and education.⁴⁶

Another weakness of the *Plessy* case as a precedent in educational segregation cases is suggested by a line of recent decisions dealing with segregation in interstate transportation.⁴⁷ Although the cases turned on a construc-

59 Sup. Ct. 232 (1938); *Gong Lum v. Rice*, 275 U.S. 78, 48 Sup. Ct. 91 (1927); *Berea College v. Kentucky*, 211 U.S. 45, 29 Sup. Ct. 33 (1908). As a result of these decisions, many jurisdictions now have constitutional and statutory provisions which compel racial segregation and their physical school systems have been built with the *Plessy* doctrine in mind.

⁴⁴ "Law is not an end, but a means to an end—the adequate control and protection of those interests, social and economic, which are the special concern of government, and hence, of law; that end is to be attained through the reasonable accommodation of law to changing economic and social needs, weighing them against the need of continuity of our legal system, and the earlier experience out of which its precedents have grown." Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 20 (1936)

⁴⁵ See note 7 *supra*.

⁴⁶ Waring, J., dissenting in *Briggs v. Elliott*, said: "Let it be remembered that the *Plessy* case decided that separate railroad accommodations might be required by a state in intrastate transportation. Of course the Supreme Court did not consider overruling *Plessy* [in the *Sweatt* and *McLaurin* cases]. It was not considering railroad matters, had no arguments in regard to it, had no business or concern with railroad accommodations and should not have even been asked to refer to that case since it had no application or business in the consideration of an educational problem before the Court. It seems to me that we have already spent too much time and wasted efforts in attempting to show any similarity between traveling in a railroad coach and furnishing education to the future citizens of this country." 98 F. Supp. 529, 544 (E.D. S.C. 1951).

Although many authorities have said that transportation holdings regarding separated facilities have no application to segregated education, none has given reasons for the distinction. The writer submits that the human relationships involved are materially different. In regard to transportation, the contact between passengers is fleeting, merely incidental to the end sought (arrival at a destination); there is little or no interaction among passengers, nor is commingling necessary to the achievement of the result. In education, the contact among students is more durable and is essential to the result sought (education to live in a democratic society). If segregation is harmful, it will produce more harmful results in the area of education, where human relationships are vital to the educational process itself, than in the area of transportation.

⁴⁷ *Atlantic Coast Line R.R. v. Chance*, 341 U.S. 941, 71 Sup. Ct. 1001 (1951); *Henderson v. United States*, 339 U.S. 816, 70 Sup. Ct. 843 (1950); *Morgan v. Virginia*, 328 U.S. 373, 66 Sup. Ct. 1050 (1946); *Mitchell v. United States*, 313 U.S. 801, 61 Sup. Ct. 873 (1941); *Whiteside v. Southern Bus Lines*, 177 F.2d 949 (6th Cir. 1949).

tion of the Interstate Commerce Act,⁴⁸ which invalidated discrimination in interstate transportation, they illustrate a growing tendency in the transportation cases to restrict the *Plessy* case to its facts. If the principal decision in the line of cases involving the "separate but equal" doctrine thus has been confined to its particular facts, should not the doctrine as applied to other areas also lose its vitality?⁴⁹

Some opponents of segregation have supported the "separate but equal" doctrine as a practical method of bringing about the desired social result (the abolition of discrimination in the schools) by natural, peaceful means, thus rendering the application of legal sanctions unnecessary. It has been said that:

as more and more Negro students demand their educational rights from the states, the latter will be faced with the prospect of building fully equal parallel facilities in many areas of study in the long run, the 'high cost of prejudice' may do more to eliminate segregation than would be accomplished by idealism working alone.⁵⁰

This argument is not without merit.

It should be noted, however, that the period of time during which the desired social result was to be brought about has been a long one; and, without the intervention of the Supreme Court, its end is nowhere in sight. Despite all the litigation enforcing the "separate but equal" rule in the past fifty years, many of the Southern states still are governed by constitutions⁵¹ and statutes⁵² providing for compulsory educational segregation, and their children still attend segregated schools. The process of whittling away at segregation in schools by the application of economic pressure has been slow and to a great extent ineffectual. Furthermore, a heavy financial burden is placed upon the petitioner who seeks to enforce his rights under the existing rule.⁵³

⁴⁸ 49 U.S.C. § 3(1) (1920).

⁴⁹ "*Plessy v. Ferguson* still stands, but not with its former vigor and certainty. Like an ancient fort, it shakes upon its foundations and the wind whistles through gaps in its walls. Some may claim that it is still defensible, but others, with a better understanding of the imperatives of modern democracy, realize that its walls are but hollow shells. Perhaps it will survive another decade; perhaps it will never be taken by storm, but the inexorable demands of a democratic society will eventually leave it, at best, a historical curiosity, at worst, an anonymous pile of rubble." Roche, *Education, Segregation and the Supreme Court—A Political Analysis*, 99 U. OF PA. L. REV. 949, 959 (1950).

⁵⁰ *Ibid.*

⁵¹ *E.g.*, "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race." S.C. CONST., Art. 11, § 7.

⁵² *E.g.*, S.C. CODE § 5406 (1932).

⁵³ ". . . [As a result of failure to entirely repudiate the 'separate but equal' doctrine] prolonged litigation may be necessary in each individual instance of alleged un-